

# WORLD TRADE ORGANIZATION

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

## MINUTES OF MEETING

Held in the Centre William Rappard  
on 1-2 December 1998

*Chairperson: Ambassador István Major (Hungary)*

### Subjects discussed:

- A. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS
- B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT
- C. REVIEW OF LEGISLATION:
  - (i) Legislation of Ecuador, Mongolia and Panama
  - (ii) Follow-up to the reviews already undertaken
  - (iii) Arrangements for future reviews
- D. IMPLEMENTATION OF ARTICLE 70.8 AND 70.9
- E. IMPLEMENTATION OF ARTICLE 66.2
- F. TECHNICAL COOPERATION
- G. REVIEW OF THE APPLICATION OF THE PROVISIONS OF THE SECTION ON GEOGRAPHICAL INDICATIONS UNDER ARTICLE 24.2
- H. IMPLEMENTATION OF ARTICLE 23.4
- I. TRADE FACILITATION
- J. ELECTRONIC COMMERCE
- K. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)
- L. ARTICLE 64.3
- M. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO
- N. DRAFT ANNUAL REPORT
- O. OTHER BUSINESS.

A. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

1. The Chairperson informed the Council that new requests for observer status had been received from the Secretariat of the Convention on Biological Diversity based in Montreal and from the South Centre based in Geneva.

2. In the light of informal consultations held on the pending requests for observer status<sup>1</sup> the Chairperson suggested that further informal consultations be held on this matter and that the Council revert to it at the next meeting. While appreciating the existence of horizontal issues, he said that it would be desirable to see if any of the requests for observer status could be dealt with in a way that would not impact on these issues. It was his intention to consult Members on this point before the next meeting. The Secretariat of the Convention on Biological Diversity and the South Centre would be requested to provide information relevant to the criteria contained in paragraphs 3 and 4 of the procedures relating to the grant of observer status for international intergovernmental organizations (Annex 3 of document WT/L/161).

3. The Council so agreed.

B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

(i) Notifications under Article 63.2

4. The Chairperson informed the Council that, since the previous meeting, new notifications of legislation had been received from Denmark, France, the European Communities, Liechtenstein, Romania, Spain and Zimbabwe. The notification from Zimbabwe concerned the provisions of Articles 3, 4 and 5 of the Agreement and informed the Council that Zimbabwe was availing itself of the transitional period of Article 65.2. All these notifications would be available in the IP/N/1/-document series as soon as possible. He also informed the Council that Ecuador and Mongolia had notified their responses to the Checklist of Issues on Enforcement. These notifications had been circulated in the IP/N/6/- series of documents.

5. The representative of the European Communities informed the Council that the Directive relating to the Legal Protection of Biotechnological Inventions that his delegation had notified had been adopted by the European Communities and had entered into force on 30 July 1998; the provisions of the Directive would have to be implemented by the member States of the European Communities by 30 July 2000.

6. The Council took note of this statement.

(ii) Notifications under Article 69

7. The Chairperson informed the Council that, since the previous meeting, a new notification under Article 69 had been received from Senegal, bringing the number of Members that had notified contact points under this provision to 87. A notification had also been received from the delegations of the European Communities and Spain, containing updated information concerning their respective contact points under Article 69. Information on these contact points was available in the IP/N/3/-series of documents.

8. The representative of Brazil said that the information on his country's contact point would be updated shortly.

9. The Council took note of this statement.

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<sup>1</sup> See document IP/C/W/52/Rev.4.

C. REVIEW OF LEGISLATION

(i) Legislation of Ecuador, Mongolia and Panama<sup>2</sup>

10. The Chairperson suggested that the reviews in question be taken up on a country-by-country basis and, in accordance with the procedures for these reviews, in alphabetical order.<sup>3</sup> Prior to the meeting, questions posed to the three countries in question had been received from Japan, circulated in document IP/C/W/111, and questions posed to Ecuador and Mongolia had been received from the European Communities and their member States, circulated in document IP/C/W/112 and IP/C/W/112/Add.1. Responses to all these questions had been received and circulated prior to the meeting as well (IP/C/W/115, IP/C/W/116, IP/C/W/116/Add.1 and IP/C/W/118). In accordance with the procedures, the delegations of Ecuador, Mongolia and Panama were asked to provide a brief introductory overview of the structure of their countries' legislation in the areas covered by the Agreement and of the changes, if any, that they had had to bring about in order to make the legislation compatible with the TRIPS Agreement. Since answers to all these questions had already been circulated in WTO documents, the Chairperson suggested that there was no need for the responses to be read out. If the delegations in question so wished, they could limit themselves to introducing their responses, emphasizing any points that they felt were particularly salient. Questions posed by the European Communities and their member States addressed to Panama, as well as additional questions addressed to Mongolia, had recently been received and would shortly be circulated as document IP/C/W/112/Add.2.

11. The record of the introductory statements made by the delegations of Ecuador, Mongolia and Panama, the questions put to them and the responses given (including written responses to be given after the meeting) will be circulated in due course in the series of documents containing the records of the reviews of national TRIPS implementing legislation.

12. The representatives of the European Communities and Japan made general statements regarding the Mongolian legislation. The representative of the European Communities expressed serious concerns with regard to the legislation of Mongolia in the area of enforcement and said that, in the view of his delegation, there was a serious violation of the WTO Protocol on the Accession of Mongolia. The representative of Japan said that the answers provided by Mongolia indicated that it needed to make further amendments to its intellectual property laws in order to comply fully with the TRIPS Agreement.

13. The representative of Panama said that the answers of his delegation to the questions that it had just received from the European Communities and their member States would be provided as soon as possible.

14. The Chairperson recalled that, according to the procedures for the review, responses to questions that could not be given at the present meeting should be submitted within eight weeks after the meeting. He suggested that Mongolia and Panama make their outstanding responses available to the Secretariat accordingly, so that the records of the review could be produced without undue delay.

15. The Council took note of the statements made.

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<sup>2</sup> These reviews concerned all the areas of intellectual property covered by the TRIPS Agreement.

<sup>3</sup> The basic procedures can be found in document IP/C/M/7, paragraph 6.

(ii) Follow-up to the reviews already undertaken

- *Copyright and Related Rights*

16. The Chairperson recalled that, at the previous meeting, the European Communities and their member States had addressed a follow-up question to Hungary and informed the Council that the response from Hungary to this question had been received and circulated as part of the records of the review of the Hungarian legislation on copyright and related rights in document IP/Q/HUN/1.

- *Trademarks, Geographical Indications and Industrial Designs*

17. The Chairperson recalled that, at the previous meeting, the European Communities and their Member States had addressed a number of follow-up questions to Bulgaria and informed the Council that the responses from Bulgaria to these questions had been received and circulated as part of the records of the review of the Bulgarian legislation on trademarks, geographical indications and industrial designs in document IP/Q2/BGR/1.

- *Legislation on Enforcement*

18. The Chairperson recalled that, at the previous meeting, the Council had urged Members to provide any outstanding material concerning the review of their legislation on enforcement without delay. He informed the Council that there were still seven Members who needed to complete the records of the review of their legislation on enforcement, namely Norway, Portugal, Romania, the Slovak Republic, Slovenia, South Africa and the United States. He suggested that the Council urge those delegations to do their utmost to provide the material due soon.

19. The representative of Slovenia said that his delegation had already sent replies to the follow-up questions posed by the United States concerning statistics but needed more time to respond to the questions posed by Switzerland as they were legally complex. He assured Members that his delegation was doing its best to provide the answers in the near future.

20. The representative of the European Communities said that Portugal's responses to the questions posed by the United States had been prepared and would be provided shortly.

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

(iii) Arrangements for future reviews

22. The Chairperson recalled that, at the previous meeting, it had been agreed that the Chair would hold further consultations with those Members that had been open to early reviews of their legislation to see if they would be in a position to have their legislation reviewed in the first part of 2000, so as to initiate the post-2000 review of legislation. It had also been agreed that consultations would be held on the practical arrangements that would need to be put in place for the reviews of the national implementing legislation of developing country Members after 1 January 2000. He reported that seven Members were prepared to have their TRIPS implementing legislation reviewed in the first part of the year 2000, namely Cyprus; Hong Kong, China; Israel; Korea; Macau; Trinidad and Tobago; and Singapore. Consultations with these Members had been held on the understanding that, in order for a review in the first part of 2000 to work, the required notifications would need to be made during 1999. Some of these Members had already made advance notifications of their legislation, but the others would need to do the same so as to allow an appropriate preparation time for the review exercise, in line with the procedures developed during the reviews of legislation carried out in 1996 and 1997. Israel had indicated that, if it could not notify before 1 January 2000, because of translation difficulties, it would do so in the early days of January 2000.

