

行政院及所屬各機關因公出國人員出國報告書
(出國類別：其他)

出席「世界貿易組織與貿易有關智慧
財產權理事會 (WTO/TRIPS) 2007
年 10 月例會及相關會議」報告

出 國 人：

服務機關：經濟部智慧財產局商標權組

職 稱：商標審查官、商標助理審查官

姓 名：張瓊惠、陳宏杰

服務機關：經濟部智慧財產局專利三組

職 稱：專利審查官

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服務機關：財政部國庫署

職 稱：稽核、專員

姓 名：員旭潔、賴欣憶

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壹、目的與過程

本次 WTO/TRIPS 理事會例會及相關會議於 2007 年 10 月 22 至 24 日於瑞士日內瓦舉行(相關議程如附件 1);我國係由財政部國庫署員稽核旭潔、賴專員欣憶、本局專利三組莊專利審查官智惠、商標組張商標審查官瓊惠及陳商標助理審查官宏杰,偕同我常駐 WTO 代表團徐秘書崇欽等共計 6 人出席。前述會議舉行時間如下:

- 10 月 23 日上午 10 時召開 WTO/TRIPS 理事會例會,至次(24)日下午 1 時結束。
- 10 月 24 日下午 4 時舉行葡萄酒及烈酒產品地理標示多邊通知及註冊制度的個別會議(Confessional meeting)。

此外,於前述會議舉行期間之空檔,亦陸續安排與 WTO 秘書處 Mrs. Jayashree Watal 參事就 CBD 等議題交換意見及與澳洲、日本代表團進行雙邊會談,該等交換意見與雙邊會談舉行時間如下(代表團行程表如附件 2):

- 10 月 22 日下午 1 時與 WTO 秘書處 Mrs. Jayashree Watal 參事,就 CBD 等議題交換意見。
- 10 月 23 日上午 9 時 45 分與澳洲代表團雙邊會談。
- 10 月 23 日晚上 6 時與日本代表團雙邊會談。

另於 10 月 21 日上午 9 時至 12 時參加由貿易及永續發展國際貿易中心(ICTSD)舉辦之「開發中國家之智慧財產權與清潔能源科技取得」研討會。

以下將先說明 WTO/TRIPS 理事會例會及相關會議之內容,然後再說明與 WTO 秘書處 Mrs. Jayashree Watal 參事就 CBD 等議題交換意見、與澳洲、日本代表團進行雙邊會談及參加前述研討會之內容。

貳、TRIPS 理事會例會情形

TRIPS 理事會例會由主席奈及利亞大使 Mr. Yonov Frederich Agah 主持，相關討論情形如下（會議紀錄詳附件 3）：

（一）採認議程

主席首先進行對於本次議程 WTO/AIR/3074/REV.1 的採認，說明因為日本於今(2007)年 9 月 28 日提出增加(M)項議程，即分享有關日本智慧財產權執行的國內經驗，該文件編號為 IP/C/W/501。

1. 祕魯首先表示反對將執行議題納入議程，並認為執行議題並非 TRIPS 例會之永久議程項目(item)。另外，從日本所提出之 IP/C/W/501 號文件之內容觀之，其題目應是日本智慧財產權之邊境管制措施，而非智慧財產權之執行。
2. 中國對祕魯之發言表示贊同，其認為執行議題係 TRIPS 例會之暫時議程項目，而非永久議程項目，且開發中國家都不贊成此議題在例會報告，浪費時間，且也沒有討論的授權(mandate)，違反 TRIPS 第 1.1 條，另此工作也和其他國際組織討論的重複，尤其是 WIPO 執行諮詢委員會，執行 IPR 並非為一個獨立的議題不應該分離出來討論，另有許多議題包括，IPR 適當保護之關係，開發中國家的經濟和社會發展宗旨，IPR 保護和技術移轉間的關係，TRIPS 和公共衛生或是 CBD 等議題，這些才是被授權來討論的且更重要，因此，反對將執行項目(item)放入此次議程及以後的議程。
3. 阿根廷發言表示執行議題不是 TRIPS 例會持續性的議程項目(standing item)。
4. 印度發言表示 TRIPS 例會不應採納執行議題項目。
5. 日本發言表示贊同 TRIPS 協定第 1.1 條之選擇適當執行方式的權利，並認為會員國內智慧財產權執行經驗之交換係

非常有益的，且 TRIPS 例會是討論執行議題的適當場所。

6. 歐盟發言表示 TRIPS 例會議程應採納該執行議題項目。

主席最後依據會員發言，決定在這次會議採認本議程。

(二) 中國大陸入會過渡檢討機制(TRM)

1. 主席提醒，依據中國大陸入會議定書第 18 段規定，在中國大陸入會 8 年內，TRIPS 理事會每年應就中國對於 TRIPS 協定之執行，檢討後即時向總理事會報告結果。主席指出中國大陸已將書面報告以 IP/C/W/505 號文件提交，中國大陸今早更提交兩份額外文件（「2006 年中國大陸的智慧財產保護」及「2007 中國大陸智慧財產權保護行動計畫」）。各會員有關中國大陸入會過渡檢討機制之評論及提問，計有日本、美國及歐盟分別提出 IP/C/W/498、IP/C/W/502 及 IP/C/W/503 號文件，內容簡譯如附件 4。

2. 中國大陸首先介紹該國對於 TRIPS 協定與其他相關國際承諾的執行報告以及兩份額外文件，緊接著回應前述會員所提書面問題。其表示，針對會員所提出有關涉及 WTO 爭端解決案件的問題，中國大陸不予以回應，其他問題回答部分，為求效率，將其分為以下 11 類回答：

(1) 有關透明化的一般議題：中國大陸代表認為該國智慧財產法制是非常開放且透明的，在法律及其他相關規則公告到施行之間，至少應有 1 個月的時間提供閱讀以供公眾評論。在法律或規則之草案送交檢視之前，則須公告以提供專業人士評論，對象包含智慧財產領域的專家、學者及業界人士。所有的建議都會被仔細地分析並分類，並會對重要建議的提供者作出回應，最後會依公眾所提供評論加以檢討。依中國大陸的智慧財產權法制而言，很少有一個以上的機關同時草擬一法令的情形發生。如果真有上述情形發生，則草擬法令的機關必須完全諮詢

各相關機關，以確保協調及避免於不同機關間發生不一致的情形。在第 3 次修改專利法的程序中，收到由政府機關、組織、企業與個人所提供的意見，另外，國務院在今年 10 月 10、11 日舉辦專利修法國際研討會，邀請專家、學者、中國大陸企業、WIPO 及美國著名企業等，協助討論修法草案中的議題。在商標法修法方面，國家商標局自 2006 年 4 月起開始接受評論並舉辦研討會，在去年底收到 112 項來自 47 個國內外組織與個人的評論。而智慧財產權保護與執行方面，在最近幾年，中國大陸已經採取許多有效的措施，以綜合的方式促進智慧財產權保護並獲得好結果。中國大陸更已進一步改進其法令，加強努力打擊侵權並提高刑事起訴與處罰案件數量，強化公眾對智慧財產權保護的意識。

(2) 法制與司法解釋問題：

- A. 在中國大陸專利法修正部分，因為修正仍在進行中，難以預測最後的結果，因此無法對目前所擬條文提供進一步澄清。
- B. 在商標與營業名稱的競合部分，目前的「反不公平競爭法」仍在檢視與修正中，在 2005 年 11 月，最高人民法院規劃了對法律議題的解釋文件草案，關於包含智慧財產權競合等多個部分的規範，在 2005 年 12 月開始經由網路蒐集公眾的評論，該司法解釋草案涵蓋商標與營業名稱的競合等相關議題，但無法於目前提供細節。
- C. 在廣播電視組織使用報酬標準規則部分，依據著作權法第 43 條，中國大陸國務院正在研擬措施以適用於使用來自廣播與電視的所有產品的情形，相關法律程序尚在進行中。依據著作權團體管理規則第 43 條，當一使用者能提供使用細節卻拒絕不提供該資訊，國務院的著作權行政部門應

命令其提供。

- D. 在審查技術進口/出口契約內容部分，依技術進出口管理規則規定，進口技術管理區分為「禁止進口技術」、「限制進口技術」及「自由進口技術」，自由進口技術申請註冊要提供契約，但不需實質審查契約內容，換句話說，審查機關必須請申請人提供契約以確定該基礎資訊為真實，在實務上，某些省級與地區級當局審查企業技術進口契約內容，並不符合中國大陸相關法律與規定。政府從未強制要求審查契約內容。
- E. 中國大陸認為技術進出口管理規則第 24 條是相對於契約法的特別規定，沒有違反契約法的問題，亦認為沒有違反 TRIPS 協定第 28.2 條及國民待遇原則。
- F. 中國大陸認為技術進出口管理規則第 25 條也沒有修改的必要。為確保滿足前述條款要求而提供的書面說明不一定要包含在契約中，而中國大陸官方也不會因該說明未包含在契約中而駁回該契約。

(3) 專利：中國大陸的專利體系遵循首次申請原則，核准專利給第 1 個申請人，考慮到他人有對創造及發明提出爭議的權利，可依據專利法相關條文向人民法院提起上訴。專利法尚在修法中，目前正在接受公眾評論，故無法預測最後結果。目前我們沒有計畫改變條文使可專利範圍擴及軟體發明專利。依據中國大陸專利法第 12 條，利用他人專利應與專利權人簽訂契約並支付授權金，如違反此條款可向人民法院提起上訴。有關秘密資料保護部分的兩個問題太過一般性，未在要求中特別指明法律條文，故中國大陸無法回應該問題。

(4) 藥品試驗資料保護：藥品應依藥品註冊相關條文申請註冊，未揭露臨床試驗資料保護也明列於前述條文中，專屬資料如已被

揭露，依據履行藥品管理法之措施，中國大陸承諾保護未揭露之資料，而非保護所有資料。保護未揭露資料自動被接受，並不需要核准的程序，而是決定在能取得該資訊的人能否保持該資訊不揭露。依照行政許可法及藥品管理法，國家食品藥品管理局應用以核定的資料是申請人自己獲得的藥品與臨床資料，而非已揭露的參考資料或由其他申請人提供的資料。

- (5) 商標與地理標示：在商標部分，「famous brands」、「renowned brands」、「export brands」是引導及鼓勵企業創造著名商標產品的輔助措施，用以提升產品品質與水準。另外，國家商標局在認可著名商標時，對於國內或外國的商標權人平等對待，沒有差別待遇。中國大陸商標法及 2003 年認可與保護著名商標條例明確提供著名商標認可程序的客觀標準，詳細條款請上國家工商管理網站參考，網址為 www.ctmo.gov.cn。關於惡意將外國著名商標拿來申請註冊的問題，請見商標法第 40 條及認可與保護著名商標條例第 3 條、第 10 條，藉由如網路等公眾媒體而著名，在著名商標認定上也是會被考慮的一種因素。商標法第 31 條保護著名商標優先權。依據智慧財產權的屬地原則，商標審查官對於先使用的判斷標準必須是在中國大陸境內使用。對於惡意將外國著名商標或已使用未在中國大陸註冊但有影響力之商標拿來申請註冊的行為，審查機關會在審查、異議及檢討階段對此採取行動。在商品與服務類似方面，審查依據商標及服務類似分組表，舉例來說，手套與圍巾不是同組群商品，故不類似。在地理標示部分，地理標示可被當作商標保護，而不以其他方式保護。在 2001 年，中國大陸加入 WTO，承諾依照 TRIPS 協定提供法令有效保護地理標示，依據商標法、商標法施行細則、證明標章與團體商標註冊與管理規則，地理標示可以註冊為證明標章或團體商標以獲得中國大陸之

法定保護，不須另外向其他機關註冊。外國地理標示申請人須提供在原屬國受保護之證明文件。受地理標示保護之相關資料公告在國家質量監督檢驗檢疫總局網站上，網址為 www.aqsiq.gov.cn。在零售與批發市場的仿冒部分，北京的 3 個主要零售市場，在與著名歐洲商標權人簽署瞭解備忘錄之後，已經對智慧財產權保護採取有效的措施，並且贏得他們的評價。在商標局積案問題部分，由於商標新申請案一年一年增加，在 2006 年有 766,000 件新申請案，目前每案審查時間為 30 個月，比前一年更長，國家工商管理局增加審查人員、強化管理並增進工作效率，在 2006 年審結 330,000 件新申請案，而每位審查人員的年工作量比其他國家都高得多。

- (6) 著作權：2006 年著作權管理當局在北京、上海、廣州、武漢的 6 所大學巡迴宣導打擊教科書盜版，美國及英國的出版業者都對中國大陸政府所採取的行動表示讚許。
- (7) 一般執行：國家工商管理局與海關當局共同建構資料庫，以作為海關執行智慧財產權保護之基礎。律師委任狀與證據的公證與採認部分，明定於中國大陸民事程序法第 242 條中，依據 TRIPS 協定第 49 條，相關行政程序應符合民事程序的原則，實務上可能耗費時間的問題，使得在中國大陸與外國智慧財產權利人及相關執行機構間的更多溝通與合作的要求變得更為急切，對法律體系與執行體系的理解，可避免因為誤解相關法律體系而造成不必要的延遲。在暫時禁制令部分，人民法院依法裁判，中國大陸質疑問題中的授予暫時禁制令比例的數據來源。依據中國大陸刑法及行政單位移送可能刑案規則，如一案件被行政單位懷疑可能為刑案，則應移送刑事程序，如在移送前已被處以如罰鍰等行政罰，則於刑事程序中將加以考量。如經移送刑事程序後未被起訴，該案將被移回行政程序解決。

- (8)行政執行：中國大陸政府依商標法第 53 條處理商標侵權案件，當執法機關會同企業確認商品侵權後，就會將該商品銷毀。如果沒收商品有價值且侵權標籤可移除，依據行政罰法第 53 條，則可被拍賣或依國家其他法令處置，商品拍賣前必須移除侵權特徵。
- (9)民事執行：私家偵探所提供的證據，欲使用在民事法庭程序中，須遵守民事程序法之規定。
- (10)海關邊境執行：為減少通過中國大陸邊境的仿冒品數量，中國大陸海關已經增進了執行需求，將預測、檢查作業與海關申報資料結合，並廣泛應用一些先進的檢查技術，例如 X 光機，有效促進探測並沒收侵權品的能力與效率。
- (11)智慧財產權網路侵權：中國大陸努力打擊著作權網路盜版，在 2006 年，國務院通過「資訊網路通訊權保護規則」；最高人民法院發佈「修正最高人民法院對於處理有關電腦網路著作權爭議案件適用法律問題之判決」；在 2006 年 12 月 29 日中國大陸加入 WIPO 的著作權條約，以及表演與音樂著作條約，2007 年 6 月 9 日兩個條約在該國已經生效。然而需強調的是，著作權網路侵權議題並不包含在 TRIPS 協定範圍中，因此在過渡檢討機制中討論並不適當。
3. 接著美國發言表示，中國大陸發言內容非常仔細，很有幫助。但這樣的綜合回應很難讓人跟得上，不知道是不是在回應其他國家的問題。美國代表以下指出沒有回應或須進一步回應的問題：5、6、7、9、12、13、18、19、20、21、22、36 等。
4. 日本發言：無法明確從中國大陸代表回應中區分出日本所提問題的答案，希望在檢查過中國大陸的回應之後再提出問題或評論。
5. 歐盟發言：所提問題 8、9、10 未回應。
6. 中國大陸回應：關於沒有提供答案的問題，該國代表認為與一正

在處理程序中的智慧財產權爭議案件有關，有另一適當的機制在處理那些問題。當然，中國大陸的門永遠為智慧財產權議題的雙邊與多邊合作而開，傳統評論與問題總會經由更適合的管道處理。有關會員國進一步提出的問題，中國大陸代表認為，智慧財產權是全球議題，而非單一國家的事。

(三) TRIPS 協定與 CBD 關聯性：檢討 TRIPS 協定第 27.3(b)條、TRIPS 與 CBD 之關係、及保護傳統知識及民俗文化議題：

此次會議就此議題，各會員代表發言方向大致與先前的發言立場一致，會議重點在於討論祕魯所提新文件關於「對抗生物剽竊-祕魯經驗」及日本所提新文件「專利制度和遺傳資源」之內容；烏干達、巴西、大陸、印度、賴索托、斯里蘭卡、巴基斯坦、哥倫比亞和泰國等會員紛紛發言認為生物剽竊是全球性的問題，重申支持印度巴西等會員於 2006 年所提之揭露提案，希望修改 TRIPs 條文，進入以文字為主(text-based)的討論。美國、日本、澳洲、加拿大、韓國及紐西蘭則表示希望繼續就事實或實例進行討論。歐盟則再次說明其於 WIPO-IGC 所提揭露方案的重點。另挪威針對我國及澳洲於今年 6 月例會之提問，予以回答。以下說明各代表的詳細發言內容。

主席首先說明此次新提討論的文件分別有，祕魯所提 IP/C/W/493 文件，日本所提針對 IP/C/W/472 文件補充說明之新溝通文件 IP/C/W/504。

1. 祕魯代表介紹其文件係設法對於國際專利制度缺乏一個有效的法律工具(instrument)來對抗(combat)生物剽竊及防止遺傳資源和相關傳統知識的不當利用之事提出警告。接著說明該文件的重點，第一部分說明祕魯豐富的天然資源和祕魯生物剽竊之真正和潛在重要性，第二部分回顧祕魯近年來於 TRIPS 理事會提交之文件，第三部分描述祕魯國家反生物剽竊委員會於確認生物剽竊案例所

遵循的程序，第四部分描述委員會於幾個已確認之與三種祕魯資源，即 maca(也稱為“Viagra of the Andes)，Camu-camu(一種有高維他命 C 含量的水果)，Sacaa inchi (一種具有再生及化妝性質的野生水果) 有關之生物剽竊案例，所採取的行動，第五部分總結國家反生物剽竊委員會所面臨的限制及問題，第六部分說明幾個結論。再次強調現今運作之專利制度，經常導致許多例子直接或間接從祕魯來源或從其社區之傳統知識所產生的專利，其不應被核准專利的發明卻通過新穎性或進步性的審查，雖然專利制度並不具有保證對利益及合法取得遺傳資源之補償之功能，其仍必須於這些需求和此制度運作的方式之間創造協力(synergies)，以確保此制度是公平的。重述此問題之重要性，祕魯代表認為會員應開始以文字為主的協商，他說若 WTO 會員不能處理杜哈回合的議題，他們不只失去其可信度(credibility)，也失去一個確保更公平和更有效的國際貿易環境之歷史機會。最後並強調需要一個真正的、特殊的協商，已有 50 個開發中國家支持其所提的揭露提案，並舉諾貝爾和平獎得主係因保護環境有功為例，強調保護地球的資源和環境之重要性。

2. 日本代表說明所提文件 IP/C/W/504 與在 2007 年 7 月 WIPO 舉行之第 11 次 IGC 會議日本所提文件內容相同，表示樂於和會員分享該資訊，其簡要說明該文件有三部分，第一部分是資料庫檢索系統之結構，第二部分是如何避免第三者的進入，第三部分是引用/參考資料之註冊。此文件強調日本於兩個重要議題的立場：錯誤核准專利和遵守生物多樣性公約的要求。渠說明該資料庫以 WIPO 為入口網站，並連接到由參加 WIPO 會員國所維護之資料庫。會員國之可經由經註冊的 IP 位址，進入會員的資料庫查詢，從所有相關的資料庫可同時得到檢索結果。洩露資料的危險可由限制參考資料進入與新穎性審查相關的資料庫的部分來降低。日本也提

議建議網路工具(protocol)位址鑑定 (authentication) 系統，其可使 WIPO 入口網站只允許經過註冊之 IP 位址之智慧財產當局進入，而使專利審查人員於專利申請案和相關遺傳資源之間建立連結，渠表示 WIPO 入口網站可協助追查 (trace) 使用相同遺傳資源之專利申請案。

3. 烏干達代表表示感謝祕魯和日本所提文件，認為祕魯文件貢獻特別重要，因其為祕魯之生物剽竊經驗之實際例子，提供不同態樣的例子和程序。並表示該國為一生物多樣性豐富的國家，已面臨到確認特殊生物剽竊案例能力上的限制。並認為國內法不足以確認生物剽竊的問題，烏干達有些特殊植物物種遭到不當利用之例，如 cat' s claw, dragon' s blood 及 ayahuasca。渠做為開發中國家揭露提案之共同發起人，很樂於知道非洲集團和 LDC 國家共同支持揭露提案，並表示在 WTO 一個意義重大的多數(mass)就此議題已擁護一個明確的結果，即透過修改 TRIPS 協定，而此結果將是杜哈回合發展的一個基本的要素(element)。
4. 巴西代表發言認為祕魯的文件提出兩個生物多樣性豐富的國家所面臨問題的兩個明確要素，即遺傳資源的越境使用 (transboundary use)和錯誤核准專利，遺傳資源的越境使用涉及在原產國取得遺傳資源及隨後在其他國家，經常是已開發國家，尋求專利保護。這是一個國際面向的議題，因此需要國際義務。關於錯誤核准專利，渠表示常發生傳統知識可能無法藉由檢索過程從先前技術找到，因為其係以口頭形式存在或不易或無法由專利審查人員獲得，或者專利審查官錯誤適用實質可專利性的基準。對此問題以多邊方式的解決方案，渠代表團及其他共同發起人，提議修改 TRIP 協定納入強制性的揭露要求。

渠認為日本所提的資料庫提案係重覆了 IGC 所進行的工作，其立場為會員在未解決生物剽竊和不當利用議題，即就揭露要求有明

確進展之前，不支持增加任何國際性的關於傳統知識的資料庫，因為此種資料庫將所有傳統知識的資料集中於單一可檢索的資料庫，使得該資料可全球性地由任何有興趣的人更容易取得，結果更會促進傳統知識的不當利用之可能性。因此，在考慮此種資料庫系統之前，需要有防衛來對抗不當使用，例如強制的揭露要求。渠更表示至少在 WTO 的非正式場合(setting)，就 CBD 議題已獲得某些備忘錄(momentum)以做為就尚待解決之執行議題

(outstanding implementation issue)，以及第 23 條地理標示保護擴大至葡萄酒及烈酒以外產品(GI 擴大)及葡萄酒及烈酒地理標示之多邊通知及註冊制度之建立議題(GI 註冊) 之協議不可或缺的一部分，他說雖然 GI 註冊的議題與 CBD 和 GI 擴大議題不屬於相同的授權，但在非正式場合中，已認知到上述議題之間有些連結。在非正式的協商中，揭露要求之提案人和 GI 擴大之提案人已指出就這些議題有某種程度的彈性，此將促進擴展就此兩個議題的結果之支持。渠也指出這兩個議題的進展與杜哈發展回合協商核心要素(即農業和非農業市場進入)之較大進展(broader movement)有密切關連。

渠表示自從非洲集團決定加入支持及 LDC 集團在 2007 年 6 月理事會表示支持之後，對於揭露提案已有增長的支持。此議題已廣泛地被理解為杜哈回合的發展成分且因此不應被留在桌上，他表示 TRIPS 理事會是一個使會員可就修正提案進行技術交換的適當論壇，他重申揭露要求必須是強制性的；透過修改 TRIPS 協定來執行；導致專利申請案的標的(object)之發明所使用的生物材料之揭露；包括遵守事先知情同意和適當利益分享的證據，並就未遵守的案例有某種法律效果。並表示揭露要求並非額外或第四個實質的可專利性的要求，其代表團希望與其他有興趣的團體進行深入的意見交換。

5. 中國代表也認同祕魯提案，認為國內的取得和利益分享制度及遺傳資源資料庫也許可減少一些生物剽竊，然而無法有效地解決生物剽竊的問題。咸信於專利申請案增加揭露要求才有助於執行 CBD 的三個原則，特別是利益分享。據此，修改 TRIPS 協定可提供一國際的法律架構且促進 CBD 和 TRIPS 之間的相互支持。遺傳資源的生物剽竊是全球性問題，因此需要全球性的解決方式，很高興非洲集團和一些 LDC 國家決定支持揭露提案，因此，揭露提案共同發起人和支持者總計幾乎是 WTO 會員的半數。由於其已被證實是發展議題，他們的支持是很重要的。故鼓勵所有會員在非正式協商進行以文字為主的討論且在理事會例行會議聚焦於修正提案的技術討論上以使會員對修正提案有更深入的了解。
6. 印度代表發言支持祕魯、厄瓜多、巴西和中國的發言，說明根據杜哈授權，就尚待解決之執行議題的協商是工作計劃(work program)不可或缺的一部分。TRIPS 協定和 CBD 之關係對於開發中國家是一個重要的執行議題。IP/C/W/474 文件所包含的揭露提案的目標為所有會員所同意(share)，沒有會員支持遺傳資源和傳統知識的不當利用，所有會員均希望防止錯誤核准專利且均同意 TRIPS 協定和 CBD 之間的相互支持可由揭露要求來促進。TRIPS 協定未能對遺傳資源和傳統知識延伸保護，是導致 TRIPS 協定及整體多邊貿易制度不平衡的因素之一。TRIPS 協定之下，各國並無義務審查專利申請案中是否有遺傳資源和傳統知識之任何不當利用。若無在國際層級對遺傳資源和傳統知識之適當及有效的保護，則遺傳資源和傳統知識之不當利用會繼續發生。渠表示已將杜哈回合歸類(label)是發展議題，若未矯正此不平衡，則其結果不會完成。對印度來說，此議題的成果是此回合所顯露(merge)之任何發展解決方案 (package) 的一個基本要素。此提案漸增支持的基礎，包括非洲集團之共同發起和 LDC 國家之支持，顯示現在是

進入以文字為主之協商時間了。TRIPS 理事會應在協商過程補足 (complement) 此工作。

7. 賴索托代表 LDC 集團發言，說明於 2007 年 6 月 5 日 TRIPS 理事會例會，LDC 集團已提出聲明支持原先由印度、巴西等會員提出之修改 TRIPS 協定的草案。重申從該次會議起，LDC 集團已在會員間諮詢，為了指出其對於揭露提案支持的真正本質，係考慮到 LDC 集團有非常多的生物資源且為生物多樣性之家鄉。渠告知理事會說明 LDC 集團咸信強調遺傳資源的不當利用和錯誤核准專利是很重要的。因此，其重申該集團對於揭露提案的支持並指出此議題應為杜哈回合發展成果的一個重要部份。
8. 斯里蘭卡代表發言支持祕魯 493 文件分享生物剽竊的經驗，渠回顧會員已就與杜哈宣言第 19 段及香港部長宣言第 44 段一致的諮詢過程中，已開始就技術議題的非排除的清單(non-exhaustive list) 進行審查，他認為這些技術議題已充分釐清。渠認為一個法律上可執行的揭露要求可避免遺傳資源和傳統知識的不當利用和錯誤核准專利。表示開發中國家壓倒性多數已重申，尋求對 CBD 議題和 GI 議題的滿意成果對於杜哈工作計畫 (program) 發展面向的傳達是很重大的。因此會員現在應進行(engage)以文字為主之協商。
9. 巴基斯坦代表認為遺傳資源的不當利用與生物剽竊不是新問題，支持進行以文字為基礎之協商。
10. 挪威代表發言感謝祕魯及日本所提文件。重申 TRIPS 協定與 CBD 可以也應以互相支持的方式來執行，且 TRIPS 協定的揭露義務可以促進這兩個條約的交互作用。另外回應 6 月例會我國及澳洲的提問。分別說明如下：
(問題 1：依據挪威提案 IP/C/W/473 文件中提到，即使專利申請案中涉及與遺傳資源無關之傳統知識，此時仍須要揭露相關傳統知

識之提供國和原產國，請問這樣涉及的專利申請案範圍是否將延伸至非生物技術相關之所有領域)

回答 1:對於 TK 所提議之揭露要求，也適用到非生物技術領域。

(問題 2：可能包含的範圍有哪些?)

回答 2:對此並無明確回答，但重要的是此規定於技術上是中性的(technology-neutral)，此即反映出 TRIPS Art.27(1)的文字即”在所有技術領域”(in all fields of technology)。

(問題 3：這是否已經超出 CBD 宗旨的適用範疇)

回答 3：此要求與杜哈聲明的概括語言(broad language) 和目標一致，因此未超過相關段落的授權。

(問題 4：另依據該提案中所提及配套之簡單通知系統，此類非關遺傳資源的案件，是否也是透過所謂 CBD 交易中心機制(CBD Clearing-House Mechanism)?)

