

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

MINUTES OF MEETING

Held in the Centre William Rappard
on 29 April 2008

Chairman: Ambassador Manzoor Ahmad (Pakistan)

<u>Subjects discussed</u>	<u>Page No.</u>
A. ADOPTION OF AGENDA	2
B. STOCKTAKING OF THE STATUS OF WORK; CHAIRMAN'S THINKING REGARDING HIS REPORT TO THE TRADE NEGOTIATIONS COMMITTEE.....	2
C. GENERAL STATEMENTS	3
D. DISCUSSION OF THE ELEMENTS ENVISAGED IN THE CHAIRMAN'S REPORT	17
1. Participation	17
2. Consequences/legal effects of registrations	18
3. Notifications	28
4. Registration	29
5. Other elements	30

A. ADOPTION OF AGENDA

1. The nineteenth Special Session agreed to adopt the agenda as set out in WTO/AIR/3174.

B. STOCKTAKING OF THE STATUS OF WORK; CHAIRMAN'S THINKING REGARDING HIS REPORT TO THE TRADE NEGOTIATIONS COMMITTEE

2. The Chairman said that one of the reasons why he had not called a formal meeting of the Special Session was to allow Members time to pursue dialogue amongst themselves and explore solutions. He had been keeping contact with the delegations concerned and, to ensure transparency and inclusiveness, he had held open-ended informal meetings in June and December 2007. More recently, he had engaged in consultations to enable him to submit a factual report setting out the status of the work to the TNC, including an open-ended consultation held for that purpose on 11 April 2008. The aim of this meeting was to take stock of the negotiations in the Special Session on the establishment of a multilateral system of notification and registration of geographical indications (GIs) for wines and spirits, including on the issues of participation, consequences/legal effects of registrations, notification and registration and any other elements that delegations might wish to address.

3. He said that, as had been indicated at the open-ended meeting on 11 April, he had in mind a report along the following lines:

- First, he would emphasize that the report would be on his own responsibility and without prejudice to the position of any delegation and to the outcome of the negotiations. As in previous reports, he would reproduce the Special Sessions' mandate as contained in paragraph 18 of the Doha Declaration and Article 23.4 of the TRIPS Agreement, and would also refer to the agreement on the Special Session's mandate in the Hong Kong Ministerial Declaration. He would then refer to the three formal proposals on the table in the same way as in previous reports, namely as set out in the side-by-side document, TN/IP/W/12, and note that more recently the European Communities had shared with participants new thinking, which it had presented as an effort to narrow the gap, and that the references to the position of the European Communities in his report would be based on this new thinking.
- Second, he would indicate that the elements of a registration system that had been considered in the work could be put into three categories:
 - In the first category, there were the two key issues of participation and consequences/legal effects of registrations, where there continued to be fundamental differences, even if there had been some movement in the past months. In regard to these elements, he would reproduce in the report the position of participants as reflected in their proposals and in the discussions in the Special Session.
 - There was a second category of elements on which a fair amount of detailed work had been done, namely the areas of notification and registration. While recognizing that much of the work was not recent and further work was clearly required, in particular because positions on these matters were linked to the treatment of participation and consequences/legal effects, he believed that it would be appropriate to set out his tentative appreciation of the points of convergence and divergence.

- The third category related to a number of other elements which depended substantially on the key policy choices to be made, in particular on the questions of participation and consequences/legal effects, and which had hitherto thus been less fully discussed. These included such matters as: fees, costs and administrative burdens, particularly as they could impact on developing and least developed country Members; the duration of registrations and procedures for their modification and withdrawal; arrangements for review; contact points; and special and differential treatment. On these points, he would not propose in the report to seek to identify points of convergence and divergence, but rather to flag the need for further discussion.
- His report would also indicate that no agreement had yet been reached on the legal form of the eventual outcome and also on the institutional arrangements for its management and servicing. On the former question, the suggestions on the table included a TRIPS Council decision and the addition of an annex to the TRIPS Agreement through an amendment to the Agreement. On the latter question, delegations had not excluded the possibility of inviting the WIPO secretariat to play a role.
- His report would factually indicate that different views had been expressed on whether the work of the Special Session should be addressed in the context of the modalities decision, and that some Members believed that further guidance on its work should be given, while some others believed that the existing mandate was sufficiently clear and that no further guidance was necessary.
- In the report he would say that he would not describe the range of views that had been expressed on issues of linkage between work in the Special Session and work elsewhere, both on non-TRIPS and TRIPS matters, including in regard to the coverage of the GI register and to the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD). This was because these issues related to matters which went beyond the mandate of the Special Session, including its limitation to geographical indications for wines and spirits.
- Following this general introduction, the report would set out in narrative form the positions on the four elements of the multilateral system, namely participation, notification, registration and consequences/legal effects. On participation and consequences/legal effects, he would set out the various proposals as they had been made. On notification and registration, he would seek to identify - in narrative form - points of convergence and divergence.

4. He proposed to take up in turn each of the four elements, namely participation, consequences/legal effects of registrations, notification and registration, and then to offer an opportunity for delegations to address any other specific elements. Before doing that, he offered the floor for general statements.

C. GENERAL STATEMENTS

5. All delegations taking the floor expressed their appreciation that the Chairman had convened the Special Session after a long interruption.

6. The representative of the European Communities said that his delegation, representing many WTO Members on this key issue at a key point in time, wished to underline its expectations in this

area. As regards the significance of GIs for the European Communities, he said that they were traditional products that reflected the regional diversity of the EC food production and were part of the EC heritage. The TRIPS Agreement provided GIs with a status of an "intellectual property right" alongside patents, trademarks or copyrights. The Agreement aimed at protecting producers of GI goods against unfair competition from companies outside their region that misused the geographical names to unfairly benefit from their reputation or to mislead consumers. Thus, GIs had a real economic impact and provided millions of jobs worldwide. In Europe and elsewhere, including in developing countries, such products improved farmers' income, allowed agricultural diversification and supported the rural economy. The GI Friends Group presently included more than 40 WTO Members and similar concerns were being shared by many more Members.

7. In the Doha negotiations, his delegation was ready to make very significant concessions on Agriculture by eliminating export subsidies, considerably reducing domestic trade distorting support and agreeing to unprecedented tariff cuts. In other words, while the EC accepted it would have to face increased competition, its farmers must have the opportunity to compete where they were competitive, namely in the high quality processed food sector related to the area where they were produced. The TRIPS Agreement was already providing some protection to GIs in general, but the system still had some important shortcomings that should be tackled to effectively allow a level playing field. He underscored that the EC and its 27 member States would not accept an unbalanced outcome on largely liberalized agricultural without providing their farmers with a chance to effectively and in a fair way compete by building on the reputation and quality of their products. Improved GI protection was essential for that. This is why an agreement on further Agriculture liberalization and improved GI protection had to be achieved at the same time, that is at the time of modalities.

8. He further said that on GIs, both register and extension, the potential for progress in the negotiations at the technical level had been exhausted for quite some time. Without any political guidance at this point in time, discussions were going round in circles. Movement had hitherto come only from the EC lowering its level of ambition. The EC had come however to the limit of what could be done on its side. GIs could only progress with a political decision at the time of modalities.

9. As regards the register, Members had agreed to set it up some 13 years ago. There would be no justice in moving ahead in one part of the built-in agenda, Agriculture, and not in the other, the GI register. Over the years the EC had indicated various and meaningful flexibilities to address the concerns expressed by other Members. First, the EC had accepted that the system proposed would have no retroactive effects: no names would have to be given up as a result of a deal. Contrary to what the opponents often claimed, the EC proposals were forward-looking and did not aim at correcting history. Second, the EC had substantially reduced the initially proposed legal effects. It would no longer be necessary to take action in the WTO within a given time-frame, and any Member would be able to take decisions according to its own national system and at any time. This would effectively eliminate any costs and burden of the register. The EC had also expressed readiness to discuss concerns on coverage, participation, or S&D. Against this background it was regrettable that opponents had not moved at all from their initial position. Their negotiators were in fact not negotiating at all and insisted that their proposal was the only way to achieve an agreement in this area. After 13 years of unsuccessful discussions, there would simply be no way to move forward unless the matter was taken up at higher level and Ministers provided guidance in this area.

10. He further indicated that the EC would be essentially seeking guidance for two issues at the time of modalities: the effects of the register which Members would be bound by these effects. At least on these two issues, Ministers should provide sufficient guidance at modalities so that a legal draft of the register could be produced. Taking account of the flexibilities it had offered, the EC considered that such guidance should deal with the points he would elaborate. First, on Members' coverage, i.e., participation, whatever effects of the register, they should apply to basically all

Members. The DDA, including the mandate for a GI register, was a multilateral negotiation not a plurilateral one. There was already a plurilateral register in WIPO, so there was no point in having another voluntary register in the WTO. Second, the legal effects of registrations should effectively "facilitate the protection of geographical indications" as indicated in the mandate. This meant that effects must be legally meaningful and not be just illusory. He recalled that in order to maintain momentum the EC had over the years drastically reduced its level of ambition. It was merely proposing that the information in the register be taken into account as rebuttable presumptions on three grounds only, namely those relating to the GI definition, to GI genericness and to GI homonymy. This would be far from being automatic TRIPS protection since these grounds could be invoked at the national level at any time. This would ensure that the EC approach would be forward looking in avoiding future problems with GI protection, and not aiming at solving problems which arose in the past. Compared to the prevailing TRIPS exceptions, the effects of the register appeared very limited. Other issues related to the register could be negotiated after modalities if sufficient guidance on legal effects was provided.

11. As regards the Chairman's report, the representative of the EC said that the report was long overdue. This negotiation had been launched in 1996 but, while other Chairs had been able to produce very detailed papers in areas with more recent mandates, this negotiating group had accumulated a substantial delay and should start catching up. The EC therefore hoped that the report would instil a new dynamic. His delegation assumed that the GI report would come out around the same time as the papers in the area of Agriculture and NAMA. The Chairman's report should facilitate the work of the negotiating group towards consensus. Therefore, the EC considered that the report on the GI register should include an explanation of the progress made and describe the current state of play, as well as provide language in all areas of the register indicating possible progress in concrete terms. On the key issues of participation and legal effects, the report should provide clear language and options. Concerning participation, his delegation would suggest some better drafting regarding its own option. The report could also clarify that all WTO Members should be able to notify GIs if they so wished. On other areas of the register such as notification and registration, positions were much closer. His delegation would therefore prefer that the paper provided legal language showing convergence and left pending issues between brackets. As was being done by other Chairs, this was a useful way to help partners move towards consensus.

12. He further reiterated that GIs were of paramount importance to the EC both for economic and political reasons. The EC did not want to see that world agricultural liberalization further erode the rights of its farmers to protect the names of their products. After all these years of negotiations, it had accepted not to look into past situations and had lowered its expectations to the bare minimum. It hoped that its efforts to understand others' concerns while remaining committed to this important topic would be rewarded. It was ready to cooperate with the Chairman as well as with WTO Members with a view to finding a solution to this issue in the modalities process in order to help avoid a "train crash".

