

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

**MINUTES OF MEETING**

Held in the Centre William Rappard  
on 16-17 March 2006

*Chairperson: Ambassador Manzoor Ahmad (Pakistan)*

<u>Subjects discussed</u>	<u>Page No.</u>
A. ELECTION OF CHAIRPERSON .....	1
B. ADOPTION OF AGENDA .....	1
C. NEGOTIATION ON THE ESTABLISHMENT OF A MULTILATERAL SYSTEM OF NOTIFICATION AND REGISTRATION OF GEOGRAPHICAL INDICATIONS FOR WINES AND SPIRITS.....	1
D. OTHER ISSUES .....	38

---

A. ELECTION OF CHAIRPERSON

1. The Special Session confirmed the reappointment of Ambassador Manzoor Ahmad (Pakistan) as Chairperson of the Special Session of the Council for TRIPS.

B. ADOPTION OF AGENDA

2. The sixteenth Special Session agreed to adopt the agenda as set out in WTO/AIR/2769.

3. 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.

4. It was so agreed.

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

5. The Chairman recalled that Ministers in Hong Kong had agreed that negotiations of the Special Session should be intensified in order to complete them within the overall time-frame for the conclusion of the negotiations that had been foreseen in the Doha Declaration. He said that, at the

TNC meeting of 6 February 2006, the TNC Chair had noted that there appeared to be a shared intention by the Members to move ahead across the whole of the DDA, making progress on all issues, and a willingness to do so by "moving in concert". The TNC Chair had also made the point that it was necessary to move urgently to negotiating elements of texts. The Chairman of the Special Session then drew Members' attention to the "Timelines for 2006" paper, circulated as JOB(06)/13, which provided for a working document of the Special Session to be on the table by July 2006. This fully reflected his own assessment that, bearing in mind the end-of-year deadline for the Doha negotiations as a whole, it would be necessary to have, before the summer break, a working document which could be used as a basis for the final product and in respect of which there would be a good degree of understanding among Members as to where the main outstanding difficulties to be resolved lay. Clearly, in order to achieve this by July, it would be desirable to have made progress in unblocking, well in advance of that time, the key difficulties that had impeded the work so far.

6. He further recalled that his report to the TNC (TN/IP/14), which was taken note of in the Hong Kong Ministerial Declaration, referred to important differences remaining on two key issues, namely the issues of legal effects and participation. The report further recognized that additional work was required on a range of other points, including on the question of costs and administrative burdens for WTO Members, in particular for developing countries. The report noted that it would be difficult to make major headway on these issues, together with other details of the mechanism to be established, without greater convergence on the two key issues.

7. He informed Members that, on the basis of what had been agreed in Hong Kong and of the guidance from the TNC meeting, he had been consulting with delegations on how the Special Session's work might be best organized. It was important to find a way of "changing gear" in these negotiations so as to be able to make progress on the issues that needed to be clarified in order to be in a position to produce the document required by July. As a result of these consultations, he had circulated to delegations, by fax and on his own responsibility, a list of the priority concerns that had been raised by delegations for discussions in this meeting. The paper listed five such priority concerns, in the order in which they appeared in the side-by-side document (TN/IP/W/12), namely participation, notification, registration, legal effects/consequences of registration, and fees and costs. He suggested that the Special Session take up each of these areas in turn. The paper further said that it had been suggested that, in discussing each area of priority concern, certain issues might be explicitly addressed as appropriate, namely: the impact of the proposals on the principle of territoriality; their impact on the existing balance of rights and obligations; their impact on developing countries; their impact on national systems/jurisdictions; and administrative burdens. He added that the discussion of the priority concerns and of the issues listed would not preclude other aspects from being discussed. He proposed that the Special Session organize its work on this basis.

8. It was so agreed.

#### ***General Comments***

9. The representatives of India, Guatemala, and the Philippines said that the issues of costs and burdens were of great importance and were always at the back of their minds when discussing the various proposals on the table.

10. The Chairman said, in response to a procedural question raised by India, and supported by Guatemala, that it was possible to raise the issues of costs and burdens at any time, including during the discussions on participation, notification, registration and legal effects.

11. The representatives of the European Communities, New Zealand and the United States said that the Chair's list would be a helpful contribution to the Special Session's efforts to move forward in a constructive manner.

12. The representative of Switzerland said that his delegation was disappointed by the fact that the list of priority concerns had grown, compared to the two key issues that the Chair had originally mentioned, namely participation and legal effects. It would be of little use to discuss issues related to notification and registration in great length without having more clarity on these two key issues.

13. The representative of Costa Rica requested that his country, which had already co-sponsored document TN/IP/W/5, be added to the list of sponsors of the joint proposal circulated in document TN/IP/W/10. He said that the joint proposal had the necessary and sufficient elements to comply with Article 23.4 of the TRIPS Agreement and the Doha Mandate, and that his delegation supported the seven basic principles enshrined in that proposal: first, that participation would be voluntary; second, that the system to be established would not have legal effects in respect of non-participating Members, a feature compatible with all existing legal systems in international law; third, that the system would maintain the existing balance of rights and obligations under the Agreement, a principle of particular importance to his delegation, for many WTO Members, including Costa Rica, were not producers or exporters of wines and spirits and would therefore not have an economic interest in these negotiations but only a systemic one; fourth, that the system to be established would not entail substantive costs, either for participating Members or for the body that would administer it; fifth, that this system would comply with the principle of territoriality; sixth, that it would preserve the rights of Members to establish the adequate method to implement the provisions of the TRIPS Agreement within the framework of their own legal systems and practices; and seventh, that the system to be established would be limited exclusively to wines and spirits.

14. The representative of the European Communities said that his delegation remained fully committed to this process and considered these negotiations as an essential element in the overall balance of the DDA. The evolution of the EC proposal from its initial content to what was currently on the table was good proof of his delegation's continually constructive attitude. The European Communities had refined their proposal, attempting to meet the concerns expressed by other delegations in the last few years, including some of the principles that had just been mentioned by Costa Rica and which were, in fact, common ground. All Members had already agreed: that the applicable GI definition was that under Article 22.1; that the purpose of the system should be to facilitate obtaining the level of protection for geographical indications established in the TRIPS Agreement; that the system should be useful and reliable; that the exceptions in Article 24 of the Agreement would continue to be valid and relevant; and that there should be a different treatment for participating and other Members. The new elements added to the EC proposal tabled in June 2005 (TN/IP/W/11) included provisions on trademarks and a system for fees that was devised to ensure that those who benefited most from the system would contribute to its functioning costs. Apart from these written improvements, his delegation had flagged, at previous meetings, that it would be prepared, as a sign of flexibility, to consider other possible adjustments if Members thought they would be helpful for improving the text. One example was his delegation's willingness to discuss the extension of the period for lodging reservations or the limitation of the annual number of notified geographical indications. He said, however, that his delegation's willingness to be flexible did not mean that it was detracting from proposing a system which was multilateral in nature and with legal effects in all Members. These two key issues, legal effects and participation, should be the focus of all the Special Session's efforts. Progress on other issues was dependent on progress on these two key issues.

15. The representative of Brazil said that his delegation was willing to engage in substantive work related to these negotiations, provided that there would also be a commitment to deal in a similar way with other TRIPS-related implementation issues, such as the proposal that Brazil, India and other developing countries had tabled in the context of the discussions of the relationship between the TRIPS Agreement and the CBD.

16. As far as the substance of these negotiations was concerned, he said: that any multilateral system of notification and registration of geographical indications for wines and spirits would have to

be of a strictly voluntary nature; that it should not produce extraterritorial effects; that it should not result in additional burdens for developing countries; that it should be limited to wines and spirits; and that it should avoid the introduction of additional commitments into the TRIPS Agreement.

17. The representative of Guatemala said that it would be essential to take into account, in a horizontal fashion, the impact that every element of the system to be established could have in terms of costs and burdens for developing countries, an essential and prevailing factor in these negotiations. She recalled that Guatemala was a co-sponsor of earlier proposals, including the joint proposal circulated in October 2002 as document TN/IP/W/5. Her delegation agreed with all seven principles outlined by Costa Rica.

18. The representative of the United States said that the joint proposal was the only proposal that respected the mandate and the principles outlined by Costa Rica. The objective of the Special Session should be to establish a multilateral system of notification and registration of geographical indications for wines and spirits that was consistent with the TRIPS Agreement and satisfied the mandate, namely that it should: be voluntary; be simple and inexpensive; preserve the existing balance of rights and obligations in the TRIPS Agreement; respect the principle of territoriality; and allow Members to continue to determine for themselves the appropriate method of implementing the provisions of the TRIPS Agreement within their own legal systems and practices. The joint proposal was the only option that satisfied the mandate, because it facilitated the protection of geographical indications for wines and spirits without imposing additional burdens on Members.

19. The representative of Korea said that his delegation was of the view that these negotiations should be conducted within the mandate set out in Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Declaration, which meant that the system to be established should be non-binding and participation in it should be voluntary. In addition, the system should not impose undue financial and other administrative burdens, either on participating Members or on those choosing not to participate and it should allow Members to continue to determine for themselves the appropriate way of implementing the provisions of the Agreement within their own legal system and practice.

20. The representative of Nicaragua said that his delegation considered the joint proposal a simple, effective and efficient system for the notification and registration of geographical indications, and that its voluntary nature was a particularly important feature. His delegation expressed support for the statements made by Chile, Costa Rica and Guatemala and requested that Nicaragua be added to the list of sponsors of the joint proposal circulated in document TN/IP/W/10. He informed the Special Session that on 15 March 2006, Nicaragua had deposited before WIPO its instrument of accession to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, which demonstrated the importance that his country placed on multilateral disciplines.

21. The representative of Singapore said that, although her country was not a producer of wine and did not have any such geographical indications, it had been following these discussions closely, given the implications of their outcome for non-wine producing Members. In this regard, her delegation agreed with the elements of the joint proposal as outlined in document TN/IP/W/10. Any multilateral system of notification and registration to facilitate the protection of geographical indications for wines and spirits must subscribe to the following principles: voluntary participation; preservation of the existing balance between Members' rights and obligations; no legal effects for Members who decide not to participate in the system; no substantial costs, particularly for non-participating Members; respect of the principle of territoriality; and consistency with Article 1.1. of the TRIPS Agreement. Whatever system the Special Session eventually agreed to should not prejudice the interests of non-wine producing Members. Her delegation was encouraged by the European Communities' willingness to be flexible and responsive to the concerns that had been raised. Her delegation was seeking a system that would be simple, straightforward, uncomplicated, efficient,

and more importantly, which would maintain the principle that the protection of geographical indications would be provided in accordance with the domestic laws of each WTO Member, consistent with existing obligations under TRIPS. In other words, it should not pre-empt decisions made regarding the protection of geographical indications at the national level.

22. The representative of Malaysia said that, like previous delegations, her delegation hoped for the fulfilment of the mandate with regard to the setting up of a multilateral system of registration and notification of geographical indications for wines and spirits that would be the least burdensome and costly for developing countries.

23. The representative of Thailand, recalling that his country was not a *demandeur* in these negotiations, expressed his delegation's concerns regarding the issues of legal effects/consequences of registration, fees and costs, and other burdens.

24. The representative of Turkey said that his delegation had broader interests than these negotiations and was therefore not a *demandeur* for a register limited to geographical indications for wines and spirits only. Turkey had registered only two geographical indications, one for a spirit and the other for a liqueur and believed that a GI register limited to wines and spirits would be a repetition of the mistake made during the Uruguay Round that limited the proper TRIPS GI protection to these two categories of products.

### ***Participation***

25. The representative of the European Communities recalled that Members were working under a mandate that called for a multilateral system of notification and registration. He said that, in the WTO context, this meant an agreement that had to be binding upon all WTO Members. Therefore, the understanding that the system to be established should have legal effects in all Members was fully in line with Article 23.4 of the TRIPS Agreement, including its reference to geographical indications "eligible for protection in those Members participating in the system". This wording meant that participating Members would be those who wanted their geographical indications to enjoy the benefits of the register by notifying them in the system. The difference between participating and non-participating Members lay precisely in the freedom Members would have to decide whether or not to include their geographical indications in the system. However, once a geographical indication was included in the system, protection should be "facilitated" in all Members, because the system was supposed to be multilateral. The EC proposal therefore achieved a fair balance in foreseeing certain effects for participating Members and some other effects for non-participating Members. Conversely, the approach taken by the joint proposal on participation was not justified, precisely because it denied the basic principle that any "multilateral" instrument in WTO terms should have effects in all Members.

26. The representative of Guatemala expressed concerns about any negative impact that the system to be established would have on developing countries, particularly those deciding not to participate in the system. The joint proposal fully complied with the mandate of negotiations and met the needs of developing countries. Participation in the system should be strictly voluntary. Therefore, the system should not entail consequences for non-participating Members. Proposing otherwise would be contrary to the rules of the TRIPS Agreement and international public law, according to which treaties were not binding upon countries which did not expressly accept to participate therein. Such a mandatory system would create additional burdens, in particular for developing countries, which were already under the obligation of implementing the heavy obligations of the TRIPS Agreement and which lacked financial and human resources.

27. The representative of Costa Rica emphasized that the mandate was clear in that participation must be voluntary. This was a key element, particularly for non-wine and spirit producing Members.

The joint proposal made clear that each Member would be able to opt in, or out of, the system and would participate, if they so wished, by notifying their national geographical indications. The joint proposal system would be multilateral in nature in the same way as the multilateral Code of Good Practice under the TBT Agreement. His delegation did not share the EC's interpretation of the term "multilateral" under Article 23.4 of the TRIPS Agreement.

28. The representative of the United States said that the language in Article 23.4 of the TRIPS Agreement, referring to the "geographical indications eligible for protection in those Members participating in the system" made it clear that WTO Members should be free to decide by themselves whether or not to participate in the system and thereby to seek the facilitation of the protection of their geographical indications under it. In accordance with the plain words in Article 23.4 of the TRIPS Agreement, participation must be truly voluntary, and proposals, such as the EC's proposal, that called for mandatory participation, were beyond the mandate of these negotiations. Under that proposal, while all participating and non-participating Members would be faced with new substantive obligations and costs, their respective rights would differ as there would be no corresponding benefits that would accrue to non-participating Members. For example, under that system all Members would have to examine notified geographical indications, engage in compulsory bilateral negotiations if there was an objection to protection, protect possibly tens of thousands of successfully registered geographical indications, and dedicate more resources for interested parties to pursue and defend challenges concerning the use of notified terms in their markets. While it was not clear that any benefits would accrue to non-participating Members under the EC system, its burdensome obligations and costs were clear. Moreover, the EC proposal seemed to suggest that a Member must participate in the system in order to receive the benefits of the TRIPS provisions on geographical indications. If a Member participated in the proposed EC system, it could notify geographical indications and obtain protection in other countries, but if it did not participate in it, then it would not be able to notify its geographical indications and would therefore not obtain protection in other countries. This should not be the paradigm for obtaining GI protection in other countries.