回答 4：現行 CBD Clearing-House Mechanism 不能用於 CBD 範圍以外的資源(material)，據此，通知制度必須被設計成包括與遺傳資源無關的傳統知識。一個有效的解決方式是可以擴大現行機制的範圍，例如 CBD Clearing-House。此外，關於我國又詢問非屬於直接生物探勘而是由市場上購得遺傳資源的情況，在專利申請案中應該如何揭露？挪威代表認為其提案的目的是促進 CBD 的目標。咸信所有的生物材料應以相同方式被對待，此將提高透明度並確保從公開市場和其他來源所得材料之間的平衡。因此，當材料係由公開市場購得時，則揭露來源(原產國或提供國，若有不同)即足夠。

另回應澳洲的提問若專利申請人提出一份已取得事先知情同意和利益分享的陳明(statement)，是否符合其提案的揭露要求？渠認為可能不足夠，若專利申請案有連接到一特定材料，專利制度將只享有必要的透明度，可靠度(credibility)和信任(trust)。另關於所詢

專利主管機關是否須確認申請人是否已遵守相關國內法？其表示無法想像專利主管機關必須去確認是否遵守相關國內法。又關於揭露要求如何確保新穎性標準是否符合的問題，其說明若專利申請案所涵蓋的材料未經改造、定序或從其天然環境單離出來，該要求可能會對新穎性和進步性的判定造成衝擊。再者，傳統知識可能包含已預見(anticipate)請求之發明的資訊。

11. 哥倫比亞代表發言認為祕魯提供的資訊對於確認生物多樣性國家所面臨的問題很有用，國內和區域的保護制度是不夠的，故需要多邊的義務。對於日本資造庫的提案，認為資料庫可以補充但不能取代多邊揭露要求的需要，而 WTO 是協商此以文字為主之議題的唯一論壇。
12. 歐盟代表發言謝謝祕魯和日本的貢獻，對祕魯文件中其國家反仿冒委員會所採取的程序(process)感到很有興趣。另認為日本所提 one-click 資料庫可幫助更有效率來檢索與遺傳資源相關的先前技術，也表示很有興趣。渠說明其代表團係以開放和具建設性的態度來處理此重要議題，他表示 TRIPS 協定的彈性與其他國際工具，諸如 CBD 的可利用性，使會員得以令人滿意的方式解決生物多樣性問題，因此 TRIPS 和 CBD 之間並無衝突。然而，若有必要，其代表團也準備研究對於此問題之具體解決方法並考慮智慧財產制度的有限調整以確保這兩個條約之間有更有效的相互作用。他重述在 2002 年理事會之溝通文件中，其代表團已同意檢視引進揭露要件的可能性，可使會員全球性來追蹤關於遺傳資源的專利申請案。此制度可確保透明原則，且使核准取得其資源的國家主管機關可以追蹤基於使用該資源的專利申請案。渠表示引進新的專利揭露要求本身不會達到 CBD 的目標，但若經適當調整，就可以是對解決方法有貢獻的工具，特別是助於確認是否契約約定受到尊重。渠表示引進揭露要求應該可使專利制度繼續成為一個激

勵創新、技術進步和經濟發展的高度有效工具，進揭露要件應該不會造成專利制度之負擔，特別是專利局不應該被要求驗證何種遺傳資源已被取得的狀況，專利局的角色應該被限制在審查形式上的要求是否符合以及已聲明該發明使用遺傳資源的專利申請人是否後續揭露了適當的資訊。同樣地，專利申請人不需要面對難以克服的形式而只須提供他們所知的資訊。因此，其代表團只支持遺傳資源的起源(origin)或來源的揭露。一個要求揭露事先知情同意和利益分享的證據之制度將會引起問題。對於未遵守揭露要求的法律效果，其認為當所提供的資訊是不正確或不完整，應採取適當的懲罰，是行政上或司法上，是由各國自行決定。然而，該懲罰應該在專利法的範圍以外適用。也就是未遵守的懲罰不應包括已核准專利之撤銷。在專利未核准之前，若專利申請人未揭露或拒絕聲明所要求的資訊，儘管已給予機會補正，該申請案不會被進一步處理且申請人應被告知其後果。

13. 泰國代表發言說明泰國關切生物剽竊問題，認為若無在國際層級適當保護遺傳資源和傳統知識，則遺傳資源和傳統知識不當利用的問題仍然會持續。修正提案是合理的且時機恰當，由於該提案只聚焦於專利制度，其應用的範圍是適當且有限的，不會擴展到其他智慧財產權。支持進行以文字為基礎的協商。
14. 日本代表發言感謝祕魯文件，並解釋祕魯文件第8頁第5段所述之「祕魯提供的資訊未被日本專利局考慮」一事，係因為收到祕魯資訊之前，專利審查人員已決定核駁此專利申請案。審查人員先前已檢索到一適當先前技術並已發第一次審查意見理由通知書，於考量祕魯所提供之資訊及申請人之申復理由和修正後，審查人員維持第一次審查意見而作出最後審定。另關於祕魯文件第8頁第4段所述日本資料庫之專利申請案翻譯不佳或無翻譯之問題，日方亦說明已致力改善機器翻譯之品質，將”遺傳資源”的

術語加入機器翻譯的字典是很有有用的。渠告知理事會於 1970 年之後收到的專利申請案的英文摘要及 1993 年之後的日本專利案的英文機器翻譯均可取得。至於祕魯所言揭露要求對於防止生物剽竊和避免壞專利，其表示如文件 IP/C/W/472 所指出，由於專利審查係基於專利標的之技術性質，而非其地理原產地，原產地的資訊與可專利性之決定無關。為了改善專利檢索之便利性，例如透過資料庫是一種防止壞或錯誤核准專利的方式。

15. 美國代表發言說明其代表團是認為 TRIPS 協定和 CBD 之間無衝突之 7 個會員當中的一個，且這些協定應以互相支持的方式來執行，不須修改 TRIPS 協定。在理事會最近的討論已大致確認就如何處理此議題有相當分歧的見解。咸信理事會的工作應該與其授權一致，繼續聚焦於分析真實例子和解釋所理解的關注之以事實為主的討論。此工作應包括特別是現有取得和利益分享機制的審查，因其顯示直接相關於何者構成不當利用的理解。因而，理事會未來的工作可促進此領域的的進展並繼續釐清不一致的觀點而有助於減少會員間的差異。

感謝祕魯分享其經驗，渠亦同意分享祕魯及其他會員的關切，即確保適當的取得及公平和合理的利益分享，以及如祕魯文件所述有些發明不應該確通過新穎性或進步性的審查。關於祕魯文件第 IV 部分所提供的例子，他表示不清楚事實上專利已核准的狀態會被視為使生物剽竊發生，例如已被過度討論的薑黃案例，已被證明原產國的參考資料與是否符合可專利性標準的審查無關。因此，新的專利揭露的要求不會獲致其所欲達到的目標。另說明渠代表團所提出之包括互相同意的條款之以契約為主的制度，可提供遺傳資源之適當取得和確保公平之利益分享。然而，其代表團仍希望透過研究特殊例子以對所引發的關切有較佳的了解，並解決會員間之歧見。關於祕魯對專利資訊的取得和翻譯的關切，其

說明有很大的可能性可以一種不會有揭露提案的先天問題的方式來處理這些關切，關於此點，他支持進一步研究日本所提 one-click 資料庫，並表示 TRIPS 理事會應聚焦於已產生的關切之務實解決，而非提倡負擔沉重的救濟(remedies)，這不會解決基礎的 (underlying)問題。

- 16.我國代表發言（發言稿詳附件 5）感謝祕魯和日本所提文件，並感謝挪威對我方於六月例會提問之回應。說明關於 TRIPS 協定及 CBD 的關係的討論，我方與日本一樣，也認為會員討論兩種不同的問題，一種是關於錯誤核准專利，另一種是關於事先知情同意和公正及公平之利益分享。

為防止錯誤核准專利，我方認為日本的提案 IP/C/W/504 是很有趣且值得探討。我方認為該提案所述之結構和手段是很有建設性的，如資料庫的格式、技術用語的多語言詞彙表(glossary)和對於無能力開發此檢索程式的國家的技術協助。因此，我方樂見對此提案有更多討論。

關於事先知情同意和公正及公平之利益分享議題，從會員的爭論和先前的文件，我方覺得會員對於如何處理此議題，有分歧的見解。我方希望經由更詳細的討論，較能對每一個提案的正反意見有更好的瞭解。

因此，我方想請問一些技術問題。提問之前，我方再次感謝挪威對我方問題的回答。我方會仔細研究看看是否需要進一步的澄清。我方請問挪威提案關於第三人異議的問題。我方想瞭解若專利申請人善意揭露，然後第三人對此揭露資訊提出異議，則申請人或該專利的法律效果為何？例如，若專利申請人揭露 A 國為遺傳資源及相關傳統知識的來源國，然後 B 國看到此揭露並爭論該國才是原產國，則審查程序是否要停止直到此問題獲得解決？若此爭論係於專利核准且一些利益已經被分享之後才發生，則對專

利持有人有何影響？

17. 瑞士代表發言歡迎日本的提案，認為其與瑞士所提之關於傳統知識之國際性的入口(gateway)的想法一致，該入口以電子化方式連接地方和國家的傳統知識資料庫，可促進專利主管機關對於儲存於該等資料庫之傳統知識的取得。此入口可使傳統知識文件有效整合到可檢索的先前技術。此入口可以其他於國際或國內層級所採用的措施來補充取得及利益分享。瑞士入口的提案之更多資訊可見先前所提文件 IP/C/W/284， IP/C/W/400Rev.1，及遺傳資源和傳統知識揭露來源的概要 WIPO/GRTKF/IC/11/10。提問日本是否已分析建立該資料庫所須之標準化問題，例如資料庫格式及所使用的軟體。另請問日本提案是否包括已建立之以國內為主的資料庫以外的資料庫，例如區域性(regional)或當地(local)的資料庫？希望日本的資料庫提案能繼續在 WIPO 及 WTO 會議討論。
18. 韓國代表說明其代表團完全了解生物剽竊和遺傳資源的不當利用的重要性，但於 TRIPS 協定中引入揭露要求以作為核准專利的要件，將對專利申請人和專利主管機關課以過度負擔，而不可避免地導致專利制度的不穩定性。關於 TRIPS 和 CBD 之間的關係，其說明以事實為主的討論有助於確認問題並降低會員對此議題了解的落差。其與日本持相同見解，即 TRIPS 理事會應考慮此工作在 WIPO 進行以避免重複。
19. 加拿大代表發言感謝秘魯和日本的文件，保留於下次會議提問。說明雖然希望在 TRIPS 理事會就此議題繼續進行建設性討論，然提醒仍有其他國際論壇，包括 CBD，WIPO 及 FAO 已建立此方面的專家和能力，也正進行技術討論。重申促進討論 TRIPS 及 CBD 關係最好的方式是在 TRIPS 理事會就所提出之各個提案進行以事實為主的討論，特別是有最佳實務可分享或已有經歷過問題的會員。也鼓勵會員考慮其他機制來保護生物多樣性和防止遺傳資源

的不當利用，例如發展更廣泛、全球更可取得及功能性的先前技術資料庫，在材料移轉協定、授權、行為規範(codes of conduct)、其他契約中使用互相同意條款。關於在 TRIPS 協定引進強制性揭露義務的提案，渠表示該代表團還未看出 TRIPS 及 CBD 之間有矛盾，故尚不確信有修改 TRIPS 之必要。

20. 澳洲代表發言首先感謝挪威對其提問的回應。另感謝祕魯文件並針對該文件內容提問及發表看法。首先質疑生物剽竊的明確意義為何？認為生物剽竊在許多不同情況被使用。第一種範疇(category)，如巴西所強調者，係指遺傳資源和傳統知識為非法取得之例，即違反該國管理該資源之取得之法律。第二種範疇，如祕魯文件所強調，係指遺傳資源和傳統知識為合法取得，且用於專利，因有以傳統知識之形式之先前技術之存在而爭議其缺乏新穎性。澳洲代表認為為了適當處理根本的問題，區分這兩種範疇是很重要的。祕魯文件所述生物剽竊的例子是落在第二種範疇中，雖然其中一個例子不是很清楚。關於日本申請案之例，她認為由於該專利申請案已為 JPO 所核駁，故疑惑祕魯為何擔心此例。第二個例子是這 5 個例子中唯一已核准專利者，對於所宣稱之生物剽竊並未給予根據(basis)，她疑惑是否祕魯主張先前技術已存在或遺傳資源不適當地從祕魯取走而違反其國內法。渠表示這些問題引發其代表團有一個基本問題：揭露提案如何影響祕魯文件中例子的結果或揭露提案如何提供專利審查人員資訊而較易取得先前技術及避免壞專利或生物剽竊？其認為揭露規定至多表明進一步集中於原產國文件的檢索可能是有必要的。然而，即使如此，實務上此資訊不太可能有助於確定相關的先前技術，因為首先，遺傳資源時常同時在許多不同國家都可以取得。其次，許多新穎性和進步性的資訊並未有記錄，因此無法從先前技術資料庫中找到，尤其是傳統知識的例子。

渠進一步說明有許多現有的工具可促進揭露，例如國際專利分類系統，其包括與傳統知識相關的申請標的（subject matter）而可做更集中目標(targeted)之文件證據之檢索，PCT 最少文件證據（minimum documentation），包括傳統知識和非專利文獻，且可由國際檢索主管機關諮詢以進行全面性的先前技術檢索。其表示資料庫方式的解決似乎對於處理祕魯所面臨的問題比所提議之 TRIPS 協定之修改有用多了。渠結論其代表團同意印度代表所言，揭露集團的目標，即防止壞專利和不當利用並確保公平的利益分享，乃廣泛為會員所同意。然而，其代表團不同意印度為達到此目標所採用的手段。

21. 紐西蘭代表發言說明該國為一生物多樣性之國家，紐西蘭對智慧財產制度的確定性和可預測性感興趣，但也對紐西蘭遺傳資源和傳統知識的保留有本土的興趣。渠和澳洲及其他會員一樣，關切遺傳資源和傳統知識不應被不當利用，且應有適當的取得和利益分享的機制。鼓勵基於事實的討論，包括特殊例子和國內經驗的討論，則可使會員能對不當利用之嚴重程度，現行制度如何更成功來執行以及是否需要新的工具，達成有用的結論。認為祕魯所提文件很重要，其對祕魯保護生物資源和傳統知識的立法和機構的架構，提供一全面性的概要，特別是祕魯國家反仿冒委員會。他注意到 JPO 的資料庫支持委員會工作，但祕魯關切時間和取得之費用，翻譯和專利申請案的分析。因此，他好奇是否祕魯有進一步研究日本提案的優點之想法。
22. 菲律賓代表發言感謝祕魯和日本所提新文件對這三個議題的貢獻，有興趣請日本澄清先前巴西所提之問題，即此資料庫的可能危險，即反而會提高(enhance)遺傳資源的不當利用。渠表示依照香港部長會議的授權，應進入以文字為主的協商。
23. 祕魯代表發言說明其代表團是以開放的心態來考慮各種提案，包

括日本、瑞士和美國的提案。渠告知理事會祕魯和美國所簽訂自由貿易協定認可以契約為主的制度。他說明祕魯為傳統知識註冊所建立的資料庫系統是有用的成果，其可由 WTO 或其他國際組織複製使用 (replicate)。關於加拿大所述其他論壇也在討論此議題一事，渠認為 WIPO IGC 就此議題的實質並未有進展，TRIPS 理事會才是一個適合討論專利制度的論壇。另關於何者構成生物剽竊的問題，他認為就是指遺傳資源和傳統知識的不當利用。關於有些會員建議會員應開始特定生物剽竊例子之審查，他表示採個案 (case by case) 研究的方式是不必要的且其他的協商並未使用此種方式。最後，說明揭露要求雖然也許不是生物剽竊的最後解決方法，但揭露要求會讓會員較容易處理及調查生物剽竊的案例。

24. 挪威代表發言感謝我國的提問，下次會議再回應問題。
25. 日本代表發言重申 IP 位址鑑定系統可處理有些會員對於資料庫系統所含的資訊暴露之關注，下次會議再回應瑞士的提問。
26. 稍後會議回到此議程，賴索托代表 WTO 之 LDC 集團發言，說明該集團不只支持原先由巴西、中國、哥倫比亞、古巴、印度、巴基斯坦、祕魯、泰國和坦尚尼亞所提之提案，也希望能做為共同發起人。
27. 印度、巴西和中國代表歡迎 LDC 集團為 TRIPS 和 CBD 開發中國家提案的共同發起人之決定，強調 WTO 會員對於採用該提案之提高支持的重要性。此增加的支持顯示杜哈回合協商的特別要素是對於一般開發中國家真的很重要，故應儘快開始以為文字為主的協商。

(四) 有關執行杜哈宣言第 6 段「TRIPS 協定與公共衛生」決議第 8 段的檢討

主席表示已豁免(waiver)之決議第 8 段規定 TRIPS 理事會應

該每年檢討該決議所開始的制度之功能，以確保其有效的運作且應每年向總理事會報告其運作。再者，該段規定此檢討應視作符合 WTO 協定第 IX:4 條之檢討要求。

主席告知各代表團，理事會自 6 月會議起已收到自盧安達依” 2003 年 8 月 30 日杜哈宣言第 6 段「TRIPS 協定與公共衛生」執行”之決議第 2(a)段之通知(IP/N/9/RWA/1)。理事會也收到來自加拿大依相同決議第 2(c)段的相關通知(IP/N/10/CAN/1)。

關於 2005 年 12 月 6 日於日內瓦之修改 TRIPS 協定議定書的批准接受(acceptance)狀態，主席表示從 6 月的理事會議起，下列會員已通知理事會渠批准接受此議定書:以色列於 8 月 10 日，日本於 8 月 31 日，澳洲於 9 月 12 日，新加坡於 9 月 28 日(文件分別為 WT/Let/582,592,593 及 594)。主席並回顧美國、瑞士、薩爾瓦多、韓國、挪威，印度和菲律賓更早之前已通知其批准接受。因此，目前有 11 個會員已批准接受此議定書，將待 2/3 會員批准接受後才會生效。

主席重述此議定書仍開放給會員批准接受，直到 2007 年 12 月 1 日或由部長會議決議之較遲之日期。由於日期已接近，主席建議理事會希望考慮提交延長對議定書批准接受之期限之提案給總理事會。因此，可能提交給總理事會關於延長批准接受之期限之決議草案已附於草案報告的附錄 2。關於批准接受延長之期限，渠建議理事會考慮提議再延長 2 年，直到 2009 年 12 月 31 日。

1. 加拿大代表表示草案報告正確反映盧安達通知理事會，其想要進口 260,000 組由加拿大 Apotex 公司製造的 HIV/AIDS 三重組合(triple combination)治療藥。9 月 4 日，Apotex 提交第一個根據加拿大藥物獲取機制(Canada's Access to Medicines Regime)之強制授權申請案，9 月 19 日，專利局局長已授權 Apotex 製造並進口

此三重治療藥到盧安達。其代表團很樂於做為此決議所開始的制度下第一個核准強制授權的國家。此授權自核准之日起兩年有效，如果於初期所授權的藥品的量未輸出的話，Apotex 可要求再展期(renewal)兩年。其希望盧安達的通知可激勵其他國家跟進。加拿大當局已準備向其他有興趣的當事人解釋如何最佳利用此機制。

渠指出其代表團是第一個立法執行該決議的會員。基於自動檢視機制(automatic review mechanism)包括國內立法，已經以諮詢書面尋求公眾意見，議會委員會已舉行公聽會。此檢視現在已完成且政府即將完成擔保報告(ensuring report)，希望下次理事會能跟大家分享更多細節。

渠指出加拿大藥物獲取機制只是政府對處理開發中世界的公共衛生問題的廣泛回應之一部分。例如，2007 年預算已引進新的稅制來鼓勵藥品製造商提供更大量必需之藥物給開發中及低度開發國家。

關於延長對議定書批准接受之期限決議之提案，其代表團支持延至 2009 年 12 月 31 日，並鼓勵所有 WTO 會員於期限前完成其內部程序。

2. 烏甘達代表非洲集團發言，表示非洲集團完全贊同主席的提案。非洲集團已與首都密切合作以取得接受議定書的必要批准並希望其會員能儘快提交批准接受的文書，以使達到 2/3 會員批准接受此議定書的要求而使 TRIPS 修正生效。

其感謝加拿大代表對於期限延長之支持且同意非洲集團對於加拿大保留豁免直到關於議定書批准接受的程序完成的陳述表示支持，也表示非洲集團將繼續監控未提出想要使用此制度的會員之國內程序。

3. 盧安達代表表示根據 2003 年 8 月 30 日杜哈宣言第 6 段 TRIPS 協

定與公共衛生執行之決議，其代表團已通知 TRIPS 理事會，其希望進口固定數量之抗反轉錄病毒之藥品。其為第一個無製造能力的國家，來啟動使用 TRIPS 協定的豁免程序。由於加拿大已對國內公司核准強制授權以使其開始生產學名藥，該程序已開始推動。其表示已進行的步驟證明了 WTO 機構為公共衛生目的所協商的手段(instrument)已經運作。

4. 中國代表表示樂見盧安達使用該決議所建立之制度的努力以及盧安達和加拿大所提出的通知。這是測試該制度之有效性的有用嘗試，可幫助其他會員從此經驗中學習。咸信中國可以在原先的期限前通知其批准接受，但也支持期限再延長兩年。

渠樂見為執行此制度而已完成修改國內法之會員的通知，鼓勵其呈現其執行中的立法，包括如何處理所面臨的問題，因為開發國家會員於修改其相關國內法和法規以及了解其他會員的國內立法時正面臨技術問題。據此，渠樂見加拿大介紹其國內立法的檢視機制並期待在下次理事會會議加拿大的成果報告。

5. 歐盟代表表示樂見盧安達因想要使用此決議所建立制度之通知以及加拿大授權所關注藥品之製造和出口之快速回應。此重要的步驟證明此制度是可以運作的。渠鼓勵其他有需要的國家來使用此制度。說明其代表團已在 2006 年正式通過一法規來執行此制度，使歐洲公司於強制授權下可生產學名藥。

由於此議定書生效的門檻於 2007 年 12 月 1 日無法達到，其代表團支持將期限再延長兩年。渠告知理事會歐洲議會已即將同意對於 TRIPS 修正，則在歐盟部長理事會的最後批准後，其代表團就可以進行該議定書之批准接受的通知。其他尚未批准接受 WTO 會員應儘快確認(confirm)其對此程序的承諾(commitment)。

6. 挪威代表表示其代表團已準備同意延長批准接受的期限。其鼓勵尚未通知其批准接受之 WTO 會員儘最大的努力符合 2007 年 12

月原先的期限。

7. 瑞士代表表示支持草擬的報告以及主席延長議定書批准接受的期限兩年的提案。其遺憾表示，儘管許多代表團迫切將此豁免轉換成 2005 年 TRIPS 協定的修正，然這是必要的。其代表團希望此修正案可以在原先總理事會所設定的最初期限前生效。其鼓勵尚未接受此議定書的會員可完成其內部作業使此修正案在經延長的接受期限失效前生效。

其樂見盧安達和加拿大的通知並期望能進一步知道此制度如何運作。其代表團已於 2006 年通知其批准接受，於 2007 年 6 月議會已通過國內執行之立法並可能於 2008 年初生效。該立法引進根據 TRIPS 協定第 31 條 bis 修正草案和其附錄的條款和條件，核准為出口之目的之強制授權的可能性。

8. 主席提議理事會同意向總理事會提出延長會員批准接受議定書的期限至 2003 年 12 月 31 日的決議。其建議向總理事會提出的草擬報告第 10 段應修正為”就批准接受的現況，TRIPS 理事會向總理事會提出所附之延長議定書批准接受期限決議的提案”。

(五) 有關智慧財產權執行之議題 (TRIPS 協定第 3 篇) — 來自日本之溝通

主席表示此議題係依日本要求納入議程。主席首先請日本介紹其所提出關於智慧財產權的執行之 IP/C/W/501 號文件。

1. 日本表示，邊境的智慧財產權執行已經成為極具挑戰與複雜的問題，因此，現今的海關被期望扮演一個打擊全球仿冒與盜版的重要角色。本份文件旨在與其他會員分享日本在海關執行智慧財產權的經驗，介紹最近侵權的趨勢，並致力於提供會員一些對抗仿冒與盜版物品邊境管制措施的深刻見解 (insights)。

涉嫌侵權的進口物品被海關查扣的案件數量，在過去 5 年

來，約增加 3 倍，但在海關被查扣物品的數量卻維持相同的水準，這顯示小包運送侵權物品（small lots shipment of infringing goods）呈現大幅增加的趨勢，而以大量裝載方式運送（large shipment）侵權物品的情況為何，目前仍不是很清楚。

在這種趨勢下，以國際郵遞運送貨物之方式（international postal shipment）係運送被查扣仿冒與盜版物品的主要管道。這部分的原因在於電子商務的發展。

關於權利侵害的種類，商標權的侵害佔絕大部分，其次分別為專利權與著作權之侵害。而有關侵權商品的種類，日本海關查扣許多仿冒知名品牌的物品，絕大部分是皮包、鑰匙圈、衣服和手錶。

為解決這種情況，日本有 2 項政策，分別為對抗假冒為個人使用之走私物品的管制措施及提高海關官員專業之政策。關於對抗假冒為個人使用之走私物品的管制措施，日本加強對於以少量裝載方式運送侵權物品之執行。原則上，無論裝載數量的多寡，日本海關均會發動智慧財產權執行的運作。由於日本海關加強智慧財產權的執行，因此，成功查扣許多從海外郵政分支機構所寄送的侵權物品。除此之外，日本亦強化機構的能力（institutional capacity），例如東京海外郵政分支機構每年處理超過 1 萬件的案件，且有 8 位智慧財產權的專門官員。

關於提高海關官員專業之政策，可分為海關智慧資料庫系統（Customs Intelligent Database System；簡稱 CIS）與網內佈告欄系統（Intranet Bulletin Board System），以及人力資源發展。當海關第一線官員懷疑某批貨物含有仿冒與盜版物品時，其可以進入海關智慧資料庫系統，利用海關智

慧資料庫系統所累積的資料來確認該批貨物含有仿冒與盜版物品的風險。而最近所發展出來的智慧財產權執行網內佈告欄系統在分享資訊方面扮演一個很重要的角色。關於人力資源發展，日本海關的海關訓練機構(Customs Training Institute；簡稱CTI)負責海關的人力資源發展。該訓練機構提供海關官員包括智慧財產權等的不同專門知識。相關的訓練課程有智慧財產權執行的密集訓練課程，以及一般的訓練課程。透過智慧財產權執行的密集訓練課程，參加者學習到有關智慧財產權執行邊境管制措施的法律架構與重要的實務觀點。為使參加者更容易了解，在該課程結束後，亦提供案例的探討。

東京海關部門扮演統合日本所有海關分局關於智慧財產權執行議題且安排在職訓練課程的中央角色。

總之，日本海關以一些方式加強智慧財產權的執行，且充分體認到為解決仿冒與盜版物品問題，需要一個有彈性且平衡執行制度的重要性。

2. 美國認為依會員的書面請求，在 TRIPS 例會討論執行議題係合法的，且美國、歐盟、瑞士及日本國內經驗的交換，說明討論的方式可依照同樣的方式進行。針對日本所提的文件及所為之報告，美國提出下列問題：

- (1) 如何區別小包之運送及以大量裝載方式之運送？
- (2) 根據日本的文件及口頭報告，日本海關查扣侵權物品的案件數量增加，請問權利人申請海關先予查扣涉嫌侵害其權利之物品的數量是否有相對應的增加？
- (3) 日本所有的港口是否均可使用網內佈告欄系統？
- (4) 本份文件第 7 段所說的訓練研討會是否會每隔一段期間舉辦？當權利人有一項新產品上市並發現有仿

冒的趨勢時，可否自行開始舉行訓練研討會，以說明如何辨別真品與贗品？

3. 我國發言表示，感謝日本經驗的分享。日本文件指出仿冒與盜版物品交易的一些重要趨勢，例如透過國際郵遞服務的運送或假冒為個人使用的物品。這些趨勢的形成，部分原因在於電子商務的普及。我們認為會員值得注意其國內是否呈現相同的趨勢。此外，該文件亦分享一些打擊仿冒與盜版的重要手段，包括加強機關的能力、提高海關官員之專業、權利人之參與及相關資料庫之建置等。我們堅信透過會員經驗之交換有助於解決仿冒與盜版之問題（如附件 6）。

會後，美國向我國表示感謝且對我國發言的內容感到十分開心。

4. 加拿大表示，如果會員選擇在 TRIPS 例會分享其國內的智慧財產權執行經驗，會員提出的經驗分享對所有的會員來說，是非常有用的。特別是對加拿大的政府而言，因其已進行到標準檢視其智慧財產權執行制度的最後階段。二個不同的委員會最近正檢視仿冒與盜版對經濟及健康安全的影響。日本文件注意到由於電子商務的普及，使得海關之智慧財產權執行的邊境管制措施面臨挑戰，因此，有必要藉由訓練提升海關官員之專業，以成功查扣侵權之物品。全球性的仿冒與盜版影響所有 WTO 會員，會員可以從其他會員的經驗當中學習，因此，加拿大鼓勵會員在這一方面進一步合作，藉由經驗的分享，達到有效的智慧財產權執行。
5. 歐盟簡短說明日本文件內容非常有用，包括涉嫌侵權的進口物品被海關扣押的案件數量，在過去 5 年來，約增加 3

倍，但在海關被扣押物品的數量卻維持相同的水準、智慧財產權執行網內佈告欄系統在分享資訊方面扮演一個很重要的角色、提高海關官員之專業等，值得會員借鏡，且歐盟亦面臨侵權物品數量急遽增加之情況，因此，透過會員執行經驗之分享，將有助於打擊仿冒與盜版。。

6. 印度發言提醒會員注意 TRIPS 協定第三篇智慧財產權執行的相關規定，TRIPS 協定第 41.1 條規定：「...前述程序執行應避免對合法貿易造成障礙，並應提供防護措施以防止其濫用」；第 41.5 條規定：「會員瞭解，本篇所規定之執行，並不強制要求會員於其現有之司法執行系統之外，另行建立一套有關智慧財產權之執程序；亦不影響會員執行其一般國內法律之能力。本篇對會員而言，並不構成執行智慧財產權與執行其他國內法之人力及資源分配之義務」。
7. 巴西表示，其認為智慧財產權執行議題並非 TRIPS 例會之永久議程項目。日本 IP/C/W/501 號文件之內容並非是真正有關智慧財產權邊境執行的內容。巴西關心日本檢送文件內容之邊境管制措施的相關法令規定與實務是否符合 TRIPS 協定，這也就是為什麼在之前的會議，巴西表示會員有義務依 TRIPS 協定第 63 條透明化原則之規定，通知其邊境管制措施的相關法令規定，以檢視其是否符合 TRIPS 協定，此應成為會員討論的客體，因此，巴西向日本提出嚴重關切是否符合 TRIPS 協定的問題：

(1) TRIPS 協定第 41.1 條規定：「...前述程序執行應避免對合法貿易造成障礙，並應提供防護措施以防止其濫用」，日本邊境管制措施的相關法令規定與實務如何符合 TRIPS 協定的規定，其如何避免對合法貿易造成障礙，並應提供防護措施以防止其濫用？

- (2) 有關智慧財產權之執执行程序為司法程序，應由權利人發動，且依 TRIPS 協定第 41.2 條規定：「有關智慧財產權之執执行程序應公平且合理。其程序不應無謂的繁瑣或過於耗費，或予以不合理之時限或任意的遲延」。日本邊境管制措施的相關法令規定與實務如何符合 TRIPS 協定的規定，其如何確保智慧財產權之執执行程序對原告及被告均屬公平且合理？其如何確保智慧財產權之程序不應無謂的繁瑣或過於耗費，或予以不合理之時限或任意的遲延，特別是任意的遲延？
- (3) TRIPS 協定第 41.3 條規定係屬法院之職權，其規定：「就案件實體內容所作之決定應儘可能以書面為之，並載明理由，而且至少應使涉案當事人均能迅速取得該書面；前揭決定，僅能依據已予當事人答辯機會之證據為之」；TRIPS 協定第 41.4 條規定：「當事人應有權請求司法機關就其案件最終行政決定為審查，並至少在合於會員有關案件重要性的管轄規定條件下，請求司法機關就初級司法實體判決之法律見解予以審查」。日本邊境管制措施的相關法令規定與實務如何符合 TRIPS 協定該條之規定？日本海關所扣押之涉嫌侵權的進口物品，如何確認該等物品的確是侵權或非侵權的物品？確認的過程當中，如何確保該決定，僅能依據已予當事人答辯機會之證據為之？其相關法令與實務是否符合前述 TRIPS 協定第 41.3 條及第 41.4 條的規定？
- (4) TRIPS 協定第 41.5 條規定：「會員瞭解，本篇所規定之執行，並不強制要求會員於其現有之司法執行系統

之外，另行建立一套有關智慧財產權之執程序；亦不影響會員執行其一般國內法律之能力。本篇對會員而言，並不構成執行智慧財產權與執行其他國內法之人力及資源分配之義務」，日本邊境管制措施的相關法令規定與實務如何符合 TRIPS 協定的規定？

- (5) TRIPS 協定第 42 條公平及衡平之程序規定，會員應賦予權利人行使本協定所涵蓋之智慧財產權之民事訴訟程序之權利，所以，智慧財產權之執程序應由權利人發動；TRIPS 協定第 42 條公平及衡平之程序規定：「...被告有被及時以書面詳細告知其被告之理由及其他相關細節之權利。雙方當事人均得委任獨立之律師代理訴訟，且訴訟程序於當事人必須親自到庭之相關規定上，不得使當事人增加無謂之負擔...」，日本邊境管制措施的相關法令規定與實務如何符合 TRIPS 協定的規定？
- (6) TRIPS 協定第 43 條有關證據之規定；TRIPS 協定第 44 條禁制令之規定，為基礎的條文，日本說其所提出之文件內容為 TRIPS 協定第 3 篇智慧財產權之執行，然而，TRIPS 協定第 44 條規定亦屬司法機關而非海關之職權，其規定：「司法機關應有權命當事人停止侵害行為，特別係在於涉有侵害智慧財產權之進口物品，於結關後立即阻止其進入司法管轄區域內之商業管道」，日本文件第 2 段顯示對涉有侵害智慧財產權之進口物品，於結關前，日本海關即依職權將涉有侵害智慧財產權之進口物品予以查扣，但依 TRIPS 協定第 44 條規定，會員對涉有侵害智慧財產權之進口物品，僅有於結關後立即阻止其進入司法管轄區域

內之商業管道的義務，且其係屬司法機關而非海關之職權。

- (7) TRIPS 協定第 45 條規定：「司法機關對於明知，或可得而知之情況下，侵害他人智慧財產權之行為人，應令其對權利人因其侵權行為所受之損害，給付相當之賠償...」；第 46 條規定：「...司法機關對於經其認定為侵害智慧財產權之物品，應有權在無任何形式之補償下，以避免對權利人造成任何損害之方式，命於商業管道外處分之，或在不違反其現行憲法之規定下，予以銷毀，司法機關對於主要用於製造侵害物品之原料與器具，亦應有權在無任何形式之補償下，以將再為侵害之危險減至最低之方式，命於商業管道外處分之。在斟酌前述請求時，侵害行為之嚴重性，所命之救濟方式及第三人利益間之比例原則應納入考量...」。日本海關邊境管制措施的相關法令規定與實務如何符合 TRIPS 協定第 2 節的規定？日本海關查扣以少量裝載方式運送之侵權物品，是否考量侵害行為之嚴重性，所命之救濟方式及第三人利益間之比例原則？
- (8) TRIPS 協定第 48 條規定：「對於濫用保護執行程序，並要求採取措施，致造成他方當事人之行為受到限制或禁制者，司法機關應命前者賠償後者所受到之損害；司法機關亦應命其賠償被告所支出之費用，該費用並得包括適當的律師費」，如果濫用保護執行程序，致造成他方當事人之行為受到限制或禁制，日本海關如何進行對被告之賠償？日本海關如何賠償被告所支出之費用，該費用並得包括適當的律師費？

