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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 27 October 2005

Chairperson: Ambassador Manzoor Ahmad (Pakistan)

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A. ADOPTION OF AGENDA

1. The fifteenth Special Session agreed to adopt the agenda as set out in WTO/AIR/2694.

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 that at its meeting of 16 September 2005 the Special Session had had a detailed and useful discussion on the three proposals on the table that had been presented side-by-side in a document prepared by the Secretariat (TN/IP/W/12). He suggested that delegations first deal with the headings that had not been addressed at the September meeting due to time constraints, and then revert, if they so wished, to those already addressed at that meeting. He further suggested that the remaining headings be grouped into three sets, namely: (1) duration and renewals of registrations, modifications and withdrawals of notifications and registrations, and termination of participation in the system; (2) fees and costs; and (3) review, contact point, administering body/other bodies, and date of entry into operation. He recalled that certain issues in these sets of headings, such as fees and costs and the administering body and other bodies, had been touched upon by some delegations at the September meeting.

5. It was so agreed.

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

- *Duration and renewals of registrations; modifications and withdrawals of notifications and registrations; termination of participation in the system*

6. The representative of Argentina said that she did not have any specific comments on the issue of duration and renewals of registrations but wished to comment on both the issue of modifications and withdrawals of notifications and registrations and the issue of termination of participation in the system. The joint proposal provided for a simple, clear and transparent mechanism for modifications and withdrawals of notifications to the WTO Secretariat, acting as the system's administering body. In contrast, the EC proposal was not clear on the issue of withdrawals. For example, the second sentence of paragraph 8.1 of the EC proposal provided that, if the geographical indication ceased to fulfil the conditions for protection, the notifying Member should withdraw the relevant notification. There was no provision in the EC proposal to cover a case where a notifying Member did not make any notification of withdrawal. If, for example, a geographical indication had fallen into disuse or was no longer protected in its country of origin, what would happen if that Member did not make such notification? She raised this concern with the strong legal effects of the EC proposal in mind. Such a situation could be damaging to producers in third countries since it could create great uncertainty. For example, if a notified geographical indication was withdrawn after a year because it had fallen into disuse, what would happen with the losses that producers of third countries had incurred during that period due to the legal effects produced by that notification, i.e. the prohibition to use that name or register it as a trademark? This showed that, as regards legal effects, the EC proposal would create uncertainties.

7. Regarding the termination of participation in the system, she said that the joint proposal was quite clear and transparent. Under paragraph 9 of the proposal, a Member could simply notify when it no longer wished to participate in the system. In contrast, paragraph 13 of the EC proposal only had the words "[w]ithdrawals from the system" in brackets. Members needed to know whether the withdrawal from the system was, or was not, provided for in the EC proposal. In any case, given the legal effects of the EC system on participating and non-participating Members, Members needed to know exactly what the content of paragraph 13 of the EC proposal would be.

8. The representative of the European Communities, commenting on the Hong Kong, China proposal regarding the duration of protection, said that, since the TRIPS Agreement was silent as to the duration of GI protection, his delegation wondered whether such a time-limit would be in conformity with the Agreement.

9. He further said that, because under the EC proposal even non-participating Members would have some legal obligations, providing for the termination of participation would not fit in the concept of a "multilateral system" as understood by the European Communities.

10. Responding to Argentina regarding the operation of Article 24.9 of the TRIPS Agreement as set out in paragraph 8.1 of the EC proposal, he said that, assuming that the EC proposal was annexed to the TRIPS Agreement, there would be a violation of the Agreement if a Member did not make a notification of withdrawal under that provision. There would be an obligation for each Member to notify that a geographical indication had ceased to be protected in that Member. The effects of this withdrawal for producers from third countries would depend on each country. He said that it was not unusual in intellectual property law that, for example, a trademark lapsed after some time, and that countries dealt with this situation in different ways. Likewise, it would be for each WTO Member's legal system to decide what would happen in a similar situation regarding geographical indications. In particular, this would depend on how Members had implemented Article 24.9 of the

TRIPS Agreement, which allowed, but did not oblige, them not to protect a geographical indication that was not protected in the country of origin. Members were therefore still free to continue protecting that particular geographical indication even if it was no longer protected in the country of origin. For these reasons it was difficult to give a definitive answer to the question posed by Argentina because the provisions of the TRIPS Agreement were fairly flexible as far as implementation was concerned.

11. He further said that, while it was true that the EC proposal did not contain any language regarding withdrawals from the system, his delegation would be ready to suggest some language. In any event, he wanted to state for the record that for his delegation, withdrawing from the system would only mean changing from the status of a participating Member to a non-participating Member, unless that Member became a LDC and hence was under the benefit of the extended transition period, or if it left the WTO.

12. The representative of Hong Kong, China, responding to the representative of the European Communities on the duration of protection, said that paragraph C.1 of his delegation's proposal was aimed at keeping the register up to date. If details concerning a geographical indication had not changed, the renewal would be automatic, subject to the payment of the required fees. Furthermore, the proposal did not impose any limitation on the number of renewals.

13. The representative of Chile said that he did not oppose the approach taken by Hong Kong, China on the duration of registrations, although it was true that the TRIPS Agreement did not have any time limits for geographical indications. He recalled that other provisions of the TRIPS Agreement provided for a minimum duration of protection. For example, Article 26.3 of the Agreement provided for a minimum period of ten years for industrial designs. Members were free to go beyond that period and to determine the mode of computing this period, for example to break it into different renewable terms.

14. The representative of the European Communities said that the fact that the TRIPS Agreement had established terms of protection for certain intellectual property rights only, such as trademarks, and not for geographical indications, had some meaning. If the negotiators had wished for a term of protection in the area of geographical indications, they would have negotiated a specific provision in the text of the Agreement.

15. The representative of the United States said that the clarification made by the representative of the European Communities regarding withdrawals from the system was troubling. It illustrated a fundamental difference between the joint proposal and the EC proposal regarding the understanding of "participation". For those Members that were producers of neither wines nor spirits, what the European Communities had said in this meeting should leave no doubt about which proposal to avoid. The EC proposal appeared to be outside the mandate of Article 23.4 of the TRIPS Agreement since it would deprive the reference to "those Members participating in the system" of any meaning. More fundamentally, his delegation failed to understand the benefits of being a non-participating Member under the EC system. It would appear instead that the result would be substantial costs for examination, protection and litigation with respect to registered geographical indications but with no corresponding benefits. Members should focus on the joint proposal, which contained a very clear and transparent process with respect to both modifications and withdrawals of particular geographical indications. Similarly, with respect to the termination of participation, in striking contrast to the EC proposal, the joint proposal, in line with its fundamental principles and Article 23.4 of the TRIPS Agreement, foresaw a truly voluntary system in which some Members would be able to choose to participate. Participating Members would also be able to voluntarily choose to no longer participate even though they could have made notifications at an earlier time.

