

WORLD TRADE ORGANIZATION

RESTRICTED

TN/IP/M/7
21 August 2003

(03-4339)

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

MINUTES OF MEETING

Held in the Centre William Rappard
on 2-3 July 2003

Chairperson: Ambassador Eui-yong Chung (Korea)

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A. ADOPTION OF AGENDA

1. The sixth Special Session agreed to adopt the agenda as set out in WTO/AIR/2123.
2. The Chairperson proposed to address first the issue of observer status for intergovernmental organizations and, under "Other business", two points: the Chair's report to the TNC and future work.
3. It was so agreed.

B. OBSERVER STATUS FOR INTERGOVERNMENTAL ORGANIZATIONS

4. The Chairperson said that there had been no developments at the TNC and General Council level; he therefore proposed reverting to this matter at the next session in the light of any new developments in these bodies.
5. It was so agreed.

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

6. The Chairperson suggested that, as in previous meetings, the International Bureau of WIPO be invited to participate in its capacity as expert in the discussions regarding issues such as notification and registration procedures.

7. It was so agreed.

8. The Chairperson said that there were three new documents: a revised version of the Secretariat compilation of issues and points (TN/IP/W/7/Rev.1 and Corr.1¹); the minutes of the sixth Special Session (TN/IP/M/6); and a communication from the European Communities on the issue of legal effects (JOB(03)/123).

9. He recalled that, at the sixth Special Session, he had expressed the hope that by the July meeting Members would be able to consider a text with a single set of ideas rather than a text with widely divergent proposals. He had said that, with a view to being in a position to have such a text by the July meeting, he would continue to consult intensively with delegates in various formats, having regard to the need to ensure transparency. He had accordingly held a number of informal consultations. The last open-ended one was on 6 June. As foreshadowed at that meeting, he had subsequently held informal consultations, either individually or in small groups of countries, with a wide range of the most active delegations to explore the scope for finding ways forward, in particular on the issues of legal effects and participation, with a view to assessing whether there was sufficient flexibility to warrant him circulating a new draft before this formal session. Based on these informal consultations and in the light of the current state of the negotiations in the Special Session and of the Doha Development Agenda as a whole, it was his appreciation that delegations did not as yet feel in a position to be sufficiently flexible in their positions on the key issues of legal effects and participation to warrant him circulating a new draft before this formal session. This assessment had been reflected in a fax sent to all participants on 24 June 2003. He therefore proposed to continue the discussions on the basis of the Draft Text contained in JOB(03)/75, and to organize them according to the structure of the Draft Text. He also indicated that the minutes contained in document TN/IP/M/6 recorded heading by heading the points that delegations had made on the Draft Text at the sixth Special Session.

General Comments

10. The representative of the European Communities said that, as long as there was no progress on the two key issues of legal effects and participation, it would be difficult to have a clearer view as to what ultimately would be a multilateral system despite the clear mandate given. Little attention had been paid to the usefulness of the system proposed by his delegation. Instead, there had been a long discussion about what would constitute a "TRIPS plus" or a "TRIPS minus", about costs and burdens without actually giving arguments why the European Communities proposal would be burdensome and costly.

11. Turning to the question of legal effects of international treaties on non-participating countries, he noted that the minutes of the sixth Special Session (TN/IP/M/6) reflected the reservation made by his delegation with respect to the request for information made by some delegations. In spite of his delegation's reservation, the Secretariat had circulated, at the informal meeting of 6 June 2003, a paper on obligations of treaties for non-participating countries. He reiterated the questions his delegation had posed to the Secretariat at that informal meeting. How many international registration systems for intellectual property rights have legal effects? How many WTO Agreements entail legal effects? How many WTO Agreements are voluntary?

¹ Concerns the English version only.

12. The representative of Australia addressed first the question of the state of negotiations and his delegation's position in relation to the Chairman's Draft Text (JOB(03)/75). The aim of the Special Session was to negotiate a multilateral system of geographical indications for wines and spirits by the Cancún Ministerial Conference. It appeared, at this stage, that the deadline was an ambitious one. Some delegations continued to want a system that the majority of delegations considered: as beyond the mandate; as violating the principle of territoriality; as too bureaucratic; and as too costly. Given that a critical mass of delegations supported a mandated system that would not increase the rights and obligations currently found in the TRIPS Agreement and that would respect the principle of territoriality, involve minimal bureaucracy and be far less costly, his delegation regretted that this negotiation remained unresolved. This negotiation was not one aimed at increasing the level of protection afforded to geographical indications under the TRIPS Agreement. As already said a number of times, his delegation would not allow it to be turned into such a negotiation. He found it extraordinary that those Members who refused to offer protection to third countries' geographical indications unless they had equivalent systems of protection were the very same who wished to re-cast the mandate in such a manner as to ensure that their own geographical indications were protected according to their wishes in all other WTO markets. He stressed that his delegation was committed to continue working towards completion of this negotiation: it was open-minded on the need for and timing of future meetings.

13. With regard to the Chair's draft report to the TNC on these negotiations, he suggested that the following considerations be taken into account. Australia remained committed to the mandate for these negotiations, which had provided the Special Session with a solid set of principles on which to base discussion both now and in the future. The mandate called for a multilateral system of notification and registration. The Joint Proposal (TN/IP/W/5) laid out the elements of a system that fulfilled this mandate. Such elements had been highlighted in the Chairman's Draft Text and his delegation remained supportive of that text insofar as it reflected those elements. He recalled that his delegation had pointed out that notification and registration systems were not new to the WTO and had highlighted the usefulness of systems for notification and registration such as those instituted under the TBT Agreement. The mandate of the Special Session did not call for the creation of a register with the type of legal effects the *demandeurs* would like to see. The system proposed under the Joint Proposal would require those Members participating in the system to commit themselves to consult the system when making decisions about the recognition and protection of geographical indications. This element of the Joint Proposal was also clearly reflected in the Chairman's Draft Text. The Special Session's mandate was to facilitate the existing level of protection accorded to geographical indications by the TRIPS Agreement and to increase that level of protection. The Joint Proposal respected the existing balance of rights and obligations in the TRIPS Agreement. His delegation could not accept those elements of the Draft Text that strayed beyond the mandate. The mandate required a system that would be voluntary, i.e., that would allow Members to choose whether or not they would participate in the system. The Joint Proposal provided Members with that choice; it did not require all WTO Members to participate nor did it prevent non-participants from accessing the information on the system. It was clear from the Chairman's Draft Text that there were proposals on the table that clearly took away from WTO Members the right to make such a choice. Referring to the part of the Chairman's opening statement made at the 6 June informal meeting recalling comments to the effect that the legal effect of a registration under the Joint Proposal might not be sufficient, he urged the Chair in further reporting to cast comments in more objective terms. It was the proposals made by other delegations seeking to re-write the way Members were implementing the TRIPS Agreement in order to increase the level of protection provided to geographical indications overall that were problematic. There was clearly no mandate to re-write the TRIPS Agreement in such a manner. It was clear that the system had to be both multilateral and give Members the right to choose whether or not to participate in it. The Joint Proposal managed this balancing act in a manner that remained true to Ministers' mandate. Unlike some other proposals on the table, it did not render Members' choice a nullity by interpreting multilateral as the equivalent of "universal". For Australia,