13. The representative of Canada said that his government considered this negotiating group's work to establish a GI registry for wines and spirits as an important component of the Doha Round. It was its view, endorsed by Canadian industry, that a GI register for wines and spirits would be a valuable tool that would provide benefits for all producers. To this end, he reaffirmed that Canada remained committed to achieving a positive conclusion to the negotiations on a GI register for wines and spirits as mandated by TRIPS Article 23.4 and paragraph 18 of the Doha Declaration. Canada viewed it as unfortunate that progress in these negotiations remained elusive. Moreover, it had been disappointed that some Members had been unwilling to engage in technical discussions, particularly with regard to the joint proposal (TN/IP/W/10). Canada and other co-sponsors were certainly willing and able to address how the joint proposal satisfied the requirements set out by Ministers. They were also prepared to discuss how it would provide producers of wines and spirits with tangible benefits.

14. He said that the joint proposal enjoyed the broadest support among WTO developed and developing country Members, for good reasons: it was the only proposal that fell within the mandate; it allowed for voluntary participation; costs and administrative burdens would be limited; and it did not create legal effects for non-participating Members. Moreover, the joint proposal was a middle ground: as was indicated in the recent informal consultations, there were viewpoints on a potential GI register for wines and spirits that fell on both sides of the joint proposal. This development should be captured in the Chairman's report.

15. With regard to the EC proposals, Canada had a number of concerns that he would also further develop later at this meeting: the proposals envisaged fundamental legal changes, and Canada's experience had caused it to be very wary of the consequences of such changes; their coverage was unclear; on participation they were unclear on who would be expected to participate, and would have repercussions on both participants and non-participants; they could mean significant costs to governments, IP offices, users of the IP system, and non-users as well, and these costs were unclear.

16. Canada had carefully considered the possible elements of a Chairman's report, which had been shared with delegations through informal consultations. It had previously indicated its preference for a factual report with a simple and straightforward account of the negotiations to date. While such a report would not reveal any discernable progress unless there were developments from this meeting's discussions, to do otherwise would be an inaccurate portrayal of the negotiations.

17. The representative of Chinese Taipei made four points concerning the factual report. Firstly, participation in the wines and spirits register should be voluntary, not only because Article 23.4 of the TRIPS Agreement clearly stated that the register was for "those Members participating in the system", but also because from a development perspective mandatory participation would result in an unwanted administrative burden for many developing Members who had limited resources and very little interest in the wines and spirits register. Secondly, on the issue of legal effect or consequences, it was made clear in the mandate that the register would be established in order to "facilitate" protection, not to "increase" it. According to the proposals of both the EC and Hong Kong, China, a notified GI from one Member would have a legal effect of presumption in another Member's domestic legal system. This legal effect would go beyond the principle of territoriality, and would actually increase protection for the GI in the wines and spirits sector. Therefore, his delegation considered such legal presumption to be unreasonable and beyond the scope of the negotiating mandate. In contrast to those two proposals, the joint proposal, sensibly in his delegation's view, provided for voluntary participation and a procedural requirement that really could facilitate protection for GIs while at the same time respecting the principle of territoriality.

18. Thirdly, regarding the horizontal process, he said that, in light of the continuing diversity of positions among Members and complexity of the technical issues, his delegation had serious doubts about the wisdom of asking Ministers to take any firm political position during the horizontal negotiating process itself. At this stage, Ministers could only be expected to decide between the three proposals in their entirety, rather than to pick-and-choose different parts from each of them. If Ministers were asked to make a political decision, then his delegation firmly believed that they should choose the joint proposal.

19. On the subject of the so-called "linkage" between the wines and spirits register negotiations and the implementation issues of GI extension and TRIPS/CBD that some delegations had proposed for inclusion in the report, he said that, since there was a clear mandate on wines and spirits in the Special Session of the TRIPS Council, and DG Lamy was due, quite separately, to produce a report on other issues, his delegation believed it would be essential that the Chairman's report be kept clearly focused on wines and spirits alone.

20. The representative of Chile reiterated his country's support for the joint proposal. His delegation was increasingly convinced that the proposal was actually an excellent basis for negotiation, because it was the only one on the table which strictly complied with the mandate of Article 23 of the TRIPS Agreement and of paragraph 18 of the Doha Declaration. Article 23.4 instructed that the negotiations dealt with four elements: first, the register should facilitate the protection of GIs; second, it related to wines and spirits; third, it should be multilateral; and, fourth, it should be applicable to those Members participating in the system. The joint proposal precisely proposed a register that contained these four elements: it would be limited to wines and spirits, be really voluntary in terms of participation, effectively facilitate and not increase the protection of GIs, and be multilateral in the sense that it would be negotiated by all Members of the WTO and be open to all those wishing to participate in the system. In addition to its conformity with the mandate, the joint proposal had the following features: it would not have any legal effects for those Members who had decided not to participate in the system; it respected the existing balance between rights and obligations of Members, which meant that Members would be able to avail themselves of Article 24 exceptions; it would not imply substantive costs neither for right holders, consumers and governments nor for the registration office and the WTO Secretariat; it respected the principle of territoriality on which the entire system of intellectual property was based and whereby a decision to protect a given GI and disputes regarding that GI continued to be within the competence of the country where protection was being sought; it preserved the right that Members had under Article 1.1 to determine the appropriate method of implementing the provisions of the TRIPS Agreement within their own legal system and practice. While achieving all these objectives, the joint proposal would not impose an excessive burden on Members nor would it substantially change Members' IP system. It was precisely for all these reasons that the joint proposal had won so much support.

21. He recalled that his delegation had been taking part in good faith in informal consultations with the proponents of a register of GIs for all types of products. While recognizing that there had been some recent movement from the EC, who had presented new ideas, their initial proposal (TN/IP/W/11) was the only official text on the table. As regards the new ideas, the EC continued to go beyond the mandate and propose a system with mandatory participation and obligations for all Members, to be applied to all products and with a reversal of the burden of proof. His delegation was of the view that the joint proposal would be the best basis for an agreement: it struck a balance between the various options, which ranged from a proposal for a mandatory register of GIs for all products to the position that the register should not have any legal effects for participating Members and that, in this regard, the joint proposal was going too far as well. For his delegation, the joint proposal fully complied with the mandate and actually facilitated protection of GIs for wines and spirits for those Members who decided to participate. He said that the Chairman's report should therefore reflect this situation. It should be a factual report reflecting the fact that, on the one hand, there was a proposal with wide support and, on the other hand, other proposals with support from a minority.

22. The representative of Australia said that all the delegations present recognized the context in which the Special Session was meeting. Like the Chairs of other negotiating groups within the Single Undertaking, the Chairman was charged with preparing a report for the TNC on the state of this group's negotiations that would assist Members through a so-called "horizontal process" to reach agreement on modalities in Agriculture in NAMA, and that in turn would allow Members to conclude the Single Undertaking negotiations by the end of the year. Australia certainly recognized that the Single Undertaking mandate did include the negotiation of a system of notification and registration of GIs for wines and spirits to facilitate the protection of these GIs in participating Members. Australia remained committed to that mandate. However, to have any chance of achieving both modalities in the coming weeks and the overall deal by the end of this year, delegations must move beyond general, rhetorical statements about the importance of one issue or another and its linkages to other areas in the Round. Delegations must deal seriously with the detail and substance of the proposals on the table. In that regard this meeting was very timely.

23. The Chairman's report for the TNC should accurately and fairly reflect the substance of the proposals and Members' positions in this negotiation. In that connection, Australia acknowledged the indication given by the Chairman that he intended to do so. For that purpose, it was necessary for all Members to have the opportunity to formally and substantively exchange their views on the proposals. At the beginning of this meeting reference had again been made in broad and vague terms to "new thinking" or "new ideas" submitted by one Member on the register negotiation, including some assertions as to how those proposals or ideas might work. His delegation looked forward to seeing those ideas submitted and elaborated in writing so that all Members could have a proper substantive exchange and understand more fully the implications of these ideas for their legal systems and for their commercial interests. This was a pre-requisite for any real negotiations. Members could not and should not think that they could bypass this substantive "technical" work" and put to Ministers some vague "political" proposals that had never been tabled or considered in this Group, let alone by experts in capitals. Any substantive technical work in these negotiations must also give proper consideration to the joint proposal.

24. His delegation had come to this meeting, prepared to elaborate on how the joint proposal would add real value and facilitate the protection of wines and spirits GIs without overreaching legally or placing unreasonable burdens on Members. The joint proposal had never been given the attention it deserved. Indeed, it had been a source of disappointment - or even of frustration - to his delegation to hear from some Members that the Joint Proposal Group "refused" to engage on GI issues, when it had a proposal on the table, with broad support from developed and developing country Members, had added value, and most importantly, met the negotiating mandate. Instead of any engagement to discuss the substance of the joint proposal, all that had been heard in the various exchanges had been snide and dismissive references to "mere databases" or to a "Google proposal", which sounded much more like a refusal to engage. One delegation had said that the Special Session had come to the end of useful technical discussions, but had referred to matters that had never been formally tabled in writing. His delegation was a little puzzled by such comments and reiterated its readiness to discuss the substance of the joint proposal.

25. The representative of Morocco said that, as indicated in the statement made by his delegation at the Ministerial Conference at Doha, the extension of the level of protection of Article 23 of the TRIPS Agreement to GIs for all products, namely to agricultural, fishery, and handicraft products was of great importance to Morocco. The Law of 17-97 on the protection of industrial property as modified and completed provided for a procedure for the protection of appellations of origin and GIs for all products and services which could be identified by their geographical origin in accordance with the definition contained in Article 22.1 of the TRIPS Agreement. He reiterated that the establishment of a multilateral system of notification and registration of GIs should be broad in scope and not be limited to wines and spirits. Morocco's position was in line with the proposal for the extension of the protection of Article 23 of the TRIPS Agreement to the GIs of all products contained in document W/T/GC/WW/587-TN/C/W/48 of 19 February 2008, which Morocco had co-sponsored. It was high time to abolish the artificial distinction which had been drawn up hitherto between the issue of GIs for wines and spirits and GIs for other products, which also included the question of the multilateral register that was being negotiated.

26. Concerning the practical modalities of the multilateral system of notification and registration of GIs, his delegation said that it should be simple, flexible, not too costly and permit the protection of prior right holders' rights acquired in good faith. Appropriate measures should also be taken within the S&D framework so as to take into consideration the situation of developing countries in general and the situation of LDCs in particular.

27. The representative of China said that, with regard to the issue of coverage, his country supported an extension of the protection under Article 23 to cover GIs for all products and would prefer that the proposed GI register covered all products. China did not see any legitimate reason why

a GI register was being negotiated for wines and spirits only, but not for rice, tea, coffee or other products. It believed that GIs of all products should be protected on an equal footing so that all Members could benefit from the GI register and a proper balance be achieved among products and among Members. Secondly, with regard to participation, China would only be interested in participating in a GI register that covered all products, and not one limited to wines and spirits. It could not afford a register which only protected the interests of some Members while leaving the interests of others unguaranteed, which was certainly not fair. As to the nature of the system, the question of whether or not the GI register should have a binding legal effect on participating Members should be carefully considered, based on the different situations of Members' domestic legislation and current level of protection. In this regard, the principle of territoriality should be fully respected. Fourthly, the special needs and situations of developing countries, particularly LDCs, had not been fully addressed in the main proposals on the table. A GI register could be costly and burdensome and special and differential treatment must be appropriately considered and fully addressed in any solution.

