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MTN.GNG/NG11/20
24 April 1990
Special Distribution

Negotiating Group on Trade-Related Aspects
of Intellectual Property Rights, including
Trade in Counterfeit Goods

MEETING OF NEGOTIATING GROUP OF 2, 4 AND 5 APRIL 1990

Chairman: Ambassador Lars E.R. Anell (Sweden)

Note by the Secretariat

1. The Group adopted the agenda proposed in GATT/AIR/2956. As agreed at its March meeting, the Group focused its discussion on new proposals from participants and on basic principles, in particular those more relevant to developmental considerations.

2. The Group had before it two new papers from participants: a proposal submitted by the European Communities for a draft agreement on trade-related aspects of intellectual property rights (NG11/W/68), and a discussion paper submitted by the delegations of Australia, Hong Kong, New Zealand and the Nordic countries on transitional arrangements in a TRIPS agreement (NG11/W/69).

New proposals from participants

3. Presenting the draft agreement on TRIPS submitted by his delegation in document NG11/W/68, the representative of the European Communities said that it was based upon a thorough review of the Community's submissions in order to take into account relevant international developments and to incorporate a number of significant modifications flowing from comments and criticism received from other participants. To the extent possible the draft tried to focus on content, avoiding the creation of problems through the attachment of certain labels to one or other issue (e.g. in the area of neighbouring rights and the protection of undisclosed information). Although this was not a harmonisation exercise, the implementation of the proposed agreement would, inevitably, imply modifications in certain aspects of domestic legislation, including for the Community and its member States. The proposal reflected the Community's determination to obtain a comprehensive, dynamic agreement which should be open to periodic review as technology developed. It also reflected the Community's continued determination to respect and safeguard the role of other international agreements or organizations. The proposed draft agreement could not replace the efforts undertaken in WIPO with respect to the harmonisation of intellectual property law. The draft further reflected the Community's determination to continue to support the decision taken at Punta del Este to strengthen the GATT system, avoiding the so-called code approach. Only the incorporation of the results of the negotiations into the General Agreement would allow the participants to live up to the decision taken at Punta del Este. To the extent that unilateral action was one of the main causes of the continuing strains on the multilateral trading system (another being the absence of material rules in key areas like TRIPS), GATT incorporation provided the indispensable means for preventing all types of unilateral measures, through the exclusive recourse to GATT dispute settlement. To incorporate the results of the negotiations in the GATT, the Community had chosen as simple and transparent a structure as possible - a new Article in Part II of the General Agreement (i.e. Article IXbis), providing an organic link

between Part II and a proposed Annex which would contain the vast bulk of the agreement. The contents of the Annex would, through this procedure, become part of the General Agreement. The method chosen to translate the Community's objectives into legal form was the same as before - to supplement the provisions of existing international conventions in respect of those issues where the absence of clear international rules created trade problems. Existing international conventions were the rock on which the Group must build, without accepting any derogations or exceptions.

4. The representative of the European Communities then provided some comments on each chapter, referring in each case to the trade problems being experienced that the proposals were intended to address:

- Copyright and related rights: The Community's basic approach to overcome trade problems in this area was to provide for what had come to be known as the "Berne plus" approach, also incorporating and adding certain elements to the Rome Convention. More specifically, the Community wished to: clarify the protection of computer programs as a literary work; provide for a rental right/equitable remuneration, at least for those works most exposed to piracy and trade problems; and provide for the protection of phonogram producers, performers and broadcasters.

- Trademarks: The trademark chapter had been subjected to few, if any, modifications of significance as compared with the previous Community proposals on this matter, since few critical remarks had been made by other participants, reflecting, he believed, a rather broad international convergence on many important issues of trademark protection.

- Geographical indications, including appellations of origin: The Community had decided to reiterate its previously tabled proposal on this matter, in the hope that other participants would make constructive attempts to address the trade problems in this area. He stressed the unacceptable nature of the present situation in certain jurisdictions, mainly created by the absence of adequate protection of appellations of origin in a few countries to the advantage of a relatively small number of producers, and to the detriment of the legitimate producers of such appellations in the Community or in other wine producing countries. To add insult to injury, some countries not only refused to protect legitimate appellations, but actually imposed import limitations or prohibitions to give a total protection to local counterfeits. In his view, the great majority of countries would only experience advantages from acceding to the Community's suggestions in this area, flowing from lesser misleading of consumers and from the establishment of clearer international rules with respect to their rights in related areas, often in the context of tropical or semi-tropical agricultural products such as tobacco, tea, coffee, etc.

- Industrial models and designs: While emphasising the importance of this subject matter, he said that the Community proposal was relatively modest, reflecting the legal and technical complexity of the issue and the lack of an international consensus on a more detailed approach. The draft was limited to what he considered to be an absolute minimum of trade-related commitments. On the term of protection, a somewhat more flexible proposal had been adopted, intended, inter alia, to respond to the call from the textile sector for the possibility of shorter, but effective, periods of protection. In this connection he recalled the importance attached by the Community to the adoption of rules in several areas, including this one, which would create a more "level playing field" in textiles trade.

- Patents: On coverage, the Community recognized that there should be no obligation for participants to protect animals and plant varieties through patents (although the latter should be protected by some means), since this was an issue which was still subject to much controversy in many countries. Nevertheless, the question of the extension of patent protection to all other subject matters remained of crucial importance to the Community. On the question of the term of protection, the Community did not wish to propose that there be international harmonisation at a precise level, but rather that the TRIPS agreement contain a floor of a 20 year term. On compulsory licences, the Community approach consisted in proposing certain guidelines, criteria, procedures and other requirements intended to reduce

potential trade distortions, including a general requirement to that effect. Compulsory licences would continue to be granted for legitimate reasons, and the Community had not found it useful to propose an exhaustive list of such possible reasons.

- Integrated circuits: On this matter the Community had decided to modify its July 1988 proposal substantially, drawing on the international consensus as it had emerged since then, while attempting to resolve certain remaining trade problems. The Community's proposal therefore would require contracting parties to comply with the substantive provisions of the Washington Treaty, subject also to the observance of additional, trade-related obligations on the three issues: term; compensation for innocent infringement and non-voluntary licences.
- Acts contrary to honest commercial practices including protection of undisclosed information: The result of the Community's internal reflections on this matter was an important revision of its earlier proposals. The revision attempted to address the substance of the problem of the potential for trade distortion if undisclosed information of commercial importance was not adequately protected under domestic law, without prejudging the label to be used by contracting parties to qualify the type of protection to be afforded, nor the type of legal instrument.

- Enforcement: The present draft was close to the previous Community submissions, with the following exceptions: the translation into legal terms; the introduction of a number of amendments in order to take into account the observations of other participants, including problems arising out of the existence of different national legal systems; and the extension of border enforcement to cover all intellectual property rights, and the inclusion of an even more extensive list of safeguards to protect against the creation of obstacles to legitimate trade. The proposal recognized the necessity to respect the continued existence of different types of national legal systems and procedures.

5. By way of conclusion, the representative of the European Communities emphasised that the Community, while defending its interests, would remain open with respect to the manner in which trade-related intellectual property problems should be addressed. He also emphasised the Community's willingness to contemplate further commitments and provisions to ensure a harmonious and mutually supportive relationship between the GATT and the WIPO; to take under positive consideration proposals relating to more precise commitments on technical assistance; and, more generally, to focus on the solution of problems faced by certain developing countries. Given that some Community member States had a GNP per head which was below that of several advanced developing countries represented in the Group, he believed that the development issue had already to a certain degree been addressed in the Community's internal discussions and in its proposal. Nevertheless, if developing country participants wished to submit for consideration problems of particular importance to their state of development, the Community stood ready to give very serious consideration to such concrete suggestions.

