

**Commission on Intellectual Property Rights**

## **CONFERENCE**

***“HOW INTELLECTUAL PROPERTY RIGHTS COULD WORK  
BETTER FOR DEVELOPING COUNTRIES AND POOR  
PEOPLE”***

## **TRANSCRIPT**

**Session 8: International Institutions,  
Rules and Practices, and Capacity  
Building**

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**THE ROYAL SOCIETY  
6 Carlton House Terrace, London SW1Y 5AG**

## **SESSION 8: International Institutions, Rules and Practices, and Capacity Building**

**Charles Clift:** Secretary to the Commission

It is a great honour to have with us to chair this session Dr Supachai Panitchpakdi. As most of you will know, later this year Dr Supachai will become the Director General of the WTO. He has had a very distinguished career. He was previously the Deputy Prime Minister in Thailand and Minister of Commerce and before that he was in the private sector. He was educated at Erasmus University in Rotterdam and also at Cambridge University.

**Supachai Panitchpakdi:** Chair, DG Designate WTO

Ladies and Gentlemen, I have been told that you have gone through some of the difficult debates but very educational instructive debates in the last couple of days. I hope that this session will help to tie-up some of the loose ends from previous sessions. We will be discussing the difficult areas wherein we will find the need for the developing countries and the poor of the developing countries who have to make their own adjustment when they have to accept their commitment with the TRIPS Agreement. As you know, although we have been told of all the good things about the need to protect the IPRs, it is a different story when countries have to put the commitments into practise, to pass law in the parliaments and to explain to their people why their countries are doing these things, sometimes with the misunderstanding that it will be beneficial only for others, the patent holders for example. It will be of great benefit to people like myself to learn what issues the international organisations should be looking at and what could be the most practical ways of transferring the knowledge and the know-how and the capacity that needs to be built up in the developing countries so that they can meet the international commitments. At the same time also meet their development objectives, which are of equal importance. We have five speakers on our panel. I would like to invite Mr Adrian Otten who is a Director of the Intellectual Property Right Division of the WTO to be the first speaker.

**Adrian Otten:** WTO

It is a great pleasure to have been invited to speak at this very interesting conference. I thought it might be helpful to outline the tasks that fall to the WTO and in particular the TRIPS Council on IP matters resulting from the Doha Declaration and then to say a few personal words about how I see the changing approach to North South trade relations in the multilateral trading system and some speculation about why this approach is changing. There are quite a few tasks before the TRIPS Council resulting from the Doha Declaration. We have the task that Francisco Cannabrava mentioned this morning resulting from paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health namely to come up with a solution to the problem of countries with limited domestic manufacturing capacities

making effective use of the Compulsory Licensing System. There are two tasks relating to the protection of geographical indications, the negotiation of a registration system for geographical indications for wines and spirits and work on the extension of the higher level of protection of GIs that presently only has to be given to GIs for wines and spirits to other product areas. There is the review of Article 27.3b relating to patent protection for plants and animals. There is the relationship between the TRIPS Agreement and the Convention on Biological Diversity, which is specifically mentioned in the Doha Declaration. Protection of Traditional Knowledge and Folklore is also specifically mentioned in the Doha Declaration. The ongoing overall review of the implementation of the TRIPS Agreement under Article 71.1, the implementation of the provisions of Article 66.2 of the TRIPS Agreement concerning incentives for the transfer of knowledge to least developed countries. We have been asked to come up with a monitoring system to ensure the effective implementation of this provision by the end of this year. The scope and modalities for non violation complaints, some other outstanding implementation issues relating to the transfer of knowledge and transition periods, electronic commerce, these are the items that fall to the TRIPS Council from the Doha Declaration and one point to make about them is that most of them are items where it is developing countries who are the ones who are seeking action in the items on the agenda in response to initiatives taken by developing countries. In the case of geographical indications it is mixed. We have some industrialised countries and some developing countries. Some points about North South trade relations in the WTO. It does seem to me that when one compares the overall approach to this that was adopted in the Uruguay Round and that which you find reflected in the Doha Declaration there has been quite a substantial change. This is my personal assessment. In the Uruguay Round what was considered to be above all of importance in conducting a round of trade negotiations was that at the end of the negotiations everybody should feel better off with the results, overall, taken as a whole, that they would be better off having the results than not having the results. Also there should be a proper balance of advantage between the participants. The view was that this was a package and that there would be concessions made that in some areas countries might agree to do things, which they might not otherwise want to do for the sake of the overall benefits. I think this approach was applied obviously to the industrialised countries but also to some extent it was the approach governing the treatment of developing countries. I say to some extent because we have always had the notion of non-reciprocity or relative reciprocity in the WTO, so it wasn't entirely applied in the case of developing countries. It seems to me what you have embodied in the approach in the Doha Declaration and in the discussions which led up to it is more of a development test, that is to say that each component of what might be done in the WTO, especially on issues which are North South in essential character has to meet a development test, has to be shown to be positive for the development of developing countries. Obviously, we see this reflected to some extent in the very name that has been attached to this document, namely the Doha Development Agenda, the frequent references to development. I believe there are about 39 throughout the text. It says that the needs and interests of developing countries are at the heart of the work programme that has been adopted. I think that the Declaration on Public Health, even the agenda on TRIPS which I have just outlined, are illustrations of this approach. I see this in the very terms of the debate now in Geneva between our members. On an issue that is seen to be mainly North South in content you won't find an industrialised country saying it thinks it wants this because it is good for the

interests of its producers of its national interest. It will say it thinks this is desirable because it is good for development. The change in the terms of the debate does reflect an underlying reality. I don't want to exaggerate the change, as there has always been an element of this. I don't think national interests are being put completely out of the window that would be naïve. I think this is especially on issues, which have a strong North South component. On issues that are more mixed, like agriculture, I think you will find that the debate is more conducted in traditional terms. There has been a marked shift; there is a strong and very real tendency in this direction. There are probably a number of reasons for this. I have identified two reasons. One is the increased participation of developing countries in the multilateral trading system. We have 144 members; the vast majority of them are, of course, developing countries. I have been with the WTO and the GAT for more than 25 years and we have seen an increasing number of influential developing countries or blocks of developing countries become members and active participants, there was always a certain number. In the Uruguay Round the Andean Pact countries, the Asian countries and Mexico became important participants really on the whole for the first time. Many of them were not previously members. In the work leading up to Doha what we have seen is the much greater influence of the Africans and the least developed countries and they have organised themselves in an impressive way and become much more effective in influencing the way decisions are taken in the WTO and the content of those decisions. Most of these countries were members of the WTO all along, they were participants at the Uruguay Round and you might say why now have they become so much more active and so much better organised in influencing things. No doubt the African countries could themselves give their reasons, but I think one reason is the development of the concept of a single undertaking or an integrated multilateral trading system at the end of the Uruguay Round, because previously under the traditional approach in the WTO many of the rules were adopted on the basis that countries didn't have to sign on to them if they didn't want to. They could pick and choose which agreements to be members of. It was, therefore, possible for a country to be a member of the WTO and to have relatively few obligations that really impacted on it. At the end of the Uruguay Round in 1991 effectively, the decision was taken that we would have this WTO with an integrated system where all the members would be expected to be members of all the key agreements. So that obviously has been one factor in the increased activity of the African countries and the least developed countries in the WTO. No doubt also their increased appreciation of the importance of what the WTO does and their concerns about marginalisation in a globalising economy are also factors. I would also mention that this process is ongoing. As was mentioned earlier today, we have another extremely important new player in the system and that is China, which has just become a member of the WTO. A second factor is the influence of the NGOs or public interest groups. Producer interests, whether in developed or developing countries have always taken an interest in the work of the WTO and have often been close to their governments in influencing government policy regarding WTO matters. In the Uruguay Round there was very little evidence of the interest and influence of what is sometimes referred to as public interest groups, NGOs who have a broader approach or a somewhat different approach, in any event, than the producer interests. I think they really have become quite important actors, or you have become, because many of you are represented here, in the system and I would say in two main ways. One is that they are impacting in a noticeable way on the policies of the developed countries and developed countries now realise that there is a