28. On the relationship between the TRIPS Agreement and CBD, which was a fundamental component of the development dimension, and had been discussed for years, it had not been included in the Special Session of the Council for TRIPS. In this regard, China reiterated that the issues of CBD was an integral part of the DDA Single Undertaking and must be fully discussed and resolved.

29. Speaking on behalf of the ASEAN Group, the representative of Singapore said that the group had been closely following the work of this Special Session given its importance and the implications of its outcome, especially on non-wine producing Members. In this regard, the group supported the voluntary elements of the joint proposal. From the group's view point the eventual multilateral system of notification and registration to facilitate the protection of GIs for wines and spirits should subscribe to the following principles: participation should be voluntary; it should preserve the existing balance between Members' rights and obligations; it should have no legal effects for Members who had decided not to participate in the system; it should not involve substantial costs, particularly for Members who had decided against participating in the system; it should respect the principle of territoriality on which intellectual property rights were premised; it should be consistent with TRIPS Article 1.1, which permitted Members to determine the most appropriate method of implementing TRIPS provisions within their own legal system and practice. Whatever system the Special Session eventually would agree to, it should not prejudice the interests of non-wine producing Members. The group was seeking a system that was simple, straightforward and efficient. More importantly, the system should maintain the principle that protection of GIs would be granted in accordance with the domestic law of each WTO Member, consistent with the existing obligations under the TRIPS Agreement. In other words, it should not pre-empt decisions made regarding the protection of GIs at the national level.

30. Short of seeing the Chairman's ideas of a report in written form, the ASEAN Group shared the reservation expressed by previous delegations on the Chairman's intention to reflect the EC's new thinking in that report. She noted that the EC had only introduced their new ideas once and had not formally submitted them. Finally, since the DG's last report to the TNC on the work in the TRIPS Special Session, little had changed. Divergences on the proposals on the table still remained. Therefore, in the Group's view, a factual report that would set out the differing positions in a general manner would suffice for the Chairman's report to the TNC. It would also support recommendations to have further consultations on this issue.

31. The representative of El Salvador recalled that her country had co-sponsored the joint proposal to promote a multilateral system which must not involve any increase or curtailment of the rights and obligations that already existed for WTO Members under the TRIPS Agreement. Her delegation said that, in conformity with the mandate of Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Declaration, the Special Session should start the negotiations. She further highlighted the objectives and advantages of the joint proposal for developing country Members. Its

objective was to facilitate the protection of GIs for wines and spirits. Voluntary participation guaranteed that the system suggested would produce effects for Members participating in this system whilst preserving the existing balance between the rights and obligations of Members and without imposing administrative burdens on those Members who had decided to participate in this system. As to legal effects, this register would produce effects on participating Members with the advantage that they would not have to modify the substantive rights and obligations currently contained in the TRIPS Agreement. Regarding the registration aspect, the system provided for in the joint proposal would offer a new tool to registration offices so that Members could fulfil their obligations under the TRIPS Agreement. As had often been explained, the system would offer information to national offices when they took administrative decisions. In conformity with TRIPS Articles 1.1, 22 to 24, such decisions would continue to be taken at the national level without affecting the rights hitherto acquired by individuals or Members, or the right to take any action in conformity with the national legislation, and they would have a stronger legal underpinning. Finally, she said that, as participation would be voluntary, the system under the joint proposal would therefore meet the need for providing for S&D measures for developing country and least developed country Members.

32. The representative of Honduras expressed support for the Chairman's intention to draw up a factual report on the state of play of these negotiations. Her delegation considered that document TN/IP/W/12/Add.1 and Corr.1, which contained a compilation of the three proposals on the table and the different points of view expressed by the delegates, as well as the discussions which had taken place since the compilation would be a good basis for the Chairman's report. With regard to the issue of participation, her delegation said that the mandate established in Article 23.4 of the TRIPS Agreement was clear enough. Firstly, it defined what was sought with these negotiations, that is, to facilitate the protection of GIs for wines and spirits. Secondly, it also explicitly referred to "Members participating in the system", which implied the possibility for Members not to participate in the system. In the light of the above, her delegation was of the view that participation in the system of notification and registration must be voluntary. It also lent support to the comments made by the delegation of Chinese Taipei.

33. The representative of Hong Kong, China reiterated that her delegation had a strong systematic interest in fulfilling the negotiating mandate under Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Ministerial Declaration for the establishment of a multilateral system of notification and registration of GIs in order to facilitate the protection of GIs for wines and spirits. Hong Kong, China therefore presented a proposal in April 2003 providing a middle ground with a view to facilitating the negotiations and meeting the mandate. Under the Hong Kong, China proposal contained in document TN/IP/W/8, Members were free to participate and notify GIs for wines and spirits protected in their territories. The obligation to give effect to a registration under the system would only be binding upon those Members choosing to participate in the system. The multilateral system under Hong, China's proposal, which was consistent with the mandate, was a voluntary system with no legal effects in non-participating Members. The legal effects or consequences of a registration, would in a way be more limited than the ones in the EC's proposal, but be more extensive than the ones in the joint proposal. She further said that, notwithstanding the Chairman's efforts, Members were still having diverging views on the interpretation of the mandate, and the negotiations on the establishment of the GI register for wines and spirits were stalled for some time. As highlighted by the Chairman, two key issues, namely participation and legal effects/consequences, were yet to be resolved. Certainly more work had to be done before the negotiations could be concluded.

34. Hong Kong, China supported the Chairman's preparation of the factual report as proposed and outlined.

35. The representative of Jordan said his delegation was looking forward to a positive result on setting rules for a multilateral registration of GIs for wines and spirits as long as it would take the

following main elements into consideration: participation should be voluntary without any legal effect; it should be the least costly and burdensome; it would not go beyond the mandate and; would preserve the existing balance.

36. As for the horizontal process, his delegation agreed with those delegations who had indicated that the Chairman's report should be factual. It also supported most of the elements mentioned by the Chairman in his introductory remarks.

37. The representative of Japan agreed to a factual report, i.e., a report accurately reflecting the discussions. The narrative form would be appropriate. Actually narrative reports on the TRIPS Special Sessions had already been made, such as those in documents TN/IP/14 and TN/IP/17. Japan could therefore go along with the same approach, which was accepted by other Members.

38. As regards the register, he said that further technical discussions were necessary. As a general comment, he recalled that the Special Session's mandate was to establish a multilateral system for notification and registration of GIs for wines and spirits in order to facilitate the protection of such GIs. In that regard, the joint proposal would be less burdensome, simpler, more flexible, and more Member-friendly. Such a system could facilitate the protection of GIs for wines and spirits and be acceptable to more Members.

39. The representative of New Zealand said that his country understood the importance of having results on GIs in the wider context of the round. As was pointed out by some delegations, the Special Session's mandate for a register to facilitate protection of GIs for wines and spirits in participating Members had been set out for quite some time. He agreed with the EC's statement that the time for fulfilment of this mandate was currently as part of the Single Undertaking, and said that New Zealand would also want these negotiations to come to a close. However, his delegation had heard previously and again at this meeting, a demand for decisions in the upcoming horizontal process that were not directed at a fulfilment, but at an amendment of the mandate. Seeking an amendment of the mandate at this late stage in the negotiations was not, in his delegation's view, a path to closure. New Zealand remained committed to a result regarding GIs, and would continue to seek a result consistent with the mandate, i.e., a register facilitating protection of GIS for wines and spirits in participating Members. There was only one proposal on the table that his country had co-sponsored and that met the mandate, namely the joint proposal.

40. While expressing readiness to address the technical questions raised in recent informal meetings, he said that such technical questions could not be resolved in the horizontal process, but only in the TRIPS Special Session's meetings.

41. The representative of Turkey said that what had to be fixed was the unfair treatment in the TRIPS Agreement of a whole set of GIs other than those for wines and spirits. For Turkey, extending the protection to all products would restore the balance under the Agreement. This was the starting point and an important principle because many developing countries did not have wines and spirits, but other valuable GI products, in many instances non-agricultural ones. The GI universe was not limited to wines and spirits only. Unless there was a protection of GIs for all products in the TRIPS Agreement, the owners of such GIs would not be able to reap the fruits of their investment in their IP rights due to the low level protection of GIs in the TRIPS Agreement. It should be kept in mind that in many of the cases related to the developing countries, all this was about small businesses, which were extremely vulnerable to unfair competition from the usurpation of their GIs by other parties. This was the major problem to be fixed.

42. With regard to the registration and notification system, Turkey supported the establishment of such a system. The system, if established, would change the territorial principle currently applicable and would create an international registration which was needed. It was clear from Article 23.4 of the

TRIPS Agreement that the protection requirement under that Article could be ensured only by attaching legal consequences to the registration. With regard to participation, Turkey believed that the participation should be binding upon all WTO Members, with some flexible provisions for LDCs and maybe for developing countries too.

43. As for the report, she said that, since there was no agreement on the whole, Turkey could not support the view that the joint proposal could be the basis for future discussions. Furthermore, the report should clearly state the facts regarding the discussions in the Special Session and contain some guidance from a higher level.

44. The representative of Guatemala, recalling that his country had co-sponsored the joint proposal, highlighted certain points. First of all, there was no dispute that the mandate in Article 23.4 of the TRIPS Agreement provided for the establishment of a multilateral system for notification and registration of geographical indications for wines and spirits. However, there remained major differences, particularly with regard to the legal effects of registration and to participation. Currently, there were three proposals on the table, each reflecting different views. The joint proposal and the proposal of the European Communities had been regarded as extreme positions while the Hong Kong, China proposal had been perceived as a compromise between the first two. This was a mischaracterization of the situation. Article 23.4 clearly provided for the facilitation of the protection of GIs; it did not contain any provision providing for an increase of the level of protection. The mandate also clearly referred to those Members participating in the system, which meant that the system was not intended for the whole WTO Membership. The mandate was limited to wines and spirits. All these elements were precisely the basis of the joint proposal. Guatemala considered that the joint proposal already met the mandate set in Article 23.4, that it should be the starting point for the discussions, and that this was the only way to move forward.

45. With regard to the process of the Doha Round, like previous delegations, Guatemala was of the view that this was not ripe for discussion in the horizontal process.

46. The representative of Korea said that his country could go along with the Chairman's idea of making a factual report on the GI multilateral registration issue, and welcome the indication that the report would be without prejudice to Members' positions and to the outcome of the negotiations. It was Korea's understanding that the report would be submitted to the TNC, not to the horizontal process meetings, be it at senior official level or at ministerial level. Given the wide gaps among the proposals on the table, it was Korea's view that discussions on GIs would only complicate the horizontal process and, eventually, delay the whole negotiating process. It would constructively engage in the future negotiations on the establishment of the GI multilateral system which was simple, not too burdensome and acceptable to a wider Membership.