29. She said that, currently, any WTO Member seeking GI protection in another country could do so without the existence of a multilateral register. It was the full implementation of existing obligations of the TRIPS Agreement that would provide such protection, which could not occur through extraterritorial mechanisms. Members must also avoid creating a system whereby mandatory participation was necessary in order for Members to receive the benefits of the TRIPS Agreement provisions on geographical indications. This was in contrast to the choice that the joint proposal gave Members to participate in the system by submitting, if they so wished, a written notification of such intention. This feature provided an appropriate balance between participating and non-participating Members: for the former, there would be rights and obligations and for the latter, there would be none. Participating Members would commit to ensuring that their domestic procedures included the provision to consult the database when making decisions regarding geographical indications and trademark registration under domestic law. Non-participating Members would, however, be free to consult this data and use it to substantiate their decisions regarding trademark and GI registration under their domestic laws.

30. Her delegation had some concerns with the Hong Kong, China proposal. While it also envisaged the voluntary participation of Members, it provided that such voluntary participation would be revisited after four years of the establishment of the system. Any changes in the scope of participation would be beyond the mandate of the Special Session.

31. The representative of Chile said that, despite the European Communities' statement that its proposal also followed the principles outlined by Costa Rica, it actually did not, for the following reasons: participation would not be voluntary; there would also be legal effects for non-participating Members; the balance of rights and obligations under the TRIPS Agreement would be altered, as it would affect the enjoyment of Article 24 exceptions; substantial costs would accrue to both

participating and non-participating Members; the principle of territoriality would be affected as a result of mandatory bilateral negotiations; the freedom Members currently enjoyed to choose the appropriate way of implementing their obligations would be curtailed; and the registry would not be limited only to wines and spirits, but would include all products. He agreed with the European Communities that the system should maintain intact the definition of geographical indications under Article 22.1 and that it should facilitate, and not increase, their protection. The language used in Article 23.4 of the Agreement, "to facilitate the protection", had a different meaning from "increasing the protection", the language used in Article 24.1 of the Agreement. Therefore, "facilitate" did not mean to "increase" and "multilateral" meant the adoption of a multilateral solution, i.e., a system the genesis of which would be multilateral but which would leave Members free to decide whether or not they wished to participate in such a system. As pointed out by Costa Rica, one example of such a system was the multilateral Code of Good Practice under the TBT Agreement.

32. The representative of the Philippines said that his delegation's position on the issue of participation had been reflected in paragraph 48 of the minutes of the meeting of the Special Session held on 16 September 2005 (TN/IP/M/14). As a co-sponsor of the earlier joint proposal in document TN/IP/W/5, his delegation also supported the most recent proposal in document TN/IP/W/10, primarily because it provided an uncomplicated and efficient system with no additional burdens for Members. His delegation was still examining the possibility of co-sponsoring document TN/IP/W/10.

33. Another important issue for his delegation was the territoriality principle. He expressed concern that the EC proposal would also have effects for non-participating Members, particularly developing country Members. Under such a system, if a developing country Member was unable to exercise the right to pose a reservation, this could have significant negative implications for that Member in terms of territoriality. While his delegation welcomed the flexibility the European Communities was showing by possibly limiting the number of notifications every year or extending the time-limit for reservations, it nevertheless had doubts as to whether such flexibilities would be enough to address the concerns that many developing countries had on this particular issue. He therefore urged the European Communities to consider, for example, building on the proposals relating to a voluntary database in the WTO or perhaps looking for other areas where it might be more flexible, bearing in mind the positions that Members, particularly developing country Members, had been taking with regard to the issue of participation.

34. The representative of Canada said that the language of Article 23.4 of the TRIPS Agreement clearly showed that the negotiators' intention was to have a non-mandatory registration system. There could be a number of reasons why a Member would choose not to participate. Non-wine and spirit producing Members would probably see no benefit in participating in the system while other Members might choose not to participate for cost reasons. It would be unfair and simply unacceptable to impose substantial obligations and costs on a large majority of non-wine and spirit producing Members that would not gain anything from, nor be able to make practical use of, the system. Canada therefore had serious concerns about the participation aspect of the EC proposal, because not only participants but also non-participants would have onerous obligations.

35. Canada also had concerns with the Hong Kong, China proposal, which foresaw a review of the voluntary nature of participation.

36. For all these reasons the joint proposal was the only one that truly respected the concept of voluntary participation. In fact, it went even further by suggesting the requirement that there should be a written notification of an intention to participate in this registry and by allowing non-participants to consult the registry.

37. The representative of Hong Kong, China said that the provision of its proposal providing for a review after four years included all aspects of the proposal, not only participation. If no consensus

arose from the review, the system would remain the same. In any case, mandating reviews after a system or agreement had been implemented was common practice in the WTO.

38. The representative of the European Communities said that, contrary to what some delegations had stated, the EC proposal fully respected the principle of territoriality as it would leave decisions regarding the protection of geographical indications in the hands of national authorities and courts. There were some misunderstandings as to the meaning of "extraterritorial" effect. An effect was extraterritorial when a country took a decision on its own and without consulting the others, and this decision had legal effects in other jurisdictions. This was different from international or multilateral effects, which was the case when all countries agreed to take a decision and the effects that flowed from it would take place in all these countries. His delegation was referring to the second situation as corresponding to the meaning of a "multilateral system". Thinking otherwise, i.e. that the European Communities were proposing a system with extraterritorial effects, would be equivalent to saying that the GATT or other WTO Agreements were also extraterritorial because they had effects in other Members. By the same token, agreements managed by WIPO, whereby there were effects flowing from IP protection granted in a given country, could also have been termed as extraterritorial agreements. Of course, none of these agreements was extraterritorial; they were in fact multilateral or international ones. He therefore requested Members to use this concept of extraterritoriality in a more prudent manner.

39. As to the question of administrative burdens, he said that his delegation had already accepted that there would be notifications that would come into the system, that the notified geographical indications would have to be analysed by Members, and that it was natural that the EC, in its proposal, was uncertain as to how many notifications the register would attract. Furthermore, the establishment of a time-limit for the examination process, and therefore for challenging notified geographical indications, would require Members to apply their relevant domestic examination procedures. This process would require the use by a Member of some resources for the determination of whether the notified geographical indications were, for example, generic, in accordance with the interpretation in that Member and on the basis of the information provided through the multilateral register. His delegation was therefore aware that this proposal would create some administrative work and that probably more applications would reach the system during its initial stage. It was therefore ready to explore ways to meet those concerns with a view to ensuring that the administrative burdens linked to the examination process could be absorbed by all WTO Members. There would be two possible ways to do that: to limit the number of geographical indications to be notified annually into the system, and to extend the period for examination. The aim was to establish a well functioning register, not one bound to collapse due to a high number of notified geographical indications. In any event, there would probably not be as many geographical indications as the number of trademarks that entered the Madrid system every year, which was in the magnitude of many thousands.

40. Furthermore, the proposed EC system would be able to be implemented easily through the existing administrative procedures that Members already had since the notification into the register would become a bundle of notifications to the different Members and the subsequent procedure at the national level would be the same as if the geographical indication had been notified directly in those Members. For all these reasons, his delegation believed that its proposal would not entail additional costs of setting up structures or different systems. Although procedurally the notification that would be coming through the register would be examined in a Member in a way similar to other domestic applications, that did not, however, mean that their legal effects would be the same. For purely national GI applications, the result would be either registration or refusal of the geographical indication. For notifications coming from the multilateral register as proposed by his delegation, the geographical indication would, in the absence of a reservation, be included in the multilateral register with certain legal effects, namely that in participating Members there would be a presumption of eligibility for protection of the notified and unopposed geographical indication. For all Members, including participating Members, notified and unopposed geographical indications would not be



refused in the future on the grounds they did not meet the definition of Article 22.1, the provision of Article 22.4 on grandfathered use or the provision of Article 24.6 on genericness. Such legal effects would only apply after a Member had examined the notification, which meant that it had the final say on this matter. This would therefore be fully consistent with the principle of territoriality.

41. The system would also facilitate the operation or the implementation of the TRIPS obligations in all Members and, given that it would create a streamlined way for Members to handle geographical indications, it would help in particular Members that had less administrative resources to devote to this purpose.

42. Regarding the question of participation, he said that, in his delegation's view, a voluntary register would not meet the mandate of Article 23.4 of the TRIPS Agreement, which had clear language. When this provision referred to "geographical indications eligible for protection in those Members participating in the system", it meant that they would have to participate if they wished their indications to enjoy the benefits of the multilateral register. However, by leaving it to Members to decide whether or not to include their geographical indications in the register, the EC proposal was not, as some Members erroneously believed, denying the benefits of the TRIPS provisions on geographical indications to Members deciding not to participate. This was not the objective of the EC proposal: those not wishing to notify a geographical indication into the system would be simply renouncing the benefits of the register, but not the benefits they already enjoyed under the TRIPS Agreement.

43. On an issue that had been repeatedly raised by some Members and which related to the voluntary or non-voluntary nature of the register, namely the meaning of the word "multilateral", he said that Article II:2 of the Marrakesh Agreement Establishing the WTO stated that: "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to "Multilateral Trade Agreements") are integral parts of this Agreements, binding on all Members". That clearly defined "Multilateral Trade Agreements" as those which were binding on "all Members". Annex 3 of the TBT Agreement, i.e. the Code of Good Practice, was a quite different instrument from the one being negotiated in this Special Session, namely a multilateral system for the notification and registration of geographical indications that would facilitate the obtaining of the TRIPS protection available for these indications. The Code of Good Practice was open, by acceptance, to standardizing bodies, both governmental and non-governmental, but what was quite clear was that all WTO Members were parties to Annex 3, given the fact that it was an integral part of the TBT Agreement, as indicated in its Article 15.5. All the European Communities were putting forward was a multilateral GI register through a proposed Annex, to which all Members would be parties and whereby they would be obliged to facilitate the protection of geographical indications. This would involve legal effects in all Members because the system was bound to be multilateral. He recalled a presentation made in this Special Session by a WIPO expert on the systems of notification and registration of IPRs managed by that organization and which were described by the expert himself as multilateral in nature and having the objective of facilitating the relevant protection. All these WIPO systems actually carried legal effects, some even stronger than those proposed by his delegation.

44. As to bilateral negotiations under the EC proposal, he said that Article 24.1 of the TRIPS Agreement was an efficient way to resolve issues through negotiation and was an obligation accepted by Members in the Uruguay Round. Members were bound by it, irrespective of its inclusion in the EC proposal.

45. The representative of Japan said that participation in the proposed system should be voluntary and a clear distinction between participating and non-participating Members should therefore exist, particularly in relation to the burden on Members, which should not be excessive. For these reasons his delegation believed that the joint proposal was the best one on the table.

46. The representative of Jordan said that, according to the mandate, the system should be voluntary and should therefore not entail any administrative and other burdens on developing countries nor be in conflict with WTO Members' commitments under the TRIPS Agreement. He stressed the importance of understanding how the system could be efficient for developing countries, keeping in mind the burdens they were already bearing and the fact that the Doha Round was a round for developing countries

47. The representative of Chinese Taipei said that, at first sight, all the three proposals that had been tabled allowed each Member to decide if they wanted to participate or not, the main difference between them lying in the consequences for non-participating Members. Under the EC proposal, the system would have strong legal effects, even for non-participating Members, a feature that caused his delegation the same concerns as those raised by Canada, Chile, Costa Rica, Guatemala, Japan, Korea, Nicaragua and the United States. The joint proposal was therefore the one that met the mandate by appropriately addressing the concerns about the consequences for non-participating Members.

48. The representative of Switzerland, said that, whatever the system to be agreed upon, it must give meaning to the wording of Article 23.4 of the TRIPS Agreement. The meaning of "multilateral" could only be determined by contrasting it with "plurilateral". In the context of the WTO, "plurilateral" was understood as referring to a system in which participation was entirely voluntary, as was the case, for example, of the Agreement on Trade and Civil Aircraft or the Agreement on Government Procurement. Conversely, "multilateral systems" were understood as being instruments by which all Members were bound or would be bound. The words "eligible for protection in those Members participating in the system" suggested that it was WTO Members' free choice to benefit from the multilateral system by notifying and registering their geographical indications and, in that sense, they would be "participating in the system". The multilateral system to be established should not create new rights and obligations. His delegation understood the EC proposal to provide for a presumption of validity to registered geographical indications, namely those notified and which remained unopposed within a certain time-limit. By doing this, the EC proposal would "facilitate the protection for geographical indications". In this connection, he pointed out that, when his delegation referred to the "protection of geographical indications", it meant geographical indications that were and would be enjoying the protection available under the current TRIPS Agreement, i.e. with or without registration.

49. If Members wanted a meaningful system with added value as compared to the current situation, i.e. a system that would actually facilitate the protection of geographical indications at the WTO level, it seemed obvious to his delegation that the registration - which was a process with the effect of producing a rebuttable presumption - of a geographical indication into the system had to have legal effects in all WTO Members. His delegation did not see any such added value in a system such as the one set out in the joint proposal and wondered how that system would facilitate the protection of geographical indications; nor did it see what incentives it would bring about for any Member to notify its geographical indications to a system without multilateral character or legal effect.

50. The representative of New Zealand said that the joint proposal was truly voluntary in the sense that it was entirely up to Members to choose whether or not to participate in the system. There were three reasons why his delegation supported a voluntary approach: first, it was consistent with the mandate; second, it was the approach that the majority of Members preferred; and third, it was the best means of ensuring that the balance of rights and obligations in the TRIPS Agreement would not be upset.

51. As to the Code of Good Practice under the TBT Agreement as a possible good precedent for the type of approach taken by the joint proposal, he said that this instrument was multilateral in the sense that it had been negotiated and concluded by all Members, just as the joint proposal for the register would be, but its legal effects only applied to those Members who had specifically chosen to

accept the terms spelt out in it. Therefore, if Members did not accept the terms spelt out in the Code, then they would not accept the legal effects, and that was the simple and effective approach taken by the joint proposal.

52. The representative of India said that, although India was not a *demandeur* for a register of geographical indications for wines and spirits, or in fact for any other products, it respected the Uruguay Round's built-in agenda as well as paragraph 18 of the Doha Declaration and subsequent decisions, including the latest reaffirmation of the mandate in the Hong Kong Ministerial Declaration. For his delegation, a shared understanding of the meaning of the two concepts in Article 23.4 of the TRIPS Agreement, namely "multilateral system" and "those Members participating in the system", was a prerequisite for the Special Session to determine what participation meant, in particular for developing countries. The next question for these countries was what the costs and burdens arising from their participation in the system would be. As at the present stage Members still did not have a common understanding of the meaning of those two concepts, India, as a developing country, was not in a position to make any assessment of costs and burdens arising from its participation in any future system. From what had been stated by the European Communities and, more explicitly, Switzerland, in this meeting, participation in a multilateral system would necessarily add obligations and consequent burdens. If a WTO Member, for example, had a policy of not administering an anti-dumping regime, it did not mean that its exporters would not face WTO legal anti-dumping duties in other WTO Members. In the same vein, if a WTO Member had no trademarks to protect, it would not escape its obligation to set up a legal and administrative system to protect trademarks of nationals of other WTO Members. Did either or both of these examples involve participation? From the language of Article II:2 of the WTO Agreement, cited by Switzerland, he believed it would, which meant that it would be necessary to have details regarding the consequent costs. On the other hand, if it did not, then the word "multilateral" in Article 23.4 of the TRIPS Agreement could perhaps be considered useless.

