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

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 February 2003

Chairperson: Ambassador Eui-yong Chung (Korea)

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A. ADOPTION OF AGENDA

1. The fifth Special Session agreed to adopt the agenda as set out in WTO/AIR/2024.
2. The Chairperson proposed to address first the issue of observer status for intergovernmental organizations.
3. It was so agreed.
4. The Chairperson suggested that, as in previous meetings, the International Bureau of WIPO participate in its capacity as expert in the discussions regarding the third category of issues, that is the notification and registration procedures.
5. It was so agreed.

B. OBSERVER STATUS FOR INTERGOVERNMENTAL ORGANIZATIONS

6. 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.
7. It was so agreed.

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

General

8. The Chairperson said that, as requested by the Special Session at its September 2002 meeting, the Secretariat had circulated, on its own responsibility, a factual compilation of issues raised and points made so far (TN/IP/W/7). He said that the compilation paper aimed to cover in a balanced way the key points raised by delegations. He expressed the hope that it would prove to be helpful to delegations in providing a comprehensive and accurate portrayal of the state of the work. He suggested that the discussions be structured according to the headings used in the compilation, which actually corresponded to the structure of his List of Points and Issues for Discussion at the June 2002 Meeting (JOB(02)/49). He pointed out that the purpose of the discussion was not to review the Secretariat's paper, but to seek to advance the substance of the negotiations pursuant to the Special Session's mandate. Delegations should, however, feel free to identify any points made which they felt were not adequately presented in the compilation as well as any new points which they would like to see added; they should, however, avoid trying to fine-tune the paper beyond its intended purpose.

9. The representative of the European Communities said that document TN/IP/W/7 was useful, comprehensive and accurate. He agreed with the Chairperson that only new points should be raised. He made two general comments. Firstly, identifying delegations which had raised issues or made points reflected in the compilation would have been helpful to participants in knowing the position of delegations on the various issues. Secondly, some delegations were using "evasive" tactics, claiming that any proposal that did not reproduce the TRIPS provisions word by word was a duplication of existing obligations or a "TRIPS plus" obligation and therefore equal to an amendment to the TRIPS Agreement. For example, paragraph 62, first indent, of TN/IP/W/7 said that the requirements proposed by the EC regarding notifications were considered by some delegations as an amendment to the Agreement although Article 23.4 itself called for the negotiation of a system of notification. For his delegation, notification should be possible without having any "TRIPS plus" obligation or without amending the Agreement. The use of the notion of a "TRIPS plus" obligation was simply misplaced. His delegation would be prepared to accept a revised version of the compilation, but would caution the Special Session against negotiating the substance of the text because this would divert the Session from its real objective, i.e., the negotiation of a multilateral register. He further said that the very fact that the Secretariat was in a position to make a comprehensive compilation illustrated that the issues had been discussed extensively. His delegation did not see that there were many new points to raise in the debate and would abstain from reiterating previous statements. Since delegations did not seem to be providing a common negotiating text, the EC delegation would urge the Chairperson to seriously consider submitting such a text. He recalled that the Chairperson had, in March 2002, envisaged tabling a text either in December 2002 or early 2003.

10. The representative of the United States said that the Secretariat's compilation was comprehensive and represented an exceptional effort to capture the various issues raised and points made. With regard to the mandate, his delegation would have appreciated the paper examining the mandate of Article 23.4 and highlighting the voluntary nature of the system, i.e., that Members would have the option of participating or not. In Annex 2, the excerpt concerning the joint proposal (TN/IP/W/5), as compared to excerpts from other proposals, did not mention the names of the co-sponsors. He also suggested that the ordering of excerpts from documents in Annex 2 be consistent with the reverse chronological order sequence as found in Annex 1.

11. He further recalled that geographical indications were a form of intellectual property specified in Article 1.2 of the TRIPS Agreement, and as set out in the fourth preambular paragraph of the Agreement, intellectual property rights were private rights. The conceptual difficulty expressed by some WTO Members in accepting geographical indications as intellectual property was precisely what led to the challenges delegations were facing in the negotiations under Article 23.4. Some WTO

Members would argue that geographical indications and trademarks were fundamentally different intellectual property rights. As an analytic matter, the premise that they were fundamentally different did not sustain scrutiny. Trademarks were source indicators; geographical indications were also source indicators. Trademarks were quality indicators, so were geographical indications. Trademarks were business interests; geographical indications were also important business interests. It was doubtful that any WTO Member would propose fully financing the trademark application, prosecution, advertisement and enforcement costs of small businesses. Yet that was precisely what Article 23.4 or some WTO Members' proposal would provide for the owner of geographical indications. It was also doubtful that any WTO Member would propose a government-to-government register to select patents, copyrights and trademarks. If protection of only a chosen few was unacceptable for these forms of intellectual property, why then should it be acceptable for geographical indications? The answer was self-evident; it was not acceptable. Individuals, whether natural or juristic, were the right holders; they must decide whether to assert or to challenge rights in the intellectual property field. In the context of intellectual property, the cost of application, prosecution, challenge, enforcement and advertisement were borne by users of the system, not by governments. The role of governments was to provide a fair and level playing field; they should not select an elite view regarding who might take advantage of the playing field that was funded by all. For his delegation, it was clear that the mandate of Article 23.4, when viewed in its proper context, was a mandate to negotiate an intellectual property system for the notification and registration of geographical indications for wines and spirits for those wishing to participate in that system. Presumably, such a treaty would take into account the fact that geographical indications were intellectual property rights and, as such, were private rights and territorial in nature. While his delegation remained committed to the negotiations, it noted that, given the huge philosophical differences among WTO Members, it saw very few areas of common understanding in the negotiations. His delegation therefore urged the Chairperson to proceed cautiously with the preparation of any common negotiating text and not issue one prematurely.

12. The representative of Hungary said that the compilation paper was useful and gave a faithful summary of the views expressed under the four headings of the Chairperson's List of Points and Issues (JOB(02)/49). For the negotiations, the compilation paper should play a different role than a background document: as indicated by previous speakers, the paper gave a reflection of views expressed, and these views were still highly divergent. Under such circumstances, his delegation questioned the utility of again discussing the same questions which were already reflected in the compilation paper. He said that the position expressed by the representative of the United States concerning the nature of the work in the Special Session and the lack of difference between trademarks and geographical indications had been well known for quite a long time. Repeating positions would not take the Special Session anywhere. His delegation had concerns about meeting the Cancún deadline with regard to this aspect of the reform of agriculture. He reminded participants that there was the March deadline in the area of agriculture and that the next Special Session would only be held at the end of April. His delegation was also concerned about the words of caution expressed by some delegations against any meaningful protection and against any initiative by the Chairperson to start looking for a solution which reflected the mandate for these negotiations. This would mean that there was no possibility and even no willingness to move forward with the negotiations in this area. This would have negative consequences on other aspects of the agriculture negotiations. His delegation therefore urged the Chairperson to take an initiative to help participants move forward.

13. The representative of Australia said that the compilation was a useful tool. He made a few preliminary remarks and suggestions. With regard to the mandate of negotiations, he suggested having a clear explanation that the mandate of these negotiations stemmed from Article 23.4 and from the Doha Ministerial Declaration. In this connection, he expressed his surprise at seeing paragraph 10, which had nothing to do with the mandate, and suggested that it be deleted and paragraph 11 be placed more appropriately under the heading "Scope of the mandate". With regard to "Participation", he said that this set of issues had only been briefly discussed at the meetings; it was

an important issue, in particular for those countries which did not have any direct interest in wines and spirits, if the system as proposed by some participants would add burdens. For his delegation and others, the system must be voluntary, and the issue of participation should be discussed further. As to the future work, he said that his delegation was unable, at this stage, to accept the possibility of charging the Chairperson with the task of tabling a negotiating text, even if it were on his own responsibility. There was no agreement on such a possibility. Bearing in mind the substantial concerns mentioned by many countries, particularly developing countries, about how to bring these negotiations to a conclusion, he said that further discussions and a revision of the compilation would be necessary in order to bridge the considerable differences that existed.

14. The representative of Switzerland said that the Secretariat's compilation represented a great amount of work and a sign of the substantive discussions that had taken place last year and even before the Doha Ministerial Conference. His delegation concurred with the delegations from the EC and Hungary on the role of the compilation and would caution the Special Session against treating it as a negotiating text. Any inaccuracies or errors of citation should be brought to the attention of the Secretariat and not become an issue of discussion in the future. The paper itself should be considered as a document for reference and the basis for delegations' work during the second phase of the Chairperson's roadmap, that is the real negotiating phase on a text on a multilateral register, which should have already started. His delegation would urge the Chairperson to initiate as soon as possible the second phase of the process in order to "inject" new dynamism and be able to fulfil the mandate by the Cancún Ministerial Conference. His delegation did not expect from the discussion on the compilation any elements that were not already reflected in the paper.

