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PROPOSED TREATY ON THE SETTLEMENT OF DISPUTES BETWEEN STATES IN THE FIELD OF INTELLECTUAL PROPERTY

Memorandum prepared by the International Bureau

1. Background. The Committee of Experts on the Settlement of Intellectual Property Disputes between States (hereinafter referred to as "the Committee") has so far held eight sessions. The first was in February 1990, the second in October 1990, the third in September 1991, the fourth in July 1992, the fifth in May 1993, the sixth in February 1994, the seventh in May-June 1995 and the eighth in July 1996.

2. The first session of the Committee considered a memorandum of the International Bureau which discussed issues that could be dealt with in a possible treaty on the settlement of intellectual property disputes between States (see documents SD/CE/I/2 and 3). Hereinafter, that possible Treaty is referred to as "the proposed Treaty."

3. The second session of the Committee considered a memorandum of the International Bureau containing principles for the proposed Treaty, as well as a memorandum containing a list of treaties in the field of intellectual property and giving information on the dispute settlement provisions in those treaties (see documents SD/CE/II/2, 3 and 4).

4. The third session of the Committee examined a memorandum of the International Bureau containing draft provisions for the proposed Treaty (see documents SD/CE/III/2 and 3).

5. The fourth session of the Committee considered Articles 1 to 8 of the proposed Treaty, prepared by the International Bureau (see documents SD/CE/IV/2 and 3).

6. The fifth session of the Committee considered a revised version of those Articles and also examined Articles 9 to 18 as well as proposals submitted by the Delegation of the Netherlands and the Delegation of the Commission of the European Communities (see documents SD/CE/V/2, 4, 5 and 6). It also considered the provisions prepared by the International Bureau of draft Regulations under the proposed Treaty (see document SD/CE/V/3).

7. The sixth session of the Committee considered texts revised by the International Bureau of the proposed Treaty (together with revised explanations ("Notes") (see document SD/CE/VI/2)) and of the draft Regulations (see document SD/CE/VI/3). It also examined proposals submitted by the Delegation of the European Communities (see document SD/CE/V/4) and by the Delegation of the Netherlands (see document SD/CE/VI/5).

8. The seventh session of the Committee had before it texts, revised by the International Bureau, of the proposed Treaty (see document SD/CE/VII/2), which took into account the question of the relationship between the dispute settlement system to be established under the proposed Treaty and other dispute settlement systems.

9. At its eighth, and so-far last, session, the Committee dealt with the following four questions: (i) the question of the relationship between the dispute settlement system of the proposed Treaty and other dispute settlement systems, including the system established within the framework of the World Trade Organization and its associated legal instruments, in particular, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the WTO Understanding on Dispute Settlement; (ii) the scope of participation in the panel procedure for entities not party to, or bound by, the source treaty under which the dispute arises; (iii) the relationship between the number of Contracting Parties required for a quorum, for the adoption by the Assembly and for the acceptance by Contracting Parties of amendments to the Treaty as well as for its entry into force; and (iv) whether a Contracting Party may seek, through the procedures established by the Treaty, a declaration or opinion as to whether an obligation exists or has been breached by a Party.

10. Following the eighth session of the Committee, the question of whether a Diplomatic Conference for the conclusion of the proposed Treaty should be convened was submitted for decision to the WIPO General Assembly at its September/October 1996 session (see document WO/GA/XIX/2).

11. The WIPO General Assembly, in that session, decided (i) that the draft program and budget for the 1998-99 biennium should contain an item for the holding of the

above-mentioned diplomatic conference in the first half of 1998 and (ii) that the International Bureau prepare by April 1997 revised drafts of the above-mentioned Treaty (with accompanying explanatory notes) and Regulations and update certain background documents and (iii) that the WIPO General Assembly should, in the light of the said documents and the WTO international dispute-settlement mechanism, examine the said item of the draft program and budget, that is, decide whether the above-mentioned diplomatic conference should be convened and, if so, for what dates and in what place. (See document WO/GA/XIX/4, paragraphs 20, 22 and 23).

12. The present document sets forth a new draft of the proposed Treaty, together with revised explanations ("Notes") and new draft Regulations, which take into account the discussions and conclusions of the Committee at its seventh and eighth sessions (see documents SD/CE/VII/8 and SD/CE/VIII/7). The updated background documents are contained in document WO/GA/XXI/3.

13. Objectives of the Proposed Treaty. The objective of the proposed Treaty is to promote the protection of intellectual property by furthering the enforcement of international obligations in the field of intellectual property and by securing the uniform interpretation and application of international rules concerning such obligations. To achieve that objective, the proposed Treaty would establish, within the framework of the World Intellectual Property Organization (WIPO), procedures for the settlement of intellectual property disputes between States or between States and intergovernmental organizations.

14. In addition to promoting, as such, the protection of intellectual property, the proposed Treaty would be a further step in promoting the progressive development of international law.

15. It is to be noted that the proposed Treaty would not be applicable to disputes between private parties. Such disputes are subject to the jurisdiction of the competent domestic tribunals of States or to such other procedure permitted by national law for the settlement of disputes, as for example, arbitration.

16. The General Assembly of WIPO is invited to decide any further activity of WIPO in respect of the proposed Treaty, in particular whether a diplomatic conference for the adoption of that Treaty should be convened by the Director General and, if so, for what dates and with which venue. The decisions of the General Assembly will be also reflected in WIPO's program and budget for the 1998-99 biennium.

PROPOSED TREATY ON THE SETTLEMENT OF DISPUTES BETWEEN STATES IN THE FIELD OF INTELLECTUAL PROPERTY

Contents

Notes on the Title and on the Preamble

0.01 The title of the proposed treaty must be considered in the context of the decision that is ultimately taken on the text of Article 2 (Sphere of Application). Should the procedures provided for in the proposed treaty be applicable not only to disputes between or among States, but also to disputes between States and intergovernmental organizations, the title could be "Treaty on the Settlement of Disputes Between States or Between States and Intergovernmental Organizations in the Field of Intellectual Property" or "Treaty on the Settlement of Governmental Disputes in the Field of Intellectual Property," rather than "Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property."

0.02 The Preamble sets forth the objective of the Treaty. It seems to be self-explanatory.

[End of Notes on the Title and on the Preamble]

Preamble

The Contracting Parties

Desiring to promote the protection of intellectual property by furthering the enforcement of international obligations and securing the uniform interpretation and application of international rules in the field of intellectual property,

Bearing in mind that disputes between States or between States and intergovernmental organizations may arise out of the enforcement of such international obligations and the interpretation or application of such international rules,

Recognizing the need for such disputes to be resolved through appropriate multilateral institutional arrangements,

Convinced that a treaty, administered by the World Intellectual Property Organization, establishing procedures for the amicable settlement of such disputes would promote the protection of intellectual property,

Have agreed as follows:

[End of Preamble]

Notes on Article 1

1.01 Item (i) defines the term “Contracting Party” as a State or an intergovernmental organization party to the Treaty. Article 14 indicates which States and which intergovernmental organizations are eligible to become party to the Treaty.

1.02 Items (ii) to (viii) seem to be self-explanatory.

Article 1

Use of Terms and Abbreviated Expressions

For the purposes of this Treaty, unless expressly stated otherwise:

(i) “Contracting Party” means a State or an intergovernmental organization that is party to this Treaty;

(ii) “Union” means the Union referred to in Article 8;

(iii) “Assembly” means the Assembly referred to in Article 9;

(iv) “Organization” means the World Intellectual Property Organization;

(v) “International Bureau” means the International Bureau of the Organization;

(vi) “Director General” means the Director General of the Organization;

(vii) “Regulations” means the Regulations under this Treaty that are referred to in Article 11;

(viii) “prescribed” means prescribed in the Regulations;

[Article 1 continues]

1.03 Item (ix) defines the term "dispute" as a disagreement over whether or not an obligation exists or has been breached, that is, has not been performed at all or has not been performed as required. The obligation must relate to an intellectual property matter (see, also, note 2.04). In addition, it must be one that is binding on the party to the dispute against which it is asserted and operate in favor of the other party to the dispute (see note 2.07).

1.04 Item (x) defines the term "party" as either a "State" or an "intergovernmental organization" and thereby makes it clear that the Treaty does not apply to disputes between private parties (natural persons or legal entities) or to disputes between one or more private parties and one or more States or such organizations.

1.05 Item (xi) is intended to make it clear that on either side of a dispute there may be more than one State or intergovernmental organization as a party to the dispute.

1.06 The "source treaty" defined in item (xii) may be a multilateral treaty (of the kind referred to in Article 2(1)) or a bilateral treaty. The treaty must contain a provision or provisions concerning intellectual property (see notes 2.04 to 2.05). Further, the application or interpretation of that provision or those provisions must be in issue in the dispute (see note 2.06).

1.07 In respect of certain States and organizations, an act of acceptance or an act of approval, rather than an act of ratification or an act of accession, is considered the way by which the State or the organization expresses its consent to be bound by a treaty. Item (xiii) should facilitate matters for such a State or organization in completing its procedure leading to becoming a party to the proposed Treaty. (Item (xiii) could be deleted if mention is made in Article 14(2) and in Article 15 of instruments of acceptance or approval in addition to instruments of ratification or accession.)

1.08 The definition of "national" or "nationals" in item (xiv) is similar to that contained in Article 5 of the Treaty on Intellectual Property in Respect of Integrated Circuits (see document WO/GA/XXI/3, Part II, item (2)) and in Article 4 of the International Convention for the Protection of New Varieties of Plants (1991) (see document WO/GA/XXI/3, Part II, item (4)). The term "national" or "nationals" is used in Article 2(5)(a) and (b), Article 5(5)(e), Article 7(2)(iii) and Article 10(5)(b).

[End of Notes on Article 1]

[Article 1, continued]

(ix) “dispute” means a disagreement between parties as to the existence or breach of an obligation that relates to a matter or to matters of intellectual property;

(x) “party” in the expression “party to a dispute” means a State or an intergovernmental organization;

(xi) the expression “a party to a dispute” shall be construed as including also cases where there are several parties;

(xii) “source treaty” means the treaty containing the provision or provisions concerning intellectual property whose interpretation or application is in issue in the dispute;

(xiii) a reference to an “instrument of ratification or accession” shall be construed as also including an instrument of acceptance and an instrument of approval;

(xiv) “national” or “nationals” of a party to a dispute or of a Contracting Party means, where the party to the dispute or the Contracting Party is a State, a national or the nationals of that State and, where the party to the dispute or the Contracting Party is an intergovernmental organization, a national or the nationals of a State member of that organization.

[End of Article 1]

Notes on Article 2

2.01 Paragraph (1) defines the sphere of application of the Treaty: it establishes which entities and which disputes come within the sphere of the Treaty.

2.02 As concerns the entities, being party to a dispute, to which the Treaty applies, paragraph (1) provides that the Treaty shall be applicable to disputes between Contracting Parties. The term Contracting Party is defined in Article 1(i) and it encompasses only a State or an intergovernmental organization party to the Treaty.

2.03 As concerns which disputes fall within the sphere of the Treaty, paragraph (1) prescribes that the Treaty applies only to disputes–a term defined in Article 1(ix)–concerning the interpretation or application of a provision in a multilateral treaty. Three elements are involved here: the subject matter of the dispute (an intellectual property matter and only that); an obligation, the existence or breach of which is in dispute (binding on the party against which it is asserted and in favor of the other party); the source of that obligation (certain multilateral treaties).

2.04 As concerns the subject matter of the dispute, the definition of dispute (Article 1(ix)), makes it clear that the obligation in question in the dispute must relate to "an intellectual property matter." Naturally, the Treaty would thus not apply to a dispute that has nothing to do with intellectual property.

2.05 It may be noted that the expression "intellectual property" is nowhere defined in the Treaty. At the fifth session of the Committee of Experts, different views were expressed as to whether the proposed Treaty should include a definition of intellectual property (see document SD/CE/V/6, paragraphs 41 to 43). On the one hand, it was argued that intellectual property was a key notion in defining the sphere of application of the Treaty and it was suggested that the definition to be found in Article 2 of the Convention Establishing the World Intellectual Property Organization should be utilized in the Treaty. On the other hand, it was pointed out that that definition could always be resorted to, and that, whether included in the Treaty or not, that definition would only provide guidance as to the meaning of the term "intellectual property" since, while it included rights relating to the specific kinds of intellectual property described therein, it also extended to rights relating to all other "intellectual activity in the industrial, scientific, literary and artistic fields," but did not define more precisely that other intellectual activity or those fields. In addition, it was pointed out that it would be the provisions of the source treaty, rather than a definition set forth in some other treaty, that would be relevant in determining whether an intellectual property matter was at issue in a given dispute.

2.06 Paragraph (1) requires that the dispute concern "the interpretation or application" of the provisions of a multilateral treaty. When read in conjunction with the definition of "dispute" in Article 1(ix), it covers the case where the dispute concerns the existence or scope of an obligation, as well as the case where it is claimed that an obligation has not been performed at all or has not been performed as required.

2.07 As concerns the obligation whose existence or breach is in dispute, paragraph (1), again when read in conjunction with the definition of "dispute" in Article 1(ix), requires that the obligation arise under a treaty provision or provisions whose interpretation or application is put into question. Furthermore, the obligation must be binding on the party against which it is

Article 2

Sphere of Application

(1) [Disputes Between Contracting Parties Under Multilateral Treaties] This Treaty applies only to disputes between Contracting Parties concerning the interpretation or application of the provisions of a multilateral treaty that is administered by the Organization alone, the Organization in association with one or more intergovernmental organizations, or the International Union for the Protection of New Varieties of Plants.

[Article 2 continues]

asserted and it must operate in favor of the party asserting it. Paragraph (1) does not require, however, that each party to the dispute be also a party to the source treaty; it suffices that the party to the dispute against which the obligation under the source treaty is asserted has accepted that obligation in favor of the other party to the dispute. Normally each party to the dispute will also be party to the source treaty; however, there are situations where one of the parties to the dispute, although not a party to the source treaty, is nevertheless bound by an obligation under that source treaty to another party to the dispute that is a party to the source treaty. Such is the case of an intergovernmental industrial property organization that is not, and cannot be, party to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure but has, by a declaration made pursuant to Article 9 of that Treaty, accepted certain obligations under the Treaty towards States party to that Treaty. Such is also the case as concerns a member of the Berne Union that has not ratified or acceded to the Paris Act (1971) of the Berne Convention (at least not in respect of Articles 1 to 21 and the Appendix) but has filed a declaration under Article VI of the Appendix of that Act by which it accepts to submit to certain acts in favor of a developing country that is party to the Paris Act (1971) and that has invoked the benefit of the faculties provided for in Article I of the Appendix. It is to be noted that, in both cases, one of the parties to the dispute could be a party that is not a party to the source treaty yet is bound by an obligation under it in favor of another that is party to the source treaty. Moreover, it is to be noted that, in the first case, the benefit of the obligation resides in a State party to the source treaty (and not in an intergovernmental industrial property organization) and that, in the second case, the benefit resides only in a developing country (and not in any other country) that is a party to the source treaty.

2.08 Paragraph (1) is not intended to exclude from the scope of the Treaty disputes concerning whether a Contracting Party is bound by a source treaty or a given provision thereof.

2.09 Paragraph (1) requires that the source of the obligation be a “multilateral treaty” of the kind referred to in that paragraph. It is those words which distinguish the scope of paragraph (1) from the scope of paragraph (2) of Article 2. Under the latter paragraph, the source of the obligation may be a treaty not referred to in paragraph (1) and may even be a source other than a treaty.

2.10 As concerns the treaty which may be the source of the obligation to which the dispute must relate, the paragraph under consideration has been modified to reflect decisions adopted by the Committee of Experts at its seventh and eight sessions. The paragraph under consideration requires that the source treaty be a multilateral treaty which is administered by WIPO alone, or by WIPO in association with one or more other intergovernmental organizations, or by the International Union for the Protection of New Varieties of Plants (UPOV). Examples of treaties administered by WIPO alone are the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. The Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms is an example of a treaty administered by WIPO in association with one other intergovernmental organization (UNESCO), whereas the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations is an example of a treaty administered by WIPO in association with more than one (namely two: ILO and UNESCO) intergovernmental organization. The

International Convention for the Protection of New Varieties of Plants is administered by UPOV.

[Article 2 continues on page 17]

2.11 Paragraph (2) makes applicable the provisions of the Treaty to a dispute that is not within the scope of paragraph (1) in certain circumstances.

2.12 Paragraph (2)(i) envisages the possibility of disputes being referred to the procedures under the Treaty where they arise out of a source treaty that is not administered by WIPO, either alone or in conjunction with an intergovernmental organization, or by UPOV. Such a source treaty may refer to the provisions of the Treaty and may either require or permit that one or more of its dispute settlement procedures be resorted to by the parties to the source treaty. Where the source treaty does not require but permits such resort, the parties to the dispute would, of course, have to agree to submit their dispute to one or more of the dispute settlement procedures established by the Treaty. Where the source treaty is silent on the matter, paragraph 2(i) enables the parties to the source treaty to decide that disputes arising under it shall be submitted to one or more of those procedures. That possibility has been introduced in view of the conclusions reached by the Chairman of the Committee of Experts on the basis of the discussions at its fifth session (see document SD/CE/V/6, paragraphs 47 and 48). Such a possibility would thus make available a dispute settlement machinery in respect of such treaties as, for example, the Convention on Biological Diversity, which contains provisions bearing on intellectual property matters, as well as in respect of treaties in the field of intellectual property administered by organizations other than WIPO as, for example, the Universal Copyright Convention, administered by UNESCO, which organization has taken the position that the dispute arising under that Convention could only be submitted to the dispute settlement procedures of the Treaty if all the parties to that Convention or its intergovernmental Committee had made arrangements with WIPO enabling such disputes to be so submitted.

2.13 Paragraph (2)(ii) enables parties to a dispute to submit to the procedures provided for in the Treaty disputes arising from a source other than a multilateral treaty within the scope of paragraph (1), e.g., bilateral treaties or generally recognized principles of law concerning or applicable to intellectual property, provided that all the parties to the dispute agree to submit the dispute to one or more of the procedures provided for in the Treaty. The agreement of the parties may be concluded at any time, either before or after the dispute has arisen.

2.14 Paragraph (2), however, contains two alternatives, one of which would qualify the cases provided for in items (i) and (ii). Under Alternative A, either all the parties to the dispute must be Contracting Parties (Alternative A(1)), or one of the parties must be a Contracting Party (Alternative A(2)). If the latter option under Alternative A is adopted, the possible financial consequences (contribution to the costs of WIPO, etc.) would be specified in the Regulations. Under Alternative B, there would be no proviso to items (i) and (ii).

[Article 2, continued]

(2) [Other Disputes] Where a dispute does not fall within the scope of paragraph (1), the provisions of this Treaty shall nevertheless be applicable to that dispute insofar as the dispute relates to a matter or to matters of intellectual property and the dispute

(i) arises under a source treaty

- whose provisions require, or
- whose provisions permit the parties to the dispute to agree, and they so agree, or
- whose parties decide,

that the dispute shall be submitted to one or more of the procedures for the settlement of disputes established by this Treaty, or

(ii) concerns an obligation whose source is not a treaty and the parties to the dispute agree to submit their dispute to one or more of the procedures for the settlement of disputes established by this Treaty

Alternative A: ,provided that, in the cases provided for in items (i) or (ii),

Alternative A(1): all the parties to the dispute are Contracting Parties.

Alternative A(2): at least one of the parties to the dispute is a Contracting Party.

Alternative B: [no such provision].