53. He said he was confused by the Joint Proposal Group's statements that the system should be voluntary, should not lead to the modification of rights and obligations or of the existing scope or level of protection for wines and spirits under the TRIPS Agreement, and that such principles stemmed from the language of Article 23.4 of the TRIPS Agreement. In his delegation's view, the phrase "in order to facilitate the protection" contained an implicit presumption of a lack of adequate facilitation of GI protection. It therefore called for the establishment of a system of GI registration, an exercise which would necessarily modify some rights and obligations. It would then be up to Members to determine to what extent these rights and obligations would need to be modified and at what costs, particularly for developing countries. The challenge would therefore be to find where to strike the balance so as to fulfil the mandate of the DDA and, at the same time, be fair to all WTO Members.

54. India was still trying to determine what the results of these negotiations should be. It had a domestic GI system with some costs and burdens. However, this was with the purpose of protecting its own geographical indications. Therefore, India's decision-makers had the full responsibility and obligation to approve the budget for setting up such a system. The first applications under India's GI system had been received in October 2003. There had been 27 applications between this date and 2006. The time for processing them currently averaged from ten months to one year. Based on this example in India, he asked whether Members were looking at a system which would oblige them to process some nine applications every year or at a system which would oblige them to process more than this number. This kind of question would enable Members to take a decision as to how much the additional administrative costs and burdens would be for their systems. This was precisely why he had raised the procedural point that Members would need to look at the developmental aspects when they went through each of the priority concerns. Any decision on each of them would depend on the costs and administrative burdens it would involve. For Members, this was not a simple question of

setting fees but also a matter of policy decision on what these burdens would be before taking any decision in these negotiations accordingly.

55. The representative of Argentina said that the joint proposal's provisions on participation respected the mandate in Article 24.3 of the TRIPS Agreement by proposing a voluntary system, a view shared by many Members, including those which did not have any geographical indications. In addition, the joint proposal's requirement of a notification of the intention to participate would result in greater legal certainty for the entire system, by avoiding any misunderstanding as to whether or not a Member would have any obligation under the system. None of the Ministerial Declarations adopted after the entry into force of Article 23.4 of the TRIPS Agreement had included any change in the mandate of that provision but rather had reaffirmed it.

56. As to the principle of territoriality, she disagreed with the point made by the European Communities that, if their proposal was "extraterritorial", as claimed by some Members, then the WTO and WIPO agreements should also be in this same category. She pointed out that the WIPO agreements carried international obligations only for those countries which had ratified them, contrary to the EC proposal. One example of the extraterritorial effect in the EC proposal was the fact that a non-participating Member that had not lodged a reservation against a notified geographical indication and had not entered in bilateral negotiations would nevertheless bear the effects of this notification in its territory. Such a Member, which had not lodged a reservation for capacity, budgetary or administrative reasons, would have to protect the geographical indication, even though according to its own legislation such indication would not be eligible for protection, for example on the ground that it did not meet the definition of Article 22.1. It would no longer be able to invoke Articles 22.1, 24.4 or 24.6. In other words, the proposal would deny the right to invoke TRIPS provisions. That was an example of the extraterritorial effect of the legislation of the notifying country in the territory of the non-participating one. Regarding the amendments made by the European Communities to their proposal in order to minimize the costs, such as by limiting the number of notifications or by extending the time-limit for reservations, she said that they might not allay all the concerns because there were other costs involved, for example those related to the examination of a notified geographical indication. Even if the costs and burdens were minimized as proposed by the European Communities, they would still be too heavy for developing country Members to bear. In contrast, the joint proposal would not create any additional costs and burdens.

57. The representative of Mexico said that the term "multilateral" should be interpreted according to its own literal meaning and in comparison with the terms "regional" and "bilateral". Article 23.4 contained the qualification of "Members participating in the system". Rather than discussing whether or not the joint proposal fulfilled the mandate, Members should focus on the substance of the EC proposal, particularly the fact that it did not address the concerns voiced by many Members. For his delegation, the joint proposal met the concerns raised and consequently facilitated the protection of geographical indications.

58. The representative of Malaysia said that it was necessary to set up a simple, uncomplicated and efficient system, such as the one offered by the joint proposal. The fact that the joint proposal system would be strictly voluntary and would not entail any legal effects in non-participating Members made it the only one that gave comfort to Malaysia, a developing country which was not a wine producer.

59. The representative of Colombia said that his country had not yet decided which proposal it would endorse. He recalled, however, that his delegation had in the past made the point that participation should be voluntary and that there should not be any legal effects on non-participating countries. Both Hong Kong, China's proposal and the joint proposal were clear regarding the voluntary character of participation. The joint proposal was, however, more transparent, as it required any Member intending to participate in the system to make a notification to this effect.

60. The representative of Ecuador said that, like previous speakers, his delegation could not commit itself to a system that would create more costs and legal obligations for Members and was unclear as to the effects touching upon the principle of territoriality.

61. The representative of Australia said that it had become clear from the interventions made during this meeting that one Member was isolated and that neither the co-sponsors of the joint proposal nor all other delegations who supported voluntary participation were those who were holding up the negotiations. It was therefore time for that isolated Member to engage with the joint proposal and listen to the overwhelming opposition to the idea of having mandatory participation. There was one other Member who had provided some support to the aforementioned isolated Member, but she sensed from that other Member a willingness to at least engage with the joint proposal group.

62. She rejected the European Communities' argument that there was a tension in Article 23.4 of the TRIPS Agreement between the words "multilateral system" and "those Members participating in the system" and that the EC proposal met the mandate by dealing with such tension and making provisions for both participating and non-participating Members. The only distinction made in the EC proposal between these two categories of countries was that, whereas participating Members could benefit from the system by notifying their own terms, non-participating Members could not benefit from it but nevertheless had to protect the terms on the register. In other words, there was a choice to not participate in the benefits but no choice not to participate in the obligations. To her delegation, this was a strange way of structuring the system. The main reason why non-participating Members were forced to participate and protect the terms was that, if they did not participate by lodging reservations and entering into compulsory negotiations, they could not refuse domestic protection to the notified geographical indication on the grounds that the product was generic in their territory or that the term was not a geographical indication. Therefore, the EC proposal not only forced Members to participate, but undermined their existing rights to make use of Article 24 exceptions.

63. She said that the definition of extraterritoriality provided by the European Communities was not the one usually given, according to which extraterritoriality meant to give to domestic actions the capability of producing legal effects in other countries. This had nothing to do with multilateral treaties that Members all negotiated and agreed in the WTO. By subjecting determinations of whether or not a term was eligible for protection in a Member to bilateral negotiations, the EC proposal was disregarding the principle of territoriality and the well-established norm, expressly recognized by the TRIPS Agreement, that IPRs were private rights to be determined and enforced at the national level. Additionally, the EC proposal would give geographical indications notified to the register a presumption of protection in all Members, whether participating or not, a feature which went well beyond any other protection provided to other IP right holders under the TRIPS Agreement. Why should some IP holders benefit from such presumptions but not others? The more appropriate place for the instrument proposed by the European Communities would perhaps be WIPO, where other international registers, such as the Madrid system for international trademarks or the Lisbon Agreement on appellations of origin, had been negotiated. The European Communities had argued that its proposal indeed respected the principle of territoriality because Members would be able to place reservations against notified terms. However, whether or not Members would have this reservation choice was really not the point, for such a reservation process would in itself erode the principle of territoriality by forcing Members to be proactive in denying IP rights to GI right holders rather than, as mandated by the TRIPS Agreement, providing the framework of minimum standards within which these rights could be acquired in relation to their territories.

64. Responding to a comment made by India that the establishment of any system implied some modifications of existing rights and obligations, she said that there was a slight misunderstanding. The precise language that Joint Proposal Group referred to in this regard related to the impact of proposals on the existing balance of rights and obligations and not to the rights and obligations *per se*. This was so because one important concern the Joint Proposal Group had with the presumptions under

the proposed EC system related to the fact that the protection granted in one country would give rise to presumptions of protection in other countries. While noting that Switzerland had made the point that such presumptions were necessary to facilitate protection, she said that that would be done at the expense of Australian and other producers, which was unacceptable and outside the mandate. What the EC proposal was doing was not to facilitate but to increase protection. These were the reasons why Australia and other Members had problems with the issue of presumptions under both the EC and Hong Kong, China proposals.

65. The representative of the European Communities, recalling that he was speaking on behalf of 25 WTO Members, said that the question of number of Members supporting a certain position was not necessarily relevant in this organization, where Members tended to work and decide on a different basis. In the WTO, rather than looking at the number of supporters of a proposal, Members would look into its substance and try to understand it with the aim of finding a compromise by looking for common ground. It was with this in mind that his delegation was listening to all the comments made in these negotiations and trying to adapt its proposal accordingly. Example of this flexibility was the inclusion in the EC proposal of provisions to cover the issues of costs and trademarks. The European Communities had also expressly mentioned that it was prepared to look at other flexibilities, such as limiting the number of geographical indications to be notified, extending the reservation period and allowing notifications to be made directly by producers. In doing so, his delegation was simply applying what it believed was the right approach for these negotiations: trying to find common ground and then trying to reach compromises. In contrast, the Joint Proposal Group had not flagged a single change that would aim at bridging the gap with other proposals on the table. This was not very encouraging.

66. The representative of Chile made reference to a WIPO document (SCT/9/5 of October 2002), which said that one of the ways of affecting the principle of territoriality was through the signing of international agreements. Both the EC proposal and the joint proposal could be characterized as international agreements, except that the latter did not entail the strong legal effects the European Communities was proposing. With regard to the point made by the European Communities that WIPO's Lisbon and Madrid systems envisaged legal effects which were actually stronger than the ones in their proposal, he said that the EC proposal entailed effects that went far beyond those provided by any existing WIPO systems. None of them had envisaged, for example, a reservation mechanism like the one suggested by the European Communities. Under the WIPO systems, each Member could decide what it would or would not protect and was not under an obligation to take part in bilateral negotiations.

### *Notification*

67. The representative of the United States said that the EC proposal concerning mandatory elements in its notification section raised significant concerns and should not be looked at in isolation from the legal effects of the system as these elements negatively impacted upon the principle of territoriality and could also lead to discriminatory treatment of certain notified geographical indications.

68. Concerning translations, the EC proposal had asserted that it was the country of origin that must notify the translation of a notified GI into the language of the Member where protection was sought. This raised concerns regarding the territoriality of IPRs, as decisions concerning protection of translations must be made by the national system and be consistent with the consumer's perception of the country where protection was sought. In the EC proposal, the scope of GI rights, including rights in translation, appeared to be determined solely by the notifying country, which was a radically different model and would take away the ability of the country in which protection was sought to define the right under its national system.

69. The EC and Hong Kong, China proposals required a reference to the legal instrument by which the geographical indication was protected in the notifying Member or, in the case of Hong Kong, China, a statement under seal to that effect from the government of the notifying Member. Fulfilling any of these requirements would be difficult, if not impossible, for those Members that protected geographical indications through unfair competition, where rights were acquired through use. In contrast, translations under the joint proposal would not become part of the notifications and the Member in which protection was being sought would be able to define for itself the right to a translated term under its national system, which was consistent with existing rights and obligations under the TRIPS Agreement. Furthermore, the notification elements requested under the joint proposal would reflect information that could be provided under the various protection systems, in particular common law, unfair competition, trademark systems, including certification and collective marks, and separate GI registration systems. The notification would contain: (i) the identity of the notifying Member; (ii) the geographical indication, as it appeared on wine or spirit goods, in the notifying Member; (iii) the identification of the territory, region or locality of the notifying Member from which the wine or spirit was identified as originating; (iv) a transliteration, for information purposes; and (v) whether the indication was for a wine or spirit. This was the kind of information that all participating Members, regardless of their existing systems, would be able to provide and therefore it would ensure equal participation in the system.

70. The representative of Hong Kong, China, responding to the comment made by the United States on the requirement for a reference to the legal instrument by which the geographical indication was protected in the notifying Member, said that for Members like Hong Kong, China, where geographical indications were protected as certification trademarks, fulfilling such a requirement would not be a problem because there would be a list containing these terms. However, he acknowledged the point raised by the United States that in other instances this would not be possible, for example when there was no list of names because the rights had been acquired through use. He assured the Special Session that his delegation would look further into this particular point.

71. The representative of Chile said that notification was one of the issues where there were many points of convergence between the various proposals on the table. He noted that, under both the Hong Kong, China and EC proposals, participating Members would notify all geographical indications protected in their territories without making the distinction made in the joint proposal between protected terms originating from the territory of the notifying Member and protected terms originating from the territories of third countries.

72. The representative of Hong Kong, China said, in response to Chile, that it would indeed be possible to interpret the proposed provision as allowing a notifying Member to notify a geographical indication protected in its territory but originating from a different country. However, this was not his delegation's intention. The Hong Kong, China proposal, as set out in page 4 of the side-by-side paper (TN/IP/W/12), referred to "domestic geographical indications for wines and spirits which were protected under their domestic legislation, judicial decisions or administrative measures". That meant that the focus of the proposal was on "domestic" geographical indications originating from the notifying Member. Thus, country A would not be able to notify a geographical indication originating from country B.

73. The representative of the European Communities said that Chile's last intervention was the correct approach, i.e. to seek for the points of convergence and use them as building blocks for a common approach to the multilateral system of notification and registration of geographical indications. According to paragraph 2.1(a) of the EC proposal, the first essential element was that notified GIs should meet the definition in Article 22.1 of the TRIPS Agreement. Furthermore, paragraph 2.1(b) of the EC proposal reflected Article 24.9 of the TRIPS Agreement, which stated that a WTO Member had no obligation to protect a geographical indication from another WTO Member if such an indication was not protected in its country of origin. He clarified that the intention of the EC

proposal was that Members would only notify geographical indications corresponding to their own territory and said that his delegation was prepared to make this requirement more explicit in its proposal. In addition, he said that notifications had to provide the necessary relevant information to confirm that the notified geographical indications complied with the definition in Article 22.1 of the TRIPS Agreement, and could include, *inter alia*, domestic rules and decisions on which protection was granted. On this particular issue, there were certain differences in the joint proposal which could perhaps be usefully adapted to what his delegation was proposing. According to the joint proposal, participation in the system was not defined by a notification. Members wishing to participate would have to notify their intention to participate in the system but might actually choose to notify, or not, their geographical indications. In contrast, the determining element of the EC proposal was that participation was defined by the fact that a Member notified its geographical indications into the system. Originally, the joint proposal had followed the same approach to the definition of participation as the EC proposal, but their current version on the table no longer included such an approach.

