

WORLD TRADE ORGANIZATION

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

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REVIEW OF LEGISLATION

NAMIBIA¹

The present document reproduces the introductory statement made by the delegation of Namibia, the questions put to it and the responses given in connection with the review of legislation undertaken at the Council's meeting of 2-5 April 2001.²

I. INTRODUCTORY STATEMENT

Namibia was among the countries that signed the Agreement establishing the World Trade Organization (WTO) and its related legal instruments including the TRIPS Agreement. In doing so, Namibia accepted all the commitments arising from the Uruguay Round.

Namibia unequivocally reaffirms its commitment to meet its obligations under the TRIPS Agreement and has continued to work on different initiatives to meet its obligations. Despite the various constraints and challenges Namibia continues to face as a young nation, the country has made remarkable progress to be fully compliant with the provisions of the TRIPS Agreement.

Prior to independence in 1990, intellectual property laws were administered from neighbouring South Africa. The need to ensure that trade policy and the Uruguay Round commitments are integrated into broader economic policy formulation pose a considerable challenge. This requires close coordination among various ministries, institutions and public offices as well as establishment of additional institutional framework responsive to these challenges. Moreover, limited parliamentary time and lack of expertise in the area of international trade law in general, and on intellectual property rights in particular can not be overemphasized.

Initiatives and Constraints towards Implementation

Industrial Property in Namibia has been regulated and protected under various pieces of legislation inherited from the country's recent past. Patents and designs are currently protected under the Patents and Designs Act 37 of 1952, Patents and Designs Act 9 of 1916, and Proclamation No. 17 of 1923. The system of protection is currently based on registration on account of formalities as opposed to substantive examinations. The provisions of these laws cover a substantial amount of protection, while in some respects falling short of complying with certain provisions of the TRIPS Agreement. Trademarks are protected under the Trademarks in South West Africa Act No. 48 of 1973.

¹ As regards laws and regulations notified by Namibia under Article 63.2 of the Agreement, reference is made to documents IP/N/1/NAM/1 (to be circulated), IP/N/1/NAM/I/2 and IP/N/6/NAM/1.

² The minutes of this meeting have been circulated as document IP/C/M/30.

In our efforts to comply with the provisions of the TRIPS Agreement and to consolidate the different legislation into one harmonized Industrial Property Act, Namibia has prepared a new Industrial Property Bill, which will give full compliance to the provisions of the TRIPS Agreement. The Bill is currently awaiting discussion at the Cabinet Committee on Legislation in the second week of April 2001, before it goes to Parliament in May 2001. It is envisaged that the new Act will be enacted by the end of June 2001.

The World Intellectual Property Organization has provided invaluable assistance during the process of drafting, by providing a model law and experts comments on the draft of the Bill. The answers we have provided in response to Members questions reflect on both the current applicable laws and the proposed Bills in respect to industrial property rights protection.

The preparations to bring the Namibian Copyrights and Neighbouring Rights Protection Act (Act No.6 of 1994) in line with Articles 9-14 of the TRIPS Agreement started back in 1995. The Copyrights Office solicited opinion from the WIPO Secretariat to advise on how to go about reviewing the Act to bring it in conformity with the TRIPS Agreement. WIPO responded promptly and availed a draft Copyright law or model law on Namibia based on the Act.

Since the 1994 Act was based on the Berne Convention of 1971, most of the substantive Sections of the Act turned out to be in conformity with Section II, Article 9-14 of the TRIPS Agreement. To be fully compliant with TRIPS, there was a need to insert new definitions and substantive provisions especially on enforcement.

With respect to meeting the obligations under Article 27.3(b) of the TRIPS Agreement, Namibia is a nation with unusual and impressive habitats and species, many of them unique to the country or to the southwestern African zone. Amongst them is a myriad of species containing potentially valuable genetic material. At the same time, Namibians have a high and widely shared level of general knowledge about wild foods, crafts and medicinal plants as well as knowledge about other natural resources and their uses.

Namibia, therefore, opted for developing a *sui generis* system on new plant varieties, as we believe that a patent law will not adequately protect the indigenous knowledge, innovations and practices of the Namibian nation. The *sui generis* system is being developed as an integral part of an ongoing process under the Namibian National Biodiversity Program. Under this Program, a range of issues relating to the conservation and sustainable use of biodiversity in Namibia is being taken up by 15 different Working Groups, each coordinated by a different national lead institution - including a Focal Group on Biotrade and Bioprospecting coordinated by the National Botanical Research Institute.

II. RESPONSES TO QUESTIONS POSED BY CANADA

1. Please describe how the enforcement obligations (Articles 41-61 of the TRIPS Agreement) have been implemented.

The Act governing copyright in Namibia sets out the remedies available to the injured party. Chapter two of the Copyright and Neighbouring Rights Protection Act of 1994 deals with infringement of copyright.

Section 30 of the Act provides for the institution of civil proceedings in a court of law by the owner of the copyright whenever an infringement is committed. The said Section also provides for relief which may be claimed as a result of such infringement. The relief that may be claimed includes

damages, interdicts, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise.

The remedies available as set out in the above paragraph are self explanatory. However, we wish to point out the following in respect of interdict and damages:

Interdicts can be either prohibitory, restitutory or mandatory. The interdict restraining the alleged infringement act is usually the principal remedy sought by the copyright holder. This type of interdict is called prohibitory interdict. The right to obtain an interdict can only be exerted by the copyright holder of the exclusive licensee or sub-licensee. This remedy can be on a case-to-case basis be classified as a provisional remedy.

"Damages" refer to the delictual damages the copyright holder will be entitled to upon infringement. The holder will be compensated for his patrimonial loss. This compensation will be calculated pursuant to the infringement.

Under Section 31, the Act also avails the aforementioned remedies to an exclusive licensee and a sub-licensee. Note that these rights shall be concurrent to those of the owner.

Our law further recognizes the "Anton Piller Order" as a so-called "assistance remedy" to the copyright holder. The said order is primarily a procedural remedy whereby the deputy sheriff of the High Court of Namibia is directed to enter the premises of the respondent (infringer) and to take possession of a and to retain in his custody pending the hearing of the matter all relevant evidence relating to the applicant's (holder's) cause of action. This type of order is granted without notice to the respondent in order to preserve the secrecy of the matter, as the rationale behind the granting of the order is that the respondent has in his possession relevant information which he is likely to destroy or put beyond the reach of the applicant.

Another remedy available to the copyright holder is contained in Section 34 of the Act which provides for the restriction of importing of infringing copies. In terms of this Section, the owner of the copyright in any published work may give notice to the Commissioner of Customs and Excise informing the latter that he/she is the owner of the copyright in that work and request that the Commissioner treat as prohibited goods, during a period specified in the notice, any copies of that work. The Section goes further, stipulating that the said owner must provide security to the Commissioner for securing the fulfilment of any liability and the payment of any expense which the Commissioner may incur by the reason of the detention of any copy of the work referred to in the notice.

Other secondary remedies available to the copyright holder by virtue of our Law of Delicts include civil claims based on unlawful infringement of privacy, unlawful competition and passing-off. These remedies can only be enforced through the Namibian courts of law and the procedure is governed by our civil procedural law as set out in the Magistrate's Court Act 32 of 1944 and the Rules promulgated thereunder, as well as the High Court Act 16 of 1990 and the Rules of the High Court promulgated under the said Act.

2. What protection does your Copyright legislation afford to "foreign works"?

Works of foreign authors from Member States of the Berne Convention, WTO and the TRIPS Agreement are protected in the same manner as those of the local authors because we are party to those international conventions.

III. RESPONSES TO QUESTIONS POSED BY THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

A. GENERAL PROVISIONS

1. Please describe if your legislation includes measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to your socio-economic and technological development as mentioned under Article 8 of the TRIPS Agreement. If yes, please explain how such measures are consistent with the provisions of the TRIPS Agreement.

Current legislation, which is to be replaced by a single and consolidated legislation, provides for the protection of public health and nutrition and promotes public interest. There are provisions in the legislation which bind the State to the effect of a patent in the same manner as its subject, which has a proviso permitting State intervention for public purposes. The intervention is allowed on such terms as agreed upon with the patentee or, in the absence of such agreement, on such terms as are determined by the registrar on application by the Minister and after hearing the patentee.

Section 48, of Act No. 37 of 1952:

"(1) Where a patent is in force in respect of:

- (a) a substance capable of being used as food or medicine or in the production of food or medicine; or
- (b) a process for producing any such substance; or
- (c) any invention capable of being used as or as part of a surgical or curative device; or
- (d) a plant;

the registrar shall, on application made to him by any person interested, order the grant to the applicant of a license under the patent on such terms as he thinks fit unless it appears to him that there are good reasons for refusing the application.

(2) In settling the terms of licenses under this section the registrar shall endeavour to secure that food, medicines, surgical and curative devices and plants shall be available to the public at the lowest prices consistent with patentees deriving a reasonable advantage from their patent rights.

(3) A license granted under paragraph (a), (b) or (c) of subsection (1), shall entitle the licensee to make, use, exercise and vend the invention as a food or medicine or for the purpose of the production of food or medicine or as part of a surgical or curative device, but not for any other purpose."

The proposed Industrial Property Bill of Namibia provides that where public interest, in particular, national security, nutrition, health or the development of other vital sectors of the national economy so require, the Minister may allow for exploitation of the invention by a government agency or a third person designated by the Minister with equitable remuneration. The relevant provision of the Bill provides for full compliance with Article 31 of the TRIPS Agreement (Section 19 subsections (1), (2), (3), (4)(a)(b) of the proposed Bill).

Furthermore, the Bill provides:

"Where the public interest, in particular, national security, nutrition, health or the development of other vital sectors of the national economy so require, the Minister may decide that, even without the agreement of the owner of the patent, a government agency or a third person designated by the Minister may exploit the invention, subject to the payment of an equitable remuneration to the said owner (...) The decision of the Minister in respect of remuneration may be the subject of an appeal before the High Court." (Section 17(5) and (6)).