[Article 2 continues]

2.15 The question whether the draft Treaty should provide for the possibility that a Contracting Party could request a declaration or opinion that an obligation within the sphere of application of the proposed Treaty did not exist or had not been breached by that Party was extensively discussed at the seventh and eighth sessions of the Committee (see documents SD/CE/VII/8, paragraphs 89–94 and SD/CE/VIII/7, paragraphs 81–87). In summarizing the discussions at the seventh session of the Committee, the Chairman concluded that the matter should be further considered and that, to that end, the explanatory notes accompanying the next draft of the proposed Treaty should include a full treatment of the question (see document SD/CE/VII/8, paragraph 94). At the eighth session of the Committee, however, the discussions on the question were such that the Chairman concluded that a great majority of the delegations did not favor the inclusion in the draft Treaty of the possibility for a Contracting Party to request a declaratory statement. Moreover, the Chairman summed up, no support had been expressed for the possibility that a party against which a countermeasure had been taken could unilaterally submit to arbitration a dispute as to whether it was in breach of an obligation (see document SD/CE/VIII/7, paragraph 87). In accordance with the conclusion of the Chairman at the eighth session of the Committee, the proposed Treaty does not provide a Contracting Party the possibility of requesting a declaratory statement as to whether an obligation existed or had been breached by that Party.

[Article 2 continues on page 21]

2.16 Paragraph (3) establishes two or, in the alternative, three exceptions to the provisions of paragraphs (1) and (2).

2.17 The first exception, set forth in paragraph (3)(i), is where the parties to a dispute, by agreement among them, exclude the application of the Treaty to their dispute.

2.18 The second exception, set forth in paragraph (3)(ii), makes the Treaty inapplicable where the dispute must be settled according to a procedure other than the one provided for in the Treaty, that is, where, according to another treaty, to which the parties to the dispute are parties, recourse to any other procedure than the one provided for in that other treaty is excluded. It seems that, at the present time, there is no such potential source treaty in force in the field of intellectual property. All the potential source treaties that are presently in force have provisions on dispute settlement that would allow recourse to the envisaged procedures under the proposed Treaty. For example, the Paris Convention for the Protection of Industrial Property provides for the jurisdiction of the International Court of Justice "unless the countries concerned agree on some other method of settlement" (Article 28). The procedures under the proposed Treaty would constitute such "other method." The second exception is, notwithstanding the present situation, still provided for because it is conceivable that there may be, in the future, source treaties that oblige the parties to such treaties to have recourse to a dispute settlement procedure other than the procedures under the proposed Treaty. Such could seemingly be the case, once they enter into force, in respect of the Convention for the European Patent for the Common Market (Community Patent Convention) of December 15, 1975[1], as well as the Agreement relating to Community Patents, signed at Luxembourg in December 1989[2].

2.19 In respect of a given source treaty, it may be difficult to determine whether that treaty provides for an exclusive dispute settlement procedure or not. The mere fact, however, that a source treaty provides for the submission of disputes to a judicial tribunal does not necessarily mean that other means for the settlement of the dispute (such as consultations, good offices, conciliation, mediation and even binding arbitration) cannot be resorted to; such is the case in respect of the Paris Convention for the Protection of Industrial Property[3] as already pointed out (see note 2.18**)** and is also the case for the Berne Convention for the Protection of Literary and Artistic Works[4] and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations[5]. Moreover, a source treaty may provide specifically for a dispute settlement procedure other than submission to a judicial tribunal, yet not necessarily foreclose the opportunity to resort to other means, such being the case of the Treaty on Intellectual Property in Respect of Integrated Circuits[6].

2.20 The third possible exception to the provisions of paragraphs (1) and (2) is set forth in Alternative A. The Committee of Experts agreed at its eighth session that the proposed text should be presented as an alternative. The alternative text states that the proposed Treaty would not apply to any dispute to which the dispute settlement mechanism of WTO was applicable. At the eighth session of the Committee of Experts, it was argued that the inclusion of the text proposed in Alternative A would avoid any risk of overlap between the sphere of

[1] See Part I, item (56) of document WO/GA/XXI/3
[2] See Part I, item (61) of document WO/GA/XXI/3
[3] See Part I, item (1) of document WO/GA/XXI/3
[4] See Part I, item (2) of document WO/GA/XXI/3
[5] See Part I, item (8) of document WO/GA/XXI/3
[6] See Part I, item (24) of document WO/GA/XXI/3

[Article 2, continued]

(3) [Non-Applicability of the Treaty to Certain Disputes] Notwithstanding paragraphs (1) and (2), this Treaty, or any procedure established therein, shall not apply

(i) where the parties to a dispute agree that, for the purposes of that dispute, this Treaty, or a specified procedure established therein, shall not apply; or

(ii) where the dispute arises under a source treaty that does not permit the parties to the dispute to resort to dispute settlement procedures other than those provided for in that treaty.

Alternative A: ; or (iii) where the dispute settlement mechanism of the World Trade Organization is applicable to the dispute.

Alternative B: [no such provision].

[Article 2 continues]

application of the proposed Treaty and that of the WTO system in order to ensure greater legal security and a uniform application of international rules in the field of intellectual property. It was also pointed out, however, that the proposed text would have the effect of giving preference to the WTO system and would unduly reduce the scope of the proposed Treaty. It could also create new sources of disagreement, in that it raised the question of who was to decide whether the WTO system was applicable to a given dispute.

[Article 2 continues on page 25]

2.21 Paragraph 4. At the eighth session of the Committee of Experts, the International Bureau formulated three alternatives (A, B and C) for the text of paragraph 4 concerning the question of applicability of procedures established by the proposed Treaty where other means were also available (see document SD/CE/VIII/2, Annex). Each of those alternatives was intended to resolve the question posed by the existence, in addition to the dispute settlement procedures established by the proposed Treaty, of other dispute settlement systems or procedures applicable to the same dispute. After extensive discussions and consultations, the Committee agreed that the text in paragraph 4 should constitute the provision to be set forth in the next draft of the Treaty (see document SD/CE/VIII/7, para. 62).

2.22. Paragraph 4 prescribes that, once a party to a dispute initiates a procedure under a dispute settlement system other than that of the proposed Treaty, and that procedure is in progress, or has brought about a final settlement of the dispute under that procedure, then no party to the dispute may resort to any procedure under the proposed Treaty in respect of the same dispute and against the same party or parties. Paragraph 4 contains, however, an exception where the other dispute settlement system or forum has determined in a final decision that its procedure does not apply to the dispute.

2.23 As has been already stated (see note 1.04), the Treaty applies neither to disputes between private parties nor to disputes between one or more private parties and a Contracting Party. However, the question arises as to the possibility for a Contracting Party to submit to the dispute settlement procedures established by the Treaty a dispute concerning the treatment by another Contracting Party of individuals or entities, particularly foreign nationals. Even in the absence of a provision in a treaty of the kind under consideration, such a submission would be subject to the applicable general rules of international public law, including the rule of exhaustion of local remedies. For instance, where a State (“the first State”) alleges that another State has, in a concrete case, breached an obligation under the source treaty in respect of one of the nationals of the first State, the rule of international law may apply that the national concerned must exhaust the remedies available to him in the other State. In such a case, before the first State espouses the claim of that national against the other State, the national of the first State must resort to the remedies within the other State, whenever they are available, to secure or enforce intellectual property rights accorded by the source treaty. Thus, for example, where the source treaty requires that, if a non-voluntary license is granted in respect of a patented invention by a government authority, that authority must fix an appropriate compensation, and, if that authority did not fix such a compensation, the owner of the patent (who is a national of a Contracting State) must–unsuccessfully–exhaust the administrative and judicial remedies in the other Contracting State before the first State can have recourse to international dispute settlement against the other State. On the other hand, where, for example, a Contracting State alleges that another Contracting State has enacted legislation on non-voluntary licenses without that legislation providing for appropriate compensation and that such a legislation is in itself a breach of the source treaty, the first-mentioned State may have recourse to international dispute settlement against the other State without having first to have, or try to have, recourse to a government authority or to the courts of the other State.

[Article 2, continued]

(4) [Applicability of a Procedure Established by this Treaty Where Another Procedure is Resorted to] Notwithstanding any other provision in this Treaty, once any procedure for the settlement of a dispute other than any of the procedures established by this Treaty is resorted to and is in progress in accordance with the rules laid down for that procedure, or has brought about a settlement of the dispute pursuant to, or a decision considered final under, those rules, no party to the dispute may initiate, in respect of the same dispute and against the same party or parties, any procedure established by this Treaty, unless that final decision is that the procedure resorted to does not apply to the dispute.

[Article 2 continues]

2.24 Paragraph 5 expresses the rule on exhaustion of local remedies. That rule was the subject of discussions in previous sessions of the Committee of Experts (see documents SD/CE/II/4, paragraphs 51 to 53, SD/CE/III/3, paragraphs 33 and 34, SD/CE/IV/3, paragraphs 72 to 75, and SD/CE/V/6, paragraphs 52 to 57). The conclusion reached by the Chairman at the fourth session of the Committee of Experts (see document SD/CE/IV/3, paragraph 75) was that the International Bureau should study the implications of the rule, taking into account the two illustrations in note 2.23, and make a proposal for the formulation of that rule, the text of which should be incorporated between brackets in the draft of the proposed Treaty. At the fifth session of the Committee of Experts, the Chairman concluded that a majority of the delegations favored inclusion in the proposed Treaty of a rule on exhaustion of local remedies (see document SD/CE/V/6, paragraph 57).

2.25 Paragraph 5(a) states the rule of exhaustion of local remedies from the point of view of its effect on the admissibility of the claim by one party against the other party to the dispute (i.e., as a condition to recourse by the former to the dispute settlement procedures of the Treaty) rather than on the formation or genesis of international responsibility (i.e., the breach of the obligation by the other party to the dispute). The rule has been so stated as a condition to recourse since it is being included as a provision in a treaty dealing with procedural matters rather than with substantive responsibility. As formulated, the rule is in no way intended to mark a departure from the view of the International Law Commission that the principle establishing the requirement of the exhaustion of local remedies is well founded in general international law and suitably placed in a set of rules settling various questions that relate to the determination of the breach of an international obligation (see Draft Articles on State Responsibility (Article 22), *Yearbook of the International Law Commission*, 1977, Vol. II, Part II, pages 30 to 50, in particular, paragraph (52)).

2.26 In the draft of the proposed Treaty presented at the fifth session of the Committee of Experts two alternatives were suggested concerning the requirements of the rule on exhaustion of local remedies: the first alternative stated those requirements in the terms formulated by the International Law Commission in the Draft Articles on State Responsibility (Article 22); under the second alternative, those requirements would have been determined by reference to generally recognized principles or to the rules of international law. In accordance with the preference expressed at the fifth session, the latter reference has been retained in the draft of the proposed Treaty.

2.27 Paragraph 5(b) states two exceptions to the rule on exhaustion of local remedies. The first covers the case where the other Contracting Party has not enacted a law to give effect to its obligation under the source treaty. The second covers the case where, as in the second example in note 2.23, the other Contracting Party has enacted a law but that law is not in conformity with its obligation under the source treaty.

[End of Notes on Article 2]

[Article 2, continued]

(5) [Exhaustion of Local Remedies] (a) A party to a dispute may not invoke any procedure for the settlement of a dispute established by this Treaty where the dispute concerns the alleged existence or breach by the other party to the dispute of an obligation concerning the treatment to be accorded by that other party to a national or to the nationals of the party invoking the procedure unless that national has or those nationals have exhausted local remedies in accordance with rules of international law.

(b) The rule stated in paragraph (a) shall not be applicable where the obligation requires the other party to the dispute to enact a law on a matter affecting the status or rights of a national or the nationals of the party invoking the procedure and the other party to the dispute has not enacted that law or has enacted a law on the matter but the law is not in conformity with that obligation.

[End of Article 2]

Notes on Article 3

3.01 Consultations with a view to settling an intellectual property dispute are provided for in a number of treaties administered by WIPO, as well as in a number of other treaties on intellectual property. The term "consultations" is used as such in the Treaty on Intellectual Property in Respect of Integrated Circuits (Article 14), whereas the term "negotiations" is used in other treaties administered by WIPO, such as the Paris Convention (Article 28), the Berne Convention (Article 33), the Rome Convention (Article 30) and the Patent Cooperation Treaty (Article 59). Both terms–consultations and negotiations–are intended to mean the same thing. Their aim is to promote the amicable settlement of the dispute by the parties to it without the participation of intermediaries.

3.02 Under Paragraph (1), consultations are normally a first and a necessary step preceding the establishment of a panel (Article 5(1)). They will, of course, be the only step if they produce a settlement. Consultations will not be a necessary step preceding the establishment of a panel if the parties to the dispute agree not to have consultations in respect of a given dispute (Articles 2(3)(i) and 5(1)(ii)), or agree to replace the procedure of consultations by good offices, conciliation or mediation (Article 4(1)(a) and (b)), or in the case where a developing country party to the dispute requests that the procedure of good offices, conciliation or mediation replace the consultations (Article 4(1)(b), Alternative A or Alternative B).

3.03 It is believed that, even where they do not lead to a direct settlement of the dispute, consultations are useful since they provide the parties with an opportunity to clarify the nature and extent of their dispute, as well as the issues involved.

3.04 Paragraph (1), except as mentioned in note 3.02, requires that the party to the dispute who contemplates invoking the panel procedure must first invite the other party to enter into consultations. The invitation to enter into consultations is thus the act that initiates the dispute settlement process of the Treaty. The invitation must, therefore, indicate that it is extended pursuant to the Treaty. In addition, the invitation must specify the facts and legal grounds, including references to the provisions of the source treaty or other source of the obligation the existence or breach of which is alleged and on which the consultations were based. Such specifications are necessary since the request for the establishment of a panel under Article 5 cannot be based on an alleged existence or breach of an obligation that is different from that set forth in the invitation and cannot be based on facts or legal grounds that go beyond those indicated in the invitation to enter into consultations, i.e., new facts and legal grounds cannot be introduced in the request. However, the issues, facts and legal grounds may have been clarified as a result of the consultations; consequently, the request for the establishment of a panel may reflect that clarification. To the extent necessary to take into account that clarification, the contents of the request could be different from the contents of the invitation to enter into consultations.

Article 3

Consultations

(1) [Invitation to Enter into Consultations] Before making a request for a procedure before a panel pursuant to Article 5, a party to a dispute shall, subject to Articles 2(3)(i), 4(1) and 5(1)(ii), invite the other party to the dispute to enter into consultations with it in respect of that dispute. The invitation shall indicate that it is made with a view to initiating consultations pursuant to this Treaty, set forth the obligation or obligations whose alleged existence or breach has given rise to the dispute and state the facts and the legal grounds on which the allegation against the other party to the dispute is based.

[Article 3 continues]

3.05 Paragraph (2) sets time limits as concerns the reply to the invitation and the period within which the consultations must be held. The parties to the dispute are free to agree on different time limits. In accordance with the conclusion reached by the Chairman on the basis of the discussions at the fourth session of the Committee, the time limits set have been changed from one month to two months (as the period within which to reply to the invitation) and from two months to three months (as the period within which the opportunity for the consultations must be given). Those changes were agreed to on condition that the period of six months specified in Article 5(1)(iii) was not in itself changed (see document SD/CE/IV/3, paragraphs 86 to 89 and 91). Article 13(1) provides that the Assembly could change, with a three-quarter majority, the time limits provided for in paragraph (2), particularly if experience showed that they were unnecessarily long or unrealistically short.

3.06 The form of the invitation and of the reply thereto required under paragraphs (1) and (2), and their mode and channels of communication, as well as procedural questions relating to the place of, and language to be used in, the consultations are prescribed in the proposed Regulations.

[Article 3, continued]

(2) [Reply to the Invitation] Unless the parties to the dispute otherwise agree, the other party to the dispute shall reply to the invitation within two months from the date of the receipt of the invitation and, subject to Article 4(1), shall offer an adequate opportunity for the consultations within a period of three months from the date of the receipt of the invitation.

[Article 3 continues]

3.07 Paragraph (3) makes explicit that it is not only expected but also required that the consultations proceed on the basis of good faith with a view to settling the dispute by agreement. No time limit is established in this paragraph for the completion of the consultations; however, and in order to ensure a swift settlement of the dispute, Article 5(1)(iii) prescribes a time limit (six months), starting from the receipt of the invitation to enter into consultations, after which any party to the dispute may request a procedure before a panel under that Article.

3.08 In the absence of paragraph (4) and paragraph (5), the Article under consideration would not require the parties to the dispute to inform the Director General, the Assembly or anybody else, about the initiation of the consultations, the discussions held or the result of the consultations.

3.09 At the third, fourth and fifth sessions of the Committee (see document SD/CE/III/3, paragraphs 42 to 45, document SD/CE/IV/3, paragraphs 81 to 85, and document SD/CE/V/6, paragraphs 62 to 68) a divergence of opinion was expressed as to whether a notification of the invitation of consultations should be sent to the Director General and also to the members of the Assembly, as well as to the parties to the source treaty and, if so, whether the notification should be made at the request of one of the parties to the dispute or only if the parties to the dispute so agree; further, divergent views were also expressed as to whether the results of the consultations should be notified to the Director General, to the members of the Assembly and to the parties to the source treaty.

3.10 In accordance with the conclusions reached by the Chairman on the basis of the discussions at the fifth session of the Committee (see document SD/V/6, paragraph 68), the draft presented by the International Bureau at the sixth session of the Committee contained two alternatives under paragraph (4) (Notification of the invitation) and two alternatives under paragraph (5) (Notification of the results of the consultations) (see document SD/CE/VI/2, Article 3(4) and (5), and note 3.10). The first of those alternatives provided for a mandatory notification, whereas the second made the notification dependent on the agreement of the parties to the dispute. Thus, the first alternative under paragraph (4) required the party extending the invitation to enter into consultations to send a copy of the invitation to the Director General; the latter was required to notify the members of the Assembly and the parties to the source treaty of the fact that an invitation had been made and the names of the parties of the dispute; the Director General was also required to transmit a copy of the invitation to any member of the Assembly or any party to the source treaty that requested a copy. According to the second alternative under paragraph (4), the sending of the said copy, the notifying of the said entry into consultations, the notifying of the names of the parties and the transmittal of copies would have been done only if the parties to the dispute agreed to that step or those steps. Similarly, the first alternative under paragraph (5) required that each of the parties to the dispute inform the Director General of the results of their consultations; the latter was required to notify the members of the Assembly and the parties to the source treaty of the information so received. According to the second alternative under paragraph (5), the Director General would be informed and he in turn, could only notify the members of the Assembly and the parties to the source treaty if the parties to the dispute so agreed to that step or those steps.

[Article 3, continued]

(3) [Consultations] The parties to a dispute shall act in good faith with a view to settling the dispute through agreement both in extending an invitation to enter into consultations or in replying to such an invitation and in the course of the ensuing consultations.

[Article 3 continues]

3.11 In summarizing the discussions at the sixth session, the Chairman concluded that a consensus could be achieved on the basis of a compromise solution whereby informing the Director General of the initiation of consultations or any other dispute settlement procedure under the proposed Treaty would be mandatory, whereas the notification by the Director General of that initiation and the results of it to the members of the Assembly and the parties to the source treaty would depend on the agreement of the parties to the dispute (see document SD/CE/VI/6, paragraphs 60 to 63).

[Article 3 continues on page 37]

3.12 Accordingly, paragraph (4), which governs notifications concerning the initiation of consultations, establishes an obligation on the party inviting the consultations to transmit a copy of the invitation to the Director General. Provided that the parties to the dispute so agree, the Director General must notify the members of the Assembly and the parties to the source treaty that an invitation has been made and who the parties to the dispute are, as well as to transmit a copy of the invitation to any member of the Assembly or to any party to the source treaty that requests a copy.

3.13 Paragraph (5) would govern notifications concerning the results of the consultations. As has been pointed, divergent views were expressed at the fourth and fifth sessions of the Committee as to whether such a notification should be required (see notes 3.09 and 3.10) until a compromise solution was achieved on the matter at the sixth session of the Committee (see notes 3.11 and 3.12).

3.14 In accordance with that compromise solution, paragraph (5) would oblige the parties to inform the Director General and the latter would be obliged, if the parties to the dispute so agree, to notify the members of the Assembly and the parties to the source treaty of the information received by him from the parties to the dispute as to whether they resolved their dispute or not and if they did, what the outcome was.