16. The representative of Australia said that his delegation shared the concerns voiced by Argentina, Chile and the United States. He did not quite understand the reply of the European Communities to the question of what would happen, particularly to third countries, when a geographical indication had fallen into disuse in its country of origin and no notification of withdrawal of that term had been made. As had been indicated by other delegations, the concerns expressed were due to the fundamental question of legal effects imposed by the EC proposal on participating and non-participating Members. He felt particularly concerned by the comment made by the EC that all WTO Members would have to assume some onerous and burdensome obligations if the system were to be truly multilateral and not plurilateral. His delegation reiterated the view it had expressed in previous meetings: there was currently in place in the WTO a system that was multilateral and which did not necessitate the participation of all WTO Members, namely the Code of Good Practice of the TBT Agreement.

17. In response to the statements made by the United States and Australia, the representative of the European Communities said that the aim of the EC proposal was to establish a system that would improve the market access conditions in third countries. While his delegation remained open to any other proposal that went in this direction, it had serious doubts regarding the possible benefits of the joint proposal.

18. Responding to a question posed by Chinese Taipei, the representative of Hong Kong, China said that under its proposal a Member would be able to terminate its participation in the system at any time.

19. The representative of Argentina said that what the TRIPS Agreement had mandated to be negotiated was a system that would facilitate the protection of geographical indications and not increase it. In this regard, she said that the European Communities had made a valid point regarding Hong Kong, China's proposal for a ten-year time-limit for registered geographical indications. This would be a limitation to protection that was not foreseen in the TRIPS Agreement. Like other aspects of the EC proposal, this feature proposed by Hong Kong, China was a point of concern.

- *Fees and costs*

20. The representative of the European Communities said that the EC proposal, inspired by the Madrid Protocol, addressed the issues of how to finance the register by essentially placing the cost of the system on the notifying Member. The proposal was based on the principle, endorsed on numerous occasions by the European Communities, that the cost of the system should be borne proportionally by the countries that benefit most from it. The EC proposal allowed WTO Members to recoup the costs incurred in complying with the obligations regarding trademarks through a system of fees to be paid by the notifying WTO Member. The mechanism proposed in paragraph 9.4 et seq. of the EC proposal was self-explanatory and largely inspired by the existing system embodied in the Madrid Protocol. It divided the fees into: (1) a basic fee to cover the administrative and functioning costs of the system, including the setting up costs, and (2) an individual fee to cover the obligation to monitor past or future trademarks. Members should notify to the WTO the costs associated with the functioning of this system. The WTO Secretariat, the International Bureau of WIPO or whichever body the WTO membership agreed to, should be the managing body. It would be in charge of establishing the fees on the basis of WTO Members' contributions. It would fix the relevant fees, would collect those fees from the notifying Members and redistribute them to the relevant WTO Members, following the well-known model of the Madrid Protocol. His delegation believed that this proposal would strike the balance and bring comfort to those that have voiced concerns on the issue of cost. The proposed system would permit all WTO Members to be involved, either as participant or non-participant Members, without burdening their administrations. Many administrations would see this system as an opportunity to optimize existing GI registration systems that had been little used to date and to recoup certain costs which they might have incurred in putting such systems into place.

21. The representative of Australia said that there were no provisions on fees and costs in the joint proposal because the system proposed did not place any significant administrative and legal burdens on participating Members, let alone on non-participating ones. The core part of the joint proposal was a free searchable database of all geographical indications for wines and spirits that were notified by participating Members. She noted that the European Communities had attempted to address the issue of costs through the inclusion of a fee mechanism to finance the system. Although costs needed to be addressed, there was still some misunderstanding as to the idea that the EC proposal was somehow a "one-stop shop" which would be cheaper than existing domestic systems. Her delegation's understanding was that under the EC proposal each patent and trademark office could charge an individual fee to cover its examination costs, in addition to a basic fee. Paragraph 9.8 of the EC proposal provided that the WTO Members would have to notify the national component of the individual fee which it wished to receive, an amount which could be charged later but could not be higher than the equivalent of the amount that the relevant administration of the WTO Member would be entitled to receive from a national applicant in the framework of a domestic procedure, where such an individual fee was payable. This meant that the fees could not be more than, but could at least be the same as, existing fees under current domestic procedures. It was therefore not clear what the cost-saving element would actually be as compared, for example, to applying for a certification mark in a Member under existing systems. In fact, the costs incurred under the EC proposed fee system could be higher because of the obligation to pay an individual fee in addition to the basic fee. At least under current domestic systems Members would only seek protection in markets where they actually sold their products. She further noted that there were many other costs associated with the EC proposal that would not be recoverable by the proposed fee mechanism. For example, Members would be required to implement new regimes for the protection of geographical indications, which would not be a simple task for many Members that were currently protecting geographical indications through unfair competition or trademark systems. Moreover, under the EC proposal Members who had chosen not to participate would still have to lodge reservations and enter into compulsory negotiations in order to retain their rights to use existing exceptions. Who would pay for the costs associated with these obligations?

22. The representative of New Zealand associated her delegation with Australia's comments on the EC proposed fee system. Unlike the EC proposal, the joint proposal was the lowest cost option on the table: it provided minimal costs for those participating Members and no costs for non-participating Members. Her delegation appreciated the European Communities' acceptance that the cost generated by their system should be supported largely by those participating Members that had notified geographical indications into the system. With regard to the point made by the European Communities that the proposed system of fees would allow WTO Members to recoup the costs incurred in complying with the obligations regarding trademarks, she said that the real cost of the EC system would be much greater than those related to trademarks, for there would be costs to consumers, producers and governments to be taken into account. It was clear that the EC proposal would require a level of monitoring and administration, including an order to lodge reservations, which would seriously stretch the bureaucracy of even a developed country Member such as New Zealand, which had a small IP Office. This would be an even more serious problem for small developing countries with smaller IP offices. She wondered whether these countries would have the infrastructure necessary to carry out such tasks.

23. She agreed with the comments made by Australia and Malaysia at the March 2005 meeting that the "user-pays principle" should apply equally to the overall administration of a system, including the handling of oppositions. She wondered whether notifying Members would be prepared to take on any new costs arising at the national level for other WTO Members. In fact, the EC proposal required Members' governments to essentially sign an enormous blank cheque for both participating and non-participating Members, which would be required to monitor all registered geographical indications and decide whether or not to lodge a reservation. They would have two alternatives: to accept a geographical indication without reservation, thus committing to new obligations such as the constant monitoring of all geographical indications registered against nationally registered trademarks and, at

the same time, losing certain existing rights and flexibilities embodied in Article 24 of the TRIPS Agreement; or, to lodge a reservation, thus committing to a series of bilateral negotiations. These alternatives, which would apply to both participating and non-participating Members, were the only ones presented and would entail real and significant administrative costs with no equivalent in international law.

24. The EC claimed their fee system to be in the interest of developing countries. This was quite unfounded, especially in light of the fact that, while the burden of protecting thousands of registered geographical indications from other Members would fall on these countries, few of their own geographical indications would be eligible for protection in third country markets, even if they would go on the register.