B. COPYRIGHT AND RELATED RIGHTS

2. Please state how your legislation provides for the protection of the exclusive rights of authors in relation to their literary and artistic works, as specified in Article 9 of the TRIPS Agreement which requires Members to comply with Articles 1-21 of the Berne Convention and the Appendix to the Berne Convention (1971)).

Protection of exclusive rights is provided for in Sections 9-12 (see pages 17-18 of the amended Act).

3. Please describe the protection accorded to authors of computer programs, databases or compilations of data.

Computer programs are protected as literary works under Article 1 of the amended Act. Databases or compilations of data are still being considered.

4. Please state whether your legislation provides for a rental right and, if so, the works to which it applies.

Rental right is referred to in Section 29 sub-section 2(b) which states clearly that the copyright shall be infringed by a person who, without the license of the owner of the copyright: (...)

- (b) sells, lets or by way of trade offers or exposes for sale or hires in Namibia any article;
- (c) refers to distribution of article for the purpose of trade.

The works to which rental rights apply in Namibia are mostly audiovisual works, musical works and books.

5. Please describe the rights granted to performers, producers of phonograms (sound recordings) and broadcasting organizations under your legislation.

Performers shall be granted rights under Article 46 and 47 to broadcast or communicate to the public, the right to make fixation, and reproduction of a fixation.

6. Please state whether your legislation provides for any limitation or exception in relation to each of the rights described above in accordance with the relevant provisions of the Berne and Rome Conventions and in light of Articles 13 and 14.6 of the TRIPS Agreement.

General exemptions or limitations:

- Cinematographic films are under Section 14.
- Sound recordings are under Section 14.

- Broadcastings are under Section 15.

7. Please state the terms of protection of each right described above and the work or subject-matter to which it applies.

The term of protection of all the rights mentioned above is the entire life of the author and 50 years from the end of the year in which the author died.

8. Please state how your legislation grants the retroactive protection provided pursuant to Article 18 of the Berne Convention (the obligation of which derives from Article 9 of the TRIPS Agreement) and Article 14.6 of the TRIPS Agreement.

The expiration of the periods provided for in this law shall cause the economic rights to lapse and the works to fall into the Public Domain, and consequently become part of the common cultural heritage. This falls under Section 8 (1) of the newly amended Act and sub-sections 2-5 explain it further.

C. TRADEMARKS

9. Please give the definition of a sign under your national legislation and explain under what conditions it is protectable.

Current legislation provides under Section 2 of the Trade Marks Act No. 48 of 1973 for a definition of a mark. A mark includes a device, band, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof or a container for goods. A trademark, other than a certification mark, means a mark used or proposed to be used in relation to goods or services.

The proposed Industrial Property Bill of Namibia defines a mark as any visible sign capable of distinguishing goods or services of an enterprise. Under the provisions of this Bill a mark can be registered if it is:

- (a) capable of distinguishing the goods or services of one enterprise from those of other enterprises;
- (b) not contrary to public order or morality;
- (c) not likely to mislead the public or trade circles, in particular as regards the geographical origin of goods or services concerned or their nature or characteristics;
- (d) not identical with, or is not an imitation of or does not contain as an element, an armorial bearing, flag and other emblem, a name or abbreviation or initials of the name of, or official sign or hallmark adopted by, any State, intergovernmental organization or organization created by an international convention, unless authorized by the competent authority of the State or organization;
- (e) not identical with, or constitutes a reproduction, an imitation, or a translation, liable to create confusion of a well-known mark; (full compliance with Article 6*bis* of the Paris Convention);
- (f) not identical with a mark belonging to a different proprietor and already on the Register, or with an earlier filing or priority date, in respect of the same goods or

services or closely related goods or services, or if it does not so nearly resemble such a mark as to be likely to deceive or cause confusion.

All the provisions of the Bill which have a bearing on the protection of a mark, were drafted to provide full compliance with the provisions of the TRIPS Agreement, including giving an express right of action against the use of well-known marks, as opposed to their registration (full compliance with Article 16 of the TRIPS Agreement and Article 6*bis* of the Paris Convention).

10. Please confirm whether or not services are a protectable subject-matter in your trademark law. Please confirm if signs, such as trade names, are protectable. Please describe if elements such as sound, perfumes and containers are protectable.

Under the current Act, trademarks used or proposed to be used in relation to services may be registered and will enjoy the same protection as those used or proposed to be used in relation to goods. Signs are protectable as trademarks only. Trade names are not protectable because the current Act does not meet the requirements of Article 2 of the TRIPS Agreement and Namibia is not yet a signatory to the Paris Convention. Sound marks are not protectable at present, a trademark for perfume is protectable but the perfume's smell is not protectable while the container for goods is protectable if it shall not prevent the bona fide use by others of any utilitarian or functional feature embodied in such container.

The proposed Bill includes substantive provisions for the protection of marks including service marks. Such provisions of the Bill will ensure complete compliance with all the requirements of the TRIPS Agreement. The Bill further provides for compliance with the Paris Convention. Namibia is preparing the necessary instruments to become party to the Paris Convention.

11. Please explain what the requirements of use are, if any, as a condition for a trademark registration. Please explain the definition of use and the conditions of maintenance of a registration in that respect.

Under current law, for a trademark to remain valid and unassailable, the trademark should be used in the course of trade and in a genuine manner at least every five years.

Section 2(2) of the Trade Marks Act No. 48 of 1973 provides:

"(2) Reference in this Act to the use of a mark shall be construed as reference to the use of a printed or other visual representation of the mark, and in addition, in the case of a container, use of such container and, in the case of a mark which is capable of being audibly reproduced, the use of an audible reproduction."

Section 2(3)(a) provides that the use of a mark in relation to goods means the use upon, or in physical or other relation to those goods. Section 2(3)(b) provides that the use of a mark in relation to services means use in relation to the performance of such services.

Under the proposed Bill, provision is made for rights conferred by registration of mark and the transfer of rights thereof, invalidation of a registration of mark, and removal of mark on grounds of non-use. Provision is also made for the right to institute court proceedings against any person who infringes or threatens to infringe the rights of the owner of a registered mark. It further provides for the duration and renewal of marks, that the Registrar or the Court would have jurisdiction in the expungement of marks, and a period of non-use of five years. In a nutshell the provisions of the Bill are geared towards achieving full compliance with all the relevant provisions of the TRIPS Agreement.

12. Please confirm whether or not your legislation permits that the registration of trademarks be indefinitely renewable.

Under current law, registration of trademarks endures initially for a period of ten years and, subject to the payment of fees, may be renewed indefinitely every ten years.

The proposed Bill provides for the duration and renewal of marks and a continuous period of non-use of five years.

13. Please describe the special requirements, if any, prescribed by your legislation concerning the use of a trademark.

Under current law, special requirements for the use of a trademark, in terms of Section 39 of Act No. 48 of 1973 are: that where a use of a registered mark is required to be proved for any purpose, the Registrar or the Court may accept proof of the use of an associated registered trademark, or of the trademark with additions or alterations not substantially affecting its identity, as equivalent to proof of the use required to be proven. The use of the whole of the registered trademark shall be deemed to be the use also of any registered trademark being a part thereof.

The proposed Bill provides that the Registrar not remove a mark from the register if the owner of that mark can show that circumstances existed which prevented the use of the mark and that there was no intention not to use the mark in respect of those goods or services, or that there was no intention to abandon the use of the mark in respect of the said goods or services. Other provisions include the accommodation of special circumstances in trade.

D. GEOGRAPHICAL INDICATIONS

14. Please explain whether or not your trademark registration authority refuses a trademark application if it contains a geographical indication.

The current Act contains no reference to geographical indications, and the Registrar may therefore register a trademark with geographical indication without extraneous proof of distinctiveness, provided that it is distinctive and not reasonably required for use in trade in the goods or services concerned.

The proposed Bill contains provisions covering geographical indications' protection with full compliance with the TRIPS Agreement, especially the provisions of Articles 22–24 of the Agreement.

15. Please give the definition of a geographical indication in your legislation.

The current Act contains no reference to geographical indications.

The proposed Bill defines geographical indications as indications which identify a good as originating in the territory of a signatory to the TRIPS Agreement, or a region or locality in that territory, where a given quality, reputation or other characteristic of good is essentially attributable to its geographical origin.

16. Please describe and explain the provisions of your legislation establishing a link, if any, between the characteristics of an indication and its geographical origin.

Please see the response to question 15.

17. Please describe how additional protection is granted by your legislation to wines and spirits. Please mention other types of products, if any, covered by this additional protection.

The proposed Bill provides for the minimum requirements for the protection of geographical indications for wines and spirits as required by the provisions of Article 23 of the TRIPS Agreement. No other types of products are covered under the proposed Bill.

18. Please explain how exceptions under Article 24 of the TRIPS Agreement are used in your jurisdiction. Please provide examples of the use of the exceptions by courts or lists of names considered as generic in your jurisdiction.

Exceptions to geographical indications, under the proposed Bill, have not yet been approved by the Cabinet Committee on Legislation to be incorporated in the Bill. Such approval is however expected soon by the third week of April 2001.

E. INDUSTRIAL DESIGNS

19. Please explain whether or not your legislation extends to the protection of designs dictated essentially by technical or functional considerations. Please explain how textile designs are protected.

The current law, the Patents and Designs Act No. 37 of 1952, incorporating provisions of the Patents and Designs Act No. 9 of 1916, and Proclamation No. 17 of 1923, provides for the protection of designs. The definition of a design in Section 76 reads:

" 'design' shall mean any design applicable to any article whether for the pattern, for the shape or configuration, or for the ornament thereof or for any two or more of such purposes and by whatever means it is applicable whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for sculpture."

The proposed Bill defines industrial design as:

"any composition of lines or colours or any three-dimensional form, whether or not associated with lines or colours, where such composition or form gives a special to a product of industry or handicraft and can serve as a pattern for a product of industry or handicraft but does not include anything in an industrial design which serves solely to obtain a technical result and to the extent that it leaves no freedom as regards arbitrary features of appearance."