3.15 Since paragraph (6) provides for the confidentiality and privileged nature of the contents of the consultations, and unless the parties to the consultations otherwise agree, the information to be notified under paragraph (5) is the results of the consultations and not the information provided, and the statements made, by the parties in the course of the consultations.

3.16 In support of the view that notification of the invitation and the results should be mandatory in all respects, it is said that such notification is not only necessary to ensure transparency, but also to preserve the multilateral nature of the system of settlement of disputes. Further, it is argued that notification to the Director General would enable him to provide information on the extent to which the procedures under the Treaty were being resorted to and to present a report thereon to the Assembly. That would facilitate a review by the Assembly of the operation of the provisions of the Treaty, including whether consultations were a meaningful stage under it. Moreover, notification to the parties to the source treaty would ensure that parties to a source treaty became aware of events, such as disputes under that treaty, that might affect their interests in that treaty. It is pointed out, however, that notification of the initiation of consultations should not lead to a means of enabling other parties to the source treaty to intervene in the consultations, but any of those parties could, if it wished, address a similar invitation to the party to whom the initial invitation had been sent. Information on the outcome of the consultations and on the results of the settlement could serve as useful precedent for the settlement of other disputes and would facilitate a uniform and harmonious interpretation and application of the Treaty. Finally, it is argued that notification of the invitation to enter into consultations would not affect their confidentiality since that was protected by paragraph (6).

[Article 3, continued]

(4) [Notification of the Invitation] The party to the dispute that extends the invitation to enter into consultations shall send a copy of the invitation to the Director General. The Director General shall, if the parties to the dispute so agree, notify the members of the Assembly and, if there is a source treaty, the parties to that treaty, of the fact that an invitation to enter into consultations has been made and of the names of the parties to the dispute. The Director General shall, if the parties to the dispute so agree, transmit, on request, to any member of the Assembly or party to the source treaty, a copy of the said invitation.

(5) [Notification of the Results of the Consultations] Each of the parties to the dispute shall inform the Director General whether the result of their consultations is the settlement of their dispute or not, and, if they have settled their dispute, what the outcome is. Where the parties to the dispute have agreed to the notification of the invitation to enter into consultations under paragraph (4), the Director General shall also notify the members of the Assembly and, if there is a source treaty, the parties to that treaty, of the information received from the parties to the dispute concerning the results of their consultations.

[Article 3 continues]

3.17 The argument against the establishment of an obligation to notify of the initiation or of the results of the consultations is that such notification would formalize a procedure–i.e., consultations–which is widely credited and resorted to for its flexibility and confidentiality. Parties to a dispute might be hesitant to submit certain situations to consultations if such a submission were to be formalized and publicized, thereby hindering the settlement of the dispute. That informality and confidentiality would not only encourage a frank and more fruitful discussion of the issues and thus facilitate the settlement of disputes, but would also encourage the parties to a dispute to resort to the system provided for in the Treaty.

3.18 With a view to encouraging the parties to the dispute to be particularly frank, imaginative and constructive in their consultations, paragraph (6) provides–subject to the provisions of paragraphs (4) and (5) concerning the notification of the initiation of consultations and of their results–for the confidentiality and privileged nature of the conduct and content of the consultations, unless the parties to the consultations otherwise agree.

3.19 Paragraph (6)(a) requires the parties to keep confidential the conduct of the consultations and also statements–including admissions and offers of settlement–made in the course of the consultations, as well as information provided during the consultations that has not been prior thereto already disclosed or that is generally known or that is in the public domain. In view of the difficulty of determining whether the information is of that kind, the possibility is given to a party to the dispute when furnishing the information to declare that the contents of that information, or the fact that it was furnished, should be kept confidential.

3.20 Paragraph (6)(b) provides that, even if the statement or information is disclosed, no adverse consequences can be attached to it and its disclosure. This approach is reflected in the Understanding on Rules and Procedures Governing the Settlement of Disputes included in Annex 2 of the Agreement Establishing the World Trade Organization (see document WO/GA/XXI/3, Part I, item (73), Article 4, paragraph 6). At its fifth session, the Committee of Experts expressed its preference for that approach rather than leaving it up to the panel or other body before which the statement or information was invoked or relied upon to determine whether it was prejudicial or not and also the consequences that should attach to the disclosure (see document SD/CE/V/6, paragraph 77).

[End of Notes on Article 3]

[Article 3, continued]

(6) [Privileged Nature of the Conduct and Contents of Consultations] (a) Subject to paragraphs (4) and (5), and unless the parties to the dispute otherwise agree, no party to the dispute shall divulge the way in which the consultations are or have been conducted or divulge any other statement made or any information furnished in the course of the consultations, by any party to the dispute, except information that has been disclosed by a party to the dispute prior to the consultations, or that is generally known or that is in the public domain. When a party to the dispute furnishes such information, it may nevertheless declare that the contents of that information, or the fact that it has furnished that information, shall be kept confidential.

(b) Any disclosure of information or statement made by a party to a dispute during consultations shall, for the purposes of any procedure other than the said consultations, including the procedures provided for in Articles 4, 5 and 7 of this Treaty, be treated as having been made without prejudice to the rights of that party to the dispute.

[End of Article 3]

Notes on Article 4

4.01 It does not seem necessary to set forth in the Treaty a particular definition of the notions of "good offices," "conciliation" and "mediation." By and large, those three means for the settlement of disputes refer to procedures that have essentially the same characteristics: what each attempts is the settlement of the dispute with the intervention of an intermediary; in none of the procedures can the dispute be compulsorily settled by a decision emanating from anyone, not even from the intermediary; each of the procedures contemplates the participation of an intermediary who tries to bring about an agreement between the parties to the dispute; such third person is called, in paragraph (1), "the intermediary" but he could just as well be called a "conciliator" or a "mediator." The intermediary could be the Director General or another person, an entity or even a State.

4.02 Paragraph (1)(a) provides for the possibility of the parties to the dispute, if they so wish, to resort by common agreement to either good offices, conciliation or mediation. The agreement will necessarily identify the subject matter of the dispute and the intermediary.

4.03 Paragraph (1)(b) contains a special measure concerning developing countries. This measure has been included in order to meet the wish expressed at the second and third sessions of the Committee by several developing countries. It is based on a similar measure adopted by the Contracting Parties of GATT (see document WO/GA/XXI/3, Part I, item (66), paragraph 1, and item (67), Annex, paragraph 2) and included in the Understanding on Rules and Procedures Governing the Settlement of Disputes included in Annex 2 of the Agreement Establishing the World Trade Organization (see document WO/GA/XXI/3, Part I, item (73), Article 4, paragraph 12).

4.04 In accordance with the conclusion reached by the Chairman on the basis of the discussions at the fourth session of the Committee (see document SD/CE/IV/3, paragraph 125), paragraph (1)(b) has not been included within square brackets, contrary to the situation under the draft Treaty presented to the Committee at its fourth session (see document SD/CE/IV/2, Article 5(1)(b)).

4.05 Unlike paragraph (1)(a), under which the procedure of good offices, conciliation or mediation may only be initiated by common agreement of the parties to a dispute, under paragraph (1)(b), such a procedure may be requested by one party to the dispute, provided it is a Contracting Party that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations; moreover, that procedure may be invoked by such a developing country against any other party to the dispute, whether the latter is a developing country or not. Whereas in the case of paragraph (1)(a), the intermediary is to be designed jointly by the parties to the dispute, in the case of paragraph (1)(b), the "intermediary" is the Director General.

Article 4

Good Offices, Conciliation, Mediation

(1) [Recourse to Good Offices, Conciliation or Mediation] (a) The parties to a dispute may, by common agreement, made at any time before, during or after the consultations provided for in Article 3, including during the panel procedure established under Article 5, submit their dispute to the procedure of good offices, conciliation or mediation of an intermediary jointly designated by them.

(b) Where a party to a dispute is a Contracting Party that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, it may request the good offices, conciliation or mediation of the Director General

Alternative A: prior to the making by either party to the dispute of a request for a procedure before a panel:

(i) if, within the time limit specified in, or otherwise agreed to by virtue of, Article 3(2), an invitation to enter into consultations made by the said Contracting Party to the other party is not replied to by the other party, or the opportunity for consultations is not offered by the other party, or the parties to the dispute are unable to agree that their consultations shall commence; or

[Article 4(1)(b) continues]

4.06 Two alternatives are presented in respect of paragraph (1)(b). Under Alternative A, the good offices, conciliation or mediation of the Director General may be resorted to only if the request by the developing country for those means has been made prior to the making by either party to the dispute of a request for a procedure before a panel and if the consultations have failed to take place because the other party does not reply to the invitation or does not offer an opportunity for consultations, or if the parties are unable to agree to commence consultations, or if the consultations have been dispensed with by agreement of the parties, or if the consultations have taken place but failed to result in a settlement. The observations in the last sentence of note 3.05 (concerning the power of the Assembly to change the time limits) apply also in respect of the time limit specified in Alternative A (item (iii)).

4.07 Under Alternative B, a developing country could resort to the good offices, conciliation or mediation of the Director General either during or after the consultations or even during the panel procedure. Different views were expressed during the discussions at the fourth session of the Committee on whether the said means could be resorted to by a developing country before or during the consultations or during the panel procedure (see document SD/CE/IV/3, paragraphs 120 to 125). On the basis of the discussions at the fifth session of the Committee, the Chairman concluded that in the next draft of the proposed Treaty Alternative B should be reformulated so as not to permit a request for good offices, conciliation or mediation to be made before the consultations but, on the other hand, to allow such a request during or after the consultations or during the panel procedure. Alternative B was so reformulated in the draft of the proposed Treaty presented to the sixth session of the Committee (see document SD/CE/VI/2, Article 4(b), Alternative A, and note 4.07). At that session differences of view continued to persist, however, as to which of the two alternatives should be adopted and, in accordance with the conclusion of the Chairman, the two alternatives have been retained in the new draft of the proposed Treaty (see document SD/CE/VI/6, paragraph 65).

4.08 Under paragraph (1)(b), the possibility of a developing country requesting the good offices, conciliation or mediation of the Director General in lieu of consultations is excluded. Such a possibility–to be exercised instead of making or replying to a request for consultations–was provided for in the draft Treaty presented to the Committee at its fourth session, but, in the light of the conclusion reached by the Chairman on the basis of the discussions at that session (see document SD/CE/IV/3, paragraphs 114 to 117 and 125), the said possibility has not been included in paragraph (1)(b). However, as indicated, if Alternative A or Alternative B is adopted, it would be possible for a developing country to request the good offices, conciliation or mediation of the Director General where consultations that should have taken place have not occurred or where they have not resulted in a settlement of the dispute.

4.09 Paragraph (1)(c) provides for two steps in the procedure which seem to be indispensable.

[Article 4(1)(b), continued]

(ii) if all parties to the dispute agree that the consultations provided for under Article 3 shall be dispensed with; or

(iii) if the consultations under Article 3 do not result in the settlement of the dispute within six months from the date of the receipt of the invitation referred to in Article 3(1) or within any other shorter or longer period agreed upon by the parties.

Alternative B: at any time during or after the consultations have taken place or after they should have occurred, as provided for in Article 3, or at any time during the procedure before a panel under Article 5.

(c) The Director General shall transmit a copy of the request referred to in paragraph (b) to the other party to the dispute and shall transmit a copy of the response of that party to the party making the request.

[Article 4 continues]

4.10 Paragraph (2) imposes upon the parties to the dispute the obligation to cooperate in good faith with the intermediary as provided for under paragraph (2).

4.11 Paragraphs (3) and (4) concern the notification of the initiation and the results of the good offices, conciliation or mediation. The explanations provided for in notes 3.08 to 3.17 apply, *mutatis mutandis*, to these paragraphs.

[Article 4, continued]

(2) [Cooperation with the Intermediary] The parties to the dispute shall cooperate in good faith with the intermediary in order to enable the latter to carry out the functions necessary to bring about the settlement of the dispute through agreement.

(3) [Notification of Submission to Good Offices, Conciliation or Mediation] Each of the parties to a dispute that is submitted under paragraph (1)(a) to the procedure of good offices, conciliation or mediation shall inform the Director General of that submission. The Director General shall, if the parties to the dispute so agree, notify the members of the Assembly and, if there is a source treaty, the parties to that treaty, of the fact that a submission has been made under paragraph (1)(a) or that a request has been made under paragraph (1)(b) and of the names of the parties to the dispute and the name of the intermediary.

(4) [Notification of the Results of Good Offices, Conciliation or Mediation] Each of the parties to a dispute that has been submitted to the procedure of good offices, conciliation or mediation under paragraph (1)(a) shall inform the Director General whether the result of the procedure is the settlement of their dispute or not, and, if they have settled their dispute, what the outcome is. Where the parties to the dispute have agreed to the notification of the submission to the procedure under paragraph (1)(a) or of the request under paragraph (1)(b), the Director General shall notify the members of the Assembly and, if there is a source treaty, the parties to that treaty, of the information received from the parties to the dispute concerning the results of the procedure of good offices, conciliation or mediation.

[Article 4 continues]

4.12 Paragraph (5) imposes upon the parties to the dispute the obligation to adhere to confidentiality and to otherwise act as provided for under Article 3(6) (see the explanation given in notes 3.17 to 3.20).

[End of Notes on Article 4]

[Article 4, continued]

(5) [Privileged Nature of the Conduct and Contents of the Procedure] Subject to paragraphs (3) and (4), Article 3(6) shall apply, *mutatis mutandis*, to both the parties to the dispute and the intermediary also in respect of the procedure of good offices, conciliation or mediation.

[End of Article 4]

Notes on Article 5

5.01 The right to submit a dispute to a panel for examination and for making recommendations to the parties to the dispute is the most important feature of the dispute settlement system of the Treaty. It is to be noted that the establishment of a panel is automatic in the sense that it does not require a decision of the Assembly or other such body to set up the panel. This feature is different from other dispute settlement systems. For instance, under Article 14 of the Treaty on Intellectual Property in Respect of Integrated Circuits, it is the Assembly which decides on the establishment of the panel (see document WO/GA/XXI/3, Part I, item (24)). Under the system put into place in implementation of GATT Article XXIII, each panel is established by the Contracting Parties of GATT (see document WO/GA/XXI/3, Part I, item (66), paragraph 5). Since, under that system, the decision to do so is taken, as a matter of practice, by consensus, the constitution of a panel is far from automatic and can be prevented or delayed by any of the parties to the dispute. Under paragraph 1 of Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, included in Annex 2 of the Agreement Establishing the World Trade Organization, the panel is established, upon the request of the complaining party, by the Dispute Settlement Body (DSB), unless it decides by consensus not to establish a panel; see document WO/GA/XXI/3, Part I, item (73).

5.02 Paragraph (1) means that the establishment of a panel cannot be requested until after the parties to the dispute have failed, within the required period of time, to settle their dispute by consultations (Article 3), or, where applicable, by good offices, conciliation or mediation (Article 4). It is to be noted, however, that, under Article 2(3)(i), the parties to a dispute may agree that in respect of a dispute any given procedure established by the Treaty will not apply, including, as stated in Article 5, paragraph (1)(ii), recourse to consultations.

5.03 In order to avoid unwarranted delays, paragraph (1)(i) and (iii) establish time limits upon the expiration of which the attempts of settling the dispute are to be regarded as having failed and any of the parties to the dispute has then the right to request a procedure before a panel. In the case where consultations have not taken place, paragraph (1)(i) specifies as the time limit the time limit within which the reply should have been made to the invitation to enter into consultations (Articles 3(2) and 5(1)(i)) or within which the opportunity should have been offered for consultations, or the date by which the consultations should have been commenced (Articles 3(2) and 5(1)(i)). In the case where consultations or recourse to good offices, conciliation or mediation have taken place, paragraph (1)(iii) specifies that a panel procedure may be requested if a settlement does not result within six months from the initiation.

5.04 Article 13(1) provides that the Assembly could change, with a three-quarter majority, the six-month time limit provided for in paragraph (1)(iii), particularly if experience showed that it was unnecessarily long or unrealistically short.

Article 5

Panel Procedure

(1) [Recourse to a Panel] Any party to a dispute may request a procedure before a panel:

(i) if, within the time limit specified in, or otherwise agreed to by virtue of, Article 3(2), an invitation to enter into consultations made by that party is not replied to by the other party, or the opportunity for consultations is not offered by the other party, or the parties to the dispute are unable to agree that their consultations shall commence; or

(ii) if all parties to the dispute agree that the consultations provided for under Article 3 shall be dispensed with; or

(iii) if the consultations under Article 3, or any procedure of good offices, conciliation or mediation under Article 4, do not result in the settlement of the dispute within six months from their initiation.

[Article 5 continues]

5.05 Paragraph (2)(a) seems to be self-explanatory.

5.06 Item (i) of paragraph (2)(b) seems to be self-explanatory.

5.07 As concerns the summary referred to in item (ii) of subparagraph (b), the Regulations would establish the requirements of the format and the language or languages in which the summary would be drawn up, as well as the required elements of the content of the summary, including the names of the parties, the obligation alleged to exist and to have been breached that gave rise to the dispute, an indication of the source treaty, if any, and of the provisions of that treaty whose interpretation or application is in question, as well as of any proposed measures that should be taken in respect of the breach.

5.08 The observations in note 5.04 (concerning the power of the Assembly to change the time limits) apply also in respect of the time limit specified in paragraph (2)(c).

[Article 5, continued]

(2) [The Request] (a) The request for a procedure before a panel shall be addressed to the Director General.

(b) The said request shall

(i) set forth the relevant facts concerning prior consultations under Article 3(1), or concerning any procedure entered into under Article 4,

(ii) be accompanied by a summary of the dispute, drawn up in the prescribed manner and with the prescribed content.

(c) The Director General shall, within 14 days of its receipt, send a copy of the request and of the summary of the dispute to the other party to the dispute. Within the said period, the Director General shall also send to all parties to the dispute a copy of the roster of potential members of panels that is established in the prescribed manner and shall offer to the parties the possibility of his drawing up from the said roster a list of persons with particular expertise appropriate to the subject matter of the dispute.

[Article 5 continues]

5.09 Paragraph (3) establishes an additional step in the panel procedure, namely, the answer by the other party to the dispute.

5.10 Paragraph 3(a) makes it mandatory for the party in the dispute against which the panel procedure is being invoked to react to the content of the request. The alternative under which an answer would have been optional, has been deleted in accordance with the conclusion reached by the Committee at its seventh session (see document SD/CE/VII/8, paragraph 77).

5.11 Paragraph 3(b) sets a time limit (seven days) within which the Director General must send a copy of that answer to the party making the request for a panel procedure. In accordance with a decision of the Committee at its seventh session (see document SD/CE/VII/8, paragraph 77), this paragraph has also been amended to provide that the Director General must notify the other party if the answer is not received within the prescribed period.

5.12 Paragraph 3(c) makes it clear that, if the party against which the panel procedure is being invoked chooses not to submit an answer, the failure to answer does not constitute an admission or denial by it of the contents of the request and will not be prejudicial to it.

5.13 The observations in note 5.04 (concerning the power of the Assembly to change the time limits) apply also in respect of the time limits specified in paragraph (3).

[Article 5, continued]

(3) [The Answer] (a) Within two months of the sending by the Director General of the copy of the request and summary in accordance with paragraph (2)(c), the other party to the dispute shall send to the Director General an answer stating which of the facts and legal grounds in the request the said party admits or denies and, in respect of the latter, on what basis. The answer may contain other facts and legal grounds upon which that other party to the dispute relies.

(b) Within seven days of the receipt of the answer, the Director General shall send a copy of that answer to the party to the dispute that made the request. If the Director General has not received the answer, the Director General shall, within seven days of the end of the period prescribed in sub-paragraph (a), notify the party to the dispute that made the request of the failure of the other party to the dispute to submit an answer.

(c) The failure of a party to a dispute to submit an answer shall not be considered as an admission or denial of the allegations or of the facts or legal grounds set forth in the request and shall not be regarded as in any way prejudicing the position of that party.

[Article 5 continues]

5.14 Paragraph (4) has been modified to include situations, referred to in paragraph 3(b), where the Director General does not receive an answer.