74. As to the content of the notification in the joint proposal, he said that the requirements to include the notifying Member, the name of the geographical indication, a reference to the GI territory or region, and a transliteration of the GI into Latin characters, instead of a reference to translations, might not be sufficient. The joint proposal made a distinction between mandatory and optional elements for notifications. In the event that only mandatory elements had been notified, one important element would still be missing, namely the basis for protection in the country of origin. This requirement was important because the protection in the country of origin was precisely the basis for seeking protection at the international level. The same could be said about the date of protection, a relevant piece of information, which was included in the joint proposal only as an optional rather than a mandatory element.

75. As to the question of translations, he said that the EC proposal contained in TN/IP/W/11 was based on previous papers and the approach taken was to use, to the maximum extent possible, the elements of convergence that had been identified at the time of presenting that proposal. One of those elements was reflected in the former Chair's paper, JOB(03)/75, which contained a draft legal instrument for the establishment of the register with different options based on Members' different proposals as well as areas for further discussion. JOB(03)/75 also included a single set of draft provisions that, while not necessarily meaning acceptance, indicated the existence of a substantial degree of convergence in some areas, such as translations. Therefore, he asked if Members could explain in more detail the problems they had with the part of JOB(03)/75 that had been considered close to being acceptable in the past. The issue of translation was a relevant element to be retained because it corresponded to the idea that, in accordance with the principle of territoriality, it would be up to national authorities to make decisions or determinations, also with regard to translations. The EC proposal, particularly its paragraph 2.2(b), should not be read or interpreted as binding on what would be the proper translation of a notified term that Members would offer. He recalled that Article 23.1 of the TRIPS Agreement expressly prohibited the use, in translation, of geographical indications identifying wines or spirits not originating in the place indicated by the geographical indications. The EC proposal that the notifying country itself provide translations of the geographical indications could be useful for national offices implementing the TRIPS obligations under Article 23 of the Agreement.

76. The representative of Colombia said that Members should have the right to notify the geographical indications that originated, and were protected, in their territories. As to the mandatory information contained in the notification, he shared the position taken by New Zealand at the last meeting of October 2005 that the need for a minimal or detailed notification procedure would depend on the extent of the legal effects of the system to be established. As to the format of the notification, it was vital to make clear that, once a format had been adopted, it should not be altered. In that regard, the Hong Kong, China proposal for a review would give rise to uncertainty. Finally, establishing a



maximum number of notifications to be submitted each year was a good idea, and could prevent the system from collapsing due to an overwhelmingly high number of notifications.

77. The representative of Turkey said that the proponents had a strong case that the register should be "multilateral", as Article 23.4 of the TRIPS Agreement specifically mentioned that term. As a comparison, the Agreement on Government Procurement was not called "multilateral".

### ***Registration***

78. The representative of Argentina said that, in the joint proposal, the registration phase was quite simple: the Secretariat would simply register all submitted notifications. Her delegation could not agree to the procedures proposed by the European Communities, such as those related to reservations, which would involve all WTO Members and exclude from national jurisdictions certain exceptions currently available under the TRIPS Agreement.

79. The representative of the European Communities noted that the seemingly limited interest for discussing registration was a signal that the two real key issues were legal effects and participation. As India had said, in order to assess other implications of the proposals more precisely, Members first had to agree on these two main issues.

80. He said that, as correctly pointed out by Argentina, the EC proposal had a more substantive content with regard to registration than the joint proposal. For example, in the EC proposal the initial step for registration was for the administering body to transmit and publish on the Internet the notified geographical indication. Once that notification had been circulated and published, a period of 18 months would start, in which Members might lodge their reservations. Although this period of time was the longest that could be found in multilateral IP registration systems, his delegation would be prepared to look into the issue if it still posed a problem to other Members. The reservation presented by Members should, in accordance with the EC proposal, be duly substantiated and be based on one of the grounds mentioned in paragraph 3.2 of the proposal: (i) that the notified geographical indication did not meet the definition in Article 22.1 of the TRIPS Agreement; (ii) that the geographical indication in question did not meet the requirement in Article 22.4 of the Agreement; and (iii) that the geographical indication was generic in the territory of the examining Member. Therefore, it would be up to the examining Member to conduct the relevant analysis, which was fully consistent with the principle of territoriality.

81. He said that such a reservation procedure made sense for many reasons. First, given the fact that the system to be established should have legal effects and presumptions in all Members in order to fulfil the mandate, it also made sense to open the challenge procedures to all Members and give them the opportunity to examine the notifications made within the 18-month period. This would allow Members to be able to prevent certain legal effects from unfolding in their territories by raising a reservation based, for example, on the grounds that the notified term was not a geographical indication as defined in Article 22.1 of the TRIPS Agreement. This would be in accordance with the principle of territoriality and would also ensure that the register contained reliable and useful information. In addition to these three grounds for reservation described above, his delegation presented, in its June 2005 communication (TN/IP/W/11), a new provision, namely paragraph 3.3, which gave a notifying Member the possibility of requesting other Members to provide information on trademarks consisting of or containing the geographical indications. In that case the WTO Member which had received the request would need to notify the existence of such trademarks.

82. Another additional important element of the EC proposal was how to resolve differences resulting from the lodging of reservations. The solution proposed by the European Communities, namely bilateral negotiations, was based on Article 24.1 of the TRIPS Agreement, which was already

an obligation accepted by Members. In addition, negotiations would be the most efficient way and more familiar approach within the WTO system to resolve differences.

83. At the expiry of the 18-month period, the administering body would register the notified geographical indication and include any annotations related to reservations, if any. Therefore, the contents of the registration would not only include the various elements of the notification but also those annotations. If the reservation had been accepted, the relevant annotation meant that there would not be legal effects for the challenging Member. That was another example of the consistency of the EC proposal with the principle of territoriality.

84. He said that, as compared with the EC proposal, the joint proposal's registration phase was relatively simple. In fact, the registration and notification phases were almost a single phase because the registration consisted basically of the administering body simply registering the notified geographical indications on a database and recording the related information. The automaticity of such a registration system, i.e. all geographical indications notified would be automatically registered, was troublesome, for it did not foresee any GI screening, nor did it provide any useful information, such as the legal basis on which the notified geographical indication was protected in its country of origin, or whether the notified term actually met the GI definition. Since all names notified into the system would be registered, the same effects would, therefore, flow from the names, irrespective of whether or not they were actually geographical indications, or even irrespective of whether or not they were protected in their countries of origin. The same comment applied to the fact that the joint proposal did not require information as to the dates on which the geographical indication started to be protected or the protection ceased to exist. As a consequence, under the joint proposal, national IP offices would have the obligation, in the case of participating Members, to look at the database, irrespective of the type of geographical indication, including where the term was not really a geographical indication. As a consequence of the automaticity of registrations and of the absence of sufficient information in the notifications, the database would be loaded with unreliable information, which would not be an adequate contribution to the legal certainty that formed the basis for facilitating protection.

85. In conclusion, he said that, because it was important to ensure that only reliable information would be registered on the GI register, it made sense to have substantive notification and registration procedures, including with the possibility of lodging reservations.

86. The representative of Australia said that her delegation was among those keen to include registration as one of the priority areas for discussion at the Special Session. The reason for this was not to avoid discussing the consequences or legal effects of the registration, which all Members agreed were critical to this debate, but rather to ensure that Members would have the opportunity to discuss the reservation process in the EC proposal, which came under the heading of "registration" and was fundamental to understanding the consequences of that proposal in relation to: firstly, the burdens it would place on Members; secondly, the limitations it would place on Members' existing rights under the TRIPS Agreement, including in relation to the Article 24 exceptions; and thirdly, its implications for intellectual property law, in particular the principle of territoriality.

87. With regard to the burdens for Members, she said that paragraph 3.2 of the EC proposal required Members to lodge reservations and enter into compulsory negotiations on behalf of every private interest in its territory that might be affected by the registration of a foreign geographical indication. If a Member failed to engage in this costly and burdensome reservation process, such a Member would not be able to decline protection to the term on the register on certain grounds, e.g. that the term was not a geographical indication or it was a generic term in that Member's territory. In other words, that Member would be forced to protect the term on the register. This would be burdensome for Members, whether developing or developed, and was unwarranted.

88. As to the limitation for existing exceptions, she said that the EC proposal limited the existing rights of Members in relation to Articles 22 and 24.6 of the TRIPS Agreement. Currently, Members were required to protect geographical indications that met the Article 22 definition in their territory. Article 23 of the Agreement provided the general obligation of ensuring a higher level of protection for geographical indications for wines and spirits, while Article 24 provided exceptions to this general rule. One of these exceptions, which was quite dear to her delegation, was Article 24.6 of the Agreement: it provided that Members were not required to protect the geographical indication of another Member when the term was a generic in their territories. However, under the EC proposal, Members' ability to use this exception was limited, because they would have to lodge reservations in order to avail themselves of the right to decline protection on the grounds that the term was generic. They would have to duly substantiate the grounds for such reservations and then enter into compulsory bilateral negotiations with the notifying party, if so requested, with the aim of resolving any disagreement. More importantly, these negotiations would be stacked in favour of increased protection due to the link made to Article 24.1 of the TRIPS Agreement. In this regard, she recalled that her delegation had not yet received a response from the European Communities to its concern that the EC proposal would diminish access to the Article 24 exceptions. In fact, the only response received so far was that the obligation to negotiate was not new. That was not a satisfactory response as Members' ability to invoke the exceptions under Article 24 was not conditional on the negotiations referred to in Article 24.1, on a Member having to justify its decision to any other Member, or on any time-limit. Although the EC delegate had made reference to an 18-month period, she said that the point was not how long the time was but rather whether there should be any time period at all. Such a limitation to exceptions would change the existing balance of rights and obligations of Members under the TRIPS Agreement, increasing the rights of some and decreasing the rights of others. Her delegation was therefore concerned that such a system would *de facto* give rise to nearly universal protection of all geographical indications notified to the register. This might be the objective of the European Communities in these negotiations and, if this was the case, then it needed to be made clear to the entire membership, because it was inconsistent with the purpose of the system to facilitate the existing level of protection of geographical indications for wines and spirits.

89. As to the point made by the European Communities that the challenge procedure made sense and was consistent with the principle of territoriality, she said that, whether or not Members had the choice to lodge reservations against a geographical indication was not the point. Reservations would erode the principle of territoriality by forcing Members to be proactive in denying IP rights to GI right holders rather than providing the framework of minimum standards within which IPRs could be acquired in relation to their territories. This was what the TRIPS Agreement was, namely a minimum standards agreement. Additionally, whether other intellectual property treaties in WIPO had a different approach was not relevant to these discussions, which were held in the WTO context. In any case, while Members could choose to sign up to WIPO treaties, under the EC proposal Members would not have this choice.

90. The representative of the Canada said that, contrary to the European Communities, the topic of registration was of great interest to her delegation. Article 23.4 required the implementation of a two-phase system, comprised of a notification phase and a registration phase. However, the EC proposal provided for three additional phases, examination, reservation and bilateral negotiations, which would substantially change the existing TRIPS Agreement obligations. In contrast, the voluntary joint proposal system did not include any of these additional phases and it did so to keep with the mandate. Under the joint proposal, both examination and opposition procedures would remain at the national level and consequently the balance of rights and obligations, as carefully negotiated in the TRIPS Agreement, would not be disturbed. The first phase would consist, for a Member, of notifying to the administering body a wine or spirit geographical indication protected within its own territory. The second phase was the registration, which was when the administering body entered the notified geographical indication on a searchable database. The list of registered geographical indications would then be accessible by all Members on the WTO website.

91. With regard to the explanation given by the EC that, under its proposal, if a Member did not notify a geographical indication, it would not be considered to be a participating Member and yet have obligations, her delegation failed to understand how a non-participating Member would receive no benefit but would incur all additional obligations. In contrast, the joint proposal would be more equitable: only those making a notification would be obliged to consult the registry. While admitting that, under the joint proposal, parties might indicate their intention to participate in the system but might not notify any geographical indications, she did not see any problem with such a hypothesis. She concluded by saying that the joint proposal system was transparent, flexible, non-burdensome and was receiving support from the majority of the Members.

92. The representative of the Philippines gave support to the comments made by Australia on the burdens that the EC proposal would create, as well as on its implications for the principle of territoriality. He took note of the clarifications given by the European Communities regarding territoriality and their assurances that Members would continue to have the prerogative and right to make their own assessment regarding the protection of a geographical indication. While conceding that there was no direct impairment of the principle of territoriality in the EC proposal, his delegation was nevertheless concerned that the proposal, as it stood, was putting on all Members, in particular developing countries, the burden of preserving the principle of territoriality to the extent that they themselves would have to make sure of making the reservation within the 18-month period. The offer made by the EC to give more flexibility to the proposal by extending this period or by limiting the number of annual notifications would not be enough to address such concerns.

93. He added that the system proposed by the EC would be burdensome, in particular for developing countries, in various respects. The first related to the time-limit of 18 months. As indicated earlier, he did not see how the flexibility offered by the EC would alleviate the burden. The second burden related to the EC proposal's requirement for Members to constantly monitor trademark applications *vis-à-vis* notified geographical indications and make the corresponding notifications, if so requested by the Member that had notified the geographical indication to that administering body. All this would put great pressure on Members, in particular developing countries, to come up with the appropriate pool of examiners to make sure that they would be able to lodge reservations within the 18-month period or to comply with one of the legal effects of registration if there had been no reservations lodged within that period. Therefore, what the Philippines and many other developing countries were looking for in these particular negotiations was a simple and yet efficient system.

94. The representative of Argentina said that understanding the registration procedures proposed by the EC was important to the discussion on the two key issues of participation and legal effects, for it was in this aspect that Members would feel most of the legal, administrative and cost-related impacts of that proposal. She was still not convinced by the explanations given by the European Communities to justify its proposed registration procedures. They might be based on an erroneous interpretation of Section 3 of Part II of the TRIPS Agreement. The Agreement required Members to implement this Section so as to make available to the parties the means to avoid certain uses, but it did not mandate any automatic protection of geographical indications in Members. As with any IP right holder, GI right holders had to go to each country and assert their rights, which would be granted according to the national legislation of that country. Recalling that the negotiations of the register could not be carried out in a vacuum but only within the framework of the existing rights and obligations under the TRIPS Agreement, she expressed the concern that through a procedural element, the EC proposal was aiming at changing the existing balance of rights and obligations.

95. She agreed with Canada that the EC proposal was adding new phases to the mandated procedure of notification and registration. These new phases, examination, reservations and mandatory bilateral negotiations, were fundamentally detrimental to developing countries. She disagreed with the argument made by the European Communities that, in the WTO, bilateral

negotiations were a customary method to resolve disputes. In the WTO, differences were to be dealt with through the dispute settlement system, which had been created precisely to prevent unilateral measures or political pressure. The EC proposal would replace this neutral way to resolve disputes with a politically-oriented dispute mechanism, which could not, in any event, be justified by Article 24.1 of the TRIPS Agreement. The approach of bilateral negotiations would be detrimental to all Members, in particular to developing ones, which had less resources and bargaining power *vis-à-vis* the European Communities or any other developed country Member.