The Locarno Agreement Establishing an International Classification for Industrial Designs is used under the provisions of the proposed Bill, with regard to industrial designs.

Textile designs are covered under the provisions of the Bill.

20. Please explain how your legislation protects right holders of a design against importing of articles bearing embodied or copied design.

Section 37 reads:

"(1) No person shall exploit, in Namibia, a design registered in Namibia unless he or she has been authorized, in writing, to do so by the owner of that design.

"(2) The person registered as the owner of a design shall, subject to the provisions of this Act, and to any rights appearing from the register of designs to be vested in any other person, have the exclusive right, in Namibia, to make, import or sell any article bearing or embodying the registered design, or a design substantially similar to the registered design, or a design substantially different from the registered design, when such acts are undertaken for commercial purposes.

"(3) The registered owner of an industrial design shall, in addition to any other rights, remedies or actions available to him, have the right to institute court proceedings against any person who infringes the industrial design by performing, without his agreement, any of the acts referred to in subsection (2) or who performs acts which make it likely that infringement will occur.

"(4) For the purpose of this section, exploitation of a registered design means the doing of any act mentioned in subsection (2).

"(5) The rights of the owner of a registered design shall not extend to acts in respect of which articles have been put on the market in Namibia by such owner, or with his or her consent."

21. Please state whether or not your legislation provides for the right to issue a compulsory licence for industrial designs.

Current law does not provide for the right to issue a compulsory licence for industrial designs. The proposed Bill also does not provide for the right to issue a compulsory licence for industrial designs.

22. Please indicate for what period of time your legislation grants protection for industrial designs.

Under current law copyright in registered designs extends for five years extendable up to a third term of five years. Section 87 of Act No. 9 of 1916 reads:

"(1) When a design is registered, the registered proprietor of the design shall, save as is provided in section seventy-eight, have copyright in the design during five years from the date of registration.

"(2) If, within the prescribed time, before the expiration of the said five years, application for the extension of the period of copyright is made to the registrar in the prescribed manner the registrar shall, on payment of the prescribed fee, extend the period of copyright for a second term of five years from the original period.

"(3) If within the prescribed time before the expiration of such second term, application for further extension is made to the registrar in the prescribed manner, he may, subject to any rules under this chapter, and on payment of the prescribed fee, extend the period of copyright for a third term of five years from the expiration of the second term."

Under the proposed Bill, the duration of the registered design also extends for five years and is renewable for two further terms. Section 38 of the Bill reads:

"(1) The registration in respect of a design shall expire five years after the filing date of the application for its registration, but may, upon payment of such renewal fee as may be prescribed, be renewed for two further consecutive periods of five years each.

"(2) Where the owner of the design pays the renewal fee late, the Registrar shall, upon payment of such surcharge by the owner as may be prescribed, give him or her a period of grace of six months within which he or she must pay the late renewal fee."

F. PATENTS

23. Please describe how your legislation defines the notions of: novelty, inventiveness and industrial application.

Under the current law, Article 1(2) reads:

"'Invention' means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement thereof, capable of being used or applied in trade or industry, and not known or used by others in the territory and not on sale for more than two years in any country outside the Territory, prior to the application for a patent under this Proclamation."

The proposed Bill defines novelty, inventiveness and industrial application as follows:

Section 9:

"(1) (...) an invention may relate to a product or process.

"(2) (a) An invention is new if it is not anticipated by prior art.

"(3) An invention shall be considered as involving an inventive step if, having regard to the prior art relevant to the application claiming the invention and as defined in subsection (2)(b), it would not have been obvious to a person having ordinary skill in the art.

"(4) An invention shall be considered industrially applicable if it can be made or used in any kind of industry. 'Industry' shall be understood in its broadest sense; it shall cover, in particular, handicraft, agriculture, fishery and services.

"(5) Inventions, the commercial exploitation of which would be contrary to public order or morality shall not be patentable."

24. Please explain whether or not in your legislation, patent or otherwise, patent rights are enjoyed without any exclusions. If exclusions are provided for, please describe in detail how these exclusions are applied in legal as well as practical terms.

Under the current law, no exclusions exist for patents, while there are exclusions for trademarks. Section 16(1) and (2) of the Trade Marks in South West Africa Act No. 48 of 1973 provides for the prohibition of registration of certain matter. It reads:

"(1) It shall not be lawful to register as a trademark or part of a trademark any matter the use of which would be likely to deceive or cause confusion or would be contrary to law or morality or would be likely to give offence or cause annoyance to any person or class of persons or would otherwise be disentitled to protection in a court of law.

"(2) If, in the opinion of the Registrar, a trademark will, in use, be likely to deceive as to the character or quality of some, but not all, of the goods or services included in the specification, the Registrar may, notwithstanding the provisions of subsection (1) of

section 36, upon receipt of an undertaking by the proprietor of the trademark that he will limit the use of the trademark to goods or services in relation to which such use will, in the opinion of the registrar, not to be likely to deceive, register the trademark in respect of all the goods and services included in the specification."

The proposed Bill provides for exclusion for both patents and trademarks. Part III Section 8 reads:

"The following, even if they are inventions in terms of section 1, shall be excluded from patent protection:

- (a) discoveries, scientific theories and mathematical methods;
- (b) schemes, rules or methods for doing business, performing purely mental acts or playing games;
- (c) plant or animal varieties or essentially biological processes for the production of plants or animals, other than microbiological processes and the products of such processes;³
- (d) methods for the treatment of the human or animal body by surgery or therapy, as well as the diagnostic methods practised on the human or animal body. This provision shall not apply to products for the use in any of those methods."

Section 9(5) reads:

"Inventions, the commercial exploitation of which would be contrary to public order or morality shall not be patentable."

Section 41 subsection (2) reads:

"A mark cannot be validly registered if it is:

- (a) incapable of distinguishing the goods or services of one enterprise from those of other enterprises;
- (b) contrary to public order or morality;
- (c) likely to mislead the public or trade circles, in particular as regards the geographical origin of the goods or services concerned or their nature or characteristics;
- (d) identical with, or is an imitation of or contains as an element, an armorial bearing, flag, and other emblem, a name or abbreviation or initials of the name of, or official sign or hallmark adopted by, any State, intergovernmental organization or organization created by an international convention, unless authorized by the competent authority of that State or organization;
- (e) identical with, or confusingly similar to, or constitutes a translation of, a mark or trade name which is well known in Namibia for identical or similar goods or services of another enterprise;

³ (NB: Namibia opted to develop a *sui generis* system of protection on new plant varieties. The *sui generis* legislation has been developed as an integral part of the Namibian National Biodiversity Program).

- (f) identical with a mark belonging to a different proprietor and already on the Register, or with an earlier filing or priority date, in respect of the same goods or services or closely related goods or services, or if it so nearly resembles such a mark as to be likely to deceive or cause confusion."

25. Please explain whether your legislation provides for the exclusion of inventions from patentability based on *ordre public* or morality. If so, please explain the relevant section of your legislation and explain its formulation. Please also explain if it has been applied in practice.

Please see the response to question 1 posed by the EC, above.

26. Please explain whether or not diagnostic, therapeutic and surgical methods are excluded from patentability in your legislation. If so, please explain the relevant section of your legislation and explain its formulation.

Please see the response to question 24, above.

27. Please explain whether or not plants, animals and essentially biological processes are excluded from patentability in your legislation. If so, please explain the relevant section of your legislation and explain its formulation.

Please see the response to question 24, above.

28. Please describe how micro-organisms, non-essentially biological processes, microbiological processes and plant varieties are protected in your legislation. Please explain, in this respect, the relevant sections of your legislation.

Please see the response to question 24, above.

29. Please explain how your legislation protects patent right holders against the importing and against the offering for sale of a patented invention.

Under current law, the effect of the patent:

"shall be to grant the patentee subject to the provisions of the law, and the conditions of the patent, full power, sole privilege and authority by himself, his agents and licensees during the term of the patent to make, use, exercise and vend the invention ... so that he shall have and enjoy the whole profit and advantage accruing by reason of the invention during the term of the patent."

Assignment and devolution of patents occur by operation of the law, amendment of specification, an extension of the patent, voluntary surrender, endorsement of patent and compulsory licensing.

The proposed Bill, under Section 17 protects patent right holders against the importing and against the offering for sale of a patented invention. Section 17 reads:

"(1) Subject to subsections (3) and (5) and section 19, the exploitation of the patented invention in Namibia by persons other than the owner of the patent shall require the owner's agreement.

"(2) The owner of the patent shall, in addition to any other rights, remedies or actions available to him or her, have the right subject to subsections (3) and (5) and section 19 to institute court proceedings against any person who exploits the patent without his or her

agreement, in terms of subsection (1), or who performs acts which make it likely that infringement will occur.

"(3) The rights under the patent shall not extend:

- (a) to acts of articles which have been put on the market in Namibia by the owner of the patent or with his or her consent;
- (b) to the use of articles on aircraft, land vehicles, or vessels of other countries which temporarily or accidentally enter the airspace, territory or waters of Namibia; or
- (c) to acts done for scientific research.

"(4) A patent in respect of which Namibia is a designated State, granted by ARIPO by virtue of the ARIPO Protocol shall have the same effect in Namibia as a patent granted under this Act unless the Registrar has communicated to ARIPO in respect of the application thereof, a decision in accordance with the provisions of the Protocol, if a patent is granted by ARIPO that patent shall have no effect in Namibia."

30. Please state if your legislation provides for patent product protection of pharmaceutical and agricultural chemical products. In the affirmative, please indicate the legal reference.

The current law does not make any specific reference to patent product protection of pharmaceuticals and agricultural chemical products, but does allow for their protection through general provisions pertaining to patentable subject-matter and the absence of exclusions from patentability. The definition of an invention under the law broadly encompasses a wide range of products, including pharmaceuticals and agro-chemicals (Patents and Designs Proclamation No. 17 of 1923 Section 1(1)(2)).