6. Many participants welcomed the Community's proposal and expressed their appreciation for the effort that had gone into its preparation. Some of these participants indicated that they considered the proposal to be comprehensive and balanced and expressed their preliminary reaction that it could constitute, in whole or in part, a basis for negotiation in the Group, although they had difficulties on specific points. One of these participants said that his delegation could accept Parts 1 and 2 of the proposal as a basis for negotiation and was encouraged by the development of the Community position in respect of trademarks, integrated circuits and undisclosed information, but had more far reaching difficulties with the standards proposed for other intellectual property rights. It believed Part 4 to be unnecessary. Appreciation was expressed for the focus in the proposal on trade-related aspects and also for the avoidance of provisions that would entail the harmonisation of national law. Some of these participants indicated that they felt that in some places the text fell short of the full rigour required for legal drafting and was insufficiently clear. In response to this observation, the representative of the European Communities confirmed that his delegation was open to suggestions to clarify the legal drafting.

7. Some other participants, in presenting their preliminary general comments, stated their disquiet that the

proposal appeared to go beyond what they considered to be the trade-related aspects of intellectual property rights. They expressed concern about the implications of accepting that the GATT was competent to deal with any matter which had some impact on international trade, however indirect. The view was also expressed that the proposal went too far in the direction of the harmonisation of intellectual property law. In response to this remark, the representative of the Community said that the level of detail and specificity of the proposal was not comparable to the much more technical and detailed provisions under negotiation in the WIPO harmonisation exercises and, even more so, in the attempts to harmonise law at the Community level. Another general criticism made was that the proposal appeared to mix up public and private international law, with some provisions referring to contracting parties and others to private parties.

8. Some participants expressed their view that the proposal failed to take on board the concerns of developing countries. It did not adequately take into account public policy objectives, including developmental and technological objectives, as required by paragraph 5 of the Mid-Term Review decision. Basic principles raised by developing countries, including the need for a balance between the rights of intellectual property holders and their obligations to society, access to technology and the need for developing countries to have freedom in determining the scope and level of protection were not reflected in the proposal. The proposal appeared to assume that the provision of incentives to creativity should take precedence over other social needs. The provisions on the special and differential treatment were confined to time-limited transitional measures, which would be inadequate to provide the degree of flexibility required by developing countries. It was suggested furthermore that the proposal might prove unreasonably costly to implement for many developing countries and that an attempt should be made to quantify such costs. Responding to these comments, the representative of the European Communities said that the Community remained willing to examine proposals to deal with the problems that might be experienced by developing countries, and in particular the least developed countries. It would be helpful if the problems could be identified as specifically as possible. It was not for the Community to put forward suggestions for special and differential treatment. However, the Community would not accept a blanket special and differential treatment clause. As regards public policy and developmental objectives, he said that each provision in the Community proposal reflected the type of balance between the rights of intellectual property owners and the society at large found appropriate by the Community. He recalled the view of his delegation that, given that the Community contained several member States with a relatively low level of GNP per capita, developmental considerations had to a large extent already been taken into account. No general reference to public policy objectives by way of a qualifier to substantive commitments had been included because this would give rise to inevitable conflicts and confusion in the interpretation of commitments. Instead of preventing disputes, it might well serve to create them.

9. Some other delegations, giving their general reactions to the Community paper, said that while they shared many of the ideas expressed in it, other provisions gave rise to concern. One of these participants said that his delegation believed that the following proposed provisions could hear further examination: Article 3 of Part 1; Articles 2, 9(2), 15(1), 27(2) and 28(a)(iii) of Part 2; Articles 3 and 13 of Part 3; and Article 3 of Part 4.

10. In regard to the Community's proposal for the incorporation of the results in the General Agreement through the creation of a new Article IX<u>bis</u>, a number of participants said that they favoured incorporation in the General Agreement and their minds were open on how this should be achieved. They were however attracted by the Community approach to this matter. Another participant said that his delegation generally favoured incorporation of the results in the General Agreement or in the GATT system. Some other delegations said that their minds were still open on the general issue of the institutional aspects of the international implementation of the results of the negotiations in this area, which was a matter to be decided by Ministers at the end of the negotiations. However, they considered that the matter needed to be reviewed in depth in advance.

11. Some participants believed it would be inappropriate to implement provisions of the sort proposed in the GATT framework. Some of these participants indicated their present preference along the lines of the

suggestion made by Chile (NG11/W/61). One such participant said that his delegation had been in favour of the incorporation of the result of the TRIPS negotiations in the GATT through an interpretative note to Article IX:6. However, if the results were to be as proposed by the European Communities, he would prefer that they not be implemented in GATT. Another of these participants recalled the view of his delegation that only restrictive business practices related to the abusive use of IPRs and distorting or impeding international trade and border enforcement in respect of counterfeit and pirated goods could be considered trade-related matters that had a place in the GATT. In his view, the Community proposal attempted to introduce into the GATT a whole set of rights and obligations not related to trade. GATT should not be made the arbiter of all international economic relations. This would risk over-taxing and thus weakening the GATT rather than strengthening it. The GATT should be strengthened by bringing back under its rules such areas as textiles, agriculture and grey area measures and improving the present rules so as to eliminate a whole host of departures from the principles of the General Agreement, not by burdening the GATT with obligations in areas unrelated to trade. Some participants were worried about the implications of incorporating such complex and extensive obligations as proposed by the Community for the legal coherence and delicate balance of existing GATT rights and obligations, with the risk that the present functions of GATT might be impaired or distorted. For example, questions were asked as to what would be the implications of Article XVIII of the General Agreement for import monopolies derived from the failure to work patents locally, and as to the compatibility of national treatment and mfn obligations relating to persons with existing such obligations in the GATT relating to goods. Concern was also expressed that implementation in the GATT framework would make the provisions of a TRIPS agreement subject to the dispute settlement procedures applicable in the area of goods through the establishment of a linkage between the two sets of rights and obligations.

12. In response to these observations, the representative of the European Communities said that the GATT would not be strengthened by Uruguay Round results that would continue and exacerbate the present lop-sided situation where some contracting parties had all the obligations and others all the rights. The GATT could only be strengthened by the incorporation in it of a global package resulting from the Uruguay Round reflecting the interests of all participants. Moreover, it could not be expected that governments would be willing to undertake not to have any recourse to unilaterally decided trade or any other type of economic measures unless the results were implemented in the GATT framework.

13. Some participants considered that the Community proposal had the effect of prejudging the institutional aspects of the international implementation of the results of the negotiations on TRIPS and therefore was inconsistent with the final paragraph of the Punta del Este Declaration and with paragraph 3 of the Mid-Term Review Decision. In response, the representative of the European Communities said that the requirement in the Punta and Mid-Term Review texts that the decision on the institutional aspects of the international implementation be taken at the end of the negotiations did not mean that the issue should not be discussed before then or that participants might not put before the Group their preferences in this respect and attempt to make them clear, including in the form of legal language. It was his view that it was in fact necessary that participants should engage in such a process so that all the implications of possible different options could be explored in advance so as to assist the Ministers in taking their decision. He would expect other delegations which had different preferences from that of the Community also to put forward their proposals as clearly as possible. Some other delegations indicated their agreement with the representative of the European Communities that, although the final decision should only be taken on this matter at the end of the negotiations, this matter needed to be discussed and examined in depth in advance.

