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Council for Trade-Related Aspects of Intellectual Property Rights
Special Session

MINUTES OF MEETING

Held in the Centre William Rappard
on 16 September 2005

Chairperson: Ambassador Manzoor Ahmad (Pakistan)

Subjects discussed — Page nos.

A. ADOPTION OF AGENDA

1. The fourteenth Special Session agreed to adopt the agenda as set out in WTO/AIR/2637.

2. The Chairman suggested that the Special Session invite the International Bureau of WIPO to be represented in an expert capacity, this being without prejudice to the issue of observer status for intergovernmental organizations.

3. It was so agreed.

B. NEGOTIATION ON THE ESTABLISHMENT OF A MULTILATERAL SYSTEM OF NOTIFICATION AND REGISTRATION OF GEOGRAPHICAL INDICATIONS FOR WINES AND SPIRITS

4. The Chairman recalled he had indicated in his written report to the TNC meeting of July, contained in TN/IP/13, that he would hold informal consultations prior to this Special Session on the steps that should be taken to assist progress in the negotiations. Accordingly, he had been in contact with many Members since the summer break. As he had reported to the TNC at its last meeting of 14 September, these consultations had focused on overcoming the problem that had been impeding work prior to the summer break. At its June meeting, the Special Session had been unable to discuss productively all the proposals on the table because of concerns expressed by some delegations about the relationship between one of the three proposals and the mandate of the Special Session. In his consultations, the main question then had been how to find a way of enabling the substance of each of the proposals as it related to the mandate of the Special Session to be discussed in a productive way.

He was confident that, thanks to the goodwill and cooperation of delegations, Members had found a way forward. To this end, the Secretariat had issued, in document TN/IP/W/12, a note setting out the three proposals side-by-side. This should facilitate comparison of the proposals as they related to those elements that, in the view of the proponents of each proposals, were relevant to the mandate.

5. With regard to the organization of the Special Session's work under agenda item B, he suggested that delegations that so wished be given the opportunity to make any general statements and that the discussion of the proposals on the table, namely the Hong Kong, China proposal contained in TN/IP/W/8, the joint proposal contained in TN/IP/W/10 and the EC proposal contained in TN/IP/W/11, be organized in a systematic way, using the main headings of the side-by-side document TN/IP/W/12.

6. It was so agreed.

General statements

7. The representative of New Zealand said that the Secretariat's side-by-side paper in TN/IP/W/12 was a useful means to encourage discussion of the various proposals currently on the table. New Zealand had taken a constructive approach to the development of this paper, while maintaining the same view taken at the last June Special Session, shared by a large number of Members, that the EC proposal in document TN/IP/W/11 fell clearly outside the terms of the specific wines and spirits mandate for this negotiation. New Zealand was nevertheless prepared to see the EC proposal included in the Secretariat's table, subject to the qualifying language provided in the cover note. While her delegation looked forward to going through the Secretariat's paper heading by heading and to providing specific comments on each element of a proposal, it also cautioned that each proposal came as a package and its individual elements were therefore heavily interrelated; it would be only when each proposal was looked at as a whole that it would actually be possible to assess its impact on Members. New Zealand, and probably other Members as well, would ultimately consider these proposals holistically.

8. The representative of Australia said that his delegation was looking forward to the opportunity to focus the discussion on the specific texts proposed for a register of geographical indications for wines and spirits. It was his delegation's understanding that the side-by-side document only contained the text of those proposals which the proponents accepted as being within the mandate of the Special Session, namely the mandate contained in Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Declaration. He therefore welcomed the fact that all Members agreed to limit the discussions in this way and recalled that such limitation was clearly set out in the cover note of the Secretariat's paper. Although his delegation would already be in a position to make some specific comments and ask questions about certain aspects of the various proposals, particularly in relation to participation and the consequences of registration, it was still going through the documents, and would therefore reserve the right to come back with further questions and points in light of this meeting's discussion. Like New Zealand, his delegation agreed to go through the document issue by issue, but cautioned that, at the end of the day, it would be important to look at the overall shape of any outcome since many of these issues were interlinked.

9. The representative of Canada hoped that the Secretariat's paper would be a useful tool in advancing this Special Session's work. He recalled that his delegation had serious concerns regarding the EC proposal tabled last June, which had placed these negotiations in jeopardy. In this regard, the approach taken by the Chair and Secretariat seemed to offer Members hope on how to move forward. He reminded Members that the co-sponsors of the joint proposal approached these negotiations in the spirit of good faith and in a constructive manner. They supported a proposal that was truly voluntary and cost-effective, had no hidden obligations and facilitated the protection of geographical indications for wines and spirits. Among the various proposals tabled so far, it was the joint proposal that was the

most consistent with the mandate and therefore it should be the basis for moving forward in these negotiations.

10. The representative of Costa Rica said that the EC proposal tabled last June was outside the mandate of the Special Session and that his delegation was showing flexibility by accepting to discuss the annex contained in that proposal. His delegation hoped that these discussions would be limited to the negotiation of a multilateral system of notification and registration of geographical indications for wines and spirits, and would oppose any proposal going beyond wines and spirits.

11. The representative of Japan reiterated his delegation's position in favour of a multilateral system of notification and registration of geographical indications for wines and spirits which would not be burdensome while facilitating their protection. As announced at the June meeting, Japan had decided to be included in the joint proposal group because, as one of the co-sponsors of the initial proposal contained in document TN/IP/W/5, it had come to the conclusion that the new joint proposal was flexible enough to fit various domestic legislations that Members might have in their territories while allowing for voluntary participation. For his delegation, it was extremely important that the negotiations in this Special Session be undertaken within its mandate as set out in Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Declaration. This point had been clearly stated in the cover note of document in TN/IP/W/12. Japan, therefore, supported this document and believed it would function as a catalyst for the substantive negotiations by helping delegations understand the differences between the different proposals.

12. The representative of the United States said that document TN/IP/W/12 had clarified that the mandate of the Special Session was limited to the negotiation of the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits only, and that this document was therefore limited solely to those elements that, in the views of the proponents of each proposal, were relevant to this mandate. With that understanding, the side-by-side presentation of the proposals was a helpful contribution to move these negotiations forward in a constructive manner. His delegation, like many others, was striving to better understand the proposals tabled, in particular what were the intentions of the proponents. This document was helpful in that it highlighted the differences among the three proposals, particularly concerning areas such as participation, the consequences of registration, and fees and costs. It was important that delegations look at these differences and assess how each proposal would impact national systems for the protection of geographical indications, government resources and the global commercial interests of Members' wine and spirit industries. For his delegation as well as others, the objectives of the Special Session should be to establish a multilateral system that was consistent with the TRIPS Agreement and satisfied the mandate. In that light, the system should be one that would be truly voluntary, simple and inexpensive, that would preserve the existing balance of rights and obligations in the TRIPS Agreement, that would respect the territoriality of intellectual property rights for geographical indications, and that would allow WTO Members to continue to determine for themselves the appropriate method of implementing the provisions of the Agreement within their own legal system and practice. These objectives were all satisfied by the joint proposal, which was the only option that met the mandate by facilitating the protection of geographical indications for wines and spirits without imposing additional burdens on WTO Members.

13. The representative of Switzerland said that the negotiation on the multilateral system, which had been conducted for some years, should reach a conclusion. In this regard, document TN/IP/W/12 would help the examination of the various proposals and provide a clearer picture of possible points of convergence and those where more work would be required to identify possible solutions and options for compromises.

14. The representative of the European Communities said, in response to the interventions regarding the issue of mandate, that like other proposals the one his delegation had made in TN/IP/W/11 was based on a reading of the mandate. The implementation of Article 23.4 should result in an effective instrument. Otherwise, why would have Members decided in the Uruguay Round to have had a paragraph 4 in Article 23 of the TRIPS Agreement? His delegation was of the opinion that the other proposals on the table were not sufficient to give effect to Article 23.4.

15. The representative of Chinese Taipei recalled his delegation's position that the discussions should stick to the Doha mandate.

16. The representative of India noted that the Secretariat's paper had been prepared under its own responsibility and without prejudice to positions of Members and to their rights and obligations under the WTO. He also noted the reference to the mandate arising both from Article 23.4 of TRIPS and paragraph 18 of the Doha Declaration. All these involved complex matters. His delegation hoped to learn from all the views that might be expressed during the present meeting, particularly on the implications of each of the proposals and the possibility of synthesising them into an integral approach to fulfil the mandate.

17. The representative of Hong Kong, China said that the Secretariat's document would help focus the discussions in the Special Session. As Hong Kong, China's proposal had been first presented in April 2003 and since then there had been changes in many delegations, he said he would give a brief description of the background and main features of the proposal. He recalled that Hong Kong, China did not have any substantive trade interests in the question of geographical indications. It was only attempting, as an honest broker, to come up with some possible middle ground option to help Members fulfil their mandate under Article 23.4 of the TRIPS Agreement and the Doha Declaration. The proposal had received inspiration from other models of protection of intellectual property rights, like petty patents, utility models and industrial designs, and followed five guiding principles. The first was that Members had a mandate under Article 23.4 of the TRIPS Agreement and that the purpose of the multilateral system was to facilitate the protection of geographical indications for wines and spirits. The second was that, under Article 1.1 of the TRIPS Agreement, WTO Members were free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice. The third was that intellectual property rights were essentially territorial in nature. The fourth was that the system to be established should not impose additional substantive legal obligations or confer additional legal rights on Members. The last principle was that the establishment and maintenance of the system should not impose undue financial or administrative burdens on Members, neither on those choosing to participate in the system nor on those opting out of the system.

18. The representative of Chile said that the Secretariat's paper was useful and also served to clarify the mandate of the Special Session regarding the EC proposal tabled last June in TN/IP/W/11. He agreed with New Zealand and Australia that, while the table would facilitate this body's work, it was only when Members had seen the proposals as a whole that they would be able to assess their actual impacts on them. In this regard, the real impact of the ambition of the EC proposal could be observed comparing its different proposals on the registry, on extension and in the context of Agriculture. In contrast, the joint proposal was the only one that respected the principle of territoriality.

19. The representative of Korea said that the multilateral system of notification and registration of geographical indications for wines and spirits should be non-binding and that participation in the system should be voluntary. Furthermore, as was indicated in the cover note of TN/IP/W/12, the present negotiations should be discussed within the mandate of the TRIPS Agreement and the Doha Declaration.

20. The representative of Thailand said that document TN/IP/W/12 dealt with complex issues and would, together with this meeting's discussions, be examined by his authorities in the capital. His delegation reserved its right to make comments on the paper at the next meeting.

Discussion of the proposals set out side-by-side in TN/IP/W/12

- *Preamble and legal form*

21. The representative of Chile pointed out that the joint proposal was the only one containing a preamble. While he was aware that the results of these negotiations might not technically lead to a treaty, he stressed the importance of preambles in the Vienna Convention on the Law of Treaties, particularly in its Article 31.2, which stated that "the context" for the purpose of the interpretation of a treaty must comprise, in addition to the text, its preamble. He asked Members to read carefully the preamble of the joint proposal and see how it had clarified the mandate as well as the limits and framework in which this proposal was put forward.

22. The representative of New Zealand said that the reason why the co-sponsors of the joint proposal included a preamble in the draft legal text was to provide some useful reminders about the task that Ministers had set for them. The preamble set out some of the most basic premises which underlay this negotiation. First of all, the aim was to facilitate the protection of geographical indications and not to confer additional rights in relation to those notified geographical indications. Secondly and related to the previous point was the premise that the basic balance of rights and obligations under the TRIPS Agreement should not be challenged. Thirdly, the preamble served to remind Members of the fundamental principle in Article 1.1 of the TRIPS Agreement, which enabled all Members to determine for themselves how best to implement the obligations in the Agreement according to their own domestic legal system and practice. While the preamble did not capture the full panoply of principles underlying the joint proposal, such as minimal costs and burdens, it set the basic terms of reference and guiding principles for the register and bedded it firmly in the TRIPS framework.