The proposed Bill also does not make any specific provision for the product patent protection for pharmaceutical and agro-chemicals. However, Section 8 of the Bill pertaining to matters excluded from patent protection does not include both areas with Section 8(d) qualifying that:

"methods for the treatment of the human or animal body by surgery or therapy, as well as the diagnostic methods practised on the human or animal body. This provision shall not apply to products for use in any of those methods."

Section 9 of the Bill provides for patentability for all inventions including pharmaceuticals and agro-chemicals without making specific reference to them.

31. Please clarify if the patent protection of a process, as provided for in your legislation, covers the product obtained directly by that process.

Current law (Proclamation No.17 of 1923, Section 1(2)), defines an invention broadly thus also allowing for coverage for products obtained directly by the process.

The proposed Bill generally provides for patent protection for products obtained by a process by not making specific exclusion and by allowing for general patentability if the product is new, involves an inventive step and is industrially applicable (Section 9(1)-(5)).

32. Please explain the additional conditions, if any, in your legislation other than the sufficient disclosure of the invention in Article 29 of the TRIPS Agreement (e.g. submission of

justification for access to genetic material or prior informed consent to its use). If such additional conditions exist, please point out the relevant legislations and describe the additional conditions in detail.

Such conditions do not prevail, but under the *sui generis* legislation being developed under the auspices of the Ministry of Environment and Tourism, additional conditions other than the sufficient disclosure of the invention are being considered.

33. Please describe if your legislation provides for limited exceptions to the exclusive rights conferred by a patent. If affirmative, please make a reference to relevant legislation.

The legislation makes provision for exclusions but no specific provisions for limited exceptions (both under the current law and the proposed Bill).

34. Please explain whether or not your legislation provides for compulsory licensing. If so, please explain in detail the conditions under which a compulsory licence may be granted. In particular, please explain how your national legislation considers individual merits in the authorization of such use.

The current law (Proclamation No. 17 of 1923) provides for compulsory licensing in respect of patents relating to food, medicine and plants (Section 48 subsection 1(a)-(d), subsection 2-3) as well as in respect of dependent patents (Section 49), and in case of abuse or insufficient use of patent rights (Section 50 subsection 1-6 (a)-(f), subsection 7-10(a)-(b), subsection 11-14).

The proposed Bill provides for compulsory licensing in respect of ARIPO Protocol Patents, exploitation by government or person thereby authorized (Section 17 (1)-(6)) and non-voluntary licenses (Section 19 subsection 1-3).

35. Please explain how your legislation explicitly ensures that a proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. In this context, how do you define "reasonable period of time". Please also explain how your legislation ensures that the use of a compulsory licence shall be authorized predominantly for the supply to the domestic market of the Member authorizing such use.

The current law explicitly ensures that a proposed user has made efforts to obtain authorization from the right-holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time and ensures that the use of a compulsory licence shall be authorized predominantly for the supply to the domestic market of the Member authorizing such use (Section 50 subsection 1-14; Section 51 subsection 1-3).

The current law defines "reasonable time" as a period of three years subsequent to the date on which the patent was sealed, if any person interested can show that he has been unable to obtain a licence under a patent on reasonable terms and applies to the Registrar in a prescribed manner for a compulsory licence on the ground that the reasonable requirements of the public with respect to the invention in question have not been or will not be satisfied.

Under the proposed Bill explicit provisions ensure that a proposed user has made efforts to obtain authorization from the right-holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time and ensure that the use of a compulsory licence shall be authorized predominantly for the supply to the domestic market of the Member authorizing such use (Section 17 subsection 1-6; Section 19)

The Bill defines the "reasonable period of time" as four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last, in which period the Registrar may grant a non-voluntary licence if the patented invention is not worked or is insufficiently worked in Namibia and if any person proves his or her ability to work the invention in Namibia.

36. Please state if your legislation grants additional protection for innovations after the 20 years of patent protection have lapsed.

The current law as well as the proposed Bill do not provide for additional protection for innovations after the 20 years of patent protection have lapsed.

37. Please explain how your legislation provides for the enhanced patent protection of patents or patent applications pending on 1 January 1995.

The proposed Bill has transitional provisions allowing for patents granted under the current laws to remain in force and to be deemed to have been granted under the provisions of the Bill (Section 67 subsection 1-3)

38. Please explain how your legislation provides for the reversal of the burden of proof in relation to process patents.

The law (both the current and the proposed Bill) do not specifically provide for process patent protection. However, under the provisions of the proposed Bill, the applicant is required to furnish, within the prescribed time limit, a copy of the earlier application certified as correct by the office with which it was filed and also furnish the date and number of any application for a patent or other title of protection filed by him/her abroad (foreign application) relating to the same or essentially the same invention as that claimed in the application filed with the office of the Registrar (Section 13 subsection 1-4; Section 14 subsection 1-2).

G. LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

39. Please describe how your legislation protects Topographies.

The current law provides for the protection of designs under copyright (Section 93 subsection 1-2 of Proclamation No. 17 of 1923)

The proposed Bill provides for the protection of designs and protection against the unlawful importation, sale or distribution for commercial purposes of topographies including integrated circuits or other articles in which a topography is incorporated in accordance with Article 36 of the TRIPS Agreement (Section 37 subsection 1-5).

40. Please explain what protection your national legislation grants to right holders against the unlawful importation, sale or distribution for commercial purposes of topographies including integrated circuits or other articles in which a topography is incorporated in accordance with Article 36 of the TRIPS Agreement.

Same as in response to question 39, above.

41. Please explain how your legislation provides for the derogation from Article 36 as specified in Article 37 of the TRIPS Agreement where a person has no knowledge or reasonable grounds to know when acquiring an integrated circuit or an article incorporating such an integrated circuit that it contains an unlawful topography.

The current law and the proposed Bill do not provide for derogation.

42. Please state the term of protection granted by your legislation to topographies.

The current law provides for a protection of five years extendable up to two consecutive terms of five years each (Section 87 subsection 1-3 of Proclamation No. 17 of 1923).

The proposed bill provides for protection of five years renewable for two consecutive terms of five years each (Section 38 subsection 1-2).

H. UNDISCLOSED INFORMATION

43. Please explain whether or not your legislation grants a defined period of time for the protection of undisclosed information. If so, please give the time span.

Both the current law and the proposed Bill do not make specific provision for undisclosed information.

44. Please explain how your legislation defines "undisclosed information".

Same as in response to question 43, above.

45. Please explain how your legislation defines data submitted to governments or governmental agencies.

Same as above.

I. ENFORCEMENT

46. Please describe how your legislation provides for effective action against infringement of intellectual property rights.

The current law in respect of patents allows for amendment of specification in action for infringement, no damages in infringement action where specification amended by way of disclaimer, correction or explanation, restriction on recovery of damages for infringement in certain cases, procedures and conditions in action for infringement, relief for infringement of partially valid specifications, remedies for groundless threats of infringement proceedings, power of Registrar to make declaration as to non infringement and presumption in action for infringement where patent relates to a new substance (Section 37 subsection 1-2; Section 38, Section 52, 53 subsection (a)-(f), Section 54 subsection 1-4; Section 55 subsection 1-2; Section 56 subsection 1-4 and Section 57)

The proposed Bill makes provision for protection against infringement, unlawful acts and offences (Section 61 subsection 1-4).

47. Please explain whether or not your legislation provides for a mechanism to appeal to judicial bodies of final administrative decisions.

Both the current and the proposed bill provide for courts to have jurisdiction in cases of dispute in matters under the bill referred to the court (Section 60 subsection 1-2).

48. Please describe how your legislation authorizes judges to order production of evidence by the opposing party. Please give precise information on what measures are taken to ensure the protection of confidential information.

The general body of laws in Namibia provides that in the absence of specific provisions in the relevant laws court rules will apply in respect of both civil and criminal proceedings.

49. Please quote provisions of your legislation that authorize judges to order a defendant to desist from an infringement.

Same as above.

50. Please quote what provisions of your legislation authorize judges to order the payment to the right holder of adequate damages to compensate the injury he suffered.

Same as above.

51. Please quote what provisions of your legislation authorize judges to order the payment of the right holder's expenses by the infringer.

Same as above.

52. Please explain if and how judges have the authority to order that infringing goods are placed outside channels of commerce or destroyed.

Same as above.

53. Please quote what provisions of your legislation authorize judges to indemnify a defendant in the event of abuse by the plaintiff.

Same as above.

54. Please explain how your legislation implements Article 50 of the TRIPS Agreement.

Same as above.

55. Please identify the competent authorities in your jurisdiction who receive requests from right holders for an application to suspend the release of counterfeit goods by the customs authorities.

Same as above.

56. Please indicate whether or not procedures are available to suspend the exporting of counterfeit goods.

Refer to Customs.

57. Please quote what provisions of your legislation authorize the competent authorities to order the destruction or disposal of infringing goods.

Refer to Customs.

58. Please indicate whether or not your legislation provides for a *de minimis* imports exception.

Refer to Customs.

59. Please explain how your legislation implements Article 61 of the TRIPS Agreement.

Same as response to question 48 above.

IV. RESPONSES TO QUESTIONS POSED BY JAPAN

A. COPYRIGHT AND RELATED RIGHTS

1. Please explain exceptions or exemptions of the national treatment and most-favoured-nation treatment under the Copyright and Neighbouring Rights Law, if any, as permitted in Articles 3 and 4 of the TRIPS Agreement.

Works of foreign authors from countries party to the Berne Union are treated in the same manner as those of the local authors. So far Namibia has not entered the Copyright law, the Minister may license a country to use Namibian works free of charge.

V. RESPONSES TO QUESTIONS POSED BY SWITZERLAND

A. PATENTS

1. In your law, are patents available for all categories of products? In particular, are all pharmaceutical products patentable? Are there any exceptions? If so please explain in detail what these exceptions are and how they comply with Article 27 of the TRIPS Agreement.