sizeable and articulate body of opinion within their countries which is concerned about the development of developing countries and that is certainly having an impact on the policies of the developed countries. Also, as Francisco pointed out this morning, they are active in assisting developing countries participate in debates and negotiations in the WTO. There are no doubt other reasons. I believe, for example, that in general, developed countries and their populations have become increasingly conscious of interdependence of peoples and economies for that matter and also there is a developing sense of international solidarity over the years which is also having an impact on these matters.

### **Supachai Panitchpakdi**

The next speaker is Dr Francis Gurry, Assistant Director General and Legal Council of WIPO in Geneva. He is responsible for many activities in WIPO.

### **Francis Gurry: WIPO**

I want to make three broad sets of observations about this topic. The first is that it is an extremely complex topic and I think we have two large terms in the topic that do require some desegregation. The first is the term Intellectual Property. Intellectual Property covers nothing less than rights in respect of technology, culture or entertainment and market identity. These subjects are extremely important subjects but also very complex. Secondly, the term "developing country" itself does require for the purposes of this topic some desegregation. What is well known is that there is incredible diversity among developing countries relating to the size of the population, the size of the landmass, and the size of the economy and the richness of the economy. Take India, for example, with one billion people having 11<sup>th</sup> largest economy in the world and Laos with 5 million people having the 157<sup>th</sup> economy in the world. Naturally there is going to be great differentiation between these countries with respect to the various rights that are comprised within IP. That is borne out. I will give a few statistics with respect to patents alone and not other IPs. When you look at the International Patent Applications that were filed last year from developing countries 85% of those came out of the Asian Pacific Region and 8% from Africa, mainly from South Africa and 6% from Latin America. In terms of actual countries, less than 10 developing countries actually filed more than 10 International Patent Applications last year. For example, with the Republic of Korea filing about 2,300 going down to China with 1,600, South Africa, India and Cuba with 10 International Patent Applications. There has, however, been an increase in the number of International Patent Applications filed out of developing countries over the course of the last 5 years, but it is still only 5% of the total number of International Patent Applications filed. In terms of that 5% it is shared amongst about 10 or 12 countries. Let me now move on from having said it is very dangerous to deal in generalisations, to give two generalisations for the purposes of this topic, how to improve the IP system for developing countries and I would like to address only two areas. They don't reflect my lack of attachment of importance to the many other areas that have been discussed over these past two days, but they have all been discussed and very richly at the conference. The two points that I would like to make is that we shouldn't lose sight of functionality. Functionality is extremely important and it is extremely

important for developing countries, because what we are talking about is IP as an economic and legal policy for translating intellectual capital, which exists richly in the developing countries, into marketable commercial assets. In order to do that then obviously some attention has to be paid to the functionality of the IP system and, therefore, international organisations have to address a significant amount of attention to this very question. Let me give you one example and that is that in the patent area one should pay some attention, of course, to the role of small office. Is it correct that a small country with very limited technological resources should devote those resources to searching and examining patent applications that have already been searched and examined in a number of other countries? Perhaps there are better ways to use those resources in the interests of finding a better use and a more effective utilisation of IP within developing countries. Similarly in the copyright area there is much work to be done simply in cataloguing the representations that are made by Intellectual Property and cultural property in this respect. Moving on to my final remark which is that apart from functionality of course it is also very important that attention be directed to the appropriate resource base for developing countries and one of the most exciting developments that has occurred in the International IP environment over the last few years has been the topic that was discussed at length yesterday, namely the increased attention that is being paid to Traditional Knowledge and the possibility of giving some protection to TK within the IP system. This is very important for the survival of the IP system as a whole, because if there is not significant participation on the part of developing countries within the IP system then ultimately it is going to be very difficult to convince developing countries to pay attention to IP and to provide administrative systems for the protection of IP assets. As far as TK is concerned, I won't go into the work programme of WIPO and indeed, as Adrian Otten has indicated, it is also on the agenda subsequent to the Doha meeting at the WTO. One comment is that I am not quite sure that we are all sure, as yet, as to the objective that we are trying to achieve through the protection or the IP application to Traditional Knowledge. Is it the use value of property to which we are paying attention, is it the exchange value of property to which we wish to pay attention or is it the status value of property and there is a vast universe within TK. For example in the area of protected signs or sacred signs it may not be the commercial exchange value of TK that we are seeking to address through the IP system if indeed that is the way to do it. We may be seeking to preserve a certain status that is associated with those sacred signs. There is, once again, great diversity within this universe of TK and I think that leads to the very important political objective that we must be wary to contain expectations about quick results for IP application to Traditional Knowledge and, indeed, about the expectations of the economic shifts that may result from IP protection of Traditional Knowledge.

### **Supachai Panitchpakdi**

Our next speaker is Mr Rashid Kaukub. Mr Kaukub has worked for the Geneva based South Centre, which is an intergovernmental organisation of developing countries since March 1998. This organisation has been very functional and useful in giving assistance to developing countries in the process of taking part in negotiations on various issues on the individual agenda and not least the agenda that deals with trade and services, agriculture, dispute settlement, even TRIPS and differential treatment.