23. The representative of Australia said that the joint proposal was contained in the form of a decision of the TRIPS Council with a preamble which provided an important context for the decision. The preamble did that by citing the negotiating mandate of Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Declaration and by outlining some of the key features of the register, notably: that the system would facilitate the protection of geographical indications for wines and spirits without altering the substantive rights and obligations of Members under the TRIPS Agreement; and that it should allow Members, consistent with Article 1 of the TRIPS Agreement, to continue to determine for themselves the appropriate method for implementing the provisions of the Agreement within their own legal system and practice.

24. The representative of the United States associated his delegation with the views expressed by Chile, New Zealand and Australia on the importance of the preambular provisions in the draft decision. It was important to have such a preamble to agree on the purpose of the system of notification and registration of geographical indications for wines and spirits. The purpose of the system was not to impose new substantive obligations regarding the protection of geographical indications for wines and spirits, but rather to facilitate the protection based on existing obligations negotiated during the Uruguay Round. The joint proposal preamble reflected that purpose, by emphasizing that the system would not confer any additional rights with respect to geographical indications and that it would not prejudice any rights or obligations under the TRIPS Agreement. It further recognized the right of Members under Article 1.1 of the Agreement to determine the appropriate method of implementing their TRIPS obligations within their own legal system and practice.

25. The representative of India asked the co-sponsors of the joint proposal what would be the consequence of the preambular references on the obligations that were embodied in the operative provisions of the draft decision. For example, while paragraph 2.2 of the joint proposal provided that participation would only be voluntary, paragraph 5 provided that participating Members committed to ensure that their procedures would include the provision to consult the database. How would this reflect the over-arching preambular objective that there would be no obligations arising out of the system proposed in the joint proposal? The proposal provided consequences for participating Members that would not necessarily be limited to what was currently the set of rights and obligations in the TRIPS Agreement.

26. The representative of the European Communities said that it was difficult to consider the preamble of the joint proposal independently of the other headings in the various proposals. The preamble prejudged completely the choice Members might make on participation and other issues. His delegation had used a different approach, which consisted in proposing an annex to the TRIPS Agreement, thus avoiding the need for a preamble and a discussion thereon.

27. The representative of Argentina said that the preamble was a fundamental part of the joint proposal in that it contained assurances regarding the principle of territoriality and the balance of rights and obligations in the TRIPS Agreement as well as other elements such as the format of the results of the negotiations, namely a draft decision by the TRIPS Council. With regard to the comment made by the delegation of the European Communities that the preamble would prejudge consideration of the rest of the text, she asked what kind of format that delegation had in mind when it referred, in paragraph 1 of its proposal, to the system "established by this [instrument]".

28. The representative of New Zealand, responding to the comment made by India, said that, under the fourth tiret of the preamble of the draft decision providing that "the system shall not confer any rights with respect to the geographical indications registered in the system", there would be no additional rights in relation to these geographical indications, the decision-making being left to the national authorities. It would, however, provide a "one-stop shop" for use by those authorities, so they could consult the register and see what was notified or not. The second relevant part of the preamble was the fifth tiret, which said that "the system shall not prejudice any rights or obligations of a Member under the TRIPS Agreement". While recognizing that the Indian delegation was correct in saying that for those Members that had chosen to participate in the system there would be an additional obligation, i.e. to consult the database, she said that this obligation of consultation would not prejudice existing rights and obligations, for example the right under Article 1.1 to choose how to implement the obligations under the Agreement and the right to exercise any of the exceptions under Article 24 at any time.

29. The representative of Brazil said that his delegation also understood that the mandate was to achieve a multilateral system of notification and registration that would be voluntary in nature and would preserve Members' rights and obligations under the current TRIPS Agreement, in particular the flexibilities under Articles 1.1 and 24 of the Agreement. In that regard, the preamble of the joint proposal was important.

30. The representative of India said that the clarification made by New Zealand would be communicated to his experts back in capital. With regard to the point made that Article 1.1 of the TRIPS Agreement was the parameter for obligations arising in terms of territoriality and administration of national IP systems, he raised the following question: if one of the participating Members of the system proposed by the joint proposal did not have, at the national level, a legal obligation to consult the WTO database before making the decision regarding a notified geographical indication, how would the fifth tiret of the preamble and the commitment specified in paragraph 5 work? Would this change in national legislation be entailed in order to incorporate this specific requirement to consult a WTO database or could this Member get away with doing nothing because the preamble said that the system did not add to the obligations?

31. The representative of the European Communities said that India had made an important point. Clearly all the proposals on the table would trigger a number of legal obligations that were not currently specifically provided for in the TRIPS Agreement. However, so far only one proposal, the one made by his delegation, had been accused of going beyond the mandate. In response to Brazil and other delegations, he said that the EC proposal also fully respected the principle of territoriality because it provided for a mechanism whereby some of the exceptions currently provided for in Article 24 of the TRIPS Agreement, notably the one provided for in its paragraph 6, could be exercised, with the other exceptions left freely invocable under domestic law.

32. The representative of Argentina said, in response to the point made by India, that the joint proposal would not, in principle, require changes in the national legislation. With regard to the point made by the European Communities that all proposals would produce legal effects not yet provided for in the TRIPS Agreement, she said that the key difference between the proposals was the fact that under the joint proposal any Member bound by the system, including the obligation to consult the database, would do it voluntarily. A Member would voluntarily notify the WTO that it was ready to participate in the system and would, in good faith, accept the commitment under paragraph 5 of the draft decision. By contrast, the EC proposal would impose legal effects on all Members, independently of whether they had expressed their willingness to participate or not in the system. These legal effects would, for example, deprive national authorities of any flexibility, and reverse the burden of proof, which was provided under the TRIPS provisions on patents but not under those on geographical indications.

33. The representative of the United States disagreed with the point made by the European Communities that the commitment to consult the database would be of a similar nature to that of other proposals, in particular the requirements set forth in the EC proposal. The joint proposal came up with a commitment that fulfilled in good faith the requirements of Article 23.4 of the TRIPS Agreement while at the same time preserving the current rights and obligations under the Agreement. This was the kind of balance that his delegation and others were looking for.

34. The representative of Australia associated his delegation to the view expressed by the United States. The joint proposal group was not saying that there would not be any procedural obligations for participating Members, but as Members would see when entering in more substantive discussion, the differences between the EC and the joint proposal with regard to substantive provisions were quite marked.

35. The representative of Chile said that, whatever legal form an international commitment would take, it would only commit the parties which had committed themselves to be part of that commitment. They would be bound to comply with it in good faith. He asked the delegation of India to clarify the point made in relation to commitments of Members under the joint proposal.

36. The representative of India said that he was not referring to non-violation nullification or impairment but to a violation of the obligation under paragraph 5 of the joint proposal.

37. The representative of the European Communities said that it was unclear to him what was the difference between a legal effect that obliged national authorities to look into a database and a legal effect that consisted of a reversal of the burden of proof under national law, or any other legal effects like the ones in the EC proposal. In his view, these effects might be more or less stringent but were all obligations not specifically provided for in the TRIPS Agreement. He therefore failed to understand the argument whereby a "soft" legal effect would be acceptable and be within the mandate while a more stringent one would not.

- *Participation*

38. The representative of Hong Kong, China said that the side-by-side document TN/IP/W/12 captured the two elements of his delegation's proposal in TN/IP/W/8: in terms of participation Members would be free to participate and notify geographical indications, and in terms of legal effects there would be a rebuttable presumption regarding certain aspects of the registration. However, the registration would only be binding upon Members choosing to participate in the system. In this regard, he drew Members' attention to paragraph F of TN/IP/W/8, which proposed a review mechanism whereby the notification and registration system would be subject to a review, particularly on the question of scope of participation, after a certain number of years from the establishment of the system.

39. The representative of Australia said that the words "in those Members participating in the system" in Article 23.4 of the TRIPS Agreement meant that the system must be voluntary, in other words there could be Members not participating in the system. For this reason the multilateral system put forward in the joint proposal was entirely voluntary and would not impose any legal effects in non-participating Members although it allowed them to have access to the system. By contrast, the EC proposal did not appear to be voluntary at all, given the provision entitled "legal effects in non-participating Members", which would force those Members to lodge reservations in order to retain their rights to rely on certain exceptions that all Members were currently entitled to enjoy under Article 24 of the TRIPS Agreement. He further said that paragraph 1 of the EC proposal appeared to be misleading in light of its paragraph 5. For his delegation, there was no genuine choice in that proposal to participate or not to participate: there was in fact only a choice to not participate in the benefits, but no choice to not participate in the obligations.

40. The representative of European Communities said that it was not surprising that the wording of Article 23.4 of TRIPS and paragraph 18 of the Doha Declaration contained a certain degree of ambiguity given the fact that treaties like TRIPS were so difficult to negotiate. Such ambiguities, in a way, reflected a certain degree of tension between multilateralism and participation. The EC proposal reflected a good faith effort to unravel this tension. The reason why the EC proposal contained legal effects even for non-participating Members related to the fact that the mandate had clearly stated that the system should be "multilateral", as opposed to "plurilateral", a term possessing a precise meaning in the WTO terminology. It should also be clarified that the protection to be "facilitated" was a protection that currently applied to all WTO Members with the exception of LDCs. The issue of participation was directly connected to the value that these negotiations had for the EC delegation: an instrument that would facilitate protection in all WTO Members was not the same as a system that would facilitate protection only in those Members which joined the system, particularly when there were no assurances of which Member would be joining that system. In response to Australia's comment on the choice of benefits and obligations under the EC proposal, he pointed out the legal effects for non-participating Members were less stringent than those set out for participating Members.

41. The representative of Canada said that his delegation had serious concerns regarding the EC proposal with respect to participation. The European Communities seemed to have seriously misread the last portion of Article 23.4, which provided for voluntary participation. In fact, the European Communities had turned the concept of participation on its head. The non-participants would have onerous obligations under the EC proposal but no corresponding enjoyment of benefits. This was absolutely unacceptable. The joint proposal, on the other hand, truly respected the concept of voluntary participation. In fact it went further by allowing non-participants to consult the registry if they so desired. In addition, the joint proposal proposed that there be a written notification of an intention to participate. Canada considered that as a good feature that would eliminate potential confusion in the future.

42. The representative of Brazil said that his country was among those Members holding the view that participation in the system should be of a voluntary nature, meaning that those who would decide not to participate would not be bound by the effects of the Agreement. For that reason his delegation had major concerns with the EC approach, which did not really provide for a differentiation between participants and non-participants. There was no point in discussing a proposal that would provide for obligations to non-participants but no rights.

43. The representative of United States said that his delegation read Article 23.4 as conceiving of a truly voluntary system in which there would be some Members that participated and some Members that did not participate. In that light, contrary to the comment made by the European Communities, he did not believe that the mandate in Article 23.4 was ambiguous. The last part of that provision, regarding Members participating in the system, was actually quite clear. The joint proposal would allow, but would not require, all Members to join the system. As noted by Canada, it would be flexible, as it would allow all non-participants to have access to the information on the database, if they so wished, when making their determinations for protection of geographical indications, trademarks or other related rights. For transparency purposes, the joint proposal included the provision that Members submit a written notification of their intention to participate. By contrast, the European Communities was actually proposing mandatory participation for all WTO Members: the effects of a registration would affect rights with respect to the registered term in all WTO Members, with the exception of the current transition period for least-developed country Members. His delegation failed to understand what would then be the benefits of being a non-participating Member under the EC system. Instead, the result would necessarily be substantial costs for examination, protection and litigation without any corresponding benefits for those that had chosen not to participate. Proposals that would call for mandatory participation remained of serious concern to his delegation as they would be beyond the mandate and would deprive the reference made at the end of Article 23.4 of TRIPS to "Members participating in the system" of any meaning.

44. While acknowledging Hong Kong, China's comment regarding voluntary participation, his delegation had noted with concern that the scope of participation could be reviewed four years after the system had been set up. This would imply that such a fundamental principle as voluntary participation could be subject to review after the system was established.

