

ANNUAL REPORT (2002) OF THE COUNCIL FOR TRIPS

I. GENERAL

1. Since the period covered by its last report¹, the Council for TRIPS has held five formal meetings, on 27 and 28 November 2001, and 5-7 March, 25-27 June, 17-19 September, and 25-27 and 29 November 2002. The fifth meeting was suspended on 29 November 2002, and the Council will reconvene in December 2002 to continue its work on agenda items "Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health" and "Implementation of Article 66.2". The minutes of these meetings are to be found in documents IP/C/M/34, 35, 36, Add.1 and Add.1/Corr.1, 37, Add.1 and Add.1/Corr.1, and 38.²

2. The two first meetings referred to above were chaired by Ambassador Boniface Chidyausiku (Zimbabwe) and the subsequent meetings by Ambassador Eduardo Pérez Motta (Mexico).

3. The meetings of the Council were open to all WTO Members, other governments with observer status in WTO bodies and certain international intergovernmental organizations granted observer status in the Council. The Food and Agriculture Organization (FAO), the International Monetary Fund (IMF), the International Union for the Protection of New Varieties of Plants (UPOV), the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN), the United Nations Conference on Trade and Development (UNCTAD), the World Bank, the World Customs Organization (WCO) and the World Intellectual Property Organization (WIPO) enjoy regular observer status in the TRIPS Council. The World Health Organization (WHO) has ad hoc observer status in the Council. At its meeting in March 2002, the Council agreed to a request from the Joint United Nations Programme on HIV/AIDS (UNAIDS) for observer status during the Council's discussions on the TRIPS Agreement and public health at that and future meetings. Decisions on requests for observer status from 15 Organizations are pending.³

4. The agenda for the meeting held in November 2001 was limited to the items concerning notifications under provisions of the TRIPS Agreement and review of national implementing legislation, in view of the need for delegations to have more time to consider the implications of the outcome of the Ministerial Conference held in Doha, Qatar in November 2001 for the other agenda items to which the Council had agreed, at its previous meeting, to revert to at that meeting. At its meeting of 1 February 2002, the Trade Negotiations Committee agreed that negotiations on the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits under the Agreement would take place in Special Sessions of the TRIPS Council, while other issues in paragraphs 18 and 19 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) relating to TRIPS will be addressed in regular meetings of the TRIPS Council on a priority basis. This report is prepared on the basis of the structure of the agenda that the Council used at each of its meetings in 2002, with the understanding that the Council would ensure that all mandates relevant to

¹ Document IP/C/23.

² Document IP/C/M/38 to be circulated.

³ The Organizations in question are listed in document IP/C/W/52/Rev.10.

each agenda item would be met within the specified time-frames.⁴ These agenda items are mandated by the TRIPS Agreement in combination with the results of the Doha Ministerial Conference.

II. NOTIFICATIONS UNDER THE PROVISIONS OF THE AGREEMENT

5. At its meeting in November 1995, the Council adopted procedures for notification of laws and regulations under Article 63.2. These procedures require that, as of the time that a Member is obliged to start applying a provision of the TRIPS Agreement, the corresponding laws and regulations shall be notified without delay (IP/C/2). To date, 120 Members have made such notifications under Article 63.2 with respect to all or part of their implementing legislation relating to all provisions of the Agreement.⁵ At that meeting, the Council also agreed that Members would provide responses to a checklist of issues on enforcement (IP/C/5). To date, 96 Members have notified responses.⁶ In addition, a number of Members have notified amendments to laws and regulations they had notified earlier.⁷

6. Article 69 of the TRIPS Agreement requires Members to establish and notify contact points for the purposes of cooperating with each other with a view to eliminating international trade in goods infringing intellectual property rights. Procedures for such notifications were agreed by the Council in September 1995. To date, 117 Members have notified contact points.⁸ In addition, during the reporting period, the Council has received a notification from Chinese Taipei under Articles 1.3 and 3.1 of the Agreement.⁹

III. REVIEW OF NATIONAL LAWS AND REGULATIONS

7. On 1 January 2000, the transitional periods of Article 65.2 and 65.3 expired and obligations entered into effect for a large number of Members who had been availing themselves of these general transitional periods. The Council scheduled its reviews of these Members' national implementing legislation in 2000 and 2001; some reviews were postponed until the first half of 2002. The Council has also taken up reviews of new WTO Members soon after their accession. During the reporting period, the Council initiated reviews of the following Members' national implementing legislation: Antigua and Barbuda, Barbados, Brazil, Brunei Darussalam, Cuba, Gabon, Ghana, India, Lithuania, Malaysia, Pakistan, Sri Lanka, Swaziland, Thailand, Tunisia, Uruguay and Zimbabwe (November 2001); Moldova and Nigeria (March 2002); Qatar and Saint Vincent and the Grenadines (June 2002); and China and Chinese Taipei (September 2002).