5.15 The observations in note 5.04 (concerning the power of the Assembly to change the time limits) apply also in respect of the time limits specified in paragraph (4).

5.16 Paragraph (5) provides for the constitution of a panel. The panel would be constituted separately for each dispute. The composition of any given panel would normally be different from the composition of any other panel. The Assembly would establish the roster of potential panel members (Article 9(2)(v)). The details–for example, who (any Contracting Party, the Director General) may propose candidates for inclusion in the roster and what qualifications candidates must have–would be governed by rules in the Regulations. The roster would be revised from time to time. The members of any panel would have to be persons whose names appear in the roster, unless the members are designated by common agreement of the parties to the dispute.

5.17 Paragraph 5(a) fixes the number of members of the panel as either three or five, at the choice of the parties to the dispute. If the parties to the dispute cannot agree on the number, the number of panel members is fixed at three by paragraph 5(b).

5.18 The designation of the members of the panels is to be made, in the first instance, by agreement of the parties to the dispute. The parties to the dispute would be assisted in this task by the Director General because of the requirements, set forth in paragraph (2)(c) that he offer to the parties to the dispute the possibility of his drawing up from the roster a list of potential members having particular expertise in the subject matter of the dispute.

[Article 5, continued]

(4) [Transmission of the Request, the Summary of the Dispute and the Answer to the Members of the Assembly and Parties to the Source Treaty] The Director General shall, within 14 days of the receipt of the request for a procedure before a panel, transmit to the members of the Assembly and, if there is a source treaty, to the parties to that treaty a copy of the request for a procedure before a panel and the summary of the dispute. Within 14 days of the receipt of an answer to that request, or within 14 days of the end of the period prescribed in paragraph 3(a), the Director General shall inform the members of the Assembly and the parties to any source treaty of the receipt or the lack of receipt of that answer, as the case may be.

(5) [Designation and Convocation of the Panel] (a) Within two months from the date of the sending by the Director General of the copy of the request referred to in paragraph (2)(c), or within such other time limit as may be agreed to by them, the parties to the dispute shall agree on the total number of members of the panel, which shall be either three or five, and on the number of such members to be designated by each, and shall communicate to each other the names of the members to be designated by each. Unless the parties to the dispute otherwise agree, the members so designated must be persons whose names appear on the roster, established by the Assembly, of potential members of panels.

(b) If the parties to the dispute fail to agree on the total number of the members of the panel, the number shall be three.

[Article 5(5) continues]

5.19 Under paragraph (5)(c), if the parties to the dispute cannot agree on the composition of a panel within the time limit specified in that paragraph, it is the Director General who, at the request of any of the parties to the dispute, will proceed, within the time limit, to designate, after consultation with the parties to the dispute, the members of that panel. In that event, paragraph (5)(e) provides that his selection must be from among nationals of a Contracting Party, not party to the dispute (the national may be of a party to the source treaty, if any) and must have expertise in the field of intellectual property.

5.20 Paragraph (5)(d) contains a special measure concerning developing countries. It requires the Director General, if requested, to designate, within the time limit specified, a person or persons from developing countries as member or members of the panel where at least one of the parties to the dispute is a developing country. The number of such members will be fixed in the Regulations. This provision has been included in order to meet the wish expressed at the second session of the Committee of Experts by several developing countries. It is based on a similar measure included in the GATT system of dispute settlement (see document WO/GA/XXI/3, Part I, item (67), paragraph 14, and Annex, paragraph 6(ii), and in the Understanding on Rules and Procedures Governing the Settlement of Disputes included in Annex 2 of the Agreement Establishing the World Trade Organization) (see document WO/GA/XXI/3, Part I, item (73), Article 8, paragraph 10).

5.21 Paragraph (5)(f) seems to be self-explanatory.

[Article 5(5), continued]

(c) If any party to the dispute fails to designate a member of the panel as required, or if the parties fail to designate a member that it was agreed would be designated by them jointly, the Director General shall, at the request of either party to the dispute, and after consulting the parties to the dispute, designate, within one month, the said member of the panel.

(d) Where at least one of the parties to the dispute is a Contracting Party that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, the Director General shall, at the request of such a party, designate, within one month, one or more persons from one or more countries regarded as developing countries as member or members of the panel, the number of them being fixed in the Regulations.

(e) The members of the panel designated by the Director General pursuant to paragraph (c) or (d) shall be persons whose names appear on the roster, established by the Assembly, of potential members of panels. A member of the panel designated by the Director General shall be a national of a Contracting Party, but may not be a national of any party to the dispute. The member or members so designated shall have expertise in the field of intellectual property.

(f) The Director General shall convene the panel not later than two months from its designation.

[Article 5 continues]

5.22 Paragraph (6) defines the tasks of every panel. It is to be noted that it is not proposed that a mandate or terms of reference be established for each panel as and when a panel is set up. The dispute is defined by the request, that is, by the allegation of the existence and breach of an obligation relating to a matter of intellectual property and the factual information and legal arguments set forth in the request to establish a panel and in the submissions of the parties to the panel. Experience in other forums has revealed that, where a specific definition of the terms of reference is required, the establishment of a panel may be delayed.

5.23 Paragraph 6(a) seems to be self-explanatory.

5.24 As concerns the report of the panel, paragraph (6)(b) and (c) prescribe its form (written) and content (summary of the proceedings and submissions, findings of fact, statement of the law and recommendations). The report would be adopted by a majority of the members of the panel. If all the members of the panel cannot agree, the report would state the opinion of those that did agree and state separately the opinion of the others.

5.25 In the discussions at the fourth session of the Committee (see document SD/CE/IV/3, paragraphs 151 and 158) and at the fifth session (see document SD/CE/V/6, paragraphs 121 and 128), the view was expressed that the panel should be able to recommend to the party concerned that it should comply with the obligation it breached but how that party gives effect to its obligation was a matter in its exclusive resort, provided that full compliance resulted. The limitation stated in paragraph (6)(c)–that the panel may not make a recommendation that legislation be enacted or amended by a party to the dispute or that its practice be changed, unless that party so requested it–has been introduced as a result of the conclusion reached by the Chairman on the basis of the discussions at those sessions. (In this respect, compare paragraph 1 of Article 19 of the Understanding on Rules and Procedures Governing the Settlement of Disputes included in Annex 2 of the Agreement Establishing the World Trade Organization. See document WO/GA/XXI/3, Part I, item (73).)

5.26 It should be noted that the draft of the proposed Treaty presented to the sixth session of the Committee stated, in paragraph (6)(c), that the panel shall make a recommendation that the party in breach of its obligation "bring its legislation or practice in conformity with its obligation" (see document SD/CE/VI/2, Article 5(6)(c)). At that session, different views were expressed as to whether the word "practice" should be qualified or deleted. According to one view, the word might be construed to extend to a judicial decision yet under the constitutional legal system of certain countries it might not be possible to compel a change of a judicial decision. To avoid any such interpretation, it was suggested that the word "practice" should be deleted or qualified by the word "administrative" or replaced by the expression "administrative measures." Under another view, it was argued that the term "practice" should be retained, since an obligation could be infringed by a practice, including a judicial decision or a series of judicial decisions that constituted a pattern, and there was no reason to prevent a panel from making a recommendation concerning those practices. In line with the conclusion reached by the Chairman on the basis of those discussions (see document SD/CE/VI/6, paragraphs 78 to 80), the text of paragraph (6) has been rephrased.

[Article 5, continued]

(6) [Task of the Panel] (a) The panel shall examine the dispute.

(b) The panel shall express an opinion in a written report on the question whether an obligation relating to a matter of intellectual property exists and was breached and, if so, to what extent. The report shall contain a finding of the facts and a statement of the law on which the opinion is based, and a summary of the panel's proceedings and of the submissions of the parties to the dispute. The report shall be adopted by a majority of the members of the panel.

(c) In the event that the panel is of the opinion that a party to the dispute has breached an obligation relating to a matter of intellectual property, the panel shall make a recommendation, in the said report, that the said party comply with the obligation it has breached; however, the panel shall not make any recommendation as to how a party to the dispute should enact or amend its legislation or change its practice, unless that party requests the panel to make such a recommendation.

[Article 5(6) continues]

5.27 As concerns the question whether the panel should be empowered to recommend measures or action other than those mentioned in paragraph (6)(c), and what those measures could be, views in the discussions at the fifth session of the Committee were divided (see document SD/CE/V/6, paragraphs 121 to 128). The Chairman concluded that those views should be stated in the notes accompanying the next draft of the proposed Treaty to enable further consideration on the matter and that in those notes the International Bureau might wish to make suggestions as to those other measures or action that the panel could make recommendations on. The said views and suggestions are set forth in the notes which follow.

5.28 It was pointed out that, in the case where a party was found by the panel to have breached its obligation, it was possible that the other party to the dispute or its nationals may have been injured as a consequence of that breach and, therefore, should be compensated for that injury. This might be the case, for example, where intellectual property protection had not been accorded as was required by the source treaty in respect of a product made or distributed within the country of the party that had not accorded that protection. In such a case, the panel should, if requested by the party concerned, be able to make a recommendation as to the compensation that should be made to those injured or as to other measures that should be taken.

5.29 In this context, attention was drawn to the fact that, under Article 9 of the draft Treaty, the Assembly was empowered by paragraph (2)(xi) to take any other appropriate action designed to further the objectives of the proposed Treaty. In order for the Assembly to carry out that task, the panel should be able to recommend not only that the party should comply with the obligation it had breached, but also bring its legislation or practice in conformity with its obligation, or to recommend other action that that party or the other party to the dispute should take.

5.30 On the other hand, it was argued that, if the panel were empowered to recommend measures other than that a party to the dispute should bring its legislation or practice into conformity with its obligations, such as measures of compensation, it would introduce a substantial change in the philosophy of the proposed Treaty.

5.31 The International Bureau recalls that, as stated also in note 5.52, the decision taken by the Governing Bodies of WIPO and its Unions in the program for the biennium 1990-1991 in approving the convening of a committee of experts to examine whether a treaty on the settlement of disputes should be prepared envisaged that neither the panel nor the Assembly could impose sanctions or authorize retaliatory measures.

[Article 5(6) continues on page 65]

5.32 However, as stated also in note 5.54, no provision of the proposed Treaty precludes the applicability of relevant principles and rules of customary international law governing the consequences of a breach of an obligation arising out of a source treaty. Those principles and rules recognize that a State whose conduct constitutes an international wrongful act has the duty to perform the obligation it has breached and to cease the conduct that constitutes the international wrongful act and that an injured State is entitled to obtain from the State which has committed the international wrongful act reparation in the form of restitution in kind, pecuniary compensation for the damages caused by that act, satisfaction (an apology, nominal damages and damages reflecting the gravity of the infringement) and assurances and guarantees of non-repetition of the wrongful act (see draft articles for the topic: State Responsibility, prepared by the International Law Commission, *Report of the International Law Commission* on the work of its forty-fifth session (May-July 1993), United Nations document A/48/10) or, perhaps, to apply as against that State countermeasures (see *Report of the International Law Commission* on the work of its forty-fourth session (May-July 1992), United Nations document A/47/10), in particular, suspending operations under the source treaty or terminating it (see Article 60 of the Vienna Convention on the Law of Treaties, United Nations document A/CONF.39/27 1969) or not performing one or more other obligations towards the said State (see Article 11 of the draft articles on State responsibility, referred to above). (In this respect, compare Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes included in Annex 2 of the Agreement Establishing the World Trade Organization. See document WO/GA/XXI/3, Part I, item (73).)

5.33 The draft of the proposed Treaty presented to the Committee at its sixth session (see document SD/CE/VI/2), contained, as paragraph (6)(d), a provision similar in its wording to the text on the matter which was included in the draft of the proposed Treaty presented to the Committee at its fifth session (see document SD/CE/V/2, Article 6(4)(iii)). That provision was worded as follows: "The panel may make recommendations, in the said report, as to such other measures that the party which has breached the said obligation should take, as well as recommendations as to measures that the other party to the dispute should take, in light of the opinion of the panel." However, the proposed provision, as presented to the sixth session, did not contain any indication of the other measures that could be the subject of the recommendations that the panel might make to either of the parties to the dispute. If other recommendations were to be allowed, they could relate to one or more of those measures mentioned in note 5.32, taking into account, however, the further development of the draft articles being prepared by the International Law Commission on this subject.

5.34 At its sixth session, the argument was made that the proposed provision was contrary to the objectives of the proposed Treaty, which was to ensure the uniform interpretation of source treaties and clarify their application and that the said paragraph opened the door to financial compensation even in respect of individual cases and that such an outcome was unacceptable since such compensation should be sought through the national system. In summarizing the discussions, the Chairman concluded that the proposed provision should not be included in the next draft of the proposed Treaty (see document SD/CE/VI/6, paragraphs 81 and 82). Consequently, the International Bureau has not included the said provision in the new draft of the proposed Treaty.

[Article 5(6) continues on page 65]

5.35 Paragraph (6)(d) seems to be self-explanatory.

5.36 In accordance with the conclusion reached by the Chairman on the basis of the discussions at the sixth session (see document SD/CE/VI/6, paragraph 88), the draft Treaty presents three alternatives in respect of paragraph (6)(e). If Alternative A or Alternative B were to be adopted, the Treaty would contain a special measure concerning developing countries of the kind referred to. If Alternative C were to be adopted, the Treaty would not contain such a measure.

5.37 A special measure concerning developing countries, drafted along the lines indicated in Alternative A, had been included in earlier drafts of the proposed Treaty in order to meet the wish expressed, initially, at the third session (see document SD/CE/III/3, paragraph 62) and, again, at the fourth session (see document SD/CE/IV/3, paragraphs 152 and 154), as well as at the fifth session (see document SD/CE/V/6, paragraphs 135 and 136) and the sixth session (see document SD/CE/VI/6, paragraphs 86 and 88) of the Committee by delegations of developing countries. It is based on a similar measure included in the GATT system of dispute settlement (see document WO/GA/XXI/3, Part I, item (66), paragraph 6, item (67), paragraphs 21 to 23, and item (70), paragraph A.4) and on the Understanding on Rules and Procedures Governing the Settlement of Disputes included in Annex 2 of the Agreement Establishing the World Trade Organization (see document WO/GA/XXI/3, Part I, item (73), Article 21, paragraphs 2 and 8, and Article 24).

[Article 5(6), continued]

(d) The panel shall conclude its proceedings, adopt its report and transmit its report to the Director General within six months from the date of its first meeting or within such longer period not exceeding 12 months from that date, as the panel, after consultation with the parties to the dispute, may decide.

(e) Whenever a party to the dispute is a Contracting Party that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations,

Alternative A: the panel shall take into account, in making its findings of fact and statement of the law, in expressing its opinion and in making its recommendations, the relevant provisions of the source treaty, if any, that contain special measures for developing countries, and the special circumstances and needs of the developing country party to the dispute that relate to those provisions

Alternative A(1): , as well as the impact of the recommendations on the economy and trade of that developing country.

Alternative A(2): [no further words].

[Article 5(6)(e) continues]

5.38 Neither the provision on the special measure which would be included as paragraph (6)(e) if Alternative A were to be adopted nor the provision of that kind that is included in the GATT system of dispute settlement referred to in note 5.37 requires that the report of the panel state the elements of that measure or how that measure was taken into account. The contrary would be the case if Alternative B were to be adopted. (In this respect, compare paragraph 11 of Article 12 of the Understanding on Rules and Procedures Governing the Settlement of Disputes included in Annex 2 of the Agreement Establishing the World Trade Organization (document WO/GA/XXI/3, Part I, item (73).) If Alternative C were to be adopted, no provision of any kind concerning such a special measure would be included in the Treaty.

[Article 5(6)(e), continued]

Alternative B: the report of the panel shall set forth the relevant provisions of any source treaty that contain special measures for developing countries, and the special circumstances and needs of the developing country party to the dispute that relate to those provisions,

Alternative B(1): as well as the impact of the recommendations on the economy and trade of that developing country.

Alternative B(2): and indicate the extent to which those provisions, special circumstances and needs and that impact were taken into account by the panel in making its findings of fact and statement of the law, in expressing its opinion and in making its recommendations.

Alternative B(3): [no further words].

Alternative C: [no such provision].

[Article 5 continues]

5.39 Paragraph (7) establishes the general procedural rights of the parties to the dispute. Other aspects of the procedure would be left to the Regulations.

5.40 Paragraph (7)(b) seems to be self-explanatory.

5.41 The text of paragraph 8(a), presented to the seventh session of the Committee, established the right of a party to the source treaty to intervene in the proceeding before a panel. It was felt that, since a party to the source treaty may be bound by the same provision as that which has given rise to the dispute, that party might have an interest in the subject matter of the proceedings.

5.42 Paragraph 8(a) has been modified in accordance with decisions of the Committee at its seventh and eighth sessions. The paragraph under consideration now provides for intervention by a Contracting Party that is not a party to the dispute, provided that it has a substantial interest in the matter in dispute, and that it has accepted an obligation under the source treaty. The requirements are that the intervening party must: (i) be a Contracting Party, (ii) have a substantial interest in the matter in dispute, and (iii) have accepted an obligation under the source treaty. The requirement that the intervening party have a "substantial interest," rather than an "interest" or "direct interest," is in line with the request made by the Chairman of the Committee at its seventh session (see document SD/CE/VII/8, paragraph 84). At the eighth session of the Committee, several delegations stated their concern that the expression "substantial interest" was not defined, but noted that the possibility was open for the diplomatic conference to adopt an agreed statement on its meaning. Such a statement could delineate certain situations as falling within the purview of that expression, including the case where the intervening party was a party to the source treaty or had accepted an obligation under it, and the case where an intergovernmental organization had competence over the subject matter of the dispute (see document SD/CE/VIII/7, paragraph 69). In accordance with the general support for the suggestion by a delegation, as well as with the statement of the Chairman, the phrase "substantial interest in dispute" has been changed to "substantial interest in the matter in dispute" (see document SD/CE/VIII/7, paragraph 72).

5.43 When informing the Director General of its wish to intervene, the intervening party must state in its notification the nature of its interest in the dispute. It will be for the panel to determine whether the intervening party has a substantial interest in the matter in dispute, that is, is directly affected or injured by the breach of the obligation which gave rise to the dispute. For instance, if State A claims that State B discriminates against the nationals of State A by refusing to process, under the Paris Convention, applications for patents for invention filed by such nationals but does not refuse such applications filed by nationals of State C, the latter would generally not have a substantial interest in the dispute. On the other hand, if State A claims that State B refuses to grant protection to a work on the ground that the work is not a literary or artistic work protected by the Berne Convention, it is believed that State C would generally be directly affected or injured by the breach of an obligation to protect such a work.

[Article 5, continued]

(7) [Procedural Rights of the Parties to the Dispute] (a) In its examination of the dispute, the panel shall ensure that the parties to the dispute are treated with equality and that each is given a fair opportunity to present its case.

(b) If all the parties to the dispute so request, the panel shall stop its proceedings.

(8) [Intervention by Contracting Party not Party to the Dispute]

(a) Any Contracting Party that is not a party to the dispute and that has a substantial interest in the matter in dispute may, provided it has accepted an obligation under the source treaty, intervene, in the prescribed manner, in the proceedings before the panel in order to express its views on the matter in dispute. Any such Contracting Party wishing to intervene shall so notify the Director General within one month from the sending of the information referred to in paragraph (4) and shall state in its notification the nature of its interest in the matter in dispute. The panel shall decide whether such a Contracting Party has a substantial interest in the matter in dispute.

[Article 5(8)(a) continues]

5.44 Paragraph 8(a) contains two alternatives, as suggested by the chairman of the Committee at its eighth session (see document SD/CE/VIII/7, paragraph 72). At the eighth session, the European Community and its Member States suggested that the following sentence should be added to Article 5(8)(a):

> "Any regional economic integration organization that is a Contracting Party may intervene, in the prescribed manner, in the proceedings before the panel when questions within its competence are the subject of a dispute between one of its member States and a non-member State."