15. The representative of New Zealand said that the compilation paper should not become a heavily negotiated document in itself. However, this did not mean that it was not an important one. In response to the comments made by some proponents that they had already expressed their positions and would not have any new ideas to contribute, she said that her delegation supported the proposal for a revision of the compilation. As highlighted by the compilation, there were a number of open issues and unanswered questions as well as a lack of clarity with respect to the legal effects of some proposals. She hoped that the compilation paper would not simply be set aside and could remain on the table as a background tool to try and help participants address the issues and reduce the gap in the positions. With respect to future steps, she supported the delegations of Australia and the United States, which had expressed caution about the need for a common negotiating text by the Chairperson at this stage.

16. The representative of Canada associated her delegation with the statements made by previous delegations concerning the compilation. She suggested that a clear reference to the Special Session's mandate should be included, to remove any reference to products other than wines and spirits since the negotiating mandate clearly said that negotiations should concern only wines and spirits. Her delegation also supported the statements made by the delegations of the United States, Australia and New Zealand regarding timing of the presentation of a common negotiating text.

17. The representative of the Czech Republic said that her delegation considered the compilation paper as a useful tool that would enable a good comparison of different positions and thus facilitate further negotiations. It should not, however, be discussed largely in this Session and should only be revised in order to reflect Members' positions more precisely. Her delegation supported the idea of having a common negotiating text as soon as possible.

18. The representative of Malaysia said that the value of the compilation paper lay in giving Members a structured ordering of the issues raised as well as arguments for, and rebuttals against, the proposals. Her delegation was of the view that for many delegations with very little experience of geographical indications this document would enable them to understand the technical arguments that were being put forth. In a way, this paper was a valuable technical assistance tool that would assist many developing country delegations to grasp the issues relating to these negotiations. It was

important for developing countries to understand the legal effects or any additional obligations that might arise. For her delegation, any additional comments made in the course of this meeting should be reflected in an updated version of the paper. There were some issues that could be elaborated further, such as the question of participation and legal effects of the multilateral system.

19. The representative of Argentina said that the compilation was a comprehensive paper and was a good presentation of arguments put forward by delegations. In a preliminary observation, she said that some of the issues included in the paper could be better reflected and some chapters or paragraphs should be reorganized. As indicated by the delegation of Malaysia regarding the importance of the paper, her delegation was of the view that it was not a mere compilation, but rather a synthesis of the discussions, which could be useful to delegations that had not been involved in all the meetings. It could not therefore be put aside and should be updated. Her delegation also associated itself with the concerns expressed by the United States, Australia, New Zealand and Canada about the Chairperson tabling a common negotiating text. She said that those delegations saying that the debate had been exhausted implied thereby a lack of will to negotiate and to find ways of bridging the gaps that persisted.

20. The representative of Chile said that the document was a useful one and should be kept updated to take into account any new comments and proposals. His delegation would have liked to have seen more emphasis on the voluntary nature of the system and the legal consequences of each of the proposals for developing countries. As indicated by other delegations, it was clear from the Secretariat's document that there was still much to be discussed and defined. His delegation therefore believed that it would be premature to submit a common negotiating text.

21. The representative of Uruguay associated her delegation with the statements made by the United States, Australia, Canada, New Zealand, Argentina and Chile, cautioning the Chairperson against prematurely tabling a common negotiating text.

22. The representative of Malta said that the compilation showed that the Special Session had had a comprehensive and exhaustive discussion and, as pointed out by the EC representative, delegations should refrain from negotiating on the substance of the paper, which should only be updated if they thought it was appropriate. His delegation was of the view that a text from the Chairperson was necessary to enable the Special Session to switch from a study mode to a negotiating one and thus fulfil its mandate by the Cancún deadline.

23. The Chairperson took note of the statements made. He reminded participants that the purpose of the meeting was not to negotiate the compilation and would encourage delegations not to repeat their positions and to try to move forward to generate creative suggestions. As had been noted, positions remained quite divided. There was still a substantial amount of ground to cover and the deadline was looming large. The Special Session had a very clear mandate, which was to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. The Special Session should fulfil its mandate in its entirety and not go beyond it, as he had previously said and as is reflected in paragraph 11 of TN/IP/W/7.

24. The representative of Hungary agreed with the Chairperson that the purpose of the meeting was not to negotiate a compilation paper, but to have a multilateral system of registration. He was, however, concerned about delegations mentioning further examination and revision of the compilation paper, including suggestions for deleting certain paragraphs. He believed that this would lead to deadlock. He agreed with the delegation of Malaysia and others that the compilation document was an excellent summary of all the views, and would help Members, in particular developing countries, understand and follow the negotiations. He did not think that there was much to be said because the basic positions were rather rigid. It was also his understanding that the compilation paper was very similar to the background papers in the area of agriculture, which had not

been negotiated nor revised but had been followed by a very ambitious draft by the Chairperson on modalities. He hoped that the Chairperson of the Special Session would issue a draft of a similar level of ambition regarding the multilateral system.

25. The representative of the European Communities said that regularly updating the compilation would not be the proper way of achieving a result by the Ministerial Conference in September 2003. He said that delegations might have different views and dislike certain parts of a document. This would not, however, authorize them to ask for a deletion of paragraphs which were a fair description of the state of play. While his delegation would certainly agree that factual errors be corrected and presentation of points be improved if necessary, it could not accept that certain points like paragraph 10 be simply deleted because some delegations had different views regarding a substantive point.

26. The representative of Australia disagreed with previous speakers that the Chairperson should proceed with the tabling of a common negotiating text because they thought that discussions had been completed. For his delegation, to say that the Special Session had finished exploring all issues was factually wrong; the process of negotiation was not over. The main difference between these negotiations and those on agriculture was that Members had explicitly agreed last year that the Chairperson of the Special Session of the Committee on Agriculture would come forward with a paper. Nothing of this kind had been agreed by the Special Session of the TRIPS Council. He was not foreclosing the possibility of a paper by the Chairperson, and was only questioning that it was the appropriate time for such a paper. He hoped that the Secretariat would establish a revised version of the compilation to take into account his delegation's concerns about the mandate: in other words, the revised text should not contain any reference to products other than wines and spirits as far as the mandate of negotiation was concerned.

27. The representative of the European Communities recalled that the delegation of the Czech Republic had specifically mentioned other products than wines and spirits and this was reflected in the minutes (TN/IP/M/2, para. 24). To agree to Australia's suggestion that anything not agreed should not be reflected in the compilation would in practice mean that the entire document could be withdrawn.

28. The representative of Argentina said that the document should reflect the positions of Members on the mandate; however, her delegation disagreed with the way the point relating to products other than wines and spirits appeared in the document, leaving some doubts as to whether it was in the mandate or not.

29. The representative of Hungary said that, if the agriculture mandate did contain a deadline, there were not so many other areas of negotiation with specific deadlines for the intermediate steps. For example, the negotiations regarding the Dispute Settlement Understanding (DSU) had one single deadline. Nonetheless, the Chairperson of that negotiating body was going to put forward at an early stage a draft with a view of breaking the deadlock: this would be on his prerogative because he had not received specific permission from the Members. With regard to paragraph 10 of the compilation paper, he said that the multilateral system should be suitable enough to include other items in the future.

30. The representative of Australia said that he did not object to the Chairperson having a role to play in breaking a deadlock. What he wanted to underline was that in agriculture there had been agreement from the outset that the Chairperson of the Committee on Agriculture would table a text. In the DSU negotiations, there had seemed to be no opposition to the Chairperson tabling a text. In other words, it was necessary to have in each group some form of consensus about the Chair's action. The moment a negotiating body came to a deadlock might be the appropriate time. For his delegation, this was not yet the right moment for the Special Session of the TRIPS Council. On paragraph 10, if Hungary thought that the multilateral system could also cover some other products, this could appear in the minutes. It could not be included in the kind of document that would aid the negotiations such

as the compilation paper in a paragraph placed under a separate heading "Products other than wines and spirits" and preceding paragraph 11, which reflected the ruling by the Chairperson that the mandate of negotiations concerned exclusively wines and spirits.

31. The Chairperson recalled that, as indicated in paragraph 3 of TN/IP/W/7, the compilation was a summary of issues and points and could not be a full reflection of all the documents or interventions made in the past years. For a full appreciation of the position of a particular Member, a list of documents issued was attached in Annex 1. When the Special Session agreed to ask the Secretariat to prepare this document, it had not expected that the compilation would be the main objective of the Session. It was envisaged to have the paper as an aid for future negotiations. For that reason, the paper was to be prepared under the responsibility of the Secretariat. If there were any factual errors or inaccuracies and if there were new suggestions or ideas in the course of the meeting, the Secretariat would make, under its own responsibility, a revision. He recalled the clear mandate given by Ministers and said that from his point of view the Special Session had not made the necessary progress and would therefore need to "change gears" in the future.

Definition of the term "geographical indications" and eligibility of geographical indications for inclusion in the system

32. The Chairperson recalled that, as pointed out at the June meeting last year and as reflected in paragraph 14 of the compilation, he had not detected any delegation questioning that the definition of geographical indications that should be used was that contained in Article 22.1 of the TRIPS Agreement. He had also not detected any disagreement with the proposition that, in determining eligibility, the exceptions provisions of Article 24 would be relevant. That included the notion that, to be eligible for inclusion in the multilateral notification and registration system, a geographical indication should be protected in its country of origin.