- (9) TRIPS 協定第 3 篇第 3 節暫時性措施規定均屬司法機關之職權，日本海關邊境管制措施的相關法令規定與實務，如何符合 TRIPS 協定的規定？特別是第 50.3 條規定，司法機關應有權要求聲請人提出其可獲得之合理有效之證據，俾可適度地證明其係權利人，而且其權利正遭受侵害或有受侵害之虞，並且得命令聲請人提供足夠之擔保，以保護被告及防止聲請人濫用權利。日本海關如何要求聲請人提出其可獲得之合理有效之證據，俾可適度地證明其係權利人，而且其權利正遭受侵害或有受侵害之虞，並且得命令聲請人提供足夠之擔保，以保護被告及防止聲請人濫用權利？
- (10) TRIPS 協定第 50.6 條規定：「於不影響第 4 項規定之前提下，依第 1 項及第 2 項實施之暫時措施，如未於原作成暫時性措施之司法機關，在該會員法律允許情況下所指定之合理期限內訴請就實體部分進行審理，應依被告之請求而予以撤銷或停止效力。如無司法機關之此種對期限之決定，則應在未逾 20 個工作日或 31 個曆日之內提起，但以較長者為準」，此意謂著日本海關未在合理期限內或 20 個工作日或 31 個曆日之內，以較長者為準，訴請就實體部分進行審理，應依被告之請求而予以撤銷或停止日本海關對涉有侵害智慧財產權之進口物品，阻止其進入司法管轄區域內之商業管道的邊境管制措施。日本海關邊境管制措施的相關法令規定與實務，如何符合 TRIPS 協定第 50.6 條規定的規定？
- (11) TRIPS 協定第 50.8 條規定：「暫時性措施可由行政機關以行政程序為之者，該程序應符合本節之原則」，

因此，暫時性措施即使由行政機關-日本海關，以行政程序為之，該程序仍應符合本節之原則。

(12)TRIPS 協定第 51 條規定，會員應依照下述規定，訂定程序，俾使有正當理由懷疑進口物品有仿冒商標或侵害著作權之權利人，而非海關，得以書面向行政或司法主管機關提出申請，要求海關對此類物品暫不放行。該條文背後隱含美國向日本提問關於隨著日本海關查扣侵權物品的數量增加，而權利人申請海關先予查扣涉嫌侵害其權利之物品的數量是否有相對應增加的問題，這也是巴西要向日本詢問的問題。日本海關邊境管制措施的相關法令規定與實務，如何符合 TRIPS 協定的規定？

(13)TRIPS 協定第 52 條規定，會員應要求權利人於依第 51 條規定提出申請時，需向主管機關提出足以推定在進口國法律之下有侵害權利人智慧財產權之表面證據，並就有關物品提供詳細說明，俾使海關易於辨認。日本海關邊境管制措施的相關法令規定與實務，如何符合 TRIPS 協定第 52 條之規定。

(14)TRIPS 協定第 53 條規定，主管機關應有權要求申請人提供足夠之保證金或相當之擔保，以保護被告及主管機關，並防止其濫用權利。日本海關邊境管制措施是否要求申請人須提供足夠之保證金或相當之擔保，以保護被告及主管機關，並防止其濫用權利？

(15)TRIPS 協定第 54 條規定，依第 51 條對貨品暫不予放行者，應立即通知進口商及申請人；TRIPS 協定第 55 條規定，自申請人受暫不放行通知送達後 10 個工作日內，海關未被告知該案已由被告以外之一方已就

該案之實體部分提起訴訟，或該案業經法律授權機關採取臨時措施予以延長留置期間，如該項物品已符合其他進口或出口之規定者，海關應予放行；在適當情況下，前述期間可再予延長 10 個工作日。該等規定旨在避免對合法貿易造成障礙。日本海關邊境管制措施的相關法令規定與實務，如何符合 TRIPS 協定有關暫不放行通知及期限之規定，是否考量避免對合法貿易造成障礙？

(16)TRIPS 協定第 56 條規定，因錯誤扣押或扣押後依第 55 條規定放行，對進口商、收貨人及物主造成損害者，相關機關應令申請人給付適當之賠償。其中錯誤扣押即為巴西詢問日本的問題；TRIPS 協定第 57 條規定，會員應授權主管機關，於不損及保護機密資料之情況下，給予權利人充分之機會，對海關所查扣之物品進行檢視，俾證實其指控。主管機關亦應有權給予進口商同等檢視物品之機會。倘就案件實體部分已作成肯定之裁決時，會員得授權主管機關，將發貨人、進口商及收貨人之姓名及地址，以及有關物品之數量通知權利人。日本海關邊境管制措施的相關法令規定與實務，如何符合 TRIPS 協定有關對進口商及物主之賠償及檢視權利及通知之規定？

(17)TRIPS 協定第 58 條有關依職權行為之規定，日本有關海關邊境管制措施之文件即為 TRIPS 協定第 58 條有關依職權之行為。該條規定，倘會員要求其主管機關主動採取措施，並要求其對於表面證據顯示有侵害智慧財產權之貨品暫不放行者：

甲、 主管機關得隨時要求權利人提供資料，以協助

其行使職權。

乙、採取暫不放行措施時，應立即通知進口商及權利人。進口商就該項暫不放行措施向主管機關提出申覆時，應準用第 55 條之規定。

丙、會員應僅於主管機關及公務員基於善意採行或意圖採行適當救濟措施時，始得免除其法律責任。

(18)TRIPS 協定第 58 條所規定的是貨品暫不放行 (to suspend the release of goods)，而非進口貨品暫不放行 (to suspend the release of importation goods)。

(19)TRIPS 協定第 59 條規定，在不損及權利人採取其他訴訟之權利，以及被告尋求司法機關審查之權利之前提下，主管機關有權命依照第 46 條所揭禁之原則銷燬或處置侵害智慧財產權之物品。對於仿冒商標物品，主管機關除特殊情況外，不得允許該侵權物品未作改變狀態下，或適用不同之海關程序再出口；TRIPS 協定第 60 條規定，會員對於旅客個人行李或小包寄送無商業性質之少量物品，得免除上述條款之適用。日本海關邊境管制措施的相關法令規定與實務，如何符合 TRIPS 協定之規定？

巴西並表示，執行議題在 WIPO 已有討論，不應重複討論，巴西願意在 WIPO 參與討論執行議題。

8. 中國發言表示不贊成此議題在例會報告。中國及開發中國家在 6 月份的會議均已表示不贊成此議題在例會報告。某些會員在 TRIPS 例會提出文件，但其並未釐清提出文件之目的為何，如果目的僅是提供資訊性質，那麼中國鼓勵那些會員依 TRIPS 第 63 條規定通知其國內法令。如果目的是

企圖要建立某種國內的慣例 (national practice)，則其並非係 TRIPS 例會授權的範圍。中國要求那些會員釐清其提出文件的真正目的。執行 IPR 並非為一個獨立的議題不應該分離出來討論，否則有違 TRIPS 第 7 條規定所揭示之原則。

9. 瑞士表示，贊成在 TRIPS 例會討論執行議題，且會員交換國內執行經驗是非常好的，因會員彼此之間可以互相學習。此外，瑞士詢問日本，如果權利人未進行後續的程序，其海關要將所查扣的可疑侵權物品予以放行，是否每一件均會通知權利人？再者，日本亦提到以小包運送侵權物品呈現大幅增加的趨勢，且有假冒個人使用之走私物品的情況，但 TRIPS 協定第 60 條卻規定，會員對於旅客個人行李或小包寄送無商業性質之少量物品，得免除上述條款之適用，因此，瑞士打算修改智慧財產權的法律，該法律將規定旅客個人行李或小包寄送之少量物品，仍有適用邊境管制措施之可能。回應會員於上一次會議對瑞士 IP/C/W/492 號溝通文件之提問，首先，關於會員希望有更多關於瑞士海關官員已經找到某種非常容易使用的檢查清單的資訊。該檢查清單對辨別真品與贗品特別有用。該檢查清單關於如何辨別真品與贗品的資訊係由權利人向海關申請查扣時所提供。會員提供辨別真品與贗品的圖片給海關官員，使海關官員更容易辨別真品與贗品，對海關的邊境管制措施相當有助益。海關官員或權利人提供該檢查清單上的資訊並未要求有一定的格式。而針對藉由海關集中化資料庫 (centralized database) 的方式，促進地區及國際合作的建議，會員詢問瑞士誰來發展並維護該權利人及所有 WTO 會員海關可以進入的資料庫？瑞士對此尚未有很細部的規劃與想法，該問題可在 TRIPS 例會討論，以建置符合權利人

及所有 WTO 會員海關需求的資料庫。最後關於偽藥問題，不一定要由權利人申請才可以查扣及銷毀。海關一旦查扣偽藥就會通知海關主管機關。如果權利人申請查扣偽藥，當海關查扣偽藥時，會通知權利人並將通知副本寄給瑞士負責藥品銷售核准與管理的 Swissmedic。原則上，針對被查扣的偽藥，權利人會申請銷毀偽藥。如果權利人未申請查扣偽藥，且海關沒有任何有關權利人的資料，當有消息來源顯示即將有偽藥運送至瑞士邊境時，會通知

Swissmedic 查扣，Swissmedic 將會決定所查扣的藥品是否為偽藥。如果是偽藥，海關主管機關將會銷燬之。還有，瑞士將繼續回應會員對其溝通文件的提問，且再次強調在 TRIPS 例會討論執行議題並不會損害會員依 TRIPS 第 1.1 條所賦予會員的彈性，也不會影響會員在 TRIPS 的權利與義務。

10. 日本表示感謝會員許多的評論。首先，日本的相關法令已通過 TRIPS 的檢視，符合 TRIPS 協定的規定。針對美國所提出的問題，有關如何區別小包之運送及以大量裝載方式之運送，實務上，日本認為以國際郵遞運送貨物之方式（international postal shipment）即為小包之運送。而關於日本所有的港口的海關是否均可使用網內佈告欄系統問題，其實任何日本的海關官員均可利用網內的網路連接網內佈告欄系統。
11. 歐盟表示，依 TRIPS 協定第 68 條規定，TRIPS 理事會應仔細檢查會員是否遵行 TRIPS 協定執行的條款，所以，在 TRIPS 例會討論執行議題是合適的。
12. 中國表示，依 TRIPS 協定，檢查或修改 TRIPS 條款，以使執行較為有效，並非 TRIPS 理事會之職責，因 TRIPS 協定

並未授權。任何會員若對特定會員如何執行 TRIPS 協定有疑問或關切，已有適當之解決機制，例如依 TRIPS 協定第 63 條執行法律之檢視或爭端解決機制處理。

13. 巴西表示，其對繼續討論日本邊境管制措施是否符合 TRIPS 協定的爭議深感興趣，且認為應在 TRIPS 協定第 63 條底下討論。此外，不應單獨解讀 TRIPS 協定第 68 條的規定，應從 TRIPS 協定的整體來解釋 TRIPS 協定第 68 條的規定。

參、葡萄酒與烈酒地理標示多邊通知及註冊制度聯合提案個別會議

葡萄酒與烈酒地理標示多邊通知及註冊制度聯合提案個別會議由巴基斯坦籍主席 Mr. Manzoor Ahmad 主持，另 WTO 副秘書長 Mr. Rufus Yerxa 亦與會，主席說明有關葡萄酒及烈酒多邊通知與註冊制度的談判一直沒有進展，希望在這個會議中看到讓步。

會議開始首先由澳洲報告其中午與歐盟會談的內容，亦即歐盟表示其有關葡萄酒與烈酒地理標示多邊通知與註冊制度的提案會在以下作出讓步：

1. 有限制的自願參加，亦即葡萄酒與烈酒貿易量占一定比例的會員強制參加，其他會員則可以選擇是否參加。
2. 刪除異議（Reservation）制度，且註冊的法律效果為可推翻的推定效力（rebuttable presumption）（原本是不可推翻的推定效力（irrebuttable presumption））
3. 鼓勵非參加會員查閱資料庫

聯合提案會員對此表示，針對歐盟新的構想，其願意參與討論，惟需要歐盟以書面正式提出文件，其才能評估或對該新構想提出意見，但對歐盟第 2 點的讓步，聯合提案會員表示關切而無

法接受推定效力所產生舉證責任轉換的問題，且如何評估「貿易量占一定的比例」。哥斯大黎加甚至表示第 2 點不是讓步，而是更糟，因移除 Reservation 後，仍有推定的效力。

我國則發言表示，有關葡萄酒與烈酒地理標示多邊通知及註冊制度，我們有下列 3 點的意見（如附件 7）：

1. 歐盟未以書面正式提出其所謂的歐盟提案修正版本，使得我們很難對此作出評估，例如，如何界定參加的門檻？該多邊通知及註冊制度對非參加會員的效力為何？此外，針對歐盟原先的提案，我們已經表達過對該提案違反屬地原則的關切。歐盟現在口頭表示他們願意刪除異議，且註冊的法律效果為可推翻的推定效力。沒有書面完整的提案，我們不能確定這樣新的設計是否能夠解決前述我們根本的關切。所以，我們建議主席鼓勵歐盟以書面提出他的修正版本。
2. 對歐盟似乎不願意參與有關聯合提案的討論，我們感到失望。我們認為如果歐盟可以對聯合提案給予非常詳細的評論，那麼他將會了解到聯合提案的優點，且針對歐盟的關切與評論，我們也會試著修改我們的提案。然後，這才較有可能在此協商當中尋求妥協。我們想要建議主席鼓勵歐盟參與有關聯合提案的討論。
3. 第 3 點是有關程序的問題。由於早上的小團體會議係由歐盟所發起，因此，該問題也許應向歐盟提出較為直接。我們想要表達這個議題對我們而言相當重要。我國不僅是葡萄酒與烈酒的生產國，也是外國葡萄酒與烈酒的重要市場。例如，關於蘇格蘭威士忌酒，我國持續排名在前 5 大市場之內，且歐盟、美國與澳洲所產的葡萄酒與烈酒，我國總是排名在前 10 大出口市場之內。因此，我們相信

在所有相關的諮詢會議上，我們均應被邀請參與，同時，也建議主席舉行開放式的會議，以提高該協商的透明性。

令人感到詫異的是，主席最後以試探的口氣，詢問聯合提案會員是否可以接受聯合提案的葡萄酒與烈酒地理標示多邊通知註冊制度加上地理標示的擴大保護，加拿大表示無法接受。然後，主席宣布散會。

肆、參加研討會及雙邊會談情形

一、 10月22日下午與WTO秘書處 Mrs. Jayashree Watal 參事就 CBD 等議題交換意見

1. 我方詢問因 CBD 與地理標示擴大議題爭議很大，未來有否可能將 CBD 與地理標示議題拉到下一回合繼續談判？Watal 參事回答有此可能，將其做為新的談判議題。
2. 關於市場上購買的遺傳資源是否要揭露原產國（the origin）的問題，我方詢問巴西印度好像不太願意正面回答，對此，Watal 參事認為在開發中國家的提案中已有說明，應該不須揭露原產國，只須揭露來源（the source），並認為未來可能有極大部分的例子會主張係在市場購買，則如此更難獲得利益分享，此恐有違開發中國家原先的立意。
3. 有關葡萄酒與烈酒地理標示的多邊通知與註冊制度，我方認為目前不會有主席的草案版本，對此，Watal 參事深表贊同。

二、 10月23日上午與澳洲雙邊會談：

當日上午我國與澳洲負責地理標示議題之代表於例會開會前進行雙邊會談，因澳方須續與美國雙邊會談，因此，我國與澳洲會談時間約 15 分鐘。

本團表示，據悉 24 日上午有小團體會議，惟本團未被邀請，爰探詢澳洲對此會議之瞭解。澳方表示，據瞭解該會議係歐盟邀集美國、加拿大、澳洲、紐西蘭，阿根廷，智利，印度、日本、瑞士、香港，中國、奈及利亞、巴西進行會談，並邀請 TRIPS 特別會議主席主持。澳方猜測歐盟對其多邊通知與註冊制度的提案會有所讓步，內容可能包括廢除異議制度 (reservation)、有條件的自願參加等。

本團另與澳洲就 24 日下午 4 時由 TRIPS 特別會議主席與聯合提案會員小團體會議之可能進行方向交換意見。澳方預期主席將詢問聯合提案之讓步底限，澳方認為聯合提案會員還是需表達聯合提案是最好的提案，且無法接受主席版本的折衷方案，該折衷方案可能是香港提案，因香港提案還是有推定的效力。我方認為，目前主席目前不會提出折衷方案，且香港提案並非折衷方案，因與歐盟相較，聯合提案會員還比較可能可以接受香港提案，原因是香港提案允許自願參加，聯合提案會員頂多選擇不參加該制度即可。澳洲表示贊同，但她認為主席版本會往歐盟提案靠近。

澳洲進一步表示，若採歐盟提案，則澳洲須修改現行地理標示保護制度，此對執行實務將產生極大負擔。澳方並詢問我國如何處理酒類地理標示之申請案件。我方說明我國係以商標法之證明標章對地理標示進行積極註冊之保護，申請人向經濟部智慧財產局提出證明標章註冊申請案件。至於酒類地理標示之標示管理則由財政部國庫署負責。目前台灣不僅生產葡萄酒，亦有受消費者歡迎之烈酒，例如金門高粱酒等。

三、 10 月 23 日下午與日本雙邊會談：

1. 日方認為關於錯誤核准專利和 CBD 議題應該分開處理的，然而現在已經被混淆。其認為專利制度不應該被

CBD 義務所影響。

2. 我方請問根據其資料庫的構想，審查委員如何引用資料庫的資料來作為先前技術？日方提到若有些資料是不對外公開，則可引用部分資訊通知申請人，我方反問若資料庫中的資料不能被公開，則如何據以作為核駁？日方說這是一個好問題，需要再詳加研究，也許可以詢問資料庫中所顯示的原產國是否可提供其他已公開的資料。
3. 我方另請問是否由 WIPO 來建置此資料庫，較能克服一些技術問題，例如資料庫的格式及語言問題等，日方認為各國對其國內的遺傳資源較瞭解，所以由各國建立較為適當，此外主要是考慮經費問題，WIPO 可能無法負擔此問題。
4. 我方向日方表達若以 WIPO 為入口網站，我方恐無法使用該資料庫之關切。
5. 有關擴大地理標示保護之立場，我方詢問日方是否支持擴大地理標示保護，日方表示目前其立場仍維持中立。
6. 我方詢問日本，有關 24 日早上，歐盟是否有邀請其參加小團體的會議，該會議可能討論的內容為何？日方表示，會後會打電話告訴我們。

四、 10 月 21 日上午 9 時參加由貿易及永續發展國際貿易中心 (ICTSD) 舉辦之「開發中國家之智慧財產權與清潔能源科技取得」研討會：

為了對抗全球暖化，開發中國家想要減少溫室氣體的排放，然須要得到新技術來達到此目的，基此，聯合國氣候變遷架構公約 (United Nations Framework Convention on Climate Change) 呼籲已開發國家以技術移轉來幫助開發中國家。但開發中國家憂慮智慧財產權之潛在障礙可能會使得清潔能源科技

之取得變得困難。為了使更了解智慧財產權的執行對這些科技取得之影響，ICTSD 召集此對話。其目的是檢討並討論此份受委託之研究的結果。

首先由進行此項研究之 John H. Barton 教授進行報告，主要檢視三項產業的架構，包括太陽能光電（photo-voltaic, 簡稱 PV）、生物能源（bio-mass for fuel）和風力（wind energy）。分別從該產業於開發中國家及已開發國家的技術發展現況、專利的持有情形及技術移轉的可能性來討論，其認為能源科技的特性與醫藥領域不同，能源科技的開發經常由政府經費補助，其技術較不會被少數人持有的專利所壟斷，最後結論認為智慧財產權對於清潔能源科技之取得，應不是大問題。接下來分別由中國、巴西、監控及永續發展協會及聯合國氣候變遷架構公約等代表分別提出評論。

伍、心得及建議

- 一、 關於 TRIPS 與 CBD 之關係的議題，目前共有四種提案，五種立場，各會員意見仍然分歧。但有越來越多的開發中國家支持印度、巴西等會員的提案，贊成修改 TRIPS 條文，我國應特別留意未來的發展趨勢，特別是此議題也會在其他國際論壇如 WIPO, CBD 會議中討論，也要觀察在其他論壇的發展，以為適當因應。同時，針對我國對挪威提案、瑞士對日本資料庫提案及澳洲對秘魯提案之提問，於下次 TRIPS 例會開會前，留意是否有相關回應文件提出，例如挪威代表對我國私下表示，針對上次會議我國之提問，其回覆將以 WTO 文件提出。
- 二、 在葡萄酒與烈酒地理標示多邊通知及註冊制度議題方面，歐盟針對其有關葡萄酒與烈酒地理標示多邊通知及註

冊制度，在其發起的小團體會議上已口頭表示作出以下讓步：1.有限制的自願參加，亦即葡萄酒與烈酒貿易量占一定比例的會員強制參加，其他會員則可以選擇是否參加；2.刪除異議（Reservation）制度，且註冊的法律效果為可推翻的推定效力（rebuttable presumption）（原本是不可推翻的推定效力（irrebuttable presumption））；3.鼓勵非參加會員查閱資料庫。歐盟希望聯合提案也能有所讓步，而聯合提案會員的回應是，歐盟須以書面完整的提出修正版本，否則其無法評估歐盟修正版本的內容及其對 WTO 會員所造成權利與義務平衡間的影響，且從歐盟讓步的內容觀之，最無法令聯合提案會員接受的是，葡萄酒與烈酒地理標示多邊註冊的效力，即註冊後所產生之可被推翻的推定效力，因此會產生舉證責任轉換的問題，同時違反屬地原則。未來歐盟若以書面正式提出完整的修正版本，我國須仔細研究可讓步的空間為何，因我國葡萄酒與烈酒的貿易量向來排名在全世界十名以內，依歐盟讓步的第 1 點內容觀之，我國勢必被要求強制參加歐盟提案修正版本的葡萄酒與烈酒地理標示多邊通知及註冊制度，對我國的影響很大。

- 三、 我國雖非世界酒類主要出口國，惟為酒類主要消費國之一，擁有酒類地理標示較多之會員如歐盟，持續關切我國如何保護酒類地理標示。針對「葡萄酒及烈酒地理標示多邊通知及註冊制度」議題之立場，目前國際上尚未形成共識，國內宜加強本議題之其他提案之認識，並積極參與相關國際會議，以避免因錯失諮商談判良機而增加國家過大行政負擔，並有助於提升我國在地理標示領域之地位。
- 四、 在智慧財產權執行議題方面，由於民國 96 年 10 月 16 日

舉行的國際經貿策略聯盟布局工作小組智慧財產權工作分組第 21 次會議決議，鑒於我國在保護智慧財產權之執行現況及成效良好，請本局洽財政部關稅總局考量是否於下次 WTO/TRIPS 理事會中就我國邊境管制措施提出報告，與各會員進行經驗分享。然而，這次 TRIPS 例會當中，許多會員紛紛針對日本所提出關於其國內邊境管制措施的執行經驗，提出包括 TRIPS 協定第 3 篇智慧財產權執行條文等相當技術與專業的問題，因此，建議我國與會人員分享國內執行經驗前，須先加強相關的專業知識，並參考會員對日本的提問內容，思考如何準備我國要報告的內容。此外，要去報告的同仁若從未參加過 TRIPS 例會，建議在報告前先去參加該會議，以了解整個會議進行的程序。

- 五、 在中國大陸入會過渡檢討機制方面，中國大陸此次雖拒絕回答與中美 WTO 爭端解決案件相關之提問，然針對該相關之提問，因我國係以第三國身份參與該爭端解決案件，故有必要深入了解中國大陸相關規定，並檢視該等規定是否的確違反 TRIPS 協定之規定，同時須密切注意與研究原告美國及被告中國大陸針對該爭端案件所提出之主張，以適時提出我國之意見。此外，同樣以第三國身份參與該爭端解決案件的日本、歐盟、墨西哥及阿根廷所提出意見，亦須密切注意。
- 六、 WTO 為我國目前最能發揮之國際經貿舞台，參加本項會議後，深感具有處理國際事務能力之重要（包括語言之使用、對各協定或議題之了解等），建議可多鼓勵同仁參與 WTO/TRIPS 協定或其他國際經貿事務課程，俾能加深對其之認識，並有效地運用俾維護我國相關利益。

陸、附件

附件 1、會議議程

附件 2、我國參加 TRIPS 會議代表團行程表

附件 3、會議紀錄

附件 4、「中國大陸入會過渡檢討機制」美國、日本、歐盟書面提問
簡譯

附件 5、「TRIPS 協定與 CBD 關聯性」我國代表發言稿

附件 6、「有關智慧財產權執行之議題（TRIPS 協定第 3 篇）－來自
日本之溝通」我國代表發言稿

附件 7、「葡萄酒與烈酒地理標示多邊通知及註冊制度聯合提案個別
會議」我國代表發言稿

附件 1、會議議程

WTO/AIR/3074/REV.1

4 OCTOBER 2007

SUBJECT: COUNCIL FOR TRIPS

THE NEXT MEETING OF THE COUNCIL FOR TRIPS WILL BE HELD IN THE CENTRE WILLIAM RAPPARD ON 23-24 OCTOBER. THE MEETING WILL START AT 10 A.M. ON TUESDAY, 23 OCTOBER.

FOLLOWING A WRITTEN REQUEST FROM JAPAN, DATED 28 SEPTEMBER 2007, ITEM M HAS BEEN ADDED TO THE ITEMS PROPOSED FOR THE AGENDA, WHICH ARE NOW AS FOLLOWS:

NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

REVIEWS OF NATIONAL IMPLEMENTING LEGISLATION

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

REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)

RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY

PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

REVIEW UNDER PARAGRAPH 8 OF THE DECISION ON THE IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

NON-VIOLATION AND SITUATION COMPLAINTS

REVIEW OF IMPLEMENTATION OF THE TRIPS AGREEMENT UNDER ARTICLE 71.1

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

FIFTH ANNUAL REVIEW UNDER PARAGRAPH 2 OF THE DECISION ON THE IMPLEMENTATION OF ARTICLE 66.2 OF THE TRIPS AGREEMENT

TECHNICAL COOPERATION AND CAPACITY-BUILDING

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (PART III OF THE TRIPS AGREEMENT) - COMMUNICATION FROM JAPAN

INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

ANNUAL REPORT TO THE GENERAL COUNCIL

OTHER BUSINESS

IT IS RECALLED THAT PARAGRAPH 19 OF THE DOHA MINISTERIAL DECLARATION PROVIDES THAT THE COUNCIL, IN UNDERTAKING THE WORK PROVIDED FOR IN THAT PARAGRAPH, SHALL BE GUIDED BY THE OBJECTIVES AND PRINCIPLES SET OUT IN ARTICLES 7 AND 8 OF THE TRIPS AGREEMENT AND SHALL TAKE FULLY INTO ACCOUNT THE DEVELOPMENT DIMENSION.

MEMBERS OF THE WTO, OTHER GOVERNMENTS WITH OBSERVER STATUS AND INTERNATIONAL ORGANIZATIONS WITH OBSERVER STATUS ARE REQUESTED TO INFORM THE SECRETARIAT OF THE NAMES OF THEIR REPRESENTATIVES AS SOON AS POSSIBLE.

PASCAL LAMY

TRIPS 會議代表團行程表

成員：經濟部智慧財產局張瓊惠商標審查官、莊智惠專利審查官、陳宏杰商標助理審查官、財政部國庫署員旭潔稽核、賴欣憶專員

| 日期/時間 | 活動內容 | 備註 |
|---|--|---------------------------------------|
| 10/21(日) 13:00 | 張商標審查官等 5 人抵達 接機：徐秘書崇欽 | LH3664 從法蘭克福到日內瓦 |
| | 旅館 check-in | Nash Airport Hotel Cityhostel(陳'r) |
| 10/22(一) 09:00 – 12:00 13:30 – 15:30 15:30 – 21:00 | 莊智惠專利審查官參加 ICTSD 舉辦之「IP and Access to Clean Energy Tech in Developing Countries」對話 本團：劉秘書志宏、徐秘書崇欽 | WMO, Room C2 |
| | 與 WTO 秘書處參事 Jayashree Watal 餐敘 | Han-Lung 餐廳 |
| | 工作會議 | 本團 |
| 10/23(二) 09:30 – 10:00 10:00 – 13:00 13:00 – 15:00 15:00 – 18:00 18:00 – 19:00 | 與澳洲代表團雙邊會談 | WTO |
| | TRIPS 理事會正式會議 | WTO |
| | 林大使工作餐會 本團：魏公使可銘、徐秘書崇欽 | Perle du Lac 餐廳 |
| | TRIPS 理事會正式會議 | WTO |
| | 與日本代表團雙邊會談 | WTO |
| 10/24(三) 10:00 – 13:00 16:00 – 16:30 | TRIPS 理事會正式會議 | WTO |
| | 與 TRIPS 特別會議主席及 WTO 副秘書長 Mr. Rufus Yerxa 小團體會議 | WTO |
| 10/25(四) 09:55 | 張商標審查官等 5 人搭機離開日內瓦 送機：徐秘書崇欽 | LH3661 從日內瓦到法蘭克福 |

手機號碼：徐崇欽:+41-79-357-3537 (在瑞士境內用一般電話打 079-357-3537)

**WORLD TRADE
ORGANIZATION**

RESTRICTED

IP/C/M/55

21 December 2007

(07-5760)

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

minutes of meeting

Held in the Centre William Rappard on 23-24 October 2007

Chairman: Ambassador Yonov Agah (Nigeria)

The present document contains the record of the discussion which took place during the TRIPS Council meeting held on 23-24 October 2007.

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1. In proposing the agenda for adoption, the Chairman said that item M on "Enforcement of Intellectual Property Rights (Part III of the Agreement) – Communication from Japan" had been put on the proposed agenda at the written request of the delegation of Japan, dated 28 September 2007. He proposed that the Council adopt the agenda as proposed.

2. The representative of Brazil said that the title of the Japanese submission "Enforcement of Intellectual Property Rights (Part III of the Agreement) – Communication from Japan" was not adequate as it did not reflect the content of the submission. As the document contained information on border measures taken by the Japanese Government, and governments did not themselves enforce IPRs, the document did not actually deal with enforcement. Intellectual property rights were private rights and were enforced by the owners or holders of these rights and not governments. His delegation had a reservation regarding the inclusion of item M in the agenda and with the practice of certain countries to coordinate positions and alternate in presenting submissions on this issue, in order to create an impression of permanence of this item on the agenda. His delegation did not agree with this practice and maintained that enforcement was not a permanent item on the Council's agenda.

3. The representative of China agreed with Brazil and said that it had always been the understanding of China and other developing Members that enforcement was a temporary item on the Council's agenda. The item did not become a permanent item only because several developed country Members continued to make submissions on the issue. It was his delegation's firm belief that discussions on enforcement were inconsistent with the spirit of Articles 1.1 and 41 of the TRIPS Agreement, which provided that Members could determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice. Article 1.1 was a recognition of the relationship between appropriate protection of IPRs and the economic and social development objectives of developing countries and this broader context for TRIPS should be respected by all Members.

4. He said that there were already many important issues on the Council's agenda, such as the relationship between IPR protection and transfer of technology, TRIPS and public health, and the relationship between TRIPS and the Convention on Biological Diversity (CBD), as well as the protection of traditional knowledge and folklore. These were mandated items in need of focused discussion and Members had no time to deal with issues outside the existing mandate. There had already been a considerable degree of duplication with WIPO activities and with initiatives regarding border measures within the WCO and Interpol. China urged developed country Members to respect the opinion of many developing country Members that the heading of enforcement did not fall within the mandate of the Council, and to cease further tilting the balance of TRIPS implementation in favour of developed countries. China's respect for the proposed agenda at this time was without prejudice to its position that there should not be any substantial position under this agenda item.