45. The representative of Switzerland said that document TN/IP/W/12 clearly showed that all three proposals provided for active participation on a purely voluntary basis. With regard to the Hong Kong, China proposal, her delegation had, however, difficulty in understanding why it would be necessary to make a distinction with regard to legal effects between participating and non-participating Members in a system that was truly multilateral, whose purpose was to facilitate protection, and whose legal effects were not to hamper recourse to the exceptions under Article 24.

46. The representative of Australia said that participation was a fundamental issue, in particular for those Members that were not wines and spirits producers, and that the joint proposal left the choice of whether or not to participate to individual Members. His delegation disagreed with the point made by the European Communities that the joint proposal would amount to a plurilateral agreement. Under the joint proposal approach, all Members would participate in the negotiations to establish a system, have access to the system once it was established and, if they so wished, have the opportunity to participate in the system by notifying domestic geographical indications. As had been pointed out by his delegation in previous meetings, the system proposed in the joint proposal would be multilateral in the same way as the multilateral Code of Good Practice in Annex 3 of the TBT Agreement, which was open to acceptance by the standardizing bodies of any Member but was not compulsory for all Members. That was precisely what Article 23.4 meant.

47. The representative of New Zealand associated her delegation to the views expressed by Australia on the fundamental issue of voluntary participation, including on the comparison with the multilateral Code of Good Practice in Annex 3 of the TBT Agreement. She recalled what the joint

proposal really meant when it proposed a "voluntary" system: each Member would make the individual choice of whether or not to participate, and they could do that by notifying their intention to participate. She noted that the Hong Kong, China proposal referred to the system as being "voluntary" while the EC proposal referred to "non-participating Members" and to the right to "elect to participate". In principle her delegation welcomed the idea of voluntary participation expressed in those two proposals. However, as had been indicated by many other delegations, the terms "participation" and "voluntary" seemed to have different meanings to Members. For her delegation as well as others, it seemed misleading that the European Communities referred to "non-participating Members" and then imposed what were clearly onerous demands and obligations on these non-participating Members.

48. The representative of the Philippines recalled that his delegation had co-sponsored an earlier version of the joint proposal, namely the one contained in document TN/IP/W/5, and had held the view that participation in any system of notification and registration should be strictly voluntary in accordance with the TRIPS Agreement and the Doha Declaration. His delegation shared the legal and fundamental policy concerns raised by other speakers that a mandatory system would disturb the balance in the TRIPS Agreement. First, it would impose undue burdens and costs on developing countries while many of them did no have any economic interest in participating in such a system, whether it was voluntary or mandatory. Second, there would be very few, if any, potential geographic indications for wines and spirits that would be of economic interest to the Philippines if a system were set up.

49. The representative of the European Communities said that there was currently one international registration system that had some of the same features as the ones discussed, the Lisbon Agreement administered by WIPO. The TRIPS Agreement had incorporated three treaties by way of reference, the Berne, Rome and Paris Conventions, but not the Lisbon Agreement. If the mandate were to set up a register with legal effects and voluntary participation – and the Lisbon Agreement was of that kind - why had the TRIPS Agreement not simply incorporated that Agreement? The answer was that his delegation, one with direct interest in this matter, had wanted a system that would go beyond Lisbon, and that was why the word "multilateral" had appeared in the mandate.

50. For the supporters of the joint proposal, if there were no benefits to be gained from the register, then the mandate would automatically mean that the register must be voluntary. He wondered whether the delegations making that point could adhere to the principle that a Member not having for example patents would not need apply the patents section of the TRIPS Agreement. This could be a dangerous line of argument, certainly not one endorsed by the TRIPS Agreement and its spirit.

51. The representative of Hong Kong, China said, in response to the comment made by Switzerland, that the basic consideration of his delegation's proposal was that there could not be a system which was labelled as "voluntary" in terms of participation and which at the same time provided additional substantive legal effects on non-participants. For his delegation, either the system was voluntary both in terms of participation and legal effects or it was mandatory both in terms of participation and legal effects.

52. The representative of Argentina expressed support for the points made by other delegations, in particular the concerns expressed by other developing countries regarding a complex system that would add legal and administrative burdens to countries which had no economic interests. She failed to understand the parallel drawn by the EC delegation regarding the Lisbon Agreement. That agreement had set up a fully voluntary system as was the case for other WIPO registration treaties: WIPO members had no obligation to adhere to, or ratify, any of those treaties. She also failed to understand the parallel drawn by the EC delegation regarding patents. The TRIPS section on patents could not be equated to the one on geographical indications. The TRIPS Agreement did not provide that there should be negotiations on an international register for patents or any assessment of the

patent system. She further recalled that the principle of territoriality under Article 1.1 of the TRIPS Agreement also applied to geographical indications. What the European Communities was proposing would generate a precedent, particularly for developing countries. If a system were established with legal effects of such a multilateral character that there would not be any reservations possible, then any WTO Member would be directly bound by the system. This would be a serious precedent for other areas, including those which were particularly sensitive like patents.

53. The representative of Canada said in response to a point made by the European Communities that there was no point in trying to re-write what negotiators had written in their wisdom in Article 23.4. The understanding was clear that the system would be voluntary.

54. The representative of Malaysia said that the notification and registration system must be one with a strictly voluntary participation and without any legal effects on non-participating Members. Therefore, her delegation would have concerns regarding the review clause of the Hong Kong, China proposal, in particular the last sentence, which said that "[i]n particular, the question of scope of participation should be revisited as part of the review".

55. The representative of Chile recalled that the Vienna Convention on the Law of Treaties stipulated that a treaty did not create rights or obligations for any third state without its consent. He did not understand the link the European Communities was trying to make with the Lisbon Agreement, which was a registration treaty and therefore different from the treaties incorporated in the TRIPS Agreement, such as the Berne, Paris Conventions, which created substantive rights. What in fact the European Communities was proposing was a system which would go far beyond the Lisbon and Madrid systems, which themselves were treaties with few members. The EC proposal would therefore create a "super category" of intellectual property, different from the traditional categories of IPRs. He further added that the Lisbon Agreement went much further than the mandate under Article 23.4 of the TRIPS Agreement because it covered all kinds of products. What the European Communities was seeking in these negotiations was to attain more than what the EC negotiators in the Uruguay Round originally wanted, namely to go beyond what was in the Lisbon and Madrid Agreements.

56. The representative of Colombia associated her delegation with the concerns expressed by Malaysia about the review clause in the Hong Kong, China proposal.

57. The representative of Argentina said that the reason for not incorporating the Lisbon Agreement was simply that the European Communities did not have, at the time of the Uruguay Round, any great interest in that agreement. She thought that Article 23.4 had been included in the TRIPS Agreement with the hope of achieving a system that would be, as stated by the European Communities, more effective in international protection because they had not achieved what they wanted with the Lisbon Agreement, namely that the right to determine the grounds for rejecting protection would not be entirely left to national jurisdictions. For example, in the Lisbon Agreement, and contrary to what the European Communities was proposing to the Special Session, there was no mandatory body to resolve differences regarding a geographical indication. Each member State would make the determination according to its own domestic legislation, whether of not it wanted to provide protection. This was an important difference. She agreed with Chile that the Lisbon system had only a few members. A great number of them were EC member States, and some eighty per cent of the appellations of origin registered came from the same countries. Among those developing countries that were members of the Lisbon system, only a few ones had notified a small number of appellations of origin; others, in all the years of existence of the agreement, had not notified even one appellation. Even since the TRIPS Agreement had entered into force and countries had been more familiar with this category of intellectual property, there had not been any increase in registrations. The Lisbon Agreement was not one of the important international agreements WTO Members, particularly developing ones, were interested in joining. This had been the case during the Uruguay Round and was so in the current negotiations.

58. The representative of Mexico said that the fact that the Lisbon Agreement had not been incorporated did no mean that WTO Members wanted a system like the one proposed by the European Communities.

59. The representative of Hong Kong, China said, in response to the comments made regarding the review clause, that the proposal made by his delegation was aimed at overcoming one of the difficulties that the Special Session was facing, namely the different interpretations of the mandate. Some would interpret the mandate as one entailing a completely voluntary system with no legal obligations for non-participants. Others would interpret it as entailing a more mandatory system with some legal effects. Given that that no consensus would likely emerge in the near future, one way to overcome this difficulty was a more incremental approach, namely to set up the system, let it operate for a certain period of time, and then to undertake the review. Under the Hong Kong, China proposal, the review would basically deal with the operation of the system, and one of the suggested elements for review would be the question of participation.

60. The representative of the European Communities said that the EC proposal went beyond the Lisbon system as far as participation was concerned because its purpose was to establish a "multilateral" system, i.e. one that actually apply to all WTO Members, who were already obligated to apply the TRIPS provisions on geographical indications. The value added of the EC proposal was its application to all WTO Members. However, with regard to legal effects, the proposal would be less ambitious than the Lisbon Agreement, which established a system whereby after twelve months from the receipt of the notification of registration members must protect an appellation. After that period, they could no longer invoke any exception. By contrast, the EC proposal left, as a minimum, two alternatives – paragraphs 4 and 5 of Article 24 of the TRIPS Agreement – so that countries could invoke them at any time, and trade activities that had been carried out using the geographical indication before the registration could continue. Furthermore, Lisbon members had to ex officio protect appellations of origin, which the EC proposal did not require. While recognizing that the Lisbon Agreement did not provide for bilateral negotiations, he said that the obligation to enter into bilateral negotiations already existed in Article 24.1 of the TRIPS Agreement, which stated in a mandatory way that "Members agree to enter into negotiations". In line with Article 24.1, what the EC proposal did was to propose, in its paragraph 3.4, a procedural solution for that obligation to be implemented. Bilateral negotiations to resolve differences would not be automatic, they would only occur when a country requested them.

61. The representative of Chile said that the obligation to undertake bilateral negotiations was a difference between the EC proposal and the Lisbon Agreement. He further said that the European Communities had for the first time admitted that there would be legal effects on non-participating Members such as the impossibility of using Articles 22.1, 22.4 and 24.6 of the TRIPS Agreement. In contrast with Lisbon, the EC proposal provided for another strong obligation, the notification of all trademarks involving notified geographical indications.

- *Notification*

62. The representative of Argentina said as a general remark that the notification aspects in the joint proposal were simple. With regard to the body responsible for receiving notifications, what the joint proposal had proposed, namely the WTO, was more appropriate. Her delegation had already said at previous meetings that it would not be appropriate to negotiate in the WTO an instrument which would then be administered by another organization. The WTO had no authority to impose administrative burdens of, or secretariat support to, this system on another organization which was absolutely independent of the WTO.

63. She asked why the EC proposal had proposed two different bodies, the "administering body" in its paragraph 2.1, and the "committee responsible for managing the system" in its paragraph 2.5.

64. With regard to paragraph 2.1(a) of the EC proposal, she noted that it expressly referred to the requirements set out by Article 22.1. By contrast, the joint proposal simply said that the notification "shall ... identify the geographical indication as it appears on wine and spirit goods ...", which corresponded to the definition in Article 22.1. The joint proposal group did not think that it was necessary to add the requirement that the notified term satisfy the definition of a geographical indication. It was within the purview of each Member to determine in accordance with its own national law whether or not a term was a geographical indication in accordance with Article 22.1.

65. In regard to paragraph 2.1(b), it was not clear to her delegation the basis on which the European Communities had proposed the requirement that the geographical indication be protected in its territory and had not fallen into disuse. For her delegation, it was optional for Members to grant protection or not to geographic indications of other Members which did not meet this criteria.

66. The representative of Chile, supported by the representative of the United States, said that paragraph 2.1(b) of the EC proposal seemed to imply that one Member might be entitled to notify any geographical indication which was protected in its territory even if it was a foreign geographical indication. The same comment applied to paragraph A.1 of Hong Kong, China proposal. By contrast, the joint proposal clearly proposed in its paragraph 3.1 that a participating Member "may notify to the WTO any geographical indication that identifies a wine or a spirit in that Member's territory".