33. The representative of Australia recalled that his delegation had been raising a number of questions on the issue of traditional expressions, which were common or generic expressions, ordinary everyday English adjectives or descriptive terms such as "chateau", "vintage", "ruby" or "tawny". There were similar everyday terms in other languages such as Spanish or Portuguese. His delegation had been asked why this question was relevant to these negotiations and it had made the answer clear. First, these questions stemmed from Australia's concrete experience with bilateral agreements in the area of wines and spirits, particularly its negotiations with the European Communities. That experience indicated that where geographical indications went, traditional expressions invariably followed. The reality was that proponents of an expensive, highly regulatory wines and spirits register had required Australia to include traditional expressions on the wines and spirits registers it had negotiated. As a result, traditional expressions had found their way onto the wines and spirits registers of a number of the New World wine producing Members. Australia wanted to ensure that they did not find their way onto the wines and spirits register the Special Session was negotiating multilaterally. Second, Australia's concern was exacerbated when it read public comments by the European Commissioner for Agriculture last year that some of these ordinary everyday words were so closely linked to geographical indications that they had in fact become geographical indications. Australia assumed that this meant, from the perspective of the proponents of the more burdensome wines and spirits register, that traditional expressions might be eligible for all the benefits that it agreed to give only to geographical indications, including benefits stemming from inclusion on a multilateral register for wines and spirits. Third, and contrary to statements that might suggest otherwise, there had been legislative attempts by a group of Members to protect some traditional expressions as if they were geographical indications. For example, Article 24 of the EC Wine Regulation (No 753/2002) required certain traditional expressions to fulfil a specific set of conditions set out in the Regulation, including that the traditional expression identified "a wine as originating in [a] region or locality within the territory of the Community, where a given quality, reputation or other characteristic of the wine, as expressed by the traditional term concerned, [was] essentially attributable to the geographical origin". Against the background of these practices, his

delegation had asked a number of questions to the proponents of GI extension whether they considered traditional expressions intellectual property. For Australia, they were not. His delegation also asked these delegations whether the TRIPS Agreement had any relevance to traditional expressions. For Australia, it was not of any relevance at all. His delegation had also asked whether a traditional expression could be a geographical indication. In other words, could ordinary adjectives in English, French or Spanish become geographical indications? For Australia, they could not, presently and in the future. The responses received to these questions from advocates of the more burdensome wines and spirits register had been carefully catalogued by the Secretariat in paragraph 25 of document TN/IP/W/7. The first response and the first sentence of that paragraph 25 said that "traditional expressions [were] attached to wines bearing a geographical indication and there [was] therefore a distinction between 'traditional expression' and a 'geographical indication'". His delegation had pondered over this and suggested that delegations look carefully at what these responses did not say. There was no mention of what the distinction between a traditional expression and a geographical indication actually was. The answer given fell short of saying that one term constituted intellectual property while the other did not. Secondly, these were terms which could only be used with a wine bearing a specific geographical indication. They could not be used with any other term. They could not be used by themselves. They could gain, de facto, each and every one of the benefits a country might agree to give only to the geographical indication with which it was associated. There was no mention of how to overcome this problem. Nor was there any mention of the fact that traditional expressions were going to be completely irrelevant to any discussion of the multilateral register for wines and spirits geographical indications that the Special Session was negotiating. The second response to his delegation's questions (second sentence of paragraph 25) caused even more concern to his delegation. The response was: "since traditional expressions [were] not protected as geographical indications in their country of origin in accordance with Article 24.9, they would not be eligible for notification under the multilateral system". Given the terms of the EC's latest attempt at a wine labelling regulation, his delegation remained unconvinced by this answer as a clear statement of fact. Article 24.9 of the TRIPS Agreement, which said that "there shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country", was clearly relevant to geographical indications only. Yet, the EC appeared to be saying, when they invoked Article 24.9 of the TRIPS Agreement, in response to Australia's questions about traditional expressions, that: firstly, the TRIPS Agreement was relevant to the issue of traditional expressions; and secondly, that Article 24.9 applied to traditional expressions in the same way that it applied to geographical indications. So, his delegation was left wondering what other Articles of the TRIPS Agreement the proponents of the more burdensome wines and spirits register thought should apply to traditional expressions. His delegation could think of many reasons why traditional expressions should not be and should never be eligible for notification under a wines and spirits register: firstly, traditional expressions bore no recognized relationship to geographical indications of relevance to the negotiations on the wines and spirits register; secondly, they should therefore not benefit either de facto or as a matter of substance from any protection the Special Session would agree to give geographical indications because no participant had agreed to give away these benefits; and thirdly, no Article of the TRIPS Agreement applied to any words considered by one or two Members to be traditional expressions. Previously, his delegation had suggested a way of registering Australia's concerns in relation to these issues by using a footnote. It would, therefore, propose such a footnote, which would clearly clarify any ambiguity about the relationship between traditional expressions and geographical indications and read as follows:

"Members agree that so-called traditional expressions, or any other analogous term, are not intellectual property. Intellectual property rights cannot vest in these terms. It is further agreed that these terms do not and could never meet the definition of a geographical indication or ever be subject to the protection conferred on geographical indications in Section 3 of Part II of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights. Accordingly, Members further agree that no claim will be made during or after the negotiations that a

traditional expression meets the definition of a geographical indication or that a traditional expression is subject to the protection conferred under Section 3 of Part II of TRIPS".

34. The representative of the United States said that it was clear from discussions that the Special Session must reach a further understanding of the scope and operation of Article 22.1 of the TRIPS Agreement to determine what would be covered by a multilateral system for wines and spirits. This was particularly true in light of the discussions regarding the eligibility for notification of traditional expressions, country names and non-geographical terms as geographical indications. For this reason, his delegation supported the footnote proposed by Australia. Without a clear understanding of what was eligible as a geographical indication under the system, discussions of the purpose of the system, its legal effects and procedure would take place in a vacuum. Disputes over eligibility of a notified term should be resolved under national law as the territorial nature of geographical indications was reflected by the terms "in the territory of that Member" in Article 24 of the TRIPS Agreement.

35. The representative of New Zealand said that her delegation shared the analysis made by Australia with respect to traditional expressions. Her delegation did not want to see these terms included in the register and considered them as being outside the mandate of the Special Session. Referring to paragraph 11 of the compilation, which reflected the reassurance given by the Chairperson concerning the mandate of the negotiations, she said that her delegation hoped that a similar clarification would be given with regard to traditional expressions. In this respect, she thought that the Australian proposal could help achieve such clarification. She further added that the proposal made by Australia was an excellent indication of the value of the compilation document: paragraph 25 had prompted the Australian delegation to table a new idea, which could help forward the negotiations. With regard to the second sentence of paragraph 25, she said that the content of this text seemed to indicate that, if a country decided at the domestic level through a domestic regulation to protect traditional expressions as some form of geographical indication, then its intention would also be to put these traditional expressions on the register. For her delegation, this was a point of concern, which would need further clarification.

36. The representative of Switzerland said that it would not be easy to accommodate the proposal made by Australia because it was drafted in treaty language, and hoped that such a proposal would be made at a more appropriate place and time. As repeatedly mentioned by his delegation on previous occasions, the definition of geographical indication as contained in Article 22.1 covered not only geographical names such as "Bordeaux" or "Havana", but also so-called "traditional designations", which were not the same as traditional expressions. Traditional designations were names which did not refer to an existing geographical place with that name, but entailed a geographical reference, since they were only used according to a practice or regulation for products having a specific origin conferring on them a given quality, reputation or other characteristics as stated in Article 22.1. These traditional designations which qualified as geographical indications under the definition of the TRIPS Agreement must clearly be distinguished from so-called "traditional expressions", which did not fall under the geographical indication definition of Article 22.1. He said that this understanding could be introduced into a draft common negotiating text, but not in a compilation paper.

37. The representative of the European Communities said his delegation concurred with the Swiss delegation's statement, in particular the point that the language as proposed by Australia could be considered when the Special Session came to consider a negotiating text. Whether participants could agree to it was another question. He reiterated that traditional expressions did not fall under what his delegation understood as being geographical indications. Regarding the second part of the Australian proposal for a footnote, he expressed doubts that the Special Session had a mandate to decide what would constitute a form of intellectual property.

38. The representative of Argentina said that her delegation had already stated that traditional expressions did not fall within the definition of geographical indications. In spite of the replies, there was still some ambiguity. She disagreed with the delegation of Switzerland regarding the timing of the Australian proposal. On the contrary, because there was no agreement on a point, delegations should first find common ground. What Australia was trying to do was to bridge the divergence. If, as stated by some delegations, traditional expressions were not geographical indications, she wondered then why it would be a problem having a footnote as proposed by Australia.

39. The representative of South Africa asked the delegation of the European Communities to confirm that paragraph 25 accurately reflected their position.

40. The representative of Australia asked the delegation of the European Communities to confirm that the multilateral system would never cover traditional expressions and that it had no problems with his proposal for a footnote. He could agree that the revised version reflect the content of his delegation's proposal and contain a reference to the proposal he had made.

41. The representatives of Argentina, Australia, Peru and South Africa asked the delegation of Switzerland to give clarifications regarding the meaning of "traditional designations" or "traditional denominations".