5. The representative of Argentina said that it was her understanding that the item was not a permanent item on the Council's agenda.

6. The representative of India said that, while his delegation could accept the agenda as proposed in WTO/AIR/3074/Rev.1, he wished to clarify that this acceptance of the inclusion of agenda item M should not be construed as its acceptance of the inclusion of that item on the permanent agenda of the Council or of its willingness to engage substantively on issues raised by Members under it.

7. The representative of Japan said that, while his delegation agreed that each Member could determine the appropriate means of implementing TRIPS provisions under Article 1.1, he believed that the exchange of experiences and information among Members was important and useful in order to enrich possible alternatives for Members to reflect. The past introduction of experiences by the United States, the European Communities and Switzerland had been constructive and useful, and his delegation was looking forward to continuing this educational exercise in this meeting. While recognizing that there were other bodies, his

delegation believed that the TRIPS Council, stipulated by the TRIPS Agreement as an authoritative body regarding enforcement, was an appropriate body for this discussion. In response to Brazil's comments, he said that Part III of the Agreement also included border measures which were the subject of the Japanese submission.

8. The representative of the European Communities said that item M was a legitimate part of the agenda as Article 68 of the TRIPS Agreement specifically stated that the Council should review issues presented under that agenda item.

9. The Council took note of the statements made and adopted the agenda as proposed.

A. Notifications under Provisions of the Agreement

10. The Chairman informed the Council that, since its meeting in June 2007, it had received a number of supplements and updates to earlier notifications of laws and regulations notified under Article 63.2 of the Agreement. Morocco had notified new laws and regulations concerning copyright and related rights, industrial property and border enforcement; Albania had notified its laws on the accession to the International Convention for the Protection of New Varieties of Plants, the Hague Agreement, the Geneva Act of the Hague Agreement and the Strasbourg Agreement, as well as an amendment to its Industrial Property Law; Hong Kong, China had notified an amendment to a copyright ordinance; Tunisia had notified amendments to its Trademark Law; Japan had notified consolidated texts of its Trademark, Designs and Patent Acts, including its latest amendments made in 2005 and 2006, as well as their implementing regulations; and Canada had notified an amendment to its Criminal Code that dealt with unauthorized recording of a film in a theatre. These notifications were being circulated in the IP/N/1/- series of documents. In addition, Slovenia had provided revised responses to the Checklist of Issues on Enforcement. These responses were available as an advance copy of document IP/N/6/SVN/1/Rev.1.

11. He urged those Members whose initial notifications remained incomplete to submit the outstanding material without delay, and reminded other Members of their obligation to notify any subsequent amendments of their laws and regulations without delay after their entry into force. In particular, he reminded those Members who had made any changes to their laws and/or regulations to implement the decision on TRIPS and Public Health and who had not yet notified such changes to the Council to do so.

12. Regarding notifications of contact points under Article 69, since the meeting in June, updates to contact points notified earlier had been received from Bangladesh and the Kyrgyz Republic. These notifications were being circulated in an addendum to document IP/N/3/Rev.9.

13. The Council took note of the information provided.

B. Reviews of National Implementing Legislation

(i) Follow-up to reviews already undertaken

14. The Chairman said that, with regard to the reviews of national implementing legislation that had been initiated at the Council's meetings since April 2001, eight reviews still remained on the Council's agenda. These reviews concerned Cuba; Fiji; Grenada; Mauritius; Saint Kitts and Nevis; Saint Vincent and the Grenadines; Suriname; and Swaziland.

15. Since the Council's last meeting, Swaziland and Mauritius had provided responses to the remaining questions posed to them in their reviews. All of the responses from these two Members had been circulated in documents IP/Q/SWZ/1 and IP/Q/MUS/1, respectively. He suggested that the regular reviews of the legislation of Swaziland and Mauritius be deleted from the agenda, it being understood that any delegation could revert to any matter stemming from the reviews at any time.

16. The Council so agreed.

17. The Chairman said that a number of questions had also been raised with regard to the implementing legislation of certain Members whose reviews had already been deleted from the Council's agenda on the understanding that any delegation should feel free to revert to any matter stemming from the review at any time. These Members were Dominica, Gabon, Ghana and Guyana.

18. He urged the delegations concerned to provide the outstanding material as soon as possible, so as to allow the Council to complete the follow-up to these reviews.

19. The Council took note of the information provided and agreed to revert to the matter at its next meeting.

(ii) Arrangements for the review of national implementing legislation of Viet Nam

20. The Chairman recalled that, at its meeting in February, the Council had agreed that it would take up the review of TRIPS implementing legislation of Viet Nam, a newly acceded Member, at its first meeting in 2008. At its meeting in June, the Council had set the following target dates for the submission of questions and answers to this review: questions were to have been submitted to Viet Nam, with a copy to the Secretariat, by 26 November 2007 and responses to questions posed within that deadline were to be submitted by 7 January 2008. However, the Council had not yet received Viet Nam's notification of its TRIPS implementing laws and regulation that would serve as a basis for the review.

21. The representative of Viet Nam said that the content of the notification had already been prepared and that its format was now being finalized. It would be submitted to the Council within a short time.

22. The Chairman proposed, in view of the fact that his intention was to suggest that the Council's first meeting in 2008 be held on 26-27 February and that Viet Nam's initial notification had not yet been received, that the Council postpone by three weeks the target dates for the submission of questions and answers in this review, namely that:

- questions should be submitted to Viet Nam, with a copy to the Secretariat, by 17 December 2007; and
- responses to questions posed within the deadline should be submitted by 4 February 2008.

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

C. Transitional Review under Section 18 of the Protocol of the Accession of the People's Republic of China

24. The Chairman recalled that section 18 of China's Protocol on Accession required the TRIPS Council to review the implementation by China of the TRIPS Agreement each year for eight years and report the results of such review promptly to the General Council. He further recalled that section 18 required China to provide relevant information, including information specified in Annex 1A, to the TRIPS Council in advance of the review. He informed the Council that the information submitted by China pursuant to the requirement, dated 18 October 2007, had been circulated as document IP/C/W/505. In addition, the Chinese delegation had made available two room documents entitled Report on China's Intellectual Property Rights Protection in 2006 and China's Action Plan on IPR Protection 2007. Questions and comments in connection with the transitional review had been submitted by Japan, the United States and the European Communities (documents IP/C/W/498, 502 and 503, respectively).

25. The representative of China said that it was his delegation's understanding of past practice in transitional reviews that Members that had posed questions to China, or had submitted comments, would always take the floor first to introduce their submissions. China would then take the floor to give its responses, both to the general comments and to the technical questions, and that this would conclude the transitional review.

26. The representative of the United States said that the practice of TRMs had varied from committee to committee, but that in this Council China had always taken the floor first to introduce its submission, had provided its responses to the written questions and Members had intervened afterwards. However, it was his delegation's view that substance was more important than procedure in this case and the United States were therefore prepared to proceed in either order at this time.

27. The representative of Brazil said that, although his delegation was not part of the dialogue that usually took place under this item, it was nonetheless a Member of the Council. He believed that this was not a tribunal and that procedures in the Council had to be fair and equitable. The obligations of China, as his delegation understood them, were to respond to questions and he was therefore interested in hearing the introduction of the questions first, as this was the natural order of things.

28. The representative of the European Communities said that his delegation had submitted seven pages of questions, 36 paragraphs, and that to read them out would be wasting time. His delegation would therefore prefer for China to respond to the questions that had already been put in writing and then possibly to additional questions that Members may raise on the basis of these responses. This process did not have the character of a tribunal. His delegation was simply applying the agreement and posing its questions, and expected a proper response.

29. The representative of China said that, as his delegation had pointed out repeatedly in the past, it was the logic of the review that China respond orally to the questions posed. However, it went beyond the commitments of China under Article 18 to provide any written responses or to respond to any additional questions posed after its answers, although China was prepared to listen to any such questions. In keeping with this logic, he asked the Chair to proceed as in previous TRMs and invite Members that had posed questions to first introduce their submissions.

30. The representative of Japan said that, while the practice in this Council had been for China to first provide its responses and for Members to then make additional further comments, his delegation, like others, liked to focus on substance in a practical manner.

31. The representative of the United States thanked the Chinese delegation in advance for its attention to the questions raised by the United States and other Members. These questions touched on many issues of concern. The United States had worked hard to address these and similar concerns through meetings of this Council and through constructive bilateral dialogue and cooperation with China. Unfortunately, it had not been possible to resolve all of these issues through these mechanisms alone.

32. His delegation recognized that China had made the protection of intellectual property rights a priority and had taken active steps to improve IPR protection and enforcement. It continued to welcome and appreciate the commitment at the highest levels of China's Government to addressing these issues. However, the United States was concerned that several aspects of the Chinese legal regime actually hindered IPR protection and enforcement and raised WTO concerns.

33. He noted that the WTO Dispute Settlement Body had established a panel to look into three such concerns under the TRIPS Agreement. These related to China's thresholds for criminal copyright and trademark enforcement; customs rules for destructions of infringing goods; and copyright protection for new products that had not yet received Chinese Government approval for publication or distribution.

34. The United States was also concerned about certain Chinese measures that affected market access for films for theatrical release and audiovisual home entertainment products such as DVDs and video cassettes; for books, periodicals, journals, and other publications; and for music. China's barriers to market access for these copyright-dependent products created legal obstacles to legitimate products reaching the Chinese consumer. That, in turn, made it easier for copyright pirates to operate in China's market. It was his delegations view, therefore, that the protection of intellectual property rights and market access for legitimate copyright-dependent products were bound together. He noted that the United States had requested establishment of a WTO panel to look into these market access concerns as well.

35. As the questions from Members today reflected, the concerns that were the subject of the two pending dispute settlement proceedings represented only a part, albeit an important part, of a much larger set of concerns about China's protection and enforcement of intellectual property rights. It was critical that China and its trading partners worked together to aggressively seek solutions to these larger issues.

36. His delegation saw evidence of unacceptable levels of IPR infringement most vividly in the numbers of infringing goods seized at US borders. Mid-year statistics for 2007 showed that China was the source of 81 per cent of infringing goods seized at US borders. China had had a high share of seized goods in past years as well, but it was especially troubling that the seizure of Chinese goods had been increasing, not decreasing, each year since China had joined the WTO in 2001. Exports were only part of the problem, however. US copyright industries consistently reported high rates of piracy within China, although there had been improvement in the software sector. Trade in pirated optical discs continued to thrive. The operation of large retail and wholesale markets for counterfeit and pirated goods had not been deterred. Piracy of books and journals was a key concern. Internet piracy was increasing.

37. Overall, product counterfeiting in China was widespread, affecting pharmaceuticals, electronics, batteries, auto parts, industrial equipment, toys, and many other products. Many of these counterfeit products, moreover, posed a direct threat to the health and safety of consumers in China, the United States and elsewhere around the world. The underlying causes for these problems, and the possible solutions, were too numerous to describe here. The US Government had set out its views on those issues in detail in various reports available on the website of the Office of the US Trade Representative.

38. Last year at the transitional review before this Council, his delegation had noted that the United States looked forward to continuing to engage bilaterally with China on a wide range of IPR issues. At the same time, it had pointed out that the multilateral WTO forum, and the tools provided under the WTO agreements, including reviews like this one, the provision for transparency requests under Article 63.3 of the TRIPS Agreement, and the availability of WTO dispute settlement, were equally indispensable to a healthy international trade environment. His delegation continued to be disappointed at China's apparent reluctance to take full advantage of the capacity of these tools to clarify issues and aid in the exploration of possible solutions.

39. The larger issue before China and its trading partners was how solutions would be found and mutual understandings be reached regarding the various IPR issues discussed today. His delegation had observed that China seemed reluctant to use the transitional reviews before this Council to their full advantage. It had also seen that China was reluctant to respond substantively to requests under Article 63.3 of the TRIPS Agreement. Since the filing of the two WTO disputes against China, it had also noted a reluctance on China's part to engage in bilateral dialogue.

40. The United States continued to believe that deeper multilateral and bilateral dialogue and cooperation was the path to progress. The United States would continue to put serious efforts into its joint work with China on innovation policy, intellectual property protection strategies, and the range of other important matters in its bilateral economic relationship through the US-China Strategic Economic Dialogue, the Joint Commission on Commerce and Trade and other bilateral engagements. He hoped that China would fully embrace all of those opportunities and his delegation viewed the current WTO disputes as evidence of the need for more, not less, bilateral and multilateral cooperation on China's IPR issues.

41. Moving ahead with that work would of course require a willingness to cooperate on the Chinese side. The United States had seen evidence of that in some areas, such as recent joint US – Chinese law enforcement actions and a memorandum of cooperation in the sphere of IPR border enforcement. His delegation hoped to see deeper cooperation in other areas as

well, with a view to making progress on the important issues that remain to be addressed with regard to China's IPR enforcement regime.

42. The representative of the Japan said that his delegation had raised questions regarding the future improvement of criminal enforcement and other issues at all TRMs from 2002-2006. With regard to further improvement of criminal enforcement, he noted that a new judicial interpretation in April 2007 had abolished the differences between criminal threshold for units and that for individuals, and had substantially lowered the threshold for units. Japan appreciated that the Chinese Government had recognized the importance of the protection of IPRs and had made efforts to improve enforcement. On the other hand, despite such efforts, a survey conducted by the Japanese Government in March and April 2007 showed that IPR enforcement in China had still room for improvement. While there had been some strengthening measures in IPR enforcement, such as an increase in the amount of confiscated illegally acquired income, which he understood was a relatively severe penalty, there continued to be some deficiencies in IPR enforcement, such as repeat offences, more sophisticated modus operandi of counterfeiters, and insufficient enforcement, especially in local areas. Therefore, his delegation had to conclude that IPR infringement in China continued to be severe for the Japanese industry. A deterrent effect through the strengthening of administrative punishment and criminal prosecution and through the enhancement of measures against the sophisticated modus operandi of counterfeiters and repeat offenders was essential to improve the situation. Japan was looking forward to China enhancing IPR protection and taking further steps to provide effective enforcement against any act of infringement of IPRs in China. Regarding the specific questions Japan had posed to China, in the interest of time and efficiency, he referred Members to document IP/C/W/498 that Japan had submitted.

43. The representative of the European Communities said that his delegation noted with satisfaction certain progress that had been made on IPRs and certain ongoing positive initiatives that had been taken by China to tackle remaining problems. However, like other delegations he remained concerned by the very high level of counterfeiting and piracy in China. According to EC customs statistics of 2006, China remained the main source of counterfeited and pirated goods, with over 86 per cent of counterfeit goods seized at the EU border coming from China. His delegation remained particularly worried by the lack of criminal prosecution. The sanctions against IPR infringement were insufficient and not a deterrent. Civil and administrative procedures against counterfeiting and piracy remained expensive and time-consuming. The European Communities therefore urged China to actively pursue its efforts towards an effective IP protection and enforcement system.

44. In this respect, he recalled that the European Communities and China had established a structured dialogue on intellectual property and had set up, in that framework, a joint IP Working Group, the fourth session of which had met in Beijing on 27-28 September. He hoped that such a cooperative approach with China on IPR issues would lead to concrete and tangible results, as these were much needed. Finally, he said that he looked forward to a comprehensive reply to the questions posed in writing in document IP/C/W/503 of 11 October 2007 and hoped that what appeared to him as lack of cooperation of China in this TRM would not have to be interpreted as a lack of respect for the questions asked by Members.

45. The representative of China said that his delegation welcomed this opportunity to elaborate on the status of China's implementation of the TRIPS Agreement and other relevant commitments, and on its intensified IPR enforcement efforts since the last review through more effective administrative sanctions, as well as to brief the Council on China's efforts in deepening its international IPR cooperation with other Members in recent years. Ever since adopting the reform and opening up policy, particularly in recent years, China had made impressive progress on IPR protection and had recently incorporated it into its national strategy. Furthermore, the Chinese President Mr. HU Jintao had reiterated in his report to the 17th CPC Congress the Party's determination to "improve indigenous innovation, build an innovative country... and implement IPR strategies", which would serve as a long-term goal for China to pursue firmly in its IPR protection task.

46. Regarding the legal infrastructure perspective, in a short period of merely 30 years, China had put in place a legal and regulatory IPR framework incorporating laws, regulations, department rules and judicial interpretations. In order to respond to its own development needs and in order to advance its national drive to build an innovative country, China was constantly studying and formulating new IPR-related laws, regulations and rules and making improvements of its IPR protection system.

47. In 2006, the State Council had promulgated the Regulations on the Protection of the Right of Communication through Information Network. The Supreme People's Court (SPC) had issued the Decision (No. 2) on Amending the Supreme People's Court's Interpretation on Certain Issues Concerning Application of Laws in Dealing With Cases Concerning Computer Network Copyright Disputes. The Supreme People's Procuratorate (SPP), the Ministry of Public Security, National Copyright Office, State Administration for Industry and Commerce (SAIC) and General Administration of Customs had issued four regulations on accelerating civil-to-criminal case transfer. The Ministry of Commerce (MOFCOM) and others had introduced specific rules on IPR protection related to trade fairs and exhibitions. The State Intellectual Property Office (SIPO) had issued the Guide on Patent Re-examination and Measures for the Reduction or Postponement of the Payment of Patent Fees. The SPC and

SPP had clarified the criteria for convictions relating to IPR crimes involving piracy and illicit sales of audiovisual products.

48. On 1 April, 2007, the National Working Group for IPR Protection had published the 2007 Action Plan on IPR Protection, which detailed 276 specific measures in ten areas including legislation and enforcement. Under this Action Plan, China would formulate and revise 14 laws, regulations, rules and administrative measures on trademark, copyright, patent and customs protection as well as seven judicial interpretations and guidelines. In the first half of 2007, the SPC had issued the Opinions on Fully Intensifying IPR Trials to Provide Judicial Assurances for Building an Innovative Country, the Interpretations on the Application of Laws in Civil Cases Involving Unfair Competition, and the Rules on the Application of Laws in Disputes Involving Infringement of Right to New Plant Varieties. The SPC and SPP had jointly circulated the Interpretations on Issues Relating to the Application of Laws in IPR Criminal Cases II. The SAIC had promulgated the Measures for the Administration of Special Signs of Geographical Indication Products. The formulation and updating of the Trademark Law, Law against Unfair Competition, Patent Law, and Patent Commissioning Regulations was also progressing on schedule.

49. On the IPR enforcement side, within the framework of international conventions and treaties such as the TRIPS Agreement and taking into consideration its national situation, China had come up with an IPR protection model featuring a parallel and concurrent system of administrative and judicial protection as well as an enforcement structure that effectively integrated administrative approaches with criminal justice, ensuring adequate protection for rightholders and ultimate fulfillment of China's international IPR obligations. In 2006, China had set up IPR Service Centers in 50 large and medium-sized Chinese cities and had launched the special "12312" service hotlines to facilitate IPR complaints and crime reporting. IPR enforcement agencies had carried out seven dedicated crackdown campaigns including Operation Sunshine, Operation Blue Sky, Mountain Eagle Two and the Anti-Piracy 100 Days Campaign, which had resulted in notable achievements.

50. Regarding the series of figures detailing China's efforts on enforcement, he referred Members to the information his delegation had provided under Annex I of Article 18 of China's Accession Protocol. In response to some Members' interventions, he emphasized that in 2006, 2,277 criminal IPR cases had been settled with a verdict of legal effect regarding 3,508 persons, 3,507 of whom had been convicted. This clearly demonstrated China's efforts to intensify criminal enforcement.

51. Some Members had also quoted increased numbers of seized pirated products at their borders. Also in China there had been an increase in the number of seizures of pirated

products. From his perspective, these figures only demonstrated that China's efforts on IPR enforcement were more intensified, not less.

52. Regarding international IPR cooperation, on 29 December 2006, China had announced its decision to join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. On 9 June 2007, these two treaties had officially taken effect in China. At present, China was also approaching its final procedures for ratifying the Protocol Amending the TRIPS Agreement.

53. China had been actively involved in the reform of international IPR systems and negotiations on global IPR issues in international forums such as the WTO, WIPO, UPOV, APEC and ASEM, while increasing bilateral IPR collaborations with other Members. China-US, China-EU, China-Russia and China-Switzerland IPR working groups had been set up to meet regularly. IPR exchange mechanisms had also been established and consolidated between China and other countries and regions, such as Japan, Korea and ASEAN. In 2007, the first sessions of the China-Russia IPR Working Group and the China-Switzerland IPR Working Group, as well as the fourth session of the China-EU IPR Working Group had successfully been convened, cementing IPR exchanges and cooperation. China had also held a China-US Enforcement Cooperation Joint Liaison Group meeting, had signed an MOU on Intensifying IPR Enforcement Cooperation between the Chinese and US customs services, and had hosted the WIPO Asia-Pacific Symposium on Performers' Rights in the Digital Network Environment, as well as an international symposium on geographical indications.

54. In conclusion, despite being a developing country confronted with many difficulties, China had never slowed down its pace of IPR protection. It should be underlined that IPR protection was a global issue and not a country-specific one. As developed and developing Members shared the daunting challenge of improving IPR protection, cooperation should serve as the main vehicle for international endeavor in the field of IPR protection. China was determined to further improve its IPR protection and enforcement system through unremitting efforts and to collaborate extensively with other WTO Members on this issue.

55. Responding to the technical questions submitted to China, another representative of China said that around 20 of these questions were closely related to the WTO dispute case DS362 or the case on market access of goods and that, therefore, her delegation did not deem it appropriate to provide responses to them. For the sake of clarity and efficiency the other questions had been categorized into 11 groups.

56. Responding to question in the first category on General Issues, she said that, regarding transparency, Chinese IP legislation was quite open and transparent. It had been provided that between the release and implementation of laws and administrative regulations at least

one month had to be allowed for public comments. Before submitting drafts of laws and regulations for deliberation and review, they had to be made public for comments from all, including experts, scholars and practitioners in IP-related fields. In addition, China also paid great attention to opinions from IP-related international organizations, foreign enterprises and individuals. All suggestions were taken seriously and submitted for detailed analysis and classification. The feedback of some crucial suggestions would be delivered to the organization or individual that had made the suggestions for further comments.

57. For example, in 2004 and 2005, the Supreme People's Court had made available on the Internet the five judicial interpretations, respectively on technical contracts, unfair competition, new plant varieties, right conflicts and legal application of MTV copyright, for public comments. Revisions had been made according to comments from the public. In China's IPR legislation, it was rarely the case that more than one agency was involved in drafting legislation at the same time. However, if such a case did occur, according to the Ordinance Concerning the Procedures for the Formulation of Administrative Regulations and the Regulations on Procedures of the Rules Formulation, all the agencies involved were required to solicit public opinions in the process of drafting administrative rules and regulations. In addition, if the draft administrative rules and regulations related to responsibilities of more than one agency, the drafting agency was required to fully consult with all the other agencies involved to ensure coordination and avoid inconsistencies among different IP-related agencies.

58. In the process of the third amendment to the Patent Law, opinions had been solicited widely from related government agencies, organizations, enterprises and citizens, and a great number of suggestions for amendments were collected. In addition, the Legislative Affairs Office of the State Council had held an international seminar on the Patent Law Amendment on 10-11 October 2007. Experts, scholars, representatives from Chinese enterprises, WIPO and well-known companies in the US, EC, Japan, Brazil, India, etc. had held comprehensive and in-depth discussions on the amendment of the draft.

59. For the amendment to the Trademark Law, the State Trademark Office had begun to solicit social comments by sending letters and holding seminars since April 2006. By the end of 2006, 48 correspondents with 1,012 pieces of suggestions from 47 organizations, groups and individuals, including foreign organizations such as the USPTO, JPO, INTA and AIPLA had been received. In late September 2007, a new round of solicitations for opinions from domestic and foreign institutions and experts was launched.

60. Regarding IP protection and enforcement, China had taken many effective measures in recent years to push forward IPR protection in a comprehensive manner and had achieved good results. China had further improved its legislation, greatly enhanced its efforts to fight

against infringement, increased the number of criminal prosecutions and penalties, and had strengthened public awareness for IPR protection. The Chinese Government had been exploring ways to establish an effective IPR protection system. However, as China was still a developing country, it was unrealistic and unreasonable to require China to reach the standards of developed countries like the European Communities within a short period of time. China hoped that the European Communities could continue to support China in its IPR protection endeavors, improve mutual understanding and trust, and reduce complaints and criticism.

61. Responding to questions in the second category on Legislation and Judicial Interpretations, she first turned to the revised draft of China's patent law. As the revision of the Patent Law was still underway, her delegation was unable to predict the final results and could therefore not provide further clarification of the provisions at present. China's Anti-Monopoly Law would come into force on 1 August 2008. Currently, there was no explicit definition of "abuse of IPR" in Article 55.

62. On conflicts between trademarks and trade names, the existing Law to Counter Unfair Competition was still under review and in the process of being amended. In November 2005, the Supreme People's court had formulated the draft text of the Interpretations on Applicable Legal Issues Concerning the Ruling of Civil Cases Involving IPR Conflicts, and had solicited public comments through the Internet in December 2005. The Judicial Interpretation draft covered relevant issues on conflicts between trademarks and trade names. Her delegation was currently unable to provide any details.

63. On the issue of royalty criteria for broadcasting and television organizations, according to the provisions of Article 43 of the Copyright Law, the Chinese State Council was working on Measures on the Remuneration for Using Audio Products by Radio and Television, and related legislation procedures were now underway.

64. According to Article 43 of the Regulations on Copyright Collective Management, when a user was able to provide the details of use but refused to do so, or practiced fraud in providing such information, the copyright administration departments of the State Council were required to rectification. The copyright collective management organization could terminate the Licensing Contract.

65. Regarding the import and export of technology, according to the Regulations on Technology Import and Export Administration, the administration of technology imports was divided into categories of technology prohibited from import, technology restricted from import and technology of free import. The technologies of free import were managed through contract registration without real examination of the contents of the contract. On the

other hand, the competent authorities still needed to instruct the enterprises to provide the authentic basic information of the contracts. In actual practice, some of the provincial and municipal authorities could suggest revisions of terms that were non-compliant with China's existing laws and regulations in the technology import contracts of the enterprises, but the final say still rested with the enterprises. The Government had never made compulsory requirements on items like royalty rates.

66. Article 355 of the Contract Law explicitly provided that "Where the laws and administrative rules and regulations stipulate otherwise on the technology import and export contracts, or patent contracts or contracts on application for patents, such provisions shall prevail". The Regulation contained special provisions for the infringement liability in the technology import contract in the form of administrative regulation, without contradicting the Contract Law. Article 24 did not conflict with Article 28.2 of the TRIPS Agreement. According to this Article, "The patentee has the right to transfer or transfer through inheritance the patent and establish license contracts".

67. Article 25 of the Regulation was appropriate and currently China had no plan to revise it. This Article focused on the technology itself, i.e. under the agreed conditions the technology could achieve the agreed technological objective. If the mishandling of or other failures to meet the agreed conditions by the Chinese side led to a failure of achieving the agreed technological objective, the responsibility should be borne by the erring party. Since this Article was mandatory, whether the concerned parties made written commitments or not to implement the above provision in their agreement, its effect could not be affected and the Chinese Government would not reject the agreement for such reason.

68. Responding to questions in the third category concerning Patents, she said that China's patent system had adopted the first-to-file principle, granting the patent to the first applicant. If parties had disputes over the rights and interests concerning the ownership of the invention and creation, they could appeal to the People's Court according to the relevant provisions of the Patent Law. The revision of the Patent Law was under way. As regarded concrete amendments to the provisions, China was soliciting opinions on various aspects, and was therefore unable to predict the final results. Currently, China was not considering changing the provisions on the scope of patentability of software inventions.

69. According to Article 12 of China's Patent Law, any entity or individual exploiting someone else's patent had to conclude a written licence contract with the patentee for exploitation and pay a fee for the exploitation of the patent. Therefore, if the licensee did not pay the fee according to the contract, the patentee could appeal to the People's Court.

70. Regarding the two questions that had been posed on the protection of confidential information, she said that these questions were quite general, without pointing to a specific law or regulation, and that therefore China was unable to respond to these questions.

71. Responding to questions in the fourth category, concerning the Protection of Test Data for Pharmaceutical Products, she said that medicines should be registered in accordance with the Provisions for Drug Registration and that undisclosed information on clinical trials should be protected in line with the above-mentioned provisions, excluding information that had already been disclosed. Under the Measures of the Implementation of the Pharmaceutical Administration Law, China was committed to the protection of undisclosed information rather than to data protection and monopoly. Protection of undisclosed information took effect automatically and no form filing, authorization or record was needed. Its effectiveness depended on how people who had access to the information kept that information undisclosed. Therefore, there was no need to provide monopolistic data as was required under the relevant laws and regulations of some other WTO Members.

72. In accordance with the Administrative License Law and the Pharmaceutical Administration Law, the State Food and Drug Administration should base its approval on the pharmaceutical and clinical materials obtained by the applicants themselves, rather than on reference materials already disclosed or materials provided by other applicants. For medicines, whether domestically produced or imported, the exact same material requirements and review and examination procedures were applied and these did not constitute any discrimination at all.

73. According to the Provisions for Drug Registration, the State Food and Drug Administration should make decisions on review and approval based on the material submitted by applicants. In light of the universally applied Bolar exception, patent disputes arising during the review and approval procedures for drug registration were impossible to constitute a patent infringement.

74. Questions in the fifth category concerned Trademarks and Geographical Indications. On trademarks, she said that "famous brands", "renowned brands" and "export brands" were supporting measures initiated to lead and encourage enterprises to create famous brand products, to enhance product quality and managerial level and raise the overall quality level and competitiveness of China. In identifying well-known trademarks, the State Trademark Office and the Trademark Review and Adjudication Board would treat domestic and foreign trademark holders equally, without any discrimination or preference to Chinese trademarks. China's Trademark Law and Recognition and Protection of Well-Known Trademarks Provisions (2003) explicitly provided for objective standards for the recognition procedures of well-known trademarks. Detailed provisions were available on the website of the State

Administration for Industry and Commerce (SAIC) at <http://www.ctmo.gov.cn>. In regard to the question of malicious application for foreign well-known trademarks, she referred Members to Article 14 of the Trademark Law and Articles 3 and 10 of the Recognition and Protection of Well-Known Trademarks Provisions. The renown gained through publicity of the media such as the Internet was also one of the elements for consideration by the SAIC when recognizing well-known trademarks.

75. Article 31 of Trademark Law protected the "prior right" of trademarks with certain renown, yet short of the well-known trademark standard. According to the principles of territoriality of intellectual property rights, the Trademark Examination and Trial Standards restricted trademarks subject to "prior use" to those used in China.

76. For actions such as malicious application for or exploitation of well-known trademarks or influential trademarks already used, but not yet registered, the SAIC would take the following actions in the stages of examination, opposition and review: (1) In the stage of examination, except for some well-known trademarks with high popularity, the SAIC generally did not take the initiative to render protection and tended to settle the problem in the subsequent opposition and review stages. (2) In the stage of opposition, the right holder could file an opposition to the Trademark Office of SAIC if he thought the trademark which had passed the preliminary examination violated Article 13 or 31 of the Trademark Law. The trademark would not be approved for registration if the Trademark Office confirmed the opposition. (3) In the stage of review, disputes could be filed if the right holder thought the registered trademark violated Articles 13 and 31 of the Trademark Law. The Trademark Review and Adjudication Board would cancel the registered trademark if the dispute was confirmed.

77. With regard to similar goods and services, the State Trade Mark Office would look at the Similar Goods and Services Differentiation Table compiled by the State Trademark Office based upon the International Classification of Goods and Services for the Purposes of the Registration of Marks. For example, gloves belonged to Similar Group 2510 of Category 25 and scarf to the Similar Group 2511 of Category 25. According to the Table, goods of these two Similar Groups were not judged as similar. Therefore, when applying for a trademark for "gloves", where there were identical or similar registered trademarks or prior applications for "scarves" by someone else, such an application would be passed for preliminary review.