96. The representative of the United States said that her delegation fully supported the statements made by the delegations of Argentina, Australia, Canada and the Philippines and had serious concerns about the onerous and overly burdensome registration procedures of the EC proposal. The proposed reservation procedure for notified geographical indications was problematic and would negatively impact upon existing TRIPS Agreement rights and obligations for trademarks and geographical indications, for it gave Members only one chance to object to a geographical indication at the international level within an 18-month period on limited grounds. This would clearly eliminate countries' abilities to use long-standing TRIPS exceptions. Her delegation had already explained what would happen if, under such a proposal, a WTO Member failed to object to every one of the notified geographical indications within the 18-month period. However, if a Member had placed any objections to the notification, it would then be forced into bilateral negotiations with the notifying Member where significant pressure would be brought to bear on that objector to work out some sort of deal for the notified geographical indication. Bilateral negotiations dealing with what were private property rights would result in less legal certainty and transparency in national systems of protection. Furthermore, they would be resource intensive, with the European Communities pressing for protection in the territory of the country that had made the objections. It was quite disturbing that the European Communities had inappropriately linked such negotiations to the provision in Article 24.1 of the TRIPS Agreement, thereby identifying the aim of the Special Session's negotiations to be that of "increasing the protection of individual geographical indications". All the procedures proposed by the European Communities, both at the national and international levels, would potentially enable one country to mandate GI protection in other countries, consequently devaluing prior valid trademark rights and ignoring Members' national legal regimes. The EC proposal would have a negative impact on the existing balance of rights and obligations for trademarks and geographical indications and would impose significant procedural burdens on all Members' national systems. While providing more protection for EC geographical indications, this system would negatively impact upon domestic trademark owners and other national systems worldwide. In contrast, the joint proposal focused on, and gave deference to, the domestic systems of participating WTO Members. It focused on domestic systems by providing them with information to make more accurate registration decisions, thereby effectively facilitating the protection of geographical indications for wines and spirits. More information for overworked and under-funded national offices could only help to allow for better decisions that would then create more legal certainty for domestic and foreign businesses.

97. The representative of New Zealand said that his delegation acknowledged the two issues of legal effects and participation as key ones, but did not want to overlook the other aspects such as registration. As had been indicated by Australia, registration was an important topic in that it was closely linked with the question of legal effects. The joint proposal involved a straightforward process of registration, which simply ensured that the notified geographical indication was duly recorded on the register. A registration itself had no impact on the legal rights and obligations of Members in terms of the status of individual geographical indications. Consistent with the principle of territoriality, all decisions about geographical indications, including the applicability of the Article 24 exceptions, were therefore left with national decision-makers in IP offices. This contrasted with the EC proposal, under which the registration process had a significant impact on the existing rights and obligations of all Members, including non-participating ones. All Members would be committed to lodging a reservation or would otherwise lose certain rights and flexibilities. When Members had lodged a reservation, they would then be obliged to enter into bilateral negotiations

aimed at "resolving differences". The use of the words "resolving differences" by the EC delegation seemed to mean that the European Communities would essentially be looking to find differences and to question decisions taken by national courts and authorities. His delegation failed to understand how such a requirement would be consistent with the principle of territoriality.

98. His delegation disagreed with the point made by the EC delegation that Article 24.1 of the TRIPS Agreement was the legal basis under which the EC proposal for mandatory bilateral negotiations was justified. In order to understand what the EC requirement really meant, he gave a hypothetical example: assuming that the proposed EC register would apply to all products - which his delegation would strongly oppose - and that the European Communities notified to the WTO the geographical indication "Feta", some Members would lodge reservations within the prescribed 18 month-period on the ground that the term was generic, in the sense of Article 24.6 of the TRIPS Agreement, in their own territories. It would be reasonable to assume that the European Communities would then seek to negotiate with those Members the outcome of the legal or administrative decision regarding the generic character of "feta". He failed to see how the negotiation by a third country of the decision taken by a national court or authority could be consistent with the principle of territoriality. He invited the European Communities to consider looking at its own situation in respect of this type of requirement. For example, the European Court of Justice had recently issued a ruling on "Feta", but New Zealand had not tried to negotiate with the European Communities to change the outcome of that decision so as to obtain that the term be considered as generic. New Zealand might not have liked the EC's ruling and its implications, but that was the way the principle of territoriality worked.

99. The representative of Guatemala said that, if developed countries like Australia or Canada had expressed concerns about the proposed EC system, developing countries like Guatemala would be in even greater difficulties, for they would not be able to react appropriately to notifications under that system. The only valid alternative for developing countries would then be the joint proposal system, which was user-friendly, accessible, simple, effective, non-costly and non-burdensome.

100. The representative of South Africa said that the hypothetical case given by New Zealand was a factual one in his country. South Africa was a producer and exporter of "feta", a generic term in its territory. Currently the European Communities, which had been its main export market until recently, were now blocking such exports and sending South African producers threatening letters. Under the TRIPS Agreement, the South African producers had the right to make use of the generic term "feta" and export this cheese to the European Communities. Therefore, if this proposed EC registration system were accepted, the case to stop South African feta cheese from entering the EC market would in fact be further strengthened, a situation which led his delegation to consider the proposal as unacceptable.

101. The representative of Argentina offered the example of a homonymous geographical indication for wine, which referred to both a region in Spain and in Argentina. Argentina had not only been prevented from exporting its wine to the European Communities under that homonymous name but its producers had also been treated there as foodstuff GI pirates. This and other examples demonstrated that the positions taken by delegations were not based on theory but rather on practical examples with commercial implications.

102. With regard to the comment made by the EC delegation that the joint proposal system did not require the mention of the date of protection, she noted that the TRIPS obligations applied to Members only as from certain dates, for example 1 January 1996 for developed countries, and wondered what would happen, under the EC proposal, with those EC geographical indications registered many years before that date.

103. The representative of Chile said that, under the joint proposal, notifications would be submitted by Members' governments, and not by private parties. Contrary to what the European Communities had said, they could be quite detailed and reliable. He recalled that the joint proposal foresaw information such as transliterations of the GI and that Members would also be free to add any other information they saw fit. Chile, for example, would probably also notify the date, the legal basis of protection of the geographical indication as well as where additional information could be obtained.

104. The representative of the European Communities said, in response to the comment made by Chile, that the purpose of the register was not to be a starting-point for GI protection, otherwise the mandate in Article 23.4 of the TRIPS Agreement would have stated that Members should establish a GI database for information purposes only. This was clearly not the case because the mandate was, instead, to establish a multilateral system for the registration and notification of geographical indications "in order to facilitate" their protection.

105. To the point made that bilateral agreements based on Article 24.1 of the TRIPS Agreement was a requirement not consistent with the principle of territoriality, he responded that, if that was true, then all Members which had bilaterally negotiated the protection of generic terms would have violated this principle.

106. As to the practical examples referred to by Argentina and South Africa, he said that it was precisely on the basis of the principle of territoriality that his delegation had taken those decisions. Regarding the particular case of "Feta", he explained that the term had been registered, and judicially confirmed, as a geographical indication in the territory of the European Communities. Therefore, based on the principle of territoriality, a decision had been taken that "Feta" was a geographical indication and was, therefore, a name that could only be used for goods having the origin indicated by it, namely Greece. Thus, a product coming from South Africa, which obviously did not have the right origin, Greece, should not use the term "Feta" in the Communities. Such decision was not, however, putting into question the right of South Africa to use "feta" as a generic term on its own territory. The same reasoning would apply to the example cited by Argentina, which was based on a different TRIPS exception, namely the one under Article 23.3 regarding homonymous geographical indications.

107. To delegations which had made the point that the TRIPS obligations were burdensome, he asked why they were thinking that such a burden existed only in relation to geographical indications, and not to other IPRs. The current obligations under the TRIPS Agreement, as under any other WTO Agreement, implied burdens. However, all Members had based their decision to participate in these agreements, and therefore to be committed by these obligations, based on the fact that there was an overall favourable balance of results for them. One of the obligations that all Members had undertaken was precisely the one in Article 24.1 of the TRIPS Agreement, which clearly stated that "Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications". Contrary to what Australia had said, this obligation did not mean an obligation to negotiate for any private interest in the European Communities. What this provision referred to was the protection of specific geographical indications, which, in this case, would be those resulting from the implementation of the proposed EC multilateral register.

108. As to the reference made in the EC proposal to the exception in Article 24.6 of the TRIPS Agreement on generic terms, he confirmed that delegations were correct in saying that, under that proposal, if an application was unopposed, the possibility of invoking that exception would be waived and would create an irrebuttable presumption. Such a possibility should not create a surprise: it had been a normal practice for Members to negotiate on generics on the basis of Article 24.1 of the TRIPS Agreement. Therefore, what the EC proposal was doing was simply implementing that provision.

109. Responding to a comment that the EC proposal was seeking "universal" protection for its geographical indications, he said that the TRIPS Agreement already provided what could be termed as "universal" protection. Therefore, because what the proposed EC system was trying to achieve was simply to facilitate the obtaining of such protection, it would not create any new substantive obligations and it was therefore within the mandate. However, GI protection under the proposed EC system would not actually be that "universal" because the objective of the procedures for opposition was precisely to make sure that Members would be able to ensure that their national particularities as far as protection was concerned would be reflected by the system.

110. As to the comment made that under the WIPO treaties Members chose to sign up for the effects flowing from these treaties, he said that, in the case of the TRIPS Agreement, Members had chosen to sign up to its Article 23.4, which was clear in stipulating that the system should be "multilateral", and hence cover, and have effects in, all the WTO Members.

111. He rejected the comments made that the EC proposal was trying to force certain results on Members by making a linkage with Article 24.1 of the TRIPS Agreement and negotiate on the exceptions. The EC proposal was quite clear that the only obligation was to enter into negotiations, as stated in Article 24 of the Agreement. Therefore, the fact that the obligation under that provision would apply even in the absence of the Doha Round showed that his delegation was not forcing any results on Members. The only objective of the proposal was to provide that, after the registration procedure, Members that had not withdrawn their reservations would get an annotation together with the geographical indication, which would imply that there would be no legal effects in their territories.

112. The representative of Argentina disagreed with the interpretation made by the European Communities of the language of Article 24.1 of the TRIPS Agreement. That provision appeared under Article 24 and not under Article 23, particularly under its paragraph 4. Had the framers of the TRIPS Agreement intended otherwise, they would have included the language of Article 24.1 in a paragraph 5 to Article 23. She considered it strange that the EC proposal gave, on one hand, great importance to the application of Article 24.1, and, on the other, subtracted the safeguards that other Members had, namely the right to invoke at national level the exceptions under Article 24.

113. The representative of Australia said that the EC delegation had correctly stated that, in accordance with the principle of territoriality, it was up to the European Communities to determine what was a geographical indication or a generic in its territory, and that it was not putting into question other Members' right to use, for example, generic terms in their territories. However, she failed to understand how the European Communities would not be putting into question those rights if in their proposal they required Members to negotiate the increase of protection of those product names on the basis of Article 24.1. With regard to the point made by the European Communities that Article 24.1 was a clear provision under which many Members had already negotiated away some of their generic terms in bilateral agreements, she said that it was precisely because of Australia's experience in negotiating these agreements that it had become extremely concerned about multilateralizing that kind of bilateral process and adding the possibility of being forced to give away the remaining generic uses that were not yet affected.

114. While taking note of the citation of Article 24.1 of the TRIPS Agreement by the European Communities as a justification for the way its proposal dealt with exceptions, she said that the EC delegation had not yet responded to the point she had made, namely that nothing in Section 3 of Part II of the TRIPS Agreement made Members' ability to invoke the generic exceptions conditional on entering into the bilateral negotiations provided under Article 24.1.

115. She disagreed with the European Communities' statement that the TRIPS Agreement provided for "universal" protection, as the provisions of this Agreement on industrial property were



underpinned by the principle of territoriality, not by universality. It seemed, therefore, that the European Communities were proposing that the register should facilitate the universal protection of geographical indications, which confirmed that their proposal was "TRIPS-plus" and, as such, would be better placed at WIPO. It was "TRIPS-plus" because it would give geographical indications notified to the register a presumption of protection in all Members, an effect which would change the balance of rights and obligations under the TRIPS Agreement.

116. The representative of the Canada said that Canada had entered into bilateral negotiations on wines and spirits with the European Communities at a mutually convenient time, which had been determined and agreed by both parties, and not within any compulsory 18-month period, as required under the EC proposal.

117. The representative of the United States said that the more his delegation listened to the points made, in particular the views and concerns expressed by the delegations of Argentina and Australia, the more it believed that the joint proposal was the only option that met the mandate. It facilitated the protection of wine and spirit geographical indications without changing rights and obligations under the TRIPS Agreement.

118. He added that, under the EC proposal, if a reservation based on the grounds that the notified GI did not meet the definition of Article 22.1 was lodged, then that Member would be subject to bilateral negotiations, which the European Communities had linked to Article 24.1 of the Agreement. However, if that term did not meet the GI definition under the Agreement, Article 24.1 would simply be inapplicable as there would not be any geographical indication to be negotiated. This was just one clear example showing that the European Communities were seeking, through their proposal, to rebalance the current rights and obligations under the TRIPS Agreement.

119. The representative of the European Communities said that Article 23.4 of the TRIPS Agreement was quite clear when it stated that what should be facilitated was the protection of geographical indications under the Agreement, which covered Articles 22, 23 and 24, all of them having elements relevant to the register. For example, under paragraph 9 of Article 24, Members did not have the obligation to protect geographical indications which were not protected in their country of origin or which had fallen into disuse in those countries. It would not therefore be possible to exclude from the scope of the register the exceptions of Article 24.

120. As to Article 24.1, he said that this provision was explicit about its applicability to both bilateral or multilateral agreements and was simply a tool at Members' disposal with regard to geographical indications and also an obligation that all the Members had accepted. It clearly did not change the balance of rights and obligations, precisely because it was already in the TRIPS Agreement, and as such formed part of the obligations that Members had undertaken.

121. Finally, he recalled that Article 24.1 mentioned, in its first part, the obligation to enter into negotiations, if so requested, to increase the protection of individual geographical indications but that the second part only said that Members "shall" not use the exceptions under paragraphs 2 to 8 of Article 24 to refuse to conduct negotiations or conclude bilateral or multilateral agreements. The wording of Article 24.1, which did not cover paragraph 9 of Article 24, did not exclude the possibility of discussing a reservation on the ground that the notified term met the definition of Article 22.1.

122. The representative of Chile said that, while Article 24.1 of the TRIPS Agreement referred to negotiations aimed "at increasing" the protection, Article 23.4 of the Agreement used the words "to facilitate" the protection. "Increase" and "facilitate" had been intentionally used by the negotiators of the TRIPS Agreement for different situations.