47. The representative of Switzerland said that this meeting would shed more clarity, particularly with regard to further negotiations at the horizontal process level in view of the upcoming ministerial meeting at a crucial time of the Doha Round where delegations were beginning to see linkages and trade-offs between the various areas of negotiations. She underscored the crucial importance that Switzerland attached to tangible results on GIs, particularly on the extension of the protection of Article 23 of TRIPS to GIs for all products as part of the outcome for the Doha negotiations; this involved decisions to be taken on the register, which was one of the integral elements. For Switzerland, this was a clear trade-off for concessions that it was being asked to make in the agricultural sector to give to Swiss products and GI quality products with high added value, be it in the agricultural, handicrafts or industrial sectors, access to niche markets where there could be efficient protection of their identification signs so that they could make the most out of the reputation that they had created and avoid usurpation of that reputation. Given the detailed discussions that had taken place for many years on GIs, her delegation restated the imperative need to include in the horizontal modalities process the issues of extension and register for the group to make progress and

reach an outcome. Time was pressing for the GI issues – register and extension - and the TRIPS/CBD issue to make real progress for an overall result in the Doha round. If not, Members would simply be going round in circles in the negotiations. All the issues were intimately linked together as several delegations had said, particularly in previous consultations.

48. Modalities for the register should contain two elements. First, participation should be extended to all Members of the WTO to achieve a real "multilateral" register as mandated under Article 23.4 of the TRIPS agreement. Second, they should address legal effects. In this regard, the creation of a rebuttable presumption regarding certain elements, e.g., the GI definition or genericness would be the best way to achieve results. The principle of territoriality should be fully respected by allowing that decisions be taken at national level.

49. She underscored the importance of the report for her delegation and the new life it would add to these negotiations as indicated by the EC. To preserve parallelism with other negotiations, it was equally important that the report be more than a simple factual report. It would be extremely useful for Ministers to be able to take stock of negotiations.

50. She further asked the Chairman to include oral proposals made at the Special Session meetings which, in her delegation's view, went some way to meeting the concerns she had mentioned.

51. The representative of Mexico said that her delegation shared the views expressed by other delegations that the report should be factual and reflect the discussions. Mexico supported a proposal which did comply with the mandate contained in Article 23.4 of the TRIPS Agreement, namely to facilitate the protection of GIs and not increase it. The only proposal that did fulfil this mandate was the joint proposal, co-sponsored by Mexico. In the light of this, her delegation was convinced that it was not necessary to ask Ministers to repeat the mandate contained in the TRIPS Agreement.

52. The representative of Argentina expressed her delegation's support for the joint proposal, which it had co-sponsored. The proposal did comply with the mandate contained in Article 23.4 of the TRIPS Agreement, and with paragraph 18 of the Doha Declaration. It had won great support from Members. It proposed the establishment of a multilateral system of notification and registration of GIs for wines and spirits which would facilitate the protection of GIs of wines and sprits and would therefore preserve the territoriality principle of intellectual property rights for GIs. Participation in the system would be strictly voluntary as spelt out in Article 23.4 of the TRIPS Agreement.

53. Her delegation considered that, if the EC insisted on having a substantive decision on the register, there would not be an agreement on modalities. As regards the Chairman's factual report, her delegation considered that the report, as he had indicated, must be factual and must set out the status of the work of the negotiations relating to the register and contain as an annex the proposals submitted by the different Members. As the report was not a negotiating text, it must not contain any brackets.

54. The representative of Ecuador agreed with the Chairman's indication that the report must be factual and reflect the status of the negotiations at this stage on the basis of the mandate set out in Article 23.4 of the TRIPS Agreement, in paragraph 18 of the Doha Declaration, and in paragraph 29 of the Hong Kong Declaration. He understood that the Chairman would reflect the three existing proposals and the fact that it had received support from a large number of Members, including Ecuador. Her country supported the comments made by the representative of Chile, namely: that the scope must be limited to wines and spirits; that participation must be voluntary; that, as spelt out in Article 23.4, it should facilitate and not increase the protection of GIs; and that there must be a multilateral discussion to define all these aspects. On the Chairman's intention to reflect the proposals, he said that the EC's new thinking, which might be more flexible, should be first presented as some delegations might not be aware of such new thinking.

55. On the issue of linkages between TRIPS issues, his delegation was of the view that if there were any results reached in GIs, register and extension, there should also be a result for the issue of TRIPS/CBD.

56. The representative of India said that, while India supported the idea of having a factual report, indicating Members' positions, convergences and divergences, it had reservations about adding texts with options and square brackets. On the GI register, India recognized that there were three proposals currently on the table. It was still studying the legal effects proposed, including the rebuttable presumption contained in the EC proposal. The implications of the proposal were still not clear to India. It was also assessing the administrative burden the register would impose on its IP authorities, and the benefits for India, which had minimal interests in wines and spirits. On the issue of coverage, it was aware that discussions were taking place with DDG Yerxa's consultations on GI extension. Therefore discussions in this Special Session should be without prejudice to the ultimate outcome and scope. The issue of scope should therefore be taken up for ministerial guidance along with other TRIPS elements, namely GI extension and TRIPS/CBD.

57. On linkages with other IP issues, India reiterated the need for parallelism in terms of process between GIs and TRIPS/CBD that it had demanded over the last year. All IP issues should be considered together for ministerial guidance. For India, the linkages were well established and the linkage made with an outcome on TRIPS/CBD had been presented by several Members in the last green room meetings as an essential element of the Single Undertaking.

58. The representative of the United States said that his delegation fully appreciated that the establishment of a registration system was part of the Single Undertaking and was fully committed to fulfilling the mandate. The mandate was very clear and needed no further modification. It was clear that there were significant gaps on important aspects of the registration system, but there were detailed text-based proposals on the table for consideration, which put this negotiating group in a good position to continue working towards a resolution of the differences between this meeting and the conclusion of the DDA.

59. With respect to the Chairman's report, his delegation appreciated and understood the value of a report from the Chairman to the TNC on the status of the negotiations. A factual report from the Chairman describing the key dynamics in the negotiations and highlighting in narrative form the key points of convergence and divergence would be useful and appropriate. His delegation thought it could be useful to set out excerpts of proposals tabled by Members in order to help illustrate the points of divergence and convergence on specific topics such as the legal consequences of the system and the question of whether participation would be voluntary or all WTO Members would be required to participate in the system. His delegation believed that it would not be appropriate or useful for the Chairman to present reformulated, bracketed or new texts at this stage. In that regard he said that no support had been expressed for such a possibility. Members seemed to recognize that additional work of the negotiators was needed before this could be considered further.

60. With respect to the horizontal modalities exercise, it was his delegation's firm view that it should focus on Agriculture, NAMA, and Services. While it understood the temptation to add other issues to the scope of what had to be worked out through the horizontal process, it feared that doing so would seriously undercut the Round's chances of success. The registration system and the issue of GIs more generally should not be a point for negotiation in the development of a horizontal modalities package for the DDA. Nevertheless, his delegation was fully prepared to continue to engage energetically in additional work of the Special Session during the remainder of the DDA negotiations in order to achieve the objective of the mandate. As one of the numerous sponsors of the joint proposal, his delegation continued to support that proposal as the optimal means for fulfilling the mandate for this negotiation. It considered that the joint proposal represented the appropriate basis for continued work of the Special Session, and the best prospects for a rapid conclusion of the work.

While his delegation appreciated the recent efforts by the EC to informally present some new ideas to a group of Members, it considered that these new ideas still went beyond the mandate to facilitate protection and still conceived of a mandatory system instead of a voluntary system envisaged in Article 23.4 of the TRIPS Agreement. The Special Session would clearly have much work to do in the negotiations. He said that the United States was committed to working hard and constructively with the Chairman and with the other Members to achieve this negotiating group's mandate. It was vital that the group keep the focus on its mandate and avoid any attempts to expand or reinterpret this mandate. In that regard, it would be wholly inappropriate to see the mandate "to facilitate protection" be somehow reinterpreted as a mandate to expand Members' rights and obligations. Moreover, this was not a mandate to achieve or try to implement mutual recognition in the field of intellectual property rights among all the WTO Members, which his delegation feared as being what the EC proposal was seeking to accomplish through the registration system. Unless his delegation could be persuaded that this was not the case, it would continue to have great difficulty in achieving the negotiating group's objective.

61. The representative of Brazil reiterated his delegation's position with respect to the substantive aspects of the register, namely that it should be voluntary, produce no legal effects, avoid undue burden and cost, especially to developing countries, be limited to wines and spirits only, and fully preserve the exceptions under Article 24 of the TRIPS Agreement. With respect to the joint proposal, some elements still needed further clarification as the proposal did not provide any certainty regarding the legal effects, in different national jurisdictions or in the WTO dispute settlement system, of the obligation to consult the register. In view of this, Brazil did not share the view that the joint proposal was a minimum common denominator and it should therefore not be indicated as such in the Chairman's report. Although Brazil had not put forward a written submission on this matter it had expressed its position orally on many occasions.

62. As some elements of the proposals on the GI register went beyond the mandate, they could only be appropriately considered in the broader context of discussions on GI extension and TRIPS/CBD. Brazil would therefore support a reference in the Chairman's report to the relationship that existed in the Doha Development Round between: (i) the elements of the register that went beyond the mandate of the TRIPS Special Session; (ii) GI extension; and (iii) TRIPS/CBD. Like other Members, Brazil believed that consideration of these three issues in a broader context could overcome a deadlock which, if left unresolved, could become an obstacle to progress in the horizontal modalities for the core negotiations of the Round.

63. The representative of Colombia said that, in order to achieve a successful outcome, Members' positions on the different proposals would have to move towards each other more than before. While her delegation believed that such convergence was still possible, it was clear that the negotiations had to take place according to the mandate, i.e., to negotiate the establishment of a multilateral system on notification and registration of GIs for wines and spirits so as to facilitate their protection.

64. With regard to technical issues, the system to be adopted would have to be simple and voluntary in nature, and should facilitate the protection of GIs for wines and spirits. It should not impose obligations or any administrative or tax burdens on the industrial property authorities of Members. While she welcomed the EU's flexibilities regarding its proposal, her delegation did not yet have sufficient knowledge of these flexibilities that would allow her to see whether these eliminated the costs and burdens for developing countries. In any case, it was necessary to envisage situations where Members could lodge reservations or oppositions.

65. Regarding the Chairman's report, she said that the time was not ripe to have anything more than a factual report. With respect to links to other areas under discussion in the WTO, her delegation considered that the issue of TRIPS/CBD was part and parcel of the Single Undertaking.

66. The representative of Costa Rica said that the Chairman's report should be a factual portrayal of the discussions in this negotiating group. Contrary to certain other delegations, his delegation did not believe that it was necessary to request guidance from the Ministers on this issue, as the existing mandate was already clear. Costa Rica, like other countries that were neither producers nor exporters of wines and spirits, had no economic interest in this issue, but a systemic interest in complying with the mandate contained in Article 23.4 of the TRIPS Agreement and in paragraph 18 of the Doha Declaration. Therefore, to fulfil this mandate the protection of Article 23 should be facilitated and not increased, participation in the registration system had to be voluntary and it should not have legal effects on Members who had decided not to participate in that system. It should not entail heavy costs for Members participating in the system, nor for the body administering the system. The system should respect the principle of territoriality, which was a fundamental element of the TRIPS Agreement, and had to be exclusively limited to GIs for wines and spirits. Costa Rica continued to support the joint proposal, which was the only proposal complying with the mandate.