This amendment was "intended to ensure that the treaty can play its intended role to the full, that is to say that any party with competence for the subject-matter of the dispute is enabled to present its observations or to defend its interests." (see document SD/CE/VIII/4 Rev., Annex, p. 3).

5.45 Different views were expressed in respect of the proposal of the European Community and its Member States (see document SD/CE/VIII/7, paragraphs 68-70). It is recalled that the proposal by the European Community and its Member States was introduced at a time when intervention under Article 8(a) was open only to those who were party to a source treaty, thus excluding, in many cases, the European Community and other similar organizations (see document SD/CE/VIII/4 Rev., Annex, p.4). Article 8(a) now provides a right of intervention for any Contracting Party having a substantial interest in the matter in dispute, provided it has accepted an obligation under the source treaty. Alternatives A and B are included in line with the request made by the Chairman at its eighth session (see document SD/CE/VIII/7, paragraph 72).

[Article 5(8)(a) continues on page 73]

[Notes on Article 5 continue on page 74]

[Article 5(8)(a), continued]

Alternative A:

An intergovernmental organization that is not a party to the dispute under the source treaty, provided it is a Contracting Party, may intervene, in the prescribed manner, in the proceedings before the panel in order to express its views on a matter that falls within its jurisdiction and that is the subject of a dispute between one or more of its Member States and another party to the dispute.

Alternative B:

[no such provision].

[Article 5(8) continues]

5.46 Paragraph 8(b) defines the procedural rights of an intervening party. Other aspects of the procedure would be left to the Regulations.

5.47 Paragraph (9) imposes upon the parties to the dispute and upon any intervening party the obligation to adhere to confidentiality and to otherwise act as provided for under Article 3(6) (see the explanation given in notes 3.18 to 3.20).

[Article 5(8), continued]

(b) The intervening party shall have the opportunity to present written submissions to, and be heard by, the panel. If the parties to the dispute so agree, the intervening party may be present when the parties to the dispute are heard by the panel and may receive copies of the submission of arguments and rebuttals of the parties to the dispute.

(9) [Privileged Nature of the Conduct and Contents of the Procedure] Subject to the necessity to include or to refer in the findings of fact and in the summary of the submissions of the parties to the dispute to information furnished or statements made in the course of the panel procedure, Article 3(6) shall apply *mutatis mutandis*, to the parties to the dispute and any intervening party, and to submissions and statements made by them, in respect of the procedure before a panel.

[Article 5 continues]

5.48 Paragraph (10)(a) seems to be self-explanatory.

5.49 The possibility to present comments on the report (subparagraph (b)) and their transmittal to the members of the Assembly and to the parties to the source treaty (subparagraph (c)) would enable the Assembly to exercise an effective review of the report and of the action taken or planned to give effect to the recommendations made in the report.

5.50 The Treaty does not provide for the establishment of an intermediate or appeal body between the panel and the Assembly. Further action on the report of the panel would be only at the level of the Assembly.

5.51 The observations in note 5.04 (concerning the power of the Assembly to amend the time limits) apply also in respect of the time limit specified in paragraph (10)(b) and (c). It is to be noted that under paragraph (10)(b) and (c) the parties to the dispute may extend the time limit, subject to the outer time limit specified.

[Article 5, continued]

(10) [Communication and Consideration of the Report of the Panel] (a) The Director General shall transmit copies of the report of the panel to the parties to the dispute.

(b) Each of the parties to the dispute shall inform the Director General within one month from the date of the transmittal of the report, or within such other period, not exceeding three months from that date, as may be agreed upon by the parties to the dispute, of any comments it may have on the report and what action, if any, it has taken or plans to take in respect of the recommendations in the said report.

(c) The Director General shall within one month from the expiration of the time limit referred to in paragraph (b), or within such other period, not exceeding three months, as may be agreed upon by the parties to the dispute, transmit copies of the said report and of any comments of the parties on the report, together with the information received from them on the action taken or to be taken in respect of the said recommendations, to the members of the Assembly and, if there is a source treaty, to the parties to that treaty.

[Article 5(10) continues]

5.52 Paragraph (10)(d) defines the powers of the Assembly in respect of any dispute. Those powers would consist exclusively of the possibility of having an "exchange of views" in and by the Assembly about the report of the panel. The Assembly could not be asked to adopt, endorse or reject the report of the panel, and it could not modify the recommendations of the panel. Neither could the Assembly impose or authorize sanctions (for example, retaliatory measures against the party at fault). These restrictions on the powers of the Assembly follow the instructions given by the Governing Bodies of WIPO and the Unions administered by WIPO in the program of WIPO for the years 1990 and 1991 wherein it is stated that "neither the panel nor the Assemblies could impose sanctions or authorize retaliatory measures" (see documents AB/XX/2, Annex A, item PRG.02(3) and AB/XX/20, paragraph 199(i)). The instructions are presumably motivated by the belief that the public exposure that would result from the panel's report and the exchange of views in the Assembly would, in most cases, be sufficient to persuade the party failing to recognize or to comply with an obligation to do so, if not also to remedy the injury caused by it. Such instructions are, furthermore, presumably motivated by the belief that giving more extensive powers to the Assembly would, in order to be effective, have to entail the exclusion of the parties to the dispute from the procedure of making a decision by the Assembly since, otherwise, a party to the dispute could, if the decision would require unanimity or consensus, prevent the making of any decision. The realities in other organizations, in particular in GATT, show that decision by a majority is more a theoretical than a real possibility since, *de facto*, consensus (including no opposition by the losing party to the dispute) is always required.[*]

5.53 The exchange of views by the Assembly, called for in paragraph (10)(d), would take place normally at its next ordinary session following the transmittal of the report by the Director General to the members of the Assembly. The exchange of views by the Assembly could also take place at any of its extraordinary sessions, which may have been convened pursuant to Article 9(7) by the Director General upon the request of one-fourth of the Contracting Parties or upon his own initiative for any purpose or purposes other than to have such an exchange of views, should a Contracting Party that is party to a dispute request the Director General to place on the draft agenda of that extraordinary session an item calling for an exchange of views on the panel report issued in respect of the dispute to which it is a party. With a view to ensuring a timely exchange of views by the Assembly in respect of the panel report and the information thereon, the second sentence of Article 9(7) would enable any Contracting Party that is a party to a dispute to request that an extraordinary session of the Assembly be convened by the Director General solely for the purpose of having such an exchange of views on the panel report and on the information thereon that had been issued in respect of the dispute to which it is a party.

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[*] Under the GATT system, although Article XXV.4 states that decisions of the Contracting Parties to the GATT shall be taken by a majority of the votes cast, according to a decision of the Contracting Parties of the GATT, dated April 12, 1989, on Improvements to the GATT Dispute Settlement Rules and Procedures, "The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable" (see document SD/CE/VII/4, item (68), paragraph G.3; see also paragraph (x) of the Ministerial Declaration adopted on November 29, 1982 (document SD/CE/VII/4, item (66)). (In this respect, compare paragraph 4 of Article 1, paragraph 4 of Article 16, and paragraph 14 of Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes included in Annex 2 of the Agreement Establishing the World Trade Organization. See document WO/GA/XXI/3, Part I, item (73).)

[Article 5(10), continued]

(d) The Assembly may have an exchange of views on the report of the panel and on the information thereon received from the parties to the dispute. The Assembly shall not impose or authorize sanctions for non-compliance with the recommendations contained in the report of the panel.

[End of Article 5]

5.54 It is to be noted that no provision of the Treaty precludes the applicability of relevant general principles and norms of international law governing the consequences of a breach of an obligation arising out of any source treaty. Such principles and norms could include the measures set forth in the Vienna Convention on the Law of Treaties concerning the termination or suspension of the operation of a treaty as a consequence of its breach (Article 60) or in the rules of international law on international responsibility (see, also, note 5.32).

[End of Notes on Article 5]

[Article 6 starts on page 83]

Notes on Article 6

6.01 This Article is designed, where the recommendations of the panel have not (yet) been (entirely) complied with, to maintain the public exposure referred to in note 5.52 and, where they have been complied with, to give an opportunity to note (with satisfaction) the success of the procedure. In addition, this Article allows the Assembly to follow up on the implementation and monitor compliance by the parties to the dispute of the recommendations of the panel.

6.02 The Article requires that a party to the dispute submit reports despite the fact that it may disagree with a recommendation of the panel.

6.03 The Assembly could consider the reports called for by Article 6 at any of its ordinary sessions. It could also consider the reports at any extraordinary session, which may have been convened pursuant to Article 9(7) by the Director General upon the request of one-fourth of the Contracting Parties or upon his own initiative for any other purpose or purposes, if a member of the Assembly requested the Director General to include in the draft agenda of that extraordinary session an item calling for the consideration of such reports. By virtue of the second sentence of Article 9(7)(b), any Contracting Party that is a party to the dispute could request that an extraordinary session of the Assembly be convened by the Director General solely for the purpose of considering the reports called for in Article 6 in respect of the recommendations made by the panel in the dispute to which it was a party.

6.04 The Regulations would establish rules on the form of and on the manner of submitting the reports.

[End of Notes on Article 6]

Article 6

Reporting on the Compliance with

the Recommendations of the Panel

Each party to a dispute shall submit reports to the Assembly, in the prescribed form and manner, and with the content and within the period or periods to be decided by the Assembly, on the implementation of the recommendation or recommendations made by the panel. Such reports shall be submitted by a party to the dispute even in the case where it disagrees with the recommendation or recommendations made by the panel.

[End of Article 6]

Notes on Article 7

7.01 Arbitration is a means of settlement of a dispute by neutral intermediaries who have the power to decide on the basis of the applicable law (in this case, the source treaty and relevant principles of international law) and to render a binding and final decision.

7.02 Parties to a dispute, or a possible future dispute, may prefer arbitration to the panel procedure, and this Article provides for such a preference. They may prefer to do so because they could freely choose the persons who would deal with their dispute, because the dispute would be defined by agreement (in the terms of reference of the arbitration tribunal), rather than by the unilateral request of the complaining party, and because they could entrust the arbitration tribunal with broader powers than merely the power of making recommendations. They could, for example, entrust the arbitration tribunal with the power of determining damages or other sanctions. Naturally, all this would require agreement between the parties to the dispute. Such agreement is not required in the panel procedure, and this is the advantage–at least from the viewpoint of the complaining party–of that procedure over arbitration.

7.03 Paragraph (1) establishes the fundamental principle that recourse to arbitration under the Treaty would be optional–and not mandatory–since the parties to the dispute must agree to arbitration. Their agreement could be concluded at any time, either after or before the dispute has arisen, either before or during or after the consultations provided for in Article 3 or the good offices, conciliation or mediation provided for in Article 4, or even during the panel procedure established under Article 5. Further, the arbitration agreement may be expressed either with reference to a specific dispute or with reference to all disputes or a specified category of disputes.

7.04 Since recourse to arbitration is optional, any dispute falling within Article 2 (Sphere of Application) of the Treaty could be submitted to arbitration under Article 7, including any dispute under Article 2(2) arising out of a bilateral treaty or involving a non-Contracting Party, provided that in such a dispute at least one of the issues to be decided concerns intellectual property.

7.05 Paragraph (1) also states that recourse to arbitration is to the exclusion of the other procedures provided for in the Treaty. Consequently, after the agreement to submit the dispute had been concluded, neither of the parties to such agreement could unilaterally submit the dispute to any of the procedures set forth in Articles 3, 4 or 5 of the Treaty. Nor may any such procedure in progress be continued.

Article 7

Arbitration

(1) [Arbitration Agreement] The parties to a dispute may agree, at any time, that their dispute shall be settled by arbitration in accordance with the provisions of this Article. If they agree so to settle their dispute, no other procedure for the settlement of that dispute under this Treaty may be invoked or pursued by any of the parties to the dispute.

[Article 7 continues]

7.06 Paragraph (2) deals with the procedure of arbitration. The first words "Unless the parties to an arbitration agreement agree otherwise" mean that the arbitration procedure will be governed by their agreement. On the other hand, if they do not agree on the procedure, the procedure will be governed by what is provided for in the Treaty and by what would be provided for in the Regulations. The details left to the Regulations are referred to by the word "prescribed" (defined in Article 1 as meaning "prescribed in the Regulations") in items (i), (ii), (iv) and (vi).

7.07 Items (i), (ii) and (iii) seem to be self-explanatory.

7.08 Item (iv) establishes the way in which arbitrators who should have been appointed under item (iii) and who were, in fact, not appointed, would be appointed. In such a case it is the Director General who would appoint the arbitrator or arbitrators not appointed under item (iii). The Regulations would contain the details governing such designation. In particular, the Regulations would provide that any arbitrator appointed by the Director General would have to be a person appearing on the roster of eligible arbitrators, the roster established by the Director General with the approval of the Assembly. Furthermore, the Rules would provide reasons for excluding, in a given procedure, members of the roster (e.g., other than nationality, domicile or habitual residence).

7.09 The observations in note 5.04 (concerning the power of the Assembly to amend the time limits) apply also in respect of the time limits specified in items (ii) and (iv).

[Article 7, continued]

(2) [Arbitration Procedure] Unless the parties to an arbitration agreement agree otherwise, the arbitration procedure shall be as follows:

(i) any party to an agreement referred to in paragraph (1) may request, in the prescribed manner, the other party to the dispute to proceed with the establishment of an arbitration tribunal. A copy of the request shall be addressed to the Director General;

(ii) the party to the dispute to which the request for the establishment of an arbitration tribunal is sent shall reply, in the prescribed manner, to the request within one month of the receipt of the request;

(iii) the arbitration tribunal shall be composed of three arbitrators: subject to item (iv), each party to the dispute shall appoint one arbitrator, and the third arbitrator shall be appointed by agreement of the parties to the dispute. No arbitrator may be a national of, or may have his domicile or habitual residence in, any State party to the dispute or any State member of an intergovernmental organization that is party to the dispute;

(iv) if, within two months from the date of receipt by the Director General of the copy of the request referred to in paragraph (2)(i), any member of the arbitration tribunal has not been appointed by the parties to the dispute as provided in (iii), above, the Director General shall, at the request of any of the parties to the dispute, appoint, as prescribed and within one month of the request, such arbitrator;

[Article 7(2) continues]

7.10 Item (v) seems to be self-explanatory.

7.11 Item (vi) states that the arbitration proceedings shall be conducted in the prescribed manner and within the prescribed time limits, that is, as specified in the Regulations.

7.12 Items (vii) and (viii) seem to be self-explanatory.

7.13 Paragraph (3) seems to be self-explanatory.

[Article 7(2), continued]

(v) the arbitration tribunal shall be the judge of its own competence;

(vi) the arbitration proceedings shall be conducted in the prescribed manner and within the prescribed time limits;

(vii) the arbitration tribunal shall decide its award on the basis of the treaty or other source of international law establishing the obligation whose alleged existence or breach has given rise to the dispute;

(viii) the adoption of the arbitration award shall require that the majority of the arbitrators vote for it.

(3) The arbitration award shall be final and binding.

[Article 7 continues]

7.14 Paragraphs (4) and (5) concern the notification of the submission to arbitration and the results of the arbitration. The explanations provided for in notes 3.08 to 3.17 apply, *mutatis mutandis*, to these paragraphs.

7.15 Paragraph (6) imposes upon the parties to the dispute the obligation to adhere to confidentiality and to otherwise act as provided for under Article 3(6) (see the explanations given in notes 3.17 to 3.19).

[End of Notes on Article 7]

[Article 7, continued]

(4) [Notification of Submission to Arbitration] Each of the parties that agree to submit a dispute to arbitration under paragraph (1) shall inform the Director General of that submission. The Director General shall, if the parties to the dispute so agree, notify the members of the Assembly and, if there is a source treaty, the parties to that treaty, of the fact that a submission has been made under paragraph (1) and, if the parties so agree, of the names of the parties to the dispute and the names of the arbitrators.

(5) [Notification of the Results of Arbitration] Each of the parties to the dispute that has been submitted to arbitration under paragraph (1) shall inform the Director General what the outcome of the arbitration is. The Director General shall, if the parties to the dispute so agree, notify the members of the Assembly and, if there is a source treaty, the parties to that treaty, of the information received from the parties to the dispute concerning the outcome of the arbitration.

(6) [Privileged Nature of the Conduct and Contents of the Arbitration] Subject to paragraphs (4) and (5), Article 3(6) shall apply, *mutatis mutandis*, to the parties to the dispute and the arbitrators, and to the submissions and statements made by the parties, in respect of the arbitration procedure.

[End of Article 7]

Notes on Proposal for Amendment submitted by the Delegation of the Netherlands (Article 7bis)

7*bis*.01 In summarizing the discussions in the sixth session of the Committee on a proposal, submitted by the Delegation of the Netherlands (document SD/CE/VI/5) to add an article in the draft of the Treaty, the Chairman concluded that further time was necessary to consider the implications of the proposal and that, to facilitate the task of the Committee, the International Bureau should include in the notes accompanying the next draft of the Treaty the text of the said proposal, together with an indication of the issues which arose from the wording of the proposal and the explanations given by the Delegation of the Netherlands in the fifth and sixth sessions of the Committee (see document SD/CE/VI/6, paragraph 108).

7*bis*.02 The proposal of the Delegation of the Netherlands (see document SD/CE/VI/5), which that Delegation stated was identical to the proposal presented by it at the fifth session (see document SD/CE/V/6, paragraph 104), reads as follows:

"Article 7bis"

(1) When ratifying, accepting, approving or acceding to this Treaty, or at any time thereafter, a Contracting Party that is a State may declare in a written instrument submitted to the depositary that, in relation to any other such State making the same declaration, it agrees that any dispute not settled by negotiation shall, at the request of any such State which is a party to the dispute, be settled by one or either of the following means of dispute settlement:

(a) submission of the dispute to the International Court of Justice,

(b) arbitration in accordance with the procedure set out in Article 7.

(2) A Contracting Party that is not a State may make a declaration with like effect in relation to arbitration in accordance with the procedure set out in Article 7."

7*bis*.03 In explaining its proposal, the Delegation of the Netherlands stated that, in addition to consultations, the only procedure for dispute settlement that the Contracting Parties to the proposed Treaty committed themselves to was the panel procedure, which led to the adoption by the panel of a report containing recommendations, but the dispute was not thereby necessarily settled in a binding way. While Article 7of the proposed Treaty provided for the possibility to submit a dispute to binding arbitration, that possibility only existed on a case by case basis where the parties to the dispute so agreed. The Delegation of the Netherlands stated that its proposal was aimed at providing a Contracting Party with the possibility, if it so wished, to make a declaration whereby it agreed beforehand that a dispute be submitted to arbitration under Article 7 of the proposed Treaty or to the International Court of Justice. It would be entirely optional for a Contracting Party to make that declaration. If a dispute arose between two Contracting Parties that had made matching declarations, the complaining party would not be obliged to resort to arbitration or to the International Court of Justice; it could choose to resort to the applicable procedures under the Treaty, including the panel procedure. The words "at the request of any such State" had been added in the proposal to make it clear that the means provided by the proposal were not compulsory but at the choice of any party to the dispute. Among the Contracting Parties that would have made such a declaration, it would

[Article 8 starts on page 99]

serve to build confidence between them and the very existence of that declaration could facilitate the settlement of the dispute through consultations and negotiations (see document SD/CE/V/6, paragraph 227, and SD/CE/VI/6, paragraph 104).

7*bis*.04 Several delegations stated that the text of the proposal of the Delegation of the Netherlands gave rise to a number of questions, including whether the parties to the dispute must first resort to the dispute settlement procedures, consultation, good offices, conciliation or mediation, or to the panel procedure, under the proposed Treaty before the matter could be submitted to arbitration or to the International Court of Justice; furthermore, it also raised the question whether the declaration made by each Contracting Party had to include the same means of dispute settlement and whether, if one declaration referred to but one of the means only, or one of the declarations referred to one of the means and the other to both means, which of the means would apply (see document SD/CE/VI/6, paragraph 106).