23. The Council took note of this statement.

24. As regards the consultations on practical arrangements for the reviews of the national implementing legislation of other developing country Members, the Chairperson said that he had been consulting on this matter, in particular about whether the reviews should be organized on a subject-by-subject basis, or by dividing the work between groups of countries. Some delegations had indicated their particular preference and he urged as many delegations as possible to inform him or the Secretariat of their views on this matter in the weeks ahead, so that he would be in a position to put to the Council a suggestion for a schedule of reviews early in 1999.

25. The Council took note of this statement.

D. IMPLEMENTATION OF ARTICLE 70.8 AND 70.9

26. The Chairperson said that he had one new notification to report under this agenda item, namely from Zimbabwe. Zimbabwe had notified that its patent law already provided for the protection of inventions of pharmaceuticals and agricultural chemicals by product patents.

27. The Chairperson recalled that, at the previous meeting, it had been proposed that the Council consider again the possibility of a systematic review of the implementation of Article 70.8 and 70.9. It had been agreed that, in the interests of transparency, the United States would circulate to all Members the questions that it had posed to individual Members. These questions were addressed to Argentina, Egypt, Paraguay and Uruguay and were available in document IP/C/W/113. Responses to these questions which the Secretariat had received recently from Uruguay were available in photocopied form at the present meeting and would be circulated in document IP/C/W/121 in due course.

28. The representatives of Argentina and Egypt said that their delegations had only learnt about these questions through document IP/C/W/113. Since this document had been circulated only recently, the questions were still being examined in their respective capitals and answers could not yet be provided.

29. The representative of the United States thanked Uruguay for its responses and appreciated the efforts by Argentina and Egypt to provide answers to the questions. He reiterated his support for a systematic review of the implementation of Article 70.8 and 70.9.

30. The representative of the European Communities welcomed the statements made and said that his delegation was looking forward to the responses to the questions posed by the United States.

31. The representative of Venezuela said that his delegation could not, at the moment, agree to a systematic review of the implementation of Article 70.8 and 70.9. Support for his statement was expressed by the representatives of India and the Philippines.

32. The representative of Egypt said that, in the view of his delegation, agreement had been reached earlier this year that there would not be a systematic review but that any Member could ask any other Member how it was applying Article 70.8 and 70.9.

33. The Chairperson concluded that there was a difference of view among Members and suggested that the matter be dealt with in informal consultations so as to try to reach a common understanding.

34. The Council took note of the statements made and agreed to proceed as suggested by the Chair.

## E. IMPLEMENTATION OF ARTICLE 66.2

35. The Chairperson recalled that the provisions of Article 66.2 required developed country Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members in order to enable them to create a sound and viable technological base.

36. The representative of Haiti expressed the hope of his delegation that, given the provisions of Article 66.2, developed country Members, and above all Haiti's main bilateral partners, would give more incentives to enterprises and institutions in their territories so that these would indeed be encouraged to transfer technology to Haiti and help it build a sound and viable technological base. He requested information on action taken under Article 66.2, in particular access to any list of incentives which might be drawn up.

37. The representatives of Venezuela, Morocco, Pakistan and the Philippines supported the request from Haiti. The representative of Venezuela said that it was the moral responsibility of all developed and developing countries to help and assist all least developed countries. The representative of Morocco suggested that the Secretariat consider drawing up a questionnaire to obtain a fuller picture as to how developed country Members were implementing Article 66.2. He also proposed that this Article be expanded to include all developing country Members. The representative of Pakistan pointed out that the specific requirement was to have information as to how the provisions of Article 66.2 had already been implemented. Information regarding what incentives had been provided and who had provided the incentives would be useful for discussing the measures required for full implementation of the provisions.

38. The representative of the European Communities said his delegation was ready to discuss how the information in question could best be provided.

39. The representative of Switzerland underlined the importance her delegation attached to technical cooperation. While transfer of technology could not be compulsory, there was a wide range of projects in Switzerland, such as partnership funds, to encourage investments in developing countries and economies in transition. Recently, Switzerland had initiated a project to establish a financial enterprise for development, the main aim of which was to encourage joint ventures between small and medium-size enterprises in Switzerland and those in developing countries. Fifty-one per cent of the capital for the financial enterprise which was being set up would be provided by the private sector and 49 per cent by the public or state sector. This enterprise would be assisting in the transfer of technology and was an example of an incentive-type measure which Switzerland considered to fall within the terms of Article 66.2. Therefore, in the view of her delegation, Switzerland was already implementing Article 66.2.

40. The representative of the United States said that his delegation was perfectly willing to provide information as to how the United States had addressed the requirements of Article 66.2 and would respond to any question directed towards it on the implementation of Article 66.2 in the same way as it would expect other Members to respond to questions addressed to them, for example in relation to Article 70.8 and 70.9.

41. The representative of the Philippines said that, in the view of his delegation, the implementation of Article 70.8 and 70.9 should not necessarily be monitored in the same way as the implementation of Article 66.2. Obligations under Article 70.8 and 70.9 applied to a small group of Members, namely only those yet to provide for product patent protection of pharmaceutical and agricultural chemical inventions. Monitoring the implementation of these obligations, which in practice only concerned developing and least developed countries, did not require a systematic review, but could be left to interested Members posing questions to the Members concerned on the floor of the Council, as they deemed appropriate. However, Article 66.2 imposed an obligation on all

developed country Members, which made a systematic review the more appropriate way of monitoring.

42. A discussion of how information on the implementation of Article 66.2 might be provided ensued. In this discussion, some delegations made a link with the provision of information on the implementation of Article 70.8 and 70.9, while some others said that such a link was not appropriate. In the light of the discussion and some consultations, the Chairperson proposed that the question put by the delegation of Haiti be circulated in an informal document of the TRIPS Council to all Members<sup>4</sup> and that developed country Members be invited to supply information in response to this question. He appealed to Members to take the necessary action to ensure that all notifications and information provided in the Council were as complete as possible, in this case as well as in all others.

43. The Council agreed to proceed as proposed by the Chairperson.

F. TECHNICAL COOPERATION

(i) Contact points for technical cooperation

44. The Chairperson informed the Council that, since the previous meeting, France had notified its contact points for technical cooperation purposes relating to the TRIPS Agreement and updated information had been received from the European Communities concerning its contact point. These notifications had been made available in the IP/N/7/- series of documents.

(ii) Updated information on technical cooperation activities

45. The Chairperson informed the Council that notifications of updated information on technical and financial cooperation activities had been received from the United States and the World Intellectual Property Organization. These notifications could be found in documents IP/C/W/109/Add.5 and IP/C/W/108/Add.5 respectively. During the year, updated information on technical and financial cooperation activities had been received from 15 Members and, when information provided in previous years was taken into account, the Council had received information altogether from 18 different Members. There were still some developed country Members that had not provided information on their technical and financial cooperation activities. The Chairperson urged those Members that had not yet provided updated information on their activities, and in particular those Members that had not provided information during the previous years either, to do so at the earliest possible opportunity. The Secretariat would contact those Members that had not yet provided such information.

46. The representative of the European Communities informed the Council that the European Communities and their member States were assisting a number of developing and least developed Members in improving their systems for intellectual property protection. Technical assistance was also being provided to a number of acceding countries like those of the Commonwealth of Independent States, China and Vietnam for the adaptation of their legal frameworks to the TRIPS Agreement. A programme for the modernization of intellectual and industrial property was being held for the Central and Eastern European countries, known as the PHARE countries, consisting of two separate technical assistance programmes called the Regional Industrial Property Program and the Horizontal Program on Intellectual Property. A programme was conducted, for the first time, for the ASEAN countries to provide technical assistance for strengthening and developing their intellectual property right systems between October 1993 and June 1997. A second cooperation programme with the ASEAN countries was under preparation. An industrial property programme was undertaken with Macau from 1995 to 1997 and further technical assistance programmes were currently in preparation with Bangladesh, India, Pakistan and Sri Lanka. In addition to the technical assistance programmes

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<sup>4</sup> The question from Haiti has been circulated in informal document No.7093 of 23 December 1998.

run by the European Communities, member States also ran their own programmes. Information on such programmes from Austria, Finland, France, Germany, the Netherlands, Spain, Sweden and the United Kingdom had already been provided to the WTO.

47. The representative of Japan reported to the Council about the WIPO Asian Forum organized jointly by WIPO and Japan, in Tokyo from 5 to 7 October 1998. Commissioners responsible for the protection of intellectual property from 23 Asian countries had participated in and discussed Asian intellectual property perspectives. The forum had issued a joint statement at the end, highlighting the importance of the implementation of the TRIPS Agreement within the available time-limit, taking appropriate measures for the enforcement of intellectual property rights and making efforts for acceding to international treaties on the protection of intellectual property.