67. The representative of the United States said that one of the key principles that had been mentioned earlier in looking at the information that would be contained in any notification was to ensure that all the various systems for the protection of GIs would equally be taken into consideration, for example those under common law, unfair competition law, trademark law, including certification and collective marks, and separate GI registration law. In that light, paragraph 3.1 of the joint proposal required that the notification contain: the identification of the notifying Member; the geographical indication as it appeared on the wine or spirit good in that Member; the identification of the territory, region or locality of the notifying Member from which the wine or spirit was identified as originating; potentially a translation, if applicable, for information purposes only; and whether the indication was for a wine or spirit.

68. Turning to the EC proposal, his delegation noted with some concern certain mandatory elements of the notification, such as the requirement to provide a translation of the geographical indication itself into one of the official languages of the WTO when the language in which the GI was protected in its country of origin was not one of the WTO official languages. This requirement did not appear to be consistent with the basic principle that it was the country where protection was sought that would have the discretion to determine the scope of protection of a geographical indication in translation. In existing intellectual property systems, decisions concerning the protection of translations were generally made by the receiving countries' courts, which would take into account the reaction of their consumers. Yet, in the EC proposal, the scope of the geographical indication rights, including those concerning translations, seemed to be determined solely by the notifying Member. He asked the EC delegation to explain why it had changed such a basic principle of the current intellectual property systems and how this would be consistent with the current obligations under the TRIPS Agreement.

69. Another issue that had been highlighted by document TN/IP/W/12 was that both EC and Hong Kong, China proposals required reference to the legal instrument by which the geographical indication was protected in the notifying Member or potentially a certification under seal from the government of the notifying Member. Fulfilling any of these types of requirements would be difficult and potentially impossible for Members that protect geographical indications through, for example, an unfair competition system or another system where rights were acquired through use. These Members could therefore find it difficult or impossible to obtain protection for their geographical indications under either the EC or the Hong Kong systems. These requirements would therefore discriminate against WTO Members' nationals whose governments had not provided a system similar to an EC

style system protecting geographical indications which would include a government-issued certification.

70. The representative of New Zealand recalled her intervention made earlier about the need for a holistic approach. In that light, the desirability of a minimal or a detailed notification procedure did in great part depend on the legal effects or consequences of the registration. The joint proposal envisaged a very simple notification process whereby each participating Member would be able to notify any geographical indication if so wished. The joint proposal group had in the past drawn on a number of principles which should guide the consideration of what would be an appropriate notification process. First of all, it would have to be flexible enough to deal with geographical indications from all WTO Members, however they were protected, whether through *sui generis* legislation, through collective trademarks or through consumer protection legislation. Secondly, they would have to be cost effective and not be unduly bureaucratic. Thirdly, the system must be transparent and simple. Although that had not been expressly spelt out in their proposal, the joint proposal group tended to support that notifications to the WTO Secretariat use existing WTO mechanisms, such as the Central Registry of Notifications (CRN). That would provide a familiar, simple and transparent approach. By contrast, others had been advocating a more complicated model such as the Lisbon Agreement. With regard to the content of the notification, the joint proposal adopted a simple approach and stuck to the mandatory notification of the essential information needed to identify the geographical indication.

71. With regard to the EC proposal, she said that her delegation shared the concerns expressed by Argentina and the United States about certain mandatory elements of the notification in paragraph 2.2, such as translation, notably in terms of the impact it might have on Members' rights under Article 1.1 of the TRIPS Agreement.

72. Turning to paragraph A.2(a) of the Hong Kong, China proposal, she asked what "details of the geographical indication" had been envisaged, and whether that would be entirely discretionary. With regard to paragraph A.2(b) of Hong Kong, China proposal, she asked who would be notified as the owner of the geographical indication, given the collective nature of this category of right.

73. The representative of European Communities said that certain provisions submitted by his delegation under "notification" were copied from the draft text that had been presented by the former Chair in 2003 in document JOB(03)/75. It was in that framework that the idea of an "administering body" had been first presented, the reason being that some delegations, including his, had showed willingness to consider whether organizations other than the WTO Secretariat, such as WIPO, with experience in this area, could take care of the management of the system. Paragraph 2.1 of the EC proposal accordingly reflected this particular idea. He noted that footnote 2 of the Hong Kong, China proposal suggested that "consideration may be given to whether other suitable international organizations should be charged with the responsibility of operating the system". He expressed his delegation's willingness to consider, beside the WTO Secretariat, WIPO as one possible body to administer the system.

74. In regard to paragraph A.3 of the Hong Kong, China proposal, whereby the administering body might limit the number of applications to be processed each year, he reiterated his delegation's willingness to explore that avenue if the issue of the number of notifications continued to be of concern to other Members. His delegation was mostly interested in having an efficient register and not making it collapse by an excess of notifications.

75. The EC delegation would also be ready to consider the possibility of having notifications made directly by producers, as had been floated at previous meetings.

76. On Argentina's point as to who under paragraph 2.1(a) of the EC proposal would determine whether a given indication met the definition of Article 22.1 of the TRIPS Agreement, he agreed that it was the national law of Members that would apply, and that the EC draft paragraph would be modified accordingly to dispel any concerns.

77. With regard to the questions raised by Argentina and Chile on paragraph 2.1(b) of the EC proposal, he said that this draft provision was the best attempt to transpose Article 24.9 of the TRIPS Agreement without, however, including the words "country of origin". The omission of those words did not imply any attempt by the European Communities to notify geographical indications of other countries. On the contrary, it simply reflected the fact that there were systems of geographical indication protection which were being managed by a regional entity, like the European Union, as opposed to individual countries such as Spain, France and Italy. The term "country" would not fit the EU system. He was confident that there would be a way to accommodate both the concerns expressed and the specific problem of his delegation with the term "country".

78. With regard to the question of translation in paragraph 2.2(b) as one of the mandatory elements of the notification, he said that there was no hidden attempt to cover any interest. The draft provision took up an idea put forward in the former Chair's draft text of 2003 which was to avoid that the Secretariat had to undertake the translation from all the languages used by WTO Members that were not the WTO official languages. In a way, those having as an official language one of the WTO languages would have an unfair advantage. His delegation would be ready to address the concerns expressed.

79. His delegation agreed with the comment made by the United States on translations of notified geographical indications. Clearly, nothing in paragraph 2.2(b) of the EC proposal should be read or interpreted as binding in any way domestic authorities in determining what would be the proper translation of a notified term. If the language used in that proposed provision, which was the one used in the former Chair's paper of 2003, was considered by other delegations as ambiguous, his delegation would be ready to explore any alternative language.

80. On the standard form to be adopted, he said that it seemed a bit excessive to provide, as in paragraph 3.4 of the joint proposal, that any changes or adjustments to the form would have to be approved by the TRIPS Council. It would seem to his delegation that a more flexible approach could be taken on that particular issue.

81. The representative of Australia said, after having heard the European Communities' clarifications, that her delegation's understanding was that a Member would not be required to protect terms in translation notified by other Members that it did not consider were the true translations of these terms in its territory. She asked clarification regarding the role of a Member in continuing, in accordance with the principle of territoriality, to determine for itself whether a geographical indication fitted within the Article 22 definition and was therefore eligible for protection in its territory. Her understanding from the response given by the European Communities on a comment made by Argentina was that Members would continue to have the right to determine whether a term was a geographical indication with respect to their own territories. In this regard, the EC response appeared to relate only to notifications Members would make of their own geographical terms. However, as indicated by paragraph 3.2 of the EC proposal, the right of Members to make their determinations regarding the geographical indications of other Members would actually be severely limited by the requirement for lodging reservations within 18 months and for entering into negotiations. By not lodging such reservation within that prescribed time a Member would actually, under paragraph 5(a) of the EC proposal, lose its right to refuse protection on the ground that the geographical indication did not meet the definition in Article 22 of the TRIPS Agreement in its own territory.

82. The representative of Costa Rica said that for the joint proposal group the notification should be sufficiently simple to avoid unnecessary costs or burdens.

83. His delegation shared the views expressed by Argentina and Chile regarding paragraph 2.1(b) of the EC proposal on protection in the country of origin. Contrary to the explanation given by the EC delegation regarding the regional character of the EU, he said that there was no confusion possible under the joint proposal because the origin of geographical indications for wines and spirits would be but that of the geographical indications originating in the territory of the "Members". The European Communities being equally a "Member" of the WTO, he failed to understand the justification given by that delegation. In that regard, he was of the view that the wording in the joint proposal was more appropriate.

84. Finally, he said that there must be a specific indication that the system would relate to geographical indications for wines and spirits only. This specific reference had been made both in the Hong Kong, China proposal and the joint proposal, but not in the EC one.

85. The representative of Chinese Taipei asked the EC delegation whether Members would retain the right to review the notification of a geographical indication in accordance with the principle of territoriality or whether the European Communities was proposing that another body take over that right. For example, under paragraph 2.1(b) of the EC proposal, who would decide that a geographical indication had not fallen into disuse in the notifying Member's territory?

86. He further asked clarification regarding the terms "suggested translations" in paragraph 2.3(a), which his delegation understood as a voluntary provision: would such translations have the same effect as the translations under paragraph 2.2(b), which was a mandatory provision?

87. The representative of Argentina recalled that the Chair's draft text mentioned by the EC, JOB(03)/75, was a paper submitted in 2003 by the former Chair under his own responsibility and without prejudice to the positions of Members, and that it had never been agreed by the joint proposal group as a basis for negotiation.

88. She said that, unlike the joint proposal, which had clearly proposed the WTO Secretariat as the administering body, paragraph 2.1 of the EC proposal mentioned between square brackets the "body administering the system". It would have helped delegations better understand the EC proposal if the administering body were clearly identified.

89. She said that the clarification given by the EC delegation regarding paragraph 2.1(b) of the EC proposal was not satisfactory and that Chinese Taipei had posed a pertinent question in light of the fact that under the EC proposal all the requirements for notification and registration would have effects on national courts. The proposed paragraph 2.1(b) would actually be a limitation to the flexibility Members enjoyed under Article 24.9 of the TRIPS Agreement to continue to protect or not geographical indications that were no longer protected or had fallen into disuse in the countries of origin.

90. With regard to paragraph 2.2(c) of the EC proposal regarding legal instruments, her delegation reiterated its concerns. The proposal made was not acceptable because it included not only national legislation but also bilateral, regional or other multilateral agreements. As to the second part of that paragraph dealing with legal instruments already notified to the TRIPS Council, she said that it was not necessary to include notifications that had already been made by Members in the context of the notification of national laws.

91. She said that the joint proposal foresaw, in its paragraph 3.3(a), the optional possibility of providing information concerning the date of protection or expiry of protection whereas under the EC proposal that would be mandatory.

92. She asked the EC delegation clarifications concerning the sub-title "substantive conditions" and the consequences if the requirements were not fulfilled.

93. Turning to the optional elements in the notification phase of the EC proposal, she asked what would be the scope of translations under paragraph 2.3(a) of that proposal, and for whom these translations would be intended.

94. With regard to format, she recalled a previous comment she had made regarding the "committee responsible for managing the system". What was being proposed by the European Communities seemed to be a strong administrative structure, if not some sort of supranational body. Who would be the members of this committee? Apparently, this committee would not be the TRIPS Council, otherwise it would have been mentioned.

95. Lastly, with regard to the paragraph 2.6 of the EC proposal, she said that the procedure of circulation or publication of the notification prior to registration was relevant only to the registration model to which the European Communities aspired. This provision was important because it would unleash the entire procedure of "reservations", which was related to the issue of legal effects claimed by the European Communities. By contrast, the joint proposal required that publication should be done only once and after registration.

96. The representative of Hong Kong, China said that his delegation did not have any rigid idea in mind regarding the issue of name and contact details of the owner of the geographical indication in paragraph A.2(b) of its proposal. Basically, there should be flexibility regarding these elements to take account of the different systems used by Members to protect geographical indications. The name identified could be for example that of a commune or of a regional body. The details of the geographical indication to be notified as indicated in paragraph A.2(a) had been placed between brackets, and were illustrative in nature. Basically, the onus would be on the notifying Member to provide as much information as possible for information purposes because at the end of the day the registration would serve to provide information, for example if that particular geographical indication was the subject of a judicial proceeding or a dispute in some other domestic legal proceeding. It would therefore be in the interest of the notifying Member to include as much information as possible.