78. With regard to GIs, according to related regulations, a GI could be protected as a trademark, while other forms of protection were not excluded. In 2001, China had acceded to the WTO. In its Accession Protocol, China had promised to fully comply with the geographical indication-related clauses in the TRIPS Agreement and to provide effective legal protection for GIs.

79. Currently, in the practice there were no conflicting GIs at STMO and AQSIQ because they had been registered by different registrants. Article 6 of the Provisions on the Protection of GI Products specified that the protection of GI products followed the principle of voluntary application, transparent acceptance, handling and approval. According to the Trademark Law, Trademark Law Implementing Regulations and Procedures for the Registration and Administration of Collective Marks and Certification Marks, GIs could be registered as collective marks or certification marks to gain legal protection in China. Registered geographical indications could enjoy sound and effective protection and their owners had no need to register with any other agencies.

80. When applying for registration of trademarks in China, according to Article 17 of the Trademark Law, foreigners and foreign enterprises should proceed in accordance with the agreements signed between their home countries and China or international treaties of which both are members, or the reciprocity principle. Besides, pursuant to Article 6 of the Procedures for the Registration and Administration of Collective Marks and Certification Marks, when registering their GIs as collective marks or certification marks, foreigners or foreign enterprises should submit proof of the legal protection of the GI in their home countries for them as the right holders. For example, the orange produced in Florida of the United States had successfully been approved for registration in China.

81. All the circulars and documents concerning the acceptance and approval of GI products protection, as well as the use of specialized indications had been made public and could be found on the website of AQSIQ at <http://www.aqsiq.gov.cn>.

82. Regarding counterfeiting at retail and wholesale markets, she said that the three major retail markets in Beijing had taken effective measures in IPR protection after signing MOUs with famous European brands holders, and had honored their commitments. However, in the process of implementing the MOUs, IPR agents and landlords had had some frictions due to different understandings of some articles in the contracts, which was quite normal. The Chinese government authorities had made great efforts to mediate between the parties to settle the frictions, and to push forward the perfection and implementation of the MOUs. At present, the market organizers held a positive and cooperative attitude.

83. On the issue of including IPR protection into the lease contracts between the landlords and vendors, the Shanghai Industrial and Commercial Administration had amended the Demonstration Text on Shanghai Merchandise Trading Market Operation Contract this year, prescribing obligations for landlords and vendors on trademark protection. Now landlords in many key garment and small merchandise markets had adopted the new contract model. To prepare for the 2008 Olympics, the Beijing Municipal Government had held a meeting in which it had decided to strengthen the communication with foreign right holders, improve the

precautionary and remedy systems in wholesale and retail markets and the 12312 Complaining and Appeal Services Centre Mechanism, and phase out counterfeiting in wholesale and retail markets.

84. On the issue of the Trademark Office backlog, due to year-on-year increase in China's trademark applications, in 2006 there had been as many as 766,000 cases. Currently the time span of the examination was about 30 months, which was longer than last year. In view of the longer time span of trademark examination, SAIC had further recruited trademark examiners, strengthened management and enhanced the operation guarantee for the automated system. All staff worked diligently in every step of the trademark application procedure and tried hard to enhance working efficiency. In 2006, altogether 313,000 trademark registration applications had been examined and the annual examination quantity of every examiner had been much higher than in other countries.

85. Responding to questions in the sixth category, concerning Copyright, she said that in 2006, the Chinese Copyright Authority had investigated and confiscated pirated overseas textbooks failing to pass content review in six universities of Beijing, Shanghai, Guangzhou and Wuhan. The Association of American Publishers and the Association of British Publishers had both expressed their gratitude with regard to such actions taken by the Chinese Government.

86. Responding to questions in the seventh category, regarding General Enforcement, she said that SAIC and China Customs had regularly published statistical data on infringement cases. As for the concrete information, i.e. the analytical statistics of all cases that had been requested by the United States, her delegation was unable to provide them as this request went completely beyond the scope of the TRIPS Agreement.

87. Measures relating to notarization and legalization of Powers of Attorney and evidence had been adopted and were consistent with Article 242 under the Civil Procedure Law of China. In accordance with Article 49 of the TRIPS Agreement, relevant administrative procedures should adopt the same principles as for civil procedures. Regarding the problem of possibly time-consuming procedures in practice, a call for more cooperation and communication between China and foreign countries (including foreign IPR holders and related enforcement institutions) was becoming more and more urgent, as well as mutual comprehension on systems of law, enforcement systems and document requirements in order to reduce unnecessary delays caused by misunderstandings of respective systems of law.

88. As for the implementation of interim injunctions, the People's Court exercised them in an active and prudential manner pursuant to laws. Her delegation was wondering about the

source of the quote that "less than 2% of all interim injunction applications actually submitted to the courts are granted".

89. It had always been the principle and goal of the Chinese Government and the public security bodies to constantly strengthen cooperation with IPR holders in conducting IPR protection. At the same time, it was also the foundation of effectively cracking down on IPR crimes. Once an appeal of the IPR holder was accepted and heard, the right holder participated in the relevant legal procedure. The private-prosecuting case in which the right holder appealed to courts directly was a major form of the right holder's direct participation.

90. According to the Criminal Law of the PRC, the Regulation on the Transferring of Suspected Crime Cases at Administrative Agencies, and the Administrative Punishment Law, the administrative law enforcement agencies should report or transfer the cases to the public security agencies if criminal responsibilities were involved. If administrative punishments such as fines had already been imposed before the transfer, such penalties would be considered by the People's Court under the law when making determinations. It was necessary to point out that, according to the Regulation on the Transferring of Suspected Crime Cases at Administrative Agencies, the cases transferred were "suspected" rather than "affirmed" cases. Cases that could not be identified as criminal cases by the public security agencies would be transferred to the relevant administrative agencies for settlement.

91. Responding to questions in the eighth category, concerning Administrative Enforcement, she said that it was widely recognized that the Chinese Government had spared no efforts in strengthening administrative enforcement of IPR protection. According to Article 53 of Trademark Law, when handling trademark infringement cases, the administrative authorities for commerce and industry could confiscate and destroy the infringing products once the violations had been confirmed. If the confiscated products were of value, which was detachable from the infringing trademark, according to Article 53 of Administrative Punishment Law, they could be openly auctioned or disposed according to the relevant provisions of the country. The proceeds from the auctioning of the confiscated illegal property should be handed to the state treasury.

92. IP infringement crimes are effectively cracked down upon. However, a few criminals still attempted to evade legal punishment by acting in a more sly and concealed manner. In this context, Chinese public security agencies had formulated strategies of both "targeted fighting" with a focus on chief offenders who were responsible for the infringing activities and "whole-chain fighting" aimed at destroying every link in the criminal network from production, storage, transportation, sales to export. As for the question of "what are the necessary conditions to punish manufacturers, distributors or would-be distributors concurrently?", she said that criminals would be held accountable as long as it could be

proven that those criminals had common criminal intentions, conducted criminal activities jointly and the actions constituted criminal offences.

93. Responding to questions in the ninth category, concerning Civil Enforcement, she said that according to the Several Provisions of the Supreme People's Court on the Evidence for Civil Actions, the formality and source of evidence should be in line with the laws. Evidence collected by private investigators and used in civil litigations should be subject to the Civil Procedure Law.

94. Responding to questions in the ninth category, concerning Customs/Border Enforcement, she said that, to reduce the outbound flow of counterfeit goods across China's borders, China Customs had improved enforcement means. Great importance had been attached to the close combination of inspections and examinations on custom declaration data, declaration bills of documents, and examination work on the spot. Some advanced examining techniques had been widely adopted by China Customs, such as X-ray machines, which effectively improved their capability and efficiency to inspect and confiscate infringing goods. Special enforcement actions aiming at cracking down on illegal export of infringing goods in the form of freight, post or express delivery had been initiated. For example, a special IPR protection action named "Dragon Boat Action" was being carried out from 1 October 2007 to 31 March 2008. China Customs had also strengthened international enforcement cooperation with customs of other countries with the purpose of protecting IPRs.

95. Responding to questions in the ninth category, concerning IPR Infringement through the Internet, she said that China severely cracked down on copyright piracy on the Internet pursuant to international treaties and domestic laws and regulations. In 2006, the State Council had promulgated the Regulations on the Protection of the Right of Communication through Information Network. The SPC had issued Decision (No. 2) on Amending the Supreme People's Court's Interpretation on Certain Issues Concerning Application of Laws in Dealing With Cases Concerning Computer Network Copyright Disputes. On 29 December 2006, China had announced its decision to join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. On 9 June 2007, these two treaties had officially taken effect in China. However, she pointed out that the issue of copyright piracy on the Internet went beyond the scope of the TRIPS Agreement and that it was therefore not appropriate to discuss this issue in the framework of the transitional review of China.

96. The representative of the United States thanked China for its detailed responses to the questions. While it was difficult to follow the responses as particular countries' questions had not been identified, it was his delegation's impression that the following questions posed by the United States had not been responded to or further clarification was necessary. Regarding US question 5 on the legislative priorities in China 2007 Action Strategy, his

delegation had not heard a response on whether China was considering any further new IPR measures that were not mentioned in that Action Strategy. Regarding enforcement issues, particularly those relating to criminal enforcement, the United States had asked in questions 6 and 7 whether there were Uniform Guidelines for Public Security Bureaus with regard to case initiation standards for criminal IP investigations and particular pilot projects in effect. US question 9 had been about whether there were any legislative proposals that would enhance the power of Chinese judges to enforce judicial orders. In questions 12 and 13 the United States had requested particular data about cases in China. In response to China's comment that these requests were beyond the scope of the TRIPS Agreement and the transitional review, he said that in his view this type of mechanism could be a useful tool and exercise in transparency and, for it to make progress, it should be interpreted broadly rather than narrowly. Regarding the questions on copyright piracy on the Internet, his delegation had the same concern. Regardless of competing views of this issue's relevance under the TRIPS Agreement, China should have answered US questions 18, 19, 20 and 21 on copyright piracy on the Internet in the interest of transparency. Regarding question 22, while appreciating China's responses on past efforts to combat textbook piracy on university campuses, there had been no answer to the additional question whether any new enforcement efforts were being planned. Lastly, regarding question 36 regarding data exclusivity, the United States had asked about the total number of data exclusivity grants provided by SFDA but had not received a response. His delegation was looking forward to further clarifications and responses from China in this regard.

97. The representative of Japan thanked China for its detailed responses. As it had not been possible to identify which response was directed at which question, his delegation would pose further questions and make further comments after having examined China's responses in detail. He reiterated his delegation's hope for China to enhance IPR protection and to take further steps to provide effective enforcement against any act of infringement of intellectual property in China.

98. The representative of the European Communities said that, although his delegation was grateful for China's detailed answers, he had not received answers to its questions 8, 9 and 10 relating to the third patent law revision in document IP/C/W/503. He disagreed with China's comment that the situation regarding the struggle against counterfeiting in the Silk Market in Beijing was improving. On the contrary, he himself had had occasion to witness the rampant and widespread counterfeiting there in person. This was unfortunate, as the European Communities had tried to improve the situation in cooperation with Chinese authorities for several years. The Shanghai situation, by contrast, seemed to be much better and therefore whatever was working in Shanghai should also be applied in Beijing. He

expressed the hope of his delegation for China to intensify its efforts in struggling against counterfeiting, which was a priority for the European Communities.

99. The representative of the China thanked the Members that had demonstrated their interest in China's IPR issues by putting forward so many questions and comments. Although it was fair to say that China never liked the Article 18 review which imposed WTO-plus obligations on China, China never escaped from fulfilling its commitments. Contrary to what some Members had said, China was always willing to take full advantage of this review mechanism in word and in spirit and had been doing so in the past five years by providing the required information and by responding to the enormous number of questions put forward by Members. However, it should be emphasized again that Article 18 was a provision with a special nature and a limited function, and that it did not require China to provide written responses nor to respond to any questions that went beyond its commitments under the TRIPS Agreement. Some questions that China had not provided answers to were closely linked to the IPR case that was already the subject of a panel process, which would be the more appropriate mechanism to deal with those questions. China's door was always open for cooperation on IPR issues, both bilaterally and multilaterally. Such additional questions and comments could always be dealt with through other more appropriate channels. With regard to the specific cases put forward by some Members, he said that IPR was a global issue instead of a country-specific one. He had visited a shopping centre in central London where he had seen a small vendor selling Louis Vuitton bags that had obviously been pirated, but such isolated cases did, of course, not diminish the efforts by those developed Members regarding their IPR enforcement. The same applied with regard to those isolated cases existing in China.

100. The representative of the European Communities said that while some counterfeit products could be found anywhere in the world, the difference lied in the size and magnitude of the counterfeiting, whether it was just one product or a shop the size of a football field with six floors like the Silk Market, which was dedicated almost entirely to the sale of counterfeits.

101. The representative of the United States reiterated his delegation's view that China had not taken full advantage of the review mechanism over the years and had shown a reluctance to do so from the beginning. It was his delegation's view that the review was a commitment that had been negotiated and agreed by China in its accession agreement and that China should fully adhere to that commitment. If China would do that, more progress would be made on some of these issues.

102. The Chairman thanked China for all the information it had provided, as well as other Members for their contributions. Turning to the Council's reporting obligation to the General Council, he suggested that the Council follow the same procedure as in the past years, namely that the Chairman, acting on his own responsibility, would again prepare a factual

report. The content of the cover page to the report would be similar to that of the report submitted by the Council in 2006 and the part of the minutes reflecting the discussions held under this agenda item would be attached.

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

D. Review of the Provisions of Article 27.3(b)

E. Relationship between the TRIPS Agreement and the Convention on Biological Diversity

F. Protection of Traditional Knowledge and Folklore

104. The Chairman recalled that, at its meeting in March 2006, the Council had agreed to maintain its present method of work on these matters, and to keep this method under review to assess whether any change might prove appropriate in the light of developments. He therefore suggested that the Council continue its past practice of discussing these three agenda items together on the basis of the contributions by Members. He informed the Council that, since its meeting in June 2007, Paraguay had requested to be added to the list of co-sponsors of the disclosure proposal circulated as document IP/C/W/474 (issued with the joint symbols, WT/GC/W/564/Rev.2 and TN/C/W/41/Rev.2). Addendum 5 to that document had been issued to this effect. In addition, the Council had received two new communications, one from Peru entitled "Combating Biopiracy – the Peruvian Experience" and circulated in document IP/C/W/493, and another from Japan containing additional explanations on its paper on "The Patent System and Genetic Resources" (document IP/C/W/472). The new communication had been circulated in document IP/C/W/504.

105. The representative of Peru said that document IP/C/W/493 sought to raise awareness of the lack of effective legal instruments in international patent systems to combat biopiracy and to prevent misappropriation of genetic resources and associated traditional knowledge. Part I of the document illustrated Peru's rich natural resources and the actual and potential magnitude of biopiracy in Peru. Part II reviewed the documents submitted by Peru in the TRIPS Council in recent years. Part III described the procedure followed by Peru's National Anti-Biopiracy Commission in identifying biopiracy cases. Part IV described the action taken by the Commission in several identified biopiracy cases which were related to three Peruvian resources, namely maca (also called the "Viagra of the Andes"), camu-camu (a fruit with high vitamin C content), and sacaa inchi (a wild fruit with regenerating and cosmetic properties). Part V summarized limitations and problems facing the National Anti-Biopiracy Commission. Part VI set out several conclusions. Reiterating the importance of this issue, he said that Members should start text-based negotiations. He said that if WTO Members

were not able to address this issue in the Doha Round, they would lose not only their credibility, but also a historic opportunity to ensure a fairer and more efficient international trading environment.

106. Introducing document IP/C/W/504, the representative of Japan said that the communication contained in its annex had also been submitted to the 11th Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in July 2007, which, in his view, was an appropriate forum to discuss this issue. Nevertheless, it was useful to share this communication with Members in the Council in order to avoid duplication. The document consisted of three parts: structure of the database system, prevention of third party's access to the database system, and registration of cited reference or information. The document addressed Japan's positions on two key issues: erroneously granted patents and compliance with the requirements of the Convention on Biological Diversity (CBD). He said that the database system could be distributed through a WIPO portal site that could have links to the databases maintained by participating WIPO member states. By entering a search formula onto the WIPO portal site, patent examiners could have access to member states' databases and obtain search results from all relevant databases simultaneously. The risk of the leakage of information could be minimized by restricting reference material to the portion of the databases that was related to novelty examination. Japan also proposed to establish an internet protocol address authentication system, which would make the WIPO portal site accessible only to intellectual property offices which had registered IP addresses. By allowing patent examiners to establish a linkage between patent applications and relevant genetic resources, he said that the WIPO portal site would help trace patent applications using the same genetic resources.

107. The representative of Ecuador said that, as a mega bio-diverse country, Ecuador faced limitations in its ability to identify specific biopiracy cases. There had been some misappropriation of genetic resources in Ecuador, such as cat's claw, dragon's blood and ayahuasca. As a co-sponsor of the developing countries' disclosure proposal, she welcomed the announcement made by the African Group and the LDC Group in support of the disclosure proposal. She said that a significant critical mass in the WTO advocated achieving a concrete result on this issue through an amendment of the TRIPS Agreement, and that this result would be an essential element in the development dimension of the Doha Round.

108. The representative of Brazil said that Peru's submission was an initiative to highlight two concrete elements of the problem facing mega bio-diverse countries: transboundary use of genetic resources and erroneously granted patents. The transboundary use involved the

acquisition of genetic resources in the country of origin and the subsequent seeking of patents in other countries, often developed countries. This was an issue with an international dimension, which therefore required international obligations. Regarding erroneously granted patents, he said that this took place where traditional knowledge could not be found in prior art searches because either it existed in oral form or was not easily or readily accessible to patent examiners or because patent examiners falsely applied the substantive patentability criteria. As a multilateral solution to this problem, his delegation, together with other co-sponsors, proposed an amendment of the TRIPS Agreement to include mandatory disclosure requirements.

109. He said that Japan's proposal on the database system duplicated the work undertaken in the IGC. His delegation would not be supportive of creating any international databases of traditional knowledge until Members made a concrete advance towards the disclosure requirements. This was because creating such a database would make all information on traditional knowledge concentrated in searchable databases and thus make it readily accessible on a global basis to any interested person, and consequently enhance and facilitate the possibility of misappropriation of traditional knowledge. Therefore, there was a need for safeguards against misappropriation, such as the mandatory disclosure requirements, before considering such database systems.

110. He further indicated that, at least in the informal setting in the WTO, discussions on the CBD issue had been gaining some momentum as an integral part of the negotiations on outstanding implementation issues together with the issue of the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits (GI extension) and the issue of the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits (GI register). He said that although the issue of GI register did not belong to the same mandate as the issues of the CBD and GI extension, there was an acknowledgement of some linkages between them at least in the informal setting. In informal consultations, the proponents of the disclosure proposal, as well as the proponents of the GI extension, had indicated a certain degree of flexibility over these issues, which would improve the conditions for broadening support to outcomes on both issues. He also indicated that developments on both issues were closely related to broader movement on the core elements of negotiations in the Doha Development Round, namely agriculture and non-agricultural market access.

111. He said that there had been a growing support for the disclosure proposal since the African Group had decided to co-sponsor it, and the LDC Group had expressed its support, at the Council's meeting of June 2007. This issue was widely perceived as a development component of the Doha Round, and therefore should not be left off the table. He said that

the TRIPS Council was an appropriate forum for Members to have a technical exchange on the amendment proposal. He reiterated that the disclosure requirement had to be mandatory; implemented through an amendment of the TRIPS Agreement; lead to disclosure of biological materials used in inventions that were the object of patent applications; include references to the compliance with prior informed consent and benefit sharing where appropriate; and have certain legal consequences in cases of non-compliance. He also indicated that the disclosure requirement was not an additional or fourth substantive patentability requirement, and that his delegation would like to have an in-depth exchange of views with other interested parties in this regard.

112. The representative of China said that his delegation welcomed the discussion on the relationship between the TRIPS Agreement and the CBD as an important item on the agenda of the Council and also welcomed the consultations chaired by the Deputy Director-General, which were helpful in leading Members to convergence on this issue. He said that while national access and benefit-sharing systems and databases on genetic resources might be of some help in eradicating biopiracy, they were far from sufficient to solve the problem. On the other hand, the disclosure requirements would substantially help to fully implement the three main principles of the CBD, especially the one on benefit sharing. Accordingly, an amendment of the TRIPS Agreement could provide an international legal framework and enhance the mutual supportiveness between the CBD and the TRIPS Agreement. As biopiracy was a global problem, it needed a global solution. With this belief, China, together with a number of other developing Members, had put forward a joint proposal in 2006 that contained concrete wording for the amendment of the TRIPS Agreement. He noted that the African Group and a number of developing country Members including Venezuela and Paraguay had decided to co-sponsor this proposal and the LDC Group had also offered its support to it. Therefore, the co-sponsors and the supporters of the disclosure proposal amounted to nearly half of the Membership of the WTO. His delegation attached great importance to their support as it proved that this was a development issue. Therefore, he encouraged all Members to engage in text-based discussions in informal consultations and to hold focused technical discussions on the amendment proposal at the Council's regular meetings in order to deepen Members' understanding of the amendment proposal.

113. The representative of India said that, according to the Doha mandate, negotiations on outstanding implementation issues were an integral part of the work programme. The relationship between the TRIPS Agreement and the CBD was a critical implementation issue for developing countries. The objectives of the disclosure proposal contained in document IP/C/W/474, of which India was one of the key proponents, were shared by all Members. No Member supported misappropriation of genetic resources and traditional knowledge and all Members wished to prevent erroneously granted patents and agreed that mutual

supportiveness between the TRIPS Agreement and the CBD could be enhanced through the disclosure requirements. The failure of the TRIPS Agreement to extend protection to genetic resources and traditional knowledge, which developing country Members enjoyed in abundance, was one of the factors leading to the imbalance in the TRIPS Agreement and in the multilateral trading system as a whole. Under the TRIPS Agreement, countries had no obligation to examine whether there was any misappropriation of genetic resources and traditional knowledge in patent applications. Without adequate and effective protection of genetic resources and traditional knowledge at the international level, the problem of misappropriation of genetic resources and traditional knowledge would continue. He said that having labelled the Doha Round as a development one, its results would not be complete if it fell short of correcting this imbalance. For India, an outcome on this issue was an essential element of any development package that emerged from the Round. The growing support base for the proposal, including co-sponsorship by the African Group and the support of the LDCs, indicated that it was time to enter the phase of text-based negotiations. The work in the TRIPS Council should complement the work in the negotiating process.

114. The representative of Lesotho, speaking on behalf of the LDC Group in the WTO, said that the LDC Group remained ready to engage constructively in all these issues with a view to achieving a successful conclusion of the Doha Round. He recalled that, at the TRIPS Council meeting of 5 June 2007, the LDC Group had made a statement supporting the disclosure proposal originally presented by Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand and Tanzania. He also recalled that, since that meeting, the LDC Group had been consulting among its Members in order to indicate the exact nature of its support for the disclosure proposal, given that the LDCs had vast biological resources and were a home of bio-diversity. He informed the Council that the LDC Group had been convinced that it was important to address misappropriation of genetic resources and erroneously granted patents. Therefore, he reiterated the Group's support to the disclosure proposal and indicated that this issue should be an important part of the development outcome of the Doha Round.

115. The representative of Sri Lanka expressed his full support to the Peruvian submission. He recalled that Members had started the process with an examination of a non-exhaustive list of technical issues during the consultations in line with paragraph 19 of the Doha Declaration and paragraph 44 of the Hong Kong Ministerial Declaration, and that, in his view, these technical issues had been sufficiently clarified. He said that a legally enforceable disclosure requirement would prevent misappropriation of genetic resources and traditional knowledge and erroneously granted patents. He said that an overwhelming majority of the developing countries had reiterated that finding a satisfactory outcome to the CBD issue, as well as to the GI issue, was critical to deliver the development dimension of the Doha work programme. Therefore it was time for Members to engage in text-based negotiations.

116. The representative of Pakistan said that the entire membership agreed with the basic premise of the proponents of the disclosure proposal that biopiracy was a serious problem. He said that, as one of the co-sponsors of the disclosure proposal, his delegation was fully aware of its value and implications for Members' economies. He said that intellectual property rights (IPRs) had evolved in large part due to the recognition by societies in domestic jurisdictions and protection afforded internationally. To block out of the same protection of IPRs the interests of developing Members and their communities in comparison to better placed stakeholders could only lead to an erosion of respect for and protection of other IPRs, which was highly undesirable. He therefore urged Members to give this issue its due importance within the Council. He appreciated the constructive attitude of some developed country Members, in particular Norway. He indicated his delegation's willingness to cooperate with other Members on finding ways to move to text-based negotiations. Finally, he said that any outcome in the Doha Round that did not take into account the development dimension of the TRIPS Agreement would not be acceptable to the proponents and to the Membership at large.

117. The representative of Norway said that the TRIPS Agreement and the CBD could and should be implemented in a mutually supportive manner, and that the interaction between the two treaties would be enhanced by the disclosure obligation in the TRIPS Agreement. He then responded to the questions posed by Chinese Taipei at the Council's previous meeting. He replied in the positive to the question whether the disclosure requirement should apply to patent applications in non-biotechnology fields. Regarding the question about which fields would be covered by the disclosure requirement, he said that while his delegation did not have a definitive answer, the requirement should be technology-neutral, as was the wording of Article 27.1 of the TRIPS Agreement. Regarding the question of whether the disclosure proposal exceeded the Doha mandate, he said that the requirement was consistent with the broad language and objectives of the Doha Declaration, and therefore did not exceed the mandate of the relevant paragraphs in the Doha Declaration. Regarding the question of whether the notification of traditional knowledge that had no connection with genetic resources had to be delivered through the CBD Clearing-House Mechanism, he said that that mechanism could not be used for material outside the scope of the CBD, and accordingly a notification system had to be designed to include such traditional knowledge. An effective solution could be to expand the scope of existing mechanisms, such as the CBD Clearing-House Mechanism. Regarding the question of whether genetic resources obtained not by bio-prospecting but by purchase on an open market should be disclosed in patent applications, he said that the aim of the Norwegian proposal was to further the objectives of the CBD, and that all biological material should be treated in the same manner. This would enhance transparency and secure a balance between the material purchased on the open market and the material obtained from other sources. Therefore, when material had been

purchased on the open market, it would be sufficient to disclose the source, i.e. the country of origin or the provider country, if different.

118. Responding to the question raised by Australia about whether it would be enough to satisfy the proposed disclosure requirement for patent applicants simply to make a statement that prior informed consent and access and benefit sharing had been obtained, he said that it might not be enough. In his view, the patent system would only enjoy necessary transparency, credibility and trust if there was a link to a specific material in patent applications. Regarding the question of whether compliance with relevant national laws had to be confirmed by patent authorities, he said that it was not envisaged that patent authorities would have to confirm compliance with relevant national laws. Regarding the question of how the disclosure requirements would ensure that the novelty criterion was met, he said that such requirements could have an impact on assessments of novelty and inventive step if the material covered by the patent application had not been modified, sequenced or isolated from its natural environment. Moreover, traditional knowledge could contain information that anticipated the claimed invention.

119. The representative of Colombia said that Peru's submission was useful to identify the problem facing mega bio-diverse countries. National and regional protection systems did not suffice and there was a need for multilateral obligations. Regarding Japan's proposal for the database system, he said that it could complement but in no way substitute the need for a multilateral disclosure requirement. He said that the WTO was the only forum to negotiate this issue based on the text submitted.

120. The representative of the European Communities said that, from the outset, his delegation had addressed these important issues in an open and constructive spirit and that it would continue to be committed to this process in line with the mandate contained in the Doha Declaration. He said that the flexibilities of the TRIPS Agreement and the availability of other international instruments, such as the CBD, allowed Members to address these issues in a satisfactory manner in many cases. There was therefore no conflict between the TRIPS Agreement and the CBD. However, his delegation was prepared to look into concrete solutions to the problem when necessary and to consider limited adjustments of intellectual property systems in order to ensure a more effective interplay between the two agreements.

121. He recalled that, in its communication to the Council in 2002, his delegation had agreed to examine the possible introduction of a system, such as a disclosure requirement, that would allow Members to keep track of all patent applications relating to genetic resources at the global level. Such a system would ensure transparency and would allow the authorities of countries granting access to their resources to keep track of patent applications based on the

use of these resources. He said that the introduction of the new patent disclosure requirement would not in itself achieve the objectives of the CBD, but if appropriately calibrated, it could be a tool to contribute to a solution, particularly to help check whether contractual arrangements had been respected. He said that the introduction of the disclosure requirement should allow the patent system to continue to be a highly effective tool for stimulating innovation, technological progress and economic development. It should not be burdensome to the patent system and, in particular, patent offices should not be required to verify the conditions under which genetic resources had been obtained. The role of the patent office should be limited to examining whether the formal requirements had been fulfilled and whether the patent applicant who had declared that his invention had used genetic resources had subsequently disclosed the appropriate information. Similarly patent applicants should not be confronted with insurmountable formalities and should only provide information that they knew. Accordingly, his delegation could only support the disclosure of origin or source. A system that would require the disclosure of evidence of prior informed consent and benefit sharing would be problematic. Regarding the legal consequences of non-compliance with the disclosure requirement, he said that when the information provided was incorrect or incomplete, appropriate sanctions, either administrative or criminal as determined by each country, should be applied. However, these sanctions should be applied outside the sphere of patent laws. In other words, sanctions for non-compliance should not include the revocation of granted patents. Before the patent was granted, if the applicant failed or refused to declare the required information despite being given the opportunity to do so, the application should not be further processed and the applicant should be duly informed of this consequence.

122. The representative of Thailand said that biopiracy was of great concern to his delegation. Without adequate and effective protection at the international level, the problem of misappropriation of genetic resources and traditional knowledge would continue. The amendment proposal was both logical and timely. As the proposal focused only on patent systems, the scope of its application would be modest and limited and would not expand to other IPRs. He said that a solution to misappropriation of genetic resources and traditional knowledge should be part of the outcome of the Doha Development Round. This was particularly important given the substantial support extended by the African Group and the LDC Group. Accordingly, his delegation suggested starting text-based negotiations.

123. The representative of Japan referred to a case of biopiracy contained in Peru's submission, in which the Japanese Patent Office (JPO) had allegedly not considered the information sent to it by Peru for examination of a patent application. He said that the patent examiner had decided to reject the patent application before receiving the information submitted by Peru. After considering the information submitted by Peru, and the arguments

and amendments made by the applicant, the examiner had issued a final decision which maintained the first decision. Regarding Peru's concern over poor or no translation of patent applications and grants in the JPO's databases, he said that the JPO had been making an effort to improve the quality of machine translation. It would be useful to add the term "genetic resources" to the dictionary of machine translation. He informed the Council that the English abstracts of patent applications received after 1970 and English machine translations of entire patent applications received after 1993 were now available. Referring to Peru's statement that the disclosure requirement was necessary to prevent biopiracy and to avoid bad patents, he said that, as indicated in document IP/C/W/472, since patent examination was based on the technical characteristics of patent subject matter rather than its geographical origin, information on the origin was irrelevant to the determination of patentability. To improve patent search facilities, such as through databases, was a way to prevent bad or erroneously granted patents.

124. The representative of the United States said that his delegation was one of several Members that saw no conflict between the TRIPS Agreement and the CBD. It considered that these agreements could and should be implemented in a mutually supportive manner and that therefore no amendment to the TRIPS Agreement was needed or warranted. The recent discussions in the Council had generally confirmed a wide divergence of views on how to address these issues. He believed that the Council's work should, consistent with its mandate, continue to focus on fact-based discussions analyzing actual examples and illustrating perceived concerns. This work should include, in particular, examination of existing access and benefit-sharing regimes as this appeared to be directly related to perceptions of what constituted misappropriation. In this way, the Council's future work could facilitate progress in this area and continue to clarify points of disagreement while helping to reduce differences among Members.