the political wishes of a few for an increased protection should not be used to trample on, and ignore, the principles that all Members had agreed to collectively.

14. With regard to the Chair's report to the TNC, the representative of Australia mentioned two elements to be included in that report. The first element was that no middle ground had emerged from the discussion, and that any solution must fall within the negotiating mandate. Apart from the Joint Proposal, no proposals reflected in the Chairman's Draft Text were so situated. Hong Kong, China proposal usefully articulated principles with which his delegation had indicated considerable sympathy. Nevertheless, it created presumptions in international law that would increase the protection currently afforded to geographical indications by the TRIPS Agreement. Protection for geographical indications could be increased in two ways: first, by strengthening Members' positive obligations to protect geographical indications; second, by weakening Members' rights to exempt certain geographical indications from protection. His delegation did not think that this was the time to add to the suggestions made by some Members to create a stronger obligation by creating a presumption, and to weaken Members' rights to except geographical indications from protection by subjecting the exercise of that right to multilateral challenge procedures. His delegation concurred with the Chair's statement made on previous occasions that this negotiation was not about increasing the level of protection. The second element of the report related to participation: the only principle that was driving these negotiations was the voluntary nature of the system. The more reasonable the system, the more likely Members would participate in it. It was not the purpose of these negotiations to remedy the defects of the Lisbon Agreement, which had 20 members because only 20 countries considered it in their interests to sign on. It would be unprecedented if, in the name of multilateralism, Members who had made the considered decision not to participate in WIPO Agreements were then forced to do so in the WTO.

15. The representative of Chile concurred with the Chair that there were still major differences among Members. For Chile, those differences could not be overcome by seeking alternatives that would change the current balance of rights and obligations of the TRIPS Agreement and change the mandate of Article 23.4 of the Agreement. Chile could not accept a system that would undermine the principle of territoriality, on which all forms of intellectual property were based. Nor could it accept new obstacles to the legitimate use of exceptions. Chile was prepared and determined to work with the Chairman to complete the mandate within the time-period, and hoped that all delegations would participate in the negotiations and consultations so as to better understand the scope of certain proposals. Chile and a substantial number of countries had made a proposal which was in compliance with the mandate and which contained no mention of increasing the level of protection or changing the balance of Members' rights and obligations. This was the lowest common denominator and the best one. The proposal made by the European Communities intended to create an unprecedented system of protection in the field of intellectual property protection systems or treaties. The information given by the Secretariat on other treaties and registration systems led to the same conclusion. For Chile, there was no reason to adopt a "super" category of intellectual property that would restrict the ability of Members to determine at the national level what would be protected. There were no legal or economic justifications for this. If some Members accepted not to change the balance of rights and obligations, this Session would be able to comply with its mandate within the required time-frame. Failure to carry out the mandate would mean that no flexibility had been shown by certain Members in their unbridled ambition to achieve much more in this field than was stipulated by the mandate and even by imposing obligations on non-participating Members. This would be an illegal track.

16. With regard to participation and legal effects, as well as the information given by the Secretariat, he said that it was clear that only by accepting explicitly in writing the obligations of a treaty would a Member enter into obligations. The future system must be voluntary and each Member should be in a position to determine if the system would suit it or not. If a Member were to decide not to participate, then it could not be subject to new obligations. Chile supported the proposal made by

Malaysia in the informal meeting of 6 June that "Each WTO Member can also elect not to participate in the multilateral system of notification and registration of geographical indications for wines and spirits and there are no legal effects or obligations on any WTO Member that has not indicated its participation in the system". Regarding the costs of the system, if it entailed additional obligations and if non-participating Members were forced to indirectly accept new obligations, then the system would be more onerous than one which was purely voluntary and would facilitate protection. He further said that exaggerated claims might hamper chances for Cancún. What was being proposed by some Members was a re-opening of the TRIPS Agreement. In this regard, he did not see any reason for not re-opening other areas in the TRIPS Agreement. Regarding the European Communities comments on the Secretariat paper on treaty obligations for non-participating countries, he said that the WTO Members had the right to have all information enabling them to negotiate on a more meaningful basis.