48. The Council took note of the statements made.

(iii) Follow-up to the Joint Initiative of the WTO and WIPO Secretariats

49. In response to a request from the representative of the European Communities, the representative of the Secretariat said that, since the Council's last meeting, about 30 Members had expressed an interest in the Joint Initiative, including two Members who were yet to finalize the details of the assistance they needed. These Members had approached WIPO or the WTO or, in many cases, both. The WTO Secretariat was working out with WIPO ways of responding to the requests for assistance received. There had also been several joint meetings of the WTO and WIPO Secretariats with delegations concerned.

50. The representative of Guatemala informed Members that her country had presented a detailed request for technical assistance in the context of the WIPO-WTO Joint Initiative on Technical Cooperation, and attached to it a work programme which contained various points ranging from the training of judges, magistrates, public prosecutors and lawyers to a request for assistance with the drafting of legislation that Guatemala had to enact to comply with its obligations under the TRIPS Agreement. Her delegation had already held a meeting with the Secretariats of WIPO and the WTO about the type of assistance that could be provided to contribute to the efforts that Guatemala was undertaking to fulfil precisely in the time permitted the obligations which derived from the TRIPS Agreement.

51. The representative of the European Communities suggested that the Secretariat report on a regular basis concerning the progress made in the implementation of the Joint Initiative.

52. The Chairperson proposed that the Council take note of the statements made and agree to proceed as suggested by the representative of the European Communities.

53. The Council so agreed.

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

54. The Chairperson recalled that, at its meeting of 12 May 1998, the Council had taken note of a Checklist of Questions and invited those Members already under an obligation to apply the provisions of the Section on Geographical Indications to provide their responses by 16 November 1998, while other Members could furnish replies on a voluntary basis. This action had been taken by the Council on the understanding that both the questionnaire itself and the responses to it would be without prejudice to the rights and obligations of Members. Responding Members would be free to group their responses to questions as they found appropriate in the context of their national systems. This Checklist was available in document IP/C/13. At its meeting of 16 July 1998, the Council had taken note of four additional questions and agreed that these questions be included in the Checklist. The



additional questions were available in document IP/C/13/Add.1. The Secretariat had received responses to the Checklist from, in chronological order, the Czech Republic, Japan, Bulgaria, the United States, Turkey, Canada, the Slovak Republic, Norway, Hungary, Ecuador, the European Communities and several of their member States, Liechtenstein and New Zealand. Advance copies of these responses were available at the present meeting and would be circulated as documents IP/C/W/117 and addenda in due course.

55. The representative of Australia said that her delegation was in the final stages of the preparation of comprehensive answers to the Checklist and would be forwarding them as soon as possible.

56. The representative of Mexico said that her delegation looked forward to receiving detailed replies from Members, which would need to be analysed in the context of Article 23.4 as well. Mexico would provide its replies soon, on a voluntary basis.

57. In response to a question from the delegation of Brazil, the Chairperson said that, since developing country Members could provide answers to the Checklist on a voluntary basis, answers to some of the questions or partial answers would be acceptable.

58. The representative of the European Communities noted that an important number of Members had responded to the Checklist and said that his delegation had started to analyse the responses. He agreed with the views of the representative of Mexico that the responses provided would also be useful for the future work to be carried out under Article 23.4. In order to enable progress to be made in the discussions on the implementation of Article 23.4, he suggested that the Secretariat draft a synopsis of the responses received.

59. The representative of Australia wondered what kind of synopsis the European Communities was envisaging. The purpose of the Checklist had been to obtain information on the range of different approaches by Members in implementing their obligations under the Section on geographical indications and she therefore found it difficult to envisage what kind of a synopsis would be possible and helpful.

60. The representative of the European Communities said that his delegation was thinking of an overview with a short summary of the responses provided by Members to the Checklist.

61. The representative of Turkey said that her delegation had already provided responses to the Checklist but would provide more comprehensive responses shortly. She said that Turkey's geographical signs protection system was fully compatible with the relevant Section of the TRIPS Agreement. The Decree Law No. 555 pertaining to the Protection of Geographical Signs had entered into force on 27 June 1995 and intended to establish a functional system which met the demands and realities of Turkey, compatible with the TRIPS Agreement and, because of the customs union it had entered into with the European Union, with European Communities Directives and Regulations. It included the following provisions: protection of designations of origin and geographical indications; publication of the applications; opposition by all interested parties; inspection (control) mechanisms for the production of the related goods; relationship with trademarks; compensation for damages; and the establishment of special courts. The protection of geographical signs under this law aimed to protect natural, agricultural, mining and industrial products and handicrafts under geographical signs, when they were in conformity with the definition of a designation of origin or a geographical indication. Protection provided by the Decree Law was effective on registration. She emphasized, as her delegation had done in its non-paper circulated to Members in informal document No. 1076/Rev.1 of 30 March 1998, the importance of the extension of the additional protection which was available for geographical indications for wines and spirits to all other goods such as natural, agricultural, mining and industrial products and handicrafts. Furthermore, she hoped that very soon an exercise could be initiated to extend the negotiating mandate on a multilateral register to include all sorts of

goods capable of being identified by their geographical origin as this was important for the development of local producers and industries.

62. The representative of Canada indicated that his delegation would need some time to analyse the answers to the Checklist that had been received before requesting the Secretariat to carry out further work. It wished to analyse itself first what the appropriate next step should be.

63. The representative of Morocco said that his delegation was not clear as to the purpose of the suggested synopsis. There was a risk that the responses received might be generalized and that such a synopsis would give a wrong picture of individual domestic systems of Members.

64. The representative of the United States said that his delegation would also prefer to have time to analyse the responses itself first. However, given the volume of information provided and the complexities involved in the various protection systems among Members, he thought that Members could benefit from some assistance from the Secretariat. He suggested that the Secretariat prepare a proposal as to how the information made available could be arranged for easier understanding by Members, and that the Council consider that proposal at its next meeting.

65. The representative of Hungary shared the views of the European Communities and the United States, in particular in relation to the work under Article 23.4, and said that a synopsis or summary would be of benefit, particularly for small delegations.

66. The representative of Morocco said that some Members might still be preparing responses. He further sought time to study the information received to see whether the questions had been comprehensively answered.

67. The Chairperson proposed that the Council take note of the statements made and revert to the matter at its next meeting.

68. The Council so agreed.

#### H. IMPLEMENTATION OF ARTICLE 23.4

69. The Chairperson recalled that the discussion on this matter, after the information-gathering exercise in 1997, had focused on the question of what the next step should be for carrying forward work concerning negotiations for the establishment of an international system for the notification and registration of geographical indications under Article 23.4. A proposal for a multilateral register of geographical indications for wines and spirits under Article 23.4 from the European Communities and their member States (circulated as document IP/C/W/107) had been commented upon by many delegations at the last meeting.

70. The representative of the European Communities, referring to the extensive comments and questions raised at the meeting of the TRIPS Council in September 1998 by Members on its proposal of the European Communities and their member States for a multilateral register of geographical indications for wines and spirits (document IP/C/W/107), wished to clarify what he believed were some important aspects of such a register. Regarding the scope of the register, he said that Article 23.4 clearly referred to wines only. However, Ministers at the Ministerial Meeting in Singapore in 1996 had taken a clear decision in favour of the inclusion of spirits. They had endorsed the TRIPS Council's report (1996) as contained in document IP/C/8 which, in paragraph 34, said "[...] in regard to geographical indications [...] the Council will initiate [...] preliminary work on issues relevant to the negotiations specified in Article 23.4 of the TRIPS Agreement [...] for wines. Issues relevant to a notification and registration system for spirits will be part of this preliminary work. All of the [...] work would be conducted without prejudice to the rights and obligations of Members under the TRIPS Agreement [...]." Ministers had not distinguished between wines and

spirits in relation to the work to be carried out, despite the fact that Ministers had the competence to take such a decision. Against this background, spirits had to be included in the Council's work. Any other course of action would be in open contradiction of the decision by the Ministerial Conference. With respect to the inclusion of "other products" in a register, the TRIPS Agreement did not provide a legal basis. However, why should Members rule out possibilities already at this stage, which they might appreciate at a later point in time? There was no need to take a decision on this issue now.