42. The representative of Hungary said that there should not be any new definition of a geographical indication apart from the current one under Article 22.1 of the TRIPS Agreement. One requirement for a term to be able to be used as a geographical indication was that there be a linkage between, on one hand, a specific geographic area, which might be a country, region or a small locality, and, on the other hand, a given quality, reputation or other characteristics of the good. He said that, since there had been no disagreement on the definition of Article 22.1, he did not see the need for any disclaimer. He pointed out that paragraph 24 of TN/IP/W/7 had already reflected the Australian proposal by saying that "a footnote clarifying that a traditional expression was not a GI should be provided". With regard to a requisite that a geographical indication should be protected in its country of origin, he noted that it would seem that there was so far agreement. He recalled that his delegation was seeking clarification from countries which did not have national specific registration systems for geographical indications and might have certification mark systems only or possibly none of these. How would it be possible for national authorities to ascertain at the national level that a name was protected? For his delegation, this would be an area where progress could be made.

43. The representative of Switzerland said that "traditional designations" (or "traditional denominations") were a category of geographical indications. They were different from traditional expressions. They were names which were not themselves geographical terms, but entailed a clear reference to a geographical place or area, such as "Tête de moine" for a special type of cheese or "Basmati" for rice coming from the Sub-Himalayan region; they were described in the compilation paper as "non-geographical names".

44. The representative of the European Communities, in response to the question posed by the delegation of South Africa, confirmed that the Secretariat had correctly reflected the statements made by his delegation on this issue in paragraph 25 of TN/IP/W/7. He also confirmed at this stage that the European Communities had no intention of ever notifying traditional expressions under the future multilateral system. Turning to the Australian delegation's proposal for explicitly excluding traditional expressions from the register, he asked that delegation whether or not it could confirm that certification trademarks were not geographical indications and could not be registered. For his delegation, the question was whether it was really useful to embark on a definition, be it as a footnote or elsewhere, of what precisely should be covered. How long would the list be? If the Special Session were to adopt a "negative" definition, his delegation would like to exclude certification trademarks from the register.

45. The representative of Australia, in response to Hungary's question, said his delegation was simply highlighting the fact that it would make a proposal. For his delegation, the discussions in 2002 on definition had been helpful. However, they had left participants with unanswered questions: What was a geographical indication? Did it include a country's name or not? Was it only used when the country was small? Could it be used to designate Japanese sushi or Chinese tea? With regard to traditional expressions, whilst he could accept the EC's statement that they had currently no intention of notifying these expressions in the register, he had no certainty about that. If the register was designed on the basis of the EC approach, there would be endless discussions between Members as to what a geographical indication was, to its eligibility for protection and other issues. He cautioned Members who did not have a direct interest in the trade of wines and spirits that they should think very seriously about what this register would imply because, as the demandeurs had made clear, they wanted it to apply to all products. In light of this, his delegation was trying to narrow down the scope of potential dispute. If the EC and Swiss delegations did not have any problems with traditional expressions, he would then suggest agreeing to the proposal he had made. With regard to certification marks, he would not mind having them excluded too, except if this had an impact on the legal effect because in Australia geographical indications were protected under the certification mark system.

46. The representative of India said that Article 22 not only provided a definition, but also provided for protection. His delegation did not agree to having any footnote which would prejudice the interpretation of existing rights under Article 22. In other words, any attempt at drafting an interpretative footnote must take into account what Members were already enjoying under Article 22.

47. The representative of Argentina asked the Swiss delegation whether "geographical indications" contained geographical names and whether those terms that did not contain geographical names would come under some other category. With respect to "traditional expressions", she said that this concept did not appear in the TRIPS Agreement or any other agreement or international rule. Her delegation's concern was that generic names or commonly used words would be covered by the future system. The concept of "traditional expressions" had been coined by one Member in its own legislation and these terms should not be registered in the multilateral system on the pretext that they were protected at the national level. Argentina could not accept that this type of distortion affecting geographical indications at one Member's level be transferred to the international level. Such systems were causing problems in the negotiation of the multilateral system. Although she appreciated the assurance given by the EC delegation that they did not intend to register traditional expressions, she wondered what would happen if in the future a Member protected a traditional expression as a geographical indication. In other words, what caused concern to her delegation was whether or not traditional expressions were protected at all as geographical indications.

48. The representative of New Zealand said that paragraph 14 of the compilation paper reflected a concluding remark made by the Chairman that "he did not detect any disagreement with the proposition that in determining eligibility, the exceptions provisions of Article 24 would be relevant. That included the notion that to be eligible for inclusion in a multilateral notification and registration system, a GI should be protected in its country of origin". Although this had effectively been said by the Chairperson, she wondered whether this remark could in fact be aligned with the actual language in Article 24.9, where the reference was made to "geographical indications" in general, using the plural form.

49. The representative of the European Communities reiterated that his delegation had no intention, currently or ever, to notify traditional expressions. He also confirmed what was reflected in paragraph 25 of TN/IP/W/7, namely that traditional expressions were not geographical indications. He was slightly puzzled that some delegations were attempting to narrow down as much as possible the flexibility for Members with regard to the TRIPS Agreement and asked whether Members would also be faced in the future with similar attempts to define whether or not business methods were patentable and whether or not olfactory signs were protectable as trademarks.

50. The representative of Argentina associated her delegation with the comments made by the European Communities and India in respect of the need for keeping the existing flexibility of the TRIPS Agreement. However, she was surprised that the EC delegation claimed that others were trying to limit the flexibility while its proposal had wiped out all the flexibility available to Members under the exceptions in Article 24, by delegating the competence of national authorities to the multilateral system. She believed that India was referring to the idea of a register that respected the flexibility of the Agreement and did not add additional burdens to countries.

51. The representative of the European Communities said that he was referring to Article 22.1 whilst the delegation of Argentina addressed another issue, that of exceptions. With regard to exceptions, his delegation had never said it would not show flexibility in this respect; exceptions would continue to apply.

52. The representative of Argentina said that full flexibility should be applied as regards the definition and be more restrictive regarding the actual exercise of the rights, i.e., the exceptions under Article 24.

53. The representative of Hungary said that the discussion at this meeting clearly showed that a discussion on general issues or on concepts would not lead the Special Session anywhere. In his view, it was time for delegations to have a text in treaty language and then raise questions if necessary. He reiterated his queries about the situation in countries where there was protection without pre-conditions, no registration system for geographical indications or no procedure for ascertaining whether or not a term met the conditions of Article 22.1.

54. The representative of Australia thought that India disagreed with his delegation's proposal only because it was limited to wines and spirits. He further said that, if Australia's proposal was considered by some delegations as restricting the flexibility contained in the TRIPS Agreement, then the Special Session should look at whether this proposal did in any way have an impact on Article 22. However, the real point he was trying to make was that the trust had been undone when the European Union had presented a draft regulation on wine that clearly protected terms which did not fall within the definition of geographical indications. Australia's concerns stemmed from the fact that bilateral agreements concluded by the European Communities with several countries covered simple common English language terms (or common terms in French and Spanish) that the EC wanted to protect. Because of the lack of trust, of understanding and of the degree of confusion and ambiguity as to what a geographical indication was, he simply wished to make clear to delegations that they should know what they had to agree to. For this reason, he had proposed a footnote but would be open to any other suggestion.

55. The representative of Hungary pointed out that precisely those proposals made by the EC and by Hungary would cover cases that had been raised and would genuinely "facilitate" the protection of geographical indications. He failed to understand why Australia was supporting a database system which would not help to clarify such notions at all.

56. The representative of Australia referred to the latest agreement between the delegations of Chile and the EC, which contained 250 traditional expressions including such terms as "noble", "superior", "crème", "chateau", "ruby", "tawny", and "vintage". What he was seeking was a clear understanding of whether or not the system which was to facilitate the protection of Article 23 for wines and spirits would cover a potential list of 250 terms, many of which were just simple English terms, in the definition of geographical indications. The issue was simple: what did participants mean by "geographical indications"? He expressed concern that the longer the discussions were, the greater the confusion was, and that new burdens and obligations on Members were being added. He wondered how countries would be able to implement in their own legislation new obligations to cover thousands of geographical indications and traditional expressions.

57. The representative of the European Communities said that this way of discussing issue by issue, i.e. traditional expressions first and then non-geographical names, country names and specific names could prolong the discussions until 2005.

58. The representative of Chile said that the fact that the Special Session was stuck on one point only clearly showed that it was necessary for this point to be discussed further. It was important to have a broad definition of geographical indications or a strict one with all the exceptions under Article 24. A strict definition of geographical indications would perhaps be irrelevant in a system such as that put forward by Chile and other Members. Under the EC's proposal, the definition of a geographical indication would be increasingly relevant and necessary. The legal implications of that proposal were considerable and went beyond any other intellectual property category and notification requirements in the treaties administered by WIPO.