17. The representative of New Zealand noted the lack of flexibility from the proponents of various proposals on the table on key outstanding issues, the strong concerns expressed by potential non-participating Members, and the concerns voiced by some developing countries about the implications of this negotiation and of some of the proposals on the table. In such a context, it was therefore appropriate to continue the negotiation on the basis of the Chairman's Draft Text of 16 April 2003 (JOB(03)/75). While it was regrettable that the Special Session was not ready for a new text from the Chair, there were clearly issues that needed to be resolved before moving to that stage. New Zealand was not in a position to contemplate proposals, whether in their entirety or in their individual components, which were outside the mandate. The component parts of the mandate had been clearly articulated by a large number of delegations throughout the course of this negotiation. That included the Chairman's statement at an early stage in the discussion that the objective of the negotiation – an important element of the mandate - was not to increase the level of protection already provided for geographical indications in Section 3 of Part II of the TRIPS Agreement. This and other elements of the mandate already mentioned were the thresholds that her delegation applied when making comments regarding the proposals on the table. These thresholds had helped show how far beyond the mandate many of the proposals on the table in fact were. However, this did not mean that the mandate was insufficient. It meant that more effort must be made to find solutions within the mandate of Article 23.4 as it was confirmed at Doha. New Zealand supported the proposal that was within the mandate, namely the Joint Proposal (TN/IP/W/5). It was unfortunate that a limited group of Members had remained unwilling to show any flexibility regarding a proposal that both met the mandate to facilitate the protection of individual geographical indications and attracted the support of a large number of interested parties. The Joint Proposal would have a legal effect on Members, contributing to their ability to fulfil their existing obligations under Section 3 of Part II of the TRIPS Agreement and, accordingly, to facilitate the protection of geographical indications. The proposal therefore warranted further serious consideration by all Members. Her delegation would welcome any ideas by other Members on how the proposal might even further facilitate protection in a way consistent with the mandate. She pointed out that proposals with legal effects outside the mandate, for example those creating presumptions in international law on aspects of geographical indication protection currently applied at a national/territorial level and those creating legal effects for non-participants would run the risk of attracting few participants. This would fail to clearly distinguish the results of this negotiation from the existing Lisbon Agreement that had a low level of participation and therefore a very low level of utility. Regarding deadlines, she noted that for this area as well as others where deadlines had been missed, her delegation would be ready and willing, if necessary, to continue the work after Cancún to finalize this negotiation within the original mandate.

18. In relation to the third question posed by the European Communities ("How many WTO Agreements entail legal effects?"), she repeated a question she had already posed at the last informal meeting of 6 June 2003: "Which WTO Agreements contain general overarching provisions like TBT, SPS and which Agreements apply to particular product sectors?"

19. The representative of Barbados referred to several comments she had made at the 6 June informal meeting. First, the analysis made by the Secretariat of the state of international public law on the application of treaties to third States was in complete accord with Barbados' own legal assessment of the situation, namely that treaties/international agreements could not have binding effects on third parties unless these third parties expressly consented to being so bound. Second, her delegation insisted that any multilateral system of notification and registration of geographical indications could not have any obligations for non-participating Members. Third, participation was a matter to be determined on an individual basis by each Member. Her delegation was sympathetic to the general approach taken by Hong Kong, China. In particular, it strongly felt that any system should be as non-intrusive as possible vis-à-vis the national system of protection for geographical indications and should not involve significant additional administrative or financial burdens for Members.

20. The representative of the United States expressed the view that it was still possible to meet the deadline set by Ministers. However, this would only be possible if delegations respected the scope of the system that was agreed in the Uruguay Round. Some delegations had said that there was a problem with the mandate. For her delegation, there was none. The mandate was very clear: it concerned a multilateral system of notification and registration that facilitated the existing protection provided under the TRIPS Agreement for those Members who were interested in participating in the system. It was not a system with "TRIPS-plus" legal implications the *demandeurs* would like to impute to the mandate. What was making difficult the conclusion of the negotiation was not the absence of proposals fulfilling the mandate but a concerted effort by a minority of Members to renegotiate the mandate under Article 23.4 itself. The system put forward as the Joint Proposal (TN/IP/W/5) had several elements that would facilitate protection by making readily available information on foreign geographical indications and by requiring domestic legal authorities to consider that information, which they currently were not required to do. As outlined by Australia, this was significant. Her delegation disagreed with suggestions that characterized the Joint Proposal as lacking in legal effects. Any report should distinguish between proposals that facilitated protection as a procedural matter like the Joint Proposal and those that increased the level of protection.

21. The mandate envisaged a voluntary system, one in which there would be two classes of Members: participants and non-participants. Referring to the concern that the European Communities had with information provided by the Secretariat, she said that it was the Chair's prerogative to ask for research from the Secretariat. Her delegation had an additional question: "In which WTO Agreements are there different classes of Members with different kinds of obligations?" The Joint Proposal allowed, but did not require, all Members to join the multilateral system, and also allowed all non-participants to have access to the information on foreign geographical indications, should they wish to consult the register. It was useful for non-participants because they would have the information without any obligations. The mandate mentioned a "multilateral system". Some of the *demandeurs* had said that the Joint Proposal would be a plurilateral rather than a multilateral system. As delegates had pointed out, the term "multilateral" did not mean "universal". If that were the case, the reference in the mandate of Article 23.4 to "Members choosing to participate in the system" would have no meaning. This would be contrary to the plain meaning of the words in the TRIPS Agreement.

22. Her delegation also had some general concerns as to how these talks were being characterized. Several options had been laid out, as though on a scale, and as though assuming that the problem could be solved by choosing some middle ground. Her delegation strongly disagreed with such a characterization. In fact, all the options beyond the Joint Proposal suggested systems that would be outside the mandate to the extent that they provided for a legal presumption. Furthermore they would create conflicts with prior trademarks, trade names or company names. For her delegation, it was inconceivable to hear that such a system did not change the substantive rights under the TRIPS Agreement. It would involve a fundamental re-write of Section 2 of Part II of the TRIPS Agreement.

The European Communities proposal required the elimination of Article 24.6 - relating to the ability of Members to refuse protection to generic terms after a brief period of 18 months and was recommending a significant roll-back of Article 24.5 – relating to prior trademarks. Both provisions were safeguard and balance provisions. The "middle ground" might not lie in the Joint Proposal, but it must lie within the mandate. So far, there had not been any other alternative that lay within it. Her delegation would therefore disagree with any report suggesting that the so-called "middle ground" might lie in the Hong Kong, China proposal, or any other that went beyond that proposal in terms of favourable presumptions.

23. With regard to the idea of a "critical mass of participants", she said that this was not required by the mandate. The more reasonable the system, the more Members would sign on as participants. If the European Communities and other *demandeurs* really wanted a useful agreement with critical mass, they should spell it out so that there would be a discussion on what terms the agreement should have so as to be most useful and have the most participants. If the issue of number of participants was not so important to the European Communities, then it would not be the role of other negotiators to guarantee a maximum of satisfaction to the *demandeurs*. Their role was to satisfy the mandate in a workable fashion. She further said that some were assuming in this negotiation that the same kind of legal effects as under the Lisbon Agreement would be foisted on all WTO Members and not merely on those who chose to participate in the system. This was not a logical interpretation of the mandate. For her delegation, it would be possible to meet the deadline given by Ministers if delegations worked on the principle of usefulness.