### *Legal Effects/Consequences of Registration*

123. The representative of the United States said that under the TRIPS Agreement there were carefully negotiated relationships between trademarks and geographical indications, with neither of them having preference over the other. The EC proposal upset this balance by creating a presumption that a notified term should be automatically protected in all WTO Members, whether or not it was considered a geographical indication in those Members. This evidentiary presumption that would be granted upon registration would call into question the validity of prior trademarks and generic terms, forcing trademark owners and users of generic terms to prove their right to continue to use these terms. In the context of the discussions of the registration procedure, the "feta" case had been raised, and the EC delegation had confirmed that the European Court of Justice had upheld that it was a geographical indication within the EC territory, despite the fact that several other EC members had indicated that "feta" was a generic in their territories. Under the EC proposal, if the European Communities notified "feta" as a geographical indication, there would be a presumption of eligibility for protection in all the WTO Members, irrespective of whether or not they were participating or non-participating Members in the multilateral system. The proposal would thus force all those Members where the term "feta" was generic to defend such determination against the presumption that would flow from the register. For her delegation, this was clearly an unprecedented substantive legal obligation being placed on all WTO Members. She was concerned that the European Communities wanted to rely on Article 24.1 of the TRIPS Agreement to eradicate the generic exception under Article 24.6.

124. She said that, as noted by previous delegations, the consequences of registration under the EC and Hong Kong, China proposals were of particular concern to her delegation, for both of them focused on presumptions that would essentially create a GI right in each WTO Member without national examination. For example, in the United States, examination and a third-party opposition period were required before a presumption of validity was granted. The evidentiary presumption under the Hong Kong, China and EC proposals appeared to grant the same status to foreign geographical indications with no examination of national law criteria or prior rights. This would force trademark owners and generic users, as the "feta" case had demonstrated, to prove their right to continue use of their trademark or of a generic term if a later-in-time geographical indication was notified. The registration of geographical indications under the proposed systems would have an impact on key issues of concern to her delegation, such as: the principle of territoriality; the need for maintaining the balance of rights and obligations for trademarks and geographical indications; and the impact on national systems and administrative burdens. It was extraordinary that one Member's decision to protect a particular IP right in its territory could lead directly to a forced presumption under local law and judicial procedures of numerous other Members. Essentially, the Hong Kong, China and EC proposals would allow for a notifying country to use its country of origin protection as a basis to receive protection in another country without having to comply with the statutory requirements of another country. This ignored the principle of territoriality in that intellectual property protection typically had effects only within the territory of the Member that had granted that protection.

125. If the EC proposal were adopted, the GI presumptive right would be established in countries even when the terms might not be considered geographical indications by their consumers, which would be an unprecedented system. A proposal based on presumptions would impact detrimentally upon owners of similar-looking trademarks and product terms on a worldwide basis even if that term had actually been in use first. There was also the very real possibility of prior right holders being forced to defend their trademarks in a territory because a later-in-time notified geographical indication would be presumed valid in that territory. By automatically claiming a broad range of terms throughout the WTO membership, the EC proposal could eliminate the ability of owners of trademarks in one market to enter a new market with their trademarks and would also inhibit the ability of small and medium-sized companies to establish new brands that might otherwise have incorporated the terms. Companies that had long sold products in a territory with generic names or as

trademarks that appeared similar to a notified geographical indication would have to find a new name for their products, the same being true for local geographical indications that happened to be similar to notified geographical indications. This would all happen as a result of Members only having one chance to object to a geographical indication at the international level and on limited grounds within an 18-month period. Another result would be that there would be nothing to stop the European Communities or other Members from simply pre-emptively registering the names of all towns, regions and other domestic geographical indications, regardless of any intent to export products therefrom. For the European Communities alone, this could number in the tens of thousands.

126. In contrast, the joint proposal would not confer any rights with respect to geographical indications registered in the system, nor would it upset the current balance of rights and obligations of WTO Members under the TRIPS Agreement. The joint proposal was quite different from the other proposals in this respect, for it did not have a direct legal effect within any WTO Member. It would be up to the Member consulting the database to determine, according to the provisions of its domestic national law and registration requirements, what evidentiary weight to give to the geographical indication included in the database when making determinations on whether or not to register a trademark or a geographical indication. Nationals from Members seeking protection would still be able to apply directly to national offices. A participating Member would not be obligated to negotiate over every term it did not believe should be protected as a geographical indication, since the use of the register would be discretionary and without legal effect. Although the joint proposal would not have legal effect in WTO Members, it would indeed facilitate the protection of geographical indications by these Members. In fact, it would create a tool to assist WTO Members that would be unprecedented in its scope, creating a global database for the first time for a category of IPR. Members would consult this database when making decisions about GI problems under national law, greatly facilitating them in providing GI protection. Lastly, the joint proposal would assist Members in protecting geographical indications under TRIPS without adding additional burdens or changing rights and obligations under the Agreement.

127. The representative of Hong Kong, China said, in response to the questions of whether the rebuttable presumptions created under Hong Kong, China's proposal would affect the balance of rights and obligations under the TRIPS Agreement and whether the proposal would be consistent with the territorial nature of IPRs, that the system proposed was voluntary and would, therefore, create certain rebuttable legal effects only in those Members participating in the system. Hence, if a Member took a well-informed policy decision not to participate in the system, then there would not be legal effects and, as a consequence, the question of its consistency with the territorial nature of IPRs should not arise. Even for those participating Members, there would be a presumption regarding three aspects only: the definition under Article 22.1 of the TRIPS Agreement; GI ownership; and protection of the geographical indication in the notifying country so as the exception under Article 24.9 would not arise. All these presumptions would be rebuttable. They would operate within Members' domestic courts, in accordance with their local jurisprudence and proceedings. Whatever decision was taken by a domestic court on a particular geographical indication, it would only have effects in that particular jurisdiction, with no consequences for other Members. In this way, the territorial nature of IPRs would be preserved.

128. He added that, under the Hong Kong, China proposal, except in relation to Article 24.9 of the TRIPS Agreement, all other exception provisions under Article 24 would stay intact and be governed by the rules under Member's domestic systems. Unlike the EC proposal, there would not be any time-limit. He said that his delegation shared the concern raised by some delegations that the EC proposal would diminish the exception provision under Article 24 in the sense that, if a certain Member did not lodge a reservation within the specified time-limit, certain rebuttable presumptions under the proposal would become irrebuttable. He confirmed that, under the Hong Kong, China proposal, there was not such a time-limit, neither there was any provision for oppositions at the multilateral level.

129. The representative of Australia recalled that Hong Kong, China had said that, under its proposal, there would be a rebuttable presumption in relation to the definition of a geographical indication in Article 22.1 of the TRIPS Agreement and that the Article 24 exceptions would not be affected. She asked whether the burden of proof as to whether a geographical indication was generic would be on generics producers or on the GI owners. The reason she asked this question was because she presumed that if a product name was generic in a given territory, then it would not be a geographical indication. Under the Hong Kong, China proposal, would there still be, in such a case, a presumption that the term was a geographical indication?

130. The representative of Hong Kong, China said, in response to Australia's comment regarding the generic exception under Article 24.6 of the TRIPS Agreement, that, under the Hong Kong, China proposal, there was no presumption linked to that provision. Therefore, on this particular issue, the burden of proof would not be affected. This was precisely one of the main features distinguishing his delegation's proposal from the EC proposal. His delegation's belief was that a Member's domestic court would be in the best position to determine whether a term was generic or not in that Member's territory. This approach would be preferable to leaving the issue to bilateral negotiations or any arbitration at the multilateral level.

131. The representative of the European Communities noted that all the three proposals on the table had certain legal effects. While it was positive that the joint proposal was on the table, it was just a starting-point and consequently did not deliver on the mandate to establish a "multilateral" register. The joint proposal's legal effect consisted only in the obligation to consult the register, which was not sufficient to truly "facilitate" the protection of geographical indications, as required by Article 23.4 of the TRIPS Agreement.

132. As to the comparison made between the GI register to be established and the registration systems managed by WIPO, he said that factual background papers by the WTO Secretariat on existing international systems of notification and registration at the multilateral level (TN/IP/W/4 and TN/IP/W/4/Add.1/Rev.1) had clearly explained that those WIPO-administered systems aimed at facilitating the acquisition of protection for different IP rights. The conclusion that he derived from these papers was that all those systems carried legal effects of various degrees. For example, in the case of the Madrid system, an international registration of a trademark under this system would result in the granting of protection to the trademark in each member State in the same way as if the trademark had been the subject of a direct application with the national office of that member State, unless it had been rejected by that office. Some of the joint proposal sponsors, like Australia and the United States, were parties to the Madrid system, which carried strong and legally binding effects. The difference with the WIPO systems was that under Article 23.4 of the TRIPS Agreement, the system to be established was being negotiated within the WTO, where the word "multilateral" meant that all the WTO Members should be covered, and that the system should hence produce legal effects in all those Members. In that light, the EC proposal was the only one that met the mandate.

133. He said that the key idea of the EC proposal with regard to participating Members was to provide for a presumption of eligibility for protection for unopposed geographical indications. This was not a substantive obligation, but simply a way of facilitating GI protection. In other words, it would make it easier for GI right holders to obtain the GI protection that was already available under the TRIPS Agreement, while leaving, in accordance with the principle of territoriality, national courts and authorities free to examine, and decide on, each case on the basis of its own merits.

134. He explained that under the EC proposal the challenge procedure, which was based on the different grounds mentioned in the proposal, allowed Members to take account of and assert territorial specificities. All this would ensure the reliability of the information that would be recorded. The exceptions in Article 24 of the TRIPS Agreement would continue to apply. Some of them should be exercised within the 18-month reservation period, while others, which were not mentioned

specifically in the original EC proposal but were later expressly included at the request of certain Members, could be invoked at the national level at any time.

135. His delegation rejected the point made that the EC proposal actually aimed at eradicating Article 24.6 of the TRIPS Agreement. This was not the case, for this provision would simply be the basis for opposition if a Member found that a term was generic in its territory, in which case the geographical indication would be registered with an annotation excluding legal effects in the opposing Member. As a consequence, not only would Article 24.6 be preserved, but the system would also ensure that the principle of territoriality was respected.

136. As to the references to "Feta", particularly the comments that this term was generic in most countries, he said that such comments were against the principle of territoriality, for only a Member could decide what was generic in its own territory. For example, a Member could not export cheese with the term "Feta" to the European Communities because this term was a registered geographical indication in the territory of the European Communities, but could still export the cheese under that name to Members that decided, based on the principle of territoriality, that it was generic in their territories. With this example, the idea he wanted to convey was that the EC proposal ensured that the decision on the protection of terms remained in the hands of national authorities.

137. He disagreed with a comment made by the United States that, as a result of the EC proposal, GI name users would be compelled to find new names for their products. This would not be the case precisely because, under the EC proposal, exceptions, such as those based on genericness, would remain applicable. In addition, other exceptions, such as those under Articles 24.4 and 24.5 of the TRIPS Agreement, could be invoked at the national level to make sure that prior uses could continue in those markets where these exceptions applied.

138. He disagreed with the comment that thousands of place names would be registered under the EC proposal because it would allow any geographical name to be registered. Not every geographical name could become a geographical indication. "Geographical indications" were only those names that referred to a geographical origin and where there was a link between the qualities, characteristics and reputation of the product with that geographical origin. This was not an easy hurdle to overcome.

139. He concluded by saying that the joint proposal established a system whereby the protection of geographical indications was not necessarily facilitated, since it would be organized in such a way that the database, simply comprised of a list of geographical indications, would not contain reliable information. According to the joint proposal, national authorities would consult this list of notified geographical indications, but there was no mechanism to ensure that such obligations would be respected. In any case, knowing that the information available in this database would not be reliable, national authorities would be likely to prefer not to take account of what was in the database. In addition, due to the limited participation, the database would contain incomplete, and hence unreliable, information. The joint proposal, which did not bring any added value with regard to legal effects, did not therefore meet the mandate.

140. The representative of Australia said that "feta" was a generic term in her country and that, in fact, there were more people of Greek origin in Melbourne than in any other city in the world outside of Athens and that more feta cheese was made in Australia, New Zealand, South Africa and the United States than in Greece.

141. As to the point made by the European Communities that the joint proposal's effects were not "sufficient", she said it would be important to determine what was meant by "sufficient". Clearly, it would be "sufficient" if it facilitated protection. All Members agreed that this was the purpose of the system they were negotiating. However, there seemed to be different interpretations of what "facilitation" meant. One of the major concerns of the *demandeurs*, which had led to the built-in

agenda in Article 23.4 of the Agreement, seemed to be to ensure that trademarks containing, or consisting of, geographical indications would not be registered in third country markets, thus avoiding that these trademarks could prevent GI owners from selling their products in those markets. The mandate also reflected some Members' concern that, because not all Members protected geographical indications through a registration system, lack of information would put GI right holders at a disadvantage *vis-à-vis* trademark owners in protecting and enforcing their rights. Taking into account this background history, "facilitation" conveyed to her delegation the idea of an information-based source, which would not be in itself, in contrast to the other proposals, the source of protection, nor give rise to a presumption of protection in Members' territories. The database under the joint proposal would sufficiently address the concerns outlined above by providing national IP offices with information on GI rights claimed by producers in the territory of another WTO Member. This information could be used by national IP offices when making decisions regarding the registration and protection of trademarks and geographical indications for wines and spirits in accordance with their national legislation, thereby facilitating the protection of geographical indications and reducing the risk that trademarks would be improperly registered. For the European Communities, it seemed that the word "sufficient" had another meaning, namely that the burden of proof should be reversed in favour of GI owners in domestic court proceedings by way of a presumption, an aspect also present in the Hong Kong, China proposal. She strongly disagreed with the European Communities' explanation that this presumption was not a substantive obligation, because such a reversal of the burden of proof would basically increase one Member's rights *vis-à-vis* another Member's rights. This would not be equivalent to simply "facilitating" the fulfilment of Member's existing rights. While agreeing that all proposals on the table could be considered to have legal effects, she said that the proposed presumptions were a type of legal effect that her delegation could not countenance because rather than "facilitate", they would instead "increase" the protection of geographical indications at the expense of trademark holders and generics producers.

142. She concluded by saying that the issue of legal effects, the most important to her delegation, could not be simplistically characterized as whether the system to be established should or should not have legal effects. Her delegation's position was not a dogmatic one, but rather one which reflected real concerns. The challenge was therefore to find a way to facilitate the protection of geographical indications under Article 23 of the TRIPS Agreement without negatively impacting upon the interests of her country's constituencies. The joint proposal would achieve that objective. Her delegation was, however, open to considering other options and would welcome any suggestions as to how the text of the joint proposal could be improved, taking into account the fundamental concerns raised with respect to the issue of presumptions and their effects on existing rights.

143. The representative of Switzerland said that participation and legal effects seemed to be the key issues to be first addressed before examining other secondary issues in greater detail, such as notification and registration. It would be only on the basis of the legal effects that would be accorded to registrations that Members would be able to determine what could be notified and registered and under which procedure.