71. He reiterated that his delegation's proposal was not intended to change the level of protection under the obligations of the TRIPS Agreement. However, at the last meeting of the TRIPS Council, several Members had questioned whether the proposal correctly reflected the TRIPS Agreement – in particular, Article 23.3 (about homonymous geographical indications) and Article 24.5 (about the prior use of a trademark) – by proposing that Members should undertake negotiations with respect to these points. Both provisions related to holders of a legitimate right. His delegation believed that conducting negotiations was the only possible way to ensure equitable treatment of the different producers and to avoid consumers being misled. However, this did not mean that the geographical indications concerned should not be registered. Article 24.1 explicitly referred to the possibility of entering into negotiations and underlined that "the provisions of paragraphs 4 through 8 [...] shall not be used by a Member to refuse to conduct negotiations [...]".

72. Coming to the voluntary character of the system (IP/C/W/107, sub I.), he said that an ideal system would require that all Members participate in it. Nevertheless, it was his delegation's view that it should be a voluntary system. This position was supported by the wording of Article 23.4 of the TRIPS Agreement, which said: "[...] negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a register of geographical indications [...] eligible for protection in those Members participating in the system". Another important question was whether or not such a system, although based on voluntary participation, would be binding on all WTO Members once a geographical indication had been registered. At first sight, the logical response to this question seemed to be that a voluntary system could only be binding on those Members participating in the system. However, this was not the solution the European Communities and their member States favoured. In his delegation's view, all WTO Members should be subject to such a register, for reasons of transparency and efficiency.

73. To counterbalance this, it seemed only fair that all WTO Members might raise objections against an application for registration of a geographical indication, as described in the proposal (IP/C/W/107, sub III.). Such an approach would lead to further transparency and clarity of a registration system. In regard to the question of how the "opposition procedure" (IP/C/W/107, sub III. and V.) and its legal effects related to the voluntary character as just described, he recalled that, at the last meeting of the TRIPS Council, several references had been made to Section V.3 of the proposal, which outlined that the refusal of a registration would only benefit a Member which had opposed the registration and would not be valid *vis-à-vis* all WTO Members. On this matter, he wished to state, first, that the "opposition procedure" – and the proposed register as such – was neither designed nor meant to create conflicts. On the contrary, it should avoid potential conflicts, by providing transparency with regard to the situation of the original applicants and opponents. Secondly, his delegation expected that the number of WTO Members concerned with a specific problem in relation to a geographical indication would, most likely, be limited. Indeed, in practice only a limited number of countries generally had a real interest in a specific geographical indication. Having said this, he felt that it might be useful to make the effects of an opposition procedure dependent on the type of reasons on which the opposition was based. In this respect, he wished to develop further the intervention made at the last meeting by his delegation concerning Member-specific exceptions to the protection of a geographical indication. He pointed out that in the proposal (IP/C/W/107, sub III.), four reasons had been listed on which an opposition could be based: (1) the question of whether a geographical indication fulfilled the definition, as contained in Article 22.1 of the TRIPS Agreement; (2) the question of whether it was still protected in the country of origin (Article 24.9 of the TRIPS Agreement); (3) the decision of whether a geographical indication had become generic; and (4) in the

case of Article 22.4 of the TRIPS Agreement, i.e. protection against a geographical indication which, although literally true as to the territory, region or locality in which the goods originated, falsely represented to the public that the goods originated in another territory. The first two reasons seemed to be of a more general interest, while the last two reasons were of a more Member-specific interest. It was unlikely that many WTO Members would be concerned when it came to these latter two reasons. In this context, he added that it might be useful to discuss further reasons for objections – as had been suggested at the last meeting of the TRIPS Council. He suggested that an additional reason could be "fraud" when applying for the registration of a geographical indication.

74. Coming to the elements of proof, i.e. to the question of what kind of proof would be appropriate, he said that Members should not limit themselves as to what should be recognized as acceptable proof, in order to take into account the different legal systems in WTO Members. It could be the relevant legislation, as suggested in his delegation's proposal (IP/C/W/107, sub I.), but could also be national certificates of registration, information on the original characteristics of the product, statistics of production, national regulations on the quality applicable to the product and the existence of producers' associations. Certainly, elements of proof should fully support an application for registration and, when objections to a registration were being raised, they should fully support the objections.

75. As regards geographical indications protected under regional or multilateral agreements, he reiterated his delegation's suggestion that the WTO Secretariat should be supplied with the agreements themselves and a list of geographical indications registered under those agreements. This proposal had been made in the interest of achieving maximum transparency. It did not mean that a different group of geographical indications would be created to which different general rules (e.g. on submission of proof) would apply.

76. Regarding the relationship between the "opposition procedure" and dispute settlement, another important question was who should decide about a registration and an opposition and how this would relate to possible dispute settlement, if at all. His delegation's proposal stated that an appropriate mechanism would have to be devised to cope with "objection cases" in order to settle cases of (potential) disputes. The European Communities and their member States believed that the needs of WTO Members with respect to potential disputes and the characteristics of such a mechanism would become clearer once the discussion had advanced further on other aspects of the register. Recalling that, at the last meeting of the TRIPS Council, several delegations had raised the question of possible costs of a register, he said that one could only have a clear idea of the costs involved once one knew how the register would operate. However, he did not believe that the costs would go beyond the "normal"; Members should avoid setting up an expensive system, be it money-wise or in terms of manpower.

77. Finally, on the relationship between the register and national competences (e.g. the role of domestic authorities), he underlined that it was not his delegation's intention that national systems be replaced. His delegation understood Article 23.4 as a transparency exercise with the important objective of creating more clarity and legal certainty in the area of geographical indications for wines and spirits. This also meant that national authorities would continue to decide on the acceptance, maintenance and protection of a geographical indication in accordance with the national rules and in compliance with the TRIPS Agreement and that a geographical indication, once registered on the multilateral register, should be enforced pursuant to the domestic rules.

78. The representative of the Czech Republic said that the European Communities proposal offered an opportunity to move forward to a stage for more concrete preparatory work for the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system, as stated in Article 23.4 of the TRIPS Agreement. Questions regarding the proposal at this stage were understandable and many of these could, perhaps, be satisfactorily answered only when a conclusion had been reached on the

systemic or basic point as to what kind of a multilateral system of notification or registration was to be developed. Recognizing the built-in flexibilities in the proposal which left options open as to how to progress on the work, he thanked the representative of the European Communities for the clarifications provided in his statement. Regarding the level of protection, he expressed the opinion that higher levels of protection or additional protection as well as a requirement for notification as envisaged under the provisions of Article 23 called for a fully fledged system and as such he supported a more complex and legally ambitious multilateral system as set out in the European Communities proposal. His delegation was pleased that the proposal took into account the legitimate interests expressed by some Members and referred to the possibility of launching complementary discussions with the objective of extending the multilateral register's coverage to other goods, in stages, once the multilateral system for wines was in place. In this context, he wished to remind Members that inputs from delegations on the issue of scope had been invited in paragraph 34 of the Report (1996) of the Council for TRIPS, which formed part of the section dealing with issues, problems and recommendations to be brought to the attention of Ministers in Singapore. His delegation had reacted positively to this invitation and presented a detailed written submission on the issue of the narrow scope of Article 23 and the need to expand its scope to cover goods other than wines and spirits. Since certain delegations had questioned, at the last meeting, the existing legal basis for negotiations concerning geographical indications for other goods, he reiterated that, in his delegation's opinion, Articles 22, 23 and 24 of the TRIPS Agreement provided an integrated framework for further negotiations aimed at increasing the protection of geographical indications. The first sentence of Article 24.1 provided the method for increasing the protection of individual geographical indications, while the method of providing such additional protection was specified in Article 23.4 by mandating negotiations in the Council. Further, under the provisions of Article 24.1, the holding of such negotiations could not be refused and the provisions of Article 24 were of general application to all goods and not only to wines and spirits. Therefore, he agreed with the opinion expressed that inclusion, in the future, of the legitimate interests of other Members to enlarge the product coverage should not be ruled out.

79. The representative of Iceland expressed support for the European Communities proposal. However, the concepts involved needed more examination and study, such as the proposals regarding dispute settlement and arbitration. While Iceland had no problems with wines and spirits, the fish producers in Iceland had faced a number of problems where their competitors were selling products in certain markets as Icelandic products which affected the competitiveness and reputation of Icelandic products as high-quality goods. If an exercise of the kind proposed by the European Communities for wines and spirits proved to be successful in better identifying and protecting the origin of the goods in question, Iceland was interested in seeing that this kind of protection was also made available to other kinds of goods, including fish.