24. The representative of Canada associated his delegation with the comments made by Australia, Chile, New Zealand and the United States. The current mandate of the Special Session was clear and balanced, and there was no need to change it. What was necessary was to work harder and for both sides to show some flexibility and realism. Canada was not ready to work on a proposal that went beyond the mandate; only the Joint Proposal fit within the mandate. In response to the EC suggestion that the Joint Proposal might not meet the mandate and that participants should get the negotiations back to the basics and focus on the value of a registration system, he explained how the Joint Proposal, and it alone, would fulfil the mandate. Members would establish a searchable system of notification and registration for all geographical indications for wines and spirits that would be notified by participating Members. The system would be available to Members in hard copy and on the WTO's internet web site, and would be updated as required. Decisions to grant protection for geographical indications for wines and spirits would continue to occur entirely at the national level, consistent with Article 1.1 and Articles 22, 23 and 24 of the TRIPS Agreement. In making those decisions, WTO Members who had chosen to participate in the system would commit to consult the register, along with other sources of information, so the information put in the system would be taken into account by the national authorities when making decisions. For example, the intellectual property offices of participating Members would consult the system when making decisions on applications for protection of a geographical indication or a trademark, or in regard to labels on imported wines and spirits. No such broad-based "register" of geographical indications currently existed. The information available in the register would thus facilitate the protection of geographical indications for wines and spirits by making available to Members much more information on the status of names used to describe wines and spirits around the world. This would assist and facilitate their decision-making with respect to the validity or eligibility of geographical indications and trademarks within their own territory, according to their existing TRIPS obligations and their own domestic procedures.

25. The Joint Proposal involved voluntary participation. What did this mean for legal effects on Members who had chosen not to participate in the system in accordance with Article 23.4? Under the Joint Proposal, there would be no legal effect of any kind on Members who had chosen not to participate. Those Members choosing to participate in the system would commit to refer to the register when making decisions regarding geographical indications under domestic law. All decisions

regarding the protection of geographical indications would continue to be made in accordance with the domestic law of each WTO Member, consistent with the current obligations in the TRIPS Agreement. The legal effect of the Joint Proposal would therefore be consistent with current rights and obligations in the TRIPS Agreement. It would not be a "TRIPS-plus". Each Member would have the right to decide whether or not to participate in the system, including by determining for itself its capacity to operate within the system. A Member could decide to participate in and withdraw from the system at any time.

26. The representative of Hungary said that the Chair's opening statement at the 6 June informal consultation gave a fair description of the range of options for legal effects. She expressed however Hungary's disappointment that the Chairperson was unable to come forward with a common negotiating text, which would enable the Special Session to move forward. Progress could be achieved if all participants showed flexibility. Hungary had on several occasions indicated its flexibility regarding legal effects, and would expect other delegations to show the same amount of flexibility. She finally said that the questions posed by the EC were useful and would provide valuable information.

27. The representative of Cyprus said that her country and its economy were so small that none of its products or practices could have a major impact on international trade. It had nevertheless decided to join the liberalization process and "be part of the game". This game must however be played by the rules, otherwise small players like Cyprus would have no fair chance on the outcome or eventual benefits of liberalization, let alone a fair chance to win. For that reason, Cyprus wanted a register that would entail legal effects on all Members and be multilateral in the same way as the TRIPS Agreement. Although a small country, Cyprus was proud of its traditions, know-how and specificities, all of which characterized the quality of its products and made them extensively known abroad. Cyprus did not only intend to safeguard these characteristics for the next generation but had no other choice or duty but to do so. Given its size and real potential, Cyprus was engaging considerable efforts and resources and, to do so, it needed a multilateral register, where it would occupy a small place but which would ensure to the whole Membership the adequate legal protection that could reasonably be expected from any WTO Agreement.

28. Cyprus supported an approach to a multilateral register based on binding legal effects through the co-sponsoring of document TN/IP/W/3 of 24 June 2002. This should not have been a surprise to anyone, as Cyprus was not new in the business of wine-making. It ranked among the oldest wine-producing countries of the world. Very few places were so ideally situated as Cyprus for the growing of the vine. The quality of the soil, the Mediterranean sunshine and the right climatic conditions of Cyprus were all ideal for the production of quality grapes. Several archaeological findings, ancient references and writings had proved that the wine-making in Cyprus had a tradition so old that its beginning was practically impossible to trace. In this sense, there was Homer's reference to the excellent quality of Cypriot wines or other authors' writings which placed the cultivation of the grape vine in Cyprus back to the early days of the island's colonization (3,000 BC). From ancient and mediaeval references and writings, it was evident that Cypriot wines enjoyed a high reputation in both classical and mediaeval times. Tomasso Poreacchi, a scholar and writer, in his "Famous Island of the World", published in Venice in 1576, described the wines of Cyprus as "very luscious and wholesome, fragrant and of pleasant taste" and "appreciated accordingly in Venice and Rome". Cypriot wines carried names such as "Commandaria", named after the area that belonged to the lands of the order of the Knights Templars, or "Laona" and "Afames", from the mountains on the southern slopes of the Troodos. They were sold in places as distant as Japan, Russia, the United States, most European countries and Canada, and denoted investment and promotion campaigns that were worth protecting, particularly given the size of Cyprus. It was therefore not surprising that Cyprus had an interest in a WTO-wide effective legal protection for those place names reputed since very ancient times. Cyprus had no interest in a system that would not apply to all WTO Members. The TRIPS Agreement did apply to all WTO Members, including Section 3 of Part II. Therefore, the protection to be facilitated,

namely that under Section 3, should also concern all WTO Members. Any other solution would constitute an unacceptable derogation from the WTO fundamental principle of multilateralism. As far as Cyprus was concerned, what was being proposed by some delegations might well be a first step towards the gradual erosion of that principle. Delegations should not work towards debasing the WTO but work towards making rules acceptable to all. A system without any legal effects would be a non-starter for many delegations. She also recalled that the European Communities had made two proposals, one in 1998 and another in 2000, which were significantly different. The 1998 proposal advanced a system of state enforcement, which was a non-starter for many; the 2000 one did not. For Cyprus, this was a significant step to allay the concerns of a number of delegations. On the other side, the various proposals made for a voluntary database system continued to be the same: no legal effects, no security and no voluntary participation. This did not seem a good spirit of approach to negotiations. Cyprus remained unconvinced that a system without legal effects would meet the Doha mandate and that it would really "facilitate" protection in accordance with Article 23.4. It would like to know how protection would be ensured through the systems of those countries promoting voluntary participation, the more so since one delegation had explained that its domestic authorities would not be bound by such a register. This would mean that protection might, but also might not, be facilitated.