25. The European Communities had also mentioned the possibility of delegations optimizing existing domestic GI registration systems on the assumption that all other Members had adopted a registration system like the EC's, despite the fact that Article 1.1 of the TRIPS Agreement specifically allowed Members to decide how to best implement their obligations. Indeed, many Members had not chosen to implement their GI obligations through a GI registration system.

26. Finally, there was another cost which would perhaps be the highest one associated with the EC proposal: the fact that it would seriously tilt the balance of rights and obligations contained in the TRIPS Agreement in favour of GI right holders by placing new obligations on all Members and at the same time taking away some of their existing rights. This would occur at a time when many Members were still struggling to implement the existing level of obligations in the TRIPS Agreement. Unlike the EC proposal, the joint proposal would establish a truly voluntary system with the lowest cost and burdens.

27. The representative of Argentina said, as a general comment, that there was a need to clarify that not all costs were covered under the heading "fees and costs" in the EC proposal. It only referred to "declared", "evident" or "international-level" costs, but not to "domestic" costs. It was therefore important to remember that other features of the proposed system would also entail costs. For example, there were "hidden costs", i.e. costs the national administrations of Members would have to bear at the national level. The entire system, comprising the notification and registration phases, and if Members were to follow the EC proposal, the reservation and examination procedures, would entail considerable costs at national level. By contrast, the column of the side-by-side paper (TN/IP/W/12) reserved for the joint proposal under this heading was blank. This was because the joint proposal would not result in substantial costs; they would be borne by the WTO in the same way as other notification procedures.

28. She said that the EC proposal contained elements that gave rise to many uncertainties. For example, in paragraphs 9.2 and 9.3 there was no estimate on how much would the core budget for this administering body would be. This meant that such a body would start its work depending on a credit which would be only paid back later. Members needed to dispel this uncertainty and have an estimate of the initial budget for such a system before starting its work.

29. She further asked about the reason for the inclusion of a new element which appeared in square brackets in paragraph 9.4, namely the "renewal of the multilateral registration".

30. She said the EC was proposing a complex system with a "basic fee" and an "individual fee". Recalling a previous comment she had made in relation to paragraph 3.3 of the EC proposal that there was no justification for "individual fees", she said that, read in conjunction with that provision, paragraph 9.7, which stated that the notification of trademarks was "[f]or information purposes only", would in fact be a prerequisite for Members from which this notification was being requested. Additionally, unlike paragraph 9.7(a), which made express reference to the information referred to in paragraph 3.3 the "monitoring" mentioned in paragraph 9.7(b) was not reflected anywhere else in the

EC proposal. Did this mean that there would be an obligation to present a notification and then an additional obligation for the permanent monitoring of conflicting trademark applications? She did not see how Members would actually implement such an obligation.

31. As to paragraph 9.8 of the EC proposal, she associated herself with what Australia had said on this point.

32. As to paragraph 9.9, which provided that the WTO Secretariat would calculate the addition of the two fees and indicate it to the applicant, she asked how the Secretariat would calculate this individual fee. The designed mechanism would create obligations that were not in the part of the proposal dedicated to notifications. For example, according to paragraph 3.3 of the EC proposal, every time a Member notified a geographical indication it also had to present information on trademarks, with an advance payment of the fee. How would the WTO Secretariat calculate the individual fees without knowing the costs incurred by Members in the monitoring and searching of trademarks?

33. The representative of Canada said that the following could be among the additional costs involved in the EC proposed system: a fee for lodging a reservation, examination costs, costs to the government for entering into negotiations, and fees for trademark searches for purposes of notification of trademark registration, which were normally carried out by lawyers or trademark practitioners. There would also be other costs for a government to set up a system to deal with the flood of applications: those associated with additional human resources and equipment and those relating to oppositions to notifications and to enforcement. Additionally, there would be costs to producers and retailers regarding re-branding and costs to right holders of trademarks containing geographical indications. For this reason, Canada believed that costs were an important element for consideration in these negotiations. He added that because Canada's intellectual property office worked on a cost-recovery basis, most of the costs of the system would necessarily be passed on to the applicants. The current cost for a GI application under Canada's wines and spirits rules was Can$450. Canada's experience indicated that this amount was insufficient to cover the costs associated with such procedures and this was to be reviewed in the near future. If Canada were to participate in a system as proposed by the EC, there would be for a notified geographical indication a Canadian-type of fee for a multilateral application, multiplied by any number of other participating Members. However, if Canada did not participate, it would then not be able to fix or collect a fee, even though it would still have costs involved. In this regard, he would be particularly concerned for small producers and SMEs that could face costs across the globe, instead of the costs associated with seeking to register in just one country which was a major market. To illustrate the question of the amount of resources needed to deal with GI applications, he recalled that in the EC-Canada bilateral negotiations on wines and spirits, Canada had been faced with an initial proposal of 10,000 EC names, later reduced to 1,500. Canada was currently dealing with around 490 applications for geographical indications that were submitted roughly at the same time. If Canada, which considered itself as a major developed country with significant resources, had been overwhelmed by only 490 applications, how would countries with fewer resources deal with thousands or tens of thousands of similar GI applications, all submitted at once?

34. Unlike the EC proposal, the joint proposal, as had been said by other delegations, put forward a voluntary low-cost system. It would, in fact, only carry nominal costs for the administering body to cover the maintenance of the system. Most importantly, there was no cost to non-participating Members and for those participating in the system there would be little to factor into resource considerations. Additionally, the joint proposal did not require a systematic and costly reviewing of all notified geographical indications.

35. The representative of Japan said that, as a general principle, the new system should not impose undue costs on the WTO Secretariat and Members. In this regard, the joint proposal contained a much better system. As to "individual fees", Japan believed that, while the amount of each fee could not be high, the aggregate amount of these fees could be, which could make the system an expensive one.

36. The representative of Chinese Taipei associated her delegation with the interventions made by New Zealand, Argentina, Australia, Canada and Japan. The system should recognize that intellectual property rights were private rights and that Members benefiting from those rights must bear the costs of protecting them. If registered geographical indications were to produce legal effects in all Members, the burden of enforcing GI rights would shift from their right holders to governments. As a result, there would be an increase in administrative costs and a change in the current balance of rights and obligations in the TRIPS Agreement.

37. The representative of Colombia said that her delegation had serious questions with regard to the administrative costs, particularly hidden ones, that would have to be borne by domestic registration offices. She asked Hong Kong, China and the European Communities to clarify what administrative costs domestic registration offices would have to bear as a result of notifications. Would there be a difference for participating and non-participating Members in the case of the EC proposal? It would seem that that in the first few years of the system proposed by the European Communities there could be a high number of notifications in a short period of time. So the administrative costs per registration, referred to under paragraph 9.2 of the EC proposal, could be relatively low. However, countries with no currently developed geographical indication system that would be interested in registering some geographical indications in five to ten years would have to bear the extensive fixed administrative costs of the system. So, in the end, the unit cost for a single registration would be quite high. This would create an imbalance between those Members which currently had a developed geographical indication system and those who did not.