80. The representative of the United States said that, in the perspective of his delegation, the purpose of the exercise regarding the multilateral system for notification and registration under Article 23.4 was to facilitate protection. Any system that might be developed should meet several criteria: it should not establish any new obligations or diminish the rights and obligations contained in Section 3 of Part II of the TRIPS Agreement; any system for notification and registration should accommodate the various systems for protection of geographical indications existing in all WTO Members' legal regimes; and such a system should not impose burdens on the WTO Secretariat. Likewise, participation in the system by Members should be voluntary and not be burdensome. His delegation believed that any system of notification or registration should involve the voluntary submission of information to the Secretariat and that such information should be made available for Members' use. The information contained in the responses to the Article 24.2 Checklist would of course help Members to ensure that any system that might be established would not require Members to alter their current legislation and practice. In order to participate in the system or use the information, it was his delegation's intention to review the responses to the Article 24.2 Checklist, and the information contained in those responses, to develop its own proposal, which it hoped to introduce

at the Council's meeting in February 1999. The proposal would be consistent with the criteria mentioned and in keeping with the purpose stated in Article 23.4.

81. The representative of Argentina said that, firstly, the Report (1996) of the TRIPS Council approved by the Ministerial Conference in Singapore indicated that a system of notification and registration of spirits would form part of the preliminary work of the Council for the establishment of a multilateral system of notification and registration under Article 23.4. Her delegation therefore considered that spirits should be included in the "preliminary work" of the Council, but they did not seem to fall within the scope of "negotiations" which under Article 23.4 were envisaged only for wines. As a result, her delegation believed that all references to spirits should be understood as relating to work with a preliminary character without the inference that they related to the negotiations as such. Secondly, her delegation believed that it was clear from an analysis of the last part of Article 23.4, where it referred to "those Members participating in the system", that registration should be of a voluntary nature. Registration was only to be an instrument for transparency and to facilitate compliance with obligations already in force under the Agreement. If new obligations and burdens were introduced, there was a risk that many Members would refuse to participate in the system, thereby removing its usefulness. As regards the European Communities proposal, she said that, despite the fact that the European Communities had said it would not impose on Members any new obligations, the second point of the first paragraph of section I entailed the creation of a new obligation in its reference to elements of proof and appeared to aim at creating a special dispute settlement mechanism for Members participating in the register. Section IV exceeded what was provided for in Article 23.3 in terms of introducing negotiations on aspects not envisaged in these provisions. The first paragraph of section V, which stated that the geographical indications would be protected for "an indefinite period", was in contradiction to Article 24.9 and the last sentence of this paragraph seemed redundant when compared to the text of the TRIPS Agreement. Her delegation had no problem with the third paragraph of section V, in light of the principles expressed at the last meeting by the representative of the European Communities, in which context he had referred to "exceptions in the Agreement which were Member-specific". Nonetheless, in order to ensure equitable treatment, the possibility should be considered that those Members who had not opposed a registration could revise this in the light of new factors which emerged subsequently. There should also be a possibility for the register to remain open to the inclusion of new geographical indications as provided in Part VII. If not, the register would "freeze" the current situation, making difficult the use of geographical indications in those Members in which use was still incipient.

82. The representative of Australia said that her delegation was in favour of the transparency and efficiency a register would bring and was happy to look at constructive ways to meet the obligations under Article 23.4. She wished to follow up on some of the comments made at the present meeting. On the issue of scope, while noting the point made by the representative of the Czech Republic regarding the provisions of Articles 22, 23 and 24, she stressed that these provisions also contained a number of caveats and standards which also needed to be taken into account. Members should not be misled that TRIPS obligations were about to change and engage in too much speculation about anything that was not in the TRIPS Agreement. In discussing how to meet the obligations, the Council should not address matters that were not obligations. A related question was whether the negotiations under Article 23.4 envisaged the renegotiation of other existing rights that were provided for in Article 24. In her delegation's view, this would go beyond the normal understanding of Section 3. A similar point could also be made about the voluntary nature. Her delegation was not convinced that the opportunity to object to specific geographical indications was really a substitute for a truly voluntary system. She reiterated her delegation's comments at the previous meeting concerning oppositions, in particular those concerning whether an opponent had to establish a *prima facie* case or not, and what would happen in the interim. Her delegation was also concerned about the labour-intensive nature of the system as any register would have to be enforced through domestic procedures. Every Member would have an interest in watching which terms were registered and she was not persuaded that the fact that the register would only apply to certain Members would diminish the need for all to regularly check its contents. Her delegation would wish to ensure that any system of proof

set up for the register would not favour one particular model, system or approach, given that Members took a range of approaches to the protection of geographical indications. As regards the issues of disputes and costs, the system would not be cheap if this would only transfer all the costs to national authorities. The question of how any disputes arising from oppositions would be resolved was a fundamental issue and she looked forward to further discussions on this matter, which had been left open in the proposal of the European Communities.

83. The representative of Morocco said that the European Communities proposal could be the basis for future work and indicated that his delegation would wish the coverage of the register to be extended to other items, especially foodstuffs and artisan ware.

84. The representative of Mexico considered that the proposal was a useful basis for setting up a multilateral register for wines and spirits as required under Article 23.4 and in accordance with the mandate provided in the work programme for the Council endorsed by Ministers in Singapore in 1996. She said that the system to be set up should be designed so as to take into account the different types of protection now provided by Members. Her delegation was considering the submission of some ideas to the Council concerning a notification and registration system, drawing on the experience of Mexico.

85. The representative of Japan expressed support for the views of the United States and Australia. In the view of his delegation, renegotiation issues and the characteristics of the system for the protection of geographical indications in the European Communities proposal should not result in too much burden either on the WTO Secretariat or Members.

86. The representative of Chile reiterated his delegation's view that, since Article 23.4 referred exclusively to wines, the Council had, in its Report (1996), which had been sent to the Ministerial Conference in Singapore, made a clear distinction with regard to the work required under Article 23.4 in relation to wines and that to be initiated in relation to spirits, which would be only preliminary. The negotiations to be undertaken under Article 23.4 should not include spirits. This should not be taken to mean that Chile was opposed to the inclusion of other products in a registration system to be set up under Article 23.4, only that such inclusion should be the result of the same negotiating route as had led to the inclusion of a provision in the TRIPS Agreement requiring negotiations for a registration system for geographical indications for wines.

87. The representative of India said that his delegation was still scrutinizing the European Communities proposal. A number of ideas that had emerged in the discussion, such as transparency, voluntary participation, no new obligations and no extra burden on domestic systems, were attractive and should govern any new system. As regards the issue of scope, divergent views expressed by Members necessitated a closer look at the Singapore Ministerial Declaration before coming to a conclusion as to the coverage of the work in this area. India had a strong interest in extending the additional protection to other products than wines and spirits.

88. The representative of Canada expressed support for the points raised by the United States, Australia and Japan. His delegation was still scrutinizing the replies to the Article 24.2 Checklist, which were also important for deciding on the appropriate next step in the context of Article 23.4.

89. The representative of Venezuela said that the preliminary work in relation to spirits could very well be carried out in parallel with the negotiations in relation to wines. In future, inclusion of additional products, such as crafts and industrial products, would be acceptable to his delegation. Regarding the characteristics of the register, he underlined the importance of determining the effect of registration or opposition *vis-à-vis* third parties and any retroactive application thereof. In regard to existing or regional agreements, he mentioned that further examination was needed as well.

90. The representative of Cuba expressed the hope that the product coverage of the notification register would be extended to, in particular, agricultural products.

91. The representative of Hong Kong, China agreed with the observation made by the representative of Chile on the issue of scope. Article 23.4 of the TRIPS Agreement referred only to wines, which meant that wines and spirits should be dealt with on two separate tracks and not necessarily in parallel. Guidelines or directives agreed by the Ministerial Conference could not change that. In respect of wine, there was a legal obligation under Article 23.4 to create a rule-based system with rights and obligations, whereas any further work on spirits must proceed on a slower track. Proposals made by some Members to include other products, like fisheries, agricultural products, artisan ware, industrial products and so on, were not consistent with the suggested criteria that the system should not be burdensome and not be in conflict with existing national systems. He said that there was no legal basis whatsoever under the TRIPS Agreement for any further work on products other than wine, and that even work on spirits had no legal basis, either in Article 23.4, which only referred to wine, or in Article 24.1, which referred back to Article 23. Nowhere in Section 3 of the TRIPS Agreement did any requirement exist for any work on any product other than wine. Hong Kong, China, like other developing Members, was preparing implementation of the TRIPS Agreement in the year 2000 and was anxious about engaging in additional negotiations and additional obligations beyond the requirements of the Agreement. Due care should be taken that the level of protection would not be changed and that there would be no change in obligations under the Agreement. He drew attention to the possible implications for dispute settlement. The European Communities had emphasized the voluntary nature of the system, but this was already stipulated in Article 23.4 itself. However, it left open the question of how any system that would be set up would apply to Members not participating in the system. He believed that the wording in paragraph V.1 of the European Communities proposal in this regard was not clear.