14. A number of more specific comments were made and questions put on the Community proposal regarding incorporation into the General Agreement. Some participants wondered whether the inclusion of provisions on most-favoured-nation treatment in the annex meant that the Community proposal was an attempt to amend Part I of the General Agreement, which required unanimity, by means of an annex to Part II of the General Agreement, the adoption of which only required acceptance by two-thirds of the contracting parties. Some participants also wondered whether the proposed new Article and the annex to it would be subject to the Protocol of Provisional Application, since they would fall under Part II of the General Agreement. In response,

the representative of the European Communities said that this was not the Community's proposal, since application of the Protocol of Provisional Application would have the effect of emptying the proposal of most of its significance. A participant believed that the proposed Article IXbis would be improved by deleting the words "Annex II" at the end and substituting "national legislation and international conventions to which they are parties". Questions were also raised as to whether the first sentence of the proposed Article implied that some degree of distortion and impediment to international trade would nevertheless be acceptable, and as to whether the commitment contained in the second sentence was separate and additional to the commitment set out in the annex; for example could it be invoked to attempt to prevent a country from enabling intellectual property right holders to take action against parallel imports. In response, the representative of the European Communities said that the language in the draft Article has been largely drawn from the Punta del Este Declaration with the intention of describing in general terms the obligations entered into. His delegation was willing to consider ways of tightening up the drafting if delegations had proposals to make.

15. Some participants expressed concern about the implications of the proposal for the rôle of WIPO as the primary international forum for dealing with intellectual property matters. In their view the practical effect, if not the legal nicety of the Community proposal, would be to amend substantially existing intellectual property treaties. The proposal also appeared to overturn the logic and philosophy of the traditional doctrines of intellectual property on which those treaties were based. They wondered what would then be the purpose of the treaties administered by WIPO and of the activities of that organisation. Some participants also wondered about the consistency of the Community's proposals with existing international obligations. In response, the representative of the European Communities said that the approach adopted by the Community was one of building on existing international obligations, notably those in WIPO Conventions. It did not detract from existing international obligations, but aimed in certain areas to add to them to deal with what were considered to be trade-related problems. This approach did not allow for any conflicts with existing international obligations, and the Community was determined to avoid any such conflicts. Certainly, it had not identified any. The Community's proposal was aimed at reinforcing the whole multilateral system, not just the GATT. Thus it was proposed that contracting parties would not only undertake to abide by the substantive provisions of the Paris and Berne Conventions, but also undertake to accede to those Conventions in their latest revisions and give careful consideration to adhering to other international conventions on intellectual property matters. He stressed the continued commitment of the Community and its member States to WIPO, for example as a forum for pursuing detailed harmonisation work.

16. Chapeau to Annex. Referring to footnote 1, a participant wondered whether the term "intellectual property" was to be considered, for the purposes of the Annex, to cover all matters relating to those categories of intellectual property rights dealt with in the Annex or only the specific issues dealt with in the Annex relating to those IPRs. Questions were also raised about the second sentence in the chapeau indicating that contracting parties would remain free to grant more extensive intellectual property protection than that provided for in the annex. One participant wondered whether this would mean that a contracting party would not be able to challenge excessive protection of intellectual property as giving rise to trade distortions or impediments. Another participant was concerned that this could be interpreted as authorising a derogation from the mfn commitment. In response the representative of the European Communities said that this provision was not intended to provide any cover for bilateral or otherwise discriminatory arrangements.

17. Part 1: General Provisions. A participant wondered whether the Community's proposals on national treatment and on mfn/non-discrimination would involve differing levels of commitment for goods and for persons. Another participant wondered why the proposal did not provide for a safeguard clause along the lines of those found in Articles XVIII and XIX of the General Agreement. The following specific comments were made and questions put on the individual Articles of the proposal under this heading.

- Article 1: Intellectual Property Conventions. A participant considered that use could be made in a TRIPS agreement of the technique of incorporating by reference obligations under intellectual property conventions. He believed that this should be kept separate from the question of any obligation to accede

to those conventions; on this point his delegation would need to reflect further. In response, the representative of the European Communities said that the most important aspect was the obligation to comply with the substantive provisions of the Paris and Berne Conventions, but his delegation also believed it would be desirable to incorporate an obligation to accede to those Conventions. Responding to comments that it would be necessary to distinguish between the substantive provisions of the Paris and Berne Conventions and the other provisions of those Conventions, he said that in his view neither governments nor, in the event of a dispute, a panel would have any difficulty in seeing the difference. In answer to a query, the representative of the European Communities confirmed that the rights which were currently optional under the provisions of the Berne Convention, such as the "droit de suite", would remain optional under the Community proposal. A participant wondered why only the Paris and Berne Conventions had been referred to, and not other international intellectual property conventions.

- Article 2: National Treatment. A participant believed that it would be important to stipulate that de facto as well as de jure national treatment should be accorded.

- Article 3: Most-Favoured-Nation Treatment/Non-Discrimination. Some participants considered that the provision as proposed by the Community was too weak. Some of these delegations thought that it would be preferable to start with an undiluted mfn standard and then consider any exceptions that might be warranted. A participant, noting that the proposed standard was less stringent than that in Article I of the GATT, wondered whether in practice it was often easy to make a distinction between goods on the one hand and persons and services on the other in the application of mfn treatment. Some participants considered the "arbitrary or unjustifiable discrimination" standard rather vague and wondered what criteria would be employed to assess whether a practice might be considered arbitrary or unjustifiable and by whom. Responding, the representative of the European Communities said that the combination of the national treatment obligations and the GATT mfn commitment would mean that hardly any situations would arise where discrimination between nationals of participating countries would occur. Given the limited scope of the problem and the complexity of introducing a stringent mfn standard, his delegation considered that the proposal was a satisfactory compromise aimed at preventing arbitrary or unjustifiable discrimination. Questions were also raised as to the implications of the proposed Article 3 for the treatment of nationals of non-signatory countries and whether the prohibition on protection that would constitute a disguised restriction on international trade was relevant to the issue of mfn treatment.

  Article 4: Customs Unions and Free Trade Areas. Some participants doubted the appropriateness of a derogation in the intellectual property area from the mfn principle in respect of customs unions or free trade areas. Some others thought that the Community proposal in this respect was too broad and open-ended, especially given the specific objective that the Community appeared to have in mind. It was, for example, suggested that the Article might need to be qualified by a requirement that measures taken under it not be used to create barriers to the trade of other contracting parties or be inconsistent with the provisions of the proposed agreement. A question was put as to whether the provision would cover not only existing customs unions and free trade areas but also future ones within the meaning of Article XXIV of the General Agreement. The representative of the Community said that the underlying purpose of the Article was to enable the Community to continue to apply the principle of Community exhaustion in respect of trade among the member States.

18. Part 2: Copyright and Related Rights. Some participants expressed the view that the rights provided for in the Berne Convention were adequate to deal with this subject and that it was unnecessary to go further. Some participants also considered that the flexibility provided for in the Appendix to the Berne Convention should be integrally maintained in any future TRIPS agreement, as this Appendix was part of that Convention. A participant welcomed the development in the Community position on computer programs and phonograms, although it was not comfortable with all the details. He also felt that databases and works made for hire should be addressed in any future draft.