59. The representative of Argentina associated herself with the comments made by the delegation of Chile in respect of the legal repercussions of each proposal. What raised concern was the fact that the future register would apply retroactively. It was as if a country, which was party to an international register for patents, was asked by another country to extend the scope of patent protection, thus forcing that country to withdraw from the public domain and in many cases expropriate rights legally held by other persons. It was important that participants could measure the repercussions of every issue within each proposal or at least understand the rationale behind each proposal. Argentina could not be accused of delaying the negotiations or of supporting a single option. Obviously, there was a great margin of flexibility within the TRIPS Agreement regarding the protection of geographical indications. Because there was no international harmonization for the time being, it was unavoidable that discrepancies existed regarding definitions and other issues. Her delegation did not question the differences between national laws because it held the view that under Article 1.1 of the TRIPS Agreement, Members had the sovereign right to grant the type of protection they thought appropriate. It did not, however, want to see the flexibility afforded by the TRIPS Agreement being curtailed; in other words, national legislation should be abided not only in terms of definition, but also in all the other aspects such as exceptions to Article 24 and the legal effect of the register. Her delegation was not negotiating the balance struck in the Uruguay Round under Article 23 with this multilateral register.

60. The representative of the European Communities reiterated that his delegation was not seeking to extend any protection which currently had to be available under the TRIPS Agreement. Geographical indications of the European Communities must be protected under Article 23 regarding wines and spirits and under Article 22 regarding other products. The same applied to other Members.

61. The representative of Hungary said that some delegations kept reverting to issues which had been discussed at previous meetings. Chile had mentioned the need for a definition of geographical indications while there was already an undisputed definition under Article 22.1. Argentina had expressed concerns about the retroactivity of Article 24 while it was clear that exceptions would continue to apply. Concerns had been voiced regarding attempts for harmonization while the purpose was only to facilitate protection. He wondered whether all these arguments were made only to delay matters.

62. The representative of Chile said that he did not want a new definition but only further discussion. The proposal made by the EC and the joint proposal had different effects, which had to be clearly defined.

63. The representative of China said that the Special Session would never be able to reach agreement on a definition because of limitations posed by languages. The same problem occurred with patents, copyright or trademarks and continuing the discussion on definition would cause more confusion.

The purpose of the notification and registration system

64. The representative of the United States said that the purpose of the system was not to impose new substantive obligations regarding the protection of geographical indications. Instead, the system was supposed to facilitate protection based upon the existing obligations negotiated during the Uruguay Round as set forth in Section 3 of Part II of the TRIPS Agreement and not to increase that level of protection. The system should recognize and accommodate the various regimes of WTO Members for the protection of geographical indications described in the responses to the Article 24.2 questionnaire. The system should be simple and inexpensive for those who chose to participate. The system should allow WTO Members and others to access and use the information submitted without undue burdens or cost.

65. The representative of Canada said that her delegation was quite convinced that the joint proposal would facilitate the protection of geographical indications by giving producers relevant information enabling them to make well-informed choices. Producers of wines and spirits did not act in bad faith: it was in their interest to choose non-contentious names. Certain wine producers in Canada had in the last few years been obliged to change the names of their products, entailing various consequences, especially in terms of the labelling and marketing of these products under a new name. Easy access to information would help protect them from such experiences. The system under the joint proposal would do this, therefore contributing to the protection of existing geographical indications.

66. The representative of the European Communities, in response to the intervention made by Canada, gave reasons why his delegation thought that the proposal for a database without opposition would not facilitate the process. On the contrary, it would add more confusion. For example, under the joint proposal, any Member could place in the database a geographical indication even though the name could not be protected in some other Members, for example on the ground that it had become generic. As there was no opposition mechanism permitting registered names to have an annotation indicating countries in which protection was not available, any administrative authority or court of those other Members would be in the odd position of having to refer to the lists and potentially to decide on protecting a geographical indication which was on the list. In other words, the authorities would not know whether or not inclusion in the database was a reliable source of information to be able to conclude that the geographical indication had to be protected in their country.

67. The representative of Malaysia reiterated that her delegation supported a simple and inexpensive notification and registration system that was easy to maintain. Furthermore, the establishment of such a system should not enhance, or add to, the existing level of Members' obligations as far as their participation was concerned. However, her delegation recognized that some obligations did exist but only in relation to the administration of the system. Even in that event, a simple notification and registration system should not have legal effects *vis-à-vis* non-participating Members. The purpose of facilitating the protection of geographical indications could be achieved by enhancing the transparency of the system for wines and spirits in Members' territories. The system should be a global reference for geographical indications protected in Members and offer opportunities for Members to be aware of competing geographical indications and hence allow for challenges under the applicable national laws.

68. The representative of Japan said that, as one of the co-sponsors of the joint proposal, his country believed that the purpose of the multilateral system was only to facilitate the implementation of the existing level of protection of geographical indications. Therefore, the mechanism to be built up was not to impose new or additional obligations on any Member. Japan fully endorsed the comments made by the United States delegation.

69. The representative of Australia expressed support for a simple, inexpensive and easy-to-maintain system, which had been suggested in the joint proposal. This would not be the case with the proposal for a system with a complicated opposition procedure. Furthermore, his delegation held the view that the opposition procedure could not be separated from the issue of costs. He noted on the basis of the Secretariat compilation that proponents of the opposition procedure wanted the system to automatically implicate all Members. With regard to the reversal of the burden of proof, there had been a lot of discussion in the Special Session: Australia had made it clear that it did not see any mandate or any need for altering the existing rights and obligations found in the TRIPS Agreement. Such a reversal would shift the burdens of the system from one set of producers with many geographical indications to protect to another set of producers with very few geographical indications to protect. This would be contrary to the mandate for this negotiation, and would also not be justified. It would not be acceptable to Australia.

70. The representative of the United States, responding to the delegation of the European Communities on the joint proposal, said that Members that chose to participate would commit to consult the database in order to make determinations under their own domestic laws. If a particular term that was on the database was generic, for example in the United States, then a trademark examining attorney in the United States would be able to take that into account.

71. The representative of Switzerland said that Article 23.4 did contain the obligation to negotiate a system which facilitated protection. In itself, this was an obligation and a guideline for Members in their negotiations. For actually facilitating the protection, the system must have some legal effect. The reversal of the burden of proof would not be an additional obligation on Members' governments but would simply enhance the position of legitimate users of geographical indications in enforcement procedures against illegitimate use of such geographical indications.

72. The representative of the European Communities, following the example taken by the delegation of the United States, asked what the value added would be of a database system if a Member had no idea as to what was considered to be generic in a given country. It would be next to zero. In the current situation, a Member already knew what its own geographical indications were and did not need a multilateral register for that. What would be interesting would be to see the overall picture in terms of where exceptions had been granted or requested by countries, and that would be precisely the role of the register. Under the joint proposal there would not be any guarantee: a judge would use the database as the first source of information, i.e., as an indicator regarding the status of a name, but he would have to conduct further research.

73. The representative of Argentina said that the compilation paper should contain an additional item concerning legal effects on all WTO Members, participating or not. She further associated her delegation with Australia's comment that the reversal of the burden of proof would be an additional obligation; this point had been correctly reflected in the compilation paper.

74. The representative of the United States, in response to the EC's statement, said that the system under the joint proposal would facilitate consideration that terms in the database were not those that were being protected. If a term that was generic in the United States remained on the database, that would be perfectly consistent with Article 24.6, which required determination of the generic character of a name on the basis of American law. A trademark examining attorney would not grant a right where it should not be granted: in this regard, the database would help him determine and hence facilitate protection of geographical indications.

75. The representative of New Zealand said that the Special Session was facing an awkward situation where participants were trying to determine what would meet the mandate in terms of facilitating protection without actually going beyond that mandate. She wondered whether it might be helpful to consider the concept of facilitating protection within the framework of Article 23, which was about according right holders the legal means to prevent uses such as inappropriate use or

registration as trademarks, and not about protection of geographical indications in situations outside those scenarios.

76. The representative of Australia, in support of the intervention made by the United States, cited the example of a company which had registered in the Netherlands a trademark called "Australia Home Made", using Australian indigenous designs, motives, symbols etc., on products. The Australian authorities objected to the registration of the trademark because it was using Australian symbols and symbols of Australian indigenous societies, which the Netherlands Industrial Property Office was not aware of because of the lack of an international register to refer to. For his delegation, this example was a typical case in point showing that the kind of register proposed by the joint proposal could facilitate protection.

77. The representative of Chile, referring to the EC's arguments reflected in paragraph 41 of the Secretariat compilation that the system proposed would facilitate protection in avoiding costs for litigation, asked why priority had been given to one category of intellectual property rights (geographical indications) over others like trademarks. A system as compelling as that proposed by the EC would imply the end of national protection systems, preventing countries from applying their national laws and from deciding which trademark, patent or geographical indication to protect.

78. The representative of the European Communities, building up on the example of "Australia Home Made", said that, if that name was deemed generic by a trademark examining attorney at the United States Patent and Trademark Office for example, it would nevertheless, under the database system, remain in the register without any annotation. In that event, would a judge in the state of Maine be able to determine whether or not he would have to protect that name? That was the reason why his delegation believed that the database system was not a reliable source of information. Furthermore, the trademark examiner in the Dutch Patent Office would be perfectly entitled to ignore the information contained in the database register because it did not entail any binding legal effect. That was exactly the point his delegation was making regarding the lack of added value of such a system. With regard to the Chilean delegation's remark, he said that the EC proposal did not create an obligation: if a WTO Member notified a geographical indication, other WTO Members could decide whether or not to protect it and whether or not they were in a position to protect that name according to their national laws. Once they had made that determination, they would be able to issue a challenge that clearly indicated that the registration at the international level would have no effect in their territory. He would not agree with statements made that, under the EC proposal, determination concerning the protection of a name occurred at the international level; such determination would only take place at the national level, in the same way as under the Madrid Agreement or any other WIPO registration treaty.