125. He said that his delegation continued to share the concerns raised by Peru and other Members regarding ensuring appropriate access and equitable benefit sharing and that some inventions that might be passing examination of novelty or inventive step when they should not, as indicated in Peru's submission. Referring to the examples provided in Part IV of Peru's paper, he said that it was not clear to his delegation that patents had in fact been granted in a manner that could be regarded as enabling biopiracy. He said that, as demonstrated by the extensive discussions on the turmeric case, reference to the country of origin was irrelevant to an examination of compatibility with patentability criteria and therefore the new patent disclosure requirements would not achieve the objectives that they sought to achieve. Instead, as advocated by his delegation, a contract based system including provisions for mutually agreed terms would provide for appropriate access to genetic resources as well as ensure equitable sharing of the benefits from their use.

Nonetheless, his delegation remained willing to work through specific examples to gain a better understanding of the concerns raised and to resolve the divergent views of Members. Referring to Peru's concerns on access to patent information and translation, he said that there was significant room to address all these concerns in a manner that would not have the inherent problem of the disclosure proposal. In this regard, he supported further work on Japan's proposal for a one-stop database system. He also said that the TRIPS Council should focus on pragmatic solutions to the concerns raised rather than advocate burdensome remedies that would not address underlying problems.

126. The representative of Chinese Taipei said that Japan's proposal for a database system was worth exploring in order to avoid erroneously granted patents. As regards prior informed consent and access and benefit sharing, he said that, as Members had divergent views on this issue, further discussion was needed to help Members understand the pros and cons of each proposal. He then posed several questions to Norway regarding its proposal: what would be the legal effect on patent applications or granted patents if the patent applicant disclosed relevant information in good faith, but a third-party protested the disclosed information? Would the patent examination process be stopped until this issue was resolved? What would happen if this issue occurred after the patent had been granted or after some benefits had been shared?

127. The representative of Switzerland said that Japan's proposal was very much in line with his delegation's proposal for the establishment of an international gateway for traditional knowledge. This gateway would link electronically local and national databases on traditional knowledge, which would facilitate access by patent authorities to traditional knowledge stored in these databases. This gateway would allow the effective integration of traditional knowledge documentation into searchable prior art. This gateway would be complemented by other measures taken at the international and national levels with regard to access and benefit sharing. More information on the gateway proposal could be found in documents IP/C/W/284 of June 2001 and IP/C/W/400/Rev.1 of June 2003. He recalled that his delegation had submitted proposals to WIPO regarding disclosure of the source of genetic resources and traditional knowledge in patent applications, a summary of which was contained in WIPO document WIPO/GRTKF/IC/11/10 of June 2007.

128. He then raised two questions on Japan's proposal: had Japan analyzed the required standardization of the established databases in detail, such as the format of the databases and the software used? Would Japan's proposals cover the databases other than those established at the national level, such as regional or local databases?

129. The representative of Korea said that his delegation fully understood the importance of biopiracy and misappropriation of genetic resources. However, introducing a new

requirement into the TRIPS Agreement as a condition for granting patents would impose an undue burden on both patent applicants and patent authorities, which would inevitably cause instability in the patent system. Regarding the relationship between the TRIPS Agreement and the CBD, he said that fact-based discussions would help to identify problems and to reduce gaps in Members' understanding of this issue. He shared the view with Japan that the TRIPS Council should take into account the work being carried out in WIPO in order to avoid duplication.

130. The representative of Canada said that his delegation would continue to engage constructively in ongoing discussions on the relationship between the TRIPS Agreement and the CBD in the TRIPS Council. Nevertheless, other international forums that had established expertise and capacity in this area, including the CBD, WIPO and the FAO, were also undertaking significant technical discussions. He underscored the progress accomplished at the last sessions of the IGC. He reaffirmed his delegation's view that the most meaningful way to advance the discussion on the relationship between the TRIPS Agreement and the CBD in the WTO was to engage in fact-based technical discussions of various proposals made in the TRIPS Council and that time and considerations should be given to a full scoping of the issue before proceeding further, with particular focus on those who had either best practices to share or who had experienced problems. He encouraged Members to consider other mechanisms to protect biodiversity and prevent misappropriation of genetic resources, such as developing broader and more globally accessible and functional prior art databases, using mutually agreed terms in material transfer agreements, licensing, codes of conduct and other contracts. With respect to the proposal for introduction of a mandatory disclosure obligation into the TRIPS Agreement, he said that his delegation had not yet been shown that there was a contradiction between the TRIPS Agreement and the CBD and therefore remained unconvinced of the need for such an amendment.

131. The representative of Australia underlined a need for a clear meaning of the term "biopiracy". She said that biopiracy was used to refer to different situations. The first category, as emphasized by Brazil, referred to cases where genetic resources and/or traditional knowledge had been obtained illegally, i.e. in contravention of laws governing access to those resources in those countries. A second one, as emphasized in Peru's paper, referred to cases where genetic resources or traditional knowledge had been obtained legally and were used in patents which arguably lacked novelty due to the existence of prior art in the form of traditional knowledge. In her view, it was important to distinguish between those two categories in order to properly deal with the underlying problem. The biopiracy cases documented by Peru appeared to fall within the second category, although one case was not entirely clear. Regarding the case concerning an application in Japan, she said that as the patent application had been rejected by the JPO, she wondered what was Peru's concern over

it. Regarding the second case, which was the only one of the five cases given where a patent had been granted, no basis had been given for the claim of biopiracy. She wondered whether Peru argued that prior art existed or that genetic resources had improperly been removed from Peru in contravention of its national laws. She said that all these questions led her delegation to a fundamental question: how would the disclosure proposal have affected the outcome of the cases documented by Peru or how would the disclosure proposal have provided patent examiners information to better access prior art and to avoid bad patents or biopiracy. She said that the disclosure provisions would indicate at most that a further concentration on a search of documents from the origin country might be warranted. However, even then in practice this information was unlikely to be helpful in identifying relevant prior art for a number of reasons. Firstly, genetic resources were often available in many different countries at the same time. Secondly, much information about novelty and inventive properties was not recorded and thus not revealed in prior art searches, which was even more likely in the case of traditional knowledge.

132. She further said that there were a number of existing tools which could facilitate disclosure, such as the International Patent Classification System which included traditional medicine related subject matter and allowed for more targeted documentation searches, and the PCT minimum documentation which included traditional knowledge and non-patent literature, and could be consulted by international search authorities to have comprehensive prior art searches. She said that database-type solutions seemed to be more useful in addressing the problems facing Peru than the proposed amendment of the TRIPS Agreement. She would like to have Peru's views on Japan's proposal for databases. In conclusion, she said that her delegation agreed with India that the objectives of the disclosure group, namely to prevent bad patents and misappropriation and to ensure equitable benefit sharing, had been widely shared by Members. However, her delegation disagreed with India on the means of achieving these objectives.

133. The representative of New Zealand said that, as a bio-diverse country, New Zealand had an interest in certainty and predictability of intellectual property systems, but also a significant indigenous interest in the preservation of New Zealand's genetic resources and traditional knowledge. Discussions in the TRIPS Council were followed with a great deal of interest at the national level. He encouraged Members to have fact-based discussions, including discussion of specific cases and national experiences, which would lead Members to useful conclusions about the extent of misappropriation, how existing systems could be implemented more successfully, and whether new tools were required. Regarding Peru's submission, he said that it provided a comprehensive outline of Peru's legislative and institutional framework for protection of biological resources and traditional knowledge, especially Peru's National Anti-Biopiracy Commission. He noted that the JPO's databases

had supported the Commission's work, but Peru had concerns on the time and cost of access, translation and analysis of patent applications. He therefore wondered whether Peru had views of the merit of further exploring Japan's proposal.

134. The representative of the Philippines said that, pursuant to the mandate given by the Hong Kong Ministerial Conference, an appropriate way forward was to constructively engage in text-based negotiations as soon as possible so as to define an international framework as proposed by Brazil, China and others.

135. The representative of Peru said that his delegation was open to all proposals on the table, including the proposals made by Japan, Switzerland and the United States. He informed the Council that the Free Trade Agreement between Peru and the United States recognized the value of contract-based systems. He said that the database system established by Peru for the registration of traditional knowledge was a useful effort, which might be replicated by the WTO or other international organizations. Referring to Canada's point that this issue was being dealt with in other forums, he said that the WIPO IGC had not made progress on the substance of this issue and that the TRIPS Council was an appropriate forum. Regarding the question of what constituted biopiracy, he said that it meant misappropriation of genetic resources and traditional knowledge. Regarding some Members' suggestion that Members should start with examination of specific biopiracy cases, he said that the approach of case-by-case study was not necessary and that other negotiations had not used such an approach. Finally, he said that the disclosure requirement, which might not be a final solution to the problem of biopiracy, did make it easier for Members to tackle and investigate biopiracy cases.

136. The representative of Japan reiterated that the IP address authentication system would address some Members' concern on the exposition of the information contained in the database system.

137. Returning to this agenda item later in the meeting, the representative of Lesotho, speaking on behalf of the LDC Group in the WTO, said that the Group not only supported the proposal originally submitted by Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand and Tanzania, but also wished to co-sponsor it.

138. The delegations of India, Brazil and China welcomed the decision of LDCs to co-sponsor the developing country proposal on TRIPS and CBD, emphasizing the importance of the growing base of supporters among WTO Members for taking the proposal further. The growing support indicated that this particular element of the negotiations in the Doha Round was of real importance to developing countries in general and that text-based negotiations on the matter had to begin soon.

139. The Council took note of the statements made under these three agenda items and agreed to revert to them at its next meeting.

G. Review under Paragraph 8 of the Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health

140. The Chairman recalled that paragraph 8 of the waiver Decision provided that the Council for TRIPS should review annually the functioning of the system set out in the Decision with a view to ensuring its effective operation and should annually report on its operation to the General Council. Furthermore, the paragraph provided that this review should be deemed to fulfil the review requirements of Article IX:4 of the WTO Agreement.

141. He said that the Secretariat had prepared a draft cover note for the Council's report modelled on that of last year's report (JOB(07)/150). The draft cover page contained factual information on the implementation and use of the system established under the Decision and on the acceptance of the Protocol Amending the TRIPS Agreement. He proposed that, in accordance with the way that the Council prepared its report last year, the part of the minutes of the meeting reflecting the discussions held under this agenda item be attached to the cover note.

142. He informed delegations that, since its meeting in June, the Council had received from Rwanda a notification under paragraph 2(a) of the Decision of 30 August 2003 on the "Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health" (IP/N/9/RWA/1). The Council had also received a related notification from Canada under paragraph 2(c) of the same Decision (IP/N/10/CAN/1).

143. As regards the status of acceptances of the Protocol Amending the TRIPS Agreement that was done at Geneva on 6 December 2005, he said that the following Members had notified their acceptance of the Protocol since the Council's meeting in June: Israel on 10 August, Japan on 31 August, Australia on 12 September, and Singapore on 28 September (documents WT/Let/582, 592, 593 and 594, respectively). He recalled that the United States, Switzerland, El Salvador, Korea, Norway, India and the Philippines had notified their acceptance already earlier. Therefore, 11 Members had accepted the Protocol so far, which would enter into force for these Members upon acceptance of the Protocol by two thirds of the Members. He said that the Secretariat had circulated an update to the note on the status of acceptances of the Protocol that the Council had requested it to prepare at its meeting in October 2006 (IP/C/W/490/Rev.1) and that the Secretariat would continue to update it periodically.

144. The Chairman recalled that the Protocol was open for acceptance by Members until 1 December 2007 or such later date as may be decided by the Ministerial Conference. Given the proximity of this date, he suggested that the Council may wish to consider submitting a proposal to the General Council for a decision to extend the period for the acceptance of the Protocol. For this purpose, a draft decision on the extension of the period for the acceptance that could be submitted to the General Council had been included in Annex 2 to the draft report. As regards the deadline for the extended period for acceptances, he suggested that the Council consider proposing an extension of the period by a further two years until 31 December 2009.

145. The representative of Canada said that the draft report accurately reflected Rwanda's notification to the Council of its intention to import 260,000 packs of triple combination HIV/AIDS therapy manufactured by the Canadian company Apotex. On 4 September, Apotex had filed the first compulsory licence application under Canada's Access to Medicines Regime and, on 19 September, the Commissioner of Patents had granted an authorization to Apotex to manufacture and export the triple therapy drug to Rwanda. His delegation was pleased to be the first country to issue a compulsory licence under the system set out in the Decision. The licence was valid for two years from the date of the grant. Apotex could seek a renewal for a further two years if the authorized quantity of the drug was not exported during the initial period. He referred to his delegation's notification for further details (IP/N/10/CAN/1) and hoped that Rwanda's notification would inspire other countries to follow. Canada's officials were prepared to explain to other interested parties how best to take advantage of the regime.

146. He noted that his delegation had been among the first to introduce legislation to implement the Decision. Based on the automatic review mechanism built into domestic legislation, public comments had been sought on a consultation paper and a parliamentary committee had held public hearings. The review was now completed and the Government was working on finalizing the ensuing report. He hoped to be in a position to share more details at the Council's next meeting.

147. He noted that Canada's Access to Medicines Regime was only one part of the Government's broader response to addressing public health problems in the developing world. For example, the budget for 2007 had introduced a new tax incentive to encourage pharmaceutical manufacturers to donate greater amounts of needed medicines to developing and least-developed countries. In addition, an HIV/AIDS vaccine initiative was currently being funded in collaboration with the Gates Foundation.

148. Turning to the proposal for a decision to extend the period for the acceptance of the Protocol, he said that his delegation supported the extension of the deadline until 31

December 2009. He encouraged all WTO Members to complete their internal procedures before that date. He reminded delegations that the waiver remained in place in the meantime and that Canada's Access to Medicines Regime would continue to function fully.

149. The representative of Uganda, speaking on behalf of the African Group, said that the African Group fully endorsed the Chairman's proposal that the draft report be submitted to the General Council and the deadline for the acceptance of the Protocol be extended for another two years to 31 December 2009. This would allow WTO Members to complete their internal ratification procedures. The African Group was working very closely with capitals to get the necessary approval for the acceptance of the Protocol and expected that most of its members would be depositing their instruments of acceptance sooner rather than later so that the required acceptance of the Protocol by two thirds of the membership could be reached and the TRIPS amendment enter into force.

150. He thanked the delegation of Canada for its support for the extension of the deadline and endorsed the African Group's support for Canada's statement according to which the waiver remained in place until the procedures regarding the acceptance of the Protocol were completed. He also noted that the African Group would continue to monitor the domestic processes in those members that had not filed their intention to use the system.

151. The representative of Rwanda recalled that, pursuant to the 30 August 2003 Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, his delegation had notified the Council for TRIPS of its intention to import a fixed dosed antiretroviral drug. It was the first country without manufacturing capacities to initiate the process of using the waiver to the TRIPS Agreement. Since Canada had issued a compulsory licence to a domestic company in order for it to start producing the generic version of the medicine, the process was moving ahead. He said that the steps already undertaken provided evidence that the instrument negotiated by WTO Members for public health purposes could work.

152. The representative of China welcomed Rwanda's effort to use the flexibilities in the system set up by the Decision, as well as the notifications submitted by Rwanda and Canada. This was a useful attempt to test the effectiveness of the system. It would be helpful for other Members to learn from the experience made in this regard. He said that China attached great importance to the Protocol and was approaching the final stage of the process for its acceptance. While he believed that China would be able to notify its acceptance before the original deadline, he could also support the extension of the deadline for another two years.

153. He welcomed notifications by Members who had already amended national legislation in order to implement the system. He encouraged them to make presentations on their implementing legislation, including on how any problems had been addressed, since many developing country Members were facing technical problems in amending their relevant national laws and regulations and in understanding the national legislations of other Members. In this regard, he welcomed Canada's introduction to the review mechanism of its national legislation and was looking forward to the report by Canada on its outcome at the Council's next meeting.

154. The representative of the European Communities welcomed the notification by Rwanda of its intention to use the system set up by the Decision and the positive and quick answer by Canada authorizing the manufacture and export of the drugs concerned to meet Rwanda's needs. This was an important step which demonstrated that the system was working. He encouraged other countries in need to use it. His delegation had adopted a Regulation in 2006 which implemented the system, allowing European companies to produce generic drugs under compulsory licence.

155. As the required threshold for the entry into force of the Protocol would not be reached by 1 December 2007, his delegation supported the extension of the deadline for another two-year period. He informed the Council that the European Parliament's assent to the TRIPS amendment was imminent, which would enable his delegation to proceed to the notification of the acceptance of the Protocol after the final approval by the European Communities' Council of Ministers. Other WTO Members which had not accepted the Protocol should do so as soon as possible to confirm their commitment to the process.

156. The representative of Norway said that his delegation was ready to go along with the proposal to extend the period for acceptance. He encouraged WTO Members that had not notified their acceptance to maximize their efforts to meet the original December 2007 deadline.

157. The representative of Switzerland supported the draft report, as well as the Chairman's proposal to extend the deadline for acceptance of the Protocol for another two years. He regretted that this had become necessary, despite the urgency attached by many delegations to the transposition of the waiver into an amendment of the TRIPS Agreement in 2005. His delegation had hoped that the amendment could have entered into force within the initial period for acceptance set by the General Council. He encouraged Members which had not yet accepted the Protocol to complete their internal procedures so that the amendment could enter into force before the expiry of the extended period for acceptance.

158. He welcomed the notifications by Rwanda and Canada and was looking forward to having further news on how the system was put in operation. His delegation had notified its acceptance in 2006. In June 2007, the Parliament had approved national implementing legislation which was expected to enter into force early in 2008. It introduced the possibility of granting a compulsory licence for export purposes in accordance with the terms and conditions of the draft amendment of Article 31bis of the TRIPS Agreement and its Annex.

159. The Chairman proposed that the Council agree on forwarding to the General Council the proposal for a decision to extend the period of acceptance by Members of the Protocol until 31 December 2009. He suggested that paragraph 10 of the draft report to the General Council be modified to read as follows: "Given the present status of acceptances, the Council for TRIPS submits the attached proposal to the General Council for a decision to extend the period for acceptances of the Protocol." He proposed that, with these modifications, the Council agree to the cover note to the report contained in JOB(07)/150 and also that the Council minutes containing the record of the discussion be attached to it.

160. The Council so agreed.

H. Non-Violation and Situation Complaints

161. The Chairman recalled that paragraph 45 of the Hong Kong Ministerial Declaration directed the TRIPS Council to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the next session of the Ministerial Conference. It was agreed that in the meantime, Members would not initiate such complaints under the TRIPS Agreement.

162. He further recalled that, at its meeting in March 2006, the Council had agreed to keep the item on non-violation and situation complaints on the agenda as a regular item so as to allow Members who would have new thinking to share it, and also enable the Council to consider improved ways of organizing its work on this matter.

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

I. Review of Implementation of the TRIPS Agreement Under Article 71.1

164. No statements were made under this agenda item.

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

J. Review of the Application of the Provisions of The Section on Geographical Indications Under Article 24.2

166. The Chairman recalled that Article 24.2 provided that the Council shall keep under review the application of the provisions of the GI Section of the Agreement. He said that, at its meeting in February, the Council had agreed that the Chair hold further consultations in due course on how the Council should organize its future work on the review. Given that he had not received any representations from delegations on the issue, he had not yet held such further consultations. However, he remained ready to hold such consultations once he would sense an active interest in pursuing the matter.

167. He urged those delegations that had not yet provided responses to the Checklist of Questions contained in document IP/C/13 and Add.1 to do so. He also said that those Members who had already provided responses could provide updates to the extent there had been any significant changes to the way they provide protection to geographical indications.

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

K. Fifth Annual Review Under Paragraph 2 of the Decision on The Implementation of Article 66.2 of the TRIPS Agreement

169. The Chairman recalled that, at its meeting in February 2003, the Council had adopted a decision on the "Implementation of Article 66.2 of the TRIPS Agreement". Paragraph 1 of the Decision provided that developed country Members shall submit annually reports on actions taken or planned in pursuance of their commitments under Article 66.2. To this end, they were to provide new detailed reports every third year and, in the intervening years, provide updates to their most recent reports. These reports were to be submitted prior to the last Council meeting scheduled for the year in question. He said that the second set of detailed annual reports under the Decision had been presented to the Council's meeting in October 2006. At its meeting in June 2007, the Council had requested developed country Members to submit updates to these reports for the October meeting. The Secretariat had issued an airgram (WTO/AIR/3053) on 23 July to remind developed country Members of this request.

170. The Council had received updates to these reports from the following developed country Members: Switzerland; Japan; the European Communities and individual member States (namely Austria, Belgium, the Czech Republic, Finland, France, Germany, Ireland, Spain, Sweden, and the United Kingdom); as well as from New Zealand; Norway; the United States; Canada; and Australia (being circulated in document IP/C/W/497 and addenda).

171. As regards the purpose and conduct of the review of this information, he recalled that paragraph 2 of the Decision on the Implementation of Article 66.2 of the TRIPS Agreement

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

172. The representative of Lesotho, speaking on behalf of the LDC Group in the WTO, said that LDCs had always been appreciative of the efforts of and initiatives taken by their developed trading partners on the issue of technology transfer. The LDC Group believed that the development of technological capacity was essential for the successful integration into the multilateral trading system. When the TRIPS Agreement was negotiated, the importance of this factor was fully realized and reflected in Article 66.2. He therefore called upon developed country Members to provide the kind of technical and financial incentives that would encourage the implementation of technology transfer. The LDC Group also requested them to share environmental technologies to help LDCs protect the environment.

173. Thanking developed country Members for their reports, he said that he expected Members to appreciate the capacity constraints LDC Members faced. It was a challenge for them to go through the reports and to be assured that the developed country Members had complied with their obligations. Given that it needed support in this area, the LDC Group believed that it would be beneficial if it could be assisted in understanding and analyzing the reports. He requested the WTO Secretariat to arrange seminars and workshops for LDC Members to help them better understand the reports and enable them to participate more actively and substantively in the discussions on this issue. He said that the WTO Secretariat could, if necessary in collaboration with other organizations like the ICTSD, organize a seminar for LDC Members.

174. The representative of Brazil noted that reports on the implementation of Article 66.2 were rather lengthy and differed in style. He said that not only LDCs needed the assistance of the WTO Secretariat to better understand what is actually being done by the submitting Members. He supported the request of the LDC Group and suggested that the workshop should be open-ended so as to allow all interested Members to attend.

175. He said that there seemed to be a diverse interpretation of what was the actual meaning of Article 66.2. Firstly, there was not a single understanding on the meaning of the concept "transfer of technology", since most submissions listed activities under technical assistance to developing countries, funded through their respective ODA or competent authorities. As stated in Canada's submission, domestic incentives for the transfer of technology might occur in the form of intellectual property embedded in the transferred goods and services. He was

not sure he could concur with this interpretation of the meaning of transfer of technology since, in his view, this was trade in goods and services. Mere trade in goods and services did not necessarily lead to transfer of technology.

176. He said that Switzerland's submission focused on the activities of the Swiss Official Development Assistance Programme, not many of which seemed to lead to transfer of technology to LDCs in the sense of Article 66.2. Its paragraph 16 described the Swiss Import Promotion Programme, which was aimed at enhancing exports from LDCs into Switzerland. While this could be an interesting trade promotion activity, it was not necessarily leading to transfer of technology. There were certain areas which needed further analysis like, for example, fostering compliance by Mozambique's exporters with EUREPGAP standards or good agricultural practices. While there was a considerable amount of training activities, they did not necessarily lead to transfer of technology. Paragraph 23 of the Swiss proposal described training courses on intellectual property supported by Swiss financing, which took place at WIPO headquarters in Geneva and then at the Swiss Federal Institute of Intellectual Property in Berne. This seemed to be a good education and awareness exercise, but not necessarily transfer of technology. According to paragraph 30, Switzerland provided assistance to LDCs for preparing and enforcing intellectual property laws and regulations, as well as for supporting their domestic offices. He said that there was also a lengthy list of projects in different countries, although there was no additional information on their nature. For example, there was a project to set up an anti-retroviral health system in Mozambique, which was carried out by Médecins Sans Frontières, Switzerland. This activity seemed to go in the right direction and was very important. However, there were other activities, which were not really covered by Article 66.2.

177. He continued that Japan's submission was framed under the Japanese official development assistance budget and appeared more in line with technical cooperation than transfer of technology. There was considerable assistance for export, legal and enforcement issues, such as an IP Enforcement Workshop for Indonesian Officials. He said that he failed to see how these capacity-building activities could lead to transfer of technology. There should be clearer criteria for the preparation of these submissions. He said that paragraph 7 of the Japanese submission described measures to combat the distribution of counterfeit medicines and this was also of great importance, but did not lead to transfer of technology.

178. He said that the lengthy EC submission attempted to define "technology transfer". According to its paragraph 4 technology transfer referred to the ways and means through which companies and organizations acquire technology from foreign sources. However, he did not agree with this definition or with the statement that the private sector was the main

source of technologies, since technology production was normally subsidized by governments and later on acquired by the private sector. The report listed incentives, including direct investment, licensing, franchising, sub-contracting, technical assistance, and legislative reform. He wondered what kind of legislative reform this referred to. Also management of standardization was included in the list as a means to promote technology transfer. He did not think that trade and technological and scientific goods per se promoted transfer of technology. He cited the example of the "Clinical Trial Unit of Prince Leopold for Tropical Medicine", where there was no list of beneficiary countries and therefore it was not obvious where the relevant technologies had been transferred to. He said that it would be important to harmonize the presentation of the submissions in order to offer concrete information related to the provisions in Article 66.2. In his view, Members remaining silent should not be construed as endorsing the reports as a proof of compliance with Article 66.2.

179. The representative of China said that the annual review was useful to ensure that developed country Members effectively provide the incentives to encourage technology transfer to least-developed country Members, as provided in Article 66. He said that his delegation appreciated the efforts made by Members responding to this annual review, but that it had been difficult to examine the lengthy submissions and to understand the link between the listed activities and transfer of technology. His delegation wished to take some time to study the submissions and make additional comments at the Council's next meeting.

180. The representative of Canada concurred with the representative of Brazil that there were different approaches to defining "transfer of technology" and to presenting information. These differences happened even at the domestic level, where agencies had differing views and, for example, some provided incentives relating to actual technologies and others for related skills. Canada had a number of programmes to encourage transfer of technology by Canadian enterprises and institutions. However, occurrences of technology transfer were private to private projects and the information could not be shared due to its proprietary and/or commercially sensitive nature. He said that since each Member had a different approach, the harmonization of reports might not be the best way to address this situation.

181. The representative of the United States said that the comments by Lesotho, on behalf of the LDC Group, had been very helpful and provided a basis for the discussion on the utility of the reports submitted under Article 66.2. He said that his delegation was ready to meet with the LDC Group to answer any questions they might have with regard to the submission of the United States in the margins of the next Council's meeting, and to hear any suggestion on how in the future his delegation could continue to improve its reporting. To refine this year's report, it had tried to move activities that looked to it to be more about technical cooperation into the separate report concerning its activities under Article 67. It had provided additional

content with respect to incentives for technology transfer in the field of health, since it was of particular interest and concern to many LDC Members. Furthermore, the report exclusively focused on activities to provide incentives for technology transfer specifically to LDC Members. While Article 66.2 was of interest to all Members, his delegation believed that it was important to focus its reporting with respect to activities on the Members that were clearly identified in the provision and it intended to follow this approach in the future.

182. The representative of Switzerland said that his delegation welcomed the substantive inputs from other delegations. All Members could learn from each other when trying to find ways and means to best implement Article 66.2. This is why developed country Members had agreed to the Decision on the Implementation of Article 66.2 of the TRIPS Agreement, which required them to report annually on the implementation of that provision. Therefore, his delegation welcomed the numerous reports submitted by other developed country Members, which were a useful source of information and inspiration. He noted that the obligation of developed countries under Article 66.2 was to provide incentives to their enterprises and institutions for the purpose of promoting and encouraging technology transfer to least-developed country Members. It was not their obligation nor were they in a position to provide for technology transfer themselves or to ensure that technology is actually transferred. Furthermore, private companies and institutions could only be expected to invest in and transfer their technology to a specific country, if a number of framework conditions in the beneficiary country did actually exist. These conditions fell largely outside the sphere of influence of Switzerland or any other WTO Member under the provisions of Article 66.2.

183. He agreed with the delegate of Brazil that there was no commonly accepted definition of the term "technology transfer" or what was comprised or not, but did not interpret the term in such a narrow sense as had been proposed by Brazil. In his view, incentives for the purpose of promoting and encouraging technology transfer to LDC Members from Swiss enterprises and institutions included, in addition to incentives and activities directed at the provision of technical equipment in the industrial sector, capacity-building in LDCs to ensure the necessary framework conditions which were necessary for technology transfer. This included technology transfer in the health sector and development of administrative institutions. Hence, Switzerland provided incentives in numerous sectors and was actively engaged in the field of training and research activities contributing to sustainable development in LDCs, which in turn worked as an incentive to our companies to transfer their technology. Switzerland believed that assistance in sustainable development should be comprehensive and should not be limited to certain areas of technology transfer as Brazil had chosen to interpret in a narrow manner.

184. His delegation's updated report described the Swiss activities and incentives in detail. He noted some examples listed in Annex I to the communication, where technology had been transferred by Swiss entities to LDCs as a direct consequence of the incentives provided for by the Swiss Government: in Bangladesh, the Swiss company Skat Consulting had provided for arsenic free water harvesting technologies; in Burkina Faso, the Swiss Institute of Technology provided for technology and know-how in waste water management; in Nepal, Skat Consulting had headed a project on improvement of energy efficiency in the brick sector; in Tanzania, the company ITECO Engineering Limited had provided for technology and know-how transfer in the area of construction of bridges and roads. He reiterated his country's commitment to participate constructively in the review of the reports and to engage in the provision of incentives for an enhanced technology transfer.

185. The Chairman said that, based on the discussion under this agenda item, the Secretariat might follow up with the LDC Group concerning its request for a seminar or colloquium possibly in cooperation with other organizations like the ICTSD, and that he had taken note of the interest expressed by the Brazilian delegation in this being an open-ended activity. He urged those developed country Members that had not yet provided reports to do so. He reiterated his intention to provide an opportunity, at the Council's next meeting, for Members to make further comments on the information submitted for this meeting that they had not yet been able to study.

186. The Council took note of the statements made and so agreed.

L. Technical Cooperation and Capacity-Building

187. The Chairman recalled that the Council had agreed, at its meeting in June 2007, to hold its annual review of technical cooperation at the present meeting. In preparation for this annual review, developed country Members had once more been requested to update information on their technical and financial cooperation activities relevant to the implementation of the TRIPS Agreement in time for the present meeting. Other Members who had also made available technical cooperation were encouraged to share information on these activities if they so wished. The Secretariat had issued on 23 July 2007 an airgram (WTO/AIR/2880) reminding Members of this request. In addition, intergovernmental organizations observers to the Council as well as the WTO Secretariat had been invited to provide information.

188. The Council had received information from the following developed country Members: Switzerland; Japan; the European Communities and individual member States and agencies (namely Austria, the Czech Republic, Finland, France, Germany, Hungary, Italy, Poland, Portugal, Slovenia, Spain, Sweden, the United Kingdom and the European Patent

Office); as well as from New Zealand, Norway, the United States; Canada and Australia (being circulated in document IP/C/W/496 and addenda). Updated information had been obtained from the following intergovernmental organizations: UNCTAD, UPOV and WIPO (being circulated in document IP/C/W/495 and addenda). In addition, the IMF had informed the Chairman, by means of a letter dated 27 July 2007, that it did not undertake any TRIPS-related technical assistance and, hence, did not have any useful information to provide to the Council. Updated information on the WTO Secretariat's technical cooperation activities in the TRIPS area could be found in document IP/C/W/494.

189. He also recalled that paragraph 2 of the TRIPS Council's 2005 decision on the "Extension of the Transition Period under Article 66.1 for Least-Developed Country Members" provided that "with a view to facilitating targeted technical and financial cooperation programmes, all the least-developed country Members will provide to the Council for TRIPS, preferably by the 1 January 2008, as much information as possible on their individual priority needs for technical and financial cooperation in order to assist them taking steps necessary to implement the TRIPS Agreement". Pursuant to this provision, the Council had received communications from Sierra Leone and Uganda on their priority needs for technical and financial cooperation (documents IP/C/W/499 and 500, respectively).