92. The representative of New Zealand said that his delegation had taken full note of the issues raised and suggestions made and would be looking forward to additional papers and further discussions.

93. The representative of Turkey said that the European Communities proposal was a good basis for establishing the multilateral register system and reiterated his delegation's interest in extending the scope of the register to products other than wines and spirits.

94. The representative of Korea agreed with the views expressed by the United States; Hong Kong, China; and Japan. Article 23.4 was limited to wines only. Furthermore, a basic question in relation to the area of geographical indications concerned the nature of the protection, in particular what was the essential element to be protected. His delegation would study the European Communities proposal and any others which might be submitted.

95. The representative of Nigeria considered the approach taken by Hong Kong, China rather legalistic. His delegation saw the European Communities proposal also as a political paper and took the view that, in case the work under Article 23.4 was being expanded to include spirits, other products, such as agricultural products and fisheries, could not be kept out for the reason that Article 23.4 did not provide a legal basis for them to be included in the work either.

96. The representative of India, also commenting on the remarks made by the representative of Hong Kong, China, said that there would seem to be a need to examine the legal value of the Singapore Ministerial Declaration *vis-à-vis* the text of the TRIPS Agreement itself. Regarding the point made by Hong Kong, China that there was no legal basis in the TRIPS Agreement for considering the extension of additional protection for geographical indications to other products, he quoted from Article 24.2, which said that "The Council for TRIPS shall keep under review the application of the provisions of this Section ...". As part of the review, it was not conceivable that the Council could come to a conclusion on the basis of consensus.



97. The representative of Mexico, referring specifically to the view expressed by Hong Kong, China that there was only a legal basis in the Agreement for work in relation to geographical indications for wines, said that Article 24.1 referred to Article 23 and the subheading for Article 23 was "Additional Protection for Geographical Indications for Wines and Spirits". Consequently, the provisions of Article 24.1 clearly applied also to spirits.

98. The representative of the Philippines said that Members had the right to propose the inclusion of other products in the registration system to be negotiated under Article 23.4. However, such proposals should not prevent progress in the negotiations that were required to be held, in good faith, under that provision in relation to geographical indications for wines and possibly spirits.

99. The representative of Brazil said that his delegation was still scrutinizing the matter. The questions raised by the representative of Venezuela regarding the definition of protection whether protection worked *erga omnes* and concerning any retroactive application of protection were very important and needed to be examined carefully.

100. The representative of Sri Lanka said that Section 3 of the TRIPS Agreement started with Article 22 and this Article referred to "goods" and not just wines and spirits. As such, the product coverage of the Section could not be restricted only to wines and spirits.

101. The Chairperson proposed that the Council take note of the statements made and revert to the matter in its next meeting. With a view to organizing its discussion at its next meeting, he proposed that the Chair might come forward with suggestions for a more structured approach to the issues under debate. In this context, the responses to the Checklist on Article 24.2 which had been received from more than 20 Members, and other proposals made, could also be taken into account.

102. The Council so agreed.

- *Question from Brazil to the European Communities*

103. The Chairperson recalled that, at the meeting in May, the delegation of Brazil had addressed a question to the European Communities relating to the protection of geographical indications. He informed the Council that the answer from the European Communities to this question had been circulated in document IP/C/W/114.

#### I. TRADE FACILITATION

104. The Chairperson recalled that this matter was on the agenda of the Council for Trade in Goods as a result of a decision at the Singapore Ministerial Conference and that the Council for TRIPS had agreed to consider this issue following a letter, dated 1 September 1998, received from the Chairman of the Council for Trade in Goods. The letter requested the Council for TRIPS to address those aspects of trade facilitation which the Council for TRIPS regarded as being related to the TRIPS Agreement and to convey the results of its discussions on the issue by March 1999. In the consideration of trade facilitation in the Council for Trade in Goods context, reference had been made to the provisions on border enforcement in the TRIPS Agreement. In the light of the informal consultations he had held on this matter, the Chairperson proposed that the Council request the Secretariat to prepare a short background note on the relationship between the TRIPS Agreement and trade facilitation. The Council would revert to this matter at its next meeting, with a view to concluding its discussions at that meeting, so as to be able to report to the Council for Trade in Goods in March 1999.

105. The Council so agreed.

J. ELECTRONIC COMMERCE

106. The Chairperson recalled that the General Council, at its meeting on 25 September 1998, had established a Work Programme on Electronic Commerce for the relevant WTO bodies, namely the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS and the Committee for Trade and Development. In addition, the Work Programme provided that further issues could be taken up at the request of Members by any of these bodies. The General Council would conduct an interim review of progress in the implementation of the work programme by 31 March 1999. The four WTO bodies in question should report or provide information to the General Council by 30 July 1999. The Work Programme provided that, in undertaking their work, the bodies concerned should take into account the work of other intergovernmental organizations. Consideration should also be given to possible ways of obtaining information from relevant non-governmental organizations. Paragraph 4.1 of the Work Programme on Electronic Commerce provided that the Council for TRIPS shall examine and report on the intellectual property issues arising in connection with electronic commerce, including issues concerning the protection and enforcement of copyright and related rights; the protection and enforcement of trademarks; and new technologies and access to technology. He had held informal consultations on how the TRIPS Council should approach the issues referred to in this paragraph of the Work Programme. However, before reporting on these consultations, he invited the representative of WIPO to provide information regarding WIPO's programme of work in relation to electronic commerce.

107. The representative of WIPO thanked the WTO, on behalf of the Director General of WIPO, for the opportunity given to explain what WIPO's work programme was in the area of electronic commerce and intellectual property. He said that this work programme was very much in evolution, since the underlying developments concerning electronic commerce were both rapid and radical. WIPO considered, at this stage, however, that electronic commerce was something that was affecting, or would affect, every aspect of the protection and exploitation of intellectual property. In assessing the effects of electronic commerce, there were two broad developments which WIPO considered needed to be taken into account. These were very much connected, but were nevertheless separate. The first was the advent of digital technology and the second was global digital networks. Certain issues arising from the advent of digital technology raised discrete problems from those that arose out of the use and exploitation of intellectual property on global digital networks. For example, the issue of reproduction of copyrighted works might require attention in the context of CD-ROM products or multimedia works without necessarily involving the additional complication of use or exploitation of the works on the Internet. Such problems as might exist as a result of digital technology were, of course, compounded in the context of works exploited also on the Internet. In general, there were two main challenges for intellectual property that arose as a consequence of global electronic commerce. They were the questions of *enforcement* of intellectual property rights and *jurisdiction*. Both challenges resulted from the ease with which intellectual property might be copied and might circulate on a global digital network. They were also both challenges that arose from the impact of a global medium without borders on a territorially based intellectual property system. The approach that had been established by the Director General of WIPO in order to deal with these two challenges envisaged that there was no one easy and comprehensive solution to them. Rather, the two challenges of enforcement and jurisdiction would need to be tackled by a multiplicity of projects. There were a number of such projects under way at present within WIPO. The first project concerned Internet domain names, where WIPO was, with the approval of its members states, undertaking an international process to develop recommendations on certain questions relating to the protection of intellectual property within the domain name system. Those questions were: (i) best practices for domain name registrations, designed to reduce conflicts between trademarks and domain names; (ii) uniform dispute resolution procedures; (iii) a mechanism for the protection of famous and well-known marks; and (iv) an evaluation of the impact on intellectual property rights of adding new generic top-level domains. The interim report of the WIPO process would be published by the end of 1998 and the final report at the end of March 1999. The recommendations of the final report would be submitted to the new corporation that had been established to manage the domain name system and

would be reported to the member states of WIPO. A second area of projects concerned copyright. Here, the emphasis had been on the implementation of the two new treaties concluded in December 1996, i.e. the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. There were also two parallel efforts to extend the principles established by those two treaties to other categories, namely audiovisual works, where the discussions were well advanced, and the rights of broadcasters, where the discussions were only just getting under way. In the same general area, work was also proceeding on examining the feasibility of a treaty for the protection of non-copyrighable databases. This project had been under discussion for some years, but progress on the multilateral level was slow pending the resolution of some of the issues involved on the national level in various countries. In the area of trademarks, the use of trademarks on the Internet was under consideration in the WIPO Standing Committee on Trademarks, Industrial Designs and Geographical Indications. As far as patents were concerned, a very specific question was under study, namely the effect that publication on the Internet might have on the patentability criterion of novelty. Finally, there was a series of projects which were directed at exploiting the tools developed for electronic commerce in the delivery of intellectual property services. WIPO felt that it was more accurate to characterize these projects as *electronic administration*, rather than *electronic commerce*, i.e. WIPO considered that, while the on-line filing of patent or trademark applications or the on-line availability of patent databases were electronic activities, they were more properly questions of the administration of intellectual property services than of commerce. Nevertheless, it was the case that a number of issues and tools arising in the context of electronic commerce, such as encryption and digital signatures, did have an immediate application in the area of the electronic delivery of intellectual property services. WIPO was studying these issues and tools within the context of the services that the Organization rendered under the global protection systems that it administered (the Patent Cooperation Treaty (PCT) and the Madrid System for the international registration of marks), as well as in the context of the equivalent services that were delivered by national industrial property offices.