- Article 2: Computer Programs. Answering queries from a number of participants, the representative of the European Communities confirmed that according to his delegation's proposal computer programs would be protected for the same duration as other literary works. Some participants considered that this term of protection was unrealistic in the light of the rapid technological advances taking place in this sector, and another participant wondered what reasoning justified such a long term. Some participants also wondered what elements of computer programs would be protected. It was also asked whether machine-made programs would be protected and, in the affirmative, who would be the author in such a case; if the "look and feel" of programs would be considered as a literary work; and which elements of a program would be considered as the "idea" and which ones as the "expression" of the idea. Another participant, while recognising the necessity of protecting computer programs, considered that a sui generis protection was preferable to copyright, notably as regards the term of protection. The view was also expressed that the protection of software should be left to the national laws of each country.

- Article 3: Rights of Authors concerning Rental. Responding to a question about the reasons for the introduction of the concept of rental rights, the representative of the European Communities stated that the issue was important because of the nature and the importance of piracy resulting from rental activities and because rental rights were not mentioned in the Berne or Rome Conventions. A delegation wondered if the explicit exclusion of works of applied art or architecture meant that all other types of works were covered a contrario by this Article. Responding to a question as to why musical works were not covered by these provisions, the representative of the European Communities said that they were not excluded and that one aspect of them had been specifically dealt with in the following Article on the rights of phonogram producers. Responding to another question, the representative of the European Communities said that the expression "corresponding to the economic value" had been included in paragraph (2) to define and circumscribe the concept of "equitable remuneration", which was used without definition in Article 12 of the Rome Convention. As an example, he said that the economic value in the case of the rental of compact disks might be equivalent to the resulting loss of sales. A participant said that the question of rental rights required further study and that at this stage he could not agree to the inclusion of such a provision in a TRIPS agreement. Another participant believed that rental rights should be left to national law except where already covered by existing international obligations. The question was also asked as to why the European Communities had departed from its proposal in Article 2 by specifically providing rental rights in respect of computer programs and not for literary works.

- Article 4: Rights of Phonogram Producers. A participant suggested that the drafting should require one or the other of the first two paragraphs of the previous Article to be applied. She also wondered why the proposal focused particularly on phonogram producers and not on other neighbouring rights holders. She considered that this could be prejudicial to composers and performers, as the interests of the three categories of right holders were not always identical. Performers and composers might prefer a wide distribution of their works, even where such distribution might not be economically justified. For these reasons her delegation was opposed to giving phonogram producers complete control over the distribution of musical works. Another delegation wondered what criteria would be used to determine what constitutes "indirect" reproduction, adding that the protection could be too broad if the expression were to be defined too extensively. The representative of the European Communities answered that this wording had been borrowed from Article 10 of the Rome Convention. Indirect reproduction might, for example, be making a copy of a copy.

- Article 7: Public Communication of Phonograms. A participant asked why the expressions "single equitable remuneration" and "phonogram published for commercial purposes" had been used in this Article. The representative of the European Communities answered that both these expressions had been taken from the Rome Convention (Article 12).

- Article 9: Term of Protection. Answering questions, the representative of the European Communities

explained that the second paragraph of this article essentially established a minimum term of protection of fifty years, but that this term could be a minimum of twenty five years for countries that had some sort of additional measures to fight piracy which could make up for that shorter period of protection, for example a well-working right of distribution. A participant expressed the view that the term of protection of twenty years provided in the Rome Convention was adequate.

19. Trademarks. A participant expressed concern that provisions on the very important concepts of parallel imports and exhaustion of rights were absent in the proposed draft agreement. Another participant asked if, under the Community proposal, trademark rights could or could not be used to prevent parallel imports. A further participant was of the view that the proposed Articles on trademarks would enable parallel imports of genuine goods to be prohibited; this conflicted with the Paris Convention and might lead to a division of markets, thus resulting in impediments and distortions of trade.

- Article 10: Protectable Subject Matter. A participant said that the shape of goods appearing in the enumeration in paragraph (1) might be redundant, since the subject matter might already be dealt with under other types of IPRs. Responding to a question whether "earlier rights" in paragraph (2)(iv) referred only to trademark rights or also to other IPRs, the representative of the European Communities said that the relevant provision had been drafted in accordance with Article 6quinquies B of the Paris Convention. He also confirmed that the term "collective marks" in paragraph (3) included guarantee and certification marks.

- Article 11: Acquisition of Rights. A participant wondered what particular trade problem required a provision prohibiting use of a trademark prior to registration be required as a condition for registration. Another participant wondered whether the European Communities contemplated that a new system for the international registration of trademarks should be created.

- Article 12: Rights Conferred. A participant wondered whether there was any relationship between marks with a "reputation" and "well-known" marks. Another participant expressed the view that the proposal introduced a very broad concept of well-known marks which conflicted with the provisions of the Paris Convention. It was also asked what was covered by the phrase "act of unfair competition" in paragraph (3); it was not clear whether this term was an alternative to "passing-off" or a synonym for it, or covered different subject matter.

- Article 13: Exceptions. A participant wondered what situations were addressed by the phrase "fair use of descriptive terms". Did it refer to descriptive terms as an element of a mark, since a descriptive sign per se could not serve as a mark?

- Article 14: Term of Protection. Responding to a question about the meaning of the requirement that the initial term shall "in general be for a term of 10 years", the representative of the European Communities said that the duration of the initial period of protection was not so important as the requirement that registration be indefinitely renewable.

- Article 15: Requirement of Use. A participant expressed the view that a period of 5 years of non-use as a requirement before a trademark could be cancelled because of non-use was too long. Considering the dynamic economic systems in various countries, a period of 3 years could be more appropriate and should remain permissible. He also said that a broad interpretation of the term "legitimate reasons" could make the provision meaningless. In response, the representative of the European Communities referred to Article 5C of the Paris Convention and said that inclusion of the term "legitimate reasons" and the elaboration on this in paragraph (2) was intended to indicate more precisely what could justify non-use.

- Article 16: Other Requirements. A participant requested clarification of this provision, since it was not

clear what situations it would cover. Another participant said that most national laws provided for conditions or special requirements for the use of a trademark, which were allowed under the Paris Convention.

20. Geographical Indications including Appellations of Origin. A participant, noting that the proposed Articles on this subject matter were not substantially different from the earlier Community proposals in MTN.GNG/NG11/W/26, said that his delegation still had difficulty in understanding them fully. Another participant said that his delegation was not opposed to having geographical indications included in a TRIPS agreement, but had some reservations about the proposed protective measures. Another participant wondered what was contemplated by the notion of "geographical".

- Article 19: Protected Indications. A participant said that the definition proposed by the European Communities was too narrow being limited to appellations of origin, and should, for example, also cover products like coffee and tobacco without the restrictive requirements relating to the protection of appellations of origin.

- Article 20: Restricted Acts. A participant wondered what was intended to be covered by the term "indirect use" in paragraph (1).

- Article 21: Protective Measures. A participant considered this provision too limited, and not practicable for countries which did not have a system for appellations of origin or other registration system. Her delegation was of the view that geographical indications should be covered irrespective of any means of registration.