38. The representative of the European Communities said that it was true that his delegation was proposing a system that was not written into the TRIPS Agreement and that had certain procedural steps to be undertaken, which implied some costs. That was exactly why the EC had proposed a system that allowed for cost recovery. He observed that the joint proposal foresaw a system with a number of obligations that also implied costs, such as the obligation for courts and administrations at the national level to consult the database when making decisions regarding the protection of trademarks and geographical indications for wines and sprits. This was particularly relevant to developing countries, which might not have the equipment for consulting the database that would be available on the Internet. What would be the costs for developing countries to maintain Internet capabilities so as to have access to the last updated list of geographical indications? Unlike the EC proposal, the joint proposal did not address the question of cost recovery. It was therefore fair to say that all of the proposals on the table involved some costs. In contrast, what the EC proposal was proposing was simply an examination process in which the public administrations would continue doing what they were already doing when they received an application from a local producer.

39. Responding to the point made by Australia that the EC proposal would not entail any savings for GI right holders, he said that that was not true, because, in fact, the greatest current difficulty for GI right holders was that if they wanted to obtain protection in all WTO Members they would have to hire lawyers to file applications in each Member. This made it very difficult to achieve general protection, and more importantly, a genuine global trade strategy of exports, because right holders did not know where they were going to be protected and where they were not. For that reason his delegation believed that the very fact that a Member would be able to lodge one single application that would then become a bundle of applications sent to national offices in other WTO Members was an added value.

40. On the comments made by Australia and New Zealand that the EC proposal would entail new obligations beyond the mandate and the current standards of the TRIPS Agreement, he said that this proposal contained procedural obligations that did not change the substantive level of protection set out in Articles 22 and 23 of the TRIPS Agreement. The EC proposal could therefore be implemented appropriately by existing systems as already provided by the Agreement. For example, the Australian Wine and Brandy Corporation, currently in charge of the protection of geographical indications in Australia, had a system that could certainly be suitable for receiving applications from the future register.

41. As to the concern raised by Australia on the costs associated with bilateral negotiations under the EC proposed system, he recalled that Article 24.1 of the TRIPS Agreement already carried the obligation to negotiate a bilateral or multilateral agreement aimed at increasing the protection of individual geographical indications. This obligation related to a protection that was to be facilitated by this register. Since Members were already under this obligation, the fact that the EC proposal included a mechanism that would trigger these existing obligations would not add any extra costs to those already incurred by Members.

42. As to New Zealand's concerns about cost burdens to a small IP office, he said that in the European Communities, which held 80 per cent of the world's geographical indications, there were only eight staff members working on the examination of applications. The examination was a far more complicated process than it would be to process a two-page application that would come via the proposed multilateral system. The applications processed in Brussels were as thick as ten centimetres. So, if the European Communities could perform its tasks with only a small staff, he was sure that even the New Zealand IP office would be able to cope with the future system. The same would apply to Canada's concern with regard to coping with the flood of applications under its bilateral agreement with the European Communities. After noting that in page 17 of the minutes of the Special Session of 16 September 2005 (TN/IP/M/14) the Canadian delegation had already made the same point, he said that it was common knowledge that the European Communities was the Member that was the most interested in having an effective system. If the European Communities were to notify ten or fifteen thousand geographical indications at once the system would obviously collapse. It would therefore be ready to exercise self-restraint in many ways. For example, the proposed registration fee would exert restraint in the number of geographical indications because not all GI right holders would be interested in participating in the system. He further recalled that the European Communities had on previous occasions indicated its readiness to negotiate the possibility of limiting the number of geographical indications to be notified annually.

43. He expressed disagreement with the point made by New Zealand that the EC proposal was not an instrument that could be in favour of developing countries. After ten years from the entry into force of the TRIPS Agreement, the European Communities had received only one application for a foreign geographical indication from all over the world. There were not many producers that could go on a country-by-country basis to seek for the protection of their geographical indications. The reason for this was that most GI users were cooperatives or small producers with limited resources, and not multinational companies which could invest huge amounts of money in national litigation procedures. If this held true for European producers, how would it be for developing country producers? His delegation held the firm view that the system should serve to materialize the protection that Members were currently bound to provide under the TRIPS Agreement and that all countries were supposed to put at the disposal of right holders. The proposed system would be particularly beneficial to producers without resources which were more likely to be located in developing than in developed countries.

44. As to Argentina's question of whether paragraph 9.7(b) of the EC proposal implied monitoring of applications for trademarks including geographical indications, he confirmed that there would be some monitoring. This would, however, be against the payment of a fee and should not cause problems. In this context, he said that one possible way to ensure monitoring would be to entrust that task, as indicated for example by Canada in the area of trademarks, to private firms. Any country could put that kind of information at the disposal of the notifying country via its own administration or via a sub-contracted private firm.

45. As to Argentina's concern about the calculation of fees, he said that the proposed EC system was basically inspired by the Madrid Protocol. The EC draft text had actually used, with minor changes, the provisions of the Madrid Protocol.

46. With regard to Canada's point that non-participating Members would not be entitled to claim fees under the EC proposal, he said that its paragraph 9.8 clearly referred to "WTO Members", meaning both participating and non-participating Members.

47. As to Japan's concern that the aggregate amount of individual fees would be high, he said that the Madrid system of registration of marks was based on a similar mechanism and had proved quite successful.

48. Finally, on the point raised by Colombia on domestic administrative burdens, he said that the costs to the national administration of Colombia would be identical to those that it was already incurring on the basis of Colombia's existing system, which allowed for the domestic registration of geographical indications, such as the recently registered "Café de Colombia". He believed that the proposed EC system could be fitted into the national regulatory framework of Colombia. For instance, it would suffice that the applications were sent directly to the IP office of Colombia, for example by electronic mail from Geneva.

49. The representative of Hong Kong, China said, in relation to the comments made by Colombia, that there would not be any direct costs for non-participating Members because there would be no legal effects on them. With regard to indirect costs related to the monitoring of third markets, the situation would not be different from the present situation where geographical indications were protected as certification marks. Under the TRIPS Agreement, i.e. without the multilateral system, a local producer in Hong Kong, China would have to monitor whether there would be certification mark applications which could have an impact on his own product and, when necessary, he would have to lodge oppositions with the Hong Kong, China IP office, in accordance with its domestic legal framework.