**Rashid Kaukub:** South Centre

It is a pleasure to speak in this session and thanks to the Commission and its staff for giving me the opportunity to be here today to speak in my personal capacity and not as a representative of the South Centre. There will not be time to go into detail on the 4 points I wish to make. One is the issue of balance and developing country interests, then the situation of developing countries in respect of IP policy and systems, also the participation of developing countries in international standard setting exercises and finally some observations about the capacity building needs and the initiatives in this regard. The general point, and this has been raised over and over again in the last two days and we are quite glad to see that because this is something we have been pointing out for quite some time, that the balance system lacks balance. I would argue that when developing countries demand the restoration of balance and for the development of a fair and balanced system, this demand is also in the interest of all countries, both developed and developing. We need to have a fair and balanced system that will protect the legitimate interests of all stakeholders, whether in the North or the South. Coming specifically to one demand which is that the IP system should not be constructed in isolation but in the context of a national development framework and in conjunction with other economic and regulated policies, such as competition policy, science and technology policy and industrial and trade policies, which is not the case at present. This brings me to my second point, which is the situation in respect of IP policies and systems in developing countries. Try to imagine some circles. The biggest circle is national development framework. Within that we can envisage a much smaller circle, which can be called IP Policy and Laws and within this is a smaller circle with contains IP laws, their administration and enforcement of those laws. These circles and this model are resting on the pedestal on the foundation of national capacity and are linked to the international scene by strings of bilateral regional international agreements. In an ideal setting these circles should rest on the pedestal of national capacity and the smaller circles should remain inside the larger circle. What we are observing in many developing countries these days is that to some of the strings, some international and bilateral agreements, the smallest of these circles, the IP laws their administration and enforcement mechanisms, is being pulled outside of the larger circles as well as away from the pedestal of national capacity. This is certainly neither an ideal nor sustainable situation and that has led to many of the protests, apprehensions and comments that we are hearing now. One can ask what is the reason behind this situation, why are many developing countries in this position now. This brings me to my third point that while there can also be other reasons for this situation, I think one major reason is that the participation by developing countries in international standard setting exercises has not been full and effective. There are several reasons for that and I will mention just two. One is, of course, this huge capacity constraint, the lack of adequate human, technical, financial, institutional resources. The second reason if linked with this first reason, lack of capacity, makes things much worse and this second issue is the issue of process, the way these standard are set in some organisations. It is no secret that in the Uruguay Round only a handful of developing countries were actively effectively participating in negotiations on TRIPS. India is one of them and India did participate quite well. What I have read, which has been written by many Indian authors, is that

even India did not have the capacity to fully analyse all the implications of this provision. If a country such as India did not have that capacity, one can well imagine the situation of much smaller countries. Returning to the issue of process, which I would argue does not always work in favour of smaller countries, let me just address this and offer a very positive and constructive comment, unless we know the problem, unless we recognise the problem, we cannot move to the stage where we can try to address it and solve it. One point related to the process issue is that in WTO the decisions are based on consensus which is a wonderful principle, I am all for it. I don't think anybody could criticise that principle because it means that smaller countries are as powerful as the bigger countries. I will read from the WTO text, Agreement establishing the WTO. According to footnote 1 of Article 9 this principle of consensus based decision making is defined as follows: "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration if no member present at the meeting when the decision is taken formally objects to the proposed decision." Which means that 20 or so countries that do not have any physical presence, any mission in Geneva, will always be part of the consensus. It also means that even those countries that may have missions in Geneva but do not have enough human resources and hence cannot participate in all the meetings will also always be part of the consensus. It also means that even those countries who may be present there but do not formally object for want of timely political guidance from the capital or for want of technical knowledge of the subject, and if they don't formally object at that time, they will be considered to be part of the consensus. This is what I would call the passive definition of consensus and my argument would be, and I think this will be really good for the system, that if we could think of an active definition of consensus it will exist when all the members explicitly agree to one decision. The fourth point I want to make is about the issue of capacity building needs and initiative in this regard. Let me briefly put forward two questions a) whether the capacity building initiative has been designed to enable developing countries to make independent and informed decisions on IP issues or to narrowly implement what will have been decided and b) whether the grant initiatives are designed for ensuring long term capacity for short term compliance. I think these are important questions and my suggestion would be that while looking into this issue the Commission should seriously consider making a recommendation to have independent evaluation of capacity building programmes. I don't want to give answers to these questions without having enough knowledge of the situation but this is certainly an area for further enquiry, and an independent evaluation of capacity building programmes would, I think, go a long way in this regard. It is quite obvious that capacity cannot be built in one day; it has to be a long-term resource intensive involved process. From that point of view and the very issue that we perhaps can try to look into is the modes of delivery of capacity building. Again, some of these modes such as seminars and preparation of model laws and even automation are very good, helpful and do serve a purpose, but do they raise in the long-term and in a sustainable manner the pedestal of national capacity, perhaps not. We need to look beyond these traditional modes of delivery of capital assistance, particularly, in view of the fact that we are also going through the negotiations phase. Faced with the situation of the need for capacity building and some of the current initiatives in this regard and the fact that negotiations are going on at that the same time, perhaps its like asking me and people like me from developing countries, without first giving us the time and the help to build stamina, physical strength and running techniques, to come and compete with Olympic and

world champions with the promise of capacity building assistance that, after completing each lap, there will be a lecture and some papers telling us we need to finish the next lap in three minutes and we had better take longer steps than our legs can afford.

## **Supachai Panitchpakdi**

May I introduce our next speaker, Dr Richard Yung. Dr Yung is the Director of Technical Cooperation at the European Patent Office. He has vast experience having worked at the Patent Office of France, and he was also a Director of the World Intellectual Property Organisation.

## **Richard Yung: European Patent Office**

We welcome the exercise, which is being carried out by the Commission. I have only one regret that we didn't start it 5 years ago, but it's never too late and I really hope that from this first exercise and from the conclusions that the UK Government may take from this work we can move forward, that this debate will continue in particular in the framework of the European Union and of the European Patent Organisation. I will give you my personal views, the views of a Frenchman, and my views on the basis of 12 years of experience of running projects on technical assistance throughout the world. I have four main observations. The first one is a general one, but important for our institutions. IP, as you all know, has now come to the front of the scene. It is a major item of any political debate and any international discussion. Therefore our institutions must adapt to this. IP for many years was a very secretive, very professional, very hidden matter. Our institutions have been built with this spirit and we must now move from the former situation to a new situation where we announce our policies, explain our policies and explain our strategies. And this is a kind of Cultural Revolution in our little world. My second observation, the needs are enormous. I can tell you the EO spends about Euro7 million a year for technical assistance toward developing countries. This is 0.7% of our budget, so we are in the norms fixed by the UN, we are good boys. If you add what the EU spends about 3 to 4 million directly and some of them we implement, if you add the second or third major donor which is Japan, and if you add the programmes of the WIPO you come to an envelope which is roughly 20-25 million Euros a year. This is basically what we put on the table for technical assistance to developing countries. I think that for 80 or 90 countries this is not sufficient. There is a big effort to be done and all developed countries should move in that direction. On the same topic I would stress that there is a great lack of expertise. The expertise exists but our offices and most of the offices throughout the world are now overburdened with applications, we have big backlogs. It is a political priority that we should deal with these backlogs and you can understand why, but then we are in a situation where it is difficult for us to move human resources from the core job, which is examination.... **Tape change** to developing countries and this is a major problem which I face every day. The third observation is that many also exist in all countries in all patent trademark IP systems. This is something that is not always felt but in most of these developing countries fees are paid by the applicants, mainly, often foreign firms, and in most cases that I know these fees, these taxes, cover the