97. The representative of Canada said the European Communities was proposing a system that would require all Members to review each and every wine and spirit geographical indication that would be notified. All Members, including developed and developing countries, whether or not they participate in the registry, would be required to establish expertise and capacities to examine the geographical indications and to file objections if they wanted to retain their reservation rights. His delegation's concerns about the EC proposal were actually based on Canada's experience with the European Communities under a bilateral wine and spirit agreement. During its wine and spirit negotiation with the European Communities, Canada had had to review approximately 10,000 names. This had been a significant drain of resources, especially when only some 1,500 of those names were ultimately retained. If this were to be applied in the context of the WTO, where countries would be required to go through a similar exercise but under tight time constraints, the resource and cost implications would be unimaginable.

98. His delegation had concerns regarding paragraph 2.3 of the EC proposal on additional or other information that the notifying Member might consider useful. In some instances the amount of information that a notifying Member would consider useful could increase significantly the burden of the WTO Member reviewing information. Furthermore, his delegation failed to see the relevance of providing additional information relating to the bilateral, regional and multilateral agreements under which a geographical indication was protected since such agreements only bound the parties. For example, if the European Communities and Canada had agreed to protect "Champagne", third countries had no obligation to take this type of information into account.

99. The representative of the European Communities said that the EC proposal was fully respectful of the principle of territoriality. This was clear from paragraph 2.1(a) and from the paragraphs dealing with reservations. He confirmed the understanding that under the principle of

territoriality it would be up to each WTO Member to decide whether certain names met the definition or not as far as its territory was concerned. Paragraph 2.1(a), which provided that each participating Member was entitled to notify a geographical indication which met the requirements of Article 22.1, implied that it would only be with respect to its own territory. However, if it would help meet those concerns that had been expressed, his delegation could think of adding at the end of paragraph 2.1(a) the words "in its own territory".

100. His delegation would be also ready to consider adding at the end of paragraph 3.2(a), which dealt with reservations, the words "in its own territory".

101. Turning to Chinese Taipei's question, he said that WTO Members would preserve the competence to examine the different applications and neither the WTO Secretariat nor any administering body or committee would substitute that national prerogative. It would be up to the national authorities to decide whether a geographical indication would be protected in their territory or not.

102. As regards the point raised by Costa Rica, he said that his delegation was ready to explore ways and means to ensure that it would not be possible for a Member to notify the geographical indication of another Member.

103. With regard to the issue of "legal instrument", he said that it would not necessarily be a question of repeating what had been notified by WTO Members in the TRIPS review or under Article 24.2 of the TRIPS Agreement but more a question of identifying under which precise instrument a particular geographical indication had been notified. The use of the terms "legal instrument" had the advantage of flexibility and could encompass laws, regulations, courts decisions, regional agreements like the Bangui Agreement or Decision 486 of the Andean Community. However, his delegation was open to any other alternative term that could cover all the different ways of protecting geographical indications.

104. As regards the value of "translations" raised by Chinese Taipei in relation to paragraphs 2.2(b) and 2.3(a), he said that they would not have legal value. The name to be protected was the name in the language of the country of origin, and the final decision regarding what the translation was in a third country would depend on the authorities of that third country. Suggested translations under paragraph 2.3(a) were a way of trying to help authorities know what they had to protect. They would be free to accept it or not. The same applied to paragraph 2.2(b), which was aimed at helping the Secretariat understand what name was being notified.

105. Finally, he said that the comments made by Canada on the number of geographical indications it had to review in bilateral negotiations with the EU were irrelevant to the Special Session. He recalled the point he had made earlier in relation to the proposal put forward by Hong Kong, China regarding limiting the number of notifications per year.

106. The representative of Canada said that the experience of Canada with the number of notifications might be helpful to the Special Session. On the value of translations, he asked whether "Parmesan", the English translation of "Parmigiano", in "Parmigiano Reggiano", would be a name to be protected.

107. The representative of the European Communities said he would not speculate on a decision that would be of the sole competence of the Canadian authorities in the specific case of Parmigiano Reggiano in Canada. As far as the European Communities was concerned, it was up to the competent bodies of the EU to decide so.

108. The representative of Argentina said that, if translations under paragraph 2.3(a) of the EC proposal had no value, she then failed to understand why the European Communities had proposed it. In particular, what would happen if there was a discrepancy between the geographical indication and the translated term? It seemed that reservations could be made only in relation to the notified geographical indication.

109. The representative of the European Communities said that many products bearing certain protected geographical indications were being traded openly in many third countries. He gave the example of "Cognac", which might be sold in certain countries with a different spelling, such as "Coñac" in Latin American countries. The idea of providing further information was meant to help third countries identify the product and because sometimes the geographical indication did not appear in the original language for reasons beyond the control of the right holder, such as labelling requirements. He reiterated that the decision as to translations of a notified geographical indication remained the sole competence of the authorities of the country where protection was being sought and not of the notifying Member.

- *Registration*

110. The representative of Australia said that the process of reservations in paragraph 3.1 to 3.5 of the EC proposal raised a number of questions: the burden this registry would place on Members; the limitations this register would place on Members' existing rights under the TRIPS Agreement, including in relation to exceptions; the implications for IP laws; and, importantly, the workability of the register. Overall, the EC proposal appeared to require Members to pursue reservations regarding, and negotiations on, what had traditionally been private rights to be determined and enforced at the national level in each Members' individual territory. This would go against the well established norm, expressly recognized in the preamble of the TRIPS Agreement, that intellectual property rights were private rights. Geographical indications, like trademarks, were commercial rights, so Members needed to provide a legal framework in which these rights could be sought, contested and defended. However, Members should not be required to lodge reservations and enter into negotiations on behalf of every private interest in its territory that could be affected by the registration of foreign geographical indications, which would be burdensome for Members, whether developing or developed.

111. He further said that the EC proposal limited the existing rights of Members under Articles 22 and 24.6 of the TRIPS Agreement. Currently, a Member was required to protect in its territory geographical indications meeting the definition of Article 22.1 of the Agreement, but was not required to protect geographical indications of other Members when these terms were generic in its territory. However, under the EC proposal Members would have to lodge reservations in order to avail themselves of this right to decline protection on the ground that the term had become generic. To duly substantiate that ground, it would be required to enter into compulsory bilateral negotiations with the notifying Member, if so requested, aimed at resolving the disagreement. This would prejudice existing rights of Members under the TRIPS Agreement, which would be inappropriate in the context of a negotiation to facilitate the existing level of protection for geographical indications for wines and spirits. Who would determine whether a term was or was not generic? How could this be determined through negotiations when such a question was market specific – in other words a territorial matter? This language of the provision on registrations, which talked of resolving disagreements, was therefore misleading, for it was not necessarily the case that by making a reservation a Member would be disagreeing with the notifying Member. Rather, it could be the case that each Member's rights were legitimate and valid under the TRIPS Agreement. For example, a GI could be protectable, but due to the genericness exception of the Agreement, the Member where the term had fallen into common usage could decline to protect it. National courts must remain the ultimate arbiters and the principle of territoriality must therefore remain the basis for the recognition and protection of geographical indications. Despite what the European Communities had said, his delegation continued to fail to understand how the proposed EC system would guarantee that fundamental principle. What

the EC proposal seemed to do was alter the underlying substantive rights and obligations of Members under Section 3, Part II of the TRIPS Agreement by requiring them to negotiate on their ability to make use of existing exceptions for each product, whilst characterizing the negotiations as being in favour of increased protection by reference to the link made to Article 24.1 of the Agreement, a link his delegation had always rejected.

112. He concluded by asking the European Communities for some clarifications. What was the purpose of the negotiations? Why did Members need to lodge reservations and enter into negotiations to exercise certain exceptions, such as the one under Article 24.6 of the Agreement, but not others, such as those in Articles 24.4 or 24.5 of the Agreement? What would be the effect of a reservation not withdrawn at the end of the 18-month period? He would assume that a Member could decline to protect a foreign geographical indication in respect of which it had lodged a reservation, but would like to have this confirmed.

113. The representative of Switzerland, commenting on the Hong Kong, China proposal regarding the formality examination that the administering body would carry out under paragraph B.1 and 2 of TN/IP/W/8, said this was desirable. Her delegation understood that the proposed examination would be a pure formality which would in no way replace the examination which each Member would carry out as to the validity of the geographical indication on its own territory.

114. As to the reservation possibilities proposed by the European Communities in paragraphs 3.2 to 3.4 of TN/IP/W/11, her delegation was of the view that they would call for some substantive examination within the 18-month period following notification. This seemed to be a good idea because it would enable Members who had made these reservations to examine problems related to geographical indications in their own territories. The registry would therefore show the status of the geographical indications of each Member, which would be a useful information for the right holders, for the authorities responsible for geographical indications and for other producers who would like to use these names. Rather than having every interested party carrying out this examination to know whether a geographical indication fulfilled the criteria or was generic, Members would have the information already on the register. In that light, the EC proposal would enable Members to facilitate protection, in contrast with the joint proposal.

115. The representative of Argentina associated her delegation with the points made by Australia on the issue of reservations in the EC proposal. The joint proposal co-sponsors did not see the need to provide for any procedures for conflicts, including a mechanism to resolve differences, in the registration process because these issues should be solved by national courts. The use of the words "Any Member" in paragraph 3.2 of the EC proposal seemed to indicate a blurring of the differentiation made between participating and non-participating Members and that the same legal effects would apply to these two supposedly different categories of Members. The grounds for reservations in paragraph 3.2(a) and (b) of the EC proposal meant that the use of flexibilities given by the TRIPS Agreement and of the sovereign power of States Members within their jurisdictions would no longer be possible. This would therefore imply a renegotiation of rights already acquired by Members during the Uruguay Round. For example, according to paragraph 3.2(a) of the EC proposal, one Member would be able to lodge a reservation to what another Member had domestically defined as a geographical indication, which would be akin to a challenge of that Member's domestic legislation. Furthermore, both would be obliged to enter into negotiations. On the issue of the obligation to negotiate, she asked the European Communities whether the use of the phrase "if so requested by the notifying country" in paragraph 3.4 meant that such negotiations would only be mandatory when they were requested by the notifying Member and not when they were requested by the Member making a reservation. If this were the case, then Members lodging reservations would not have any capacity to request for negotiations. She added that this obligation would require, in fact, a negotiation on how a Member had applied in its domestic legislation the definition of Article 22.1 of the Agreement. This issue was important because it was already possible to predict which WTO Member would be a massive notifier of geographical indications. What would happen when

developing countries presented, for example, reservations and would have to engage in bilateral negotiations? The examples of recent bilateral agreements on intellectual property showed imbalances in this kind of negotiations. In sum, it seemed that this kind of provision was aimed at giving more power to those who already had it to determine the course of a negotiation.

116. The representative of Chile asked three questions to the European Communities. First, why would it be only possible to invoke the exception of Article 24.6 of the TRIPS Agreement during the 18-month period while the other exceptions under Articles 24.4 and 24.5 of the Agreement could be only invoked at domestic level? Second, would Members be able to invoke the Article 24.6 exception on generics at the domestic level after the 18-month period, since a geographical indication, as well as a trademark, could become a generic after that period? Third, why would reservations which would not be followed by bilateral negotiations and be simply accompanied by an annotation referring to the reservation not also have a similar strong effect to that given to non-challenged geographical indications?

117. The representative of the United States said his delegation shared the concerns expressed by Australia and Argentina. As a general remark, he said that the side-by-side presentation in TN/IP/W/12 had clearly highlighted one of the main differences between the proposals on the table, namely reservations, and that the joint proposal was fully consistent with the principles his delegation had previously outlined. Expressing support for the comments made by Argentina on reservations, he added that the joint proposal co-sponsors saw no need for a complex system of defining particular grounds of reservation and consequential effects of such reservations. These consequential effects could include intensive bilateral negotiations. In that light, the EC proposal was somewhat alarming.