50. The representative of Australia said that the EC proposal was clearly more costly than the joint proposal for a whole range of reasons. One crucial difference was the issue of participation. Unlike the EC proposal, the joint proposal was entirely voluntary. It was the view of many Members, including Members that had not co-sponsored the joint proposal, that participation must be voluntary, which meant that there should not be any legal obligations for non-participating Members. As had been discussed previously and best expressed by Brazil and the Philippines at the September meeting, there was no point in discussing a proposal that would only provide for obligations with no corresponding rights to non-participants, and that would impose undue burdens and costs on developing countries, many of which did not have any economic interest in participating in the system because they had few or no wine or spirit geographical indications to protect. This had just been confirmed by the European Communities, who had said that 80 per cent of the world's geographical indications were probably European. Members should therefore focus on those statistics when considering the costs and benefits of the various proposals. She asked those delegations who so far had not been active in these negotiations and whose views on this particular issue were not clear to carefully consider whether they were willing and able to take on the burden inherent in the EC proposal. As had been mentioned by New Zealand, non-participating Members would essentially

have two alternatives: either to lodge reservations and enter into negotiations in order to exercise their existing rights to deny protection on the basis of certain exceptions; or to protect all EC geographical indications by not having been able to decline protection on the grounds laid out in paragraphs 3.2(a) to 3.2(c) of the EC proposal.

51. As to the argument put forward by the European Communities that their proposal would entail cost-saving benefits by helping right holders to enforce their rights in different jurisdictions, she asked how this would be different from trademarks or patents. She pointed out that the Madrid Protocol, which seemed to have been the model used by the European Communities, was a voluntary treaty, and that so far there had been no international patent register nor progress in the area of harmonization of patent law within the framework of WIPO.

52. She further said that her delegation had problems with the assertion made by the European Communities that the Australian Wine and Brandy Corporation would have no problems with undertaking the burdens imposed by the EC proposal. Firstly, it would be unlikely that every Member of the WTO would have a similar body that would be in a position to assume the proposed obligations. Secondly, the question was not whether the Australian Wine and Brandy Corporation would have the capacity to take up the obligations, but whether it should have to do so, and whether Australia's existing rights to use the exceptions in Article 24 of the TRIPS Agreement should be limited in the way proposed by the European Communities. According to the proposed system, if Australia chose not to participate, lodge reservations or enter into negotiations, then it would have to protect all notified geographical indications unless, of course, it would be able to apply Article 24.4 and 24.5 exceptions, which were not, in any case, the only ones available under the TRIPS Agreement.

53. Finally, on the point that the mandatory negotiations requirement under the EC proposal had already been established by the TRIPS Agreement, she said that, if Members' intentions in the Uruguay Round were to increase the protection of individual geographical indications through a register of geographical indications for wines and spirits, then both paragraph 4 of Article 23 and paragraph 1 of Article 24 of the Agreement would have been placed in the same article.

54. The representative of the United States said that third parties from other WTO Members were having difficulties using the current EC GI system because for some time the European Communities had been representing that it was not possible for those third parties to file for protection in that system unless the other Members had an equivalent system. It was only after that representation had been changed that the first foreign application mentioned by the EC representative, namely that from Colombia, was eventually filed.

55. He said that under the US certification mark system a number of third country geographical indications had received protection, which was evidence that such a system was a good one. Moreover, it was consistent with the objective set out in the joint proposal to facilitate the protection for geographical indications.

56. On the specific issue of fees and costs, his delegation shared the concerns raised by, Argentina, Australia, Canada, Colombia, Japan, New Zealand and Chinese Taipei that the EC's proposed system was complex, costly, burdensome and overreaching. The experience of other international IP instruments that had detailed proposals on fee systems indicated that these issues tended to make negotiations much more difficult and lengthy.

57. His delegation disagreed with the European Communities' statement that there were no benefits under the joint proposal. The system proposed would certainly meet the mandate by facilitating protection through an international database to be consulted by Members. This database had no parallel in international IP systems and would be unprecedented in terms of interaction and transparency. The European Communities' objection to the joint proposal seemed to come from the

very fact that this proposal could indeed meet the mandate without imposing new substantive obligations and prejudicing any existing rights or obligations under the TRIPS Agreement.

58. His delegation failed to understand how the EC proposal for mandatory negotiations could not be considered as a new substantive obligation. His delegation's understanding of Article 24.1 of the TRIPS Agreement, described by the EC representative as a current obligation, was that a name had to be a geographical indication under Article 22.1 of the Agreement before such provision could be invoked. Unlike Article 24.1 of the Agreement, the European Communities' proposal for bilateral negotiations seemed to cover any objections, including the objection that a name was not a geographical indication in the territory where protection was sought.

59. The representative of Argentina said that the fact that small European producers would have to face litigation costs to defend their GI rights could not be a valid justification to give unprecedented supranational protection only to GI rights through the WTO. Such producers had the freedom to use or not to use geographical indications just as any other person had the freedom to protect their inventions or creations under various IP rights. Each type of protection could bring not only benefits but also costs and risks, including litigation costs in other countries. European producers would choose the protection based on their own commercial interests. They would generally opt for GI protection because they would get immediate benefits, such as subsidies. The difficulties mentioned by the EC delegation could not be compared to those to be faced by small producers in developing countries, who had other market access difficulties. She did not understand why problems encountered by European producers in the area of geographical indications should receive a better treatment than problems faced by producers of developing countries in other IP areas such as patents.

60. In response to the points made by the European Communities on the costs developing countries would incur with the monitoring of trademarks under the EC proposal, she wondered how many of these countries would be able to pay for such services in a developed country. Under the Madrid Protocol each WIPO member had absolute freedom to ratify it or not, a decision which would depend on their commercial interests. The EC's proposed system, on the contrary, would be mandatory for all WTO Members, whatever their interests might be in the wines and spirits sectors. The Madrid Protocol model that the European Communities claimed to have used for its proposed fee system was not relevant to the WTO context. The dynamics of trademarks were completely different from the dynamics of geographical indications. She further said that the Madrid system was administered by WIPO, with 90 per cent of its budget coming from the PCT system. Although the Lisbon Agreement, which applied to all kinds of geographical indications, did not yield any revenue, WIPO could nevertheless continue administering it, thanks to resources from other administered agreements, such as the PCT. She therefore wondered for how long the supranational administrative structure the European Communities was proposing would be sustainable.

61. The representative of Canada said that his delegation would continue to draw on its experience of the bilateral negotiations with the European Communities in the area of geographical indications for wines and spirits because it considered it useful for other Members to have an understanding of Canada's experiences in this area.

62. He further said that under the EC proposed system both participating and non-participating Members were going to bear certain significant costs related to the examination of applications, particularly the examination as to whether these applications would qualify under the applicable exceptions and could be used in the reservation process during the 18-month period. Whether these would be the current exceptions under the TRIPS Agreement or the exceptions as modified by the EC proposal was a point to clarify.

63. The representative of Colombia said that unfortunately the reply from the European Communities was not specific enough and that her question did not relate to the Colombian system for registering geographical indications. What were the administrative costs that would be incurred under paragraph 9 of the EC proposal, both for participating and non-participating Members? Would these costs be different for participating and non-participating Members?

64. The representative of Japan said that, contrary to what the European Communities were saying, the Madrid Protocol system and the proposed EC system were quite different. While the Madrid system had a limited number of Members, the proposed EC system would be binding upon all WTO Members.