67. The representative of Venezuela said that, while his delegation had not sponsored any of the proposals on the table, it supported the approach of a voluntary system of registration and notification for GIs for wines and spirits without legal effects. It should take into account the asymmetry between developed and developing countries and should be clear with respect to its economic impact and its legal consequences. He said that in taking into account these considerations the Chairman's report should be balanced and remain strictly factual.

68. The representative of Kuwait said that his delegation would like to put on the record that, as Kuwait did not import or export alcohol for religious reasons, it was of the view that participation in the registration system for GIs should be voluntary and without any legal effect.

69. The representative of the European Communities, in responding to the points raised, said that he spoke on behalf of 27 Members who did not want to change the way they did business. Canada's claim that the joint proposal had stronger support than the EC proposal was incorrect if one counted the EC's 27 Members together with the other Members that had spoken in favour of a meaningful GI register. In case the Chairman was intending to indicate the number of Members supporting each proposal, his delegation would prefer that the EC proposal be referred to as "the EC and its 27 member States" or some similar language.

70. Furthermore, his delegation rejected Canada's claim that the joint proposal met the mandate, as it did not facilitate the protection of GIs, but only created the illusion of such facilitation. He also rejected the claim that the EC proposal had extraterritorial effects, unless it was believed that all WTO agreements had extraterritorial effects. While any international agreement by definition impacted on the legal regime of its signatories, this was not a contradiction to the principle of territoriality. Likewise, the EC proposal did not affect this principle. National jurisdictions were not affected by the EC proposal as national courts or administrative bodies would continue to take decisions on the protection of GIs under domestic legislation.

71. In response to the criticism concerning costs and burdens of a GI register by Canada and Chile, he said that the register would follow the normal procedure of notifications in the WTO. The WTO Secretariat would just have to compile the legal acts creating GIs and put them on a website in an organized manner. National authorities would consult the register, which would facilitate their work, and they would not need to deal with the issue of GI definitions unless a party claimed it before them. He also rejected the criticism that the EC had not submitted its formal proposal in a revised paper. His delegation had undertaken all efforts to explain its proposal at length in different settings and had submitted a non-paper to this end. He regretted that other Members had not engaged in meaningful negotiations on this proposal.

72. Finally, he reiterated his delegation's wish that the Chairman's report be a fully fledged report with legal texts and bracketed options to make clear the state of play on this important subject at the time of modalities.

D. DISCUSSION OF THE ELEMENTS ENVISAGED IN THE CHAIRMAN'S REPORT

1. Participation

73. The Chairman said that he would now invite comments on the specific elements envisaged for his report, the first of which was participation. Under this element, it was his plan to set out, in narrative form, the three proposals that had been made on this point.

74. The representative of Australia requested a clarification regarding the three proposals. With respect to the non-paper mentioned by the EC delegation he was not aware of any Job document, or any other document with a number or a reference and would therefore like more clarity with respect to which three proposals were being referred to.

75. The Chairman said that he would take account of the EC's new thinking as it had been mentioned by the EC's delegation at this meeting. The EC had proposed that there be a register with participating and non-participating Members, and that participating Members should be those Members above a certain share in world trade.

76. The representative of the European Communities said that, with respect to the specific element on participation, his delegation would like to clarify that its views would be best reflected by language as follows: "In accordance with paragraph 4 of Article 23 of the TRIPS Agreement, the system is multilateral, that is, applicable to all WTO Members. Participating Members are Members above a certain share in world trade."

77. Furthermore, his delegation would prefer that the language should reflect that there was common ground that any WTO Member would be entitled to submit notifications, and then clarify that it was on the legal effects or consequences of such notifications in WTO Members' that differences still existed.

78. The Chairman said that, as he had set out in his introductory comments, he did not intend to have options in his report, but rather would reflect Members' positions in a narrative form.

79. The representative of the European Communities said that, while his delegation regretted this change of approach because it thought that legal language would provide more clarity, it would of course defer to the Chairman's decision on the format of his report.

80. The representative of Australia said that, in order to avoid confusion arising from references to a paper that not all delegations had seen, she would like to set out the Members' three positions on participation which were straightforward and easy to characterize. On the one hand, the joint proposal was voluntary, which her delegation continued to consider as a requirement of the mandate in Article 23.4 of TRIPS. This position was not only supported by the 17 co-sponsors of the joint proposal, but also by many other delegations. On the other hand, the EC proposal, in both its original version of 2005, which was available as a written document (TN/IP/W/11), and in its new thinking that had been outlined in general terms at this meeting, provided for a system in which participation for the vast majority of Members was not voluntary but mandatory. Finally, the Hong Kong, China proposal was a hybrid in which participation was initially voluntary, consistent with the mandate, but with a clause envisaging review after a period of time.

81. The representative of Switzerland requested a clarification with respect to Members' positions that had only been mentioned orally. She asked whether the report would take into account what had been said at formal meetings of the TRIPS Council in the past and what was being said at this meeting.

82. The representative of Turkey said that, as the Chairman's report would be factual, it would only be logical to include the EC's new approach as any other papers or points made.

83. The Chairman said that he would take into account both what had been said at past meetings as well as what was said in this meeting.

84. The representative of New Zealand said that his delegation would have difficulties with the Chairman's characterization of the EC proposal as a register with participating and non-participating Members, as the EC proposal, even under its new ideas, required all Members to participate in the system by consulting the register when making decisions on GIs. As the vast majority of Members would also have to take action to implement the legal presumptions of the EC proposal, his delegation did not accept that a distinction was made between participating and non-participating Members in that proposal. It was difficult for the Chairman to be forced into a position of having to paraphrase the EC proposal for them. Therefore, as the EC itself was in the best position to characterize its proposal accurately, his delegation would suggest that the EC submit it in writing.

85. The representative of Chile said that only three formal proposals were on the table, namely the Hong Kong, China proposal (TN/IP/W/8), the joint proposal (TN/IP/W/10) and the EC proposal (TN/IP/W/11). In addition, there were three other informal proposals: one by the EC, one from Brazil and another one from Switzerland. The Brazilian one had been made orally, and the most recent one from the EU had been orally changed at this meeting. His delegation would like to know how the Chairman's report intended to incorporate this mixture of proposals that had been mentioned.

86. The representative of Switzerland said that her delegation would like to remind Members of its position regarding participation so that it could be clearly reflected in the Chairman's report. As Switzerland's approach to participation and legal effects was related to its request relating to GI extension, it did not want to develop a registration system that was overly specific to wines and spirits, but rather a flexible system that would be extended to all products in the long term.

87. In order to go beyond what existed in WIPO and the Lisbon system on participation, it was absolutely vital for her delegation that meaning be given to the term "multilateral" in Article 23.4 of the TRIPS Agreement. It was a logical consequence of that mandate that all Members would have to take into account registrations in the multilateral register whereas they would be free whether or not to notify their national geographical indications. In this context, her delegation did not believe that the EC's use of a percentage of world trade as a criterion for participation was appropriate in the context of intellectual property, particularly as it would not allow Members to fulfil the mandate of establishing a "multilateral" system. In that respect, her delegation was reassured by the clarifications at this meeting that all Members would be participating.

88. It should not be forgotten that the mandate was to facilitate, without increasing, the protection of GIs that all Members were already obliged to make available nationally under Articles 22 to 24 of the TRIPS Agreement. Such protection was, of course, subject to any applicable transitional periods which would continue to be applicable in the case of the register. Her delegation remained open to discuss the incorporation of further measures relating to special and differential treatment if necessary.

2. Consequences/legal effects of registrations

89. The representative of the European Communities said that his delegation would appreciate if it were made clear in the Chairman's report that the joint proposal envisaged a database which

included the obligation to consult, and not just the provision to consult, as had been indicated in some meetings.

90. The representative of New Zealand said that, regarding the consequences of registrations, there was a wide range of views among Members ranging from, at one end of the spectrum, the view that the register should have no legal effects to, at the other end of the spectrum, a proposal which would have draconian legal effects that would not facilitate but substantially increase protection. Such legal effects were draconian because they would reverse a fundamental principle of New Zealand law, namely the burden of proof, and would give legal status to an IPR from any Member that registered a GI on such a register, which was clearly inconsistent with the principle of territoriality. Such a register would be unprecedented as it went further than the Madrid Protocol in relation to trademarks or the Patent Cooperation Treaty. Both treaties reduced the costs of seeking protection in all countries, but the examination process was still undertaken in each country under its domestic law.

91. Turning to the joint proposal, he rejected the EC's description of it as an illusion of facilitation. The joint proposal fell between the two positions on the spectrum in that it provided for consequences of registration that facilitated protection in accordance with the mandate. If adopted, it would provide real and substantive benefits to GI right holders. In New Zealand, for instance, wines and spirits GIs were protected principally by the common law tort of "passing off", and legislative requirements in the Trade Marks Act and Fair Trading Act. According to expert advice received by his delegation, if the joint proposal were to be implemented in New Zealand, GI rights holders could use a registration under a joint proposal-type register to establish their case in a court action, as it would help right holders to show that it had a reputation in the particular name.

92. In relation to trademarks, under the New Zealand Trade Marks Act an examiner had to satisfy himself that there were no grounds preventing the registration of the trademark, e.g., if the trademarks were non-distinctive. Implementation of the joint proposal in New Zealand would involve including in the trademark examination process a requirement for the examiner to consult the register, to assess whether the trademark application contained a registered GI, and then to consider its eligibility for trademark registration with that information in mind. If the trademark did consist of or contain a wine or spirit GI appearing on the international register, that would be highly relevant in assessing whether it was non-distinctive and therefore not registrable. Furthermore, the examination record obtainable under New Zealand's legislation on access to official information would show if the requirement to consult the register had not been complied with and this would constitute grounds for review of the decision to register the trademark. Contrary to the views that the joint proposal had no legal effect was an illusion or would make no difference, the joint proposal would therefore clearly facilitate the protection of GIs in New Zealand by making consolidated information on geographical terms available to examiners. It would have a real effect in New Zealand as it would help prevent geographical indications from being inappropriately registered as trademarks by specifically requiring consultation of the database in the examination process. A joint proposal-style register could also avoid the need for GI right holders to spend time and money lodging an opposition to an accepted application on the basis of non-distinctiveness. Therefore, it would also be of real benefit to GI right holders.

93. The representative of Australia said that the issue of legal effects or consequences of registration was obviously a fundamental area of disagreement in these negotiations and merited spending some time on it. She believed that the reasons why this area had been so difficult for Members was that, unlike in some other negotiations in the WTO, this issue was not dealing with numbers on which one could split the difference, but rather with legal systems on which this difference-splitting would not be possible.

94. In her view, Members had basically two approaches to choose. On the one hand, there was the simple information-based joint proposal, where terms on the register would be considered by national authorities and form part of the body of information taken into account under national law when making decisions about the protection of GIs and trademarks. This would add value to the current system and facilitate the protection of GIs for wines and spirits irrespective of how participating Members protected GIs, whether through trademark systems, sui generis systems, or consumer protection legislation.