79. The representative of Chile said that, if a country did not challenge a notified geographical indication within 18 months, it would be obliged to protect it. This was a clear legal consequence. With regard to the argument that a database register would not give much protection, he pointed out that the system proposed was more ambitious than the WIPO treaties, which only bound those participating countries.

80. The representative of Australia said that the final word should lie with the national authorities.

81. The representative of Hungary associated his delegation with the comments made by Switzerland that the reversal of the burden of proof would not create any new substantive obligations for Member governments, unless a government owned the enterprises that were using geographical indications registered by others in the multilateral registry. In response to the comment by Chile, he said that the legal effect flowing from the register would be a rebuttable presumption of eligibility for protection, which would not take away the right of governments or national authorities to make the final determination of whether or not a term or sign fulfilled the requirements under Section 3 of

Part II of the TRIPS Agreement. Finally, in order to avoid repeating views, he recalled that his delegation's position had been reflected in paragraphs 26, 45 to 47 of TN/IP/M/4.

82. The representative of the United States said, in response to the argumentation by the EC delegation on the "Australian Home Made" case, that a plaintiff would not challenge the registration of the mark based on terms in a multilateral register. If the term was generic, the mark would simply be invalidated because of its generic nature. There would not have to be any determination of what was in the database. The judge would not have to consider that aspect.

83. The representative of the European Communities asked the United States delegation whether the judge should rely on the register. He thought that under the joint proposal all national authorities would have to look at the register.

84. The representative of the United States said that in a civil action an element would only be considered in a court of law if it were raised by the parties. If it was not relevant in a law suit or in an invalidity proceeding, it would not be decided by the fact-trier. If it was relevant, it would be considered. If a person challenged a geographical indication in a national court and invoked, for example, the existence of a prior right based on a name listed in the multilateral system, then it would go without saying that the fact-trier would have to consider what was in the multilateral system.

85. The representative of the European Communities said that he understood that national authorities under the joint proposal were supposed to look into the lists. The only point he was trying to make related to the situation where there would be two opposite decisions by two different authorities in the same country; for example, a judge in the United States might determine that a name was protectable, contrary to a decision made by the United States Patent and Trademark Office. In that regard, his view remained unchanged that information given so far on the database system was confusing. The discussion had highlighted the problem: under the joint proposal, there was no certainty as to what protection might or might not eventually be available, which worsened his delegation's view. In response to Chile's comment, he reiterated that the EC proposal only required Members to provide a presumption of eligibility for protection under national law, which could be reversed in national courts or administrative bodies. To say that this would go beyond any WIPO treaty was inaccurate.

86. The representative of Argentina pointed out, in response to a comment made by Hungary, that the reversal of the burden of proof was specifically mentioned in Article 34 relating to process patents but not in other provisions of the TRIPS Agreement, such as Article 43 relating to evidence.

87. The representative of Australia asked what would be, under the EC proposal, the obligations of a WTO Member, for example China, which did not want to take part in the voluntary system with regard to a product bearing one of the 8,300 geographical indications notified by the EC. Who should take action? Would it be for the Chinese authorities to take action to prevent the wine being sold or would it be up to the European owner of the geographical indication?

88. The representative of the European Communities said that the Chinese authorities would have no obligations under the register. Nothing would change compared to the current situation under the TRIPS Agreement. It would be up to the individual right holder to seek enforcement of his rights.

89. The representative of Hungary said, in response to Argentina's question, that the obligations under Article 23 were different from the kind of obligations under Article 34 because Article 23.1 obliged Members to provide the legal means for interested parties to prevent the use of a geographical indication. He also supported the views expressed by Switzerland that the reversal of the burden of proof would not create any substantive new obligations on Member governments unless there were State-owned enterprises that used geographical indications registered in the multilateral registry.

90. The representative of Australia said that the EC proposal would add obligations with the reversal of the burden of proof and underlined that the purpose of these negotiations should not be to create new obligations for Members nor to make them lose any existing rights.

91. The representative of the European Communities said that the added value of a registration in the multilateral register was a presumption. The reversal of burden of proof was one of the indirect consequences of the presumption. The holder of a WTO registration certificate would be presumed to be the owner or legitimate user of the registered geographical indication, and the indication would be presumed to meet the definition under Article 22.1. That holder would be entitled to benefit from the protection that the TRIPS Agreement already provided. From a procedural point of view, it would be up to other persons to challenge that presumption on the ground that the registration was not valid because, for example the name had become generic, had been registered as a trademark or had been "grand-fathered". There was no additional burden on Members' governments. The procedures and legal means to be applied were those already available before the establishment of the register. The protection would only be facilitated.

92. The representative of Australia said that if China, as a non-participating country, did not object to the names notified by the EC, it would have to enforce them. It would have to translate 8,300 names at its own expense into all the different languages used in China so that products bearing those names could be imported into China. In his view, this would differ from the current rights and obligations under the TRIPS Agreement.

93. The representative of Switzerland said that, by agreeing in the Uruguay Round to put a multilateral register in place that should facilitate protection, Members had implicitly agreed that the reversal of burden of proof would actually facilitate protection. The reversal of the burden of proof was an implicit key element of the multilateral register; it was therefore not necessary to have a specific reference to it in Article 23.4.

94. The representative of the European Communities recalled that his delegation had never specified how many geographical indications it was likely to notify but had suggested that it would notify a number which could be easily absorbed by the system. His delegation had an interest in having a system that actually worked. However, it should be recalled that, today if Hungary notified 1,000 notifications to the Australian register for geographical indications for wines and spirits, the Australian Wine and Brandy Corporation would have to examine them under the time-limits of the Australian Wine Incorporation Act of 1980, which would probably be around 12 months. If the United States made one million notifications for trademarks to the European Union Office for Harmonisation in the Internal Market, that office would have to examine them within eight months under the EU law. This showed that the current level of protection that Members were obligated to give under the TRIPS Agreement remained unchanged.

95. The representative of Argentina said that the interpretation given by Switzerland of certain rules for certain categories of intellectual property in the TRIPS Agreement was unacceptable. She reiterated her question about why Article 34 contained a specific provision on the reversal of the burden of proof. She pointed out that, if there was an implicit understanding as suggested by Switzerland that the judicial authorities should be empowered to order that the defendant prove his claim, this had been made explicit for Article 34 and had not been introduced for other intellectual property rights.

96. The representative of Australia noted that, while the EC delegation was giving assurances on many points such as traditional expressions and reversal of the burden of proof, the EC had included in bilateral agreements hundreds of traditional expressions and the reversal of burden of proof. Many participants did not understand that the proposal did not imply a change to the rights and obligations assumed under the TRIPS Agreement.

What is meant by a "system of notification and registration"

Procedures

97. The representative of Hong Kong, China recalled that, at the third Special Session in September 2002, delegations had expressed the hope of working towards a system which would be extremely simple and yet maximize outcome while minimizing costs. At that time, his delegation had posed the following question: if most Members could accept registration of, for example, petty patents, utility models and industrial designs on the basis of no more than a simple formality examination, would they want to introduce a much more elaborate system for the notification and registration of geographical indications? His delegation had also given an example of how Hong Kong, China's courts had accepted as prima facie evidence, registration of works in overseas copyright registries, such as the Library of Congress Registry in the United States. Since then, his delegation had given further thought to the matter, drawing reference from Hong Kong, China's regime for the protection of short-term patents, industrial designs and copyright. In his delegation's view, one important guiding principle was that any eventual system should: (a) not impose additional substantive legal obligations beyond the existing TRIPS provisions; and (b) not impose undue financial and administrative burdens on Members, particularly on those Members who did not have many geographical indications and therefore did not envisage making use of the system on a regular basis.