65. The representative of New Zealand took issue with the statement of the European Communities, claiming that the joint proposal also set out new legal effects that would result in costly and significant new burdens. While she agreed that the joint proposal indeed provided for each participating Member to be required to consult the database, this was only because Members were mandated to negotiate a system that would facilitate the protection of geographical indications for wines and spirits. It was precisely to give effect to that mandate that the joint proposal provided for a simple examination process in which national offices had to consult a database of geographical indications. The proposed system stood in contrast to the complex and multifaceted approach proposed by the European Communities and other proposals on the table.

66. She also took issue with the European Communities' challenge to her delegation's comments with regard to the extent of the new substantive obligations implied by the proposed EC system. The European Communities had said that under their proposal there would not be any change to the current level of protection provided for under Articles 22 and 23 of the TRIPS Agreement. The European Communities had, however, entirely failed to mention Article 24, which provided a balance to the protection provided in Articles 22 and 23. In fact, under the EC proposal most of the flexibilities of Article 24 would entirely evaporate after 18 months, unless the Member had the resources and capacity to monitor and make reservations.

67. As to the point about the size of the New Zealand IP office as compared with the EC office and the suggestion that New Zealand's office would have no problem monitoring geographical indications, she said that this conclusion presumed an office that was dedicated entirely to geographical indications. The number of people working only with geographical indications in the European Communities was in fact equivalent to just less than half of New Zealand's entire IP office staff working with all other forms of intellectual property rights, most of which existed in greater numbers than geographical indications. New Zealand had no intention of establishing a dedicated office for geographical indications and wondered how many other Members would be interested in establishing such a specialized office.

68. She said that it was a fact that most geographical indications in the world were European, a point that the European Communities itself would not challenge. Therefore, it went without saying that the majority of benefits of these negotiations would accrue to the European Communities. Since these geographical indications were already protected within the European Communities and the additional protection being sought was therefore outside the European Communities, most of the costs would, in fact, accrue to Members other than those from the European Communities. Moreover, for the one or two geographical indications that other Members would wish to put on the register, there were no assurances that they would be protected in third country markets.

69. She welcomed the efforts of the Hong Kong, China delegation to spell out the costs of the system it was proposing, particularly its assurances that there would not be any new burdens, as indicated in Annex B of the proposal. She regretted, however, that the estimation of costs provided in Annex B only dealt with a small portion of the real costs that were being discussed. In fact, it was clear from the discussions that the type of costs that Members were concerned about went well

beyond those that were set out in Annex B and included, *inter alia*, additional costs to national systems, consumers and producers.

70. Finally, like Canada, she thought that it was clear from the discussions that among all the proposals on the table, the joint proposal was the one containing the lowest costs and least burdensome option. Most importantly, the joint proposal contained a system which involved absolutely no costs for non-participating Members, reflecting its truly voluntary character.

71. The representative of the European Communities said, in response to Australia, that in fact he had never suggested that the joint proposal was the most costly proposal. What he was trying to say was that he was not sure about the cost implications of the joint proposal. He therefore wished to know how much it would cost for national administrations to implement the legal effects attached to the joint proposal. How much would it cost, for example, for Australian tribunals and administration to look into a database every time they made a decision on geographical indications and trademarks?

72. As to a point made by Australia with regard to the percentage of EC geographical indications, he said that in fact the estimate of 80 per cent he had given at a previous meeting might require some correction. The fact that Australia alone had currently approximately 300 geographical indications was an indication that that estimate had to be updated. More importantly, GI protection was a dynamic process and countries that presently were just discovering geographical indications could in the future wish to protect their own geographical indications. He recalled that in a symposium organized in June 2005 by WIPO in Parma, Italy, the representative of Australia had referred to an example given by an Indian representative according to which India would have more than 100 geographical indications for "saris" alone. Therefore, the issue of the number of geographical indications would evolve in the future and hence be of relative relevance to these negotiations.

73. On the cost implications of bilateral negotiations in case of reservations, he recalled that what the TRIPS Agreement simply provided for was an obligation for a Member to negotiate if so requested by another Member. This did not necessarily mean that there would be extra costs. It was just a question of willingness and of agreeing on the modalities.

74. He said that the question of why a Member should protect a geographical indication if it did not wish to participate in the system was, to a large extent, hypothetical for countries like Australia, which was already protecting, on the basis of a bilateral agreement, EC geographical indications for wines, which formed the greater part of EC geographical indications. In any event, the European Communities believed the system should be a WTO multilateral system in accordance with the mandate, and that Members were not having in the Special Session of the Council for TRIPS a discussion about geographical indications in general but one on how they should implement this mandate.

75. On the bilateral negotiations foreseen under paragraph 3.2-3.4 of the EC proposal, he said that, while he agreed with Australia that Articles 24.1 and 23.4 of the TRIPS Agreement were different provisions, he also saw nothing in the latter that excluded the former from the section on geographical indications, which set out the entire standard of protection for geographical indications. The protection that an individual geographical indication received in a third country was a combination of Articles 22 and 23 of the TRIPS Agreement, which could, at the same time, be nullified by one of the provisions on exceptions under Article 24. Therefore, it was the entire operation of Section 3 of Part II of the TRIPS Agreement which should be facilitated and, to the extent that Article 23.1 was an integral part of that Section, there was nothing indicating that this provision should not be included in the EC proposal.

76. In response to a comment made by the representative of the United States on "Colombian Coffee", he said that, following the circulation of the WTO dispute settlement reports involving the EC Regulation on geographical indications for foodstuffs, the European Communities was in the process of clarifying certain aspects of the regulation, in particular those related to reciprocity. The fact that this recent third country application had been applied under the current system showed that it was capable of receiving third country geographical indications. He added that Colombia had only recently applied for "Colombian Coffee" in the European Communities simply because this name had only been recently registered in Colombia.

77. As to the argument raised by Argentina that there was no justification for having a WTO registration system for geographical indications and not for other intellectual property rights, he said that Members were in a negotiating arena which followed a mandate included in the TRIPS Agreement and in the Doha Ministerial Declaration. This was therefore a political issue, which was hard to explain from a logical perspective. He nevertheless took note of this argument about differences not being justified, which was a point his delegation had raised in relation to GI extension and in WIPO, where his delegation had been advocating that the agenda item of domain name arbitration rules also address geographical indications.

78. He refuted the comment made by Argentina that EC producers who registered geographical indications automatically received subsidies. There was certainly not any such mechanism that would provide for a subsidy to be given the moment a producer registered a geographical indication.

79. As to Canada's reference to Article 9.4 of the EC proposal, he said that, indeed, it referred to participating Members as opposed to WTO Members. This provision simply enabled WTO Members to charge to their own producers whatever it would cost them to participate and to notify and register an individual geographical indication. As in the EC proposal only participating Members could notify geographical indications and charge their producers for the geographical indications they wished to be notified in the system, only participating Members had been mentioned in this provision. This did not mean, however, that this provision prohibited the possibility for any other WTO Member to indicate the costs for it being involved in the system and to recover them at a later stage after the notification of the geographical indication.