190. The representative of Brazil said that, while in his view many of the activities presented under Article 66.2 should have been presented under Article 67 on technical cooperation, he had doubts as to whether the activities presented under Article 67 actually facilitated the implementation of the TRIPS Agreement. Law harmonization should not be an objective of technical cooperation under Article 67. It was not an objective of the Agreement. Article 1.1 indicated that it accepted the diversity of Members' laws, a point that had been made by developed and developing country Members in several instances in the Council's discussions. For example, in the context of the discussions on GI extension and GI registry, the United States had on several occasions indicated that it would not accept any overriding of the territorial nature of the patent law. Therefore, he did not understand how law harmonization could be the priority of European Patent Office technical assistance with a view towards assisting developing countries in the implementation of the Agreement as a whole. In this regard, he made a number of points in connection with parts of an advance copy of the EC report which were not retained in the final version of the document.

191. Turning to the US contribution, he said that the report referred to many training programmes, most of them concentrated on enforcement. The long list of activities included USPTO GIPA enforcement of IPR programmes with a list of participating developing countries from Eastern Europe and Central Asian countries. It also included a DR-CAFTA Roundtable on border enforcement of IPR. These programmes also addressed

customs-to-customs best IP practices and the identification of pirate music products. While not denying that there was an enforcement chapter in the Agreement, this was not the type of technical cooperation that was meant by Article 67. As already indicated on several occasions and in different forums, his delegation understood that the Agreement contained a balance of rights and obligations, as well as flexibilities. Technical cooperation was meant to assist developing countries in complying with the Agreement as a whole, and not only "cherry picking" its specific provisions and concentrating technical cooperation activity, to a certain extent, in a self-interested way.

192. The representative of the United States thanked the delegations of Uganda and Sierra Leone for their submissions in connection with the Council's decision under 66.1 of the Agreement. Based upon an initial review, he thought that these needs evaluations were helpful in being cogent and a comprehensive articulation of what these Members considered to be their priority needs. He found them to be a useful basis for bilateral engagement, through his country's development agencies present in those countries, to evaluate additional assistance that could be provided. As many of the identified needs were relevant to the work being undertaken in other organizations, notably in WIPO, he encouraged Uganda and Sierra Leone to consider looking to those organizations as well. He encouraged other LDCs to follow suit.

193. The representative of Sierra Leone welcomed the opportunity to present to the TRIPS Council a comprehensive assessment of Sierra Leone's priority technical and financial cooperation needs, as well as a plan of action, in relation to efforts to reform intellectual property protection laws. In making the present communication to the Council (IP/C/W/499), the Government of Sierra Leone had been guided by the Council's Decision of 29 November 2005 (IP/C/40), which had extended the deadline for compliance with the TRIPS Agreement from 1 January 2006 to 1 July 2013, and called on LDCs to submit their needs assessment for TRIPS compliance, where possible, by 1 January 2008. Following Sierra Leone's successful trade policy review in 2005, one of the key policy reforms on the Government of Sierra Leone's agenda had been the reform of its intellectual property rights laws. What then had become the IPR reform project had two broad policy objectives: (i) to support private sector development in Sierra Leone as part of a wider process of legislative and administrative reform; and (ii) to ensure compliance with TRIPS and other international and regional obligations. The looming deadline to comply with the Agreement by 1 January 2006 had been an important factor in the second imperative for reform.

194. However, Sierra Leone's low technological base, its institutional weaknesses, and its pressing needs for human, social and economic development had severely constrained its attempts to use IPRs as tools for development, much less to implement the TRIPS Agreement.

The Government of Sierra Leone therefore wished to underscore that it would avail itself of the maximum flexibility in the implementation of the Agreement through its laws and regulations, as set out in the Preamble to the Agreement. Given the two policy objectives, a project had therefore started with modest funding from the United Kingdom's Department for International Development, for which the Government of Sierra Leone was very grateful. The IPR reform process had been spearheaded by the Ministry of Trade and Industry (MTI) and a multidisciplinary Working Group on Intellectual Property (IPWG) had been established and convened. The IPWG had directed that IP reform should take into account (i) the fact that IPRs should be a tool for Sierra Leone's development and an integral part of sustainable policies on science, technology, culture and innovation; and (ii) the effect of TRIPS and ARIPO treaties on the country's policy objectives within the context of the Poverty Reduction Strategy and the National Vision 2025.

195. The IPWG had been assisted in this reform process by international experts on IP administrative structures and laws. Options for legislation on patents, trademarks and copyright had been produced and validated; a draft national IPR policy had been developed and would be the subject of consultations later in the year; and drafting of new legislation had now commenced on copyright, patents and industrial designs, and trademarks. A legal clinic for the bench and the bar would take place in late November 2007 through a video conference with colleagues from the American University in Washington DC. Awareness raising and consultations would take place on other forms of IP such as geographical indications, plant variety protection and folklore and traditional knowledge in early 2008. In the meantime, agreement had already been reached with WIPO on the development of a national IPR strategy which would get underway in December 2007.

196. Sierra Leone's progression from post-conflict reconstruction to a development-oriented phase meant that it must now focus on enabling access by SMEs to a wide range of IPRs in order to develop the most promising sectors of its economy, taking into account the aspirations expressed in its Vision 2025. The application of scientific research in the agriculture and minerals industries; the promotion of innovation in the information technology, musical and textile design sectors; and the encouragement of transfer of technology between foreign and domestic firms, were uppermost in the crafting of laws and policy on IPRs for Sierra Leone.

197. In light of the Council's decision of November 2005, Sierra Leone had taken the opportunity to build on its current IPR reform programme by carrying out an assessment of its priority needs for compliance with the TRIPS Agreement. In July 2007, a mission had been jointly undertaken by Saana Consulting, Sierra Leone's existing expert in the IPR reform process, and the International Centre for Trade and Sustainable Development (ICTSD) in

which consultations with key stakeholders had been conducted around priority capacity building needs. Annex A in the current submission to the Council set out the resulting needs from that Needs Assessment exercise using the diagnostic toolkit developed by Saana and the ICTSD.

198. In this communication of its priority needs, the Government of Sierra Leone proposed the development and implementation of a medium term national IP capacity building programme, beginning with an initial five-year phase from July 2008 to July 2013. Section 1 of the report detailed the policy and legal frameworks which focused on the need to establish a small policy unit specializing in IPRs within the MTI. Section 2 covered IP administrative arrangements central to which was the eventual establishment of an efficient national IP office. Section 3 dealt with IP enforcement and regulation including the training of enforcement agencies. In section 4, Sierra Leone's aspiration to become a science and technology driven nation, as expressed in its Vision 2025, was given prominence, with a focus on the needs of SMEs and the promotion of IP as a tool for development.

199. Annex B outlined a programme planning matrix in project form of the needs already identified in Annex A. The programme approach the Government of Sierra Leone sought had the following built-in key design features: (i) an initial heavy emphasis on building the capacity of relevant Government agencies to take the lead in co-coordinating, implementing and monitoring projects and activities within the programme and the linkages to related Government policies and programmes; (ii) a medium-term strategic common planning framework, with a gradual level of sustained activity supported by the Government and its development partners over the programme period rather than a series of ad-hoc events, peaks and interruptions; (iii) a strong development focus to the programme, emphasizing the need to involve a broad range of stakeholders from across government, the private sector and civil society and to gain their support for the protection of IPRs in the country by raising awareness and demonstrably contributing to national social and economic goals, building a sound and viable technological base and meeting international obligations; (iv) harmonized, predictable and transparent arrangements for programme funding, management and coordination by development partners, with emphasis on upgrading and utilizing the Government's own public financial and procurement systems as far as possible; and (v) mechanisms for regular multi-partner joint reporting, review and evaluation of a common set of expected results, impacts and outcomes, as opposed to multiple discrete systems which place a heavy and unnecessary burden on the lead government agencies.

200. The Government of Sierra Leone expected that the successful implementation of the proposals detailed in the needs assessment required technical cooperation, financial assistance and thorough consultations between the Government, national stakeholders, international

organizations and the country's development partners. It was her country's hope that it would find willing partners, who would join it in meeting the needs as set out in the current communication to the Council and she looked forward to responses and any questions from other Members.

201. The representative of Uganda recalled that the TRIPS Council Decision of 29 November 2005 had extended the transition period for LDCs to implement the TRIPS Agreement until 1 July 2013. Paragraph 2 had invited LDC Members to provide as much information as possible to the Council, preferably by 1 January 2008, on their individual priority needs for technical and financial cooperation in order to assist them in taking steps necessary for implementing the Agreement. It was against this background that Uganda was presenting its needs assessment (IP/C/W/500). It was Uganda's hope that developed country partners would also live up to its expectations in responding positively by providing the required technical and financial assistance and by promoting the needed technology transfer for the benefit of Uganda during this transition period. Uganda was fully aware of its international obligations and the need to implement the Agreement. However, there were several constraints that had to be addressed. In this regard, Uganda's communication was a reflection of the priority needs and set out a plan of action for technical and financial assistance seen as a pre-requisite to implement the Agreement by Uganda at an appropriate time in future.

202. Uganda's communication pointed out that IP was a cross-cutting issue where complementary policies on, for instance, health, agriculture, environment and competition were equally important in the context of implementing the Agreement. In this regard, implementation needed to be undertaken comprehensively and coherently with other international arrangements as well as regional trade and IP arrangements.

203. It was important to align domestic policies with rapidly changing technological trends in the global economy. At this stage of Uganda's path to development, it was necessary for the country to seek and receive support from the international community on the use and management of IPRs in combination with well designed government support measures that addressed domestic development needs such as the promotion and establishment of a creative and innovative domestic industry and the development of its technological base. Uganda believed that IPRs should be a tool for development and an integrated part of national policies and programmes aimed at poverty eradication. In taking the steps necessary to advance the implementation of the TRIPS Agreement, Uganda emphasized the importance of special and differential treatment, especially in terms of its explicit entitlement to maximum policy flexibility in building a sound and viable technological base for the benefit of its people.

204. Article 66.2 clearly stated that developed country Members should provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to LDCs. LDCs, including Uganda, had already waited for the implementation of these promises. For countries like Uganda, technology transfer and capacity building would be very significant to transform their economies and to allow people to fully benefit from the multilateral trading system. It was therefore important that the developed country Members faithfully provide the kind of technical and financial incentives that would encourage technology transfer and development. Uganda, like other LDCs, experienced capacity constraints in this area and called on developed country Members to comply with their promises and obligations to address this issue that was critical to its development.

205. It was Uganda's expectation that developed countries would reorient their technical and financial assistance to reflect what had been presented in this Council. An evaluation and monitoring mechanism should be established in the WTO under the TRIPS Council to make sure that the LDCs' requests were responded to.

206. The representative of China said that information on action taken to address priority needs identified by LDCs should be essential components of future notifications from developed country Members of the Council. He welcomed the submissions from several developed country Members on their technical cooperation and capacity building activities, which would help to provide a better understanding of how they were fulfilling their obligations under the TRIPS Agreement. He recalled that Article 67 provided that "such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse". As to the objectives of technical cooperation and capacity building activities, such activities should not be limited to the implementation of TRIPS obligations, but also focus on prevention of IPR abuses and on the rights provided to developing countries, including how to make full use of the flexibilities contained in the Doha Ministerial Declaration on the TRIPS Agreement and Public Health.

207. His understanding was that the reports on technical cooperation submitted for this and previous meetings should only contain factual and objective information on relevant activities, as said by the Chair at the Council's meeting in June 2007. Law harmonization and harmonization of examination practices should not be an objective as they would be against the principle of Article 1.1. In this regard, he made a number of points in connection with the parts dealing with the activities of the European Patent Office of an advance copy of the EC report which were not retained in the final version of that document.

208. The representative of Lesotho, speaking on behalf of the LDC Group in the WTO, recalled the contents of paragraph 2 of the decision of 29 November 2005 on the Extension of the Transition Period under Article 66.1. It called on LDCs to provide to the Council for TRIPS preferably by 1 January 2008, as much information as possible on their individual priority needs for technical and financial cooperation in order to help them take necessary steps to implement the TRIPS Agreement. To this end, the LDC Group sincerely thanked the delegations of Uganda and Sierra Leone, two Members of the Group, that had made their reports about their activities regarding implementation of Article 66.2 of the Agreement. At the same time, the LDC Group requested that flexibilities be extended to those LDCs that might not be able to submit their needs assessment by January 2008 so that they could submit even after this deadline. The LDC Group requested the developed country Members to provide LDCs with the requisite technical and financial assistance and technology transfer that the individual LDC's country specific needs assessment had identified. Often donor country activities failed to meet the specific needs of LDCs. They should address the actual specific needs that would enable LDCs to build the necessary infrastructure which was a major basis for actual implantation of the Agreement.

209. He called for an effective evaluation and monitoring mechanism in order to meticulously monitor and evaluate whether the LDCs' assessed needs had been responded to. The LDC Group appreciated very much the kind of help and support that the LDCs received in matters related to the Agreement which was one of the areas where most assistance was needed.

210. The Chairman said that the deadline of 1 January 2008 was not fixed. He recalled that the wording of paragraph 2 of the decision on the extension of the transition period was "preferably by 1 January 2008". While an earlier submission was to be preferred, it was possible to go beyond that date.

211. The representative of the European Communities welcomed the communications made by Sierra Leone and Uganda. While his delegation was ready to look into them, it would be useful to see also other LDCs' submissions. Therefore, it might be appropriate to put this issue on the agenda of the Council's next meeting with a view to an in-depth discussion on the basis of all contributions received from all LDCs. This would enable those LDCs which had not yet submitted their priority needs to do it in advance of that meeting.

212. The delegation of India said that he felt that reports should refrain from value judgement in keeping with the spirit of Article 67. They should confine themselves to being factual rather than patronising and judgemental.

213. The representative of Japan said that his country attached importance to technical cooperation as well as transfer of technology, which would be an essential basis to promote protection of intellectual property on a global basis. Intellectual property was intangible in nature, which meant that its value was in the form of an idea, invention, expression or know-how, rather than in physical facilities like water, electricity, building, machines, and so on. Therefore, the creative mind and knowledge of a human being was highly important in the intellectual property arena. Such characteristics of intellectual property might relate to the way of performing technical cooperation or transfer of technology. Japan had been putting emphasis on the enhancement of capacity building for people in charge of intellectual property in this connection. To be specific, he introduced the "One-Village One-Product Project" activities. This project assisted each concerned village to form capacity to make and sell marketable local products and successful examples had been generated so far under this project. Copies of DVDs explaining this "One-Village One-Product Project" were now available and he invited anybody interested in them to contact his delegation.

214. The representative of Egypt said that Sierra Leone and Uganda's submissions and interventions clearly showed how seriously the two countries were taking their international TRIPS obligations. He joined them in calling upon developed countries and the development aid community at large to lend them all necessary support and also encouraged other LDCs to undertake similar endeavours in order to fully integrate in the international IP system.

215. The representative of Sierra Leone said that he noted some of the comments from other Members regarding their own particular capacity building provisions and he would explore those hopefully in the near future and he looked forward to working with other WTO Members regarding his country's technical and financial needs on moving forward on its IPR agenda. However, he underscored that what his country needed was predictable long-term and transparent funding rather than ad hoc or short-term assistance.

216. The representative of China said that the Article 67 review was not a unilateral process. It should be governed by the principles and the mandate of the multilateral process under Article 67 review. He referred to the minutes of the Council' meeting in June 2006, paragraph 159, in which the European Communities had indicated that, by requesting the item on enforcement to be put on the agenda again, it did not wish to be "negative" or engage in "finger-pointing". He also referred to the minutes of the October 2006 meeting, which showed that the EC delegation had repeated that the objective was not finger-pointing. However, he felt that the same rule should apply in this area.

217. The Chairman said that he would provide Members of the Council an opportunity at the next meeting to make further comments on the information submitted for this meeting that

they might not yet had been able to study. He also urged other LDC Members to provide information on their individual priority needs for technical and financial cooperation preferably by 1 January 2008, noting that this was not a fixed deadline. In order to facilitate the discussions and follow-up to this matter, he proposed that the items on LDCs' priority needs for technical and financial cooperation be placed on the agenda of the Council's next meeting as a separate agenda item.

218. The Council took note of the statements and so agreed.

M. Enforcement of Intellectual Property Rights (Part III of the TRIPS Agreement) – Communication from Japan

219. The Chairman recalled that this item had been put on the Council's proposed agenda at the request of the delegation of Japan, dated 28 September 2007. The Council had received a communication from Japan entitled "Enforcement of Intellectual Property Rights" (IP/C/W/501).

220. The representative of Japan said that he was pleased to have an opportunity to share Japan's experiences regarding border measures to enforce IPRs, and hoped that the insights into the measures it had taken against counterfeit and pirated goods could be useful for other Members as regards the implementation of related provisions of the TRIPS Agreement. Customs authorities were expected to play a vital role in combating global counterfeiting and piracy. The tables on page 2 of document IP/C/W/501 illustrated the recent trend of customs seizures with a steadily increasing number of suspension cases, whereas the number of suspended items had remained at the same level for the last five years. This indicated a significant increase of shipments in small lots. Postal delivery was the main channel for the importation of counterfeit and pirated goods into Japan, partly due to the development of e-commerce which increased importation by individuals over the Internet. As manifest data and entry data were not available, considerable human resources were required to inspect international postal shipments. In terms of the type of rights, trademark infringement accounted for the vast majority of cases. As to the type of commodities, the Japan Customs had suspended a large number of fake brand name products, such as bags, key-holders, clothes and watches.

221. In order to suspend goods infringing IPR at the border more effectively, emphasis had been placed on countermeasures against shipments in small lots, as explained in section III of the communication. Since a large amount of cargo was disguised as for personal use, the Japan Customs initiated enforcement exercises regardless of the number of items involved. Due to this tightened enforcement, Japan had successfully suspended lots of counterfeits at

the overseas mail sub-branches. Institutional capacity had also been strengthened and IPR specialized teams had been allocated to key overseas mail sub-branches.

222. The improvement of customs officers' expertise was another key element. Section IV of the communication explained related measures, based on the utilization of information systems and human resource development. The Japan Customs were utilizing two different information systems: the Customs Intelligence Database System (CIS), and the Intranet bulletin board system. When front-line staff suspected that cargos contained counterfeit or pirated goods, it could access the CIS in order to ascertain the risk level of the cargos, using the accumulated information. While the CIS was based on both past records and advance information, the new Intranet bulletin board system placed an emphasis on raising awareness levels of front-line staff. These two systems had greatly contributed to improving both the expertise and awareness of the front-line staff by enabling them to obtain the necessary information on a timely basis. With respect to human resource development, Japan's educational programmes for customs officials played a vital role. For example, the Customs Training Institute provided intensive training programmes specialized in IPR enforcement. These programmes included legal studies and practical training. In order for the participants to apply the acquired knowledge, they were provided with case studies at the end of the programme. In addition, the Japan Customs had attached great importance on OJT programmes at the IPR central office in the Tokyo Customs. Through the OJT programmes, inexperienced staff could learn the practical issues from experienced IPR investigators.

223. The representative of the United States welcomed Japan's communication, as well as the continued dialogue in the Council on the implementation of the enforcement provisions of the TRIPS Agreement and on the experience of individual Members in applying those provisions effectively within national jurisdictions. The concepts outlined in a recent paper presented jointly by the United States, the European Communities, Switzerland and Japan represented a reasonable way of approaching a discussion of Part III of the Agreement. While he recognized that there was no consensus in the Council on these questions, enforcement should remain a legitimate item for discussion upon the request of individual Members. Recent meetings had demonstrated that it was possible to undertake this discussion in a reasonable and fact-based manner. The discussion was clearly relevant to Japan's implementation of Part III of the Agreement. While the communication indicated an increase in suspensions with respect to small lot shipments, the situation regarding large shipments remained unclear. He was therefore interested to know what accounted for the distinction between the large and the small shipments. Given the increased number of suspended shipments experienced by Japan, he wondered if there had been a corresponding increase in the number of applications for suspension. The concept of the Intranet bulletin board system containing specialized intellectual property information was a very useful concept for consideration by the United

States and other Members. He asked if the bulletin board function was available at all ports of entry in Japan. Finally, regarding the training seminars with right holders mentioned in paragraph 7 of Japan's communication, he asked whether the seminars took place at selected intervals or whether it was possible for a right holder to initiate one of these programmes when a new product was about to be introduced into the Japanese market or, for example, when the right holder detected a new trend with respect to counterfeiting or piracy.

224. The representative of Chinese Taipei said that Japan's communication identified some important trends in the trade in counterfeit and pirated goods, such as shipping through the means of international postal services, or by being disguised as personal use items. Part of the reasons for this was the prevalence of e-commerce. It deserved Members' attention to identify whether the same trends existed in their own countries. The communication shared some important methods for combating counterfeiting and piracy, including strengthened institutional capacity, the improvement of customs officers' expertise, the involvement of right holders, and the establishment of related databases. It was useful to deal with counterfeiting and piracy through the exchange of Members' experiences.

225. The representative of Canada said that sharing experiences with respect to enforcement in the Council was useful for all Members. It was particularly timely for his delegation as it was in the final stages of an extensive review of its IPR enforcement regime. Two separate parliamentary committees had recently reviewed the economic and the health and safety aspects of counterfeiting and piracy. Growing e-commerce activities posed challenges for border authorities as they had to perform duties within their limited resources. Improving enforcement authorities' expertise through training was therefore an important investment toward increasing cases of successful interception of infringing goods. Counterfeiting and piracy was a global issue effecting all WTO Members. Members could learn from each others' experiences. He encouraged further cooperation in this regard by sharing experiences on infringement trends and effective enforcement measures.

226. The representative of the European Communities said that border enforcement had become a challenging and complicated issue in the fight against counterfeiting and piracy. The recent trend in seizures of counterfeit and pirated products by the Japan Customs showed that the number of cases had been multiplied by approximately three over the last five years, while the number of items suspended at the border had remained at the same level. It was worrying that international postal shipments had become the main method of transporting counterfeit and pirated goods. The Japan Customs Intelligence Database System created in 1991 was useful for analyzing various types of information related to customs operations, including the import and export of IPR infringing goods. The new Intranet bulletin board system that specialized in IPR enforcement was another interesting tool to share information.

Training activities for customs officers were very important to ensure the effective fight against counterfeiting and piracy at the border. The drawing up of annual statistics provided useful information in support of analysis of counterfeiting and piracy. In the European Union, the numbers of counterfeit and pirated goods had increased dramatically recently. In 2006, 120 million articles, involving 37,000 cases, had been seized by customs. He said that his delegation remained committed to exchanging views and experiences on IPR enforcement in the Council and hoped that all Members would show the same engagement. The objective was to address IPR enforcement in good faith and in a constructive spirit with a view to sharing experiences and best practices.

227. The representative of India said that the TRIPS negotiations had been long and rather arduous. Negotiators' concerns relating to enforcement of IPRs were evident from the chapeau provisions of Section 1 of Part III. Article 41.1 mentioned that "these procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse". This sense of caution also dominated the provisions on border measures. Furthermore, Article 41.5 provided critical insights into understanding the delicate balance of rights and obligations that was achieved in negotiating the TRIPS Agreement and the role therein of Part III. Any discussion of Part III had to bear in mind that the existing text had achieved a very careful balance between the interests of right holders, on the one hand, and those of wrongly accused infringers, on the other hand, so as not to cause obstacles to legitimate trade. Article 41.5 also took into account the concerns about limited resources of developing country governments to enforce IPR laws relative to other laws. Furthermore, the text of Part III recognized that IPRs were private rights and action for their enforcement had ultimately to be taken by the right holders themselves. The proponents of any discussion on Part III of the TRIPS Agreement in the TRIPS Council should bear this in mind.

228. The representative of Brazil said that enforcement of IPRs was not a permanent item on the Council's agenda. In his view, the content of Japan's communication was not really about border enforcement of IPRs. The only subject matter of interest to his delegation with regard to the communication was whether Japan's regulations and practices in respect of border measures were compliant with the TRIPS Agreement. In his view, such issues were best discussed as part of Members' obligation to notify laws and regulations under Article 63, so that their compatibility with the rights and obligations under the TRIPS Agreement could be scrutinized.

229. He raised a series of questions in regard to the compatibility of Japan's measures taken with the Agreement. The chapeau of Article 41 reflected an overriding principle according to which the measures adopted to implement Part III of the Agreement were to avoid the

creation of barriers to legitimate trade and to provide for safeguards against their abuse. He asked how Japan's regulations and practices with respect to border measures complied with this obligation, given that the enforcement measures were in reality trade measures taken by customs officials at the border. Furthermore, the whole of Part III referred to procedures concerning the enforcement of IPRs which were to be understood as judicial procedures, and not self-initiated procedures by customs officials. These judicial procedures were carefully crafted to ensure that all actions with respect to IPR enforcement were initiated by the right holder within a Member's local or national judicial system and that defendants had a right to fair and equitable procedures to argue their case against whatever action was taken with respect to the enforcement of IPRs. Cases were therefore required to be brought to the court before actions were initiated. He wondered how Japan took care of the obligation to make available fair and equitable procedures both for the applicant and the defendant, which were not unnecessarily complicated or costly, and which did not entail unreasonable time limits or unwarranted delays. Article 41.3 confirmed that procedures were meant to refer to judicial procedures because reference was made to decisions on the merits of a case, preferably in writing and reasoned, to be made available at least to the parties to the proceeding without undue delay, and to be based on evidence in respect of which parties were offered the opportunity to be heard. He asked how Japan's border measures complied with these criteria and whether the parties were allowed to be heard with respect to the suspension of imports of allegedly infringing goods. Article 41.4 provided that parties to a proceeding were to be given an opportunity for review by a judicial authority of final administrative decisions. He asked if Japan's border measures provided for such an opportunity. Article 41.5 indicated that this part did not create any obligation to put in place a judicial system for the enforcement of IPRs distinct from that for the enforcement of law in general. No Member was required to adopt any measures similar to those adopted by Japan. The same applied with respect to the distribution of resources between IPR enforcement and enforcement of law in general.

230. Article 42 referred to fair and equitable procedures to be made available under national judicial systems. Cases had to be brought to court, initiated by the right holder and subject to certain criteria. The defendant had a right to a written notice, including the basis of the claim. He asked who had to make the claim for action by the Japan Customs to suspend the importation of goods. Parties had to be allowed to be represented by an independent legal counsel. He wondered if this was allowed in Japan, in particular to avoid that procedures imposed overly burdensome requirements concerning mandatory personal appearance. Article 44 was another fundamental provision for this discussion because Japan had indicated that IPR enforcement under Section 4 on border measures was related to Article 44. However, Article 44 referred to judicial authorities, and not customs officials, which had the authority "to order a party to desist from an infringement, inter alia to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the

infringement of an IPR immediately after customs clearance of such goods". He asked if there was customs clearance of such goods in Japan before decisions on the suspension of their entry into channels of commerce was taken by customs officials. Article 44 had to be clearly distinguished from import suspension, since it only applied to situations occurring after customs clearance. Article 46 addressed other remedies. Here again, it was judicial authorities and not customs officials which had the authority to order that goods that they had found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce. In considering such requests, there was a need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties to be taken into account. He asked how Japan complied with this determination in Section 3 of the TRIPS Agreement, how the interests of third parties were taken into account and how proportionality was established by customs officials with respect to the seriousness of the infringement. The Japan Customs had recently increased the suspension of imports of small packages of goods, but it was left open how customs officials applied the issue of proportionality in the seriousness of the act in respect of the suspension of imports of small quantities of goods which are sometimes for personal use. Article 48 provided for the indemnification of the defendant. The judicial authorities had to be authorized "to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse". He asked what kind of indemnification was foreseen in the context of the Japanese border measures in case of abuse or in case of wrongful action and whether the defendants' expenses were paid for by the Japan Customs.

231. Section 3 concerned provisional measures ordered by judicial authorities. These provided more expedite action, but were drafted along the same lines as the preceding provisions. A decision on the merits of the case was required at some stage, either before or even after the action was taken. Fair and equitable treatment had to be guaranteed. These principles applied, including where provisional measures were taken *inaudita altera parte*. Article 50.3 provided the judicial authorities with the authority "to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse". He asked how the Japan Customs complied with this particular requirement of the TRIPS Agreement, how the necessary degree of certainty about the applicant's status as right holder was obtained and how sufficient assurance was gained to protect the defendant and to prevent abuse. Article 50.6 stipulated that "if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a

determination, not to exceed 20 working days or 31 calendar days, whichever is the longer". This meant that the provisional measures and the suspension of entry into the channels of commerce of imported goods that had already been cleared by customs had to be revoked or otherwise cease to have effect if proceedings leading to a decision were not initiated within a reasonable period of time. He asked how Japan's rules, regulations and practices with respect to border measures described in the communication complied with this obligation. Appropriate compensation had to be paid to the defendant according to Article 50.7. Pursuant to Article 50.8, the same principles applied where a provisional measure was ordered as a result of administrative procedures. There was therefore no change regarding the requirements to be complied with by the Japan Customs. According to Article 51, Members had to "enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities". This addressed right holders and not customs officials. The representative of Brazil thought that both injunctions and border measures had motivated the US question as to whether the increase in the suspension of imports had been met with a corresponding increase in applications for suspension. This was also a relevant question with respect to the issue of compliance of Japan's border measures with the Agreement. Article 52 foresaw that "any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is prima facie an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities". He asked how this obligation was met by Japan in its procedures for suspension of importation by customs officials. Furthermore, the representative of Brazil referred to Article 53 as another relevant provision, providing the competent authorities with the authority "to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse". He asked in how far such securities were sought in the process of applying Japan's border measures to suspend the importation of goods. A further question was how a prompt notice of suspension was given to the importer and the applicant of the suspension of the release of goods according to Article 51, as provided for in Article 54.

232. The duration of the suspension was addressed in Article 55 according to which "if, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of goods - again the release of goods not the importation of goods - the goods shall be released, provided that all other conditions for importation or exportation have been

complied with". This was an important element because it limited the discretion of the customs authority to maintain the suspension of the goods for a period of time that was unduly long or created an unreasonable or unsubstantiated barrier to trade of other WTO Members. Proceedings leading to a decision on the merits of the case were required and it was questionable how this was achieved in the context of Japan's border measures. Article 56 referred to the indemnification of the importer and of the owner of the goods. He asked if such indemnification was guaranteed by Japan in the case of wrongful detention of the goods. The right of inspection and information was foreseen in Article 57, and he wondered if the importer in Japan was given an equivalent opportunity to have the goods inspected. Article 58 addressed *ex officio* action. In his view, this was probably what Japan intended to cover by the measures set out in its communication. This provision did, however, not refer to the suspension of importation of suspected goods, but to the possibility for competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they had acquired *prima facie* evidence that an IPR was being infringed. Reference was made to the release of goods and not the suspension of importation, implying that the goods had to clear customs before action was taken. Article 60 addressed *de minimis* imports, which was a permissive provision, indicating that Members were allowed to exclude from the application of the other provisions in Part III small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in mail consignments. This seemed to indicate that, in the spirit of the Agreement, small consignments were not meant to be subject to mandatory coverage of the provisions in Part III.

233. His delegation believed that enforcement was an issue for discussion in WIPO's Advisory Committee on Enforcement where Brazilian officials had actively participated, including through presentations on the enforcement of IPRs at domestic level. Those discussions should not be duplicated in the TRIPS Council.

234. The representative of China viewed the initiative taken by some developed country Members to make submissions on enforcement to the Council as inappropriate. Those Members had yet to clarify the purpose of their submissions. If they were for information only, they should be notified to the WTO as related laws and regulations under Article 63. If they were aimed at establishing best practices, there was no mandate for the Council to deal with such matters. Enforcement of IPR protection was not an isolated issue and should therefore not be treated separately from the implementation of the TRIPS Agreement as a whole, in particular its objectives and principles in its Articles 7 and 8. Agenda item I on the review of the implementation of the TRIPS Agreement covered the whole picture and was therefore more balanced and appropriate to discuss the issue.

235. The representative of Switzerland said that the Council was the appropriate forum to discuss issues relating to Part III which was an integral part of the TRIPS Agreement. This was the natural place for Members to share information on national experiences. The purpose was to provide a forum where Members could share their experiences on enforcement in order to learn from each other on how best to address specific issues and challenges encountered. His delegation had submitted a communication to the last TRIPS Council on its own experiences with implementing border measures at the national level.