98. Regarding this possible mechanism, his delegation had considered five main elements. First, the multilateral system would involve only a formality examination of the geographical indication subject to notification. Provided that basic information identifying the geographical indication, its ownership and the basis on which it claimed protection in the country of origin was submitted to the administering body, the indication would be entered on the register. The formality examination would involve checking that the documentation submitted met the stipulated minimum formal requirements. Secondly, registration on the multilateral register would provide prima facie evidence to prove three issues: (a) ownership; (b) that the indication was within the definition of geographical indications under Article 22.1 of the TRIPS Agreement; and (c) that it was protected in the country of origin. The effect would be that the three issues were deemed to have been proved unless evidence to the contrary was produced by the other party to the proceedings. In other words, a rebuttable presumption was created in relation to the three relevant issues. The proposed legal tool would therefore help the assumed owner of the geographical indication discharge the legal burden of proof on the three issues in the course of domestic proceedings if such burden lay on him under the domestic laws. This would in turn facilitate protection of geographical indications through each Member's domestic legal system. Such a framework would not change the substantive legal rights of either party to a proceedings. For instance, any questioning of the conformity of a geographical indication with, for example, Article 22.1 would be left to the local jurisdiction in accordance with the Member's domestic legal regime. Thirdly, questions relating to the applicability of the exceptions under Article 24 of the TRIPS Agreement would continue to be decided by Members' domestic authorities having regard to the relevant local circumstances. Registration in the multilateral register would not have any legal effect or create any presumption in relation to these issues, except if it related to Article 24.9. Fourthly, the system would not deal with competing claims for geographical indications. These would continue to be dealt with under national laws. Fifthly, under the proposed framework, the legal effect of registration would be limited in scope, i.e., registration on the multilateral register would provide prima facie evidence to prove: (a) ownership; (b) that the indication was within the definition of geographical indications under Article 22.1 of the TRIPS Agreement; and (c) that it was protected in the country of origin. His delegation did not therefore see the need for putting in place a process of substantive examination or opposition at the multilateral level. He finally stressed that the points he had made formed the preliminary outline of a possible framework. There were other elements which his delegation was still deliberating.

99. The representative of Argentina said that paragraphs 60 and 61 of the compilation should be merged because there seemed to be no difference between the information described in paragraph 60 such as the date of protection and the other data mentioned in paragraph 61. If any distinction had to be made, she would then suggest simply referring to the information specified in both documents TN/IP/W/5 and IP/C/W/107/Rev. 1.

100. The representative of the United States said that the format for notification should be kept simple. The issue of language and translation was much less significant under the joint proposal since registration in a database would not have the effect of registration or presumption of validity at the national level.

101. Regarding opposition, he said that any opposition should occur exclusively at the national level given the territorial nature of geographical indications. Any opposition procedures at the national level within the notifying Member's legal system should be available to nationals of all other WTO Members on a non-discriminatory basis.

102. With regard to registration, the legal effect of registration in the database should be, for those WTO Members choosing to participate in the system, a commitment to consult, along with other sources of information, the database when making decisions regarding the protection of geographical indications for wines and spirits in accordance with their national legislation. Registration should not give rise to any presumption regarding eligibility for protection, given the territorial nature of geographical indications and the applicability of Article 24 exceptions.

103. With regard to updates and modifications, the multilateral register should be updated to reflect registration of new geographical indications and any modification of existing registrations or cancellations.

104. Finally, in terms of the review and monitoring of the system as suggested in the joint proposal, the TRIPS Council should examine the operation of the system four years after its establishment in order to evaluate its effectiveness. This examination would not constitute a renegotiation of the system.

105. The representative of Japan recalled that his country was one of those WTO Members whose official and/or working language was not one of the WTO working languages, namely English, French and Spanish. So, the translation-related issues were extremely important for his delegation from the point of view of costs and burdens as well as of trademark examination and search procedures. He noted with satisfaction that paragraphs 68 to 72 of TN/IP/W/7 dealt with translation-related issues.

106. The representative of Canada gave preliminary comments regarding Hong Kong, China's proposal, which provided for a presumption created by a registration. Discussions had shown that there was no unanimity in respect of the scope of the definition. Should such a presumption be created, it would cause problems to trademark examiners. As pointed out by the delegation of the United States, according to the principle of territoriality, the scope of definition should be decided by those Members where protection was requested and at the time such protection was requested.

107. The representative of the European Communities concurred with the delegation of the United States that the notification procedure should be simple. Taking the example of the EU system of registration of geographical indications for foodstuffs, he said that the information to be provided amounted to exactly two pages in A4 format. Therefore, the amount of information to be provided by Members and subsequently processed should not be very large. It was also the kind of information his delegation thought sufficient for Members to examine in the process of registration. On the second point made by the American delegation that the system under the joint proposal was less expensive, his delegation was unconvinced. For example, under the joint proposal, administrative

authorities and judges would be under an obligation to look at the list before making or taking decisions regarding the protection of geographical indications; they would have to face the same problems of translation.

108. The representative of the United States, responding to the EC intervention, said that the joint proposal involved a commitment by Members to consult the database when making domestic determinations, but this was very small in comparison to the costs of the EC proposal where a review of all the terms that had been submitted to the register would have to be conducted within an 18-month period of time. In addition, there would be substantial costs to those Members who failed to review the proposed terms on the register within those 18 months: they would subsequently be forced to rename and relabel their products or remove them from their markets.

109. While appreciating Hong Kong, China's efforts, his delegation had concerns that this proposal might result in subsidies for a few WTO Members by the vast majority of other WTO Members. It appeared that in common with other proposals for a register or a "positive list", Hong Kong, China's proposed system might actually impose a subsidiary register rather than operate as a system in the WTO. His delegation acknowledged that Hong Kong, China had candidly attempted to overcome the real-world problem of cost by recommending that the cost of operating the system be shared among Members on the basis of numbers of notifications, and was grateful for Hong Kong, China's efforts to develop a practical basis for sharing costs. His delegation had however looked to the experiences of a similar existing system. The question was whether there were significant hidden costs for all WTO Members in what should be consistent with the mandate of Article 23.4, that is a strictly voluntary system designed to facilitate protection of geographical indications for wines and spirits. He took the example of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration since it was an existing system for the registration of a similar subject-matter in which members shared costs. For his delegation, the Lisbon system had failed: it bound only a small number of contracting parties and dealt with the specific matter of appellations of origin. As of 15 January 2003, 20 countries of Africa, Europe and Latin America had acceded to the agreement, while countries from Asia had so far not done so. According to an analysis of WIPO's statistics conducted by the South Centre, 12 member countries had appellations of origin protected in the international register. As the South Centre report made clear, at least seven Lisbon members had not so far registered any appellations of origin. There were some imbalances in Lisbon system: 527 of the registered appellations of origin for wines and spirits (97% of the total registrations) belonged to countries of the European continent; 468 appellations of origins (86% of the registrations for wines and/or spirits) belonged to EU Member States (France, Italy and Portugal). France as a single country had the greatest part of appellations of origin already registered under the Lisbon Agreement, including 81% of the total number of registrations for wines and spirits.

110. The representative of Hungary fully shared the views expressed by the representative of the European Communities that the proposals on the table did not seem to be different with regard to translation costs. Paragraph 67 of TN/IP/W/7 reflected his delegation's view that Article 23.1 prohibited the use of geographical indications even in translation. At previous meetings, his delegation had raised quite a number of questions on how Members who did not have national registries for at least wines and spirits could identify those terms that they would seek to notify. He asked for responses to his delegation's request because these responses could have a bearing on whether or not there was a need to include in the multilateral system a challenge procedure.

111. With regard to the argument that the EC proposal would entail excessive costs, he reiterated a proposal made by Hungary before the Seattle Ministerial Conference, which was to entrust the International Bureau of WIPO with the task of administering the system so as to minimize the costs.

112. The representative of the European Communities said he was puzzled that the delegation of the United States had devoted so much time to the Lisbon Agreement, which was not on the agenda. However, if the point made implied that most of the geographical indications registered under the Lisbon Agreement pertained to European nationals or countries, his delegation would also like to know how many patent applications under the PCT Agreement pertained to US nationals. If the point was to indicate that this had caused ample cases of relabelling and disruption of production, his delegation would be very interested in hearing about these cases, including from Members which were supporting the joint proposal and were at the same time party to the Lisbon Agreement. The US and New Zealand had indicated on a previous occasion that they would provide instances showing that there had been no cases of relabelling or disruption of production in their countries.

113. The representative of the United States said that the example of the Lisbon Agreement had been used for purposes of comparison with Hong Kong, China's proposal. He added that comparing patents and geographical indications was like comparing apples and oranges. The patents were for a limited term; they contributed to new, useful and non-obvious inventions that the public exchanged for a exclusive right for a limited time period. Geographical indications had a potentially unlimited duration and they did not contribute to innovations.

114. The representative of Japan said that he understood that under the EC and Hungarian proposals the information itself would be considered as the intellectual property right whereas under the joint proposal the information in the database could be considered only as a reference information. As far as translation was concerned, there were actually differences between the two systems in terms of burden and accuracy of translations.

115. The representative of Malaysia said that her delegation was in favour of a system of notification where the relevant information could be contained in a simple format and that any accompanying documents were referred to from some other databases so as to minimize the translation costs involved. Her delegation was concerned that the system to be established could have an impact on all Members, whether participating or not. It also noted that views on how costs would be shared did get closer, that there had been some proposal on fees, and that there had been suggestions relating to S&D for developing countries so that these countries would not be excluded for the system. She hoped that, failing agreement on the legal effects, the Special Session could at least come to an agreement that the system would incur minimal costs for Members concerned.

Costs

116. The representative of Hong Kong, China said that his delegation shared the concerns expressed by many developing country Members who were not frequent users of geographical indications that they could be asked to shoulder the costs for setting-up and running the system. To address such concerns, one possible option would be for the Special Session to agree at the outset that the cost of operating the system should be shared between Members on the basis of the number of applications filed by each of them. Therefore, in that respect, the delegation of the United States had already covered Hong Kong, China's thinking. There were other issues that should be considered further, for example whether a limit should be set with regard to the number of applications to be processed each year in order to manage the workload. Hong Kong, China had also given some thought to the estimated costs of operating a system of notification and registration based on formality checking only. In this regard, Hong Kong, China did have some experience of operating a Designs Registry, which was running along similar but slightly more complicated lines. Its initial assessment was that the costs of running such a system should not be excessive. His delegation would share the estimates at a later stage.