29. The representative of the Slovak Republic expressed his delegation's disappointment regarding the lack of progress. The main objective of the TRIPS Agreement was to reduce distortions in international trade and to promote effective and adequate protection of intellectual property. The register of geographical indications would achieve those objectives. There would be greater certainty for producers, who would have a better picture of where their geographical indications were protected. The combination of two elements, the lack of legal effects and the voluntary participation, would not give any value to the creation of such a register. The system of improving the protection of geographical indications should be prevailing, and should apply to all WTO Members, otherwise it would not achieve the aim of a "multilateral" system. He finally added that an historical interpretation of Article 23.4 might not result in a voluntary register.

30. The representative of the European Communities said, in response to comments made on the mandate, that every delegation might well believe that its proposal fell within the mandate. A system that would give WTO Members the choice whether or not to attach legal effects to an international registration system did not ensure that protection would be facilitated. For his delegation, such a system did not provide the type of predictability it was aiming at and could hardly be the object of negotiations. It was as if commitments were agreed upon in market access without defining the commitments and Members were left free to honour them or to change them. This was exactly the major problem with the Joint Proposal.

31. With respect to the Hong Kong, China proposal, the question was whether it contained any presumption regarding the non-applicability of any exception other than the one under Article 24.9 of the TRIPS Agreement. It advanced a presumption that the definition of Article 22.1 was met. Thus, if a certain term was presumed to be a geographical indication, would there also be a presumption that it was not generic, and the exception under Article 24.6 would not apply? Regarding the observation made that under the Hong Kong, China proposal a multilateral examination procedure would not be necessary, he said that, given that legal effects were reduced to a mere presumption of protection, a multilateral examination and opposition system was not really necessary. Indeed, such a presumption could always be rebutted at the national level. However, his delegation believed that a multilateral opposition system could be envisaged on a voluntary basis. Certain Members might find it useful to use an opposition system on a voluntary basis in order to prevent the presumption of protection from becoming effective at the national level. Also, the main problem with the Hong Kong, China proposal was its voluntary character. No matter what legal effects were attached to the act of registration under that proposal, any WTO Member would be able to simply opt out. This would not only be at odds with the mandated multilateral character of such a register but would fundamentally undermine the purpose of facilitating protection of geographical indications in all Members.

32. With regard to legal effects, the models described in paragraphs 6 and 7 of the Chair's opening statement at the 6 June meeting did not differ from the Hong Kong, China proposal. Both the European Communities and the Hong Kong, China proposals provided for a presumption that a registered geographical indication met the Article 22.1 definition. In this sense and contrary to what was implied in the Chair's statement, there was no presumption that a geographical indication did not fall under one of the Article 24 exceptions. For example, a geographical indication might well meet the definition of Article 22.1 and be presumed as entitled to protection under Articles 22 and 23. Yet this would not imply that there was a presumption that certain uses of the geographical indication in third countries did not fall under Article 24. For example, if there were uses falling under the Article 24.4 exception, the protection of Articles 22 and 23 would simply not be operational vis-à-vis those uses but would be operational vis-à-vis other uses that did not fall under that exception. He further clarified that the request to enter into negotiations in case of a challenge was nothing more than a repetition of the existing obligations contained in Article 24.1.

33. With regard to participation as indicated in paragraph 13 of the Chair's opening statement, he said that the degree of participation was an essential element. The European Communities had always thought of this register as a WTO instrument, otherwise there would not be any need to negotiate in the WTO since there was already such a plurilateral instrument in the Lisbon Agreement. Reference had been made to a "universal" agreement, which was not a common term in the WTO. The TRIPS Agreement established certain requirements for the legal protection of geographical indications that applied to all Members and the multilateral register should not be different. While appreciating the Chair's idea of a critical mass, the European Communities were not ready to deviate from the principle of multilateralism. The future multilateral system must be part of the WTO package for present and future WTO Members, otherwise there would be an erosion of the WTO building principles. If the WTO Members were to be deprived of the fundamental principle of multilateralism in this area, they should also be prepared to have opt-out clauses in other WTO areas of negotiation. This should be borne in mind for the Chair's draft report. The report should be factual and should not contain phrases which indicated that a proposal fell within or outside the mandate.

34. The representative of Switzerland said that her delegation failed to understand why some delegations kept finding that a system with legal effects would contravene Article 23.4 in spite of all the clarifications given. It would be impossible to fulfil the mandate, i.e., to establish a system facilitating the protection of geographical indications, if the system did not entail the legal effect of facilitating such protection. The examination system would take into account the concerns related to territoriality. If a country believed that a geographical indication did not comply with the conditions of protectability, it could challenge it. The effects of the registration would then be suspended in that country until the difference was resolved. In the event of a simple database which authorities would only refer to, it would be impossible to know how the domestic authorities' work would be facilitated by such a system. Switzerland only wanted a system that would simply transcribe into operational terms the current level of protection which was already incumbent on all Members. The system should be multilateral like the TRIPS Agreement: non-participating WTO Members would not be bound by the future system. With regard to the idea of a critical mass, her delegation did not think that this would be an appropriate solution because the establishment of the multilateral system was part of a single undertaking. She finally said that the draft report to the TNC should be a factual one.

35. The representative of Hong Kong, China said, in response to a comment made by the European Communities regarding his delegation's proposal (TN/IP/W/8), that the presumption created by a registered geographical indication would not affect the Article 24 exceptions, except as it related to Article 24.9. As regards the relationship between Articles 22.1. and 24.6, he said under the former there would be a general presumption that the geographical indication met the requirements of Article 22.1, and under the latter the circumstances of each specific case had to be taken into account. This matter would be left to the domestic courts.