7*bis*.05 Several other delegations stated that, while they recognized the advantage of the possibility of agreeing beforehand to the submission of a dispute to the arbitration mechanism of Article 7 of the proposed Treaty, and thus might be prepared to accept the proposal to that extent, they questioned whether the other means provided for, which called for submission to a dispute settlement mechanism not within the framework of the proposed Treaty, was consistent with the objective of the proposed Treaty to promote the amicable settlement of a dispute pursuant to the procedures provided for in the proposed Treaty (see document SD/CE/VI/6, paragraph 107). The view was also expressed that only Contracting Parties that were States should be able to make the declaration in question (see document SD/CE/V/6, paragraph 229).

7*bis*.06 In reply to the questions and comments put by other delegations, the Delegation of the Netherlands stated that, as concerns when the declaration referred to in its proposal could be made, it could be made at any time, though it would be hoped that declarations would be made when ratifying or acceding to the proposed Treaty. That Delegation confirmed that the declaration did not preclude recourse to any of the procedures provided for by the proposed Treaty and that its proposal did not grant priority to arbitration or to recourse to the International Court of Justice; in other words, a complainant Contracting Party that had made the declaration under the Article proposed would be free to resort, at its own choice, either to any applicable procedure under the proposed Treaty or to arbitration or to the International Court of Justice (see document SD/CE/V/6, paragraph 227). As concerns the notion of including in the proposed Treaty a dispute settlement alternative of submission to the International Court of Justice, the Delegation of the Netherlands stated that, as opposed to the practice concerning multilateral treaties in the field of intellectual property, there was no provision on the International Court of Justice in the relevant instruments of GATT concerning dispute settlement or in the text of the Uruguay Round negotiations.

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7*bis*.07 The Delegation of the Netherlands stated that the status of intergovernmental organizations and regional economic integration organizations was a question of a general nature that would have to be decided in the context of the proposal submitted on that matter by the Delegation of the European Communities. The Delegation of the Netherlands stated that, in any case, should those organizations be eligible to become party to the proposed Treaty, both intergovernmental organizations and regional economic organizations should be entitled to make use of the possibility proposed; however, since disputes where an intergovernmental organization was a party could not be submitted to the decision of the International Court of Justice, its proposal did not provide for declarations by those organizations in respect of submission to that Court (see document SD/CE/V/6, paragraph 228).

[End of Notes on Proposal for Article 7*bis*]

[Article 8 starts on page 99]

Notes on Article 8

8.01 This Article provides, in conformity with the practice concerning treaties administered by WIPO, for the establishment of a "Union" of the Contracting Parties. Under that practice, a union is created whenever a treaty administered by WIPO sets up a governing body (usually denominated, as in the case of the proposed Treaty, as an "Assembly") (see Article 9 and notes 9.01 to 9.20) to deal with various matters in implementation of the treaty and whenever also the treaty entrusts the International Bureau of WIPO with the performance of administrative and other tasks (see Article 10 and notes 10.01 to 10.03).

8.02 The administration of the Union is dealt with in Articles 9 and 10.

8.03 It is to be noted that the Union established for the purposes of this Treaty would be one of those Unions administered by WIPO which entails no financial obligations for its members (see Article 9(1)(d) and note 9.02).

[End of Notes on Article 8]

Article 8

Establishment of a Union

The Contracting Parties to this Treaty constitute a Union for the purposes of this Treaty.

[End of Article 8]

Notes on Article 9

9.01 This Article provides that the Union, established under Article 8, shall have an Assembly, consisting of the Contracting Parties, which constitutes the forum in which the Contracting Parties meet to discuss matters relating to the maintenance and development of the Union and the implementation of the Treaty.

9.02 Paragraph (1) deals with the composition of the Assembly and seems to be generally self-explanatory. Subparagraph (c) provides that the Union shall not bear the expenses of participation of any delegation in the meetings of the Assembly. It is subject to the exception stated in subparagraph (d), which authorizes the Assembly to ask WIPO to grant financial assistance in the cases therein mentioned. The provision in subparagraph (d)(i) follows the language of Article 9(1)(d) of the Treaty on Intellectual Property in Respect of Integrated Circuits.

9.03 Otherwise, no provision has been made in respect of finances, and it is not proposed that Contracting Parties should pay contributions to the International Bureau of WIPO. The provisions of the Treaty are similar, in this respect, to those of the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, which also establishes a Union with an Assembly without financial provisions. As in the case of such a Union, those functions of the Assembly and the International Bureau concerning the maintenance and development of the Union and the implementation of the Treaty which require financing would have to be financed by the Organization, whereas the expenses of the procedure or procedures to which the dispute is submitted would have to be borne by the parties having recourse to the procedure.

Article 9

Assembly

(1) [Composition] (a) The Union shall have an Assembly consisting of the Contracting Parties.

(b) Each Contracting Party shall be represented by one delegate, who may be assisted by alternate delegates, advisors and experts.

(c) Subject to sub-paragraph (d), the Union shall not bear the expenses of the participation of any delegation in any session of the Assembly.

(d) The Assembly may ask the Organization to grant financial assistance

(i) to facilitate the participation in sessions of the Assembly of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or

(ii) to cover the cost of any qualified legal expert referred to in Article 10(1)(v).

[Article 9 continues]

9.04 Paragraph (2) lists the tasks of the Assembly. In general, the provisions of paragraph (2) follow those of corresponding provisions in treaties concluded under the aegis of WIPO. Only five of the provisions contained in paragraph (2) would seem to require further comment, namely, subparagraphs (a)(ii) to (vi) and (x).

9.05 Subparagraph (a)(ii) empowers the Assembly to amend certain provisions of the Treaty, as provided for in Article 13.

9.06 Subparagraph (a)(iii) empowers the Assembly to modify the Regulations. The confiding of the power of amendment of the Regulations to the Assembly would seem to be justified on the basis that the Regulations would contain administrative details, rather than fundamental principles. In addition, that power would enable the Assembly to make changes in the Regulations which experience or circumstances indicate are necessary. The draft Treaty and the draft Regulations would be submitted to the Diplomatic Conference, which would adopt the Treaty and the Regulations under the Treaty. Those Regulations could subsequently be examined by a Preparatory Committee, consisting of interested States and intergovernmental organizations, which could meet before the entry into force of the Treaty and recommend any changes for adoption by the Assembly at its first session.

9.07 Subparagraph (a)(iv) empowers the Assembly to adopt guidelines of an administrative character for the implementation of provisions under the Treaty or the Regulations. Such guidelines would be subordinated to the Regulations which, in turn, are subordinated to the provisions of the Treaty itself (Article 11(4) provides that the provisions of the Treaty shall prevail over those of the Regulations in the case of a conflict). They would not be binding on the Contracting Parties, but would merely constitute guidance as to how to institute and conduct the dispute settlement procedures established by the Treaty. The guidelines could also define the details concerning the services to be provided by the International Bureau in respect of those procedures. The guidelines would have the advantage of being able to take account of experience gained by Contracting Parties in the implementation of the provisions of the Treaty and the Regulations.

9.08 Subparagraph (a)(v) entrusts to the Assembly the task of establishing the roster of potential members of panels referred to in Article 5 (see note 5.16).

9.09 Subparagraph (a)(vi) refers to the rights and tasks specifically conferred upon the Assembly or assigned to it under the Treaty. Those rights and tasks include, besides those mentioned in Article 9 itself, the tasks of considering the reports of panels (Article 5(10)(d)), considering the reports on the implementation of the recommendation made by a panel (Article 6), and designating the languages in which official texts shall be established (Article 17(1)(b)).

[Article 9, continued]

(2) [Tasks] (a) The Assembly:

(i) shall deal with all matters concerning the maintenance and development of the Union and the implementation of this Treaty;

(ii) may amend certain provisions of the Treaty in accordance with the provisions of Article 13;

(iii) may amend the Regulations in accordance with the provisions of Article 11;

(iv) may adopt, where it considers it desirable, guidelines of an administrative character for the implementation of provisions of this Treaty or the Regulations;

(v) shall establish the roster of potential panelists referred to in Article 5(5);

(vi) shall exercise such rights and perform such tasks as are specifically conferred upon it or assigned to it under this Treaty;

(vii) shall give directions to the Director General concerning the preparations for any conference of revision referred to in Article 12 and decide the convocation of any such conference;

[Article 9(2) continues]

9.10 Subparagraph (a)(x) follows, with one exception, the corresponding provision in treaties administered by WIPO concerning participation by non-Contracting Parties as observers. It can be expected that the Assembly will determine that any State or intergovernmental organization that is not a Contracting Party but that is party to the source treaty giving rise to a dispute be invited to the sessions of the Assembly at which the exchange of views referred to in Article 5(10)(d) or the consideration of the reports referred to in Article 6 would take place.

9.11 The exception referred to in note 9.10 concerns non-governmental organizations. At its fifth session, the Committee agreed that, in view of the fact that the Assembly would examine sensitive issues concerning the settlement of disputes between States, non-governmental organizations should not be admitted to the meetings of the Assembly and, therefore, the reference to non-governmental organizations which, in previous drafts of the proposed Treaty, had appeared in item (x) should be deleted (see document SD/CE/V/6, paragraph 180). In the draft of the Treaty presented to the Committee at its sixth session, rather than make that deletion, the International Bureau included the words “and which non-governmental organizations” within brackets (see document SD/CE/VI/2, Article 9(2)(x)) and invited the Committee to reconsider the matter in view of the long standing practice of admitting non-governmental organizations to observer status in the meetings of WIPO and its Unions (see document SD/CE/VI/6, paragraph 111). In accordance with the conclusion of the Chairman reached on the basis of the discussions in that session (see document SD/CE/VI/6, paragraphs 111 to 113), the words in question have been retained within brackets.

9.12 Paragraph (3) seems to be self-explanatory.

[Article 9(2), continued]

(viii) shall review and approve the reports and activities of the Director General concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union;

(ix) may establish such committees and working groups as it deems appropriate to achieve the objectives of the Union;

(x) shall determine which States and intergovernmental organizations, other than Contracting Parties [, and which non-governmental organizations] shall be admitted to its meetings as observers;

(xi) may take any other appropriate action designed to further the objectives of the Union and perform such other functions as are appropriate under this Treaty.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(3) [Representation] A delegate may represent one Contracting Party only.

[Article 9 continues]

9.13 Paragraph (4) governs the matter of voting in the Assembly. Subparagraph (a) is based on Article 9(3)(a) of the Treaty on Intellectual Property in Respect of Integrated Circuits, which establishes that only States that are Contracting Parties have the right to vote. Although, under Article 14 of the Treaty, certain intergovernmental organizations are eligible to become party to the Treaty, an intergovernmental organization that becomes party to the Treaty does not have the right, under subparagraph (a), to vote in the Assembly. That is so because, otherwise, the case may arise where the voting right of a State (that is a Contracting Party) could be enlarged by the vote of an intergovernmental organization (that is a Contracting Party) of which that State is a member.

9.14 Subparagraph (b) authorizes the exercise by an intergovernmental organization of the right to vote of its member States that are Contracting Parties. The last sentence of subparagraph (b) provides that the intergovernmental organization automatically loses the right to exercise the vote of any of its member States if any of them participated in the vote or expressly abstains.

9.15 In order to ensure that a State will not have more than one vote, subparagraph (c) provides a safeguard by way of a rule against the right to vote of a State being exercised by more than one intergovernmental organization.

9.16 Paragraph (5) does not contain a provision, corresponding to that in treaties administered by WIPO, establishing a procedure for a vote by correspondence. At its fifth session, the Committee agreed that such a provision, which appeared in previous drafts of the proposed Treaty, should be deleted since it would be inappropriate in a treaty of the kind under consideration (see document SD/CE/V/6, paragraph 180).

9.17 Paragraph (6)(a) establishes as the general rule that decisions of the Assembly require a majority ("simple majority") of the votes cast. Three types of decisions of the Assembly, however, require a majority of three-fourths of the votes cast, namely, the adoption of guidelines for the implementation of provisions of the Treaty (Article 9(9)(b)), the amendment of the Regulations (Article 11(2)(b)) and the adoption of amendments to certain provisions of the Treaty (Article 13(3)(b)). One type of decision of the Assembly would require unanimity. That decision is the amendment of rules contained in the Regulations which are specified by the Regulations as requiring unanimity, the exclusion of any rule from a designated requirement of unanimity and the inclusion of a requirement of unanimity in respect of the amendment of any rule to which the requirement does not already apply (Article 11(3)). A further exception to the normal rule of decision by a majority of the votes cast is also contained in Article 13(3)(b): it requires four fifths of the votes cast to amend paragraphs (1)(c) and (d) and (7) of Article 9 (the Assembly).

[Article 9, continued]

(4) [Voting] (a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Provided that all its member States that are Contracting Parties have notified the Director General that their right to vote may be exercised by it, any intergovernmental organization that is a Contracting Party may so exercise the right to vote of its member States that are Contracting Parties and are present at the time of voting. The intergovernmental organization may not, in a given vote, exercise the right to vote if any of its member States participates in the vote or expressly abstains.

(c) The right to vote of a State that is a Contracting Party may not, in a given vote, be exercised by more than one intergovernmental organization.

(5) [Quorum] One half of the Contracting Parties that have the right to vote shall constitute a quorum.

(6) [Majorities] (a) Subject to paragraph (9)(b) of this Article, to Article 11(2)(b) and (3) and to Article 13(3)(b), the decisions of the Assembly shall require a majority of the votes cast. Abstentions shall not be considered as votes.

[Article 9(6) continues]

9.18 At the seventh and eighth sessions of the Committee, concern was expressed that the Treaty could enter into force after the deposit of five instruments of ratification or accession and that, thereafter, the Assembly, which would then be composed of only the five states or intergovernmental organizations that had deposited those instruments, could amend the Treaty in accordance with the majorities and the procedures prescribed in Article 9(6)(a) and Article 13, respectively. To meet that concern, and in accordance with the conclusion of the Chairman at the eighth session of the Committee (see document SD/CE/VIII/7, paragraph 80), paragraph 6(b) provides two alternatives, which could be linked either in a conjunctive or in a disjunctive manner. Under the first alternative in brackets, the Assembly could decide to amend the Treaty in accordance with Article 13 only after the expiration of a period of three years from the date of entry into force of the Treaty. Under the second alternative in brackets, it could do so only after the number of members of the Assembly had reached 20. While there was general agreement at the eighth session of the Committee that the two alternatives should be linked, there was no apparent agreement on whether only one or the other, or whether both conditions, would have to be fulfilled. The text in paragraph 6(b) is intended to give effect to the conclusion of the Chairman at the eighth session of the Committee that the next version of the draft Treaty should include both alternatives, but should present them in such a way that the Diplomatic Conference could choose between one or the other condition or adopt both conditions as a requirement that had to be fulfilled before the Assembly could amend the Treaty.

9.19 Paragraph (7) is, with one exception, in the same form as corresponding provisions contained in treaties concluded under the aegis of WIPO and seems generally to be self-explanatory. The exception is stated in the second sentence of subparagraph (b), which provides for the convocation of the Assembly in extraordinary session at the request of any Contracting Party that is party to a dispute but only for the purpose of either having the exchange of views on the panel report and the information received thereon (Article 5(10)(d)) or for the purpose of considering the reports on the implementation of the recommendations in that report (Article 6). It is with a view to facilitating timely action by the Assembly that the second sentence of paragraph (7)(b) enables any such Contracting Party to request that the Assembly be so convened.

9.20 Paragraph (8) seems to be self-explanatory.

[Article 9(6), continued]

(b) The Assembly may not amend any provisions of the Treaty in accordance with the provisions of Article 13, amend the Regulations in accordance with the provisions of Article 11 or adopt or amend guidelines in accordance with Article 9(9)(b) before (i) the expiration of a period of [three] years after the entry into force of this Treaty, [and][or] (ii) the number of members of the Assembly reaches [twenty].

(7) [Sessions] (a) The Assembly shall meet once in every second calendar year in ordinary session upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, either at the request of one-fourth of the Contracting Parties or on the Director General's own initiative. The Assembly shall also meet in extraordinary session, upon the convocation of the Director General, for the purpose of having the exchange of views provided for in Article 5(10)(d), or for the purpose of considering the reports called for under Article 6, if requested to do so for that purpose by any Contracting Party that is party to the dispute which is to be the subject of that exchange of views or of the said reports.

(8) [Rules of Procedure] The Assembly shall adopt its own rules of procedure.

[Article 9 continues]

9.20 Paragraph (9) makes it explicit that the provisions of the Treaty or the Regulations prevail in the event of conflict with the guidelines that the Assembly is empowered by Article 9(2)(a)(iv) to adopt.

[End of Notes on Article 9]

(9) [Guidelines] (a) In the case of conflict between the guidelines referred to in paragraph (2)(a)(iv) and the provisions of this Treaty or the Regulations, the latter shall prevail.

(b) The adoption or amendment by the Assembly of the said guidelines shall require three-fourths of the votes cast.

[End of Article 9]

Notes on Article 10

10.01 Article 10 deals with the tasks of the International Bureau.

10.02 Paragraph (1) contains, in item (iv), a requirement that the International Bureau provide information to any Contracting Party (whether developing or industrialized) at its request. The information would relate to the availability and operation of the dispute settlement procedures and not to the actual dispute.

10.03 Paragraph (1) contains, in item (v), a special measure concerning developing countries, namely, that the International Bureau would have to make available a legal expert to a Contracting Party that so requests if it is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, provided that funds of the Organization have been authorized to be used for that purpose. It would be for the Assembly to ask the Organization to grant financial assistance, and it would be for the Organization to grant that assistance, to enable the International Bureau to make available a qualified legal expert to assist a developing country. The legal expert would be made available to a developing country that is a party to a dispute that is being submitted to any of the procedures provided for in the Treaty. This provision has been included in order to meet the wish expressed at the second session of the Committee of Experts by several developing countries. It is based on a similar provision adopted by the Contracting Parties of GATT (see document WO/GA/XXI/3, Part I, item (70), Section H), as well as on paragraph 2 of Article 27 of the Understanding on Rules and Procedures Governing the Settlement of Disputes included in Annex 2 of the Agreement Establishing the World Trade Organization (see document WO/GA/XXI/3, Part I, item (73)). Item (v) does not envisage that a roster of potential experts would be established.

Article 10

International Bureau

(1) [Tasks] The International Bureau shall

(i) perform the administrative tasks concerning the Union, as well as any tasks specifically assigned to it by the Assembly;

(ii) provide the secretariat of the conferences of revision referred to in Article 12, of the Assembly, of the committees and working groups established by the Assembly, and of any other meeting convened by the Director General under the aegis of the Union;

(iii) perform, in the prescribed manner, the administrative tasks that may be required by any of the procedures for dispute settlement established by this Treaty;

(iv) provide to any Contracting Party, at its request, information in respect of the dispute settlement procedures available under this Treaty and on their operation;

(v) where a Contracting Party is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations and funds of the Organization have been authorized to be used for such a purpose, make available to that developing country, at its request, a qualified legal expert to assist the said country in respect of any procedure established by this Treaty for the settlement of any dispute to which it is a party, it being understood that the International Bureau shall act in a manner ensuring its continued impartiality.

[Article 10 continues]

10.04 Paragraphs (2), (4) and (5) seem to be self-explanatory and are similar to the corresponding provisions appearing in treaties administered by WIPO.

10.05 Paragraph (3) empowers the Director General to convene the Assembly, committees and working groups established by the Assembly and all other meetings that might be of concern to the Union. An example of a committee or working group that might be established by the Assembly would be a committee or working group to prepare modifications of the amendments to the Regulations (see Article 9(2)(a)(iii)) or to prepare or amend the guidelines for the implementation of the provisions of the Treaty or the Regulations (see Article 9(2)(a)(iv)).

[End of Notes on Article 10]

[Article 10, continued]

(2) [Director General] The Director General shall be the chief executive of the Union and shall represent the Union.

(3) [Assembly and Other Meetings] The Director General shall convene the Assembly and any committee and working group established by the Assembly and all other meetings dealing with matters of concern to the Union.