117. The representative of the United States said that costs were an important issue for his delegation. The cost of the system to governments would obviously depend on the type of system adopted. The joint proposal entailed far fewer costs to governments than other proposals; a mandatory system with a legal presumption as proposed by the EC and their supporters would impose undue burdens on governments and impose obligations beyond the TRIPS Agreement on WTO Members. The cost would include, among other things, that of introducing new legislation and a system for the examination of geographical indications within very tight timeframes as noted by the Secretariat's compilation. With regard to cost to producers, the EC proposal would impose tremendous obligations on producers in WTO Members that did not challenge notifications in a timely manner. Such Members would be required to protect the notified geographical indication, whether or not it merited protection in its territory, adversely impacting producers where protection was not wanted. Like producers, consumers would be adversely affected under the EC proposal, particularly in those WTO Members that did not challenge notifications in a timely manner. Where protection was required in a territory of a Member for lack of challenges even if the geographical indication did not merit protection in that territory, then competition among producers was reduced. Costs to the administering body under the joint proposal would be relatively low and not substantially different from that incurred by the WTO Secretariat in administering existing WTO notification systems. The joint proposal would also satisfy the need for S&D measures for LDCs and developing countries because it was completely voluntary.

118. The representative of Switzerland recalled that his delegation's views, which had been repeatedly expressed several times throughout the previous year's discussions, had been reflected in the compilation paper.

Possible role of the Secretariat

119. The representative of the United States said that, as noted in the Secretariat's compilation, the role of the WTO Secretariat would be limited and would not entail examination of the notifications, permitting the Secretariat to follow a long-standing practice of not commenting on legal matters.

Participation

120. The representative of the United States said that the system should be truly voluntary, and full TRIPS protection should be accorded to geographical indications of all WTO Members, whether or not they participated in the system. The voluntary nature of the system proposed by the joint proposal was supportive of the S&D objectives of developing and least-developed country Members.

121. The representative of Australia said that the proponents of a more burdensome system tried to convince other Members that what was to be a voluntary system as clearly indicated by Article 23.4 should actually have mandatory effects on all WTO Members. His delegation could understand why developing countries, particularly those that were not wine-producing countries, had expressed concerns about this interpretation. Australia shared those concerns. He recalled that proponents had tried to place emphasis on the word "multilateral" in Article 23.4 as overriding a much more specific language on voluntary participation. The word "multilateral" in itself could in no way be seen to imply, for example, compulsory participation on all Members. This was clearly not the intention of the negotiators of Article 23.4. Why otherwise would Article 23.4 make it clear that every Member was to be "participating in the system", and that protection would only be for geographical indications "eligible for protection in those Members participating in the system"? For his delegation, the use of the word "multilateral" in Article 23.4 took on no special significance other than to suggest that the system being developed would be open to all Members if they wanted to participate. As if to overwrite this view, the last phrase of Article 23.4 made a crystal-clear point that the system should be voluntary in nature. Some delegations had quoted selectively from paragraph 18 of the Doha Declaration to imply that Ministers made a decision to force mandatory participation on the Membership. Again, his delegation rejected such an association out of hand. Paragraph 18 of the

Doha Declaration only contained a reference to Article 23.4, which was clear on the question of voluntary participation. Therefore, selectively pulling out parts of paragraph 18 of the Doha Declaration to justify the case for a mandatory binding effect on all Members was inappropriate and misleading. It was clear that what the proponents wanted was a system where all Members would incur obligations under it. Where obligations were incurred, there would also be expenses and costs, not to mention regulation and the prospect of other unnecessary red tape. His delegation would therefore fully sympathize with many non-wine-producing countries when they asked why the register for wines should apply to them.

122. The representative of Guatemala said that countries like Guatemala and others who did not produce wines and spirits would have to be convinced that it was appropriate for them to participate in the system. If they decided not to participate in it, then they should not be affected in any way. This would therefore imply that they had to pay close attention to the current negotiations. He associated his delegation with the statement made by the delegation of Australia.

123. The representative of the European Communities said that he would refer to the statements his delegation had made at previous meetings on the issue so as to avoid repetition of positions.

D. OTHER BUSINESS

Future work

124. The Chairperson recalled that the Special Session had a mandate to negotiate the establishment of a multilateral system by the Fifth Session of the Ministerial Conference, which was effectively no more than six months away. Clearly, it would be necessary for participants in the negotiations to considerably step up the intensity of the work. With this in mind, he intended to have intensive consultations with delegations in the coming weeks in a variety of formats. He reassured Members that transparency would be ensured with open-ended meetings whenever necessary. As regards what should be done in these consultations, his understanding was that the Special Session needed to pursue the processes of both further clarifying and understanding the views and positions of all Members as well as of seeking to narrow differences; in other words, to negotiate. There might be some issues where it would already be possible to start identifying elements that might appear in the multilateral system. For example, this might be the case as regards the notification stage of the multilateral system. Clearly, there were other areas where the differences were more profound, for example regarding legal effect and participation; here, work might need to focus on options. What he hoped would emerge from these consultations was guidance on the negotiating text that he would, if necessary, be prepared to put on the table. He had noted the various comments that had been made on the timing of this text. All that he could say at this stage was that it continued to be his intention to make the text available in good time prior to the next meeting of the Special Session scheduled for the last week of April.

125. The representative of Australia said that his delegation was prepared to enter into more intensive discussions on this subject. However, he would like to reiterate that positions were divergent and that more discussion was necessary on a range of issues as reflected in the numerous comments made on the compilation document. He suggested that the Chairperson exercised real caution in coming forward with the text at an early stage because this could actually harm the process more than carry it forward.

126. The representative of Hungary said that his delegation shared the Chairperson's sense of urgency and views about the need for changing gears to intensify work. His delegation urged the Chairperson to table a full negotiating text as early as possible, preferably in the first ten days of March and conduct the intensive informal consultations in various formats on the basis of a full negotiating text. His delegation believed that this way of proceeding would be the only way to make progress; it would be necessary to give impetus, which could only be done by a text. Although it

might be easier to make progress on certain parts where there seemed to be a higher degree of convergence, this could give a false picture of the end result that would be acceptable for all; therefore, only a full text – even with options - could give an impetus to the negotiations. He referred to the statement his delegation had made earlier regarding the negotiations on agriculture.

127. The representative of the European Communities concurred with the comments made by the delegation of Hungary. He recalled a statement made by Australia at a previous meeting that it was fully committed to fulfilling the decision of Ministers to complete negotiations envisaged under Article 23.4 by the Fifth Ministerial Conference and wondered how the Special Session could accomplish that if the delegation of Australia considered this to be an early stage for the submission of a negotiating text. His delegation urged the Chairperson to come up with a negotiating text in the first half of March, with options in square brackets. A discussion on elements only would not necessarily help the Chairperson to test the flexibility which delegations had or had not in terms of assessing the overall proposal by the Chairperson.

128. The representative of the United States associated his delegation with the statements by Australia. Positions were still divided and more time was needed to bring their views closer. To rush into a bracketed text might create more controversy and mire the process, whereas to allow more time for continuing discussions and bridging some of the differences might be productive. He would advise the Chairperson not to rush into tabling a negotiating text.

129. The representative of Australia said that his delegation remained committed to the process of moving these negotiations forward, which was why it was one of the most active participants. The point he was trying to make was that tabling a text at an early stage could push the positions further apart instead of achieving the purpose of bringing them together. The results of further discussions as well as intensive consultations would form the basis of future action by the Chairperson.

130. The representative of Argentina said that her delegation shared the views expressed by the delegations of the United States and Australia. A common negotiating text would not change anything if there was no will to make concessions or modify positions. Referring to a comment by Chile on legal effects, she said that no element was isolated; some issues which seemed to be less controversial became relevant when they concerned the legal effects of the system.

131. The representative of Switzerland said that the only way to inject dynamism would actually be to work on a common negotiating basis. In view of the short time-period left, his delegation urged the Chairperson to propose such a text as quickly as possible so that delegations had ample time to study that text.

132. The representative of Chile supported the Chairperson in the procedure suggested and pointed out that his delegation committed itself to working in the consultations he would be holding. He hoped that the result of these consultations would be reflected in the Secretariat paper.

133. The Chairperson took note of all the comments made by delegations. He understood the concerns certain delegations had expressed about tabling a single negotiating text prematurely. The Special Session also had to consider that a common negotiating basis could help trigger more intensive negotiations so as to complete work on time as mandated by Ministers. He further emphasised that, if he were to table a text, it would be on his own responsibility and without prejudice to the positions of Members and without prejudice to the outcome of the negotiations. He would start intensive consultations with delegations who were interested in the issue and would ensure as much as possible transparency in the process. Delegations should feel free to consult him, bilaterally or in groups.