21. Industrial Designs and Models. A participant considered that the criteria set forth in this Article was not sufficiently elaborated. Another participant welcomed the proposals, but wondered whether they fully took account of the large range of products with very considerably different commercial lives which a system for the protection of industrial designs should cover. Her delegation continued to favour a minimum term of 5+5+5 years. A further participant supported this view. Some other participants considered the term of protection proposed in the Article too long. It was said that generally industrial designs had a very short commercial life and that protection for a long period under copyright law might be harmful for normal business activities, for example the development of new designs. In response, the representative of the European Communities said that the proposed Article contained a minimum provision and allowed, for example, national laws that provided for protection of designs only under copyright law in accordance with the Berne Convention. The Article did not contain any restriction as to a maximum term to be provided for copyright protection in this respect. Responding to a request for clarification concerning any special treatment for designs in the textiles area, the representative of the European Communities said that such designs often had a commercial life of only one or two years. Protection for at least 10 or 15 years would make costs for the protection of these designs disproportionately high. Hence the proposal for a term of 5+5 years.

22. Patents

- Article 23: Patentable Subject Matter. Some participants said that more exclusions from patentability should be allowed. Particular mention was made of inventions concerning nuclear atomic transformation processes or inventions concerning agricultural machinery. It was also said that exclusion from patent protection should be allowed on grounds of public interest, health care, nutrition or promotion of sectors of vital interest for economic and technological development, and that the flexibility available to developing countries under the Paris Convention should be preserved. A participant asked for clarification of the linkage made between paragraph (2), second indent, and paragraph (3). Responding to a question, the representative of the European Communities said that paragraph (3) allowed countries to afford protection for plant varieties either through the patent system or through a sui generis system or through both systems. A participant said that an obligation to protect

plant varieties might be beyond the parameters of what was necessary in a TRIPS agreement to fulfil the Group's mandate of encouraging the fullest possible participation in the results. Another participant expressed disagreement with such an obligation. A participant expressed his delegation's concern about the approach of the European Communities with regard to patentable subject matter and with the Community proposal in paragraph (4) with respect to the first-to-file principle. Another participant said that in a legal text the term "first-to-file principle" should be defined. In response, the representative of the European Communities said that the Group should avoid struggles of the kind that were already taking place with regard to a more detailed text on this subject matter in the context of the WIPO Committee of Experts on the Harmonisation of Certain Provision in Laws for the Protection of Inventions. Therefore, the European Communities had limited this provision to what it believed was a reasonably clearly stated objective.

- Article 24: Rights Conferred. A participant expressed the view that the proposed provisions on rights conferred were not in line with the principles of intellectual property protection, for example because they tried to invalidate parallel imports and the doctrine of exhaustion of rights. Another participant wondered whether the Article would prohibit reverse engineering. In regard to paragraph (3), a participant wondered why revocation of a patent should not be allowed when it had not been industrially exploited, and said that the proposed provision would not favour research and development at the national level, especially not in developing countries. Responding to comments on paragraph (4), the representative of the European Communities said that the provision prescribing reversal of the burden of proof did not, in his view, involve any conflict with the Paris Convention.

- Article 25: Term of Protection. A participant wondered what was the legal significance of a provision merely encouraging contracting parties to extend the term of protection in appropriate cases to compensate for delays caused by regulatory approval processes. In response, the representative of the European Communities said that his delegation was open to any suggestions for legal drafting in this respect. A participant said that the provision on term was not in line with the Paris Convention, which left the determination of the term of protection and the conditions governing it to national legislation.

- Article 26: Compulsory Licences. A participant questioned the approach taken by the European Communities. In his delegation's view the proper way of dealing with compulsory licences in a TRIPS agreement was by focusing on the situations in which such licences were permitted as opposed to the conditions under which they were granted. Another participant welcomed the Community approach that a TRIPS agreement should not specify the grounds for the grant of compulsory licences. The view was expressed that a provision on this subject matter should not be drafted too strictly and that, since compulsory licences were essential for the transfer of technology and for the prevention of abuse of exclusive rights, the conditions laid down in a TRIPS agreement should achieve a balance between inventors and users of IPRs, while fully respecting the relevant provisions of the Paris Convention. Another participant wondered why the notion of abuses and the consequences arising from them were ignored in the draft, which appeared to restrict the right of countries to use compulsory licences to combat such abuses. In his view, it was not the granting of compulsory licences that created unjustifiable barriers to legitimate trade, but the non-working and lack of exploitation of patents. Some participants wondered why the proposed Article did not contain any reference to public policy objectives and sought an explanation of the differences between it and Article 5(A) of the Paris Convention. A participant questioned the usefulness of the eight paragraphs under the introductory part, since these were only relevant if the grant of a compulsory licence would not distort trade, which seemed a very difficult condition to meet. In response, the representative of the European Communities agreed that all compulsory licences impinged on trade, but not all to the same degree. Prescription of what degree should be allowed had not been attempted in the proposed Article and should in his view be left to dispute settlement. Responding to another question on paragraph (2), he said that, like in the area of copyright, a more precise indication had been given as to the content of the concept of "equitable remuneration", which should correspond to the economic value of the licence and could thus, for

example, relate to market value or loss of sales. A participant wondered how the term "manifest" in paragraph (3) should be defined.

23. Article 27: Lay-out Designs of Integrated Circuits. In response to a question, the representative of the European Communities said that it was outside the purview of this Negotiating Group to attempt any changes to the Washington Treaty. Referring to the term of protection of eight years provided for in the Washington Treaty, a participant wondered what logic required a term of ten years instead. A participant wondered why here, unlike in Article 3 on rental rights, the concept of equitable remuneration was not defined in terms of the economic value of the use. Comparing paragraph (3) with Article 26 on compulsory licensing of patents, a participant wondered why different language had been used regarding the prohibition of compulsory licences that caused distortions to trade.

24. Article 28: Acts Contrary to Honest Commercial Practices including Protection of Undisclosed Information. A participant said that merely by calling trade secrets undisclosed information the character of the subject matter could not be changed. Although in the view of his delegation trade secrets or undisclosed information should be protected, they could not be regarded as a form of intellectual property. Another participant said that his delegation too recognized the necessity for protecting business secrets and was still studying the matter. However, considering their variety, it seemed more attractive to leave the protection to national legislation only. A participant said that his delegation considered the proposed Article unclear and requested clarification.

25. Part 3: Enforcement of Intellectual Property Rights. Some participants believed that the Community proposal was an important effort to recognise differences between national legal systems and could be a useful basis for further negotiation on this matter. It was also said that the proposal would help determine the appropriate level of specificity needed to accommodate different legal systems, but some additional flexibility might be needed in certain areas. Some participants, while agreeing with the principle of establishing fair, equitable and transparent enforcement measures to prevent infringement of intellectual property rights, considered that the level of specificity contained in this part of the proposal was excessive, in the light of the important differences between domestic enforcement procedures. The view was expressed that the exact nature and operation of enforcement measures should be left for each country to decide, and that the proposal constituted an unwelcome effort to harmonise national judicial procedures. Concern was also expressed about the resource implications of the proposal especially for developing countries. It was suggested that some countries would only be able to implement such a proposal gradually. In response, the representative of the European Communities said that, even if the Group were to start with general principles, it would soon become clear that, because of differences between different national legal systems, the specification of certain nuances and clarifications would be necessary. If the provisions on enforcement in a future TRIPS agreement were not detailed enough, there would inevitably be conflicting interpretations leading to disputes. He hoped that the Community draft provisions on enforcement would serve as a useful basis for the further work of the Group, especially in view of the fact that the widely different national legal systems within the Community had been taken into account in the drafting process. The representative of India said that his country's position with regard to enforcement, including in regard to the institutional aspects of international implementation, remained as stated in document NG11/W/40. Another participant said that agreed measures dealing with enforcement should be limited to border measures. Some participants stressed the importance they attached to ensuring that enforcement of intellectual property rights did not result in arbitrary restrictions on international trade by governments and enterprises. A participant emphasised that the initiation of border measures should in all cases be the responsibility of the right holder.