36. The representative of Argentina associated her delegation with the comments made by Australia, Canada, Chile and New Zealand on the content of this negotiation. Having participated in the discussions since the beginning, her delegation noted that negotiations had not made headway because some delegations had been including points outside the mandate. In this context, she recalled that there was no mandate to change the existing balance of rights and obligations. Argentina was not in a position to accept solutions that would modify the current rights and obligations contained in the Agreement. She concurred with the representative of Chile that there was no possibility of striking a balance within Section 3 of Part II of the TRIPS Agreement. If that section were to be reopened, then her delegation would wish to have other elements included as well: for example, an international system to facilitate trademark protection, or competition policy rules to avoid intellectual property becoming a trade barrier. She further indicated that, when discussing JOB(03)/75 paragraph by paragraph, her delegation would refrain from repeating the same points but silence should not be taken to mean acquiescence.

37. The representative of Turkey expressed his delegation's commitment to the Doha mandate, namely to create a multilateral register which would be useful and have a binding character. His delegation had some difficulty in accepting the interpretation that Ministers had agreed to a registration system which would be a mere repetition of the Lisbon Agreement.

38. The representative of the European Communities said that his delegation had shown a significant degree of flexibility. It had first made a proposal in 1998, and revised it. As regards Chile's comment that the European Communities proposal would entail an amendment of the TRIPS Agreement and reopen the whole Agreement, he said that the proposal only aimed at putting into effect Article 23.4 and not at amending the rest of Section 3 of Part II of the Agreement. Such a mandate had been given by Ministers at Doha. He further said that the Joint Proposal would actually not bring any added value but would even be dangerous because any Member would be able to notify any geographical indication even if it was not entitled to do so, and there was no procedure to resolve conflicts raised by conflicting notifications.

39. The representative of the Czech Republic expressed support for the statements made by the European Communities and Switzerland that only a multilateral system with legal effects on all Members could fulfil the mandate of Article 23.4 and of the Doha Declaration.

40. The representative of Canada, responding to the European Communities remark that the Joint Proposal would entail dangerous consequences, said that all geographical indications notified under that proposal would be entered into the system, and any WTO Member or private party in that Member wishing to challenge the legitimacy of a notified geographical indication could do so in accordance with domestic procedures of that Member. Concerns about the legitimacy of a geographical indication, for example whether or not it met the definition of Article 22.1 or the exceptions under Article 24, would simply be resolved domestically rather than through a new system of dispute settlement with compulsory negotiations. There would be no need to establish a new dispute settlement procedure at the international level as the European Communities had proposed: if a Member believed that another Member was not complying with the TRIPS provisions, it could make use of the WTO dispute settlement procedure.

41. The representative of the Secretariat said, in relation to the first question raised by the European Communities ("How many international registration systems for intellectual property rights have legal effects?") that the Secretariat paper on multilateral notification and registration systems (TN/IP/W/4) already provided information on this matter. Paragraph 8 of that document as well as the synoptic tables on pages 5-14 for example dealt with the legal effects provided in various multilateral registration systems. With regard to the second question ("How many WTO Agreements entail legal effects?"), he asked whether he was correct in understanding that the question related to WTO agreements which contained obligations on the national laws that Members should establish on

trade and intellectual property within their territories. On the third issue ("How many WTO Agreements are voluntary?"), he asked whether he was correct in understanding that this related to agreements to which Members had the option of whether or not to join. Regarding the question posed by New Zealand, he understood it to refer to WTO agreements which contained provisions that applied generally to trade in goods as opposed to agreements that related to particular sectors of trade in goods or services or of intellectual property. He understood the question posed by the United States as relating to WTO agreements which provided for different obligations for different classes of Members, e.g., developing countries.

42. The representative of the United States further clarified that her question covered specific situations in which some Members and not others were expected to take on some obligations. She added another question: "Are there any WTO Agreements that require national governments to instruct their courts to impose presumptions of a legal nature in their domestic court system?"

43. The Chairperson asked whether it would be agreeable to delegations to ask the Secretariat to provide information on the questions posed by the delegations of the European Communities, New Zealand and the United States.

44. It was so agreed.

Chairperson's Draft Text (JOB(03)/75)

Paragraph 4: Legal Effects in Participating Members

45. The representative of New Zealand offered some comments on the legal effects suggested by Hong Kong, China in TN/IP/W/8. Hong Kong, China had proposed that the registration create a presumption that the geographical indication met the definition under Article 22.1. The effect of this presumption - the reversal of the burden of proof - was a cause for practical concern for her delegation: it claimed that persons who had rights to a term and had registered that term in the multilateral system would benefit from the presumption that the registered term met the definition of a geographical indication. To show the effect of the proposal, she gave the example of a court case in New Zealand regarding the term "Champagne". In that instance, the French Champagne-makers produced evidence that French Champagne had certain characteristics, reputation and quality that were attributable to a certain region in France while the other sparkling wine from New Zealand did not. It seemed logical that French producers had to prove that "Champagne" was "Champagne". They did that convincingly in the court case. However, how could one expect the defendants in this case to come up with evidence that the French Champagne did not have the specific characteristics, quality and reputation that was attributable to its geographical origin? The defendants might have evidence on why their product was not substantially different from the French Champagne as it too had bubbles, taste and a certain colour. Reversing the burden of proof would make it impossible for the defendants to ever win. This substantial point shifted the balance of rights and obligations and was outside the Special Session mandate. She believed this was not the intention of Hong Kong, China, who had explained that the proposed prima facie evidence would have a procedural rather than a substantive effect. This was however the practical result of what Hong Kong, China was proposing.

46. The representative of Colombia took note of New Zealand's comments on the Hong Kong, China proposal. She further asked whether the proposal, in particular with regard to the reversal of burden of proof, would not imply amending national legislation.

47. The representative of Argentina asked for clarifications regarding JOB(O3)/123 (non-paper on legal effects from the European Communities). This document clearly showed that there was no difference between legal effects in participating Members and those in non-participating Members. Referring to Article 24, which dealt with exceptions and acquired rights by third parties, she

wondered whether it would really be a sign of flexibility to say that participating Members might use it freely and that non-participating Members might use it to "modulate" the protection under Articles 22 and 23. All Members had full right to apply the exceptions at the national level; exceptions were a guarantee of the legitimate and prior usage by others. She asked for clarification of the term "to modulate" in the fifth and sixth rows of the table in JOB(03)/123.