80. As regards Colombia's question on administrative costs incurred by virtue of the operation of the proposed EC system, he said that this would depend on how this system was implemented in each WTO Member. In any case, there would be a first task, which was to receive the notification and, if necessary, translate it. Colombia would not have translation costs since Spanish was one of the official languages of the WTO. Once the notification had been received, the examination procedure, which varied in each country, would begin. While some countries would make a substantive examination with opposition procedures, others would not. He did not know exactly how the Colombian system worked, but there would certainly be some costs associated with this process. Once this examination process had been completed, if as a result of it there was still some doubt or a problem regarding the possibility of registering this geographical indication in Colombia, then the Colombian authorities would send a note to the WTO Secretariat informing the WTO that it wanted to lodge a reservation regarding this geographical indication in Colombia. In its reservation, Colombia could indicate, for example, evidence of genericness of that name, non-compliance with the Article 22.1 definition of a GI, or any other additional information, so that the notifying Member would be aware of the problem. The process of examination would be identical both for participating and non-participating Members, the only difference being the legal effects which would arise at national level. These legal effects at the national level were, however, presumptions that would be invoked by the GI right holder himself, before the administration, trademark office or court, and there would not be an obligation to require the administration to raise them ex officio. This was why these legal effects would not involve excessive administrative costs.

81. As to Japan's argument that comparing the Madrid Protocol with the proposed EC system was not useful because the Madrid system had a more limited membership, while he agreed that the WTO multilateral system to be established would involve the WTO membership, which had 149 Members, the fact that LDC Members would not be affected meant that in fact only some 110 Members would be concerned by the EC proposed system, only around 30 more than the Madrid Protocol.

82. Finally, on the question of the size of New Zealand's IP office, he said that the relative size and number of geographical indications of New Zealand compared to the European Communities justified the fact that the European Communities designated eight people to deal exclusively with geographical indications. The important issue under this discussion was, however, not so much the numbers but the fact that when a country acted on a fee recovery basis it did not really matter how many geographical indications it had, because it would be able to make applicants pay for them and with that payment finance the costs of its IP office, and even enlarge its personnel.

83. On New Zealand's comment that under the EC proposal all exceptions would no longer be available after 18 months, he said that this was not correct. Genericness was one exception that could be raised during the 18-month period, which was a long time-limit, while other exceptions under Article 24 of the TRIPS Agreement, such as prior trademarks, grandfathered use, use of personal names, would continue to be available.

84. The representative of Chile took issue with the statement from the European Communities that the joint proposal would entail high costs for Members' administrations and courts, because under such a proposal what they would have to do was simply to consult the database when taking decisions on geographical indications and trademarks. This system would truly facilitate the work of the few courts or administrative agencies involved, and would not therefore be costly. In contrast, under the EC proposal, Members would have to engage in mandatory bilateral negotiations, an obligation that did not exist in either the TRIPS Agreement or in the Madrid system and which would entail high costs.

85. The representative of Australia said that under the joint proposal there would be absolutely no cost to non-participating Members, which meant that those Members who did not produce wines and spirits or did not have anything to gain from this system would not have to bear costs. The costs of the joint proposal for participating Members, on the other hand, would vary, as Article 1.1 of the TRIPS Agreement would give Members the freedom to determine the appropriate way of implementing this proposal within their own legal system and practice. Under Australian law, for example, decisions regarding the registration and protection of trademarks and geographical indications for wines and spirits were made by two bodies, namely IP Australia, responsible for the administration of Australia's Trademarks Act, and the Australian Wine and Brandy Corporation (AWBC), which administered the AWBC Act. These bodies would be able to implement the joint proposal in a simple way, namely through the regulations to the already existing legislation with no need to neither change substantive law nor employ new staff. Most importantly, there would be no need to review the register, lodge reservations or enter into negotiations on behalf of every interested party in Australia that might be affected by the registration of a foreign geographical indication. This was significantly different from the EC proposal, which had legal effects both in participating and non-participating Members and would consequently pose serious burdens on those Members who themselves were not benefiting from the system.

86. The representative of the European Communities said that under the EC proposal non-participating Members would in the end also bear no costs because they would be fully recoverable. He further asked the delegations who had stated that the EC proposal would be more costly than theirs to come up with figures in order to be more credible.

87. The representative of the United States said that for Article 24.1 to be applicable, a name had first to be considered a geographical indication in the country where protection was sought. If that country had made a reservation on the grounds that the name was not a geographical indication, then the linkage with Article 24.1 would raise concerns that the balance of obligations and rights under the TRIPS Agreement would be changed.

88. On the point made by the delegate of the European Communities on the costs of both proposals, he said that the aim of the joint proposal was only to facilitate protection in an effective manner while at the same time being neutral as to rights and obligations under the TRIPS Agreement. It would consequently result in very low costs for the administrative agencies that would have to implement the proposal at a national level. More specifically, there would truly not be any additional costs in setting up a system because it would be sufficient to use existing systems, with the current ordinary costs of applying relevant information in accordance with the domestic laws of participating Members. This was not to say that the joint proposal would not also carry some minimal costs in establishing the database at the international level. The EC proposal, on the other hand, would result in great burdens and costs associated with the need to modify Members' existing systems and retrain personnel, as well as costs associated with the increased challenge costs for interested parties.

89. The representative of Argentina said the proposal made by the EC that the WTO's budget initially cover the costs and be reimbursed implied that the EC had already made some calculations. The argument that under the proposed EC system it would be possible to recoup all the costs was not a valid one. Argentina did not want to incur any additional costs. The WTO had other examples of notifications systems, such as under the SPS Agreement, which did not involve major costs. There was therefore no reason why the notification system for GIs for wines and spirits should cost more. Argentina was still in the initial stage of setting up a register of geographical indications, which had already resulted in high costs for its national administration. Hence, it was unthinkable for Argentina's Government to extend this current incipient system to a universal system of reviewing a massive number of GI notifications. The elaborate system proposed by the European Communities merely responded to the structure of protection which had been prevalent in the EU member States for many years. These member States benefited from administrative structures, both at Community and national levels, which was far beyond what Argentina had.

- *Review; contact point; administering body/other bodies; date of entry into operation.*

90. The representative of the European Communities said that the functioning of the system entailed two kinds of tasks, namely norm-setting tasks and administrative tasks. The European Communities believed that the multilateral register should be a WTO instrument and therefore there must be a body setting the different administrative rules that would allow the system to function. The body would probably be the TRIPS Council and therefore all the administrative rules that would be required should be agreed by all WTO Members. However, as for the day-to-day management of the system, such as receiving the applications and translating them, his delegation was open as to the body which could perform such a task. It could be the WTO Secretariat, but could also be carried out by any other bodies that had expertise in the area of intellectual property, in particular the World Intellectual Property Organization.

91. The representative of Canada, supported by the representatives of Australia and the United States, expressed concerns regarding the second sentence of the review provision under Section F of the Hong Kong, China proposal, which stated that "[i]n particular, the question of scope of participation should be revisited as part of the review". This could call into question the voluntary nature of the system. In that light, he reminded Members that their mandate under Article 23.4 of the TRIPS Agreement was to negotiate a system that would facilitate the protection of geographical indications for wines and spirits eligible for protection "in those Members participating in the system".