- Article 2: General Requirements. A participant commented that although this Article established a general requirement of "fair and equitable procedures", the following Articles were so detailed that they were not really in harmony with this principle.

- Article 4: Judicial Review. A participant wondered why the right of appeal provided for in this Article

did not mention the possibility of appeal to a quasi-judicial body, as was the case in Article 4 of Part 4 of the proposal, dealing with the acquisition of rights.

- Article 6: Evidence of Proof. A participant stated that the expression "coherent case" was unknown in its national legal system and wondered if clarifications could be provided as to its exact meaning.

- Article 9: Damages. A participant wanted to know whether in practice any infringement was covered by the expression "deliberate or negligent infringement" used in the proposal; would it be considered negligent, for example, if one were to inadvertently violate a patent right because one was unaware of its existence? In respect of the "appropriate circumstances" mentioned in the second sentence of this Article, another participant said that in the law of torts, it was difficult to obtain an award of profits when the infringer had not acted intentionally or negligently.

- Article 10: Right of Information. A participant said that it would be interested to know more about the experience of other countries in the operation in practice of the right to information mentioned in this Article.

- Article 13: Provisional Measures. A participant wondered whether under the proposal contracting parties would be free to choose between civil, administrative or criminal procedures to implement provisional measures. Another participant expressed the view that paragraph (b) of this Article was balanced but considered that the defendant, because of the severe impact on him and interested parties, should be forewarned three days in advance of provisional measures and that the review procedure should take place immediately after execution of provisional measures instead of within a "reasonable period" as proposed by the EC.

- Article 14: Suspension of Release by Customs Authorities. With respect to this Article and the following Articles in this section of the proposal, some participants were of the view that it would be difficult for customs authorities to carry out the quasi-judicial authority required of them, except in relation to counterfeit and pirated goods. Only courts should be allowed to make judgments on the existence of prima facie infringements in other cases. Another participant considered that in some countries a competent authority should be able to take all the decisions in respect of border controls, without necessarily referring the matter to the judiciary. In response to a query, the representative of the European Communities confirmed that the model legislation drawn up by the Customs Cooperation Council and designed to give the Customs powers to implement trademark and copyright legislation, communicated to the Group by the Council and contained in document NG11/W/5/Add.5, had been taken into account.

- Article 17: Duration of Suspension. A participant wondered if the two week delay mentioned in this Article was equivalent to the delay provided for in the Community regulation dealing with the same subject matter.

- Article 23: Criminal Procedures. A participant expressed the view that the obligation relating to criminal measures should be limited to piracy of copyrighted works and counterfeiting.

26. Part 4: Acquisition of IPRs and Related Inter-Parties Procedures. A participant was of the opinion that a TRIPS agreement should not have provisions on this subject matter, because it was not something that necessarily had to be dealt with by the Group. Another participant welcomed the inclusion of a section on the acquisition of IPRs and could support most of its provisions. A third participant said that her delegation would prefer less broadly drafted provisions. A participant wondered why Article 3 did not refer, like Article 2, to the general principles set out in Part 3, Section 1, Articles 2 and 3 of the proposed draft agreement.

27. Part 5: Supplementary Provisions. The following comments were made and questions put on the the

proposed Articles under this Part of the Community proposal.

- Article 1: Other Conventions. Some participants believed that accession to the Paris and Berne Conventions should be left for each participating country to decide. Some other participants asked the Community what time frame it had in mind for accession to these Conventions.

- Article 2: Transparency. One participant was interested in the scope of the proposed obligations compared with those in Article X of the General Agreement and in the Agreement on Technical Barriers to Trade. Another participant requested clarification of the suggestions in the final paragraph under this Article.

- Article 3: Prior Consultation. Some participants were sympathetic to this proposal while others indicated that they had difficulties with committing themselves to prior consultation. In response, the representative of the European Communities emphasised the very cautious and circumscribed nature of the provision. Questions were asked as to what would be construed as making "reasonable efforts" and also whether it was feasible to apply such a prior consultation procedure to possible changes in the administration of laws and regulations.

- Article 4: Transitional Period. One participant considered that the availability of adequate transitional periods was the most important element for guaranteeing the widest possible participation in the results; transitional arrangements should be sufficiently flexible to respond to the differing stages of development of countries. Another participant stressed the need for all participants to be able to benefit from transitional arrangements. Some other participants emphasised that time-limited transitional arrangements would not in themselves provide sufficient flexibility to meet the development needs of many developing countries; there was no inevitability that a developing country would necessarily have achieved by given date the level of development commensurate with the obligations being proposed. One of these participants said that the transitional period must be clearly specified in the agreement as a right that participating countries could avail themselves of; it should not be at the discretion of the proposed committee. Some participants asked the Community to be more specific about the duration of the transitional periods that it envisaged. One participant suggested that one possibility might be that each of the three transitional periods suggested could be five years. Another participant wondered whether it was reasonable to except from the transitional period for developing countries the obligation to comply by the substantive provisions of the Paris and Berne Conventions, which figured in Part 1 of the proposal. Responding to comments, the representative of the European Communities said that his delegation had great understanding for the problems of all countries, including industrial ones, which were undergoing major structural adjustments and would be willing to give careful consideration to how their problems might be addressed. In response to a question as to whether a participant invoking the transitional provisions would enjoy full rights under the Agreement during that transitional period, he said that the Community would view such a suggestion positively if the substance of the eventual agreement were satisfactory and the commitment to implement it at the end of the transitional period were strong and unequivocal.

- Article 5: Technical Assistance. A participant suggested that technical assistance should be available to all participants that needed it and requested it, not only to developing contracting parties. Some other participants noted that it was suggested that technical assistance might be available in respect of legislation aimed at preventing the abuse of intellectual property rights and wondered why no section appeared in the agreement containing proposals for substantive obligations to combat such abusive practices since it was so clearly admitted that legal action was required in this area.

- Article 6: Committee on Trade-Related Intellectual Property Rights. A participant indicated that his delegation could not support the establishment of such a committee. Another participant was concerned that the proposed committee would have a right to question domestic policies.

- Article 7: Joint Expert Group. A participant believed that the proposed joint GATT/WIPO expert group would contribute to secure a mutually supportive relationship between GATT and WIPO as required by the Punta and Mid-Term Review decisions. Some other participants wondered what would be the terms of reference of such a joint expert group, what input it might make into the GATT dispute settlement process and what implications any such input might have for the operationality of the dispute settlement process.

  Article 8: Dispute Settlement. Some participants expressed concern that the Community proposal would allow for the withdrawal of concessions and obligations under the General Agreement as a form of countermeasure in the event of a participant failing to abide by a panel ruling concerning its compliance with commitments in the intellectual property area. One of these participants believed that it would be more appropriate to improve first the dispute settlement system in the WIPO framework before considering possible GATT-based mechanisms. In response to a question as to whether, under the Community proposal, retaliation in the intellectual property field for a violation of GATT obligations would be possible, the representative of the European Communities said that if the TRIPS agreement were fully incorporated into the General Agreement and if all the normal requirements of the dispute settlement process were met, including authorization for the retaliation by the Council, retaliation in the intellectual property field would be possible, provided that it did not contravene the other international obligations of the country concerned. A participant said that the reference to unilateral measures in the Article would be superfluous if the Agreement would contain clear-cut commitments. Other participants expressed support for the emphasis in the Community proposal on the control of unilateral measures and it was suggested that such a commitment would constitute an important incentive to join a TRIPS agreement. It was also suggested that the issue of control of unilateral measures was not confined to the TRIPS area, but one which had to be seen in the context of the Uruguay Round as a whole.