48. Turning to the seventh row of the table in JOB(03)/123, where it was said that "This could be used both to expunge a GI from the register and to deny any 'presumed' protection for a notified GI", she asked whether geographical indications that were not protected in the country of notification could nevertheless be notified and registered.

49. With regard to the last paragraph of JOB(03)/123 on the effects of a challenge, she observed that one possibility would be for all Members to challenge a notified geographical presumption merely from a preventive point of view and have subsequently a national examination. She wondered whether it should not be specified in the notification that it would be subject to a prior process of examination in a country so that this country could really challenge the notification. She also wondered how it was possible to give Members the sovereign right of determining at a national level whether or not a geographical indication fell under an Article 24 exception and at the same time to submit the geographical indication to bilateral negotiations. This would render the right relative.

50. Regarding bilateral negotiations, she asked how the MFN clause would apply to the results of the negotiation between two Members.

51. Turning to homonymous geographical indications, she asked on what basis it would be determined which of two or several notifying Members would have the homonymous term. In the event that there were no challenges by third countries, would the registered homonymous geographical indications have the same legal effects in those third countries? Would third countries have to wait until the bilateral negotiations were finalized?

52. The representative of the United States asked for clarification on the role of non-participating Members under the European Communities proposal. It was not clear to his delegation what the benefits would be in terms of legal effects. In JOB(03)/60 (Chairman's Note on Possible Elements/Options), it was stated that, under the option covered by paragraph 14(b), a non-participant might refuse protection of a registered geographical indication if the non-participant was referred to in an annotation to the registration. Would this mean that non-participants must file a challenge to each and every geographical indication to ensure that they would not have to provide protection under the system? If this were the case, what would then be the benefit of being a non-participant?

53. He further asked for clarifications regarding JOB(03)/123. The first question related to the fourth row of the table. On what basis was the European Communities making the assertion that "providing WTO Members with a possibility to verify whether notifications comply with the definition must lead to assurances for a right holder that he will be entitled to protection in case of no opposition"?

54. Second, why must Members be forced to undertake new obligations just for being given the opportunity to verify if a geographical indication was eligible for protection? Nothing in the mandate of the Special Session said whether and why it should be done within 18 months.

55. Third, why should Members have, as specified in the third row, only 18 months for opposing a notified geographical indication on the basis of the genericness exception of Article 24.6? For his delegation, Members should never lose the right to invoke Article 24.6.

56. Fourth, what was the meaning of "to modulate the 'presumed' protection of Articles 22.3 and 23.2" in the fifth and sixth rows?

57. Fifth, would Members be required to enter into negotiation to resolve a dispute over a notified geographical indication and in what circumstances?

58. He finally said that his delegation disagreed with the European Communities that Article 24.5 established coexistence of the prior trademark with the geographical indication.

59. The representative of the European Communities said that the paper contained in JOB(03)/123 attempted to bring clarity to the legal effects proposed under the EC approach. On the first page under "legal effect", the paper reflected the language used in IP/C/W/107/Rev.1 as well as some previous statements made by his delegation on this issue. It attempted to explain in a table format how those legal effects related to each and every one of the TRIPS provisions. In the first column, the various legal effects had been specified. The second and third columns showed how the legal effects applied to participating and non-participating Members. The fourth column contained comments as to the rationale behind the legal effect specified in the first column. He also clarified that the language used in the columns on "legal effects" and "comments" was not necessarily the language of the European Communities proposal. This should not mean that the European Communities had changed their proposal or position. They had only tried to make some genuine effort to explain the same things without using the same words in order to avoid the same questions being raised again. On the last section of this paper, "effects of a challenge (i.e. opposition)", the paper attempted to give: some insight into what the effects were of a challenge; some views on how the process of examination and verification of different notifications could be done through existing national systems; and what would happen if there was a divergence in time-lengths between national laws and between the European Communities proposal. The launching of a challenge by the other Member - and ensuing consultations *and negotiation* - would not be an automatic process: that Member would have first to finalize its domestic examination of the notified geographical indication. If the examination had led to the conclusion that protection should not be granted, and a challenge were made, then it should be possible to invoke Article 24.1 directly.

60. In response to the first question posed by the United States about the advantage of being a non-participant under the European Communities proposal, he said that the future register would apply to all WTO Members. The difference between participating and non-participating Members was clearly set out in the table of JOB(03)/123, in the fourth row: participating Members would have to provide for presumption of eligibility for protection, while non-participating Members would not. Non-participating Members would only be concerned by legal effects described in the first, second and third rows, namely regarding the situations dealt with under Articles 22.1 (definition of a geographical indication), 22.4 (false homonymous geographical indications) and 24.6 (generic terms). Non-participating Members would not need to offer the presumption of eligibility. Being part of the register even for non-participants could be of benefit to them. Taking the example of Article 23.2 of the TRIPS Agreement, which provided that trademarks containing geographical indications should not be registered, he said that this provisions did not seem to be often applied because countries did not know what terms were geographical indications. Under the European Communities proposal, a trademark examiner would simply look at the register, see what terms were geographical indications and refuse registration of those trademarks containing such terms.

61. In response to the comment made that the obligation to verify whether a term met the definition of a geographical indication or not was a new one, he said that the European Communities' system would only provide protection to terms that fulfilled the requirements for protection as geographical indications. A country might wish to examine whether a term met the definition and, if not, it could lodge an opposition. If a country did not make such an examination and wished to grant

protection independently of whether or not the term met the definition, this would be that country's choice.

62. In response to the question of why Members should be obliged to accept a time-limit of 18 months for challenging a geographical indication on the basis of genericness, he said that a producer who was seeking for protection in each and every Member would know after this time-limit whether the term was generic or not in certain Members and that protection would be denied in those Members in accordance with Article 24.6. He pointed out that the wording of this Article seemed to suggest that the determination of whether a term was generic or not should be done at the date of the notification and not later on.