running costs of the local patent trademark system. The real problem is that this money is then diverted to the budget of the Government. This money is considered not as a fee paid for a service rendered to industry, it is considered a tax and the treasury takes it away. Therefore, you have an additional financing problem. So I think one of the recommendations is that money which is paid by industry for Industrial Property Protection should be kept for and used for Intellectual or Industrial Property Protection to improve the system and to invest in the system. The next observation is that there is a big need to have a global approach, both by the developing countries and the donors, whatever countries or organisations, to define what we are trying to do, to have a strategy. In most cases, things just fall apart, it is difficult to get the targets fixed, it is difficult to have coordination of the various donors and either you act as Father Christmas coming with his bag of presents and people will choose, or basically you don't know where your money is going. I think there is an important need of rationalisation. If a country has decided to build a well functioning patent trademark system it takes roughly 10 years. This is the experience we have had, for instance, when we started working with countries of Central and Eastern Europe in 91/92 and these countries with our help have come 10 years after to a situation where, as many of you know, they will join the European Patent Office. You need to plan and think and have a strategy over those 10 years. Next, we need to adapt the legal and technical assistance, which is provided. There is a tendency to develop in many countries a complex search and examination procedure for patents, for trademarks the problem is of less importance. We all know that it takes a lot of money and human resources to be able to run a proper search and examination patent system. We should move towards a system where we encourage the use of search and examination which has been done previously by other organisations and we should concentrate in helping countries to build their own capacity on their own patent documentation which they often don't have, to capture, to organise their national patent documentation and to search in that documentation which is not done elsewhere in the world, because that is the added value they can bring to the system. This means devising systems where you can scan, capture the national patent documentation, or you can put it together first, often it is dispersed and it is very difficult to put together, scan it, organise it in a database and the examiners of the National Patent Office of the local Patent Office then work on that documentation and this is what they bring to their country and also to the world Patent System. We should also concentrate on making patent information available. There are now many systems that are available, allow this and are cheap, for the magnitude Euro 25,000.00 you can build up a good patent documentation dissemination system for a country and these costs will only go down and down. We have also tried to adapt an automation system for the management of patent offices, I wont expand on this but these systems exist. For my last observation I think we should encourage regional cooperation. Of course, we are an example of regional cooperation and I think a successful one, but generally speaking this is one of the ways for the future. It has been noted that Africa has two regional cooperation organisations and although it doesn't solve all the problems, it has, I think, brought many benefits to the countries of Africa who participate in those two systems. In other areas of the world it is difficult, there is very little progress. There is little progress in South East Asia. There are discussions, they are tentative in the framework of Asian, but basically there is no real progress done and this is something we should look into and perhaps discuss again with the countries and this is also true for Latin America where, in fact, no progress has been made, either in

the framework of MERCOSUR or any other framework. This is a pity and I think we should underline the importance of building regional organisations for reasons of cost efficiency, sharing staff etc. Those are the main topics and I will conclude by saying that there is a great need, at least in the framework of the Europe, of the European Union or larger country members of the European Patent Organisation, for further and better coordination of our efforts for having a common policy or a coordinated policy or policies, because there can be different aspects, and there is also a need for further cooperation with the WIPO.

### **Supachai Panitchpakdi**

Our last speaker is Mr Martin Khor, Director of the Third World Network. This is a network of several NGOs in different parts of the developing world. Martin has written so many articles and books that he needs no introduction.

### **Martin Khor: Third World Network**

As the last formal speaker of this Conference I am going to try to give a systemic, holistic view of what we have learned from this Conference and the work of the Commission and also from our own individual knowledge and experiences and also from the last two days. I would like to give a summary of the new situation on TRIPS and go back over the three major problems that we have encountered and what the dilemmas are, look at some of the systemic problems that have arisen that I have also learned a lot from at this Conference and what the possible solutions in terms of principles are and then I would like to cover three sets of proposals. One is a set of proposals by the Third World Network, the second a set of proposals by the Africa Group in the WTO and the third is a very interesting NGO set of proposals on rethinking the TRIPS.

We have gathered here really because a new situation has arisen in the last few years which has been mainly the result of TRIPS. Before TRIPS countries could choose whether they wanted to enter into IP International Agreements and what kind of national laws or policies they wanted to have. They could choose the timing of their entry, the scope and the sectors of protection that they would like to have. After TRIPS we have this situation which some of you have called "one size fits all" or rather a minimum standard, which you can exceed if you want but that minimum standard is a very high standard. It is like having a big shoe that you have to wear and you can wear a bigger size if you want, but you have to wear that big size anyway. Unlike the GATS Agreement in the WTO where countries can pick and choose which sector they would like to liberalise and they have to liberalise progressively anyway, in the TRIPS Agreement you have to take on this big size shoe and there is no exclusion possible in terms of a country saying this year I want to do this sector and next year that sector, etc. Therefore, we have legally binding and strict international standards that countries have to follow whether appropriate or not. This is the problem that we have now encountered. There are three subsidiary problems, I am sure there are many more, but at least these three we seem to have focused on. The first is consumer excess, the second the negative effect on research and technology upgrading in developing countries, and the third is the