144. Bearing in mind the fact that the mandate called for establishing a system to "facilitate the protection" of geographical indications that was currently available under the TRIPS Agreement, it would be necessary to bring in a "plus". To her delegation, the objective of "facilitation" of protection could not be achieved without providing, as the EC and Hong Kong, China proposals did, that a registration would have as a legal effect the presumption of validity of the registered geographical indication in all the Members that had not opposed it. This presumption should be rebuttable at any time and on any applicable ground. It was not aimed at creating new rights or obligations, but rather at putting GI right holders in a better situation than the one existing at the present time to defend their rights. By providing this type of limited or qualified legal effect, Members would fulfil the mandate of "facilitating" protection. She said that, while it was clear that Article 24 of the TRIPS Agreement provided some exceptions to the general rule of protection, such as generic terms or grandfathered

uses, she had the impression that some delegations were trying to turn those exceptions into a general rule and that, of course, was unacceptable.

145. She said that a rebuttable presumption was a legal effect that fully respected the principle of territoriality because the decision regarding the validity of this presumption would take place in the national courts of a Member. As with any kind of IPR, geographical indications had to respect the principle of territoriality. Each Member should continue to be able to decide whether a term was or was not a geographical indication in its territory and, as a consequence, whether it merited protection. Since the principle of territoriality also applied to determinations regarding the genericness of terms, it would therefore not be logical to give an extraterritorial character to such determinations. Thus, as confirmed by Australia, the principle of territoriality applied both ways.

146. She stated that her delegation saw great benefit in providing for examination procedures and for reservations that could be lodged based on various elements, such as the definition of a geographical indication, genericness or homonymy. This would bring clarity to the register at an early stage, namely before there was any litigation at the national level. In that sense, protection would be facilitated.

147. With regard to the joint proposal, she asked how it would effectively facilitate protection if the only obligation it provided for Members was to consult, amongst other sources of information, a database that simply compiled national information. Chile had explained, in this regard, that the database would compile information provided by Members. For her delegation this would be a mere source of information. Where then could GI right holders find the effective facilitation of the protection of their rights in the joint proposal? Would such facilitation consist only of right holders knowing that they were protected in their own country of origin? Was this the extent of Member's ambitions in these negotiations? Was that how Members intended to meet the mandate under Article 23.4 of the TRIPS Agreement? Her delegation was simply not convinced that such was the case. The purpose of the multilateral register was to facilitate the protection of geographical indications in other Members. Otherwise, why should a country be a party to a multilateral agreement? The reason was certainly not because it wanted to focus on the protection given at the national level to geographical indications located in its own territory. Swiss GI right holders were already aware that they were protected in Switzerland, so what they really wanted was to have the protection of their geographical indications facilitated in other WTO Members. Therefore, in the light of the proposals on the table, her delegation was of the view that providing unopposed GI registrations with certain minimal legal effects that could be invoked in all WTO Members was the only way to effectively facilitate the protection of geographical indications as compared to the current situation.

148. The representative of New Zealand agreed with Switzerland that the objective of the register, as stated in the mandate, should be to "facilitate the protection" for geographical indications. The joint proposal was therefore the only one that would meet this objective without increasing GI rights nor their protection. He agreed with the comments made by Australia as to the value of the legal effects in the joint proposal. The obligation to consult the GI database was a serious and meaningful new commitment that would not upset the fundamental balance of rights and obligations in the TRIPS Agreement. This new procedural obligation would need to be built into Members' systems and procedures, and was one that participating Members would be expected to honour. In fact, many IP offices would probably welcome having access to such a one-stop resource. New Zealand took its TRIPS obligations seriously and believed that this proposal could be a useful tool in helping IP offices avoid possible conflicts between trademarks and geographical indications. Finally, while the joint proposal would involve no new obligations for non-participating Members, they would nevertheless have access to it, if they so wished. In this way, it would be likely that the total number of Members consulting the database would be higher than the number of Members being obliged to do so.

149. The representative of Chile said, in response to Switzerland, that the joint proposal would provide effective protection through a system that would be unprecedented in the intellectual property field. Current IPR agreements, such as the Strasbourg Agreement, Lisbon Agreement, the Madrid Protocol or the PCT, were only schemes for the facilitation of IPR protection, some through registry systems that had limited number of participants, inferior to the number of WTO Members. Under the joint proposal, it would be likely that many Members, Chile included, would use the GI register and notify all their geographical indications. Their IP offices would surely consult this database when taking decisions on geographical indications and trademarks because this would be an obligation. This was, therefore, a legal effect. The information contained in this database would be reliable because it would be sent by WTO Members. Thinking otherwise would be the equivalent of accepting that Members distrusted each other.

150. The representative of the European Communities said that it was quite clear from the language of Article 23.4 of the TRIPS Agreement that the objective of the system was not simply to inform Members. The WTO Agreements, including the TRIPS Agreement, contained provisions on notifications that explicitly and clearly indicated that the notification obligations were just for purposes of exchanging information or of responding to requests concerning Members' legislation. In contrast, Article 23.4 contained obligations that went beyond the obligations under these other provisions.

151. As to the comparison made by Chile with other WIPO registration systems, he said that these systems carried strong legal effects. The European Communities, as Chile had also remarked, were proposing a different system because these negotiations were being conducted under the WTO framework. Thus, the European Communities were suggesting different legal effects, which would be less than, for example, the Lisbon Agreement, or the Madrid System, where the effect of registrations was exactly the same as national registrations. The reason for a lesser degree of legal effect was that the system simply aimed to facilitate the protection provided under the TRIPS Agreement. Another important feature, specific to the multilateral character of the WTO, was that the legal effects should cover all WTO Members.

152. The representative of Australia said that, while Members could continue discussing what facilitation or effective facilitation meant, they had never held any real discussion on the merits of the EC proposal. To this end, and also in response to the comment made by Switzerland about the certainty that Swiss producers wanted to secure when seeking protection in other countries, she asked why geographical indication owners from one country should have this benefit in domestic proceedings in other countries, while other IP right holders, whether trademark or patent owners, would continue to have to seek to obtain and enforce their own rights in those other countries. Why, as a matter of public policy, should geographical indications be any different from these other IPRs?

153. As to the important issue of the balance of rights and obligations, she said that the idea of facilitating protection was completely different from that of providing protection at others' expense, which would change the balance of rights and obligations in the TRIPS Agreement in a way that would be commercially damaging to countries outside Europe. This was a core question to her delegation: why should generic producers in Australia bear the burden of proving that a term was generic?

154. The representative of Chile said that to "facilitate" clearly did not mean the same as to "increase" and this was confirmed by the fact that, while Article 24.1 of the TRIPS Agreement used the latter term, Article 23.4 used the former. Had the participants in the Uruguay Round intended to have a system which would increase protection, they would have expressly used such a term.

155. He stated that, contrary to what the European Communities had said, the EC proposal would produce legal effects that would be greater than those currently produced under the Madrid system or



Lisbon Agreement. Under the Madrid system, on which the European Communities was purportedly basing its proposal, if a member notified a registered trademark, this would be sent out to a designated country, Chile for instance. If the Chilean authorities decided that they would not grant protection to the trademark, whatever the reason might be, this would be the end of the process at the Madrid level. If the foreign trademark right holder felt affected by this decision, he could still go to Chile to seek national registration. If the Chilean authorities decided to accept the trademark registration notified through the Madrid system, this registration would then deploy effects in Chile. The Madrid system, like the other WIPO ones, was very different from what the European Communities was proposing in the Special Session. To take the same example, if Chile refused to grant protection to a notified geographical indication, it would still have to negotiate with the European Communities within the 18-month period. In sum, unlike the EC proposal, the strong legal effects under the WIPO registration systems would only apply if a member decided to accept the notified application for, or title of, protection.

156. The representative of the European Communities said that the two preceding interventions had simply shown that the really controversial issue under legal effects was the meaning of the word "facilitating". To Chile's last intervention with regard to effects, he responded that it was true that the EC proposal included effects in all Members, simply because these negotiations were being conducted within the WTO and not in WIPO.

#### ***Fees and Costs***

157. The representative of Argentina recalled that, at the last meeting in October 2005, her delegation had indicated that the column of the side-by-side paper (TN/IP/W/12) reserved for the joint proposal under this heading was blank, which meant that it would not result in substantial costs nor there would be any need to establish fees. This would be beneficial for the majority of WTO Members, which were developing and least developed countries. On the other hand, the column of that side-by-side paper reserved for the EC proposal under this heading showed how complex this proposal was in this regard, to the point that it would create uncertainties. For example, paragraphs 9.2 et seq. were not clear as to how much the final costs of the system would be. Not even an estimate had been given. There was uncertainty as to whether the intention of paragraph 9.3 of the EC proposal was to establish that the costs of the system would be first borne by the main budget of the WTO and be later reimbursed. Furthermore, there would be serious administrative and financial costs for developing countries since the EC system established a double system of fees: a basic fee and an individual one. She reiterated her delegation's perplexity over the establishment of an individual fee. It appeared that it would be linked to an obligation for many Members to undertake a continuous monitoring of geographical indications. The European Communities had given the assurance that the costs associated with it would be reimbursed. However, it was still not clear how this would work in practice. The complicated structure for fees in the EC proposal was just one element of a whole complex system. This was the reason why it was important to analyse and better understand the broad range of costs and burdens implied in a proposal.

158. The representative of the Philippines expressed concern about this issue, in particular its impact on developing countries, both as potential users or participating Members and as countries being required to implement legal effects even if they were not participating in the system. With regard to the impact for his country as a potential user, he said that his delegation had not yet made any mathematical calculations in this regard, and was therefore not in a position to criticize or endorse the proposed EC system. However, there was a fundamental concern for developing countries: in the event that a developing country like the Philippines had geographical indications for wines and spirits to protect in the future, the elaborate and complicated system under the EC proposal would impose fees that would become so prohibitive that it would not be able to participate even if an economic interest existed. The other, more compelling, concern his delegation had related to the burden and costs that the EC mandatory system would most probably impose on Members, particularly

developing countries, even though they had decided not to participate in the system. The EC proposal would entail additional costs for some Members as a result of the obligation of monitoring trademarks and of the need for providing for capacity building of examiners and personnel in Member's IP offices so as to ensure that they would be able to lodge the necessary reservations within the 18-month period. There were also notification costs, which would be burdensome for Members, as well as the additional costs associated with the reservation procedures and the requirement of engaging in mandatory bilateral negotiations. Another concern was whether the EC proposal would not have certain consequences with regard to border controls by his country. If that was the case, then it would constitute an additional burden and cost for many Members, particularly developing countries. In addition to the costs for Members, there would be costs for their exporters, who might be compelled to re-label and re-brand their products. He said that, for the above reasons, it seemed that the EC proposal implied a fundamental shift in the way GI protection would be provided, at least for wines and spirits. While costs and burdens were currently more on the side of the private sector, or at least on the producers and manufacturers, they would be shifted to governments. This would pose a problem for the governments of many developing countries in terms of funding and budgetary priorities. Although not directly impacting on the topic under discussion, global branding was one corollary issue that was also at the back of the minds of countries, in particular the developing ones.

159. He concluded by saying that, from a developing country's perspective, it would be preferable to have voluntary participation in the system. Mandatory participation, in particular for countries with no interest in the system, would be unfair and would most probably impose undue financial and administrative burdens on Members, especially the developing countries, which was unacceptable.

160. The representative of Chinese Taipei recalled that, at the last meeting of October 2005, two points had been raised. The first one, made by the European Communities, was whether or not the proposal made by Hong Kong, China on the duration of registrations would be in conformity with the TRIPS Agreement. The other, made by Argentina, related to the reason for the inclusion of a new element in square brackets in paragraph 9.4 of the EC proposal, namely the "renewal of the multilateral registration", to which the European Communities had simply replied that its proposal was basically inspired by the Madrid Protocol. She asked the European Communities: whether there was a term of protection for registered GIs under their proposal; if there was, how would it conform with the TRIPS Agreement; and, if there was not, why did paragraph 9.4 of the proposal contain a provision for renewal fees in square brackets?

161. She expressed concern about the individual fee under the EC proposal. According to its paragraph 9.7, the individual fee would cover the costs of searching for trademarks containing, or consisting of, a notified geographical indication prior to registration as well as the costs of monitoring conflicting trademarks. This would shift to governments the burden that should be borne by GI right holders. Given that IPRs were private rights, it should be the right holders who should bear that burden. Furthermore, according to paragraph 9.8, "WTO Members shall notify the national component of the individual fee which it wishes to receive" on the condition that this fee "may not be higher than the equivalent of the amount which 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 is payable". Given that not all WTO Members were signatories to the Lisbon Agreement or to the Madrid Protocol, how could Members decide which domestic procedure to use as a reference in deciding the individual fee? If there was a complaint from other Members that the individual fee was too high, how would the system manage to resolve it? In contrast, there was no such fee under the system of the joint proposal.

162. She expressed serious doubts about the European Communities' statement that under the EC proposal all costs would be fully recoverable. There were many hidden costs that would still not be covered by the fees proposed in paragraph 9.5 of the proposal, including the costs of lodging

reservations and entering into compulsory negotiations to retain the right to use existing exceptions, as well as the costs of re-branding for producers and retailers.

163. She concluded by expressing concern that the proposed EC system would be expensive. In contrast, the system under the joint proposal appeared to be inexpensive, given the way it was designed and, most importantly, that it fully respected the principle of territoriality and the fact that intellectual property rights were private rights.

164. The representative of Turkey recalled the detailed explanation given by the European Communities on its proposal related to costs. Although the system would be based on the user-pays principle, the cost issue would need to be further elaborated so as to allay the concerns of developing countries. In this regard, he welcomed the EC proposal on technical assistance to LDCs and developing countries in view of their active use and participation in the system. It might therefore be necessary to envisage S&D elements in the system.

165. As for administrative burdens and costs, he echoed parts of the statement made by India, and added that since 1995 Turkey had been investing heavily in its IP infrastructure with a view to having a better and larger IP office, and had extended legal and law enforcement structures with adequately trained personnel, facilities and equipment. These were real costs that Turkey's taxpayers, including its businesses, had incurred for the protection of third parties' IPRs as a result of the fulfilment of its international commitments. What Turkey was expecting from this round was to also have a result for itself in terms of IP protection.

166. The representative of Jordan recalled an earlier statement expressing his delegation's concern about the burdens that the proposed EC system might cause to developing countries. He considered the proposed EC system as being complicated, including with regard to fees, the implementation and functioning of which he was still struggling to understand. He feared that the costs and burdens associated with this proposal, including due to fees and costs for re-branding and re-labelling of products, would be negatively reflected in product prices. In other words, the EC proposal would produce adverse effects.

167. The representative of Singapore expressed his delegation's concern with the impact of the EC proposal's obligations on Members with little or, as in the case of Singapore, no wine geographical indications, since for them there would potentially be no benefits to reap. In fact, it was clear that the current version of the EC proposal would indeed give rise to additional costs and burdens to non-wine producing countries.