8. During the reporting period, the Council completed its reviews of the following Members' legislation: Argentina, Bahrain, Bolivia, Costa Rica, Croatia, Dominica, the Dominican Republic, Georgia, Honduras, Jamaica, Kuwait, Morocco, Nicaragua, Papua New Guinea and Paraguay

⁴ At its meeting in November 2002, the Council could not reach agreement on how to report, in accordance with paragraph 12 of the Doha Ministerial Declaration, to the TNC on its work on outstanding implementation issues.

⁵ In addition, a number of other Members have made notifications relating specifically to the implementation of Articles 3, 4 and 5 of the Agreement, or concerning the implementation of Article 70.8 and, in some cases, Article 70.9 of the Agreement.

⁶ A table attached to document JOB(02)/162, dated 15 November 2002, sets out the status, as of 14 November 2002, of notifications of national laws and regulations received under Article 63.2 of the TRIPS Agreement from Members whose transitional period under Article 65.2 or 65.3 expired on 1 January 2000 or who have acceded to the WTO after that date.

⁷ Notifications laws and regulations are being circulated in the IP/N/1/COUNTRY/- series of documents, and responses to the checklist of issues on enforcement in the IP/N/6/COUNTRY/- series of documents.

⁸ These contact points are contained in document IP/N/3/Rev.6 and addenda.

⁹ Circulation of notifications under these provisions takes place in the IP/N/2/COUNTRY/- series of documents.

(November 2001); Botswana, Côte d'Ivoire and Lithuania (March 2002); Albania, Antigua and Barbuda, Barbados, Brunei Darussalam, Gabon, Ghana, Namibia, Sri Lanka, Thailand, Tunisia, the United Arab Emirates and Uruguay (June 2002); Malaysia and Oman (September 2002); and Chinese Taipei, Guyana and India (November 2002).¹⁰

9. At its meeting of 17-19 September 2002, the Council took up the review under the transitional review of the implementation by China of its WTO commitments, pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China (WT/L/432) in combination with its normal review of China's TRIPS implementing legislation.¹¹

IV. THE TRIPS AGREEMENT AND PUBLIC HEALTH

A. PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

10. The Council discussed, at its formal meetings and in a number of informal meetings in 2002, the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2), which instructs the Council to find an expeditions solution to difficulties that Members with insufficient or no manufacturing capacities may face in making effective use of compulsory licensing. For the March meeting, papers were provided by the European Communities and their member States (IP/C/W/339) and the United States (IP/C/W/340). For the June meeting, proposals for possible solutions were submitted by the African Group (IP/C/W/351), the European Communities and their member States (IP/C/W/352), the United Arab Emirates (IP/C/W/354), Bolivia, Brazil, Cuba, China, the Dominican Republic, Ecuador, India, Indonesia, Pakistan, Peru, Sri Lanka, Thailand and Venezuela (IP/C/W/355), and the United States (IP/C/W/358). For the September meeting, the Council received a non-paper from Switzerland (JOB(02)/109). Prior to the November meeting, non-papers were submitted by South Africa (JOB(02)/156) and the European Communities and their member States (JOB(02)/157).

11. The Council requested the Secretariat to prepare, for the June meeting, background notes providing available information on the existence of patents in regard to diseases referred to in the Declaration on the TRIPS Agreement and Public Health (IP/C/W/348) and on manufacturing capacity for medicines (IP/C/W/345). To facilitate a more systematic discussion, the Secretariat was asked to prepare a thematic compilation of the five written proposals that had been received on the implementation of paragraph 6 (IP/C/W/363 and Corr.1). The Council also requested the Secretariat to provide information on the procedural requirements of each proposed legal mechanism and experience with the use of that mechanism (IP/C/W/363/Add.1). At its meeting in September, the Council had before it an informal Secretariat note (JOB(02)/102), which updated the thematic compilation, in the light of the comments made at the Council's informal meeting held on 24-25 July. At that meeting, the Council requested the Secretariat to prepare a list of all waivers that had been granted in the WTO and describe the procedures invoked in their adoption (IP/C/W/387). At the Council's informal meeting held on 10 November 2002, the Secretariat was requested to prepare a note setting out provisions of the TRIPS Agreement relevant to the proposals that had been made for safeguards against the diversion of products supplied under a paragraph 6 system (JOB(02)/172).