(4) [Role of the International Bureau in Meetings] (a) The Director General and any staff member designated by him shall participate, without the right to vote, in all the meetings of the Assembly, the committees and working groups established by the Assembly, and any other meetings convened by the Director General under the aegis of the Union.

(b) The Director General or a staff member designated by him shall be ex officio secretary in all the meetings of the Assembly, and of the committees, working groups and other meetings referred to in subparagraph (a).

(5) [Conferences of Revision] (a) The Director General shall, in accordance with the directions of the Assembly, make the preparations for conferences of revision referred to in Article 12 and convene such conferences.

(b) The Director General may consult with intergovernmental and international and national non-governmental organizations concerning the said preparations.

[Article 10(5) continues]

[Notes on Article 11 start on page 118]

[Article 10(5), continued]

(c) The Director General and staff members designated by him shall take part, without the right to vote, in the discussions at any conference of revision referred to in subparagraph (a).

(d) The Director General or a staff member designated by him shall be ex officio secretary of any conference of revision referred to in subparagraph (a).

[End of Article 10]

Notes on Article 11

11.01 This Article seems to be self-explanatory.

[End of Notes on Article 11]

Article 11

Regulations

(1) [Content] The Regulations annexed to this Treaty provide rules concerning

(i) matters which this Treaty expressly provides are to be “prescribed”;

(ii) any details useful in the implementation of the provisions of this Treaty.

(2) [Entry into Force and Majorities] (a) The Assembly shall determine the conditions for the entry into force of each amendment to the Regulations.

(b) Subject to the provisions of paragraph (3), the adoption of any amendment to the Regulations and the determination of the conditions for its entry into force shall require three-fourths of the votes cast.

(3) [Requirement of Unanimity] (a) The Regulations may specify rules which may be amended only by unanimous consent.

(b) Exclusion, for the future, of any rules designated as requiring unanimous consent for amendment from such requirement shall require unanimous consent.

[Article 11(3) continues]

[Notes on Article 12 start on page 122]

[Article 11(3), continued]

(c) Inclusion, for the future, of the requirement of unanimous consent for the amendment of any rule shall require unanimous consent.

(4) [Conflict Between the Treaty and the Regulations] In the case of conflict between the provisions of this Treaty and those of the Regulations, the former shall prevail.

[End of Article 11]

Notes on Article 12

12.01 Paragraph (1) confirms the standard rule that a treaty may be revised by conferences of the Contracting Parties. Article 9(2)(vii) provides that the convocation of revision conferences is to be decided by the Assembly.

12.02 Paragraph (2) seems to be self-explanatory.

[End of Notes on Article 12]

Article 12

Revision of the Treaty by Conferences of Revision

(1) [Revision Conferences] This Treaty may be revised by the Contracting Parties in conferences of revision.

(2) [Provisions that can be Amended Also by the Assembly] The provisions referred to in Article 13(1) may be amended either by a conference of revision or according to Article 13.

[End of Article 12]

Notes on Article 13

13.01 The provisions in Article 13 are similar to those in a number of treaties administered by WIPO, as well as in other international treaties. Article 13 is limited in its scope since it would allow the Assembly to amend only those provisions of the Treaty dealing with time limits and certain other provisions concerning financial and administrative matters and requires that their adoption be by a majority higher than a simple majority. Moreover, the amendment would not enter into force until three-fourths of the Contracting Parties, members of the Assembly at the time of its adoption, had accepted it.

13.02 In accordance with the conclusion reached by the Chairman on the basis of the discussions at the fifth session (see document SD/CE/V/6, paragraphs 209 and 212), the Assembly may amend a provision containing a time limit only in so far as it does not extend the period of that time limit beyond the duration that was in itself stated in that provision.

[End of Notes on Article 13]

Article 13

Amendment of Certain Provisions of the Treaty by the Assembly

(1) [Amending of Certain Provisions by the Assembly] The Assembly may amend any time-limit established in the provisions of this Treaty, provided that a time limit may not be extended for a duration that exceeds the period stated in that time limit. The Assembly may also amend the provisions in Article 9(1)(c) and (d) and (7).

(2) [Initiation and Notice of Proposals for Amendment] (a) Proposals for amendments under paragraph (1) may be made by any Contracting Party or by the Director General.

(b) Such proposals shall be communicated by the Director General to the Contracting Parties at least six months in advance of their consideration by the Assembly.

(3) [Adoption and Required Majority] (a) Amendments under paragraph (1) shall be adopted by the Assembly.

(b) Adoption by the Assembly of any amendment under this Article shall require three-fourths of the votes cast, provided that any amendment to Article 9(1)(c) and (d) and (7) shall require four-fifths of the votes cast.

[Article 13 continues]

[Notes on Article 14 start on page 128]

[Article 13, continued]

(4) [Entry Into Force] (a) Any amendment adopted under paragraph (3) shall enter into force one month after written notifications of acceptance have been received by the Director General from three-fourths of the Contracting Parties members of the Assembly at the time the Assembly adopted the amendment.

(b) Any amendment to the said provisions thus accepted shall bind all States and intergovernmental organizations that were Contracting Parties at the time the amendment was adopted by the Assembly or that become Contracting Parties thereafter, except Contracting Parties which have notified their denunciation of this Treaty in accordance with Article 16 before the entry into force of the amendment.

[End of Article 13]

Notes on Article 14

14.01 Paragraph (1) specifies the two kind of entities that may become party to the Treaty, namely, States and intergovernmental organizations. Each has to meet certain requirements. Those requirements are indicated in items (i) and (ii).

14.02 Subparagraph (i) seems to be self-explanatory.

14.03 Subparagraph (ii) states that any intergovernmental organization that is a party to, or has accepted an obligation under, a multilateral treaty in the field of intellectual property is eligible to become a party to the Treaty. It should be recalled that, under the auspices of WIPO, five treaties in the field of intellectual property to which certain intergovernmental organizations may become a party have been adopted, namely, in 1989, the Treaty on Intellectual Property in Respect of Integrated Circuits and the Protocol to the Madrid Agreement Concerning the International Registration of Marks; in 1994, the Trademark Law Treaty; and, more recently, in 1996, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. As a consequence of the increasingly important role that intergovernmental organizations play in the field of intellectual property, the adoption of more treaties in that field to which they may become party can be expected. In becoming party to such treaties, and thus the subject of rights and obligations that may come into dispute, there is no reason to foreclose their access to the dispute settlement procedures established by the Treaty.

14.04 The subparagraph under consideration would also make eligible to become party to the Treaty any intergovernmental organization that, although is not a party to a multilateral treaty in the field of intellectual property, has accepted an obligation under it. It is recalled that under Article 9 of the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedures, certain intergovernmental organizations, although not eligible to be party to that Treaty may accept certain of its obligations.

14.05 In summarizing the discussions in the sixth session of the Committee on a proposal, submitted by the Delegation of the European Communities at the fifth session (document SD/CE/V/4), to replace the text of subparagraph (ii) by another text, the Chairman concluded that further discussion was necessary to consider the said proposal and that, to facilitate the task of the Committee, the International Bureau should include in the notes accompanying the next draft of the proposed Treaty the text of the proposal submitted by the Delegation of the European Communities together with the explanations given by that Delegation in the fifth and sixth sessions of the Committee (see document SD/CE/VI/6, paragraph 132).

14.06 The said proposal of the Delegation of the European Communities (document SD/CE/V/4) would replace the text of subparagraph (ii) by the following text:

> "Any intergovernmental organization or regional economic integration organization which is Party to a Treaty referred to in Article 3 or which, without being a Party to it, has accepted an obligation by virtue of such a Treaty, or is vested with the international competences for matters falling under such a Treaty."

Article 14

Becoming Party to the Treaty

(1) [Eligibility] The following may become party to this Treaty:

(i) any State that is a member of the Organization and any other State member of the United Nations or of any other specialized agency brought into relationship with the United Nations;

(ii) any intergovernmental organization that is a party to a multilateral treaty in the field of intellectual property or that, without being party to it, has accepted an obligation or obligations under such a treaty.

[Article 14 continues]

Proposals were also submitted by the Delegation of the European Communities for the amendment of the following other articles of the draft Treaty: Article 1(i) and (x), defining "Contracting Party" and "party," respectively; Article 5(8)(a) [Intervention by Parties to a Source Treaty] (formerly Article 6(6)(a) of the draft Treaty presented at the fifth session); Article 9(4)(b) [Voting]. That Delegation stated that if its proposals were accepted, consequential changes in other provisions of the draft Treaty would be necessary.

14.07 In explaining its proposal to amend subparagraph (ii), the Delegation of the European Communities stated that the aim of that proposal was to ensure coherence between Article 14 and Article 2 with respect to the sphere of application of the proposed Treaty and to ensure that such a treaty on the settlement of disputes would be as open as possible. The Delegation added that the second element in that proposal was to provide that the intergovernmental organizations or regional economic integration organizations would be able to accede to the proposed Treaty if they had competence for matters falling under the Treaty, thus making it more open than under the present wording of subparagraph (ii) (see document SD/CE/VI/6, paragraph 129). The said Delegation stated that the European Communities had neither become party to, nor accepted an obligation under, any source treaty and, consequently, it could not become party to the proposed Treaty if the wording of Article 14 as set forth in the draft Treaty was retained; yet there were matters governed by a source treaty to which the Member States of the European Communities were parties but in respect of which competence had been transferred to the European Communities and, in that respect, it was necessary that Article 14 should take that situation into account (see document SD/CE/V/6, paragraphs 231 and 235).

14.08 The issues raised by the proposals of the Delegation of the European Communities for the amendment of the provisions of certain other articles of the draft Treaty, and the explanation given by that Delegation in respect of these issues, are set forth in the report of the Committee on its fifth session (see document SD/CE/V/6, paragraphs 231 to 245).

14.09 Paragraph (2). It follows from Article 1(xiii) that, even if a State or intergovernmental organization calls its instrument an instrument of "acceptance" or an instrument of "approval" (see note 1.07), it will be considered, for the purposes of the Treaty, as an instrument of ratification or accession.

[End of Notes on Article 14]

[Article 14, continued]

(2) [Signature; Deposit of Instrument] To become party to this Treaty, the State or the intergovernmental organization referred to in paragraph (1) shall:

(i) sign this Treaty and deposit an instrument of ratification, or

(ii) deposit an instrument of accession.

[End of Article 14]

Notes on Article 15

15.01 Paragraph (1) requires that five instruments (of ratification, accession, acceptance or approval) be deposited for the Treaty to enter into force. Those instruments may be those of States or intergovernmental organizations. The deposit of five instruments is also the number provided for in some of the more recent treaties concluded under the aegis of WIPO: the Treaty on the International Registration of Audiovisual Works (Article 12) and the Treaty on Intellectual Property in Respect of Integrated Circuits (Article 14), both of which were adopted in 1991, and the Trademark Law Treaty (Article 20(2)), adopted in 1994.

15.02 It may be argued that the number of deposits of instruments required to bring the Treaty into force need only be two as that would allow at least two parties to a dispute which were each a Contracting Party to have early access to the dispute settlement procedures established by the Treaty.

15.03 On the other hand, it may be argued that more Contracting Parties than two should be required to put into effect what is intended to be a multilateral Treaty. In addition, in the discussions in the sixth session of the Committee, it was reasoned that it would not be advisable that decisions on such matters as amendments to the Treaty and to the Regulations could be taken by a lesser number of members of the Assembly than five; moreover, it had to be borne in mind that in certain cases the members of the panel to be designated and the arbitrators to be selected could not be persons who were nationals of any of the States parties to the dispute and could not be persons who were not nationals of a Contracting Party and that requirement could be an impediment if the number of States that were Contracting Parties were limited at the time of that designation or that selection (see document SD/CE/VI/6, paragraph 134).

15.04 In summarizing the discussions in the sixth session, the Chairman concluded that there appeared to be a consensus that the number of instruments that would have to be deposited to bring the Treaty into force should be five rather than two--those being the two alternatives presented, each within brackets, in the draft of the Treaty presented to the Committee at the sixth session (see document SD/CE/VI/2, Article 15(1)), that the next draft of the Treaty should so state and that the International Bureau should include in the notes the reasons that had been advanced in favor of that number rather than two (see document SD/CE/VI/6, paragraphs 134 and 135).

15.05 Paragraph (2) seems to be self-explanatory.

[End of Notes on Article 15]

Article 15

Entry Into Force of the Treaty

(1) [Entry Into Force] This Treaty shall enter into force three months after five States or intergovernmental organizations have deposited their instruments of ratification or accession.

(2) [Ratifications and Accessions Subsequent to the Entry Into Force of the Treaty] Any State or intergovernmental organization not covered by paragraph (1) shall become bound by this Treaty three months after the date on which it has deposited its instrument of ratification or accession, unless a later date has been indicated in the said instrument. In the latter case, the said State or intergovernmental organization shall become bound by this Treaty on the date thus indicated.

[End of Article 15]

Notes on Article 16

16.01 Paragraph (1) seems to be self-explanatory.

16.02 Paragraph (2) states the effective date of the denunciation: it is one year from the date of the receipt of the denunciation (subparagraph (a)). Nevertheless, in accordance with subparagraph (b), the provisions of the Treaty would be applicable, even after the expiration of the one-year period, to disputes pending at the end of that period. A dispute is regarded as pending not only where, at the end of the one-year period, a procedure for the settlement of that dispute before a panel has been requested or is in progress under Article 5, but also where, at the end of the one-year period, any of the other procedures for the settlement of disputes established under the Treaty has been initiated, i.e., an invitation to enter into consultations with respect to the dispute has been made under Article 3(1), or an agreement has been concluded under Article 5(1)(ii) to dispense with such consultations, or a procedure of good offices, conciliation or mediation has been agreed to under Article 4(1)(a) or requested under Article 4(1)(b), or an agreement has been concluded under Article 7 to settle the dispute by arbitration.

[End of Notes on Article 16]

Article 16

Denunciation of the Treaty

(1) [Notification] Any Contracting Party may denounce this Treaty by notification addressed to the Director General.

(2) [Effective Date] (a) Denunciation shall take effect one year from the date on which the Director General has received the notification of denunciation.

(b) The denunciation shall not affect the application of this Treaty to any dispute to which the Contracting Party making the denunciation is a party and in respect of which a dispute settlement procedure established under this Treaty has been initiated or is in progress before or at the time of the expiration of the one-year period referred to in subparagraph (a).

[End of Article 16]

Notes on Article 17

17.01 In accordance with WIPO practice, paragraph (1) makes a distinction between the languages in which the single original of the proposed Treaty would be adopted and signed at a diplomatic conference and other languages in which, subsequently, a text would be prepared by the International Bureau or by a Government concerned and, after consultations with interested Governments, would be established by the Director General as an "official text" of the Treaty.

17.02 Subparagraph (a), in stating the six languages referred to therein as the languages in which the original of the proposed Treaty would be signed, follows the practice since 1971 of adopting and signing the original of a WIPO treaty in the four languages in which the Convention Establishing the World Intellectual Property Organization was signed (English, French, Russian and Spanish), as well as the trend since 1989 of adopting and signing a WIPO treaty also in the other two languages referred to (Arabic and Chinese).

17.03 Rather than stating the languages in which official texts of the proposed Treaty should be established and providing that the Assembly may designate other languages of such texts, as was the practice under WIPO treaties until 1989, subparagraph (b) does not state those languages but leaves it to the Assembly alone to designate the languages in which official texts shall be established (as in the case under the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted in 1989 (see Article 18(2)). (It may be noted that under the Trademark Law Treaty, adopted in 1994, an official text must be established in an official language of a Contracting Party if that Contracting Party so requests (Article 24), and in the WIPO Copyright Treaty (Geneva, 1996) and the WIPO Performances and Phonograms Treaty (Geneva, 1996), an official text in any language other than the six referred to in paragraph 17.02 must be established by the Director General of WIPO, after consultation with all the interested parties, if an interested party so requests (Articles 24 and 32, respectively)).

17.04 In summarizing the discussions in the sixth session of the Committee, the Chairman concluded that the text of paragraph (1)(a) of Article 17 of the draft Treaty should continue to be included as drafted, but that the International Bureau should incorporate, in the notes to the next draft of the Treaty, information on which languages were specified in which treaties as the languages in which texts were to be signed and in which official texts were to be established (see document SD/CE/VI/6, paragraph 143).

17.05 As concerns the languages in which the treaties adopted at the 1967 Stockholm Conference and since then under the auspices of WIPO have been signed, the following indicates the language and the number of treaties signed in that language: Arabic (4); Chinese (4); English (21); French (26); Russian (10); Spanish (12). As concerns the languages specified in the said treaties in which official texts are to be established, the following indicates the languages and the number of treaties in which such a language is specified: Arabic (7); Chinese (1); Danish (2); English (1); French (0); German (15); Italian (13); Japanese (5); Portuguese (15); Russian (9); Spanish (9).

17.06 Paragraph (2) seems to be self-explanatory and follows the practice in respect of the place where and the time during which signature of a treaty initiated by WIPO may occur.

[End of Notes on Article 17]

Article 17

Languages of the Treaty; Signature

(1) [Original Texts; Official Texts] (a) This Treaty shall be signed in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in such other languages as the Assembly may designate.

(2) [Time Limit for Signature] This Treaty shall remain open for signature at the headquarters of the Organization for one year after its adoption.

[End of article 17]

Notes on Article 18

18.01 Article 18 provides for the Director General to be the depositary of the Treaty. The nature of the functions of the depositary of a treaty and a list of those functions are set out in Articles 76 and 77 of the Vienna Convention on the Law of Treaties. Those functions relate, in particular, to the custody of the original text of the Treaty, the preparation of certified copies of the original text, the receipt of the deposit of instruments of ratification or accession and of notifications, and the communication of notifications to the Contracting Parties.

[End of Notes on Article 18]

Article 18

Depositary

The Director General shall be the depositary of this Treaty.

[End of Article 18]

DRAFT REGULATIONS UNDER THE TREATY

List of Rules

PART A

Introductory Rules

Rule 1

Use of Terms and Abbreviated Expressions

(1) ["Treaty"; "Article"; "Regulations"; "Rule"; "Guidelines"] In these Regulations, the word

(i) "Treaty" means the Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property;

(ii) "Article" means an Article of the Treaty;

(iii) "Regulations" means the Regulations under the Treaty;

(iv) "Rule" means a Rule of the Regulations;

(v) "Guidelines" means the guidelines adopted by the Assembly.

(2) [Use of Terms and Abbreviated Expressions Defined in the Treaty] The terms and abbreviated expressions defined in Article 1 for the purposes of the Treaty shall have the same meaning for the purposes of the Regulations.

Rule 2

Interpretation of Certain Words

(1) ["Sender"; "Addressee"] Whenever the word "sender" or "addressee" is used in these Regulations, it shall be construed as meaning a Contracting Party, a party to the dispute, an intervening party, the Director General or the International Bureau that sends a communication or to whom a communication is addressed, unless the contrary clearly follows from the wording or the nature of the provision, or the context in which the word is used.

(2) ["Communication"] Whenever the word "communication" is used in these Regulations, it shall be construed as meaning any written statement, notification or other communication required or allowed to be given under the provisions of the Treaty, unless the contrary clearly follows from the wording or the nature of the provision, or the context in which the word is used.

[End of Rule 2]

PART B

Rules Concerning Several Articles of the Treaty

Rule 3

Languages of Communications

(1) [Communications to a Party to a Dispute] (a) Any communication addressed by a party to a dispute to another party to that dispute may be in any language chosen by the sender, provided that, if that language is not a language that is an official language of the addressee, the communication shall be accompanied by a translation in an official language of the addressee, prepared by the sender, unless the addressee agrees to accept that communication in a language other than its official language.

(b) Any communication addressed by the Director General or the International Bureau to a party to a dispute or to an intervening party shall be, at the option of the Director General or the International Bureau, in English or French; however, where that communication is in response to a communication addressed by such party to the Director General or the International Bureau in English or in French, it shall be in the language of the latter communication.