The current law does not make any specific reference to patent product protection of pharmaceuticals and agricultural chemical products, but does allow for their protection through general provisions pertaining to patentable subject-matter and the absence of exclusions from patentability. The definition of an invention under the law broadly encompasses a wide range of products, including pharmaceuticals and agro-chemicals (Patents and Designs Proclamation No. 17 of 1923 Section 1(1)(2)).

The proposed Bill also does not make any specific provision for the product patent protection for pharmaceuticals and agro-chemicals. However, Section 8 of the Bill pertaining to matters excluded from patent protection does not include both areas with Section 8(d) qualifying that:

"methods for the treatment of the human or animal body by surgery or therapy, as well as the diagnostic methods practised on the human or animal body. This provision shall not apply to products for use in any of those methods."

Section 9 of the Bill provides for patentability for all inventions including pharmaceuticals and agro-chemicals without making specific reference to them.

2. Does your law, in accordance with Article 27.1 in combination with Article 31 of the TRIPS Agreement, consider importation as "working a patent" (and therefore preclude compulsory licensing, if a product is being imported)?

Under current law, the effect of the patent:

"shall be to grant the patentee subject to the provisions of the law, and the conditions of the patent, full power, sole privilege and authority by himself, his agents and licensees during the term of the patent to make, use, exercise and vend the invention ... so that he shall have and enjoy the whole profit and advantage accruing by reason of the invention during the term of the patent."

Assignment and devolution of patents occur by operation of the law, amendment of specification, an extension of the patent, voluntary surrender, endorsement of patent and compulsory licensing.

The proposed Bill, under Section 17 protects patent rights holders against the importing and against the offering for sale of a patented invention. Section 17 reads:

"(1) Subject to subsections (3) and (5) and section 19, the exploitation of the patented invention in Namibia by persons other than the owner of the patent shall require the owner's agreement.

"(2) The owner of the patent shall, in addition to any other rights, remedies or actions available to him or her, have the right subject to subsections (3) and (5) and section 19 to institute court proceedings against any person who exploits the patent without his or her agreement, in terms of subsection (1), or who performs acts which make it likely that infringement will occur.

"(3) The rights under the patent shall not extend:

- (a) to acts of articles which have been put on the market in Namibia by the owner of the patent or with his or her consent;
- (b) to the use of articles on aircraft, land vehicles, or vessels of other countries which temporarily or accidentally enter the airspace, territory or waters of Namibia; or
- (c) to acts done for scientific research.

"(4) A patent in respect of which Namibia is a designated State, granted by ARIPO by virtue of the ARIPO Protocol shall have the same effect in Namibia as a patent granted under this Act unless the Registrar has communicated to ARIPO in respect of the application thereof, a decision in accordance with the provisions of the Protocol, if a patent is granted by ARIPO that patent shall have no effect in Namibia."

Follow-up question:

Please confirm whether your law (the current law and the proposed Bill), in accordance with Article 27.1 of the TRIPS Agreement in combination with Article 31 of the TRIPS Agreement, considers importation as "working/utilizing" a patent (and therefore precludes compulsory licensing, if a product is being imported).

Current legislation (Patents, Designs, Trade Mark and Copyright Act 1916 and the Patents, Designs, Trade Mark and Copyright Proclamation No. 17 of 1923) provide for grounds on which compulsory licences are granted or patents revoked (Patents, Designs, Trade Mark and Copyright Act No. 9 of 1916 Part IV Sections 59 and 60; Patents, Designs, Trade Marks and Copyright

Proclamation No. 17 of 1923 section 5; and Patents, Designs, Trade Mark and Copyright Act No. 37 of 1952 Sections 48, 49 and 50).

The proposed Bill provides for the "working/utilizing" of a patent (and therefore precludes compulsory licensing, if a product is being imported) in Part II Section 17 which provides for rights conferred by patent and the ARIPO Protocol Patents in Sections 19 and 20 which provide for exploitation by Government or persons thereby authorized as well as non-voluntary licences.

3. Does your law make compulsory licenses subject to all the conditions enumerated in Article 31 of the TRIPS Agreement? Please cite the relevant provisions of law.

The current law (Proclamation No. 17 of 1923) provides for compulsory licensing in respect of patents relating to food, medicine and plants (Section 48 subsection 1(a)-(d), subsection 2-3) as well as in respect of dependent patents (Section 49), and in case of abuse or insufficient use of patent rights (Section 50 subsection 1-6 (a)-(f), subsection 7-10 (a)-(b), subsection 11-14).

The proposed Bill provides for compulsory licensing in respect of ARIPO Protocol Patents, exploitation by government or persons thereby authorized (Section 17, subsection 1-6) and non-voluntary licences (Section 19 subsection 1-3).

4. Does your legislation provide for the principle of the reversal of burden of proof in a process patent litigation? Please cite the relevant provisions of law.

The law (both the current and the proposed Bill) does not specifically provide for process patent protection. However, under the provisions of the proposed Bill, the applicant is required to furnish, within the prescribed time limit, a copy of the earlier application certified as correct by the office with which it was filed and also furnish the date and number of any application for a patent or other title of protection filed by him/her abroad (foreign application) relating to the same or essentially the same invention as that claimed in the application filed with the office of the Registrar (Section 13 subsection 1-4; Section 14 subsection 1-2).

Follow-up question:

You mention that your legislation (the current law and the proposed Bill) does not specifically provide for process patent protection. Please explain in detail how your legislation complies/will comply with the obligation of Article 34.3 TRIPS Agreement which indicates that Members shall provide the principle for the reversal of burden of proof in a process patent litigation, in at least one of the circumstances mentioned in Article 34.1 of the TRIPS Agreement.

The earlier response could have created an erroneous impression that process patents are not provided for, and that is sincerely regretted.

Both the current legislation and the proposed Bill provide for process patents. However, they both do not provide for process patents by way of specific substantive provisions. In both legislations the definition of an invention and or a patent relates to both product and process patents. Provisions for application, grant, maintenance, infringement action, etc. in both legislations provide in a general manner for procedures pertaining to both product and process patents (Patents, Designs, Trade Mark and Copyright Act of 1916, Act No. 9 of 1916 Part I Section 6, Part II, Part III, Patents, Designs, Trade Mark and Copyright Proclamation No. 17 of 1923 section 1(2), Act No. 37 of 1952 sections 56 and 57, the Proposed Bill sections 7(3), 9, 11, 17(5)(b)).

B. PROTECTION OF UNDISCLOSED INFORMATION

5. Please explain in detail if your legislation ensures that undisclosed and confidential test data or other data submitted by an applicant to the responsible State agency in the procedure for market authorization of a pharmaceutical or of an agricultural chemical product is protected against disclosure and against unfair commercial use by a competitor, for example by prohibiting a second applicant from relying on, or from referring to the original data of the first applicant, when applying subsequently for market authorization for his own product. Does your legislation provide for exceptions to this? If yes, under what conditions would such exceptions apply? Does your legislation provide for a defined period of protection for undisclosed information/for such test data of the first applicant?

Both the current law and the proposed Bill do not make specific provision for undisclosed information.

Follow-up question:

You mention that in your legislation (the current law and the proposed Bill) there is not/will not be any specific provision for the protection of undisclosed information. Please explain how this complies with the obligations of Article 39.3 of the TRIPS Agreement. Is/Will be Article 39.3 of the TRIPS Agreement directly applicable in your legislation?

In discussions between the Office of the Registrar and the Ministry of Justice (Legal Drafting) it has now been agreed that not providing for specific provisions for the protection of undisclosed information was a glaring omission in the proposed legislation. Specific provisions providing for undisclosed information are being developed and inserted in the proposed Bill in compliance with the obligations of Article 39.3 of the TRIPS Agreement.

In fact Article 39.3 of the TRIPS Agreement will become directly applicable in the Namibian legislation.

VI. RESPONSES TO QUESTIONS POSED BY THE UNITED STATES

A. GENERAL

1. Please describe, in relation to each form of intellectual property covered by the TRIPS Agreement, including plant variety protection, the manner in which national treatment and most-favoured-nation treatment are provided to nationals of other WTO Members.

Namibia is a member of the Berne Union and as per Article 5(3) of the Berne Convention (1971), Namibia treats all works of intellectual property the same, regardless of their countries of origin.

Follow-up question:

In your response, you stated that "Namibia treats all works of intellectual property the same, regardless of their countries of origin". One of our industry associations has advised us that Section 63 of your Copyright Act provides the Minister of Information and Broadcasting authority to issue a notice extending protection to foreign works. We have been advised that, to date, no such notice has been issued and that this has led to a reluctance, on the part of Namibia's Office of the Prosecutor General, to prosecute any infringement cases due to the fact that foreign works are not clearly protected under the law of Namibia. We would appreciate receiving clarification regarding how a work of a foreign author receives copyright protection

under your law (and, therefore, how a copyright owner can enforce his or her rights to a work in your country).

Please see reproduced in the annex copies of an Official Notice for Publication in the Government Gazette and a Government Notice by the Minister of Foreign Affairs, Information and Broadcasting, both dated 13 June 2001.

B. COPYRIGHT AND RELATED RIGHTS

2. Please explain whether and how the copyright law of Namibia complies with Article 9 of the TRIPS Agreement requiring that Members comply with all Articles 1 through 21 of the Berne Convention (1971), except Article 6bis, since Members do not have rights or obligations relating to the latter Article under the TRIPS Agreement.

Yes, Namibia's Copyright law which was amended in 2000, does indeed comply with Article 9 of the TRIPS Agreement because it was actually amended in order to be in conformity with the TRIPS provisions and/or requirements. However, in relation to Article 16 (1) (2) and (3) of the Berne Convention, Section 4 (10) of the Namibian Customs and Excise Act, Act 20 of 1998 would apply.

3. Please explain how the copyright law of Namibia protects computer programs as literary works and compilations of data as required by Article 10 of the TRIPS Agreement.