92. The representative of Hong Kong, China drew Members' attention to paragraph 59 of the minutes of the September meeting (TN/IP/M/14), where his delegation explained the objective of the review mechanism under Section F of its proposal. His delegation was conscious of the fact that the issue of participation was important to the debate, but it was also unlikely that Members would reach a consensus on it in the near future. This was the reason why, under his delegation's proposal, the suggestion of having a review a number of years after the setting up of the system was introduced. Such a review was, however, not just on the issue of participation. It was meant to take into account the actual experience of operating the system to see where the system could be further improved. In this context, participation could be one of the issues that could be addressed under the review.

93. The representative of Australia said that, although it was premature to start discussions on the administering body, his delegation could see the TRIPS Council playing a role in this regard, which did not mean that it would not also be open to looking into other organizations, such as WIPO. In any case, under the joint proposal an onerous commitment would not be placed on any administering body.

94. The representative of Switzerland said that the administering body should be an intermediary between Members in the administration of the system. Its tasks should therefore be to receive notifications and reservations by a Member, send them to all other Members or publish them online or in any other form that was decided. Another important task of the administering body should be, as suggested by Hong Kong, China, to carry out a formal examination of notifications to ensure that the requirements defined by Members would be fulfilled. The administering body should not, however, decide whether a notification would be valid on Members' territories. This would be the sole competence of each Member, which would continue to have the full competence to make such a determination at the national level and uphold its international obligations. The formal examination to be carried out by the administering body would, however, serve to alleviate the workload of Members. The administering body should manage the system on a daily basis and regularly update the information contained in the register to take account of new notifications, modifications and withdrawals or removals of geographical indications, and communicate this information to Members.

95. Finally, she said that it was important to decide who would serve as the administering body. It could be the WTO Secretariat or another international organization with the capacity and expertise to carry out such work, such as the International Bureau of WIPO, which has the expertise of administering the Madrid Protocol and the Lisbon Agreement. Her delegation was open to possible proposals along these lines, as Hong Kong, China had suggested in its proposal on page 23 of the Secretariat's side-by-side document, TN/IP/W/12.

96. The representative of the European Communities said that one of the key elements of the mandate was the term "multilateral" which, in the WTO terminology, called for participation of all WTO Members. This was one of the cornerstones of the WTO system. This was not just a formalistic question but an issue that the previous Chair had described as one that would be, at the end of the day, relevant to determining the value that Members attached to this particular instrument on the negotiating table. It was therefore clear that a multilateral register with one or two Members only and another that covered the whole or most of world trade, would not have the same value. He expressed concern that some delegations seemed to have an approach to the negotiations in this Special Session that was different from those in Agriculture or NAMA, namely to negotiate an instrument and thereafter be able to decide to join the outcome.

97. The representative of Chile asked the European Communities how they would interpret the phrase "Members participating in the system" in Article 23.1 of the TRIPS Agreement.

98. The representative of the European Communities said that there was in fact a tension between the word "multilateral" and the notion of "Members participating in the system". This was the very reason why the EC proposal attempted to give meaning to these two aspects by proposing two different sets of legal obligations for participating and non-participating Members. This type of interpretation arose from the notion that the TRIPS Agreement in itself was built upon the idea that WTO Members must offer mechanisms of protection to other nationals' intellectual property rights, including geographical indications, whether or not they had any IPR to benefit from protection in other Members. Therefore, the word "multilateral" could not mean anything but that all WTO Members that had to facilitate protection of geographical indications and apply Section 3 of Part II of the TRIPS Agreement should be, in one way or another, involved in the system, some having lesser obligations than others.

99. The representative of the United States said that the mandate under which Members were working envisioned a purely voluntary system and that any other interpretation of this mandate would deprive the words "those Members participating in the system" in Article 23.4 of the TRIPS Agreement of its meaning.

100. With respect to the administering body, he said that his delegation would not have any strong preference as to which body should have such responsibility. It would be, however, premature to decide on this issue at this stage of the negotiations. In any case, under the joint proposal, which put forward a system that was easy to administer, the implementation could be carried out in a similar manner to how it was currently done by the WTO Secretariat in administering the Central Registry of Notifications. Therefore, the joint proposal would be more inclined to having the WTO Secretariat do this work because of the low overheads of the system proposed.

101. The representative of Argentina associated her delegation with the view expressed by Australia, Canada and the United States that the mandate under Article 23.4 of the TRIPS Agreement instructed the negotiation of a voluntary system. She said that the European Communities' attempt to accommodate the word "multilateral" and the notion of "Members participating in the system" by explaining that under its proposal fewer legal effects would be given with regard to non-participating Members showed how difficult it was to reconcile what was given under Article 23.4 of the Agreement with the EC proposal. In fact, what the EC proposal was doing was to assimilate the concept of "participation" with that of "notification" by saying that a non-participant was a Member which did not notify. This was not the understanding of the joint proposal group, according to which only those who participate would notify since through this voluntary act they gave their consent to certain rights and obligations. She disagreed with the European Communities that the notion that all Members should participate emerged from the concept that WTO Members had the general obligation to protect the intellectual property rights of other Members' nationals. This was contradicted by Article 23 of the TRIPS Agreement, which contained no strong obligation to afford protection and only stated that each Member should provide the legal means for interested parties to prevent certain uses of geographical indications. So, it was obvious that the differences of positions in this Special Session resided not only in relation to the mandate under 23.4 of the Agreement, but also in relation to what the TRIPS Agreement provided in the GI area. Therefore, what the European Communities was seeking was not provided under the TRIPS Agreement, namely direct protection.

102. The representative of Australia recalled that a recent WTO panel decision had determined that the European Communities had not been respecting the national treatment principle in the area of geographical indications for foodstuffs, and that they had a certain time-limit to implement the panel ruling. As long as the ruling had not been implemented, her delegation was of the view that any statement by the European Communities on the obligation for a Member to protect IPRs of nationals of other Members could not be taken seriously.

103. The representative of the European Communities agreed with the representative of Argentina that the TRIPS Agreement did not require direct protection and that such protection should not be derived from the proposed EC multilateral register. Although the proposal provided for a system of presumptions, such presumptions would have to be asserted by the right-holders themselves, not directly by the administrations of the third countries concerned. He would therefore correct his earlier point and say that Members had the obligation to provide legal means to interested parties to impede misuses of geographical indication.

104. With regard to the Australian comment on the panel ruling, he regretted that "Café de Colombia" had not been applied for registration in the European Union earlier because it would have clearly shown that the EC system had always allowed registration of third countries' geographical indications.

C. OTHER ISSUES

105. The Chairman said that he would hold consultations on the draft report he would have to make to the TNC. He further indicated that for 2006 three formal meetings were planned back-to-back with the meetings of the regular session of the Council for TRIPS: 16-17 March, 12-13 June, and 27 October.

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