95. On the other hand, there were the EC and Hong Kong, China proposals, whose legal effects were based on legal presumptions whereby the multilateral registration of a term by one Member would have legal implications for its eligibility for protection in another Member. She emphasized that there were actually two approaches, not three, as the Hong Kong, China and EC proposals were both based on legal presumptions, which her delegation found difficult for various reasons that she would set out later.

96. Commenting on the EC's request to the Chairman that the joint proposal be paraphrased as including an obligation to consult, she agreed with previous speakers that had pointed out the Chairman's difficulty in paraphrasing what were quite contentious and controversial issues in different proposals. For this reason, her delegation believed that the best approach would be to maintain the language used by delegations who had made the proposals. Having said this, she did want to share Australia's understanding of the joint proposal that its legal effect would be to place on authorities an obligation to consult the database of GIs when making decisions about the protection of GIs and trademarks under national laws. Implementation of the joint proposal in Australia would include writing into the rules of its authorities the requirement to consult the terms on the register and take them into account where relevant under national law.

97. Her delegation considered that the joint proposal did add value to the status quo and facilitate the protection of wines and spirits GIs consistent with the mandate in two important ways. Firstly, it could prevent the improper registration of trademarks that contain foreign GIs by alerting trademark examiners to the existence of the foreign GI, thereby facilitating compliance with Article 23.2 of TRIPS. This was an issue of real importance to advocates of increased protection for GIs, particularly EC member States who had raised serious concerns in the past about trademarks being granted over terms that contained European geographical indications. According to these delegations, one of the problems had been that these terms had not been well known to the trademark officers of countries like Australia. It was for this reason that the database proposed in the joint proposal would provide all of this information in one place at a click. This database had been referred to as a mere database or as the "Google" proposal in certain consultations, but Members needed to recognize that it was precisely this kind of information that trademark examiners had recourse to in examining applications for trademarks or certification marks in various systems. Currently trademark examiners were using dictionaries or atlases to determine whether a term used in or as a trademark was actually a geographical name. Thus, having in one place the GIs claimed by all WTO Members who chose to participate in the system would be a significant improvement of the status quo.

98. Secondly, the joint proposal would facilitate the protection of GIs for wines and spirits in that it would provide useful information to the trademark examiner in considering whether or not to grant a certification mark to a GI, e.g., who owned the mark, who controlled the mark, what were the rules governing the use of the GI in its country of origin. This added value to the current system without overreaching legally or creating unreasonable burdens on governments and industry.

99. With respect to the legal presumptions contained in the EC proposal and their implications for the principle of territoriality, she said that to her delegation, the EC's new thinking did not seem to be very different from their 2005 proposal. For the benefit of those Members who had not participated in the informal consultations, she said that the main difference between the EC's 2005 proposal and the

proposal elaborated at this meeting was the removal of the cumbersome state-to-state multilateral reservations and negotiations mechanism. While her delegation welcomed this reduction of excessive and inappropriate government involvement in asserting and defending GI rights under the register by no longer subjecting determinations of a GI status to political negotiations, she had also seen the reservation system as a function of the legal presumptions: one could not be removed without the other, or the system would in fact get worse. Whereas previously a Member could object to a notification and consequently did not have to provide the legal presumption in its law, now all participating Members, which she understood to mean the vast majority of Members, would be required to implement the presumption that a foreign GI was a GI in their respective markets. While it might be possible to rebut this presumption somewhere and somehow, this remained to be elaborated.

100. There were a number of problems with this approach. Firstly, her delegation believed that the Hong Kong, China and EC proposals were inconsistent with the important principle of territoriality, and the EC's claim that from this point of view all WTO Agreements would have to be deemed extra-territorial was incorrect. Under the legal presumption envisaged by the EC's new thinking, all terms on the register would enter Australia with a presumption in their favour that they satisfied certain facts under Australian law, and that was extraterritorial. The fact that a GI in Europe was relevant to its status in Australia without Australia having being able to examine that term and verify its entitlement to protection under its law was extraterritorial. In the area of intellectual property no one was presumed to have this kind of monopoly, but had actually to seek one, and she saw no reason why GIs should be any different. Her delegation could not accept a system where the intellectual property status of a term in Europe had legal implications for its status in Australia, whether those implications were substantive and absolute, or procedural. For those familiar with the adversarial system of the common law it was clear that the question who bore the burden of proof was a significant one.

101. Finally, her delegation wanted to raise a second concern regarding the legal presumptions which was a policy concern of interest to the broader Membership. The presumption in the EC proposal was that all registered terms would be presumed not to be generic in all markets. This proposal limited the exception for generic terms in Article 24.6 of the TRIPS Agreement. A number of Members, and not just co-sponsors of the joint proposal, had stated that the register should not alter the balance of rights and obligations and should not affect the Article 24 exceptions, but the EC proposal did. Article 24.6 provided that Members did not have to protect terms that were customary in common usage in their markets. The EC proposal would constrain Members' implementation of this exception by dictating who, in a court of law, would have the burden of proving what. As a matter of public policy, it was questionable why the burden should be on users of generic terms, i.e., terms in the public domain, to justify their continued uses, rather than on the IP owner seeking the monopoly. Commercially, such a limitation on Article 24.6 posed particular risks in export markets. Although the EC had said in its general statements that its proposal was only forward-looking and not retrospective, this could not be ensured. The EC proposal would give GI right holders presumptive rights in all markets without giving other legitimate users any certainty that they would have an opportunity to rebut the presumption. Increasing the protection without increasing the exceptions upset the balance of rights and obligations in the TRIPS Agreement and was unnecessary to fulfil the mandate given to Members. Her delegation remained open to questions on the joint proposal and was prepared to discuss it in more detail.

102. The representative of the United States said that his delegation wanted to take the opportunity at this formal meeting to set out what the impact of the EC proposal would be on the US legal system, and how the joint proposal would be implemented in the United States. As had been pointed out previously, the reversal of the burden of proof envisaged by the EC proposal would be a fundamental change, not just in the protection of GIs in the US, but also in intellectual property protection more generally. The burden of proof in the US system was upon the person or entity that was seeking the intellectual property right. That person or entity had to affirmatively demonstrate that it deserved this

right whether it was a GI certification mark or a trademark. The EC proposal did quite the reverse. It presumed that, because this term was on a list in another country, the burden of proof was on everybody else to show that it should not be protected. This effect of reversing the burden of proof was not just incidental to the United States system, but concerned basically the system as it existed within TRIPS and for intellectual property protection more generally. For those who already had rights, this reversal put a burden on them to defend the rights they thought they already had, e.g., a trademark holder would have to defend his trademark against the presumption that a GI in Europe, or some other country, that was on the register should enjoy protection in the US. The EC claim that the exceptions spelt out in Article 24 would apply did not change the fundamental fact of who had to prove what under the EC proposal.

103. Regarding the joint proposal, the US would operate in very much the same way as Australia had just set out: it would be embedded in the procedures of the patent office that a trademark examiner had a responsibility to consult the register. If the trademark examiner had not done that properly, this would be a basis for a complaint and a challenge of the decision. Having that information on the register would allow the examiner to complete or verify certain information that had to be checked during the examining procedure. Examples for such information would be questions like: Was the term primarily geographic? Was it remote or obscure? Was there a goods-place association, such that the US consumers were likely to believe that the goods came from the place indicated as its origin? Did the applicant for this protection exert control in its home market? With regard to such questions that the examiner had to go through in order to make a determination, the register of the joint proposal would actually provide real value, certainly more value than a situation without such a register, and would therefore fully meet the mandate. He hoped that other Members would also recognize the value of the joint proposal.

104. The representative of Chinese Taipei said that, firstly, the fact that the EC had only mentioned their new ideas in consultations and had not shared them in writing presented a procedural problem, as Members who had not participated in the Chairman's small group consultations had not seen the proposal and could therefore not seek instructions from their capitals in that regard.

105. Secondly, although the EC's new ideas distinguished between "participating" and "non-participating" Members, non-participating Members were still obliged to consult the multilateral register. Therefore, the system envisaged under the EC's new ideas was still mandatory and not voluntary. It also agreed with Australia regarding the forward-looking effect of the proposal. Furthermore, his delegation believed that the legal effects of the EC and Hong Kong, China proposals undermined the principle of territoriality.

106. Thirdly, Chinese Taipei shared the belief of other Members that the joint proposal did facilitate the protection of GIs for wines and spirits. His delegation had also done some research as to how it would be implemented internally. Currently, as Chinese Taipei protected GIs as certification marks, when examining the applications for such marks examiners would consult a database that contained not only prior trademarks, but also terms that were not allowed to be registered as trademarks, such as WIPO notifications under Article 6^{ter} of the Paris Convention, names and logos of government authorities, and the names of agricultural products. Currently, examiners were not required to provide a written record of their use of this database in the examination of a trademark application.

107. If the joint proposal became a multilateral obligation, the internal examination guidelines would need to be amended to include the requirement for examiners to consult the WTO multilateral database when examining applications for certification marks for wines and spirits, and keep the records on file irrespective of the results. The implementation of such procedures could be ensured by a checklist. This showed that having a joint proposal style register did make a difference and did facilitate the protection of GIs for wines and spirits.

108. The representative of Canada agreed with Australia that, it would be wise to use the proposals' actual language in the report. Secondly, he agreed with others that the joint proposal had real effects for participating Members.

109. In view of its own direct experience with the EC in negotiating the bilateral wines and spirits agreement, his delegation had reasons to be concerned about the consequences of the fundamental legal changes envisaged by the EC proposal. In that proposal, the EC was asking Members to accept all GIs notified to the system as being valid GIs according to the definition in Article 22.1 of the TRIPS Agreement. However, in the negotiation of the bilateral agreement the EC had provided a list of approximately 10,000 names, supposedly wines and spirits GIs, and it had been difficult and time-consuming for Canada to analyse each of these names and determine whether they were eligible for protection. After analysis, only approximately 1,500 names had qualified for consideration for protection, the rest had failed because they had either not been for a wine or a spirit, they were not GIs, or they had not been protected in their own country. The EC was asking other Members to accept in good faith that anything notified to the system would constitute a wine and spirit GI unless proven otherwise, that any GI notified to the system could not be considered generic, unless it was proven to be generic in those other Members. This turned Article 24.6 of the TRIPS Agreement on its head and ignored the fundamental territorial aspect of this provision, which deferred to the perception of customary use of a term in the country where the GI was being used rather than where a product was being produced. For these reasons, his delegation believed that all Members should be concerned about the consequences of the EC proposal.

110. Finally, while the issue of costs and burdens might well be covered in a different part of the Chairman's report, he wanted to point out that the EC proposal envisaged costs not only for governments, IP users and IP offices, but also for people who never before would have thought of having to incur costs in the IP system, such as producers of generic goods. This was another consequence of the EC proposal that Members should be concerned about.

111. The representative of Hong Kong, China said that the legal effect of a registration was an important element of the register. While not wanting to repeat the details of her delegation's proposal on legal effects of registrations, she said that the operation of the rebuttable presumptions, which only affected the burden of proof on the three issues identified in the proposal, did not have an extraterritorial effect as the system did not deal with competing claims for GIs. Such claims, as well the applicability of the exceptions under Article 24 of the TRIPS Agreement, would continue to be dealt with under the national laws. Members interested in the differences between the Hong Kong, China and the EC proposal on legal effects could refer to paragraph 149 of the minutes in TN/IP/M/14 for her delegation's intervention on that point.