The Act defines, first of all, computer programs as a set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that a computer can read, of causing a computer to perform or achieve a particular task or result. As per the above definition, computer programs are therefore protected by the Act, as "literary works". In the case of infringement of computer programs, Section 19 (2)(a), (b) and (c) will apply, whereby a person would not be regarded as an infringer if:

- (1) the person makes copies thereof specifically for back-up purposes only;
- (2) a copy so made is intended exclusively for personal or private purposes; and/or
- (3) that copy is destroyed when the possession of that program, or authorized copy thereof, ceased to be lawful.

4. Article 11 of the TRIPS Agreement requires that rental rights for computer programs and cinematographic works be available. Please cite to the corresponding provision of the copyright law of Namibia.

Rental rights for computer programs and cinematographic works were not specifically covered in the new law.

5. Please state the length and terms of protection the copyright law of Namibia provides for a work other than a photographic work or a work of applied art and cite to the relevant provision of law.

The duration for protection of copyright in Namibia is the whole life of the author and a period of 50 years from the end of the year in which the author died. This is done under Section 7(1)(a).

6. Please describe the protection the copyright law of Namibia provides for performers, and the term of the protection.

Performers in Namibia are protected under Section 48 (a)-(f), and Section 49 (1-3). The duration of protection is the same as in the case of copyright, in principle.

7. Article 14.2 of the TRIPS Agreement provides that producers of phonograms are to enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Article 14.2 requires that producers of phonograms are to have the right to authorize or prohibit the commercial rental to the public of originals or copies of their phonograms. Please describe how the copyright law of Namibia implements these obligations and indicate the term of protection.

Rental rights for performers and producers of phonograms were not mentioned as such in the revised law but they fell under Section 29 (1) (b) of the old copyright law. Under Section 29 the producers' phonograms have exclusive right to authorize rental and to prohibit the direct or indirect production of phonograms.

C. TRADEMARKS

8. Please describe the subject-matter that can comprise a trademark under the trademark law of Namibia.

Current legislation provides under Section 2 of the Trade Marks Act No. 48 of 1973 for a definition of a mark. A mark includes a device, band, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof or a container for goods. A trademark, other than a certification mark, means a mark used or proposed to be used in relation to goods or services.

The proposed Industrial Property Bill of Namibia, defines a mark as any visible sign capable of distinguishing goods or services of an enterprise. Under the provisions of this Bill a mark can be registered, if it is:

- (a) capable of distinguishing the goods or services of one enterprise from those of other enterprises;
- (b) not contrary to public order or morality;
- (c) not likely to mislead the public or trade circles, in particular as regards the geographical origin of goods or services concerned or their nature or characteristics;
- (d) not identical with, or is not an imitation of or does not contain as an element, an armorial bearing, flag and other emblem, a name or abbreviation or initials of the name of, or official sign or hallmark adopted by, any State, intergovernmental organization or organization created by an international convention, unless authorized by the competent authority of that State or organization;
- (e) not identical with, or confusingly similar to, or does not constitute a translation of, a mark or trade name which is well-known in Namibia for identical or similar goods or services of another enterprise;
- (f) not identical with a mark belonging to a different proprietor and already on the Register, or with an earlier filing or priority date, in respect of the same goods or

services or closely related goods or services, or if it does not so nearly resemble such a mark as to be likely to deceive or cause confusion.

All the provisions of the Bill which have a bearing on the protection of a mark, were drafted to provide full compliance with the provisions of the TRIPS Agreement, including giving an express right of action against the use of well-known marks, as opposed to their registration (full compliance with Article 16 of the TRIPS Agreement and Article 6*bis* of the Paris Convention).

9. Please describe the procedure that must be followed to register a trademark in Namibia, citing the relevant provisions of the law, and describe the rights that the owner of a registered mark can exercise.

Under current law (Trade Marks in South West Africa Act, No. 48 of 1973), procedure to be followed to register a trademark and the rights exercised by the owners are contained in the following provisions (Parts III, IV, V, VI, VII, VIII, IX, X, XI and XII):

- (a) Application for registration: Part III (Sections 20-25);
- (b) Opposition: Part IV (Sections 26-30);
- (c) The Register: Part V (Sections 31-36);
- (d) Registration and its effects: Part VI (Sections 37-42);
- (e) Infringement: Part VII (Sections 43-46);
- (f) Duration and Renewal of Registration: Part VIII (Section 47);
- (g) Registered Users: Part IX (Section 48);
- (h) Assignment: Part X (Sections 49-51);
- (i) Certification Marks: Part XI (Section 52); and
- (j) Defensive Trade Marks: Part XII (Section 53).

Under the proposed Bill, the following provisions cover the procedure to be followed to register a trademark and the rights of owners:

- (a) Acquisition of exclusive right to a mark and registrability: Section 41;
- (b) Application for registration of a mark: Section 42;
- (c) Examination of application for registration of a mark: Section 43;
- (d) Opposition to registration of a mark: Section 44;
- (e) Registration of a mark: Section 45;
- (f) Rights conferred by registration of a mark and transfer of rights thereof: Section 46;
- (g) Banjul Protocol on Marks: Section 47;

- (h) Invalidation of registration of a mark: Section 48;
- (i) Removal of a mark on grounds of non-use: Section 49;
- (j) Collective marks: Section 50;
- (k) Invalidation of registration of collective mark: Section 51;
- (l) Licensing of marks and collective marks: Section 52; and
- (m) Trade names: Section 53.

10. Please provide the length and terms of protection that the trademark law of Namibia provides for a trademark.

Under current law, registration of trademarks endures initially for a period of ten years and, subject to the payment of fees, may be renewed indefinitely every ten years.

The proposed Bill provides for the duration and renewal of marks and a continuous period of non-use of five years.

11. Please explain whether the Namibian law protects well-known marks and identify all relevant laws and regulations.

Under current law, there are provisions covering the protection of well-known marks through a defensive registration (Section 53).

Under the provisions of the proposed Bill, in Section 41 subsection (2)(e), which reads:

"A mark cannot be validly registered if it is identical or confusingly similar to, or constitutes a translation of, a mark or trade name which is well-known in Namibia for identical or similar goods or services of another enterprise."

12. Please explain whether the Namibian law protects pre-existing trademarks against usurpation by geographical indications, as required by Article 24 of the TRIPS Agreement.

The proposed Bill has transitional provisions which generally protect all trademarks registered under the current laws which are to be repealed by the proposed Bill, with a proviso that such marks shall be due for renewal within the same period as under the current laws or ten years from the entry into force of the Bill (Section 67, subsection 3). However, specific provision to protect pre-existing trademarks against usurpation by geographical indications, as required by Article 24 of the TRIPS Agreement, will be included.

D. GEOGRAPHICAL INDICATIONS

13. Please describe in detail how the laws of Namibia provide for the recognition and protection of geographical indications required by Article 22.2 of the TRIPS Agreement, citing to the relevant provisions of law or regulation, and provide examples of geographical indications so protected.

The current Act contains no reference to geographical indications, and the Registrar may therefore register a trademark with geographical indication without extraneous proof of distinctiveness, provided that it is distinctive and not reasonably required for use in trade in the goods

or services concerned. This Act does not meet the requirements of Article 22.2 of the TRIPS Agreement.

The proposed Bill contains provisions covering geographical indications' protection with full compliance with the TRIPS Agreement, especially with the provisions of Articles 22-24 of the Agreement. Provisions pertaining to geographical indications have been drafted separately from the proposed Bill and will be inserted therein soon after they are approved by the Cabinet Committee on Legislation (CCL).

14. Please describe in detail the manner in which the higher level of protection required for wines and spirits under Article 23.2 of the TRIPS Agreement is implemented, citing to the relevant provisions of law or regulation, and provide examples of geographical indications for such products.

The current Act contains no reference to geographical indications.

The proposed Bill provides for minimum requirements for the protection of geographical indications for wines and spirits as required by the provisions of Article 23 of the TRIPS Agreement. No other types of products are specifically covered under the proposed Bill.

E. INDUSTRIAL DESIGNS

15. Please describe the procedure that must be followed to obtain protection for industrial designs, citing to the provisions of the law of Namibia, and describe the nature of the protection provided.

The current Act provides for the protection of designs during copyright (Section 93 subsection 1-2 of Proclamation No. 17 of 1923).

The proposed Bill provides for application for registration of design, examination and registration of industrial design, rights conferred by registration, duration and renewal of registered designs, ARIPO Protocol designs and the invalidation of registered designs in Sections 35, 36, 37, 38, 39 and 40.

16. Please describe the procedure that must be followed to obtain protection for textile designs and cite to the relevant provisions of law or regulation.

The proposed Bill provides for design protection in general terms and does not specify protection for the protection of textile designs. It defines industrial designs as meaning any composition of lines or colours or any three-dimensional forms, whether or not associated with lines or colours, where such composition or form gives a special appearance to a product of industry or handicraft and can serve as a pattern for a product of industry or handicraft but does not include anything in an industrial design which serves solely to obtain a technical result and to the extent that it leaves no freedom as regards arbitrary features of appearance.

The Bill provides for protection of textile designs in the context of general provisions for the protection of industrial designs.

F. PATENTS

17. Please describe in detail the way in which the patent law of Namibia implements Article 27 of the TRIPS Agreement, indicating any exceptions provided for, and including details regarding the protection for micro-organisms and non-biological and microbiological processes

and plant varieties. Please cite to the relevant provisions of the law.

Namibia has opted to develop a *sui generis* system of protection on new plant varieties, micro-organisms and non-biological and microbiological processes. The *sui generis* legislation has been developed as an integral part of the Namibian National Bio-diversity Program under the auspices of the Ministry of Environment and Tourism.

18. Please describe in detail the rights provided patent holders under the patent law of Namibia and cite to the relevant provisions of law.

Under the current Act, rights provided patent holders are found in Sections 32-65 of the Act No. 37 of 1952.

The proposed Bill provides for such rights under Sections 10 and 16-20, which sections provide for the right to patent and naming of inventor, grant of patent, time-limit for grant and changes in patents, rights conferred by patent, ARIPO Protocol patents, exploitation by government or person thereby authorized, duration and annual fees, non-voluntary licences and invalidation.