108. The Chairperson thanked the representative of WIPO for this useful information. As regards the informal consultations that he had held, he said that the discussions had focused on three main questions: first, what type of information the Council might wish to obtain as a basis for its work; second, what should be the particular focus of work in the Council, taking into account the issues that were already being addressed in other fora; and third, procedurally, how the Council should carry forward the work on this matter. In the light of the consultations held, he proposed that the Council proceed as follows:

The Secretariat would be requested to prepare a factual background note examining the provisions of the TRIPS Agreement relevant to paragraph 4.1 of the Work Programme on Electronic Commerce. The note should also provide information on the relevant activities of WIPO and other intergovernmental organizations.

The Council would revert to the matter at its next meeting, at which it should prepare a progress report for the General Council. The Chairperson would hold, before that time, further informal consultations. It would be open to Members to make contributions at any time, and Members were urged to do so.

109. The Council took note of the statement made and agreed to proceed as proposed by the Chairperson.

#### K. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)

110. The Chairperson recalled that the Council had agreed, at its previous meeting, to consider at the present meeting how to take up the review of Article 27.3(b) that it was required to undertake in 1999, and that informal consultations would be held in advance in this regard. Reporting on these informal consultations, he said that they had focused on two main issues, namely whether this review process should be initiated in the same way as the Council had done in respect of other elements of

the built-in agenda, i.e. through an information-gathering exercise, and if this were to be an acceptable way of proceeding, whether the Council would need to draft some type of questionnaire or whether Article 27.3(b) itself was already sufficiently clear on the sorts of information that would be relevant.

111. In the light of the informal consultations held, the Chairperson proposed that the Council initiate this review process in the following way:

First, those Members that were already under an obligation to apply Article 27.3(b) would be invited to provide information on how the matters addressed in this provision were presently treated in their national law. Other Members would be invited to provide such information on a best endeavours basis. The target date for the provision of this information would be 1 February 1999.

Second, while it would be left to each Member to provide information as it would see fit, having regard to the specific provisions of Article 27.3(b), the Secretariat would be requested to provide an illustrative list of questions relevant in this regard in order to assist Members to prepare their contributions.

Third, the Secretariat would be requested to contact the FAO, the Secretariat for the Convention on Biological Diversity and UPOV, to request factual information on their activities of relevance.

It would be understood that this information-gathering would be a first step in the review process and without prejudice to the review process to be carried out. Once this information had been received, the Council might revert to the question of whether any further information might be requested from the Secretariat.

112. The representative of India regretted that he did not have instructions to agree to the Chairperson's proposal at the present meeting. Normally, he would have requested the Chairperson to conduct further informal consultations and to revert to the matter at a later stage but he realized that this would unduly complicate matters. He therefore requested more time for his delegation to consider the Chairperson's proposal.

113. The representative of Mexico said that her delegation had a few suggestions for the illustrative list concerning the review of Article 27.3(b) to be provided by the Secretariat. Her delegation would submit a non-paper on certain items that it would like to see included in the illustrative list.<sup>5</sup>

114. The representative of Malaysia, speaking on behalf of the ASEAN group of countries, asked the Chairperson to amend the third point of his proposal by replacing references to "information" with "inputs" to clarify that the Secretariat might obtain information on the implications of Article 27.3(b) from the other intergovernmental organizations mentioned. The ASEAN countries could go along with the proposed information-gathering exercise, which could initially be limited to an exchange of information about how Members were applying the provisions in question, but should be followed by a review of the provisions of Article 27.3(b) themselves. The purpose of the review was to see whether the provisions could be kept as they currently read or needed to be amended, be it by expanding the exceptions or by eliminating exceptions. Therefore, it was important to have information about the implications of the provisions of Article 27.3(b) in relation to, for example, biological diversity, such as from the FAO, the Secretariat of the Convention on Biological Diversity and UPOV.

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<sup>5</sup> Circulated as informal document No. 6954 of 8 December 1998.

115. The representative of Morocco saw no problem with the proposed working procedure, but he believed that the text should reflect that a number of delegations had underscored that the review was not a review of the implementation of Article 27.3(b) but was a review of the provision itself. He did not wish to prejudge the outcome of the review but he did wonder what would be the legal status of Article 27.3(b) if there were no consensus during the review.

116. The representative of India suggested that the last paragraph of the proposed text refer specifically to the nature of the review provided for in Article 27.3(b).

117. The Chairperson suggested that the last paragraph of the proposed text be replaced by the following text:

It would be understood that this information-gathering would be without prejudice to the nature of the review provided for in Article 27.3(b). Once this information had been received, the Council would revert to the question of whether any further information might be requested from the Secretariat.

118. The Council took note of the statements made and agreed to proceed as proposed by the Chairperson, subject to a waiting reserve on the part of India that was lifted on 11 December 1998.

L. ARTICLE 64.3

119. The Chairperson recalled that, under this provision, the Council was required to examine the scope and modalities for complaints of the type provided for under Article XXIII:1(b) and (c) of GATT 1994 (so-called "non-violation" disputes) made pursuant to the TRIPS Agreement. At the previous meeting, the Council had requested the Secretariat to prepare a factual background note on the experience with disputes so far under the TRIPS Agreement, including any references made to non-violation issues, the negotiating history of paragraphs 2 and 3 of Article 64, the experience with non-violation complaints under the GATT/WTO, and any information available on the use of the non-violation concept in disputes on intellectual property matters elsewhere. Unfortunately, the Secretariat had not been able to complete this work in time for this meeting of the Council, but would have the paper available in time for the Council's next meeting.

120. The representative of Korea said that, while awaiting the Secretariat's factual background note, her delegation wished to express its initial views on the matter. The TRIPS Agreement provided for minimum standards of protection of intellectual property rights which were of a prohibitive, private and contractual nature and Members were free to determine appropriate methods for implementing the TRIPS Agreement's provisions within their respective legal system and practice. Given this, it might be difficult to determine whether such rights were being nullified or impaired by a government measure. As these rights were to be enforced under domestic legislation after incorporation of the enforcement provisions of the Agreement, the right holder could have recourse to domestic courts in respect of benefits derived from protection to be provided under the Agreement, if these were believed to be nullified or impaired by any government measure or if such measures were not consistent with the related domestic laws and regulations implementing the TRIPS Agreement. In addition, the Member government of which the right holder was a national could have recourse to the DSU for any lack of proper protection under domestic legislation in a violation case. In the view of her delegation, opening the window to non-violation complaints under the TRIPS Agreement might contradict or undermine the spirit of the TRIPS Agreement as a minimum standard Agreement, as stipulated in Article 1 of the Agreement. Therefore, it was the preliminary view of her delegation that it would not be necessary to provide for the non-violation route in the TRIPS area. Moreover, she recalled the view expressed at the informal meeting of the General Council the previous week that, during the moratorium period of Article 64.2, developing countries were still benefiting from a transitional period and that it was difficult for them to assess the possible advantages or disadvantages of the application of non-violation complaints by the end of the transitional period. As Members had

only limited experience with regard to non-violation complaints with regard to intellectual property protection, it was unreasonable to simply let the moratorium expire at the end of the transitional period. Members should be extremely careful when committing themselves to a binding rule when they did not have a clear picture as to how such a rule would work.

121. The representative of Canada said that his delegation had long had concerns about the use of the non-violation remedy in the context of the TRIPS Agreement. Those concerns had not been alleviated since the Agreement had entered into force. His delegation believed that many others would share those concerns and that there were a number of issues that needed to be identified and examined carefully as Members looked at the potential application of this remedy in the area of TRIPS. For that purpose, his delegation intended to circulate a paper in advance of the next meeting on this matter.

122. The representative of India associated himself with the statements of Canada and Korea.

123. The representative of Japan stressed the importance his delegation attached to examination of the scope and modalities of the application of the non-violation remedy in the TRIPS area.