112. Finally, to clarify the legal effects on non-participating Members under the Hong Kong, China proposal, she said that the obligation to give legal effect to registrations under the system would only be binding on Members choosing to participate in the system. In other words, there would be no legal effects in the non-participating Members.

113. The representative of Argentina said that, in her view, the Chairman's report would not have to distinguish between participating and non-participating Members. Her delegation considered that the proposals must appear textually as they had been presented, and that the Chairman should not paraphrase the joint proposal. Finally, she said that the extraterritoriality of the legal presumptions in the EC proposal was not acceptable.

114. The representative of Chile said that the discussion seemed rather confusing. While all delegations had the formal EC proposal (TN/IP/W/11) only, the discussion seemed to relate rather to "new ideas" and amendments thereof. Both the EC formal proposal and the new ideas would have strong legal effects on all WTO Members. Both were problematic. First of all, because of what had

already been said relating to legal presumptions and also because this was related to participation. Although the EC had said that there would be two categories of Members, i.e., those participating in the system and those who decide not to participate in the system, it was still proposing that the legal effects would be applicable to all WTO Members, including those who had decided not to participate in the system. This was a flagrant contradiction. He further asked the EC to clarify what they meant by proposing that participating Members be those "above a certain share in world trade". It was important that the Special Session look at that in view of the horizontal process and how Ministers would appraise the EC approach. In comparison, the joint proposal had value for two main reasons. First of all, it had an intrinsic value. It would be a very reliable centralized database which would include GIs notified by WTO participating Members. The governments of many Members would certainly be assured that the GIs were recognized as such in their countries of origin. This was an important aspect to bear in mind, particularly for those countries who wanted to protect foreign GIs. This database proposed would be unprecedented: it would be a kind of single window accessible to all with a click. Secondly, the value of this database was that the WTO Members that wanted to take part in the system would be obliged to consult that database. Members would be obliged to consult the database when they take decisions relating to the protection of GIs and of trademarks for wines and spirits in conformity with their domestic legislation. It was equally important that for those Members who did not wish to take part in the system there would not be any legal consequences.

115. The representative of the European Communities said that his delegation did not want to disrupt the checks and balances between rights and obligations under the TRIPS Agreement, nor want retroactive effects. As a result of its proposal on legal effects, it did not want Members to give up the use of an existing name, the grandfathered use exception, the prior trademark use exception, or the genericness exception. It had not proposed that genericness claims be appreciated according to the country of origin instead of the country where protection was sought. He expressed surprise that other delegations kept commenting on what they only thought the EC wanted or that they did not know what the EC really wanted in spite of the fact that they had been present at the informal consultations held last November where his delegation had shared a non-paper on new ideas. In light of this, he reiterated what the EC was seeking. The registration or notification of a GI would entail a legal presumption. Would this mean that all Members would have to examine in detail whether or not the GI was or not a problem in their own territories? The answer was negative: challenges could be made at any time in the country where protection was sought after the notification had been made. In that regard there would not be any extraterritorial effect.

116. As regards the joint proposal, he had heard that the added value of the proposed database would be to allow for trademark examiners to have a place where they could see if there was a GI, if the name was actually a GI, and so on. He said that in an Internet era, where such information would already be available, there would not be any added value. He pointed out that the obligation to prohibit the registration of a trademark consisting of or containing a GI was currently part of TRIPS obligations. In that regard the joint proposal would not add any value. Under the EC proposal, when a GI had been notified to the register, it would be considered valid unless proven otherwise according to the legislation of the country where the challenge was being made. As an example, he said that the EC would accept that a notified GI could be generic in Australia but not in Canada. On the issue of the reversal of the burden of proof, he took the following example based on the EC experience in the WTO: if a WTO Member's GI legislation was not challenged or unsuccessfully challenged, it must be considered as valid. The same applied to GIs: unless proven otherwise at any time and according to the legislation of each of the WTO Members, a notified GI would be considered valid. A GI right owner would not have to prove that his GI was not generic, it would be the challenger of the GI which would have to prove that the GI was generic. The legal effect proposed under the joint proposal did not have any added value in an Internet world where anyone could consult any database to know whether there was an existing GI or not. In contrast, only the EC proposal fulfilled the mandate because it actually facilitated the protection of GIs. He could not see how the protection of a GI, which was a legal judgment, would be facilitated under the joint proposal.

117. The representative of Canada said the point he wanted to make about Canada's experience was that the EC and their member States had proposed a list of some 10,000 names, out of which many had been eliminated because they were not GIs, they were not for wines or spirits, not registered nor protected in their home country, and so on. The point of concern based on the Canadian experience was that the notification of so many GIs with the addition of a rebuttable presumption, i.e., a reversal of the burden of proof, would create a daunting situation for users and others dealing with the proposed system.

118. The representative of Japan said that after the explanations given by the EC he understood the need for further technical discussions. He asked whether the notified GI would be granted an automatic rebuttable presumption, in other words whether a Member would have to presume that a foreign GI would have some legal effect on its own territory and that that Member would have to bear the burden of the rebuttal of that presumption. This would be a significant legal effect which was difficult to be accepted by many Members. As mentioned by other co-sponsors, the joint proposal did not propose a database which would simply collect information but a system with legal consequences, which would add value.

119. The representative of New Zealand said that the point about the 10,000 GIs in the context of the bilateral agreement between Canada and the EC went to the heart of the concerns and issues discussed. As Canada had already clarified, it was a fact that the EC had sought protection for around about 10,000 terms and it would seem that in fact the work in thinning down that list was not done by the EC, but by the Canadians. To some extent, this was precisely the situation which raised concerns. This would involve outsourcing of work and responsibilities to others, which was a problem for his country. He was not sure whether or not the objective of this exercise was to come up with a system where all Members were required to go through 10,000 terms in each of their administrations and work down to some more appropriate list. On the issue of legal effects under the EC's new ideas and its assurances about the generic exception, he said that there was no list of generic terms in the EC and therefore asked how the EC could give assurances.

120. The representative of Australia referred to the statement by the EC that it was not seeking to change the checks and balances in the GI provisions in the TRIPS Agreement, that it was not seeking retroactive effects and that it was not seeking to undermine or change in any way the prior use or generic exceptions. While welcoming these clarifications, her delegation would be keen to see these reflected in writing in a proposal. These points were inconsistent with the EC proposals, both in their 2005 version and in their new thinking version.

121. Regarding the generic exception, the EC had said that it was not interested in changing the checks and balances. However, under its proposal it increased the protection of GIs because all terms entered on the multilateral register, entered all other Members' markets with the presumption that they met the definition of a GI under those other Members' laws. That would increase the protection of GIs without providing any certainty that in the export market context Australian producers would have the opportunity to rebut the presumption. So, in certain export markets it might be that the terms would be simply protected.

122. The other point that was raised regarded territoriality. The EC had indicated that their proposal would not require other Members to review all the terms. That was precisely the problem. Under the Madrid system (trademarks) in WIPO, which was consistent with the principle of territoriality, all trademarks were notified, sent to all trademark offices in the other Members, who would then have the opportunity to review them and reject them. She noted however that this feature of the Madrid system was not one which could be proposed in these negotiations because there was not yet enough harmonization of laws on GIs to enable that kind of system and because that would go well beyond the mandate.

123. In terms of added value, in reply to the comment made that a database as proposed by the joint proposal would not bring any added value, she said that this would be an unfair characterization. The argument was made that the database would not be anything more than the Internet. While the Internet could provide a whole range of different information, much of it would not be relevant to the task at hand. If Members had in one place a consolidated database of terms formally notified to the WTO by a government, how could it be argued to be the same as entering a GI into Google? This was simply not fair nor correct.

124. The point was also made that there would not be added value because the requirement not to allow trademarks to contain or consist of GIs was already in the TRIPS Agreement. In that regard, she said there was a mandate to facilitate the existing level of protection for GIs under TRIPS Article 23. So, the joint proposal did facilitate protection by facilitating the compliance with TRIPS Article 23.

125. Finally on the burden of proof, she asked for clarifications. Her understanding was rather than the IP owner having to seek and assert its own right and bear the burden of proving that its terms were distinctive or met the definition, that burden would be shifted to the others to defend their existing uses. She further added that discussions would be facilitated if there were a written text.

126. The representative of the European Communities said that if Canada had signed an agreement with the EC it must mean that it had seen some value in it and therefore whether the EC had more GIs and Canada had less GIs did not seem relevant. What was interesting was that the EC simply offered both systems, trademark and GI protection. Producers could use both or either one. In contrast some Members favoured one system only.

127. In reply to the concern expressed by Japan that GIs notified by a Member would be automatically protected in all other Members, he said that the EC did not want a one-stop-shop. If the EC notified the GI "Côte du Rhône" to the register, it would not automatically get protection everywhere. For example, a Côte du Rhône producer would still have to go to Ruratania's administration and register the GI as "Côte du Rhône". The only thing that the register brought the producer was that Ruratania's administration would have to consult the register and any third party in Ruratania could challenge the registered name on the ground that in Ruratania the term Côte du Rhône had become generic or there was a prior use or a prior trademark. What the challenger had to do would be to provide the evidence. What was important for the GI owner was that, contrary to the current situation in many countries, Ruratania's administration could not ask him to prove that the GI was not generic. Each Member would examine whether or not the GI was deemed protectable according to its national law, which had by definition to be compatible with the TRIPS Agreement. What the EC had put forward was that those claiming that an exception applied to them had to prove it. While the 2005 proposal suggested that GIs notified and not challenged on ground of genericness would not be challengeable any longer, the new EC thinking would not imply any additional work nor any need for changes in IP systems that were presently functioning well.

128. In response to the question by New Zealand regarding a list of generic names, he said that the fact that a name was generic or not generic in the EC had not, and should not have, any consequences in New Zealand. Otherwise the effect of notification would be extraterritorial, which would be totally unfair and against the EC approach. In that regard, the EC position was very consistent.

129. The representative of the United States associated his delegation with the views expressed by the delegations of Australia, New Zealand, Canada, and Japan. He welcomed the clarifications made by the representative of the European Communities as his delegation's reading of the EC proposals was that they delivered practically all of what he was saying they did not want. He further explained the concerns his delegation was having with regard to the EC proposal. It included the presumption that one Member's determination regarding a GI would have a certain legal standing in the territory of

other Members. That would be unworkable in the US legal system and clearly at odds with the most basic principles underlying the TRIPS Agreement and IPR protection more generally. Members were mandated to establish a multilateral system of notification and registration of GIs for wines and spirits in order to facilitate the protection of those GIs. That mandate provided neither for the expansion of the GI protection nor the encroachment upon other IP rights. They were not in any manner mandated through this negotiation to weaken or potentially negate other rights that were currently existing within the territories of WTO Members. The EC proposal would place existing right holders in an automatically defensive position and subject to the loss of their rights simply by virtue of a name being placed on a list based on a determination of its IP status made in another territory. These right holders would then be required through mechanisms that were still extremely unclear to his delegation to take affirmative action to defend their existing rights or to invoke one of the TRIPS exceptions. Under the EC proposal as just explained, a notified term would be presumed to meet the TRIPS definition. By virtue of this short circuiting or circumvention of domestic examination and procedures, the validity of any conflicting use in the receiving country would automatically and immediately be called into question, notably before the courts. While the continued availability of the exceptions spelt out in Article 24 of TRIPS was important to note, this did not at all overcome this fundamental problem of short circuiting of domestic decision-making through these presumptions and the reversal of the burden of proof. This change was a fundamental shift. As regard the exceptions under Article 24, he said that they were not even sacrosanct because the EC proposal put forward that a notified GI would be presumed to be non generic, and that would be a limitation.