19. Please describe in detail any provisions in the laws of Namibia permitting unauthorized use of a patent, citing to the relevant provisions of law, and describe in detail the conditions under which such use can occur.

Under the current Law, unauthorized use of a patent refers to compulsory licensing in respect of patents relating to food, medicine and plants, in respect of dependent patents and in case of insufficient use patent rights (Sections 48, 49 and 50 of Act No. 37 of 1952).

The proposed Bill for compulsory licensing under Section 19 pertaining to non-voluntary licences and under Section 17 subsections 5 and 6 providing that where public interest, in particular, national security, nutrition, health or the development of other vital sector of the national economy so requires, the Minister may allow for exploitation of the invention by a government agency or a third person designated by the Minister with equitable remuneration.

20. What term of protection does the patent law of Namibia provide for patents? Please describe any provisions for extension of the term of protection and cite to the relevant provisions of the law.

Under current law (Act No. 37 of 1952, Section 28 subsection 1) the term of protection is sixteen years from the date on which the complete specification was lodged and ten years in the case of a plant patent.

The proposed Bill in Section 18 subsection 1, provides for a term of 20 years after the filing date of the application for the patent.

G. LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

21. Please describe in detail the protection for layout-designs of integrated circuits provided under the laws of Namibia, including the term of protection, and cite to the relevant provisions of law.

The current law provides for the protection of designs during copyright (Section 93 subsection 1-2 of Proclamation No. 17 of 1923)

The proposed Bill provides for the protection of designs and protection against the unlawful importation, sale or distribution for commercial purposes of topographies including integrated circuits or other articles in which, a topography is incorporated in accordance with Article 36 of the TRIPS Agreement (Section 37 subsection 1-5).

H. PROTECTION OF UNDISCLOSED INFORMATION

22. Please describe in detail how the laws of Namibia provide for the protection of undisclosed information as required by Article 39.2 of the TRIPS Agreement and provide citations to the relevant provisions of law.

Both the current law and the proposed Bill do not make specific provision for undisclosed information.

23. Please describe in detail the manner in which protection is provided for test data regarding pharmaceutical and agricultural chemical products submitted to the government in order to obtain marketing approval in Namibia and cite to the relevant provisions of law.

Both the current law and the proposed Bill do not make specific provision for undisclosed information.

24. Are other applicants for marketing approval for their own versions of a previously approved pharmaceutical or agricultural chemical products permitted to rely on data submitted by the earlier applicant? If so, how long a period of exclusivity is given the earlier applicant before such reliance becomes possible.

There are no specific provisions in respect to this in both the current law and the proposed Bill.

I. ENFORCEMENT – GENERAL OBLIGATIONS, CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES AND PROVISIONAL MEASURES

25. Please describe in detail the manner in which the laws of Namibia provide for effective action against infringement of intellectual property rights as required by Article 41.1 of the TRIPS Agreement.

The current law in respect of patents allows, for amendment of specification in action for infringement, no damages in infringement action where specification amended by way of disclaimer, correction or explanation, restriction on recovery of damages for infringement in certain cases, procedures and conditions in action for infringement, relief for infringement of partially valid specifications, remedies for groundless threats of infringement proceedings, power of Registrar to make declaration as to non infringement and presumption in action for infringement where patent relates to a new substance (Section 37 subsection 1-2; Section 38; Section 52, 53 subsection (a)-(f); Section 54 subsection 1-4; Section 55 subsection 1-2; Section 56 subsection 1-4 and Section 57).

The proposed Bill makes provision for protection against infringement, unlawful acts and offences (Section 61 subsection 1-4).

26. Article 43.1 of the TRIPS Agreement requires that judges be authorized to order production of evidence necessary to substantiate a party's claims where that party has been unable to obtain such evidence from the opposing party. Please describe how the laws or regulations of Namibia provide this authorization, citing to the relevant provisions of law or regulation.

The general body of laws in Namibia provides that in the absence of specific provisions in the relevant laws court rules will apply in respect of both civil and criminal proceedings.

27. Please describe in detail all of the civil remedies that are available to right holders under the laws of Namibia, citing to the relevant provisions of law or regulation.

The Act governing copyright in Namibia sets out the remedies available to the injured party. Chapter two of the Copyright and Neighbouring Rights Protection of Act 1994 deals with infringement of copyright and the infringement thereof.

Section 30 of the Act provides for the institution of civil proceedings in a court of law by the owner of the copyright whenever an infringement is committed. The said Section also provides for relief which may be claimed as a result of such infringement. The relief that may be claimed includes damages, interdicts, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise.

The remedies available as set out in the above paragraph are self explanatory. However, we wish to point out the following in respect of interdict and damages:

Interdicts can be either prohibitory, restitutory or mandatory. The interdict restraining the alleged infringement act is usually the principal remedy sought by the copyright holder. This type of interdict is called prohibitory interdict. The right to obtain an interdict can only be exerted by the copyright holder of the exclusive licensee or sub-licensee. This remedy can be on a case-to-case basis be classified as a provisional remedy.

"Damages" refer to the delictual damages the copyright holder will be entitled to upon infringement. The holder will be compensated for his patrimonial loss. This compensation will be calculated pursuant to the infringement.

Under Section 31, the Act also avails the aforementioned remedies to an exclusive licensee and a sub-licensee. Note that these rights shall be concurrent to those of the owner.

Our law further recognises the "Anton Piller Order", as a so-called "assistance remedy" to the copyright holder. The said order is primarily a procedural remedy whereby the deputy sheriff of the High Court of Namibia is directed to enter the premises of the respondent (infringer) and to take possession of a and to retain in his custody pending the hearing of the matter all relevant evidence relating to the applicant's (holder) cause of action. This type of order is granted without notice to the respondent in order to preserve the secrecy of the matter, as the rationale behind the granting of the order is that the respondent has in his possession relevant information which he is likely to destroy or put beyond the reach of the applicant.

Another remedy available to the copyright holder is contained in Section 34 of the Act which provides for the restriction of importing of infringing copies. In terms this Section, the owner of the copyright in any published work may give notice to the Commissioner of Customs and Excise informing the latter the (s)he is the owner of the copyright in that work and request that the Commissioner treat as prohibited goods, during a period specified in the notice, any copies of that work. The Section goes further, stipulating that the said owner must provide security to the Commissioner for securing the fulfilment of any liability and the payment of any expense which the Commissioner may incur by the reason of the detention of any copy of the work referred to in the notice.

Other secondary remedies available to the copyright holder by virtue of our Law of Delicts includes civil claims based on unlawful infringement of privacy, unlawful competition and passing-off. These remedies can only be enforced through the Namibian courts of law and the procedure and the procedure to enforce same is governed by our civil procedural law as set out in the Magistrate's Court Act 32 of 1944 and the Rules promulgated thereunder, as well as the High Court Act 16 of 1990 and the Rules of the High Court promulgated under the said Act.

Under Patents Law, Section 65(3) makes provision for civil remedies in case of infringement. The remedies available includes interdict, delivery up of infringe product or any article or product of which the infringe product forms an inseparable part, and damages. Section 70(1) refers to declaration in re groundless threat.

Under Trademark law, Section 43 indirectly points to damages.

28. Please describe in detail the provisional procedures and remedies available to right holders under the laws of Namibia, citing to the relevant provisions of law and regulation, and indicate any condition under which a right holder may avail itself of those procedures and remedies.

The procedures, though not in the Act, are such that right holders; should register themselves with local or foreign authors collecting societies, which would always act on their behalf in the case of infringements of their rights.

J. ENFORCEMENT – SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES

29. Please describe in detail the procedures under the laws of Namibia that provide for border enforcement at least for trademark counterfeiting and copyright piracy, identifying the competent authority and citing to the relevant provisions of law or regulation.

The competent authority in this regard is the Customs and Excise Office in the Ministry of Finance and this is done under Section 4 (10) of the Customs and Excise Act 20 of 1998.

30. Please indicate if border enforcement is available to owners of other forms of intellectual property and, if so, please describe the procedures and remedies available in relation to each form of intellectual property, citing the relevant provisions of law.

The response to question 29 above would also apply in question 30 herewith.

31. Article 58 of the TRIPS Agreement specifies procedures to be followed where the competent authorities can act ex officio. Please explain whether the competent authorities in Namibia are empowered to act ex officio and, if so, please identify the intellectual property areas subject to ex officio action.

In terms of Copyright, only police officers are empowered to act ex officio upon production of his/her identification card. Other competent authorities such as copyright societies, Custom officials and other intellectual property law enforcement agencies do not have ex officio power under the new Act.

K. ENFORCEMENT - CRIMINAL PROCEDURES

32. Please describe in detail how the laws of Namibia implement Article 61 of the TRIPS Agreement that requires Members to have criminal procedures and penalties, including imprisonment and/or monetary fines sufficient to act as a deterrent, at least for cases of willful

trademark counterfeiting and copyright infringement on a commercial scale. Please cite to the relevant provisions of law and regulation.

Trademarks

- Section 70: false entry in register or making, producing or tendering false copy - N\$200 or 12 months imprisonment or both;
- Section 71: making false statements in order to deceive register or other officer - N\$200 or 12 months imprisonment or both;
- Section 72: falsely representing a trademark as registered - N\$100.

Copyrights

The following actions amount to criminal offences or penalties with respect to copyrights under the following Sections:

Section 33(1):

- making for sale or hire;
- selling or letting or by way of trade offering or exposing for sale or hire, by way of trade exhibits in public;
- importing into Namibia for a purpose other than for his or her private or domestic use;
- distributing for purposes of trade;
- distributing for any other purpose to such an extent that the owner of the copyright is prejudicially affected;

any article which he or she knows to be an infringing copy of the work.

Section 33(2):

- causing a literary or musical work to be performed in public, knowing that copyright subsists in the work and that such performance constitutes an infringement of the copyright;
- causing a broadcast to be rebroadcast or transmitted in a diffusion service, knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes an infringement of the copyright;
- causing programme carrying signals to be distributed by a distributor for whom they were not intended, knowing that copyright subsists in the signals and that such distribution constitutes an infringement of copyright.