12. The Council suspended its end of year meeting on 29 November 2002, so as to be able to reconvene at short notice with a view to making a recommendation to the General Council within the deadline set at Doha.

¹⁰ A table attached to document JOB(02)/160, dated 12 November 2002, lists those Members whose reviews were initiated at the Council's meetings in April, June and November 2001, and March and June 2002 but which had not yet been completed at the Council's meeting in September 2002 or earlier. All reviews of legislation initiated in the year 2000 have been completed.

¹¹ The Council's report to the General Council on "Transitional Review under Section 18 of the Protocol on the Accession of the People's Republic of China" has been circulated in document IP/C/26.

B. EXTENSION OF THE TRANSITION PERIOD PROVIDED FOR IN PARAGRAPH 7 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

13. At its meeting in June 2002, the Council adopted a decision on the "Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products" (IP/C/25). This Decision gives effect to the extension of the transition period for LDCs until 1 January 2016 in the respects referred to in paragraph 7 of the Doha Declaration on the TRIPS Agreement and Public Health.

14. The Council also approved a draft waiver in respect of the obligations of LDC Members under Article 70.9 of the TRIPS Agreement until 1 January 2016, and agreed to forward it to the General Council for adoption. The draft waiver was designed to supplement the decision on the extension of transition periods by waiving the obligations of LDC Members relating to the grant of exclusive marketing rights under Article 70.9 for the same period. The draft waiver was adopted by the General Council on 8 July 2002 (WT/L/478).

V. ISSUES RELATED TO THE EXTENSION OF THE PROTECTION OF GEOGRAPHICAL INDICATIONS PROVIDED FOR IN ARTICLE 23 TO PRODUCTS OTHER THAN WINES AND SPIRITS

15. Paragraph 18 of the Doha Ministerial Declaration provides that "issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this Declaration". The Council had an extensive exchange of views on this matter at its meetings in March and June. In order to facilitate a more systematic discussion, the Chair prepared for the September meeting a checklist of issues taking into consideration the points raised in the discussions at the Council's previous meetings and informal consultations and recent communications (JOB(02)/117). At the September meeting, the Council's discussion focused on the first set of issues identified in the checklist ("the legal issues relating to the differences between the general protection for geographical indications provided for in the TRIPS Agreement and the additional protection for geographical indications for wines and spirits"). At an informal meeting held on 10 November 2002, the Council continued its discussion on the first set of issues, and started its discussion of the second set of issues ("broader policy issues such as the impact on producers and consumers of any extended protection"). At its meeting in November, the Council continued its discussion on the second set of issues and took up the third one ("the administrative costs and burdens of the procedures associated with any extended protection and any other impacts on governments").

16. At its meeting in March, the Council received a non-paper from Sri Lanka (JOB(02)/32). At its meeting in June, it received a submission from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and their member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, Slovakia, Sri Lanka, Switzerland, Thailand and Turkey (IP/C/W/353). At its meeting in September, the Council had before it a communication from Australia, Canada, Guatemala, New Zealand, Paraguay, the Philippines and the United States (document IP/C/W/360), and a subsequent communication from Argentina, Australia, Canada, Chile, Chinese Taipei, the Dominican Republic, El Salvador, Guatemala, New Zealand, Paraguay, the Philippines and the United States (IP/C/W/386). At its November meeting, the Council received two papers, one from Bulgaria, Cyprus, the Czech Republic, the European Communities, Georgia, Hungary, India, Jamaica, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey (JOB(02)/194), and another from Argentina, Australia, Canada, Chile, Chinese Taipei, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, New Zealand, Panama and the United States (IP/C/W/395).

17. At its September meeting, the Council requested the Secretariat to prepare a compilation of the elements contained in the oral statements made at the September meeting and the written

submissions prepared for it, including the points made at the informal meeting of 10 November, in relation to the first set of issues. At its meeting in November, the Council requested the Secretariat to cover in its compilation also the points made in relation to the second and third sets of issues.