63. Regarding the meaning of "to modulate the 'presumed' protection" of Articles 22 and 23, he said that the term "modulate" was used to explain how the presumption would work vis-à-vis the exception under Article 24.5. For his delegation, Article 24.5 established the principle of coexistence of geographical indications and trademarks in certain circumstances. This was generally accepted and even trademark organizations like INTA (International Trademark Association) had confirmed this. If indeed in certain circumstances a geographical indication and a trademark must coexist, then it would mean that the protection that was exclusive for each right would be "modulated" to accommodate each other's use of the same sign under the relevant provisions of the TRIPS Agreement. In other words, the exclusive protection that a geographical indication might otherwise enjoy would be eroded or modulated by the prior trademark.

64. As far as the proposal for entering into negotiation was concerned, he recalled that Article 24.1 already provided that Members must not refuse to enter into negotiation with a view to increase protection of individual geographical indications. The European Communities only reiterated the obligation in their proposal. The notifying Member could therefore ask the challenging Member to enter into negotiation. In practice, this would require the challenging Member to accept it. In the European Communities' view, consultations might be counter-productive for the notifying Member.

65. Regarding protection in the country of origin, he said that the European Communities proposal did not impinge on the possibility of invoking Article 24.9 at the national level. In other words, if a geographical indication was notified and later registered and for some reason ceased to be protected in the country of origin, nothing in the European Communities proposal prevented a private party in a third country from invoking the fact that the registered geographical indication had ceased to be protected in the country of origin in order to nullify the protection or any presumption that resulted from registration in that third country. In other words, Article 24.9 could be invoked in order to expunge the geographical indication from the register. However, if this had not occurred, any private party would still be able to invoke Article 24.9 in a third country under the national law if it believed that the registered geographical indication had ceased to be protected or had fallen into disuse.

66. With respect to opposition, and as had been explained, countries could already use existing domestic systems to process international applications for registrations of geographical indications in order to undertake the examination that would be required under the European Communities proposal. He observed that, under Argentinian law, a domestic application would be processed within 90 days; the time-limit of 18 months proposed by the European Communities proposal therefore seemed feasible.

67. The representative of Australia said that the responses given by the European Communities gave his delegation little comfort. The one and only real issue was whether the European Communities proposal would lead to an increase of the level of protection for geographical indications compared to the one currently afforded under the TRIPS Agreement. For his delegation,

this would be the case. There were two ways of increasing the level of protection: one would consist in increasing a Member's obligation to protect geographical indications, and the other in limiting a Member's ability to exempt certain geographical indications from protection. With their proposal, the European Communities had highlighted how they proposed to complete both objectives. First, the proposal increased a Member's obligation through establishing an irrebuttable presumption of protection. Secondly, the proposed legal effects were aimed at weakening a Member's ability to exempt certain geographical indications from protection. The TRIPS Agreement as it was agreed at the end of the Uruguay Round had clearly articulated time-frames for the use of certain exceptions. There was no agreement that TRIPS exceptions should be invoked in a 18-month time-frame. What Members had elected to do in other intellectual property treaties or frameworks was of little relevance here. Ultimately, an agreement to invoke the exception within 18 months would mean that for certain geographical indications the exceptions would be completely phased out. Nothing in the TRIPS Agreement said that a Member's right to invoke an exception should be subject to any type of challenge procedure. Had Members agreed to subject the use of the TRIPS Agreement to this type of situation, they could have done so for example for homonymous geographical indications, which provided for bilateral or plurilateral consultations. Clearly, that language was never agreed. The obligation to submit to a challenge procedure was not part of the TRIPS Agreement, but enshrined the principle that intellectual property rights were private rights with territorial application. That was why the European Communities did little to allay Australia's concerns.

68. The representative of the European Communities said, in response to the Australian delegation's comments, that the initial intention of his delegation was to propose a shorter time-limit for challenges which would curtail the period of uncertainty for the notifying Member. Thus, the proposed time-limit of 18 months was a reasonable one. He also observed that nothing in Article 23.4 said that a database should be established.

69. The representative of Morocco said that Article 23.4 expressly stated that Members would create a multilateral register to facilitate the protection of geographical indications. The protection was already provided by Article 23. It was therefore surprising to hear some delegations say that the legal effects of the multilateral system would lead to new obligations. For his delegation, the balance of rights and obligations should be respected; in this connection, the register would have a useful effect, namely to facilitate the protection of right holders of geographical indications on an existing basis. Without legal effects, the multilateral system would not have any real effect and would be similar to the Lisbon Agreement. It was important to understand producers' concerns: they needed the necessary means to get an efficient implementation of the protection of geographical indications in case of confusion or undue usage. It was therefore necessary to create a legal context in which the owners of geographical indications could have their rights protected not only for wines and spirits but also for other products. There should be insuperable obstacles to undue usage of geographical indications by producers outside the country of the geographical indication, otherwise producers in that country would give up seeking protection in other countries. This would be most unfortunate because many products which represented a Member's cultural heritage would not find a place on markets that corresponded to their just value.

Paragraph 5: Legal Effects on Non-participating Members

70. The representative of Morocco proposed that the Draft Text provide that non-participating Members be obliged to not refuse the protection of a geographical indication on the basis of Articles 21.1, 22.4 and 24.6 of the TRIPS Agreement.

Paragraph 11: Administering Body

71. The representative of Morocco said that the administering body should be the WTO Secretariat because of the availability of the WTO multilateral dispute settlement system.

D. OTHER BUSINESS

Draft Chair's Report to the TNC

72. The Chairperson said that the Chairs of all the negotiating bodies were required to submit to the TNC of 14-15 July reports on the state of play in their respective areas. He would give delegations an opportunity to look at his draft report and make comments. The report would indicate that positions remained far apart on many issues, in particular with regard to legal effects and participation and that these differences would need to be resolved at the Ministerial Conference at Cancún. The report, which would be brief and factual, would be on his own responsibility and be without prejudice to the positions of delegations.

Future Work

73. The Chairperson recalled that the Doha mandate of the Special Session was to complete the negotiation of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. He noted however that positions remained far apart, in particular with regard to legal effects and participation. He saw no option but to continue with the work in the run-up to Cancún. In this regard, he referred to the coming meetings of the TNC (14-15 July) and of the General Council (24-25 July), which would deal with the organization of the further work prior to Cancún.