124. The representative of the United States wished to make it clear that his delegation firmly believed that the concept of non-violation nullification or impairment was an important element of the WTO dispute settlement system and should apply to the TRIPS area as it did to other areas of the WTO. His delegation looked forward to discussing the scope and modalities of such disputes although it believed that Article 26 of the DSU was sufficiently clear to provide direction in any such dispute. Nevertheless, his delegation believed that the moratorium provided by Article 64.2 of the TRIPS Agreement should be allowed to expire on 1 January 2000. The United States could not agree to any weakening of the rights of Members in connection with the DSU.

125. The representative of the Philippines, speaking on behalf of the ASEAN group of countries, said that, pending the receipt of the input from the Secretariat, his delegation was not in a position to state the view of ASEAN on the matter but looked forward to the debate on specific viewpoints.

126. The Chairperson proposed that the Council take note of the statements made and revert to the matter at its next meeting.

127. The Council so agreed.

M. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

(i) Dispute settlement

128. The Chairperson informed the Council that the Report of the Panel established to investigate the complaint of the European Communities and their member States regarding patent protection for pharmaceutical and agricultural chemical products in India had been circulated to WTO Members on 24 August 1998 (document WT/DS79/R) and adopted by the DSB at its meeting of 22 September 1998.

129. Referring to dispute IP/D/11 (WT/DS114), the Chairperson informed the Council that, on 11 November 1998, the European Communities and their member States had requested the establishment of a panel in their dispute with Canada on patent protection for pharmaceutical products in Canada (document WT/DS114/5).

130. The representative of Canada said that his delegation was disappointed that the European Communities had chosen to request the establishment of a panel to challenge certain aspects of Canada's patent laws and regulations. His delegation believed that this challenge was intended to

strike not just the Canadian model for patent protection, but also the model used by many other Members. This was a vital issue for Canada with implications for many other Members. This panel request challenged the stated objectives of the TRIPS Agreement which were to balance a competitive investment, research and development climate with social welfare. In focusing on the pharmaceutical sector, the European Communities were challenging essential measures that many governments had in place to balance interests of innovators with interests of governments to ensure affordable access to medicines. He emphasized that Canada supported the effective protection of intellectual property rights: it had been instrumental with the European Communities and others in negotiating the TRIPS Agreement which contained both minimum substantive standards and effective enforcement procedures for the protection of intellectual property rights. However, at the same time, the Agreement provided that the application of those rights needed to be balanced against other important societal interests. The European Communities position, in challenging Canada's legislation, seemed not to reflect that balance, but instead a more absolutist form of protection. The TRIPS Agreement did not support such a position. Various provisions of the TRIPS Agreement expressly contemplated a balance between the rights of producers and users of technology. It recognized the fact that Members would take measures that were necessary for the protection of public health and promotion of other public interests. One of the ways to do so was through the use of limited exceptions. The TRIPS Agreement allowed limited exceptions to be made to patent rights, not in the narrow traditional sense of exceptions to other intellectual property rights but in the general sense of safeguards against overprotection in order to protect public policy objectives. The European Communities seemed to be forgetting that these provisions also formed a part of, and animated, the TRIPS Agreement. For these reasons, Canada could not agree to the establishment of a panel and hoped that the European Communities would reconsider their request in the light of the effect that it would have on national patent laws and the international trading system. This was not the type of issue that should be litigated but, if it were, it would be important for all Members to be involved as it would have a significant impact on all Members. Canada would certainly vigorously defend its patent law as it was fully consistent with what all Members had negotiated in the TRIPS Agreement.

131. The representative of the European Communities said that his delegation's request for the establishment of a panel in dispute IP/D/11 (WT/DS114) concerned Canada's implementation of Articles 27, 28 and 33 of the TRIPS Agreement in relation to pharmaceutical inventions. Under Canadian patent legislation, a person who was not the patent holder was permitted, without the consent of the patent holder, to use a patented invention to (i) carry out experiments and tests required for obtaining marketing approval of a copy of the patented medicine before the expiration of the relevant patent; and (ii) manufacture and stockpile patented medicines for a period of up to six months before patent expiry for sale after expiry. The TRIPS Agreement obliged Members to provide that the holder of a patent had exclusive rights, for a period that would end 20 years from the filing date of the application on which the patent had been granted, to prevent others from making and using his or her patented invention during that period. His delegation had made the request for consultations after it had carefully examined the legislation of Canada, which it had begun to do so soon after Canada was required to implement the corresponding provisions of the TRIPS Agreement. The review exercise had been extremely helpful in this regard and, indeed, through the discussions in the Council his delegation had become convinced that the legislation of Canada violated the TRIPS Agreement. His delegation considered this to be an important matter and the European Communities and their member States were certainly not challenging the balanced outcome of the Uruguay Round negotiations. It was a question of making sure that, in this particular area, Canada, like others, complied with its obligations.

132. The representative of Pakistan expressed his delegation's interest in this issue, which it believed had widespread implications. It would watch closely the evolution of the matter and, at this stage, wished to state only that it would consider it unfortunate if the balance of interests between right holders and consumers were in any way upset in an undesired direction.

133. The representative of Venezuela recited an African proverb, that "When there is a fight among elephants, the grass does not grow". His delegation viewed with sympathy the exception established by Canada. It was his delegation's understanding that the stockpiled products covered by a patent in Canada were not commercialized until after patent expiry.

134. The representative of the European Communities referred to dispute IP/D/10 (WT/DS86) and said that his delegation had nearly reached an agreement with the United States in the context of the request of the United States for consultations concerning measures affecting the enforcement of intellectual property rights in Sweden. The parties were very close to reaching a mutually agreed solution because recently Sweden had adopted new legislation which provided judicial authorities the authority to grant provisional measures in civil proceedings involving intellectual property rights. He hoped that the parties could soon end the consultation procedure.

135. The representative of the United States thanked the Government of Sweden for its work to resolve this dispute. In addition to the comments made by the representative of the European Communities, it was his delegation's understanding that the new Swedish legislation provided that, if there were reasons to believe that a person had taken, or was about to take, action to infringe intellectual property rights, the courts could order a search for infringing materials, documents or other relevant evidence and that this search could be ordered without prior notice to the other party if there was a risk that materials or documents could be removed, destroyed or altered, and that this legislation would come into effect on 1 January 1999. He stressed the importance of this development for all Members.

136. The representative of Canada informed the Council that his delegation had recently made a request for consultations with the European Communities pursuant to Article 4 of the DSU, Article 64 of the TRIPS Agreement and in conjunction with Article XXII of GATT 1994. It was requesting consultations regarding the protection of inventions in the area of pharmaceutical and agricultural chemical products that the European Communities afforded in relation to their obligations under the TRIPS Agreement. The patent term extension scheme of the European Communities, in Canada's view, was incompatible with the obligation of the European Communities not to discriminate with respect to the field of technology as stipulated in Article 27.1 of the TRIPS Agreement, since the patent term extension scheme only applied to pharmaceutical and agricultural chemical inventions.

137. The Council took note of the statements made.

(ii) Accession

138. The Chairperson informed the Council that, since the previous meeting, the accession negotiations with two governments had been concluded, namely the Kyrgyz Republic and Latvia, subject to ratification. The Protocols of Accession for both these countries included, in relation to the TRIPS Agreement, a commitment that no transitional period under the TRIPS Agreement would be invoked. Meanwhile, the Kyrgyz Republic had deposited its instrument of ratification and would become a WTO Member as of 20 December 1998.

N. DRAFT ANNUAL REPORT

139. The Chairperson informed the Council that the Draft Annual Report of the Council had been circulated in document IP/C/W/119. As the period of review included also the present meeting, he proposed necessary additions taking into account the discussions at the present meeting, which were made available to the Council in document IP/C/W/119/Rev.1.

140. The Council adopted the report with amendments taking into account proposals by the Chairperson and a number of delegations, as reflected in document IP/C/15.



O. OTHER BUSINESS

(i) *Schedule of meetings in 1999*

141. The Chairperson proposed that the Council schedule its next meeting for 16 and 17 February 1999. As regards the other dates that the Secretariat had tentatively pencilled in for 1999, namely, 27 and 28 April<sup>6</sup>, 7 and 8 July, 15 and 16 September and 23 and 24 November, he suggested, in the light of comments made, that the Council consider further its autumn schedule at its July meeting.

(ii) *Question posed by Cuba to the United States*

142. The representative of Cuba addressed a question to the United States concerning section 211 of its Omnibus Consolidated and Emergency Supplemental Appropriations Act.<sup>7</sup>

143. The Council took note of the statement of the delegation of Cuba.

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<sup>6</sup> Subsequent to the meeting, the tentative dates for the meeting in April were rescheduled and are now pencilled in for 21 and 22 April 1999.

<sup>7</sup> The text of this question is available in document IP/C/W/120/Rev.1.