VI. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B); RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY; AND PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

18. Article 27.3(b) provides that its provisions shall be reviewed four years after the date of entry into force of the WTO Agreement. In paragraph 19 of the Doha Ministerial Declaration, Ministers instructed the Council "in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council 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."

19. The Council discussed the three agenda items, namely; the "Review of the provisions of Article 27.3(b)"; "Relationship between the TRIPS Agreement and the Convention on Biological Diversity"; and "Protection of traditional knowledge and folklore" at its meetings in 2002. The Council's work on these items also covered the related outstanding implementation issues (tires 88, 91 and 95, and the proposal by least-developed countries of 22 October 2001 relating to the patenting of living organisms). The Council received two papers from the United States relating to the agenda item on the relationship between the TRIPS Agreement and the CBD (IP/C/W/341 and 393), a paper from Brazil, China, Cuba, the Dominican Republic, Ecuador, India, Pakistan, Peru, Thailand, Venezuela, Zambia and Zimbabwe on "The Relationship between the TRIPS Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge" (IP/C/W/356 and Add.1), and "A concept paper" from the European Communities and their member States relating to these three agenda items (IP/C/W/383).

20. The Secretariat prepared for the September meeting three notes, upon a request by the Council, summarizing previous discussions and inputs in the Council relevant to these agenda items (IP/C/W/369, 368 and 370, respectively). The Secretariat was requested to periodically update these summary notes, not after every meeting necessarily, but when significant new material would have been presented.

21. The Council urged more Members to provide responses to the questionnaire on the implementation of Article 27.3(b) and requested the Secretariat to update the synoptic table in its summary note (IP/C/W/273) on the basis of new responses received from Members. Additional responses were received from Estonia; Hong Kong, China; Lithuania; and Thailand (IP/C/W/125/Add.20, 21, 23 and 22, respectively), and a supplement to information received earlier from the Czech Republic (IPC/W/125/Add.8/Suppl.1).

22. The Council obtained updated information from the FAO, the CBD, UNCTAD, UPOV and the World Bank on their activities in relation to these three agenda items (IP/C/W/347 and Addenda 1-4, respectively). In addition, the representative of WIPO briefed the Council in July on the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore held on 13-21 June 2002, and the representative of the FAO made a presentation on the International Treaty on Plant Genetic Resources for Food and Agriculture at the November meeting of the Council.

VII. REVIEW OF IMPLEMENTATION OF THE TRIPS AGREEMENT UNDER ARTICLE 71

23. Article 71.1 requires the Council for TRIPS to review the implementation of the Agreement after the end of the five-year transition period provided for in Article 65.2. A substantial number of suggestions for topics to be considered under Article 71.1 review had been made prior to the Doha Ministerial Conference, but some of them overlap with other items on the Council's post-Doha agenda. In considering how to best organize its work, the Council invited, at its March meeting, Members to submit ideas for issues to be taken up under this agenda item by the June meeting, without prejudice to the right of Members to submit ideas at a later stage. To date, no suggestions have been tabled by any Member.

VIII. IMPLEMENTATION OF ARTICLE 66.2

24. Article 66.2 requires developed country Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base. Paragraph 11.2 of the Doha Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17) reads as follows: "Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually."

25. Given the need for early action to implement the Ministerial instruction to the Council to put in place a mechanism for ensuring the monitoring and full implementation of Article 66.2, and in the light of the suggestions and discussions in the Council and informal consultations, the Chair circulated an informal note for the September meeting suggesting elements that the Council could consider to fulfil the instruction (JOB(02)/118). In the light of further consultations, he circulated another informal note (JOB(02)/195) containing a draft decision for the consideration of the Council.

26. The Council received two communications on this matter from the Least-Developed Countries' Group, one for the June meeting (IP/C/W/357) and another for the November meeting (IP/C/W/390).

27. At its meeting in September, the Council requested developed country Members to make information on their implementation of Article 66.2 available for the Council's meeting in November. To date, such information has been received from Australia, Canada, the European Communities and their member States, Japan, New Zealand, Norway and Switzerland (being circulated as IP/C/W/388 and addenda).

28. At the Council's meeting in March, the representative of UNCTAD introduced a document providing information on the outcome of UNCTAD's Expert Meeting on International Arrangements for Transfer of Technology in June 2001 (document IP/C/W/332).