- Article 10: Review and Amendment. Some participants expressed support for the Community proposals on this matter.

The Applicability of the Basic Principles of the GATT and of Relevant International Intellectual Property Agreements or Conventions

28. As agreed, the Group focused its discussion on basic principles relevant to developmental considerations.

29. Some participants expressed the view that the Group and many of the proposals before it had so far failed to give adequate attention to the development dimension. They believed that the Group was bound to do this on the basis of paragraph 5 of the Mid-Term Review Decision as well as on the basis of the general principles governing the Uruguay Round negotiations set out in Part I:B of the Punta del Este Declaration, notably paragraphs (iv) to (vii), which were recalled in paragraph 2 of the Mid-Term Review Decision. Some of these delegations said that specific proposals had been made by developing country participants, for example in documents W/30, W/37, W/39 and W/57, but that these had not been sufficiently taken into account by their negotiating partners. In their view the present situation was giving rise to an imbalance both within the TRIPS area and possibly between areas in the negotiations as a whole. It was said that many of these concerns stemmed from the tendency of proposals to go beyond what were the trade-related aspects of intellectual property and into matters that were questions of domestic policy. It was therefore suggested that it would be important to define what were the trade-related aspects and to confine the negotiations to such matters.

30. Responding to these statements, some participants said that they were concerned to ensure that a TRIPS agreement facilitated the development of developing countries, in part for the selfish reason that it would

thereby provide new opportunities for their industries. They believed that the development was fundamental to the protection of intellectual property and had been taken into account in the proposals that they had made. In their view an adequate level of protection of intellectual property, although not sufficient to secure development, would contribute towards it. One of these participants said that low intellectual property protection tended to be part of a package of economic policies that had proved not to be conducive to development and which were now tending to be rejected in favour of more liberal and open economic policies. Responding, a participant said that the distinction between doing something in national law and accepting international obligations to do it had to be borne in mind. Even if it were true that high levels of intellectual property protection were conducive to domestic development, it would not necessarily follow that entering into international obligations regarding the level of protection would add anything to the positive effect on development that could be secured through purely national action.

31. On the question of freedom on the scope and level of protection, some developing country participants said that what they were seeking was to be able to enjoy the same degree of freedom in this matter as had been enjoyed by the present industrialized countries when they had been at a comparable level of development. In this regard they recalled that some of the present industrialized countries had only recently introduced full patent protection in certain sectors, notably in the chemical, pharmaceutical and foodstuff sectors, and some were not intending to make such changes until later this decade. These policies had presumably been followed because they were considered to be likely to assist in the development of the industrial and technological capabilities in these sectors. It was only when sufficient industrial and technological strength had been attained that these countries had come to the view that tightening levels of patent protection would be in their interest. It thus had to be recognized that the patent system was, and historically had been, an important instrument of national economic development policy. There were, for example, good reasons sometimes for excluding products from patent protection and only providing process protection; research and development activity in the invention of new and more efficient and economical processes of production could be hamstrung by product protection. It was also suggested that developing country participants should have the right to determine the scope of the rights accorded to owners of process patents and to grant compulsory licenses for importation.

32. Responding to these views, some participants reiterated their belief that their proposals would be conducive to the development of developing countries through providing greater security and predictability and more attractive conditions for foreign investment and research and development. In their view the fact that some industrialized countries had not until recently provided full patent protection in certain sectors or were still in the process of doing so did not establish that such policies were conducive to technological and economic development. Rather experience had shown the opposite, that in countries where patent protection had been increased, the industries concerned had been stimulated and in countries where patent protection had been reduced, the industries affected had suffered. The delay in extending full patent protection in certain sectors had been because it had taken time to learn from experience the benefits of patent protection sufficiently to overcome sectoral interests that might be opposed to it. Developing countries were now in a position to profit from the experience which had been gained at some expense in the industrialized countries. As regards the merits of not protecting products in order to promote the development of new processes, it was suggested that such development activity would not be socially useful where it would only serve the development of processes, possibly of a less efficient nature, merely in order circumvent the process patent and produce the product that was the true subject of the invention. Some participants also said that their proposals did not intend to remove all freedom in establishing the scope and level of protection, but merely attempted to establish certain minimum levels of protection necessary to avoid distortions and impediments to trade. It was suggested that freedom in establishing the scope and level of protection would not be compatible with the objective of the Punta declaration, which was also recalled in paragraph 2 of the Mid-Term Review decision on TRIPS, of strengthening the role of GATT and of bringing about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines. Responding to these points, a participant recalled the experience of his own country where the high levels of patent protection that had been in force for over 100 years before 1970 had done little to promote economic development and where development had considerably accelerated subsequently in sectors where protection had been reduced. He also said that the correlation between the level

of intellectual property protection and the stage of development had been established in academic studies.

33. Some participants said that there were also public interest reasons why countries should enjoy freedom in establishing the scope and level of protection, especially in terms of exclusions from patentability. These included the need in developing countries for essential articles, such as medicine and food to be available at reasonable prices to the public. The monopoly right granted by the patent system inhibited competition and led to artificial prices being maintained in these sectors. It was also said that, in regard to the patenting of life forms including genetically engineered micro organisms, there was a whole range of moral, ethical, environmental and other issues which were not yet fully comprehended even in the industrialized countries. Responding to these comments, some participants said that it would be wrong to equate the issue of pharmaceutical prices with that of patent protection; most pharmaceuticals, including the overwhelming majority of those on the WHO list of essential drugs, were in the public domain and not under patent protection. It had to be recalled that the effect of the long delay in obtaining marketing approval for new pharmaceuticals, meant that the effective period of protection was often rather short, even in countries granting a term of 20 years. Patent protection contributed greatly to the public interest, by stimulating the development of new drugs and other valuable products, such as drug resistant varieties of crops etc. One of the unfortunate consequences of the low levels of protection for pharmaceuticals in many developing countries was the small amount of private research and development into tropical diseases.

34. Some participants stressed the importance of full account being taken of the principle of balance of rights and obligations, that is to say that the rights or privileges granted by the society to owners of intellectual property should be balanced by obligations on those owners vis-à-vis the society at large. Several of these participants focused on two concerns, the local working of patents and the avoidance of restrictive business practices by private operators. It was said that, given that the nationals and companies of developing countries owned hardly any of the total world stock of patents, the commercial working of patents in the country on reasonable terms was a matter of crucial importance to developing countries. Otherwise the patent would merely serve to enable the patent owner to enjoy a monopoly for the importation of the patented article. Without the working of the patent there could hardly be any transfer or diffusion of technology and the promotion of industrial activity in the host country. This was particularly true for developing countries where a patent could seldom be operated without the associated secret know-how. Moreover, the working of a patent generally led to the saving of scarce foreign exchange and the lowering of the price of products, particularly in areas like pharmaceuticals and agro-chemicals. It was therefore suggested that the working of a patent by the patent owner in the host country should be regarded as a fundamental obligation on his part. In this connection, one participant said that, while recognizing that provisions on compulsory licensing should not be too open and permissive, the grounds for the grant of a compulsory licence should include the failure without legitimate reason to exploit the patented invention, or the insufficient exploitation of it so as to fail to satisfy local needs at reasonable prices. The conditions under which compulsory licences could be made available, however, should have to be in accordance with the provisions of the Paris Convention. Another participant said that the provisions on compulsory licensing should be at least as permissive as those in the Paris Convention. It was also suggested that vital public interest concerns, such as security and public health, should be grounds for the grant of compulsory licences; that there should be a possibility for relating the duration of protection to the explicit working of the object of protection in the domestic market; and that the competent national authorities should have the right to grant licences of right where the public interest warranted them.