ironic situation of the reverse flow of technology from South to North or from communities to companies without being appropriately rewarded and therefore land themselves in a hot soup that one day they themselves may not be able to use their resources. In relation to consumer excess we have been debating the whole issue of medicines, the access to medicines, and a great amount of data has been produced. We in the Third World Network have our own data showing how, with the imposition and the depredation of patents, if a country is not able in future to use genetic drugs, then prices of medicines will rise. We also have data showing how, unlike what one would expect, in many cases the prices of medicines in poor developing countries are much higher than the medicines sold in the rich countries. The solutions in relation to medicines that have been tried so far relate to, as some speaker has eloquently said in another session, spending one or two years debating with the highest body of the WTO what is already granted in the TRIPS Agreement which is that countries affirm that the TRIPS Agreement gives them flexibility and that they can use that flexibility, basically that is what we tried to do in Doha because of the uncertainties and pressures put on countries not to make use of the rights that they inherently have under the Agreement. We know what the case studies contain and countries feelings about this. There is only one line in the Doha declaration in relation to TRIPS and medicines and that is that countries are allowed to assert the flexibility and the rights that they have under the Agreement and no other member should bully them into not asserting their rights. That is what the political story is all about and more needs to be done on the medicines side. Of course, medicine is only one key area relating to access, you also have access to food, access to information, to consumer software etc. The second problem that we have encountered and discussed here is the negative effect that IP has on the upgrading of technology in developing countries and many of us have raised the issue of how, if you look at the history of IP, the developed countries increased their standards only when they became more developed and could then withstand competition or could also give themselves the reward if they patent abroad. In some European countries, patenting took place on some products only recently. For example, pharmaceutical products were patented only in 1967 in West Germany and France, 1992 in Spain, 1979 in Italy. Chemical substances were patented only in 1967 in West Germany, 1992 in Spain etc. The question is why are we asking the developing countries to take on very high standards when they are still at a low level of development. As Carlos Correa, one of the Commissioners, has said in one of his papers, under TRIPS reverse engineering and other methods of imitated innovation that industrialised countries extensively use when they are industrialising shall be increasingly restrictive thereby making technological catching up more difficult than before. I think this is a very major concern that we have in the developing countries. The third area, bio piracy, is well known but there are so many subsidiary issues that have surfaced but have not really been resolved at this Conference. Maybe the Commissioners have gone into greater depths. If we look at Traditional Knowledge and the whole debate we had at this conference, how to reward the TK owners by giving them patents or some other system, or if WIPO could devise a system, the crux of the problem and why the issue has become of so much concern is the appropriation of TK. This is the new situation that has occurred. We know of many case studies on the patenting or the patent applications of thousands of genes, including human genes, the patenting of knowledge and resources of developing countries etc. By trying co-op indigenous people or farmers into the patent system may not be the solution because we may be squeezing Traditional Knowledge and

TK owners with their own system into another system that may be inappropriate. Surely it is better to tackle the problem at source. That is how do we try to stop the misappropriation of biological knowledge and resources, for example, through exclusion of patents, narrowing of patents, requiring prior informed consent forms attached to patent applications in relation to biological resources and knowledge. That prior informed consent form may be linked to a benefit sharing arrangement before any patents shall be granted. These are examples of the possible solutions that could be there to prevent bio piracy. This session is on governance and the international system of changes etc, and in relation to changes which are required, it did occur to me that, at present, we have the following three or four major systemic problems. The first is the high minimum level of IP, one-size fits all is a large minimum size that has been facilitated by TRIPS. Secondly, linked to this there is no distinction between countries with different capacities except different transition periods, maybe a longer one for LDCs and a longer transition period for developing countries, but these transition periods are also coming to an end or have already come to an end. The third is, within TRIPS, a national treatment clause saying you must get patent rights or IP to foreigners as well as to locals. The problem with this is when you open the floodgate to foreign holders then there will be a monopoly or near monopoly of foreigners and big companies of patent applications and actual patents in developing countries. We have seen some of the figures today and we also note that in some developed countries when they were developing they did have a “discriminatory policy” in terms of granting patents to locals whilst discouraging patents from foreigners, which could then give an incentive to local innovation whilst preventing foreign monopolisation. This is not possible under TRIPS. Also, TRIPS does not allow sectorial “discrimination” or a sectorial approach. We have heard from the discussions of the last few days that sometimes you need to make a distinction between sectors because in any country some sectors may be more developed than others and therefore can afford protection or cannot afford protection depending on the sectorial capacity. Given the systemic problems that we have in TRIPS, the following key principles came up during this Conference. Firstly, one size fits all with high minimum standards is not suitable as an international principle that has to be nationally implemented. Countries are at different levels of development and have different capacity. IP levels that are appropriate should be linked to the levels of capacity of specific countries. There should thus be differential treatment, which at the moment does not exist except in transition periods and this should be built into the WTO TRIPS Agreement. There has to be an amendment in the Agreement to allow this differential treatment in order to take account of the reality on the ground where differential treatment is needed for different capacities. This could be done using either the special and differential treatment principle of the WTO or other principles of the WTO. For example, LDCs should be exempted altogether as long as they remain LDCs. Other developing countries should have prolonged implementation periods and the extension could be according to whether or not they graduate into another level of technological development. Secondly, in relation to national treatment, could it be that in some cases developing countries should be allowed to grant IP for locals whilst not entertaining wholesale foreign owned IPRs. I think this is something the Commission could look into, including looking at economic history on this question, how to enable stimulation to local innovators whilst avoiding the monopolisation that may come from opening the floodgate to foreign IP and how could this be incorporated to an amendment in the TRIPS? Thirdly, exclusions that now exist in

TRIPS could be extended for essential products and sensitive areas such as drugs, agriculture, food, etc, sectors that had been excluded by many countries before they joined the TRIPS Agreement. Maximum flexibility should be given to developing countries to choose the scope and coverage of IP according to national interests and conditions. There could be exclusion of life forms from patentability if a country so desires or a consideration can even be made of the proposal by the Africa Group in August 1999 and this proposal is now part of the set of outstanding implementation issues in the WTO that clarification under Article 27.3b review should clarify that all living things should not be patentable and all living processes also should not be patentable. This is in the context of trying to understand the artificial distinction made between microorganisms and other organisms; after all they are all life forms, and microbiological processes and other living processes. Why should one set of processes be compulsorily patentable whilst another set be possibly excluded from patentability? There are specific proposals also in the paper that is on the table, which is under my name. I won't go into details, except to mention briefly the following: Developing countries' transition periods should be extended until after a proper review of TRIPS is carried out, in light of the systemic problems that are now being raised. In implementing TRIPS, developing countries must be allowed the flexibility to choose between different options and capacity building should really be given to them to choose what kinds of different options and what implications there are. So I think the proposal made by other speakers on independent capacity building through technical assistance where a country can choose for itself is very important. Otherwise we are in danger of a brainwashing exercise. Pressure should not be put on developing countries through bilateral means or regional arrangements that are WTO plus. The mandated review of Article 27.3b should be given a high profile just as TRIPS and GATS was given a high profile last year. I think this issue is just as important or perhaps even more important in the long run than TRIPS and health. We could perhaps think of a process towards a ministerial declaration on TRIPS, biodiversity and living things. Countries could also be allowed to exempt environmentally sound technology from patentability. There is a proposal actually in the TRIPS Council in that respect. Finally, in the review of TRIPS overall, as you know, this is mandated under Article 71.1 there is to be a review of the TRIPS Agreement to take into account recent developments, including the need perhaps to amend the Agreement in light of recent developments and recent conclusions from processes such as, for example, this Commission. Under this review process the objectives of the TRIPS Agreement in Articles 7 and 8, are not only of technology transfer but to strike the proper balance between the interests of society, that is the consumer and other producers, and the interests of the IP holders who have been given the privilege, perhaps not the right, but the privilege of monopoly. In the light of these two objectives, we should review the entire corpus of the TRIPS Agreement and see what changes can be made. Finally, during this conference I have already mentioned this point, whether TRIPS should actually belong to the WTO or to some other organisation. By TRIPS we mean an international regime on Intellectual Property and even very famous free trade economists like Bhagwati, who used to advise GAT during the Uruguay Round, have come to the conclusion that it was a mistake, and I agree, for two reasons. First, that the subject matter does not belong to a trade organisation like the WTO, it was put there in order to borrow the Dispute Settlement Enforcement system of the WTO rather than because it really belonged in a free trade organisation. The second worry that also concerned Bhagwati was that if you introduce a non trade issue such as IP into the WTO it could open the

floodgate to other non trade issues entering the WTO such as labour standards, women's rights and even other issues like investors' rights, competition policy etc. and, therefore, it would overload and distort the free trade system from its job of conducting balance and proper trade relations between countries. So more is at stake in the IP issue an IP itself. The trade system and its future and identity are also put into question as we review this whole issue of IP in the WTO.