(2) [Communications to the Director General or the International Bureau] Any communication addressed to the Director General or the International Bureau by a party to a dispute or by an intervening party may be in such language as that party chooses, provided that, if that language is other than English or French, the communication is accompanied by a translation in English or French, prepared by that party.

(3) [Communications to the Assembly or to Parties to a Source Treaty] (a) Any communication addressed by the Director General or the International Bureau to the members of the Assembly or, if there is a source treaty, to the parties to that treaty, shall be, at the option of the Director General, in English or French.

(b) Any communication by a party to a dispute that is required or allowed to be given to the Director General or the International Bureau under the provisions of the Treaty shall be accompanied by a translation, prepared by that party, in English and in French, if the language of the communication is neither English nor French.

(c) The report of the panel referred to in Article 5(10)(a) and (c) shall be transmitted by the Director General to the Assembly and, if there is a source treaty, to the parties to that treaty, in the language or languages in which it is to be prepared in accordance with Rule 17(2), and, if that language is not English or French, it shall be accompanied by a translation in English and in French, prepared by the International Bureau.

[End of Rule 3]

Rule 4

Expenses to be Paid by a Party to a Dispute

(a) The International Bureau shall, subject to Rule 28, fix the amount to be paid by each party to a dispute and by each intervening party as its contribution to the expenses of the procedure or procedures to which the dispute is submitted.

(b) The expenses referred to in paragraph (a) shall include

(i) the travel and subsistence allowances for the intermediary in the procedure of good offices, conciliation or mediation, the members of the panel, the members of the arbitration tribunal, and for any witness requested or expert appointed by an intermediary, a panel or arbitration tribunal,

(ii) the remuneration of the members of the arbitration tribunal,

(iii) the costs of the preparation of the report of the panel and of the translation thereof in accordance with Rule 17(2),

(iv) the costs of sound equipment, interpretation, clerical and secretarial services, meeting rooms and related facilities provided by the International Bureau.

(c) The method of fixing the amount of the expenses referred to in paragraph (b) and of their payment shall be indicated in the Guidelines.

PART C

Rule Concerning Article 2 of the Treaty

Rule 5

Notification of Submission of Dispute under Article 2(2)

Where a dispute is to be submitted to one or more procedures pursuant to Article 2(2), each party to the dispute shall inform the Director General of the submission and shall specify the procedure or procedures concerned.

[End of Rule 5]

PART D

Rules Concerning Article 3 of the Treaty

Rule 6

Content of the Invitation

The invitation to enter into consultations, referred to in Article 3(1), shall

(i) state the name of the State or intergovernmental organization that is extending the invitation,

(ii) state the name of the State or intergovernmental organization to which the invitation is extended,

(iii) state that the invitation is extended with a view to initiating consultations under Article 3 of the Treaty,

(iv) contain an allegation that an obligation relating to a matter or to matters of intellectual property exists and that the addressee of the invitation denies the existence of that obligation or that it has breached that obligation,

(v) indicate the source of the obligation by referring either to the provision or provisions of any source treaty or to a generally recognized principle of law concerning or applicable to intellectual property that is the basis of the obligation,

(vi) describe the matter or matters of intellectual property in respect of which the obligation relates,

(vii) specify the facts that demonstrate the denial or a breach of the obligation,

(viii) state any other legal grounds in support of the alleged existence or breach of the obligation,

(ix) identify the authority in the State or the unit in the intergovernmental organization, as the case may be, that is extending the invitation, which is competent to enter into the consultations,

(x) designate the official or officials of that authority or that unit, as the case may be, who is or are authorized to carry out the consultations,

(xi) set forth the postal address and the facsimile number of the authority or unit to which the reply and other written communications are to be sent,

[Rule 6 continues]

(xii) indicate whether the reply to the invitation may be made within a period other than the two-month period referred to in Article 3(2) and, if so, what that period is,

(xiii) indicate whether the date to be offered for the consultations may be within a period other than the three-month period referred to in Article 3(2) and, if so, what that period is.

Rule 7

Content of the Reply

The reply to the invitation to enter into consultations, referred to in Article 3(2), shall

(i) state the name of the State or the intergovernmental organization that is the sender of the reply,

(ii) identify the invitation in respect of which the reply is being sent,

(iii) state which of the facts and legal grounds in the invitation are admitted or denied, and on what basis,

(iv) state what other facts and legal grounds are relied upon,

(v) specify a date on which the sender of the reply proposes that the consultations commence,

(vi) indicate the place where the sender of the reply proposes that the consultations be carried out,

(vii) identify the authority in the State or the unit in the intergovernmental organization, as the case may be, which is competent, on behalf of the sender of the reply, to enter into the consultations,

(viii) designate the official or officials of that authority or that unit, as the case may be, who is or are authorized to carry out the consultations,

(ix) set forth the postal address and the facsimile number of the authority or unit to which written communications are to be sent.

[End of Rule 7]

Rule 8

Channel and Mode of Communication of the Invitation and of the Reply

The invitation to enter into consultations, referred to in Article 3(1), and the reply to that invitation, referred to in Article 3(2), shall be

(i) addressed, in the case of a State party to the dispute, by or to the Minister for Foreign Affairs of that State and, in the case of an intergovernmental organization that is party to the dispute, by or to the executive head of that organization;

(ii) sent, through a postal or delivery service or electronically transmitted, to the addressee referred to in item (i), above; in respect of a reply to an invitation to enter into consultations, the reply shall be sent to the place indicated in that invitation.

Rule 9

Place of the Consultations

The consultations shall be carried out at the place proposed by the addressee to whom the invitation to enter into consultations has been sent, unless the sender of that invitation objects to that place. In the event of such an objection, the consultations shall be carried out at such other place as may be agreed upon by the parties to the dispute. In the absence of such an agreement, the consultations shall be carried out at the headquarters of the Organization.

Rule 10

Languages of the Consultations

The consultations shall be carried out in the language or languages agreed upon by the parties to the dispute. In the absence of such an agreement, each party to the dispute may use the language it prefers, provided that it furnishes interpretation from that language into a language designated by the other party to the dispute, if the latter requests such interpretation.

[End of Rule 10]

PART E

Rule Concerning Article 4 of the Treaty

Rule 11

Good Offices, Conciliation or Mediation of the Director General

(1) [The Request] The request for the good offices, conciliation or mediation of the Director General, referred to in Article 4(1)(b), shall

(i) be addressed to the Director General,

(ii) state the name of the State making the request,

(iii) state the name of the other party to the dispute,

(iv) state that the request is being made with a view to initiating the good offices, conciliation or mediation of the Director General pursuant to Article 4(1)(b) of the Treaty,

(v) contain an allegation that an obligation relating to a matter of intellectual property exists and that the other party to the dispute denies the existence of that obligation or that it has breached that obligation,

(vi) indicate the source of the obligation by referring either to the provision or provisions of any source treaty, or to a generally recognized principle of law concerning or applicable to intellectual property that is the basis of the obligation,

(vii) describe the matter or matters of intellectual property in respect of which the obligation relates,

(viii) specify the facts that demonstrate the denial or the breach of the obligation,

(ix) state any other legal grounds in support of the alleged existence or breach of the obligation,

(x) identify the authority in the State making the request which is competent to take part in the procedure of good offices, conciliation or mediation,

(xi) designate the official or officials of that authority who is or are authorized to be contacted in the course of that procedure,

(xii) set forth the postal address and the facsimile number of the authority to which written communications are to be sent.

[Rule 11 continues]

(2) [Transmittal of Copy of the Request to the Other Party to the Dispute] The Director General shall send to the other party to the dispute a copy of the request referred to in paragraph (1) and invite the said party to respond to that request.

(3) [The Response] The response of the other party to the dispute to the request referred to in paragraph (1) shall

(i) state the name of the State or intergovernmental organization that is the sender of the response,

(ii) identify the request in respect of which the response is being sent,

(iii) state which of the facts and legal grounds in the request are admitted or denied, and, on what basis,

(iv) state what other facts and legal grounds are relied upon,

(v) identify the authority in the State or the unit in the intergovernmental organization, as the case may be, which is competent, on behalf of the sender of the response, to take part in the procedure of good offices, conciliation or mediation,

(vi) designate the official or officials of that authority or that unit, as the case may be, who is or are authorized to be contacted in the course of that procedure,

(vii) set forth the postal address and the facsimile number of the authority or unit to which written communications are to be sent.

(4) [Date, Place and Languages of the Procedure] The date when, and the place where, as well as the language or languages in which, the procedure of good offices, conciliation or mediation is to be conducted shall be fixed by the Director General in agreement with the parties to the dispute.

[End of Rule 11]

PART F

Rules Concerning Article 5 of the Treaty

Rule 12

Roster of Potential Members of Panels

(1) [Invitation to Nominate Persons] At least two months before the first session of the Assembly, and, thereafter, before each ordinary session of the Assembly, the Director General shall address a communication to the Contracting Parties inviting each Contracting Party to nominate for inclusion in the roster of potential members of panels, to be established by the Assembly, four persons, each of whom may be a national of that Contracting Party.

(2) [Preparation and Submission of List] (a) The Director General shall prepare a list in alphabetical order of all the persons thus nominated as well as twelve persons nominated by him. The list shall be accompanied by a brief description of each person, indicating his nationality, education, service in government, position in industry or status in a profession and expertise in a given branch of intellectual property.

(b) The Director General shall submit the list and the information on each person to the Assembly.

(3) [Establishment of Roster] The Assembly, at its first session, and, similarly, at each ordinary session, shall, on the basis of the list submitted to it, establish the roster of potential members of panels. In establishing that roster, the Assembly may delete from the list submitted to it the name of any person appearing thereon.

Rule 13

Number of Persons from Developing Countries as Members of Panel

Pursuant to Article 5(5)(d), the Director General shall designate as members of the panel the following number of persons from developing countries:

(i) one, in the event that the designation of one member of the panel, or

(ii) two, in the event that the designation of at least two members of the panel,

has not been agreed to or has not taken place in accordance with Article 5(5)(a).

[End of Rule 13]

Rule 14

Summary of the Dispute

(1) The summary of the dispute, referred to in Article 5(2)(b)(ii) shall

(i) state the name of the State or intergovernmental organization that has drawn up the request for a procedure before a panel and the name of the other party to the dispute,

(ii) set forth the obligation alleged to exist or alleged to have been breached that has given rise to the dispute,

(iii) indicate the source of the obligation by referring to the provision or provisions of any source treaty or a generally recognized principle of law concerning or applicable to intellectual property,

(iv) specify the facts on which the alleged denial or breach of the obligation is based.

(2) The summary of the dispute shall be drawn up in accordance with the format indicated in the Guidelines or, in the absence of Guidelines, as recommended by the International Bureau.

Rule 15

Meetings of the Panel

(1) The panel shall fix the date, time and place of its meetings.

(2) At its meetings, the panel shall, subject to these Regulations, designate its chairman, determine the place, languages and procedure to be followed during its proceedings, prepare its draft report, consider the comments on that draft report, made by the parties to the dispute, and adopt its report.

(3) All meetings of the panel shall be in private.

Rule 16

Place of Panel Proceedings

The place of the proceedings before the panel shall be at the headquarters of the Organization, unless the panel determines, in view of all the circumstances of the matter, that another place is more appropriate.

[End of Rule 16]

Rule 17

Languages in Panel Proceedings

(1) Subject to any agreement of the parties to the dispute, and to paragraph (2), the panel shall promptly after its convocation determine the language or languages to be used in the proceedings.

(2) The report of the panel referred to in Article 5(10)(a) shall be prepared by the International Bureau in the language or languages determined by the panel, unless the panel decides, in agreement with the parties to the dispute, that the report shall be prepared in another language, in which case the International Bureau shall prepare a translation in English and in French.

Rule 18

Written Submissions, Comments, Statements and Documents in Panel Proceedings

(1) The panel shall determine the periods of time within which each party to the dispute shall present its written submission and comments on the draft report and within which an intervening party shall present its written submissions.

(2) The panel shall decide which further written statement or statements, in addition to the written submissions, shall be required from any party to the dispute or any intervening party, or may be presented by such a party, and shall fix the period of time for communicating such statement or statements.

(3) The period of time fixed by the panel for any written submission or of any further written statement shall not exceed forty-five (45) days. However, the panel may extend the time limit on such terms as it may deem appropriate.

(4) All written submissions or any further statement or statements shall be accompanied by copies (or, if they are especially voluminous, lists) of all essential documents on which the party concerned relies and which have not previously been submitted by any party.

(5) As soon as practicable following the completion of the written submissions and any further written statement or statements, the panel may hold hearings and otherwise proceed pursuant to its authority under Article 5 and these Rules.

[Rule 18 continues]

(6) If any party to the dispute or intervening party fails, within the period of time fixed by the panel, to present written submissions or any further written statement or statements, or, if at any point any party fails to avail itself of the opportunity to present its case in the manner directed by the panel, the panel may nevertheless proceed, conclude its proceedings, prepare its draft report, invite comments thereon, and adopt its report.

Rule 19

Hearings Before the Panel

(1) The panel may decide to hold hearings for the presentation of oral argument by a party to the dispute or by an intervening party and, upon the initiative of the panel or at the request of a party to the dispute, for the presentation of evidence by witnesses, including expert witnesses.

(2) The panel shall fix the date, time and place of hearings before the panel and shall give the parties to the dispute and any intervening party reasonable notice thereof.

(3) The panel may in advance of hearings submit to any party to the dispute or to any intervening party a list of questions which the panel wishes that party to treat with special attention.

(4) All hearings before the panel shall be in private, unless the panel decides otherwise.

(5) The panel may declare the hearings closed if no party to the dispute or any intervening party has any further written submissions to make or oral arguments to present or proof to offer.

(6) The panel may, upon its own initiative or at the request of any party to the dispute, but before the panel adopts its report, reopen the hearings.

Rule 20

Content of the Panel Report

The report of the panel shall contain

(i) the date on which it was drawn up,

(ii) the names of the members of the panel and of its chairman,

(iii) the names of the parties to the dispute,

[Rule 20 continues]

(iv) the names of the representatives of each of the parties to the dispute,

(v) a summary of the proceedings,

(vi) a finding of the facts,

(vii) a statement of the arguments of each party to the dispute,

(viii) the opinion of the panel, or the opinion of the majority of the panel and the views of the other member or members of the panel, as to whether an obligation relating to a matter or to matters of intellectual property exists and whether the facts found disclose a breach of that obligation by the party to the dispute concerned,

(ix) the reasons on which the opinion is based,

(x) the recommendations of the panel.

PART G

Rule Concerning Article 6 of the Treaty

Rule 21

Reports to the Assembly

The report or reports on the implementation of the recommendation or recommendations of the panel, referred to in Article 6, shall be submitted by each party to the dispute in such form and manner as indicated in the Guidelines or as decided by the Assembly after its exchange of views on the report of the panel has taken place in accordance with Article 5(10)(d).

[End of Rule 21]

PART H

Rules Concerning Article 7 of the Treaty

Rule 22

Request for an Arbitration Tribunal

(1) [The Request] The request for the establishment of an arbitration tribunal, referred to in Article 7(2)(i), shall

(i) refer to the agreement between the parties to the dispute to settle their dispute by arbitration,

(ii) set forth the obligation the alleged existence or breach of which has given rise to the dispute,

(iii) state the facts and legal grounds on which the allegation of the existence or breach of the obligation is based,

(iv) state any other legal grounds in support of the alleged existence or breach of the obligation,

(v) indicate the name of the arbitrator appointed by the party requesting the establishment of the arbitration tribunal and propose the name of the third arbitrator to be appointed by agreement of the parties to the dispute,

(vi) ask the other party to the dispute to proceed with the establishment of the arbitration tribunal,

(vii) identify the authority in the State or the unit in the intergovernmental organization which is competent to take part in the arbitration procedure,

(viii) designate the official or officials of that authority or that unit who is or are authorized to be contacted in respect of that procedure,

(ix) set forth the postal address and the facsimile number of the authority or that unit to which written communications are to be sent.

(2) [The Reply to the Request] (a) The reply of the other party to the dispute shall

(i) state which of the facts and legal grounds in the request are admitted or denied, and, on what basis,

(ii) state what other facts and legal grounds are relied upon,

[Rule 22(2) continues]

(iii) indicate the name of the arbitrator appointed by that party and indicate whether it agrees to the third arbitrator proposed by the other party or propose the name of the third arbitrator to be appointed by agreement of the parties to the dispute.

(b) The reply shall contain also the information indicated in items (vi), (vii) and (viii) of paragraph (1).

(3) [Channel and Mode of Communication of the Request and the Reply] (a) When sending the request for the establishment of an arbitration tribunal to the other party to the dispute, the sender shall also transmit a copy of the request to the Director General.

(b) Rule 8 shall apply, *mutatis mutandis*, to the request for the establishment of an arbitration tribunal and to the reply to that request.

Rule 23

Roster of Potential Arbitrators

Rule 12 shall apply, *mutatis mutandis*, to the invitation to nominate persons for inclusion in the roster of potential arbitrators, the preparation of the list of persons thus nominated and its submission to the Assembly, as well as to the establishment by the Assembly of the roster of potential arbitrators.

Rule 24

Composition of the Arbitration Tribunal

(1) [Arbitrators appointed by the Director General] When requested by a party to the dispute, the Director General shall appoint the arbitrator or arbitrators, in consultation with the parties, from among the persons on the roster of potential arbitrators referred to in Rule 23.

(2) [Presiding Arbitrator] The third arbitrator, appointed by agreement of the parties or, in the absence of such agreement, by the Director General, shall be the presiding arbitrator.

[End of Rule 24]

Rule 25

Time and Place of Arbitration Proceedings

Except if the parties to the dispute agree otherwise, the arbitration proceedings shall

(i) commence at such time as the presiding arbitrator shall decide,

(ii) take place at the headquarters of the Organization or, in view of the circumstances, elsewhere if the arbitration tribunal so decides.

Rule 26

Languages in Arbitration Proceedings

Subject to any agreement of the parties to the dispute, the arbitration tribunal shall promptly after its convocation determine the language or languages to be used in its proceedings.

Rule 27

Conduct of Arbitration Proceedings

(1) [Procedure before the Tribunal] Unless the parties to the dispute agree otherwise, the arbitration tribunal shall determine its procedure, assuring to each party a fair opportunity to be heard and to present its case. In particular, the arbitration tribunal shall determine

(i) the periods of time within which each of the parties to the dispute shall submit its written arguments and rebuttals,

(ii) whether further written statements, documents or other information should be submitted by any of the parties and, if so, fix the period of time for communicating such statement or statements,

(iii) whether, in view of the circumstances, any period of time may be extended,

(iv) whether oral hearings shall take place and, if so, their date and place.

(2) [Experts] The arbitration tribunal may appoint one or more experts to report on specific issues determined by the arbitration tribunal.

[Rule 27 continues]

(3) [The Award] The award shall be made in writing and shall state the reasons upon which it is based.

(4) [Transmission of the Award] The arbitration tribunal shall transmit the award to the parties to the dispute.

Rule 28
Expenses of Arbitration Proceedings

The expenses of the arbitration proceedings, including the remuneration of the members of the arbitration tribunal, shall be borne by the parties to the dispute in equal shares, unless the arbitration tribunal decides otherwise in view of the circumstances of the case.

PART I

Rules Concerning Articles 9 to 18 of the Treaty

Rule 29

Facilities of the International Bureau

The International Bureau shall, at the request of any party to a dispute that is the subject of consultations, good offices, mediation or conciliation, or at the request of the panel before which a procedure has been requested, or at the request of the arbitration tribunal to which a dispute has been submitted, make available, or arrange for, such facilities for the conduct of the consultations, good offices, conciliation or mediation, or the procedure before the panel, or the arbitration proceedings, as may be required, including suitable accommodation therefor, and interpretation, clerical and secretarial services.

Rule 30

Requirement of Unanimity for Amending Certain Rules
(ad Article 11(3))

Amendment of the present Rule of these Regulations or of any Rule that specifies that it may be amended only by unanimous consent shall require that no Contracting Party having the right to vote in the Assembly vote against the proposed amendment.

[End of Rule 30 and of document]