35. In respect of restricted business practices, it was said that the problem of anti-competitive practices adopted by patent owners and technology suppliers was particularly acute for developing countries. A variety of restrictive and anti-competitive conditions were frequently imposed in agreements involving the licensing of patents, trademarks and know-how and in the supply of patented products. Developing countries often suffered from unequal bargaining power between their firms and transnational corporations. Some participants said that this problem could not be addressed solely through domestic competition law, because the market for technology was a market where sellers were able to dictate terms. If participants wished to seek privileges for their domestic operators in other markets, there was no reason why they should not take on obligations and

responsibility for their behaviour. One participant said that developing countries should not be prevented from taking measures to ensure that voluntary transfer of technology agreements (i) did not impose unfair and unjustifiable limitations or handicaps on the local party; (ii) were not prejudicial to the national interest; (iii) did not provide for the payment of fees or royalties that were not commensurate with the value of the technology transferred; and (iv) did not result in the transfer of obsolete technology.

36. Certain suggestions were made on obligations regarding disclosure as a condition of patentability. One participant said that such disclosure should be sufficient to enable locals to apply the invention after the expiry of the term of protection. Another participant said that disclosure requirements should enable a person versed in the technical field concerned to comprehend or put the knowledge or innovation into practice and should require the disclosure of the best mode of working the invention as well as to provide competent authorities information on new developments made by the owner or his licencee regarding the technology.

37. Responding to the comments on the issue of balance of rights and obligations, some participants said that they believed that their proposals did provide for such a balance. Reference was made in this connection to the proposal in the legal text put forward by the European Communities on compulsory licensing and to the normal requirements for disclosure by patent owners. It was said that it would be wrong to assume that owners of IPRs were necessarily the nationals of industrialised countries and users the nationals of developing countries; in reality it was sometimes the other way round. Some participants said that they considered that national competition laws were the appropriate means to address restrictive business practices and another participant said that his delegation was prepared to address this matter in the context of provisions on compulsory licensing. In regard to the working of patents, a participant expressed the view that the best method of ensuring that patents were worked locally was to provide an open foreign investment regime and appropriate intellectual property protection.

38. The Group addressed the question of special and differential treatment. Some participants said that this was a principle already recognised in the GATT and also implicitly in intellectual property conventions insofar as they provided a certain degree of freedom for member states to tune their IPR regimes to their own needs and their level of economic development. It was also explicitly provided for in Part I:B of the Punta Declaration and in the Mid-Term Review Decision on TRIPS as a guiding principle of the negotiations. Special and differential treatment should therefore be recognised as a principle which would guide the outcome of the negotiations on TRIPS. This did not mean that developing countries did not accept the principle of protecting IPRs or were not prepared to make any contributions, but such protection and contributions would have to be consistent with their trade, development and financial needs, and in the TRIPS area with the underlying policy objectives of their national regimes for the protection of intellectual property rights.

39. These participants believed that provisions on special and differential treatment could not be limited to time-limited transitional arrangements allowing developing countries to phase in higher levels of obligation without reference to their level of development. The issue was how to give developing countries an equivalent degree of flexibility to that which the developed countries had themselves enjoyed when they were at a comparable level of development. Several delegations agreed that the issue of transitional arrangements and that of special and differential treatment should be kept separate; in fact many countries, not only developing ones, would need to benefit from transitional arrangements. One participant emphasised that special and differential treatment should be integrated in each provision of the results, for example in the area of trademarks developing countries should be free to regulate the use of foreign trademarks on their domestic markets. Developing countries would also need special and differential treatment in respect of the term of protection of intellectual property rights. There should furthermore be commitments on developed countries to provide technical and financial assistance to developing countries as well as to cooperate with developing countries in the transfer of technology. Responding to these comments, some participants expressed the view that the substantive obligations in the areas of standards and enforcement should be the same for all countries. However, wide flexibility could be introduced through transitional arrangements to accommodate the positions of countries at different stages of development. One participant said that, if exceptions to the basic rules were

to be considered, they should be examined in connection with the specific rules on standards and enforcement.

40. A participant was concerned that the position of some developing countries appeared to be based on the proposition that intellectual property created in the industrialised countries should be made available at low cost or it would be appropriated anyway. He did not dispute that ultimately countries were free to follow their own economic policies, including in the area of intellectual property rights, but if they did so they could not expect that his country would not avail itself of the same freedom to defend its own economic interests.

41. A number of participants stressed the need for the outcome of the negotiations to contribute to the access of developing countries to technology. A participant, recalling the proposals made by his delegation on this matter, said that it was not that developing countries were not prepared to pay for technology but that such payment should be according to internationally established parameters. Adequate access to technology required satisfactory provisions concerning the working of patents, the disclosure of inventions as a condition of patentability and the prevention of anti-competitive or restrictive practices in the licensing of technology. It was also suggested that the results of the negotiations should not impair the right of developing countries to give financial or other support to the research and development activities of nationals only or to introduce inventor's certificates or protection for utility models. Responding to these statements, some participants said that they believed that the proposals their delegations had made would facilitate the transfer of technology to developing countries. In their view, the best way to encourage such transfer would be to provide an attractive environment for the voluntary transfer of technology through a satisfactory intellectual property regime and associated provisions. Although details of patented inventions were generally publically available through patent disclosures, a satisfactory intellectual property regime would encourage the transfer of the associated know-how necessary for meaningful transfer of technology.

42. A number of the other basic principles referred to in the Checklist of Issues were discussed. In respect of non-reciprocity and independence of protection, several delegations emphasised their agreement with these principles. As regards the issue of reciprocity, a participant said that if treaty obligations in a country were not directly applicable in national law, there should be an obligation to apply them through specific law-making. Some participants also referred to the need for the avoidance of obstacles to legitimate trade. One participant said that intellectual property law should not provide a means of preventing parallel imports of genuine goods. There should also be provision for the adoption of appropriate measures to remedy insufficient marketing of a comodity which had received patent protection and for the prevention of marketing agreements, as well as obligations on participants to ensure that measures and procedures to enforce intellectual property rights did not themselves become barriers to trade and to establish safeguards against their constituting a means of arbitrary on unjustified discrimination between countries or right holders. Another participant cautioned against the dangers of attempting to respecify the GATT principles governing international trade simply because intellectual property right matters were under discussion. In regard to the question of a safeguard clause, one participant said that developing countries should have the possibility of recourse to such a provision for development purposes. Another said that, if the agreement were incorporated in the General Agreement, Article XIX would be sufficient.

Transitional Arrangements Aiming at the Fullest Participation in the Results of the Negotiations

43. The Group acceded to a request from the participants submitting document NG11/W/69, "Transitional Arrangements in a TRIPS Agreement", to take up the paper as the first item at its next meeting.

Other Business, including Arrangements for the Next Meeting of the Negotiating Group

44. The Chairman urged delegations wishing to submit legal texts to the Group to do so in advance, and if possible well in advance, of the Group's next meeting which, as previously scheduled, would take place on 14-

16 May.