29. The Council suspended its meeting in November 2002, and agreed to revert to this item later in the course of the meeting.

IX. NON-VIOLATION AND SITUATION COMPLAINTS

30. Paragraph 11.1 of the Doha Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17) reads as follows: "The TRIPS Council is directed 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 Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement." As requested by the Council at its meeting in March, the Chair circulated, prior to the meeting in June, an annotated agenda aimed at suggesting a number of basic questions with a view to providing some focus to the Council's discussion on this subject. At its meeting in September, the Council set its first meeting in 2003 as a target date for the submission of specific proposals.

31. As requested by the Council, the Secretariat prepared for the June meeting a note summarizing the points raised in the substantive discussion on this agenda item so far (IP/C/W/349). At its meeting in September, the Council received a submission from Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka and Venezuela on non-violation and situation complaints (IP/C/W/385).

X. ELECTRONIC COMMERCE

32. At each meeting of the TRIPS Council, the item "Electronic commerce" was on the Council's agenda. At its meeting in March, the Secretariat was requested to update its factual background note on intellectual property and electronic commerce circulated in document IP/C/W/128 in February 1999.

XI. OTHER OUTSTANDING IMPLEMENTATION ISSUES (TIRETS 93 AND 94 AND PROPOSAL BY LDCs ON THEIR TRANSITION PERIOD)

33. At each meeting of the TRIPS Council, the item "Other outstanding implementation issues (tirets 93 and 94 and proposal by LDCs on their transition period)" was on the Council's agenda. At its meeting in November, the Council received a communication from Cuba on these three issues (IP/C/W/394).¹²

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

34. At its meeting in March 2002, the Council urged those Members that had not provided responses to the Checklist of Questions contained in document IP/C/13 and Add. 1 to do so before the June meeting, if possible. Since then, further responses have been obtained from Cuba, Lithuania, Morocco and Poland (circulated as addenda to document IP/C/W/117). To date, the Council has received responses to the Checklist from 43 Members. These responses, except for the five most recent ones, have been summarized in a Secretariat note contained in document IP/C/W/253.

35. The European Communities and their member States submitted questions to Australia in relation to its responses to the Checklist circulated in document IP/C/W/117/Add.19 (JOB(02)/97). The Council received a communication from Canada providing information on the protection of geographical indications in Canada (JOB(02)/119), and a communication from Australia providing an overview of the main features of its domestic regime for the protection of geographical indications (IPC/W/392)¹².

¹² To be circulated.

XIII. TECHNICAL COOPERATION AND CAPACITY-BUILDING

36. The Council has continued its work in this area on the basis of the procedures agreed at its meeting in February 1996. The Council agreed that this year developed country Members would update the information on their technical and financial cooperation activities pursuant to Article 67 of the Agreement in time for the Council's meeting in September. Other Members who also made available technical cooperation were encouraged to share information on these activities if they so desired. The Council received updated information on technical cooperation activities from the following Members: Australia; Canada; the Czech Republic; the European Communities and the following members States: Austria, Finland, Germany, Italy, Portugal, Spain, Sweden and the United Kingdom; Hong Kong, China; Japan; New Zealand; Norway; Switzerland; and the United States (being circulated in document IP/C/W/377 and addenda). Updated information was also received from a number of intergovernmental organizations observers to the Council, namely the FAO, IMF, OECD, UNCTAD, UPOV, WIPO and WHO, (being circulated in document IP/C/W/376 and addenda), as well as the WTO Secretariat (IP/C/W/375).¹³

XIV. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

37. During the period under review, the Council was informed of actions relating to proceedings in cases initiated under the Dispute Settlement Understanding relevant to the TRIPS Agreement (documents IP/D/16/Add.2; WT/DS160/21; WT/DS176/AB/R and WT/DS176/R; IP/D/18/Add.1 and IP/D/22/Add.1; and IP/D/8/Add.1 and IP/D/12/Add.1) as well as of other developments elsewhere in the WTO relating to the TRIPS Agreement.

¹³ Contact points in developed country Members' administrations which can be addressed by developing countries seeking technical cooperation on TRIPS are contained in document IP/N/7/Rev.2 and addenda. In addition, this document contains contact points for technical assistance on TRIPS notifications between WTO Members notified by Members pursuant to paragraph 11 of document IP/C/W/241.