**Christopher Stevens:** Institute of Development Studies

I would like to make a very modest suggestion for the consideration of the Commission. I think it is evident that this session goes far beyond the issues discussed in previous sessions which came down broadly to the conclusion that a balance needs to be struck between the interests of different parties and that this balance is likely to be different in different sectors and different countries. Because of the introduction of TRIPS under the WTO, we now have the situation that at the end of a transition period, regardless of how that balance plays out in a particular country, that country can be faced with the imposition of trade sanctions for not complying with the TRIPS Agreement. Non compliance need not just mean an unwillingness to fulfil on political commitments made, because, as Rashid Kaukab pointed out, the implementation of the TRIPS Agreement is enormously costly in both financial and personnel terms and I would direct everyone's attention to the last paper in the collected papers for today, which points out how far most of developing countries are from becoming anywhere close to fulfilling their obligations under the TRIPS Agreement. This means that many will be vulnerable either to Dispute Settlement or much more seriously, as we know in other areas, the threat of Dispute Settlement on an issue on which they might not win, which will be enough to cause them to change policies to which the countries threatening object. I don't want to detract from suggestions made by Martin Khor for the need to have substantial revision to the TRIPS Agreement but that is going to be difficult and costly and these are very difficult issues. What I would like to suggest is that at a very minimum we need to have a change that will protect the poorer developing countries from adverse action in Dispute Settlement simply because of their failure to distort their own development priorities by spending a disproportionate amount of money and technical capacity on the system of the Administration of IP Justice. I would like to suggest that one opportunity for doing this would be to borrow from the precedent eagerly put forward by the industrialised countries in the Uruguay Round in the Agreement on Agriculture and that is to have a peace clause under which the members of the WTO would commit themselves not to take to Dispute Settlement any country which met criteria related to their size and international trade or put a cap on the proportion of Government expenditure which should be devoted to the implementation of the TRIPS Agreement. I would have thought that that would be much easier to negotiate than a substantial revision to the TRIPS Agreement and would give the assurance that the poorer countries need that they cannot be bullied by the threat that if you do not do what I want in this area then we will take you to Dispute Settlement and you will have to put up the substantial costs of defending yourself in that forum.

## **Christopher Garrison: MSF**

MSF, as everyone will know, has congratulated the WTO members on the Doha Declaration. It seems extremely important to us that the principles and the features of the Doha Declaration are reflected in other related international organisations and perhaps the first among these is WIPO. A critical issue for MSF is whether the provisions of TRIPS Agreement, in particular after the Doha Declaration, are well reflected in national legislation in particular, of course, in developing and least developed countries. A relevant feature for this session is the cooperation between the WTO and the WIPO in terms of the assistance given to developing and least developed countries in framing their legislation to be TRIPS compliant. I am sure that many of you are extremely sensitive to this issue that options available under the TRIPS Agreement, in particular after Doha, really must be placed openly and transparently before these countries who are facing, in many cases, very grave public health crises and who need the safeguards to be implemented as much or arguably more with greater need than the developed countries who have them. There is still a great deal of misrepresentation about what is allowed under TRIPS and, indeed, what might be acceptable following the Doha Declaration. If I may take a contemporary example, this morning the gentleman from IFPMA indicated in the context of compulsory licensing that a prior negotiation with the rights holder was necessary and if this prior negotiation did not take place then this would be “contrary to TRIPS”. I am sure many of you will know the provisions of Article 31b in the TRIPS Agreement almost by heart. It is a fact that an important qualification to the matter expressed by the gentleman from IFPMA is that this requirement may be waived by a member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. I wish to make a point generally on compulsory licensing that it is easy for the provisions of the TRIPS Agreement to be misrepresented and it is incumbent upon organisations giving advice, such as the joint technical assistance teams from the WTO and WIPO, to make sure that all available options are presented to countries that ask for assistance and that these options are presented in the most appropriate fashion. An extremely important matter for the WTO outstanding from Doha is Paragraph 6, regarding taking advantage of compulsory licensing by small countries also referred to as production for export. We would very much like to put on record that we hope and trust that the Commission will address the case both of production for export to countries who have issued a compulsory licence, which is what is explicitly mentioned in Paragraph 6, but also production for export to countries where there is no patent. You will find outside a joint letter signed by MSF and other organisations addressed to the TRIPS Council in respect of this matter.

## **Dafydd Wyn Phillips: Authors' Licensing and Collecting Society**

Regarding Francis Gurry's presentation, I wish to stress the important role that collective administration can play in promoting and protecting copyright and authors' rights. Last year I attended two conferences in Africa on Authors' Rights and Collective Management and I would like to quote a couple of passages from a paper that was given at one of these conferences by Dr S.O. Williams, Director General of the Nigerian Copyright Commission when he announced in Cape Town in October the establishment of a Literary Collecting Society in Nigeria. I quote “Copyright

protection plays an important role in any nation's growth as an element of cultural development. Copyright is a very significant regime for the advancement of social economic and cultural values of any nation." He finished by saying "The gains of copyright cannot be successfully garnered until an effective authors' society is put in place which will assist in weakening piracy and ensure adequate remuneration for the use of literary works. Copyright remains a crucial instrument for the improvement of the life of authors and the enhancement of national ethos. This is a goal which for us must be achieved."

**Mary Footer:** Amsterdam University

I would like to support Chris Stevens in what he said about applying a peace clause. I was very impressed by Martin Khor's remarks. Perhaps we could also think of introducing a deminimus clause also, something similar to what we have in the field of subsidies already for developing and least developed countries. I would like to suggest that we open up the issue to more public debate within and outside the WTO if possible and it is now nearly 40 years since we added part 4 to the General Agreement on Tariffs and Trade. How about a similar proposal for changing the TRIPS Agreement not fundamentally but adding another section to it and we'll call the year 2004.