130. He further said that the trademark system was based on consumer perception. If it was found that consumers were deceived by the use of a mark on a particular good, that mark would be invalid. The fact that a notified term was presumed to meet the TRIPS GI definition in the receiving Member's territory meant that any conflicting uses would immediately be deemed geographically deceptive by operation of law. That was the way this would work. In other words, under the EC proposal the act of notification would be deemed to artificially create knowledge of perceptions of consumers in the receiving Member or, in other words, to presume that the consumers in the US identified a particular GI with a particular good. The EC was asking his country to create this consumer perception by statute or regulation rather than to infer it from actual consumer's experience. To put it mildly, this was a radical shift in the concepts and in the legal foundations of the trademark field. It would significantly impact the operation of national trademark systems in a profound and far-reaching and quite unpredictable way. Under the EC's revised concepts where the presumption would be rebuttable, there were significant questions as to whether, at what cost to existing right holders, and through what procedures that presumption could be rebutted even within the US system. Thus, it appeared that this process of rebutting presumptions would, to a very significant degree, be played out in US courts, would unleash domestic litigation on a scale undetermined, and could be quite significant. This extremely burdensome process would also have to be repeated in every Member's territory in which existing right holders sought to maintain those rights. It was fundamentally unfair and unreasonable that in order to facilitate protection of GIs the rights of other right holders should be placed in legal jeopardy. There must be a better and fairer way, which his delegation thought it had already found.

131. The representative of the European Communities said, in response to the comment made by the US representative that the EC were trying to dictate to the US consumer what he had to recognize as a GI or not, that this was only relevant when it came to the issue of genericness. This was totally irrelevant in respect of GI definition, which was about the quality and characteristics or reputation, but not necessarily reputation only. Genericness by definition had to be subjective and consumer-oriented. So the EC proposal would not have any impact on the GI definition. The issue was who has to prove what. If in the US the GI holder did not have to prove that his GI was not generic, but it was the one who claimed that the GI was generic who had to prove his claim, then the EC proposal did not change anything. On the point made that the EC wanted to impose a system, he said that it would be the US rules and system that would apply and that there would not be any extraterritoriality. In the light of a

statement made by some joint proposal delegations that Members' trademark or GI authorities would be obliged to consult the register, he asked where would the difference be with the EC proposal.

132. The representative of Australia asked that, if the EC was just seeking to ensure that those claiming an exception make it out, why then was it seeking in its revised proposal a legal presumption as to three points and not only one, including that the terms met the definition of a GI in a market.

133. On the comment made by the EC in response to the US that consumer perception was only relevant in the context of the genericness exception, she asked whether the EC considered that the definition of a GI in Article 22.1 was objective and universal or, as Australia did, that it was subjective and territorial.

3. Notifications

134. The Chairman recalled that earlier discussions in the Special Session, reflected in documents TN/IP/W/12/Add.1 and Corr.1, indicated a fair measure of common ground on certain aspects, but also significant remaining differences on some others. In his report he would intend to draw upon that, subject to any new thinking, with a view to describing points of convergence and divergence. The description should only be regarded as tentative, since much of the discussion was not all that recent and because positions on these matters were linked to the treatment of participation and consequences/legal effects.

135. The representative of the European Communities said that his delegation would like to have this part as well as the other parts in legal language with brackets as the best way to show the progress and the state of play. This was particularly the case in these two issues of notification and registration because the level of convergence was high.

136. Concerning the GI to be notified, he thought that all Members agreed that only GIs that met the definition of Article 22.1 in the territory of the notifying country or had not fallen into disuse could be notified.

137. On other elements that might be notified, the divergence was not so much on whether or not an element could be notified but whether they "shall" or "may" be notified. He suggested that the Chairman reflect this in his report.

138. The representative of Canada said that, as indicated by other delegations, the appropriate approach for the Chairman was to not include draft legal language but, as he had suggested, to make a factual report.

139. The representative of Argentina said the report should be factual and not contain any text between square brackets. Texts should only quote the proposals as they had been made.

140. The Chairman said that his report would be factual, but if there was some progress made regarding certain points this could be captured, not in the same way as for the modalities texts, but so as to show that there was some agreement on certain points while on others differences remained.

141. The representative of El Salvador reiterated what her delegation had said at previous meetings of the Special Session and in informal consultations, namely that her country as a developing one was currently adjusting its national offices to the new obligations that it was having and would have. It believed that the negotiations in this group had not been fully explored. This was not the appropriate time to have negotiations on a legal text. She would urge the Chairman to reflect in his report the position of small countries.

142. The representative of the United States welcomed the narrative approach the Chairman intended to take for his report, in particular the fact that he would give, as he had indicated, his "tentative" appreciation of the state of play. His delegation strongly felt that it would be essential for the Special Session to engage in additional discussions on the notification of the system, in particular because there had not been discussions for quite some time. In the light of the additional discussions that were being held, the issues of notification and registration were clearly interrelated. He therefore supported the request made by Canada that the report set out the notification elements in narrative form.

143. The representative of the European Communities encouraged the Chairman to produce a full legal text with brackets, which would not be an exaggerated demand after 13 years of intense discussions.

4. Registration

144. The Chairman said that there appeared to be significant common ground among Members on certain elements, although as previously said it would need to be made clear that final positions on this, as on other matters, would depend on the treatment of participation and consequences/legal effects.

145. The representative of the European Communities said that registration was an area where there was important convergence among Members. This should therefore be reflected in the report. The draft paper submitted by the Chairman to a small group of Members did not contain any brackets. His delegation had at that time made a point that one element, on which there had been some degree of convergence and which was also contained in the joint proposal, was missing, namely that the registration should be made in the three WTO languages. Elements of registration were evidently subject to a final agreement covering other issues, in particular the key issues of legal effects and participation, which in his delegation's view should be tackled by Ministers because of fundamental differences.

146. The representative of the United States said that his delegation shared the view expressed by Australia regarding the EC's new thinking that the removal of opposition was actually potentially worse because a name put on a list by a Member by virtue of its domestic legislation would have legal effects in all other Members. On registration he said that more discussion would be required to discuss the suggestion made that some sort of examination of each notification should be undertaken prior to notifications being formally entered into the database. Compared to other elements in this negotiation, registration would perhaps be more straightforward; however, it was important to consider all the elements together. It would therefore be inappropriate to present new text at this stage.

147. The representative of New Zealand said that the new thinking from the EC had never been formally circulated. It had been discussed, and the Chairman had alluded to it. In fact some of the Members here had given more details of the new thinking than the EC had. Members had not seen the most substantive set of issues, namely legal effect and participation. While seeing value in drawing some aspects of notification and registration together, he said that other aspects of these issues related straight back to legal effects and participation. These were as much about the mechanics for delivering once the key issues were settled. He asked how the Chairman could be asked to put forward texts with square brackets when an important proposal by the EC had not even been formally tabled.

148. The representative of Argentina said that there should not be any negotiating texts in the Chairman's factual report.

5. Other elements

149. The Chairman said that he would not propose to deal in substance with such other matters as: fees, costs and administrative burdens, particularly as they impact on developing and least developed country Members; the duration of registrations; procedures for their modification and withdrawals; arrangements for review; contact points; and special and differential treatment. Rather, he would flag in his report the need for further discussion on these matters. This was because these elements depended substantially on the key policy choices to be made on the questions of participation and consequences/legal effects in particular and had thus been less fully discussed hitherto.

150. The delegation of Canada said that, while his delegation was fairly clear on what the costs would be under the joint proposal, it was not clear what the EC's new ideas would mean particularly regarding costs to governments, both participating and non-participating, costs for IP offices, including those which were self-financing, and costs to IP users. On this last aspect, he noted that the EC proposal might have benefits for GI holders who sought for protection, but he had concerns regarding the costs that would be incurred by those users in a third country who were faced with the task of proving genericness and prior uses, rather than having the entity asking for protection for its GIs to incur the costs. In Canada many of these users were small or medium enterprises. The issue of costs should be looked at quite carefully.

151. The representative of the European Communities said that on these issues there should also be scope for finding some language which captured the progress made, similar to the other issues. He therefore suggested that on these issues as well there should be legal drafting with brackets as the Chairman saw fit. On contact points, that was quite obvious. On other issues, this might be less obvious. There were however some areas which could be identified. While agreeing that the report would be a factual one, his delegation believed that there was a way to portray facts so as to underline the degree of convergence, if there was any. If there was no convergence, then the report could indicate that there should be further discussions.

152. On the issue of the costs, he said that the time limit for opposition in the WTO that the EC had eliminated as a sign of flexibility would in fact eliminate any burden to the authorities or agencies in all WTO Members, developing or developed countries, which would not be required to examine claims within a given time frame. There would no longer be any costs to the domestic agencies. Actually the system would facilitate their work in the same way that they would have an atlas where to search for geographical names: they would be able to look at a list of GIs when any party made a claim, which would diminish some of the administrative work.

153. The representative of Chile said that of all the topics highlighted by the Chairman the most problematic was costs, particularly for developing countries. This was a point made by almost all delegations that had taken the floor. It would be useful to highlight the issue of costs in the Chairman's report. Registration systems such as these were difficult to administer and the fact that the EU had withdrawn its proposal relating to the 18-months opposition would not suffice to allow the EC to claim that it was removing burdens on authorities. There would be burdens on governments and new responsibilities for them. The question of to which extent the burden should be left to the private entities using the system required a careful examination. Having had some experience in this area with thousands of GIs notified, Chile knew that this had to do with consumers, producers and governments. He did not think that picking up the EC proposal on S&D and adding a few square brackets would be sufficient.

154. The representative of Brazil said that the EC new thinking did away with the opposition procedure that appeared in the earlier proposal, but did not do away with the legal effects. There were still legal effects of rebuttable presumptions and they were extra-territorial in nature. This was not necessarily a flexibility from the perspective of a developing country. To the extent that there was

some form of legal effect, his delegation was of the view that an opposition procedure was essential. What was burdensome in the previous proposal by the EC was not the opposition procedure as such, but the obligation to hold bilateral consultations for each opposition that was not clear. If a country could simply oppose, and have its opposition recorded in the register so that the registered GI would not have any effect for that country, this would be good from the perspective of a developing country. The system would not be burdensome.

155. The Chairman said that he had taken good note of all statements. As for the timing of the circulation of the report, he said that he would have to fine tune it with what would be decided in the wider context of the overall process. He reiterated that his report would be exclusively on his own responsibility and without prejudice to the position of any delegations and to the outcome of the negotiations.