118. He further made specific comments on the EC proposal for reservations. First, it appeared to give a Member only one chance to object to a geographical indication at the international level and on limited grounds. Any other objection would have to be made at the national level by domestic producers, trademark owners or others affected that would be taken to the courts by the registered GI owner. It would then be unclear, as had been pointed out by Chile, whether the Member in which the geographical indication was being challenged could even entertain such objections at the national level. Certainly, if a Member had not objected to a geographical indication, it had then waived its ability to object to that geographical indication later and the ability of its domestic producers to object in court proceedings later. The EC proposal's requirement that notified geographical indications would receive an evidentiary presumption would make court proceedings complicated and unpredictable. In such case, the validity of established trademarks, for example, could be suddenly called into question and certainly the ability of trademark owners and other right holders to exercise their TRIPS rights would be significantly curtailed. In this light, the presumptions and effects would be similar in the EC and Hong Kong, China proposals. To illustrate with an example the concerns of his delegation on this issue, he said that in the United States trademark owners were granted an evidentiary presumption upon registration from the US Patent and Trademark Office. This was given only after a rigorous examination regarding prior rights and statutory requirements as well as after a third party opposition period. However, the presumptions that were spelled out under both the Hong Kong, China and EC proposals would appear to grant the same status to the registered geographical indications on the international register, yet with no examination at the national level or no examination for national law criteria or any prior rights. Furthermore, if a Member objected to the registration of a geographical indication, that Member would then be forced into bilateral negotiations with the notifying party where significant pressure would then be brought to bear for that objecting party to work out some kind of deal for this geographical indication. This would be a government-to-government negotiation on what were private property rights and, in that way, it could result in less legal certainty and less transparency than current national systems of protection. Moreover, such negotiations would be resource intensive, with the European Communities as one of the main proponents pressing for protection in the territory of Members having made reservations.

119. It was also disturbing to his delegation that the EC delegation had linked its proposal on bilateral negotiations with those under Article 24.1 of the TRIPS Agreement, which would thereby identify the aim of the bilateral negotiations to be that of "increasing the protection of the individual geographical indications" at issue. All these procedures would potentially enable one Member to mandate protection of a geographical indication in another Member, or in many other Members, curtailing prior valid rights and bypassing Members' national legal regimes.

120. He concluded by saying that, while the EC proposal might provide more protection to EC geographical indications, it would appear to do so at the expense of national trademark and other rights systems of Members. By contrast, the joint proposal continued to focus on, and give deference to, domestic systems of participating WTO Members. It provided information for those domestic systems to make more accurate decisions regarding registrations, thereby effectively facilitating the protection of geographical indications for wines and spirits and fulfilling the mandate given to Members without the need for changing the balance of rights and obligations in the TRIPS Agreement.

121. The representative of New Zealand said that her delegation shared the concerns expressed by Argentina, Australia, Chile and the United States on the issue of reservations. She recalled the features of the joint proposal. It set up a database which participating Members would consult during their own decision-making process in relation to geographical indications. It did not provide for any form of reservation as it did not limit the right for Members to invoke Article 24 exceptions at any time. By contrast, the EC proposal relied heavily on a reservation system as a means of implementing a time-limit on the right to exercise certain fundamental exceptions. In doing so, it upset the balance of rights and obligations contained in the TRIPS Agreement by undermining the rights of Members to exercise the exceptions contained in Article 24 of the TRIPS Agreement. What the EC proposal essentially did was to give all Members, participating or non-participating, an ultimatum every time a geographical indication was notified. There was nothing in the TRIPS Agreement or the negotiating mandate which placed an expiry date on the rights of Members to access these exceptions. The EC proposal would impose a heavy burden on Members: failure by a participating Member or a non-participating Member to lodge reservations within an 18-month time frame would result in onerous obligations. Under the EC proposal the exceptions of Article 24 of the TRIPS Agreement would become cumbersome to exercise and therefore the balance of rights and obligations of the Agreement would be heavily tipped in favour of GI rights holders. She also expressed concerns regarding the administrative costs resulting from such a system of reservations. These would be associated with monitoring GI notifications, engaging in negotiations and, if requested by a notifying Member, notifying the existence of any trademark that contained or consisted of a notified geographical indication.

122. In support of Chile's comment, she first asked the European Communities the basis on which the European Communities distinguished between different types of Article 24 exceptions when the TRIPS Agreement and the negotiating mandate appeared to provide no such basis. Second, after noting that the EC proposal provided for bilateral negotiations upon request by the notifying Member, she asked clarification as to the precise subject of such negotiations. Was the European Communities proposing that an individual Member’s implementation of a TRIPS provision, such as Article 24.6, be subject to negotiations? What did the European Communities expect would be traded in such negotiations? Would Members be expected to trade away legal judgements made by their domestic courts or authorities for example? The EC proposal stated that the EC register proposal ensured that the bulk of the costs generated by the system would be covered by those WTO Members that had notified geographical indications into the system. In relation to costs, how had the European Communities intended to cover the costs incurred in lodging reservations as well as those incurred in bilateral negotiations? Finally, how did the EC proposal enable legitimately interested parties to lodge reservations or submissions in respect of interests in third country markets?

123. The representative of Canada said that his delegation was concerned with the limited 18-month period to review a notified geographical indication and to place a reservation, after which a

Member would lose certain important TRIPS rights. This constituted, once again, an attempt to renegotiate the text agreed in the Uruguay Round, an exercise not part of the present negotiations. Why was the European Communities proposing discrimination between exceptions for Members to place a reservation? What would the European Communities consider would happen with respect to the bilateral negotiations that were proposed? What would be there to negotiate if decisions were to be taken by national authorities under the rule of law? He could not find any other instance where governments were required to negotiate on intellectual property. He recalled again the 10,000 names that Canada had been proposed under its bilateral negotiation with the European Communities, some of which were not geographical indications or were not protected in their own country of origin and others were not even related to wines and spirits. If Canada were to regulate this matter under the EC proposal, it would have had to place approximately 8,500 reservations and be faced with some 8,500 negotiations. Needless to say Canada was deeply concerned about the administrative burdens and other similar issues.

124. The representative of the European Communities said, in response to Australia's question of who would define or decide as to whether certain names were geographical indications or generic, that this was obviously related to the principles of territoriality and sovereignty: in Australia, it would be the Australian authorities and courts which would decide upon those questions.

125. With regard to bilateral negotiations, he said that this issue was not a new one. It was already stated in Article 24.1 of the TRIPS Agreement that "Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23". This sentence clearly meant that if one Member made such a request the other had to accept to engage in negotiations. When a Member filed a reservation regarding a notified geographical indication, this meant that, in principle, that geographical indication was not protected in that Member, but that could be the subject of a negotiation aimed at increasing the protection, as agreed today in Article 24.1 of the Agreement. If, however, the wording used in the EC proposal on this matter seemed to be too harsh, his delegation could certainly replace it by another wording, such as: "Members may invoke at any time Article 24.1 of the TRIPS Agreement". The idea of this provision was to remind Members that they had a choice to always invoke that provision and trigger bilateral negotiations. The reason why the European Communities had proposed that the negotiations be triggered by the request of the notifying Member was because that Member was the one who had an interest in negotiating more protection since it was facing reservations from other Members. This did not mean that other non-notifying Members could not also invoke Article 24.1 of the TRIPS Agreement, since this was something that stemmed directly from the Agreement and had nothing to do with the register. Article 24.1 could be invoked at any time.

126. As to the questions raised on what were the reasons for providing for a reservation system, he said that this stemmed from the fact that his delegation proposed a system with certain legal effects and presumptions, similar to those attached to a trademark registration after its examination. Therefore, his delegation believed that Members should be provided an opportunity to examine whether the notified geographical indications were protected in their territory or not within a period of 18 months. To the best of his knowledge this was one of the longest periods of examination provided by similar international systems of registration. He further noted that providing for reservations in international registration systems was not something new and the Madrid Protocol system, to which most of the countries that were taking the floor at this meeting were members, had a system of reservations or oppositions.

127. As to the question of what would happen if a country made a reservation, he said that there would be no protection for that individual geographical indication in the territory of the country placing the reservation and that this could last forever, for example if the notifying country did not ask for bilateral negotiations, or if such negotiations did not lead to an agreement.

128. To the point made regarding third country markets, he said that the principle of territoriality would apply, meaning that it was up to each WTO Member to decide whether to protect or not in its territory a certain geographical indication, and the system of reservations clearly expressed and illustrated this very idea. This, however, was not a new idea: if a Member or a party in that Member today hired lawyers to seek advice as to the registrability of its geographical indication in every other WTO Member, the lawyers' responses would probably be that that Member or party would gain protection in some individual countries but not in others. That was the way the principle of territoriality always worked.

129. In response to a question about the subject matter of the bilateral negotiations, he said this would be up to the parties to the negotiations to decide. Those Members that had concluded bilateral agreements with the European Communities in the area of wines and spirits might be able to offer some insights.

130. On the question of why the EC proposal had not proposed a reservation system for all exceptions, he said that his delegation would be ready to discuss this idea and that the reasons for not including all exceptions were manifold. First, not all exceptions were "optional" like the ones in paragraphs 4 and 6 of Article 24 of the TRIPS Agreement. These provisions did not carry a compulsory implementation requirement. Indeed, some Members that had made interventions in the present meeting had given up, in the context of bilateral negotiations, their rights to declare under the TRIPS Agreement certain geographical indications of Europe as generic in their territory. The idea of not providing for the possibility of reservations with respect to, for example, paragraphs 4 and 5 of Article 24 of the Agreement was a sign of flexibility on the part of the European Communities. If a Member had failed or "forgotten" to place a reservation because it had thought the term was generic and was thereafter afraid that its local producers would lose the right to use a geographical indication, it would still be able to use paragraphs 4 and 5 of Article 24 of the Agreement to deal with all those cases and avoid having problems with its local industry. For example, a producer from a Member could at any time invoke that he was using a term in good faith before 1994; this Member would therefore be able to continue its local production of a certain wine or spirit which had been using a geographical indication. This feature of the EC proposal was not meant to be a discriminatory measure, quite the contrary. If Members would feel more comfortable including paragraphs 4 and 5 of Article 24 of the Agreement among the cases of reservation, his delegation would be open to discuss this possibility, which would actually be a better alternative for the European Communities.

131. Responding to a point made about annotations in paragraph 3.5(b) of the EC proposal, he said that an annotation meant that there would be no legal effects from the registration with respect to the territories of the Members having made a reservation and not withdrawn it. If Chile's point was to ask, for example, whether it meant that the Secretariat would have to issue a certificate saying that the geographical indication was the object of an international registration and that x, y and z countries had placed reservation, he could agree with this possibility. If Chile was actually suggesting, for example, that these reservations should extend to third countries, he said that that would obviously run against the principle of territoriality.

132. The representative of Argentina expressed surprise at the explanation given by the European Communities regarding the non-inclusion of some provisions of the TRIPS Agreement as possible basis for reservations, particularly the argument that these provisions were "optional". She reminded Members that the real issue discussed on this point was the very existence of exceptions, in other words, the margins of flexibility that were negotiated to safeguard rights of interested third parties. This was the reason why her delegation wanted to reiterate its concern about this whole procedure of reservations, which seemed to be some "engineering project" with the purpose and effect to subtract from national jurisdictions the competences they had in terms of options for implementing the existing flexibilities. Flexibilities in the TRIPS Agreement constituted one of the few gains of developing countries. What was being proposed by the European Communities was a multilateral

system with new rights and obligations. The Special Session was not negotiating a harmonization treaty on geographical indications. That was an important point for developing countries.

133. The representative of Australia said, in response to the comment made by the European Communities that the commitment to enter into bilateral negotiations was not new because it was already agreed in Article 24.1, that, if Members had agreed in the Uruguay Round to increase the protection of individual geographical indications through a register of geographical indications for wines and sprits, then both Articles 23.4 and 24.1 of the TRIPS Agreement would had been in the same article, which was not the case.

134. As to the EC response to the question regarding the justification for the difference in treatment between the various exceptions, she said that it was still unclear how a Member could negotiate on whether or not a term was generic in another market.

135. As to the subject matter of the negotiations, she said that the comment made by the European Communities that New Zealand could get some insights from those Members who had concluded bilateral agreements in the area of wines and spirits with the EU was not appropriate because those agreements involved subject matter that went beyond the protection of geographical indications for wines and spirits.