168. Building on the comments made by the Philippines and Chinese Taipei on this issue, he said that the functioning of the EC proposal's reservations system would automatically bring about the question of costs and administrative burden. This was so because, apart from monitoring trademarks systems, Members would also have the obligation to set up efficient processes for the purpose of collating the representations of their traders so as to lodge reservations within the 18-month period, which was, in any case, quite short. There would also be costs associated with liaising closely with the traders and businesses so as to competently negotiate bilaterally on their behalf. While the setting up of these processes would involve substantial costs, it was still unclear how a country with no geographical indications, like Singapore, would benefit from the system. For all these reasons, his delegation was in favour of a simple and uncomplicated system that would not involve substantial costs and administrative burdens.

169. The representative of Costa Rica said that costs and fees were an essential issue for developing countries, in particular, as mentioned by the Philippines, for those developing Members who were non-producers or exporters of wines and spirits. The joint proposal had no provisions on fees and costs, exactly because the system it proposed would not impose any kind of administrative

burden for the participating Members, and none at all for non-participating Members. In contrast, under the proposed EC system system, Members who had opted not to participate would have, in addition to the costs mentioned by the Philippines, to lodge reservations and engage in compulsory negotiations so as to maintain their rights and make use of the existing exceptions under the TRIPS Agreement. Who would bear such costs? The EC proposal was therefore onerous for developing countries, including those opting not to participate in the system.

170. He welcomed the commitment for trade-related technical assistance for developing countries and LDCs as suggested in paragraph 9.10 of the EC proposal. This was positive wording that could be used in other areas of negotiations of the Round. He nevertheless expressed doubt regarding the part of this paragraph stating that such assistance would be provided with a view to enabling developing countries and LDCs to profit and actively participate in the system. He wondered whether this meant that countries without geographical indications, such as Costa Rica, would have to change their production and marketing systems to be able to use the EC system. If that were the case, there would be many costs and it would constitute a form of neo-colonialism of standards and rules.

171. The representative of the European Communities said that the issue of costs and fees would depend on what was agreed on other issues, such as legal effects, participation or the number of notified geographical indications, taking into account the flexibility that his delegation had offered in this regard. He recalled that originally his delegation had not intended to include in its proposal provisions related to costs and fees. They had been later included only at the request of other Members and in order to meet their concerns. In addressing Member's concerns, this section of the EC proposal was guided by the principle that it should be the beneficiaries of the system who would mainly pay for its functioning. His delegation was nevertheless open to addressing further concerns Members might have under this item.

172. He explained that under the EC proposal there were two different sets of costs: the costs for administering the system and the costs for Members. The first costs were basically those incurred by the administering body and would be minimal. They would derive from the reception, processing and circulation to Members of the notifications, annotations of challenges and updating the system, and would essentially be the same as those deriving from the other proposals on the table. The other set of costs were those that Members would incur and were related to the examination of the notifications. He recalled his delegation's earlier statement that such examinations would take place under the existing administrative and legislative structures that Members, as Turkey had indicated, had already put in place as a result of their implementation of the TRIPS Agreement. This meant that most of those administrative costs had already been borne by Members.

173. On the basis of the principle that the beneficiaries of the system should mainly be the ones to bear the burden of paying for its functioning, the EC proposal had divided into two the fee that should be paid at the time when a Member made a notification: a basic fee and an individual fee. The basic fee would be intended to cover the administrative functioning of the system, i.e. the first set of costs described above. The individual fee would cover the costs incurred by Members in monitoring past and future trademarks.

174. As to the comments that the EC's fee proposal was complex, he said that it was precisely to allay a similar concern that his delegation itself had had that it had decided to draw inspiration from the Madrid fee system, which had proved to be a manageable one.

175. As to the comments that under the EC proposal costs would be shifted from the beneficiaries to governments, he responded that that was the reason why the proposal included the possibility for Members to pass on, or to collect, fees from the beneficiaries, i.e. the GI right holders.

176. He further said that paragraph 9.10 of the EC proposal was designed to help developing countries to benefit from the establishment of the system. According to this provision, WTO Members would commit to providing trade-related technical assistance to ensure that those developing country Members could actively participate in the system, in other words, be able to notify their geographical indications into the system, which was the main criterion under the EC system to define a participating Member.

177. The representative of Australia asked the European Communities whether it accepted the fact that there were many costs associated with its proposal that would not be recoverable by the fee mechanism proposed, most particularly those stemming from the reservations process.

178. The representative of the European Communities said that he had already addressed that point when he had said that Members would not need to set up new structures to conduct examinations using their existing administrative systems. As to further costs that might emerge, the EC proposal only referred explicitly to the individual fee covering those obligations to monitor past or future trademarks. However, if there were further costs that Members believed could be covered, his delegation would be prepared to exercise flexibility in that respect.

179. The representative of Argentina expressed support for the comments made by the previous speakers. She said that the preceding interventions, particularly those from Costa Rica, the Philippines and Singapore, had shown that any discussion over costs of the system could not just be limited to multilateral administrative costs or fees. Concerns had been voiced about the basic and individual fees from the point of view of non-wine producing countries. Argentina, as a wine-producing country, was also not convinced why and under what justification the system to be established should result in costs either for its government or its producers. As indicated by other delegations, Argentina's concerns also touched upon a wider range of issues, such as enforcement, examination or bilateral negotiations, which were all time-consuming and involved financial and human resources.

180. She expressed surprise with the European Communities' point that the costs would be minimized by the fact that the system would make use of existing national structures that had already been set up to comply with the standards under the current TRIPS Agreement. For her delegation, the TRIPS Agreement did not create any obligation whatsoever to establish any kind of structure to examine geographical indications. However, if that were the case, what would happen with those Members, who were the majority of this organization, that did not have such costly structures nor the financial resources to create them? If some member States of the European Communities had such systems, it was not because of the TRIPS Agreement but because they had had them in place for more than a century.

181. The representative of the United States said that there was a direct relationship between the structure of the system and the fees and costs involved. The more complex the system, the higher the costs would be. The EC system was more complex than the one proposed by Hong Kong, China but they were both more costly than the joint proposal. With respect to fees, the joint proposal was easy to administer and no fees would be charged. It was unclear under the EC proposal whether non-participating Members would be able to obtain fees for the examinations conducted for notified geographical indications. There would also be many costs associated with the EC proposal that would not be recoverable by the fee mechanism proposed, such as costs to governments, producers, consumers and the administering body.

182. The representative of the Philippines said that, while he had taken note of the response given by the European Communities to the point raised by some delegations that under the EC proposal there were certain costs that would not be recoverable, his delegation was still unconvinced that the proposal addressed the core concerns raised by many Members in this meeting.

183. He further took note of the European Communities' point that under the EC proposal Members would not have to restructure their national IP administration systems in order to protect geographical indications. Although his delegation was not in a position to fully debate this particular assertion, it had always been the position of his authorities that implementing the EC proposal would require changes with significant implications as to how his country was going to administer its system. Therefore, his delegation was not completely convinced that this issue was as simple as the EC delegation was claiming it to be.

184. He agreed in principle with India that there were certain core systemic concerns, such as legal effects and participation, which needed to enjoy some commonality before Members would be able to move forward on other issues. However, from the perspective of developing countries, costs and burdens were also core issues. Many developing countries were already finding it difficult to implement many of their obligations under the different WTO Agreements, which imposed additional costs and burdens on them. It would therefore be difficult for them to explain and justify to their constituencies and stakeholders why they should undertake to implement a mandatory system that would have additional costs and burdens to governments while there no economic interests.

#### ***Remarks by the Chair***

185. The Chairman said that the discussion had been focused on the priority concerns and hence useful. He hoped that the points made had helped Members to better understand each other's concerns and invited them to think further on how certain concerns or fears could be allayed. He noted that, while in some areas, such as legal effects/consequence of registration and participation, Members were still far apart, on some others, such as notification, there seemed to be more common ground. His sense was that on issues such as fees and costs there was need for more work to clarify the issues and the differences.

#### **D. OTHER ISSUES**

186. The Chairman informed Members that the next formal meeting of the Special Session had been scheduled for 12-13 June 2006, back-to-back with the next regular session of the TRIPS Council. He said that, in the meantime, an intensive process of work in more informal settings had to be envisaged in order to make significant progress by that time, and in order for Members to be able to produce the required working document by July of this year. He was also cognizant of the guidance that Members had received from the TNC about the need for the negotiations across the whole of the DDA to move ahead in concert. He therefore planed to organize consultations in a variety of formats in the period between this meeting and the June meeting. It would clearly be necessary for delegations to intensify also their contacts with each other in order to find the way forward.

187. The representative of the European Communities said that the Chair's suggestions appeared to be a reasonable way forward. His delegation would continue its informal work with other Members to try to make progress. He added that it would be useful if a draft of the document to be tabled in for July 2006 could be prepared for the June meeting. He recalled that in the past his delegation had asked the Chair to produce a compromise proposal with options. It would certainly be useful if such a compromise proposal was prepared with the support and input that might flow from the work conducted in the consultations.

188. The representative of Argentina said that her delegation had no difficulties with the Chair's suggestions as to the way forward. Members needed to take into account all the points discussed and made in this Special Session, including the general comments made at this meeting. In this regard, she noted that in his concluding remarks the Chair had identified points about which delegations were still apart, a point about which there could be some common ground, and other points where more clarification was needed. Her delegation believed that the current situation would not enable

Members to use any paper other than the document under which they had been conducting their negotiations, i.e. the side-by-side paper (TN/IP/W/12). Therefore, future consultations should be based on that document and it looked likely that this would not change for the formal meeting in June. This would have been different if there were consensus among Members that would enable them to move on. In principle, any working document within the meaning of the guidelines of the TNC should be a consensus document, i.e. one emanating from the Members themselves. Any consultation should therefore continue on the basis of what Members already had on the table and it was not the right time to request a compromise proposal. In this regard, she recalled an attempt made by the previous Chairman to come forward with a compromise text including options, with which her delegation had had difficulties. Noting that the side-by-side document already showed the options, she suggested that, given the support expressed for the joint proposal at this meeting, the EC delegation come to the consultations and to the June meeting with a revised proposal that would better take account of the interests of all Members.

189. The representative of Australia said that her delegation also agreed with the approach suggested by the Chair. The discussions had been quite useful and had attracted wider participation than usual. Although these negotiations might appear tortuous at times, she believed that Members had gradually been able to discern what the real issues were. She agreed with the Chair that Members should keep discussing the issues and try to address each other's concerns. She supported Argentina's point that it would be positive if the European Communities could come to the next Special Session's meeting with some responses to the questions and concerns raised by many delegations at this meeting. Her delegation would also reflect on certain points, including some of the concerns raised by the European Communities and Switzerland, so as to be able to address them at the next meeting. Some of these points or concerns were, for example, those regarding the effectiveness or sufficiency of the joint proposal or those on how the integrity of information on geographical terms could be ensured under the joint proposal.

190. As to the July working document, she agreed with Argentina that it should be a consensus document from Members. She wondered how a compromise text, as suggested by the European Communities, would work. For example, what would be the compromise between a voluntary and a mandatory register if the only possible options were either to participate or not? Would this compromise be based on the complicated idea of non-participating and participating Members under the EC proposal? The same concern applied to legal effects, where the issue of presumptions and their implications regarding the balance of rights and obligations was an essential one to her delegation and many others. Would the compromise be to diminish Members' rights slightly less than what was being proposed by the European Communities? She was not even sure whether such an idea would be acceptable to her delegation. Therefore, the best course of action was to intensify these negotiations by holding informal consultations, which would hopefully enable Members to come to the next Special Session meeting in June with some responses to each other's concerns, and help them achieve progress in these negotiations.

191. The representative of the Philippines said that the discussions at the meeting had been interesting and educative and that they had attracted, as Australia noted, more participation than usual. While his delegation recognized the importance of this issue for the European Communities, Switzerland and perhaps a few other delegations, as well as the right of the European Communities to present a proposal, which some Members would view as overly ambitious, he said that it should also be recognized that a good number of Members had raised legitimate concerns, leading them, including the Philippines, to express preference for the joint proposal.

192. As to the way forward, his delegation agreed with the Chair's concluding remarks that perhaps it would be too late if Members waited until the June 2006 formal meeting of the Special Session. It would therefore be necessary to intensify informal bilateral and plurilateral contacts, whether or not under the auspices of the Chair. He said that the Chair should convene an open-ended

informal meeting between this meeting and the June formal meeting so as to ensure that the process of consultations would be transparent and inclusive, because at the end of the day any agreement would have to be adopted by all Members by consensus. It was clear from this meeting that the *demandeurs* and the proponents were not the only interested parties in these negotiations. There were many other delegations, such as the Philippines, who might not have been always active or vocal in the discussions, but had legitimate systemic concerns. He concluded by saying that the way forward proposed by the Chair was the best option and urged Members on both sides of the fence to truly intensify discussions and be open to the legitimate concerns that each side had raised over the course of many years of negotiations.

193. The representative of the United States said that the brief summary of the Chair was accurate, and that her delegation agreed with his suggested way forward. Her delegation associated itself with the comments made by Argentina and Australia with regard to the July working document and the continuation of the Special Session's work, and therefore supported their comment that a compromise working document was not warranted at this juncture.

194. The representative of Switzerland said that her delegation agreed with the Chair's proposal regarding the way forward. An intensification of consultations in different formats would enable Members to make progress in these negotiations. Regarding the consultations, she said that Members were just at the beginning of a process and had differing positions. If they wanted to reach specific results, then they would have to take into account each other's interests and make concessions. She hoped that the consultations would enable Members to achieve this goal.

195. As to the document to be produced, she also believed that it was premature at this point to say whether Members needed such a document, or whether they should keep the side-by-side document. In any case, Members would need to have a text which would enable them to identify their room for manoeuvre and what the final result could be. While noting that it was helpful that Hong Kong, China had made such an attempt, she said that, in the absence of a text by Members, the Chair might have to come forward with a text with options that allowed them to see where they were heading.

196. The representative of the European Communities expressed surprise at the suggestion made by Argentina and Australia as a way forward that the European Communities modify its proposal to address the concerns they had expressed but which had not been appropriately addressed in the EC proposal. His delegation could also say exactly the same, namely that its concerns regarding the joint proposal had not been appropriately addressed, and that the appropriate way forward would therefore be for the Joint Proposal Group to modify its proposal before coming to the June meeting.

197. Referring to Switzerland's statement that what Members needed to do was to engage immediately in an informal process to understand each other's concerns so as to be able to work their way towards a compromise, he expressed the hope that for the June meeting Members would be able to establish a sufficient basis to produce that compromise text, which, as Switzerland also had said, at some point in time might come from the Chair.

198. The representative of Chile agreed with the Chair's summary of the discussions and with his suggestion as to the way forward. He said that the side-by-side paper was a good document and should continue to be the basis for the discussions of the Special Session. With regard to the instruction by the TNC that these negotiations would have to proceed in concert with other areas of the DDA, he said that, compared to other negotiating groups, the Special Session seemed to be quite advanced with a document presenting the various proposals that delegations had put in a draft legal form on the table.

199. The Chairman took note of all the comments made. He thought that it would be rather early for him to say whether he was in a position to come up with a document. This would depend on how



bilateral consultations and his consultations developed, as well as on developments in other areas of the WTO. He therefore urged all Members to show flexibility so as to allow these negotiations to achieve some results.

---