236. Japan's communication referred to a particular challenge in the context of border measures faced by many Members, including Switzerland. The prevalence of e-commerce had turned international postal shipments into one of the major routes for the trade in counterfeit and pirated goods. Such shipments often contained single or only small quantities of infringing goods. Detecting such shipments at the border was a formidable challenge both for right holders and customs authorities. He expressed an interest in knowing more about how Japan addressed this issue, for example, whether the Japan Customs notified the right holders in each and every case and whether small consignments were released if the right holder did not initiate follow-up procedures. Japan's communication also addressed the increase of de minimis imports of infringing goods for personal use. While Article 60 provided flexibility to Members on whether and how to address this issue, Switzerland had decided to introduce a deterrent against such de minimis imports by providing for the possibility to confiscate counterfeit and pirated goods imported for personal use at the Swiss border in its recently amended IP legislation.

237. He took the opportunity to respond to questions that had been raised by some delegations at the last Council meeting in relation to the communication by Switzerland on its experience with implementing border measures at the national level (IP/C/W/492). Additional information had been requested on the "easy-to-use checklist" to facilitate the task of the customs authorities to detect consignments of counterfeit and pirated goods. These lists were provided by right holders in the context of their application for border measures to the customs authorities. The salient features distinguishing a genuine product from a fake one had to be listed. Experience had shown that pictures illustrating typical characteristics of fake goods were particularly helpful for customs employees. There was no specific form or format required by the customs authorities for a right holder to submit such documentation or checklist. It was left to right holders to determine themselves which features best described in a specific case the differences between the fake and the original products. Another question concerned the idea of a centralized, international database containing applications for border measures filed by right holders with the customs authorities in the various Members and accessible by customs authorities of all Members. This idea had not been developed in any more detail by his delegation so far, but a further exchange of views

and considerations by Members would be interesting as to whether such a tool was of assistance in facilitating the administration of border measures for Members.

238. In response to another question, he said that it was correct that, in the case of counterfeit medicines, the involvement of the right holder was not a necessary precondition for the customs authorities in order to seize and destroy counterfeit medicines. If fake medicines were seized by customs, the customs authorities would notify the right holder if the latter had filed a corresponding application for border measures. A copy of this notification would be transmitted to Swissmedic, the therapeutic agency responsible for market admission and control of medicinal products. In a regular case, the right holder would apply for the destruction of the seized medicines, once it was established that they were counterfeit. If there was no corresponding application for border measures pending with the customs authority and if no information on the right holder was available to the customs, notification of the suspension would be sent to Swissmedic only, which would determine whether, on the basis of the Swiss Federal Law on Therapeutic Products, the seized medicines were counterfeit. If so, the customs authorities would be instructed by Swissmedic to destroy the fake medicines – even in the case where it had not been possible to establish contact with the right holder. Swissmedic and the customs authorities were enforcing first and foremost public health interests vested in the Law on Therapeutic Products rather than IPRs.

239. He said that his delegation stood ready to respond to any further questions concerning its earlier communication. It was his delegation's understanding that the discussion was without any prejudice to the rights of Members under Article 1.1 of the Agreement nor was it intended to create new obligations for Members.

240. The delegation of Japan said that its laws and regulations had already been reviewed by the TRIPS Council and were found to be TRIPS-consistent. With respect to the question raised by the United States regarding the distinction of small and large shipments, the practice was to consider international postal shipments as small shipments. As regards the Intranet bulletin board, every customs official could access it through the intranet.

241. In reaction to Brazil's statement that the Council should not review Members' practices and experiences in the field of IPR enforcement, the representative of the European Communities referred to Article 68 according to which the "Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights". This was precisely the purpose of the discussions in the Council which was the appropriate forum, whereas the WIPO was not the right place to review the TRIPS Agreement.

242. The delegation of Brazil said that the discussion regarding the compliance of Japan's border measures with the TRIPS Agreement was better placed under the obligation of Members to notify their laws and regulations pursuant to Article 63. As regards the reference to Article 68 by the European Communities, he said that this provision focused on trade-related aspects of IPRs. This meant that the measures in question had to comply with the Agreement as a whole, and not only with specific sections on IPR enforcement. His delegation's particular concern was to avoid that such measures would create unwarranted barriers to trade of other Members. He reiterated his position that the title of Japan's communication, also mirrored in the related agenda item, falsely reflected the debate that was held on this subject in the Council. He invited Members to notify their laws and regulations under Article 63.4, so that a discussion could be held in the appropriate context.

243. The Council took note of the statements made.

N. Information on Relevant Developments Elsewhere in the WTO

244. The Chairman said that the Kingdom of Tonga had become the 151st Member of the WTO on 27 July 2007. In paragraph 169 of the Report of the Working Party on the Accession of Tonga (WT/ACC/TON/17 and WT/MIN(05)/4), the representative of Tonga had confirmed that Tonga would apply the TRIPS Agreement no later than 30 June 2008 according to the Action Plan in Table 11 of the Report with the understanding that during this period protection for intellectual property rights listed in paragraphs 167 and 168 of that Report would be applied in Tonga. This commitment was incorporated in paragraph 2 of the Protocol on the Accession of the Kingdom of Tonga (WT/L/644).

245. The Council took note of the information provided.

O. Observer Status for International Intergovernmental Organizations

246. The Chairman recalled that, at its last meeting, the Council had agreed that the Chair hold consultations on the issue of observer status for intergovernmental organizations, in particular on the request from the CBD Secretariat. There were 17 pending requests for observer status in the TRIPS Council by other intergovernmental organizations, a list of which was contained in document IP/C/W/52/Rev.11.

247. The Chairman said that he would first inform the Council on developments in the Special Session of the Committee on Trade and Environment and their implications to this Council, given that this issue had been raised at the Council's last meeting. The CTESS was mandated, pursuant to paragraph 31(ii) of the Doha Ministerial Declaration, to negotiate on "procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status".

248. The CTESS was currently considering elements of a draft text under paragraph 31(ii). At a meeting of the CTESS in July 2007 where this issue had been last discussed, the Chair had reported to the Committee that "further consultations had been undertaken on the basis of a document entitled 'Elements of a Draft Text under Paragraph 31(ii)'", and noted that "there seemed to be broad support for the elements set out in this document to provide a basis for an outcome under Paragraph 31(ii)". He had added that "[t]here were also some other proposals on the table, for instance with respect to observer status, on which delegations would need to continue working in future."

249. As regards the pending requests for observer status in the TRIPS Council from the CBD Secretariat and certain other intergovernmental organizations, he said that, as had been requested by the Council at its last meeting, he had consulted with the delegations that had been most actively engaged in this issue. However, he regretted to inform the Council that the cross-cutting considerations that had prevented the Council from making headway continued to be present and, therefore, he had to report that it did not seem possible to make progress at that stage.

250. As regards the question raised at the Council's last meeting of informing the CBD Secretariat on the status of its pending request, he noted that the WTO Secretariat had last informed in writing the Executive Secretary of the CBD Secretariat of the status of the pending request by means of a letter dated 22 September 2006. In addition, the WTO Secretariat had regular contacts with the CBD Secretariat during which it kept the latter informed of relevant developments. He said that he would be happy to inform the Executive Secretary of the CBD Secretariat of the latest situation if the Council would find that useful.

251. The representative of Brazil thanked the Chairman for his good offices and for carrying out the consultations with interested Members. He said that the possible reason for lack of progress was that a few Members had tied the decision regarding the ad hoc observership of the CBD in the TRIPS Council to similar decisions with respect to other organizations, particularly the Arab League. He said that he would like to hear from Members if they would still maintain this position, since the CBD Secretariat had a direct interest in the discussions taking place in the TRIPS Council and it could be solved through an ad hoc observership. He said that his delegation would be grateful if the Chairman could continue to consult with Members on this issue.

252. The representatives of China, Peru, Ecuador and India supported the statement of Brazil regarding an ad hoc observer status of the CBD Secretariat.

253. The Chairman suggested that he continue his consultations to resolve this matter. He noted that, nevertheless, the decision remained in the hands of Members.

254. The representative of Brazil thanked the Chairman for his commitment to continue holding consultations to solve this matter. However, he wished that, in his next report to the TRIPS Council, the Chairman could be more specific regarding the position of specific Members, so that a clear view could be had of the degree of opposition and support for the ad hoc solution, as well as the reasons behind those positions. This was important to ensure transparency. The Chairman had the authority to provide an in-depth report on the situation, and this would be enough from the standpoint of his delegation. The report should contain specifics on Members' positions in a fair, balanced and transparent manner in order to have a substantive discussion during the next meeting of the TRIPS Council.

255. The representative of Egypt supported Brazil's statement regarding consultations on this matter.

256. The Council took note of the statements made and agreed to proceed as proposed by the Chairman.

P. Annual Report to the General Council

257. The Chairman said that the draft Annual Report of the Council had been circulated in document JOB(07)/156. It still needed to be updated so as to reflect the discussions at the present meeting. He suggested that the Secretariat be requested to update the draft to reflect the discussion at the present meeting. This draft would be faxed to Members, who would have one week to comment on the updated parts of the draft report once it has been circulated by the Secretariat.

258. The representative of Brazil suggested that the opportunity for Members to comment on the revised draft report relate to any part of it, not just the updated text.

259. The Council agreed to proceed as proposed by the Chair, and that Members could provide comments on any part of the revised draft report.¹

Q. Other Business

260. The Chairman referred to the arrangements for the upcoming review of Tonga. As he had informed the Council under agenda item N, Tonga had recently acceded to the WTO with a transitional period until 30 June 2008. In light of this, he suggested that the Council revert to the arrangements for the review of national implementing legislation of Tonga at its second meeting in 2008, which normally would take place in the middle of the year.

¹ The Annual Report (2007) of the Council for TRIPS was subsequently circulated as document IP/C/48.

261. The Council so agreed.

262. The Chairman suggested that the Council agree on the following dates for the Council's meetings in 2008: Tuesday and Wednesday, 26 and 27 February²; Tuesday and Wednesday, 17 and 18 June; and Tuesday and Wednesday, 28 and 29 October.

263. The Council so agreed.

² The Chairman circulated a faxed communication on 18 December 2007 suggesting an alternative date for this meeting.

美國、日本、歐盟書面提問簡譯

1. 美國書面提問 IP/C/W/502 號文件內容略述如下：

- (1) 一般問題：法律制定時，應確保人民參與。請問草案如何供人表示意見，以及如何納入考量？通知與評論期間多長？如何避免不同智慧財產機關徵求評論時產生不一致之情形？當超過一個機關草擬並發布特定措施時，如何將評論列入考量？最近的智慧財產修法，公眾有無機會表示意見？
- (2) 法規：請更新有關智慧財產之倡議或措施。是否有行動策略沒有提到過的新措施？
- (3) 執行：全國公安部門對於智慧財產刑事偵查是否有一致的基準或程序？某些智慧財產刑事偵查有啟動標準，是否考慮將導航程序的範圍訂得更廣泛？請澄清私家偵探在民事法庭程序中提供證據的角色。是否討論提案增強大陸法官權力以執行其司法命令？對以下議題是否有特定執行倡議？(a) 危害健康與安全的仿冒品(b) 網路盜版與仿冒(c) 盜版光碟商業生產與銷售(d) 不公平競爭行為(公司名稱)；採用哪些新方法來減少仿冒品通過大陸邊境流向境外？請依法條分類，更新刑案統計數字。請中國大陸提供該國智慧財產權侵權案件，應用刑事、行政及民事手段的統計資料。
- (4) 專利：由於國家智慧財產局不提供新型與新式樣專利新申請案實質審查，許多公司抱怨道，他們的新型或新式樣已經被不道德的人所盜用，拿去申請並獲得專利權，然後用那些權力來向他們的公司主張侵權。請解釋國家智慧財產局及其他相關智慧財產機關於最近發佈的專利申請案標準化管理規則及其他行

動，如何減輕這些疑慮。請問軟體發明可專利性。

- (5) 著作權：請提供著作權法第 4 條修正後相關法令或文件，並提供翻譯。有關著作權網路盜版，請提供(a)在權利人代表確認侵權並通知後，取下侵權內容及/或聯絡的法律步驟；(b)可以暫停或終結反覆侵權者帳號的所有手段；(c)能提供直接侵權者識別資料給權利人或其他代表的方法。請舉前述法律程序的案例。針對網路盜版，採用何種形式偵查方法？在中國大陸主張網路侵權要實體通知(紙本)而不能採用電子形式。請說明電子形式通知的可接受性。在打擊大學校園教科書盜版巡迴活動方面，是否有新的成就？請說明對付 2008 年北京夏季奧運未授權網路重新傳輸行為的手段。
- (6) 商標/地理標示：為什麼有這麼多種類的著名商標？搶註問題在審查、異議及撤銷階段如何處理？商品類似如何判斷？請說明有關地理標示保護相關法令，商標法與地理標示產品保護規則的競合問題（不同主管機關）。下位法（地理標示產品保護規則）何時要修法？依前 1 題，地理標示應向誰註冊？在註冊與執行上有何不同？由於有兩個不同的行政管理程序，如果由不同人註冊，則會發生相同地理標示在兩個機關併存的情形，這種衝突註冊問題如何解決？已註冊為證明標章或團體商標的地理標示，是否要到國家質量監督檢驗檢疫總局也註冊？取得 1 種授權的使用者，是否也要另 1 種的授權？外國的地理標示如何享有國民待遇？國家質量監督檢驗檢疫總局是不是也有地理標示資料庫？
- (7) 資料專屬保護：大陸的藥品註冊規則如何管理？獲得資料專屬保護的要求為何？授予資料專屬保護的規定為何（包含應完成表格）？是否已有案件獲准保護？請提供獲准保護件數，並請區分為國內外。

2. 日本書面提問 IP/C/W/498 號文件內容略述如下：日本歡迎中國大陸在進入 WTO 之後的第 6 年，對於智慧財產承諾的履行，已經由簡單的程序進步到現在的巡航階段（固定執行狀態）。過渡檢討機制對於使中國大陸在過渡期的努力成果更為有效率且更有收穫是有用的，日本很榮幸對這個程序做出貢獻。依中國大陸入會議定書（WT/L/432）第 18 條，「中國大陸應在檢討前提供相關資訊給各會員國（subsidiary body）」，且依使過渡檢討機製程序更有效率及更有影響力的合作精神，日本要求中國大陸在 TRIP 理事會開會之前，提供對於以下問題與評論的回應與相關資訊。

(1) 著作權：請提供有關廣播電視組織使用報酬標準規則草案進展的細節。中國大陸的團體管理社團（即仲團）無法有效且適當地分配使用報酬給著作權人，因為著作物使用者通常不完整報告其實際使用方式。為解決此問題，日本認為應確保著作權團體管理規則第 27 條，有關使用者有義務提供完整使用資訊的規定，已被完全執行。請中國大陸針對此事提供看法。如中國大陸政府計劃對此問題採取任何措施，亦請提供細節。

(2) 商標：

A. 著名商標保護：有關經工商管理當局認可的著名商標數量，該局說對於國內或外國的著名商標認可沒有差別待遇。然而，跟中國大陸的執行情形相比（2005 年商標侵權案件總數 49412 件，其中 6770 件係侵害外國商標），看起來被認可的外國著名商標數量與中國大陸自己的著名商標數量比較起來是非常少的。請說明是否有關於認可著名商標程序的任何駁回標準，如有，請提供細節。有關不適當地註冊的問題，中國大陸商標審查基準中關於「先使用」的標準提到，一定要在中國大陸使用。然而，有許多案件顯示，當外國著名商標的商品或服務尚未進入中國大陸之前，已

經藉由例如網路等各種管道而變得廣為人知時，卻已經被未經外國商標權人同意之人惡意且不適當地獲得註冊。惡意將外國著名商標拿來申請註冊的情形，應被減少並禁止。請中國大陸說明為什麼先使用的標準要限制在中國大陸地區使用。

- B. 商標審查期間：中國大陸的商標管理單位說，從提出申請到首次通知約需 24 個月。請回覆下列 3 點：(a)24 個月的待辦期間是否有進一步減少？(b)目前的待辦期間長度，(c)過去幾年來中國大陸採取何種前瞻性措施以減少註冊程序長度（亦即待辦期間）。

(3) 執行：

- A. 刑事處罰統計：關於中國大陸刑法第 213-219 條的刑事案件，請提供自中國大陸加入 WTO 後每年的下列統計資料：(a)由行政單位移送至公安單位的應受刑事起訴的案件數量；(b)由公安單位移送至人民檢察署的案件數，及其中由行政單位移送至公安單位的案件數；(c)人民檢察署向人民法院提起訴訟的案件數；(d)商標權人自行向人民法院提起訴訟主張的案件數。
- B. 酒精飲料商標統計：關於仿冒日本清酒案件的資訊，該等案件中之商標已於日本註冊（其中有些也已在大陸註冊），商標權人並在中國大陸販賣或製造。日本上次提問，中國大陸未提供資料，故日本再次要求中國大陸提供以下資訊：(a)近 3 年來中國大陸酒精飲料仿冒品製造/販賣案件數量（請依適用法律或規定、行政/民事/刑事案件、遭侵權產品來源國等項目分類）；(b)通常用以規範中國大陸酒精飲料仿冒品製造/販賣的法律或規則。如果有任何特別適用於酒精飲料或食品的法律或規則，請告知。
- C. 資訊要求：日本要求中國大陸提供依據 TRIPS 協定第 63.3 條規定之智慧財產權執行特定司法判決及行政規則。雖然要求回應期限

已過，中國大陸仍未提供該資訊。日本希望要求提供此資料。

- D. 邊境措施：有關邊境沒收商品的處置，請提供大陸海關今年執行沒收的案件數與商品數量，包括：(a)移交給公共福利事業；(b)移交給智慧財產權人代替適當賠償；(c)商品在移除侵權特徵後拍賣；(d)銷毀。請提供中國大陸海關過去扣押數量的統計資料，包含處置方式、智慧財產權本質、出口國（進口扣押案件）及目的國（出口扣押案件）等資訊。
- E. 迂迴案件的處理：請提供有關可處罰的必須要求：製造者、散佈者或準備散佈商品者，如商品在製造時沒有商標，而後來在散佈階段或其他散佈者於準備散佈階段附貼違法商標時。
- F. 行政罰與刑罰：依行政單位移送可能刑案規則第 11 條，似乎能在案件移送刑事程序之前處以行政罰。當一案件已被行政單位懷疑可能為刑案且應移送刑事程序，請告知該案件將(a)在處以行政罰後移送，或(b)逕移送而不處以行政罰。請告知何者為實務上一般情形，並提供相關法律規定細節。如果答案是(b)，而當案件沒被送給檢察官，或最後未被起訴，該案是否會被再次移回行政程序，而其後是否處以行政罰？
- G. 沒收仿冒品的處置：中國大陸告知，如果沒收商品有價值且侵權標籤可移除，則會採取銷毀之外的處置方式。請指明在此種案件中，所謂的銷毀之外的處置方式為何？並請提供法律、規定、文件或任何資訊。

(4) 其他：

- A. 營業名稱與商標的競合：據瞭解大陸計畫修正目前的反不公平競爭法，而且修正後的法律將處理營業名稱中包含他人於大陸或其他國家/地區註冊且於大陸使用之商標或營業名稱、卻未經原權利人授權之案件。去年日本要求大陸處理以上提到問題的資訊，得到的答案是「該問題正被視為『營業名稱與商標競合』問題，並

且正在思考對策」。日本想知道進度如何。

B. 授權規則：日本企業說出他們的疑慮，大陸省級與地區級當局在他們依技術進出口管理規則第 17 條規定申請註冊時，經常檢查他們的技術進口/出口契約內容。日本希望大陸基於技術進/出口自由，確認其當局將不會檢查契約內容，尤其是授權金比率及契約擴充部分。技術進出口管理規則第 24 條規定，「當受讓人依據契約內容利用一技術，侵犯他人的法定權利與利益時，該受讓人應負法律責任」。在上次過渡檢討機制中我們所獲得的回應指出，該條款係強制性而非任意性的。如果該規則的條款意指受讓人的法律責任無法藉由相關人間的協定免除，就如同契約法第 353 條所允許，那麼規則可能需要修改，才能符合契約法第 353 條、TRIPS 協定第 28.2 條及國民待遇原則。技術進出口管理規則第 25 條規定，「審查官應確信所提供技術為完整、正確、有效且滿足所議定的技術目標」。請釐清應滿足前述條款的特定要求。另外，請說明為確保滿足前述條款要求而提供的書面說明是否一定要包含在契約中，而中國大陸官方是否會因該說明未包含在契約中而駁回該契約。規則可能需要修改，才能符合契約法第 353 條、TRIPS 協定第 28.2 條及國民待遇原則。

3. 歐盟書面提問 IP/C/W/503 號文件內容略述如下：

(1) 智慧財產權保護：

A. 專利、技術移轉與營業秘密保護：(a) 專利技術的使用：中國大陸要如何鼓勵中國公司較為尊重智慧財產權，且如何推廣於使用外國專利技術時的授權協定談判？(b) 第三次專利法修正：中國大陸專利法規定，如一專利的創造發明在該國完成，則該專利應於外國送件申請時，需先獲得專利局之同意。歐盟希望中國大陸澄清，這個須經同意的要求，是否只適用在該發明影響「國家機密或其他重要利益」，或者是否會適用在中國大陸完成的所有發明？中國

大陸專利法規定，中國大陸行政機關部門得允許指定企業利用發明，而且適用於所有發明，包含外國企業提出的發明，這是否違反 TRIPS 協定第 31 條？中國大陸專利法第 72、73 條規定，當侵權者相信專利權人不會反對其侵權時，則限制專利權人的權利。這樣如何確保專利權人的權利被尊重？(c)營業秘密保護：公司申請產品技術與規範許可或建廠授權時，被要求要將高度機密資料託付給政府機關，在許多案件中，資料的要求超過合理的需要。是否有意處理此議題？是否要訂立明確規範禁止揭露於申請授權或許可所必要的技術內容？某些資料常沒有被保密，而是被公開。在某些情況，資料甚至在該產品所使用規範被許可前被公開在網路上。是否有意處理此問題？是否準備明確定義公務員與相關機構的義務，並對未經同意散佈機密資料的人員追究責任並處罰。(d)藥品試驗資料保護：歐洲歡迎中國大陸提出藥品註冊規則草案。大陸的規範架構提供 6 種上市許可，不同種類的許可對提交給註冊機關的資料型態與程度要求也不同。創新藥品通常落在第 3 類（首次上市地區在中國大陸以外的藥品），新藥註冊只需提交很少的資料。這會造成先前大陸對資料專屬保護的條文變得沒有用，因為可能只需要提供少量資料，而該資料通常能公開取得。是否有意檢視這 6 個註冊種類，以確保保護程度沒有差別，且以大陸法律條文為骨架，創造資料專屬保護的環境。在資料的使用上，目前的中國大陸法制沒有明確地聲明藥品試驗專屬資料有 6 年的資料專屬保護，是否有意引進適當條款？(e)受到上市許可產品的保護：中國大陸是否有意引進「追加保護證明」制度，以提供如藥品等無法於上市許可取得前上市銷售的產品額外的保護？

B. 商標：(a)零售與批發市場的仿冒：中國大陸公家機關如何協助市場的地主履行與商標權人簽訂的瞭解備忘錄？中國大陸有意採取哪些強力措施來對付販賣侵權品的零售與批發市場？(b)商標局積

案問題：一個申請案平均花費 2 年時間獲得公告及註冊，如有爭議還會拖延到 5 至 6 年之久。中國大陸如何解決此問題？是否有增加審查人員的計畫？

- C. 著作權—市場進入議題：外國錄音銷售服務供應商相對於中國大陸錄音銷售服務供應商而言，遭遇不公平對待。任何「進口」音樂（包含權利人為外國人所擁有的企業或外國人所投資的企業）必須要在數位銷售之前檢查內容。然而，權利人為無外國投資的中國大陸企業的音樂，在數位銷售前可以不用先經內容檢查而直接註冊。結果造成在中國大陸的外國人所擁有的或外國人所投資的錄音銷售企業，以及提供跨國界錄音銷售服務的企業，相對於中國大陸完全自有的錄音銷售企業而言，遭遇不公平待遇。另一個問題在於釐清檢查程序所花的時間。在快速移動的音樂產業中，誰先到達市場，誰就獲得大量優勢，且目前制度造成侵權者通常能比著作權人早幾個月提供音樂。中國大陸想要如何解決此議題？中國大陸有意將與外國供應商相同的檢查要求套用在中國大陸企業身上嗎？中國大陸有無任何減化檢查程序的計畫，以容許權利人更快進入市場？錄音以物理形式（實體物）進口到中國大陸，但欲進行數位銷售者，必須在於中國大陸境內銷售前先經歷內容檢查；但國內製造的錄音就不用這樣要求，而能即時進行數位銷售。因此顯示以物理形式進口到中國大陸的錄音，相對於中國大陸製造的物理形式錄音而言，遭受不公平待遇。數位形式作品通過澄清檢查，不代表相同物理形式作品也已通過檢查，反之亦然。中國大陸想要如何解決此問題？中國大陸有意將與外國供應商相同的檢查要求套用在中國大陸企業身上嗎？中國大陸有無任何減化檢查程序的計畫，以容許權利人更快進入市場？中國大陸能保證（相同）內容只需要 1 次檢查申請，不論它的形式為何（數位形式或物理形式）？

- (2) 智慧財產權與競爭法：請說明中國大陸的反獨佔法中「濫用智慧財產權」的概念在實務上的意思。
- (3) 智慧財產權執行：(a) 海關措施：中國大陸將採取何種措施來處理出口至歐洲的仿冒與盜版商品過多問題？(b) 律師委任狀與證據的公證與採認問題：中國大陸是否有意簡化律師委任狀與證據的公證與採認等形式要求？會如何做？(c) 暫時禁制令：法院授予暫時禁制令比率過低（2%），讓人懷疑是否符合 TRIPS 協定，中國大陸是否有意解決此問題？(d) 起訴門檻體系的修正：中國大陸是否有意以著作權侵權標準為基礎，重新評估其他智慧財產權侵權刑事起訴的門檻機制？(e) 價格評估系統：侵權金額計算方式不明確，中國大陸當局不以真品價格估算，而以嫌犯所指價格或其他難以理解的方法估算，且沒有將未完成商品以及完成侵權步驟的各種必要組成部分（即瓶子、包裝等）列入計算。這樣常造成扣押大量侵權品，卻只計算出不合理的低價值，這對任何認真且有效的行動是種妨礙。中國大陸是否有意澄清此情況？(f) 累犯：中國大陸是否有意對累犯引進更強力的懲罰？(g) 危險侵權品的刑事起訴：中國大陸是否有意移除製造威脅健康、公共安全及/或環境的仿冒品之犯罪門檻？(h) 緩刑：中國大陸有許多極嚴重案件獲判緩刑的情形，請問該國要採取何種措施以防止極嚴重案件獲判緩刑？(i) 智慧財產權人的資訊：中國大陸要如何確保智慧財產權人適時被通知執行程序的發展與結果？是否有意提供由智慧財產權人開始的程序參與的權利？(j) 網路盜版：中國大陸想要採取什麼措施以去除網路侵權的情形？對於提供違法或侵權內容網頁之關係人及經營者，中國大陸已由目前法律與規則中採取何種執行行動？當網頁經營者或網路服務提供者拒絕回應或刪除侵權內容，或提供回應卻不接受其對內容的責任，隨後並允許侵權持續時，中國大陸會採取何種措施以澄清及簡化此情況？民事法庭判決網

路侵權平均損害金額過低，而且越來越低，造成侵權網站寧願等著被告，也不願向唱片公司取得授權，這在商業上看來很合理。中國大陸要如何處理此議題？

**Talking Points on Issues Relating to
the Convention on Biological Diversity (CBD)
at the TRIPS Council Meeting, October 2007**

At the outset, we would like to thank Peru and Japan for their papers and presentations, and thank Norway for providing responses to our questions raised in the last meeting in June.

- Regarding the discussion on the relationship between the TRIPS agreement and the CBD, like Japan, we also think that Members are talking about two different types of problem. One type concerns erroneously granted patents and the other is about prior-informed consent (PIC) and fair and equitable benefit-sharing (ABS).
- To avoid erroneously granted patents, we feel Japan's proposal in IP/C/W/504 is interesting and worth exploring. We think the structure and tools as mentioned in this proposal is very constructive, such as the format of a database, the multi-language glossary of technical terms, and the technical assistance for countries that are not able to develop such search programs. Therefore we are happy to see more discussion on this proposal.
- As for the issue of PIC and ABS, from Members' interventions and previous papers, we have the feeling that there are divergent views about how to deal with the issue. We hope that through more detailed discussion, we can get a better understanding of the 'pros' and 'cons' of each proposal.
- We would therefore like to raise some technical questions. Before we post these questions, we would like to thank Norway again for its specific answers to our questions. We would of course study them carefully to see if we need further clarification. Our questions are about third-party

objections with regard to Norway's proposal this time.

- We would like to know what the legal effect on the application or the patent would be if the patent applicant does disclose in good faith, but then a third-party protests the disclosed information? For example, if the patent applicant discloses country A as the origin of the GR and related TK with regard to the invention, and then country B sees the disclosure and argues that it should be the origin, will the examination process be stopped until this issue is resolved? What would happen to the patent holder if this argument were to occur after the patent is granted, and some benefit is already shared?

附件 6、「有關智慧財產權執行之議題（TRIPS 協定第 3 篇）－來自
日本之溝通」我國代表發言稿

Talking Points on the Enforcement issue at the TRIPS Council
meeting, October 2007

Thank you, Mr Chairman.

We would like to thank Japan for sharing its experience. This paper identifies some important trends in the trade of counterfeit and pirated goods, such as shipping through the means of international postal services, or by being disguised as personal use items. Part of the reasons for these trends is the prevalence of e-commerce. We think it deserves Members' attention to identify whether the same trends exist in themselves. Also this paper shares some important methods for combating counterfeiting and piracy, including the strengthened institutional capacity, the improvement of customs officers' expertise, the involvement of right holders, and the establishment of related databases. We believe that it will be very useful to deal with counterfeiting and piracy through the exchange of Members' experiences.

I thank you, Mr. Chairman.

附件 7、「葡萄酒與烈酒地理標示多邊通知及註冊制度聯合提案個別
會議」我國代表發言稿

Talking Points on Issues Relating to GI register in Wine and
Spirits at the small group consultation of 23rd October

Thank you, Mr. Chair (Chair of TRIPS-Special Session).

Regarding the issues relating to GI register in wine and spirits,
we have three points to make:

- Regarding the so-called “modification” of the EC’s proposal that we have just heard, we think it is very difficult to assess it without the ideas put on a paper. For example, how to define the threshold of participation? What is the impact of this register to the non-participating Member? Furthermore, we have been expressing our concern that the EC’s original proposal upsets the principle of territoriality. Now the EC orally expressed that they would like to remove the “reservation” system and make the registered information have a rebuttable presumption. We are not sure whether this new design will address our fundamental concern without a comprehensive proposal in the written form. Therefore we would suggest the chair to encourage the EC to submit its modification in paper.
- The second point is that we would like to express our disappointment that the EC seems not willing to engage in discussion on the Joint Proposal. We think that if EC can make detailed comments our proposal, it will see the merits of our proposal and we can also try to modify our proposal to respond the EC’s concern and comments. Then it will be more possible to seek a compromise in this negotiation. We would like to suggest you Mr Chairman to encourage the EC to do so.
- The third point is regarding the procedure. Our comments on this point might be more directed to the EC since this

morning's meeting was initiated by them. We would like to attach great importance of this issue to my delegation. We are not only wine and spirits producers, but we are also important markets for foreign wine and spirits. For example, we continue to be among the top 5 exporting markets for Scotch Whisky, and we are always among the top 10 exporting markets for wines and spirits produced in the EC, the US and Australia. Therefore, we believe that we should be included in all related consultations. And we also suggest you, Mr Chairman, to hold an open-ended session in due course to enhance the transparency of this negotiation.