136. Finally, on the point that Members would retain the right to determine what was and was not a geographical indication in their territories, her delegation failed to understand how the principle of territoriality had been upheld in the EC proposal if it provided that Members would have to engage in negotiations in order to avail themselves of these exceptions.

137. The representative of Canada said that the EC proposed system could impose heavy costs on national administrations and asked the EC delegation to address that issue. He further asked why the EC proposal had not included certain exceptions.

138. The representative of Chile said that, if the European Communities notified a geographical indication and no Member challenged it during the 18-month period, there would be a strong effect in every WTO Member because all of them would have to accept that geographical indication. What would happen if the European Communities had notified a geographical indication and Chile had made a reservation without engaging in negotiations? Would countries be able to invoke the exception of Article 24.6 of the TRIPS Agreement after the 18-month period in domestic procedures. Finally, he asked why the exception on personal names of Article 24.8 of the TRIPS Agreement was also not a ground for reservations in that proposal?

139. The representative of the United States drew Members' attention to two points. First, the comment made by the European Communities that the type of presumption they were proposing was similar in effect to the presumptions that would be granted post-examination by the United States Patent and Trademark Office in trademark examination proceedings only confirmed his delegation's concern that the EC proposal, through its registration and complex reservation system, would indeed grant rights that would essentially bypass national systems. This would potentially have negative effects on existing rights holders. That was also linked to his delegation's concerns about preserving the principle of territoriality.

140. Secondly, like Australia, his delegation rejected the European Communities' attempt to make a linkage between Articles 23.4 and 24.1 of the Agreement, since these two provisions had two distinct objectives. For example, while Article 24.1 of the Agreement referred to "increasing the protection", Article 23.4 referred to "facilitating protection".

141. The representative of the European Communities said that he wanted to make sure that all Members understood that his delegation was not trying to remove or annul the exceptions under Article 24 of the TRIPS Agreement. In fact, Article 24.1 did not allow this. However, what Article 24.1 said was that the provisions of paragraphs 4 through 8 of Article 24, which were the core of the exceptions to the TRIPS Agreement, "shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements". This certainly meant that what was at issue were individual exceptions and the applicability of these exceptions to individual instances, not the elimination of x, y or z provisions from the TRIPS Agreement.

142. He recognized that Articles 23.4 and 24.1 of the TRIPS Agreement were not in the same provision. Article 23.4 referred to a register that was meant to facilitate the protection of geographical indications; such protection was certainly the one provided for in Articles 22, 23 and 24 of the Agreement. Since Article 24.1 was part of these three provisions, surely there would be a place for that provision within the register to facilitate its application, which was this Special Session's mandate. That was why the EC proposal had included in its paragraph 3.4 a reference to Article 24.1 of the Agreement.

143. As to Chile's question regarding the time limit for reservations, he said that Members would have 1.5 year to examine a GI notification and, if need be, place a reservation. If a Member did not place such reservation it could no longer claim that particular name to be generic, the reason being the assumption that if a term was being protected it should not turn generic. The EC paper proposed that such effect should only apply to Article 24.6 of the Agreement in order to address concerns raised by some Members in the past on what would happen if a Member forgot to place a reservation and found out subsequently that some of its local producers had been using that geographical indication. In such a case, Members would still be able to invoke, for example, the grandfathering clause exception of Article 24.4 of the Agreement. On this issue, he recalled that in the EC first proposal in 1998, Article 24.5 of the Agreement had been among the grounds for reservations.

144. As to the issue of personal names, he said that the point made by some speakers was a good one. Actually, the reference to paragraphs 4 and 5 of Article 24 of the Agreement was not necessary, but was made *ex abuntantia*. Clearly, paragraphs 4 and 5 of Article 24 of the Agreement would continue to apply, even if this was not spelt out in the EC proposal. So, for the same reason, Article 24.8 of the Agreement continued to apply. His delegation was, however, open to expressly including that into its proposal to reassure that any person had the right to use his or her name in the course of trade even if it conflicted with a geographical indication.

145. As to the points made on legal effects, he said that his delegation perceived the 18-month period as an opportunity for Members to examine applications. It would also be an opportunity to give some legal effects to a geographical indication which truly deserved protection. His delegation would be ready to study another timeframe if Members could come up with some concrete evidence that 18 months was too short of a period. That was, in fact, why the European Communities was also offering flexibility when it had proposed at previous meetings for the possibility of limiting the number of geographical indications to be notified. It was in his delegation's interest to make sure that notified geographical indications only got registered after a proper and in-depth examination. That was also in line with what his delegation was aiming at, namely to develop a system that would produce accurate information which would help Members' economic operators have a clear view as to whether, for example, to start exporting or investing in other countries. He added that the EC proposal did not seek a register with legal effects of a supranational nature; on the contrary, his delegation understood that these legal effects would not stem directly from the WTO multilateral register treaty but would need to be transposed into national law, unless the constitution of a country already provided for the possibility of direct application of international law.

146. Finally, on a point raised on annotations, he said that if the European Communities notified a certain geographical indication and Chile, for example, placed a reservation, such objection, which would be based upon questions such as definition or genericness, would take into account the prevailing circumstances in Chile's territory. Therefore, the geographical indication would not be valid as regards the Chilean territory. What the principle of territoriality did not allow was to extend Chile's reservation, reached solely on the basis of particular circumstances in Chile, to other third countries, where the term might not be generic and therefore be protectable. The analysis that led to each individual reservation, should be market-based. He said that it might be possible to address Chile's concerns by giving some sort of publicity to reservations placed by Members.

147. The representative of Chile took issue with the point made by the European Communities that if a term was protected then it should not become generic. He thought that the purpose of the exception in Article 24.6 of the TRIPS Agreement was precisely to tackle instances when a geographical indication had become generic. Such genericness could happen because the right holder of the geographical indication had been negligent in protecting it against infringers. Unlike paragraphs 4 and 5 of Article 24, the exception under paragraph 6 was not limited in time. The importance of this exception would be easier to comprehend when looking at systems that protect geographical indications through trademarks, since in such systems trademarks could become diluted and generic. Therefore, Members should be able to invoke the genericness exception in domestic procedures after the suggested 18-month period, which was the same as the one in the PCT and Madrid systems.

- *Consequences of registration (proposed "effect of registration"/"participation", "procedures to be followed by participating Members"/"access for other Members" or "legal effects in participating Members"/"legal effects in non-participating Members"/"legal effects in least-developed country Members")*

148. The representative of Australia recalled that the European Communities had acknowledged in one of its previous responses that, if a Member had not lodged a reservation, it would have waived its right to claim that a geographical indication was generic in its territory. For example, if Australia had chosen not to participate in the system and for this reason decided not to lodge any reservations, would it still be able to decline to protect a registered geographical indication on the grounds that it was generic in its market? If the answer to this question was negative, then it was clear that the EC proposal would not only force Members to participate in it but it would also limit the exceptions to which all Members were currently entitled to avail themselves when determining the eligibility for protection of geographical indications in their territories.

149. The representative of Hong Kong, China said that "consequences of registration" was certainly one of the most important elements of the system being negotiated in the Special Session. While it would be relatively easy for Members to see the differences in terms of consequences between the Hong Kong, China proposal and the joint proposal, it might be more difficult to see the differences between his delegation's proposal and the EC one, because both proposals provided for a "rebuttable presumption". Firstly, under the Hong Kong, China proposal, and unlike the EC proposal, only Members participating in the system would be required to give legal effect to a registration. Secondly, under the Hong Kong, China proposal the rebuttable presumption that a registration would entail related to three specific issues, namely ownership of the geographical indication, that the indication satisfied the definition under Article 22.1 of the TRIPS Agreement in the notifying country, and that it was protected in its country of origin. There was no time limit attached to these rebuttable presumptions. On the other hand, the presumption under the EC proposal seemed to extend to other elements, and for those Members who had not lodged a reservation within the 18-month period, presumptions relating to paragraphs 1 and 4 of Article 22 and paragraph 6 of Article 24 of the TRIPS Agreement would become irrebuttable. His delegation believed that issues like genericness under Article 24.6 of the Agreement should be decided by domestic courts of each Member according to their domestic legislation, taking into account local circumstances. In contrast, under the EC proposal

a registration would create an irrebuttable presumption with regard to the exception under Article 24.6 if, for example, a Member had not lodged a reservation within the 18-month period. Finally, he noted that paragraphs 3.3, 4(c) and 5(b) of the EC proposal provided a procedural requirement, whereby a WTO Member would have to notify conflicting trademark registrations and applications at the request of the notifying Member; this would enable GI owners to extend the scope of their rights in different jurisdictions in view of existing trademark rights and to take action to protect their rights. His delegation believed that on this particular issue it would be more reasonable to provide that the burden should be on the GI owners themselves to search for conflicting trademark registrations and applications in the market they wished to enter. This was the case for existing trademark owners in places like Hong Kong, China, where geographical indications were protected as trademarks.

150. The representative of Argentina said that the Hong Kong, China proposal to shift the burden of proof would substantially alter the balance of rights and obligations under the TRIPS Agreement. In fact, it was only in Article 34 of the Agreement that the reversal of the burden of proof was expressly provided for process patents. The existence of these presumptions seemed to be in contradiction with the recognition in paragraph 4(a) of Section D of the Hong Kong, China proposal that the exceptions under Articles 22 to 24 of the TRIPS Agreement continued to be fully applicable by domestic courts.

151. With regard to the EC proposal, she said that the substantive legal effects it applied to participating Members were not foreseen in the current standards of the TRIPS Agreement. The requirement set out in paragraph 4(c) of the EC proposal for both participating and non-participating Members to notify all trademark registrations and applications containing or consisting of a geographical indication, if so required by the notifying participating Member, would be an additional burden to all Members. Her delegation failed to understand the rationale of such a requirement.

152. She recalled that under the EC proposal there would be effects on non-participating Members which had not lodged a reservation.

153. As to paragraph 6 of the EC proposal regarding LDCs, she said that the joint proposal did not have any similar provision precisely because, unlike the EC proposal, it would result in minimum costs to the participating Members. In fact, the EC provision seemed superfluous in light of the transitional period LDCs were currently enjoying under Article 66.1 of the TRIPS Agreement. Hence, she wondered what would happen when these LDCs started to apply this system at the expiry of their transitional period? Would they have to protect all the pre-existing registered geographical indications? Or would there be a special system for LDCs to lodge reservations even before the expiration of their transitional periods? If that were the case, would that mean that during the transitional period LDCs would be able to place reservations but not to notify geographical indications?

154. The representative of the United States recalled that the joint proposal only required that each Member participating in the system commit to ensuring that its domestic procedures would include a provision to consult the database when making decisions in accordance with its domestic law. In contrast with the other two proposals, this would ensure the facilitation of the protection of geographical indications in a manner consistent with the mandate of this Special Session and would not prejudice rights and obligations under the TRIPS Agreement.

155. His delegation had serious concerns with the presumptions foreshadowed both in the EC and Hong Kong, China proposals for a number of reasons. These presumptions would create a right in favour of a foreign right holder of a geographical indication registered under the system and any prior use or prior trademark could be significantly curtailed. Moreover, these two proposals seemed to facilitate a type of "automatic claiming" of a broad range of terms throughout the WTO membership, which was problematic because that could eliminate the ability of right owners in one market to enter a new market with, for example, their trademark or other rights, and could also inhibit the ability of

small and medium-sized companies to establish new brands that could otherwise have incorporated such terms. Another general point was the fact that these two proposals would allow for a notifying country to use its own country of origin protection as the basis for receiving protection elsewhere, which again would bypass national systems of other countries. All these features seemed to suggest an intention to set up a type of worldwide extraterritorial system of protection. His delegation failed to understand how such a philosophy could be reconciled with the notion that intellectual property rights were territorial and that rights had to be established and asserted under the laws of the country where protection was being sought.