Penalties

- N\$12,000 or 3 years imprisonment or both for first conviction;
- N\$20,000 or 5 years imprisonment or both for second conviction.

33. Article 61 also requires that remedies in appropriate cases include the seizure, forfeiture and destruction of infringing goods and any materials and implements the predominant use of which has been the commission of the offense. Please describe the provisions in the laws of Namibia that provide for such remedies, and describe the circumstances in which those remedies would be imposed, citing to the relevant provisions of law or regulation.

Under the Copyright Act:

- (i) Section 53 makes provision for destruction of infringing goods;
- (ii) Section 33 (copyright infringement): the fine is N\$12,000 or three years or both for first conviction. N\$20,000 or five years or both for subsequent convictions; and
- (iii) Section 51 (performers): the same provisions apply as in Section 33.

34. Article 61 also indicates that Members may provide for criminal procedures and penalties in cases of wilful infringement of other forms of intellectual property. Please describe any provisions of the laws of Namibia that provide for such procedures and remedies, citing to the relevant provisions of law or regulation.

Trademarks and patents impose monetary fines and imprisonment. The seizure and forfeiture of infringing goods and implements for their production are authorized by the Criminal Procedures Act of 1977 and (Act No. 51 of 1977) which applies to all criminal cases instituted under the laws concerned.

L. STATISTICAL QUESTIONS

35. Please provide statistical information related to civil copyright, trademark, geographical indication, industrial design, patent

36. , integrated circuit layout-design, and trade secret enforcement for 2000, including the number of cases filed; injunctions issued; infringing products seized; infringing equipment seized; cases resolved (including settlement); and the amount of damages awarded.

A total number of 2100 new trademark applications were received during the year 2000. No other statistics are kept and no case of any kind was filed for 2000.

37. Please provide statistical information related to criminal enforcement in the area of copyright piracy and trademark infringement for 2000, including the number of raids, prosecutions, convictions, and the amount of fines and/or jail terms (including whether the fines were paid and whether the jail term was actually served or was suspended) and any other information establishing that the criminal system operates effectively to deter copyright piracy and trademark counterfeiting.

There is no specific procedure prescribed for enforcement of remedies against trademark infringements. The court system has jurisdiction to entertain claims for damages for infringements or to prevent the use of the mark by others. In the light thereof the registry does not have statistical information relevant to the question.

ANNEX

GOVERNMENT OF THE REPUBLIC OF NAMIBIA
GOVERNMENT SERVICE

Reference No.

OFFICIAL NOTICE FOR PUBLICATION

The Permanent Secretary
Ministry of Justice
Private Bag 13302
WINDHOEK

Ministry/Department of Foreign Affairs

SUBJECT: *Extension of copyright protection in relation to members of the Berne Copyright Union: Copyright and Neighbouring Rights Protection Act, 1994*

Please accept the attached official notice as approved by *Legal Affairs*

for publication in the Government Gazette as per instruction below:

N.B. Mark with and 'X' in the appropriate space.

☐ Proclamation

☐ General Notice

☐ Act

☐ Ordinance

☒ Government Notice

☐ Advertisement

Number of Insertions: *1*.....

Whether proof required? *Yes*

Date of first insertion: *27-06-01*.....

Number of slip copies required: *10*

Should you require further information, kindly contact *T. H. Shinavena* Telephone number: *222266*

Signature *[signature]*

13/06/01
Date

For use by the Government Gazette Section

Received by *[signature]*

Date : *13/06/01*

GOVERNMENT NOTICE

MINISTRY OF FOREIGN AFFAIRS, INFORMATION AND BROADCASTING

No.

2001

EXTENSION OF COPYRIGHT PROTECTION IN RELATION
TO MEMBERS OF THE BERNE COPYRIGHT UNION:
COPYRIGHT AND NEIGHBOURING
RIGHTS PROTECTION ACT, 1994

Under the powers vested in me by section 63(1) of the Copyright and Neighbouring Rights Protection Act, 1994 (Act No. 6 of 1994), I hereby determine that the provisions of that Act specified in the Schedule shall apply in relation to the countries of the Berne Copyright Union set out in the Annexure to that Schedule.

Minister of Foreign Affairs,

[Signature]

Information and Broadcasting,

Windhoek,

13 June

2001

SCHEDULE

Definitions

1. In this Schedule, a word or expression to which a meaning has been assigned in the Act has that meaning and, unless the context otherwise indicates -

"material time" means: -

- (a) in relation to an unpublished work, other than a programme-carrying, signal, the time at which such work was made or, if the making thereof extended over a period, a substantial part of that period;
- (b) in relation to a published work, the time of first publication;
- (c) in relation to a programme-carrying signal, the time at which the signal is emitted to a satellite.

"published" means the making available of copies of a work to the public in reasonable quantities for sale, hire, public lending or for other transfer of the ownership or possession of the copies with the consent of the owner of copyright in that work;

"published simultaneously" means published in two or more countries within a period of 30 days;

"the Act" means the Copyright and Neighbouring Rights Protection Act, 1994 (Act No. 6 of 1994);
and

"Union" means the Berne Copyright Union constituted by the Berne Convention for the Protection of Literary and Artistic Works signed on 9 September 1886 and completed at Paris on 4 May 1896, revised by the Berlin Convention on 13 November 1908 and completed at Berne on 20 March 1914, revised by the Rome Convention on 2 June 1928 and revised by the Brussels Convention on 26 June 1948, revised by the Stockholm Convention on 14 July 1967 and revised at Paris on 24 July 1971;

and "country of the Union" means any country which ratified or acceded to any one or more of the said Conventions and is mentioned in the Annexure.

Extension of copyright protection in relation to countries of the Union

2. Chapters 1 and 2 of Part I and all other provisions of the Act relevant to works that are eligible for copyright protection under the Act apply with regard to a country of the Union specified in the Annexure to this Schedule and:

- (a) in relation to literary, musical or artistic works, computer programs, cinematograph films, sound recordings or published editions first published in that country, in the same manner as they apply in relation to literary, musical or artistic works, computer programs, cinematograph films, sound recordings or published editions first published in Namibia;
- (b) in relation to persons who at a material time are citizens or subjects of that country, in the same manner as they apply in relation to persons who at such a time are Namibian citizens;
- (c) in relation to persons who at a material time are domiciled or resident in that country, in the same manner as they apply in relation to persons who at such a time are domiciled or resident in Namibia;
- (d) in relation to bodies incorporated under the laws of that country, in the same manner as they apply in relation to bodies incorporated under the laws of Namibia;
- (e) in relation to broadcasts made or programme-carrying signals emitted to a satellite from places in that country, in the same manner as they apply in relation to broadcasts made and programme-carrying signals emitted to a satellite from a place in Namibia.

Repeal of Proclamations

3. Proclamations No. R.73 of 18 March 1966 and No. R. 171 of 15 August 1966 are repealed.

Coming into operation of notice

4. This notice shall be deemed to have come into operation on 15 March 1996.

ANNEXURE

Countries of the Union		
A	Denmark	J
Albania	Dominica	Jamaica
Algeria	Dominican Republic	Japan
Antigua and Barbuda		Jordan
Argentina	E	
Armenia	Ecuador	K
Australia	Egypt	Kazakhstan
Austria	El Salvador	Kenya
Azerbaijan	Equatorial Guinea	Kyrgyzstan
B	Estonia	
Bahamas	F	L
Bahrain	Fiji	Latvia
Bangladesh	Finland	Lebanon
Barbados	France	Lesotho
Belarus		Liberia
Belgium	G	Libya
Belize	Gabon	Liechtenstein
Benin	Gambia	Lithuania
Bolivia	Georgia	Luxembourg
Bosnia and Herzegovina	Germany	M
Botswana	Ghana	Macedonia
Brazil	Great Britain	Madagascar
Bulgaria	Greece	Malawi
Burkina Faso	Grenada	Malaysia
C	Guatemala	Mali
Cameroon	Guinea	Malta
Canada	Guinea-Bissau	Mauritania
Cape Verde	Guyana	Mauritius
Central African Republic		Mexico
Chad	H	Moldavia
Chile	Haiti	Monaco
China	Holy See	Mongolia
Colombia	Honduras	Morocco
Congo	Hungary	
Costa Rica		N
Côte d'Ivoire	I	Netherlands
Croatia	Iceland	New Zealand
Cuba	India	Nicaragua
Cyprus	Indonesia	Niger
Czech Republic	Ireland	Nigeria
D	Israel	Norway
Democratic Republic of the Congo	Italy	

<p>O</p> <p>Oman</p> <p>P</p> <p>Pakistan</p> <p>Panama</p> <p>Paraguay</p> <p>Peru</p> <p>Philippines</p> <p>Poland</p> <p>Portugal</p> <p>Q</p> <p>Qatar</p> <p>R</p> <p>Romania</p> <p>Russian Federation</p> <p>Rwanda</p> <p>S</p> <p>Saint Kitts and Nevis</p> <p>Saint Lucia</p> <p>Saint Vincent and the Grenadines</p> <p>Senegal</p> <p>Singapore</p> <p>Slovakia</p> <p>Slovenia</p> <p>South Africa</p> <p>South Korea</p> <p>Spain</p> <p>Sri Lanka</p> <p>Sudan</p> <p>Suriname</p> <p>Swaziland</p> <p>Sweden</p> <p>Switzerland</p>	<p>T</p> <p>Tajikistan</p> <p>Tanzania</p> <p>Thailand</p> <p>Togo</p> <p>Trinidad and Tobago</p> <p>Tunisia</p> <p>Turkey</p> <p>U</p> <p>Ukraine</p> <p>United States of America</p> <p>Uruguay</p> <p>V</p> <p>Venezuela</p> <p>Y</p> <p>Yugoslavia</p> <p>Z</p> <p>Zambia</p> <p>Zimbabwe</p>	
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