**Philippa Saunders:** Essential Drugs Project

My point is the same as MSF's. The TRIPS safeguards were clarified at Doha. The entitlement to use compulsory licensing of drugs offers a mechanism for achieving price competition and is therefore fundamental to the interests of developing countries. Many countries, however, cannot operationalise TRIPS safeguards for resource and capacity reasons as we have heard. Would a solution be for WIPO, WTO and WHO to work together to develop a simple model administrative order, perhaps regionally, working with developing country experts and will not developing countries justifiably feel betrayed if they cannot actually use the safeguards they have won.

**William Haddad:** Biogenerics Inc

The contexts of my remarks today come from two backgrounds. I was the initiator and negotiator for Waxman Hatch, the Drugs Price Competition Act in the US. Also, 18 months ago, a group of us met with Dr Hamied and designed a campaign to reduce the prices of AIDS drugs in Africa. We came to two conclusions at that meeting. One, we didn't have a chance in hell of succeeding and number 2, if the multinational did drop their price that would be a victory. I want to briefly tell you what has happened in those 18 months, very little. The price reduced from 10 to 15 thousand dollars a year in Africa to a subsidisable 350 dollars i.e. 1 dollar a day, which many people cannot afford but it is within the range of subsidy as different from 10-15 thousand. I have worked as a volunteer again in Central America and in the Caribbean, where a dollar a day is something people can pay and still the door is closed. We heard a lot of bull today about patents not being the block for

compulsory licensing. I spend part of the last 18 months in face-to-face meeting with people about compulsory licensing. They don't want to do it. Why? Bilateral pressures from my nation, the United States. Recently Slovenia was warned they wouldn't get into NATO if they didn't go along with the multinationals. Israel was told that they would have repressions against them if they didn't take Bolar out of their legislation. We also hear today that patents don't matter, just disregard that. That is Merck data recycled through Harvard, baloney! When we did Waxman Hatch in the US it was a pragmatic agreement. Very tough, very long and very similar to what you are doing here, the multinationals and the generics, and we realised we had one objective, to get it over with. We gave Pfizer one billion dollars to get off our back. We gave them a one-year patent extension for feldine, a lousy drug just to get them off the battlefield. So you can watch legislation for a sausage being made. We did get it but when we came to the end of these discussions we are going to get deep into TRIPS and beyond TRIPS. Martin Khor, your presentation was terrific. If I could pray, I would pray for what you just said. We may not get there, but it is going to be very pragmatic. Right now in the US Congress, contrary to what happened to Doha....**tape change** the pharmaceutical industry put TRIPS plus in there with no amendments allowed, and that is going across the board, what is done informally sometime is more important than the formality. I want to touch on something that is very important that we missed. I did something very nasty at Oslo. I took the time we spent there and calculated how many people died while we were talking. The other day on public broadcasting I saw a hospice for orphan children, under 5 years of age, who were dying in pain. 70% of those children could have been saved by nevarapine given to the mother and the child. It costs practically nothing and those children are dying in pain. You are the light at the end of the road. This Commission has the ball, and I hope you follow through.

**Ruth Mayne:** Oxfam

I was interested in what Adrian Otten said, the notion that a development test would apply to the new round and I wondered if he and the panel could say more about how that could actually work in practice given the nature of ways negotiations take place in the WTO and also what the WTO can do in relation to the extension granted to the least developed countries given that many actually have pharmaceutical patent legislation, what will they be advising.

**Robin Simpson:** Consumers International

We have members worldwide of consumer organisations and we will be looking at capacity building and having listened for two days about this complex subject it is going to be extremely difficult. I say that with no disrespect to our members worldwide. Many of them are extremely expert in terms of national and local conditions. The problem is the complexity of the subject. It seems to me that the law is actually more complex than the science and I ask you to reflect on that extraordinary thought for the moment. Secondly, Mr Otten's remarks about a shift in emphasis in negotiations, I think there has been a shift but I don't think we should exaggerate it. It has also been present in this Conference. I think Mr Musungu pointed to the enormous difficulties of drafting the ministerial draft declaration for

Doha. It was the only element of the draft Ministerial Declaration that was not fully agreed in draft. It went to Doha in two versions. Not even agriculture entered Doha with such a level of discord and it dominated the proceedings for two days. I was a member of the EU Delegation and in that capacity I was completely useless but it was an extremely educational experience. I don't think we should exaggerate the degree of consensus. Yes, things are shifting but there is still an enormous amount of very tough negotiating positions. One of the things of concern to me in that respect is that the concept of the single undertaking is still alive and well. Single undertaking was introduced in the Uruguay Round really to explain how it worked. Basically, the developing countries on the whole ended up accepting the total package of the Uruguay Round because they thought they could get from the Agriculture Agreement and the Textiles Agreement enough to outweigh the disadvantages of the TRIPS and the TRIMS Agreements. In many ways they were let down even there because the results of the Agriculture Agreement were extremely disappointing, the Textiles Agreement we still have to see its full implementation, but the concept was that where you have a package you have to accept some negatives and some positives. On TRIPS, I agree absolutely with Martin Khor's remarks. Basically, we felt at the time it was about access to the sanctions mechanisms, the Disputes Settlement, we also felt it sat uneasily with the liberalising agenda of the WTO and really wasn't a trade liberalising measure at all. The point that Martin made about national treatment, whether it could be overridden in TRIPS, just to say that there is a precedent for this in the GATS. The Services Agreement has such an override where governments can opt in to not extending national treatment. On the point made about the peace clause, this was agreed largely between the US and the EU in December 1993 in Washington. We condemned it as a carve up between the rich countries really colluding in the dumping practices, but if it good enough for the rich countries then, in this case, it may actually serve the interests of the poor countries and it seems to me a strong moral argument for that. There was a discussion earlier today about the origin of the quotation "Lets kill all the lawyers." The origin of this quotation is Henry IV Part II and the speaker was Jack Cade who was the leader of the pheasants revolt, we have been warned.

### **Adrian Otten**

Some remarks were made about the situation of developing countries not having fully complied with the TRIPS Agreement after the expiry of their transition period. The TRIPS Council has been engaged in a process of reviewing the legislation of developing countries after the end of their transition period and in the Secretariat we did a fairly brief internal examination of the records that came out of that and this was based on the first three quarters of the countries, so it is not a complete sample. According to the way they presented their compliance, they were about two-thirds in compliance. If you take the number of countries, the number of different areas, they had done about two-thirds. A lot had been done, but a considerable amount remained to be done. There has been no Dispute Settlement proceeding instigated or, as far as I am aware, threatened against countries simply needing more time to bring themselves into compliance. We have had a couple of cases as you may know since the end of the transition period, one against Brazil which was settled and one against Argentina which is still in the consultation phase. That wasn't because these