156. The representative of New Zealand recalled that under the joint proposal Members that had chosen to participate would make a commitment to consult the database when making national decisions about registering geographical indications for wines and spirits. This was indeed a new substantive and meaningful obligation that would apply to all participating Members without prejudicing existing rights and obligations under the TRIPS Agreement. Under the joint proposal there were no legal consequences for non-participating Members, who would, however, have free access to the database.

157. In contrast, the EC proposal was putting forward significant substantive obligations both on participating and non-participating Members. For participating Members, the registrations would enable GI holders to exercise a presumption of protection in the territory of participating Members, a presumption which would be irrebuttable as far as the exceptions under paragraphs 4 and 6 of Article 24 of the TRIPS Agreement were concerned. Under the EC proposal, even for non-participating Members, the effect was the removal, after a certain time, of their right to use certain flexibilities within the existing TRIPS Agreement. If those were indeed the impacts of the EC proposal, then her delegation would perceive such an erosion of rights as being inappropriate in the context of the negotiation on a register of geographical indications for wines and spirits. Similarly, the Hong Kong, China proposal envisaged that as a result of the performance of a simple formality check, registered terms would enjoy the status of prima facie evidence before the domestic courts and authorities of Members regarding three crucial elements, namely the ownership of the geographical indication, whether it met the Article 22 definition and whether it was protected in the country of origin. Therefore, her delegation believed that both the EC and Hong Kong, China proposals would substantially changed the balance of rights and obligations under the TRIPS Agreement and they would, in fact, serve to enhance rather than facilitate protection of geographical indications. Shifting the burden of proof away from the right holder, where it traditionally and logically belonged, would impose higher costs on those producers seeking to avoid disruption of trade. This reversal of the burden of proof would also place geographical indications at a higher level than any other form of intellectual property. Why should geographical indications benefit from presumption of protection when other forms of intellectual property did not?

158. The representative of Switzerland said that there was no reason to make a distinction between the legal effects of registration in Members who notify and in those who did not because the system to be set up would be a multilateral one with the sole objective to facilitate the protection that all Members, except LDCs, had already to offer, and not to increase such protection. If, as far as legal effects were concerned, the objective was not to increase the current protection and to enable all WTO Members to continue to have recourse at any time to the exceptions under Article 24 of the TRIPS Agreement, then this seemed to indicate that this Special Session would be fully within its mandate and was perhaps going in the direction of finding some solution to the issue of legal effects.

159. The proposal made by Hong Kong, China to create a presumption that would be rebuttable at any time with regard to all points seemed to be the approach to follow. As far as the basis on which this presumption would relate, her delegation considered that it should not only relate to definition and protection in the country of origin, as was proposed by Hong Kong, China, but also to the generic nature of a name or the misleading character of a homonymous name, as was proposed by the European Communities. The concept of territoriality would be fully respected for two reasons: first,

each Member would have the possibility, in a system with reservations, to lodge a reservation; second, since the presumption was rebuttable, it would be possible to challenge the presumption at any time after the registration before the national courts. By contrast, the joint proposal provision that the legal effect of a registration would be limited to an encouragement of Members to consult a database would not fulfil the mandate to facilitate protection.

160. The representative of the European Communities agreed with the point made by the representative of Argentina that the EC proposal regarding prior trademark searching could be a burden. That was the reason why the EC proposal foresaw this as an obligation for which right holders should pay themselves. This was recognized in paragraph 9.5 of the proposal, according to which the registration of a geographical indication "shall be subject to the advance payment of a multilateral fee which shall include: (i) a basic fee; and (ii) an individual fee". Paragraph 9.7 stated that such individual fees "shall cover the costs incurred by WTO Members requested to provide", for a given application: (a) the information about prior trademarks; and (b) future trademark applications. This was, in fact, not a novelty in terms of international registration systems for many offices had already been providing for search reports. Furthermore, nothing prevented Members from delegating this work to specialized private companies. The reason behind this obligation was the idea to use it as a mechanism to bring to the fore information about possible conflicts with trademarks. It was meant to help all interested parties, GI and trademark right holders, avoid conflicts in the future. In other words, it was meant to be a mechanism that would help the functioning of the system as a whole.

161. As to the questions raised on irrebuttable presumptions, he confirmed that, under the EC proposal, if a Member did not place a reservation after 18 months, it would waive its right to declare a term generic. However, this kind of determination was not a novelty since it was common practice for trademark offices to decide whether or not signs in applications were actually distinctive and, therefore, registrable as trademarks. As far as geographical indications were concerned, there were Members that were already making this kind of determination. For example, as a result of bilateral negotiations, Canada had engaged in a process whereby around 20 names that were initially considered generics on its territory were no longer treated as such. That was the sort of determination made in application of the flexibility Members were enjoying under the TRIPS Agreement to decide on the genericness of terms, including on whether to protect a term which had formerly been considered generic. While Article 24.6 of the TRIPS Agreement allowed Members not to protect geographical indications of other Members they considered as generic, it did not oblige Members to do so. It was just their choice.

162. After noting that Argentina had made a fair point regarding the treatment of LDCs in the EC proposal, he said that because the proposal allowed LDCs to be participating or non-participating Members there were no exclusion of the possibility for LDCs to place reservations. He recalled that the LDCs provision of the EC proposal only related to the issue of legal effects, but if Members still wished to address this issue they should perhaps discuss the establishment of a transitional mechanism whereby LDCs which did not exercise their rights to examine the notified geographical indications during the 18-month period would have the opportunity to do so in a manner that would be not be burdensome to their administrations. The only reason for the European Communities to provide for this exception for LDCs was simply based on the fact that the mandate given to this Special Session said that the protection to be facilitated was the one that applied to wines and spirits, in other words Articles 22, 23 and 24 of the TRIPS Agreement, and that these provisions currently applied to all Members, except LDCs. The proposal attempted to reflect that situation.

163. He expressed surprise at the point made by the United States that the EC proposed register would result in the wiping out of the use of certain terms in world trade. Intellectual property, and certainly trademarks and geographical indications, sought to monopolize the use of certain terms. The delegation of the United States should be aware of this since the United States were the first holder of trademarks in the world; the use of many terms had, in a way, been wiped out through trademarks, which certainly covered more terms than those affected by geographical indication systems.

Intellectual protection was a valid aim and it was legitimate for GI right holders to seek protection not only in their countries, but also in other countries where they wished to operate. Clearly, and this is something the United States had also repeated, all GIs right holders that were trying to gain protection in third countries via this register could, if they had the money to do so, start registering certification marks in these countries. As certification marks would also give a monopoly right on the use of these terms, he was not sure whether the argument of wiping out the use of certain terms should not also apply in this case.

164. He disagreed with the point made that the EC proposal was somehow trying to bypass national administrations, particularly because the proposed system gave Members' national authorities a period of time of 18 months – which was a reasonable one - to review an application and decide whether a geographical indication could be protected in their territories.

165. As to the point made that the EC proposal was providing the possibility of seeking global protection on the basis of the protection of a geographical indication in the country of origin, he said that this possibility was based on the TRIPS Agreement itself, which introduced the notion of country of origin. In fact, this was not a new feature in intellectual property systems. For example, trademarks registered in one country enjoyed certain priority rights in others. It was on the basis of the protection in the "country of origin", i.e., the country of first registration, that priority rights could be obtained in other third countries if registrations were lodged within a certain period of time.

166. The representative of the United States said that, while his delegation was aware that the effects of a registration under the EC proposal would be conditioned on certain actions such as reservations, it continued having serious concerns about the proposal. The type of system being envisioned by the European Communities entailed a supranational approach whereby one single action taken at international level would have immediate and automatic effects in a global membership. It would trigger global effects regardless of any intent of the right holder to actively market a term in any particular country, thereby potentially foreclosing markets that otherwise would not be foreclosed. By contrast, the underlying general approach for existing international IPR systems was that a person filing an application in various countries had an interest in operating in those countries

167. He agreed with the European Communities that GI right holders could file certification marks in various countries throughout the world. Certification marks were a good system that should be used to protect geographical indications.

168. On the issue of bypassing national systems, he said that the language used in the EC proposal was based on the concept of protection in the country of origin, justifying, on that basis alone, protection in third country markets. By contrast, under current systems of IP protection, it was in the country where protection was sought that the determinations should be made. His delegation was concerned with these supranational systems that would only take into account the protectability of a term in the notifying country and, on that basis, trigger all types of rights globally. This point actually was raising major concerns for his delegation as far as the territoriality principle was concerned.

169. The representative of Argentina said that the EC proposal would transfer directly to national governments all the country-by-country costs that currently were the responsibility of individual producers. This meant that the majority of countries, particularly developing ones, would have to assume all the costs of examining the notified geographical indications.

170. She further said that the reversal of the burden of proof would mean that all those producers, especially from countries with greater purchasing power, would save in litigation costs, because they would be able to litigate in those countries solely based on the protection given in their own territories. Producers of third countries would be the ones who would have to go to courts to defend their rights.

The EC proposed system would grant supranational exclusive rights to some producers who would have an additional competition advantage over other competitors in third markets.

171. As to the submission of trademark search reports mandated in paragraph 9.7 of the EC proposal, she said that that paragraph foresaw a complicated structure of costs and fees, with two kinds of fees, namely a basic fee and an individual fee. The individual fee seemed to aim at covering the costs incurred by Members who had to produce the reports. Such a system would be a total novelty in multilateral registration systems. She failed to understand the rationale of that obligation. Was the WTO going to act as some taxing agency responsible for the redistribution of the fees to developing countries, who would be, in the end, those having to pay for such reports? She did not know how many LDCs and developing countries would be able to take on such costs. She wondered how much it would cost for developing countries to request a search report from the Swiss authorities dealing with geographical indications. While this might cost them thousands of Swiss francs, it would be much cheaper for Switzerland to ask Argentina, Jamaica or Brazil for a search report.

172. Finally, she said that the comparison between paragraph 6 of the joint proposal and paragraphs 4 to 6 of the EC proposal clearly showed that the former had many advantages over the latter in that it neither altered the balance of rights and obligations under the TRIPS Agreement nor generated burdens, in particular as far as developing countries were concerned.

173. The representative of the European Communities expressed surprise at the points made by Argentina because he had heard for many years that the EC proposal was, among other things, burdensome, costly and unclear as to who would pay for the costs. He pointed out that the Madrid Protocol had a system based on a similar approach whereby registration fees differed depending on the various costs related to registration in each member State.

174. The Chairman thanked delegations for all their comments and said that the headings from page 17 to 23 of TN/IP/W/12 remained to be discussed. The Special Session would be able to address them and revert to those already discussed at its next meeting in October. He said that the present discussion had been quite productive, but as regards the two key issues, participation and legal effects, there had been no narrowing of views.

C. OTHER ISSUES

175. The Chairman invited Members to share any thoughts on the contribution that the Special Session might make to the preparations of the Hong Kong Ministerial Conference.

176. The representative of the European Communities said that in his delegation's view the Hong Kong Ministerial should give an opportunity to provide useful guidance and direction to these negotiations.

177. The representative of Argentina said that Members should not have great expectations that some single issues, solely based on their own merits, would be able to move forward independently from the context of the whole negotiations. All Members were aware of the current stagnation of the negotiations on important issues such as market access. Therefore, it would only be Members altogether, with an overall vision, who would be in a position to assess what could to be done in Hong Kong.

178. The representative of Switzerland said that, given the discussions in this meeting and the fact that the positions were not getting closer, it would be important to obtain at the Ministerial Conference clear guidelines on the direction of the negotiations that would follow it.

179. The representative of the United States noted that the work the Special Session was currently undertaking was an important one and that the present meeting had been conducted in a constructive

manner. Since Members were still digesting the proposals on the table, he believed that there was still a need to continue with such discussions. He hoped Members would be able to come together with some form of constructive approach within the mandate in time for the Ministerial Conference.

180. The representative of Australia said that the discussions at this meeting had been useful because his delegation had been able to get a better understanding of all proposals. However, as Members had not been able to finish making their comments on all aspects of the proposals, his delegation would like to be able to continue the discussions in the next meeting.

181. The Chairman agreed that the discussions were fruitful. He said that the next meeting of the Special Session would take place on 27-28 October, and that he would hold consultations prior to that meeting.