countries hadn't amended their legislation, it was because the complaining party believed they had amended it in a way that was not TRIPS consistent. For countries unable to amend their legislation or do other things that are necessary the emphasis, at least up until now, has been very much on technical assistance to assist them and complete the task. Regarding the retaliation in the TRIPS area we have relatively little experience so far. There have been two cases. One is the banana dispute between the EU Community and Ecuador, where Ecuador was authorised to retaliate in some areas of IP against the community until such time as the community brought its banana regime into compliance, but that matter has now been settled, I believe, between Ecuador and the EU Community. We also have a dispute between the US and EU Community in the copyright area where the Community is asking for authority to retaliate. On the issue of the Development Test, this is really shorthand of what is already in the Doha Declaration, and the Doha Declaration starts out by saying that the needs and interests of developing countries are at the heart of the work programme and if you take the TRIPS paragraph, for example, it says that the TRIPS Council should be guided by the objectives and principles set out in Article 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension. You will find many other references of a similar nature, so I think the concept of something close to a Development Test is already built into the Doha Declaration. This is the way the debate is taking place. We will have to see the result of all this but I do believe that there has been a distinct change in approach to this type of issue. Regarding the status of the single undertaking and the concept of the single undertaking, there has been some discussion in the WTO, especially in the lead up to Doha as to whether the results of negotiations that might be agreed upon at Doha should be implemented on a single undertaking basis, an integrated basis, as in the Uruguay Round and there was a great deal of discussion in relation to some of the so-called Singapore issues, like competition and investment as to whether some kind of opt out system should be envisaged. It was quite interesting that there was a great deal of reticence on the part of many developing countries to envisage going down that road.

## **Rashid Kaukub**

There was an excellent presentation made by Richard Yung in which he made some very good suggestions, which I totally agree with. He had also suggested in terms of the need for capacity building that we should consider allocating all the fees received through IP Offices for the establishment and strengthening of IP infrastructure in developing countries. I know this proposal have been made with good intentions. Nevertheless, I would advocate a little caution here because, although these fees are going into the oral kitty of developing countries, we have to keep in mind the overall budget deficits as well as increasing demands on those budgets for additional expenditure on educations, health and other issues. As the Commission's Chairman has said, this is a horrendously complex problem because if we take the money from the budget for the establishment of IP infrastructure and as a result the money remaining for social services and other services is less that does not really solve the problem. We need to look into this issue in much more depth. I also agree with what has been said by many speakers and I think the idea to have a peace clause, which was put forward by Professor Stevens and supported by Mary Footer, is quite good. If we could have an immediate decision on that it would be wonderful, while in

the meantime you work to restore the balance. If it means negotiating and spending political human negotiating capital such as in the case of the TRIPS and Public Health Declaration for two years, then I would rather spend it on advocating for substantive changes in that Agreement. So I hope we can agree on this fairly soon. Similarly, the deminimous idea is quite interesting and I think that what Martin Khor proposed is in that direction. That is that LDCs, so long as they remain LDCs, do not have to comply with the Agreement and this in essence is what is in the Subsidies Agreement that unless your per capita reaches a certain level the disciplines don't apply to you. That can certainly be looked into.

### **Richard Yung**

If you take Study Paper 9 you have a series of proposals and, I think, if only half of them were implemented they would really make great progress towards the different problems we have all been tackling during these two days. I think they are very practical and they cover most of the issues. On the financial problem, I won't expand too much because this is a touchy problem even in developed European countries and the US. The budget of the USPTO suffers each year a reduction of roughly 10%, \$100 million, which are diverted to other activities. Basically if you take for example, not a developing country or a group of developing countries, those are transition economies, I am thinking of the former USSR. We have helped very much in the establishment of a regional patent system, called the Eurasian Patent Organisation, which covers 9 or 10 of the former Soviet Republics. This is a good regional patent system with a common patent and procedure and the important thing is that after three years it has become self financed and precisely because it could keep most of its resources. This is very important because it gives a perspective, it means this organisation will continue, will live and will improve. That is the idea one must have in mind. If your financing is not assured, if your autonomy is not guaranteed, then you always have a question mark on the future.

### **Martin Khor**

I think a number of the questioners were saying that my proposals were very good and you pray to god that they will come through, meaning that it's wonderful but there is no chance on earth that they will ever go through. TRIPS was an answer to an 80's movement to have a technology transfer agreement where in UNCTAD there was a code of conduct where trans nationals going to developing countries would have to transfer their technology and this was the answer to stopping this sort of thing by putting in an international regime, something that would make the developing countries have to comply. I think it is no secret that TRIPS was actually conceptualised and even drafted by some industries and also advertised by some of these industries in the Economist magazine and other magazines saying how wonderful this whole system was because they helped to draft it. So, what is made by man, and I consciously say man rather than men and women, can also be altered and I think the work of this Commission is one step towards rethinking whether this was suitable. If this Commission had come to light in 1993, perhaps we would have had a different TRIPS or it might have been in another venue. I think we need to see whether things can be improved, undone and redone again in the proper light. As

we have seen, the signs are saying something and perhaps the law does not correspond to the signs and we need to make the law correspond to what is happening on the ground. Just before Doha the Africa Group had a very interesting set of proposals on what they would have liked the main Doha Declaration, not the one on TRIPS and Health, to say on TRIPS. There is also a very comprehensive set of proposals by the NGOs, again before Doha, on what they would like to see changed in the TRIPS Agreement. This is signed by 300 NGOs. It is very detailed and I have given copies to the Commission. Finally on the Development Test that Adrian mentioned. I am glad he brought the subject up. I wish the Doha Declaration were as energetic and enthusiastic about this as he personally interpreted it to be. I hope that the members of the WTO will take that interpretation, but for a Development Test to really work it should mean that if there is a conflict between an existing rule or principle in the WTO or a proposal in the WTO that would seek that countries have to get rid of existing legislation that is trade distorting for example and that also seeks national treatment. If this conflicts against the development needs or consumer needs of a country, e.g. health or development needs such as technology upgrading etc. then the Development Test would say that development is a higher principle which indeed it is in the WTO in the preamble and the other proposal or rule has to give way and has to be amended. If we can go through all the existing rules of the WTO including TRIPS but also agriculture, TRIMS etc and amend them accordingly, in fact the sets of proposals are already there on the WTO table under something called Implementation and if the developed country members would go along with this Development Test the way I have set it out and, of course, you can contradict whether what I have said is the right methodology, then we would be on the road to a proper reform of the WTO into a balanced organisation that would work. This Development Test would also apply to the proposals to extend the WTO in new areas, such as investment, competition and government procurement which, in my opinion, would repeat the mistake of TRIPS that is another "one size fits all" kind of international regime on non trade issues into a trade organisation. It would repeat the mistake of TRIPS. Now, if we apply the Development Test we may well see that those proposals should not be entertained within the WTO. They could be negotiated elsewhere. That is my response to the question raised earlier.

### **Supachai Panitchpakdi**

I wish to thank the panellists for their constructive and useful contributions and to those contributing from the floor.