

WORLD TRADE ORGANIZATION

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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 20 September 2002

Chairperson: Ambassador Eui-yong Chung (Korea)

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A. ADOPTION OF AGENDA

1. The third Special Session agreed to adopt the agenda as set out in WTO/AIR/1889.
2. The Chairperson proposed to address first the issue of observer status for intergovernmental organizations.

B. OBSERVER STATUS FOR INTERGOVERNMENTAL ORGANIZATIONS

3. The Chairperson recalled that, at the June meeting, he had made without success several suggestions, including granting observer status to those intergovernmental organizations that already had such status in the regular session of the TRIPS Council. It was then agreed to revert to this matter in the light of any action by the TNC or the General Council. Since there had been no new development, he proposed to revert to the matter at the November meeting in the light of any decision by the TNC or the General Council.
4. It was so agreed.

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

5. The Chairperson said that the Special Session had agreed at the June meeting that the WTO Secretariat, with the assistance of the International Bureau of the World Intellectual Property Organization (WIPO), would provide factual material about the different types of notification and registration systems. Pursuant to this decision, the International Bureau of WIPO had assisted the WTO Secretariat in the preparation of the factual material (TN/IP/W/4). He therefore suggested that, in view of WIPO's expertise, it would be helpful to ask the International Bureau of WIPO to be present at the meeting for that part of the discussion related to systems of notification and registration so as to be able to respond to any questions relating to WIPO registration systems. He emphasized that his suggestion was not related to the issue of observership for intergovernmental organizations, which the Special Session had just decided to postpone until the November meeting.

6. It was so agreed.

7. The Chairperson recalled that it had been understood at the June meeting that participants would, at the September meeting, go into the issue of the "mechanics" of a notification and registration system as suggested in paragraph 8 of his informal note (JOB(02)/49), including such matters as procedures for notification, opposition, registration and modification as well as issues of cost and the possible role of the Secretariat. It had also been understood that participants could continue the discussion of the four categories of points and issues identified in his note that were covered in June, as well as having a first examination of any new or modified proposals. He proposed to start with new communications.

8. The representative of China said that, since it was the first time her delegation took the floor on this issue, it would focus its intervention on the points listed by the Chairperson in document JOB(02)/49. As regards the definition of "geographical indications" (GIs), and their eligibility for inclusion in the system, the Chinese delegation's view, at this stage, was to follow the definition of geographical indications under Article 22.1 of the TRIPS Agreement. With regard to the purpose of the notification and registration system, the Chinese delegation's view was that such a system according to Article 23.4 must be to facilitate the protection of GIs of wines and spirits at the level which was already established pursuant to the TRIPS Agreement and not to enhance the level of the protection. As regards the nature of the system, the Chinese delegation had some concerns. Firstly, the balance of interests should be fully considered when establishing a multilateral system. Not all WTO Members were producers of wines and spirits and this should be taken into account when discussing the system. Secondly, participation should be considered with caution if the proposed system were to have binding effects on all Members.

New papers from participants

9. The representative of Canada said that the communication contained in document TN/IP/W/5 was co-sponsored by Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, the Philippines, Chinese Taipei and the United States. It was a joint proposal for a multilateral system for notification and registration of geographical indications for wines and spirits based on Article 23.4 of the TRIPS Agreement. The proposal satisfied the requirements of Article 23.4 as well as the criteria that Canada and other countries had identified during past discussions in the TRIPS Council and at the June meeting of the Special Session as being appropriate for a system of notification and registration to facilitate protection for geographical indications for wines and spirits. The proposed system would facilitate protection of GIs for participating WTO Members by providing an uncomplicated and efficient system for notification and registration of GIs for wines and spirits that were recognized in the national systems of individual WTO Members. The proposed system would allow those participating WTO Members to send a list of their claimed GIs to the Secretariat, which would then

compile that information into a searchable database. The information would then be readily available to all the WTO Members who had chosen to participate in the system for use in their decision-making processes related to the protection of GIs for wines and spirits. The proposed system would be used to making decisions that had legal impact and decisions that could protect other countries' claimed terms. The proposed system would not impose new substantive obligations regarding protection of GIs. It would rely instead on the existing obligations and would not prejudice any of the rights of Members enshrined in the TRIPS Agreement. The proposal allowed for truly voluntary participation. In addition, the voluntary nature of the proposed system was supportive of the special and differential treatment objective of developing and least-developed country Members. The proposal recognized and accommodated the various regimes of WTO Members for protection of GIs already described in the responses to the Article 24.2 Checklist of Questions. It was a simple and inexpensive system for those choosing to participate and would allow WTO Members and others to access and use information submitted without undue burden or cost. Finally, the proposed system would not impose undue administrative burdens or costs on the WTO Secretariat.

10. The representative of Argentina said that the communication contained in document TN/IP/W/6 was co-sponsored by Argentina, Australia, Canada, Chile, New Zealand and the United States, and aimed to contribute to the discussion. The document referred to the issues proposed by the Chairperson for discussion at the June meeting. It expressed some general considerations regarding the features that delegations thought should be contained in the multilateral system for wines (and spirits). In the introductory part of the communication, emphasis was put on the role of Article 1.1 of the TRIPS Agreement in the framework of these negotiations. The communication then analysed the issues that were brought up at the last meeting: the definition of GIs, the eligibility of GIs for wines (and spirits) for protection; the purpose of a notification and registration system; and participation. It also made a brief reference to proposals that had been presented so far. It also contained a section with general considerations on the consequences with respect to the "marge de manoeuvre" or flexibility that Members had on the basis of the TRIPS Agreement, and on the establishment of a system which would be binding in terms of participation and attribute competence which had not been envisaged by the TRIPS Agreement.

11. The representative of the European Communities made some preliminary comments regarding the communication contained in document TN/IP/W/5. In his view, the key question would be whether the proposal satisfied the criteria and objectives of Article 23. On the basis of the introductory remarks made in relation to document TN/IP/W/5, he said that he remained sceptical about the direction in which this new or amended proposal was going: the basic objective seemed to establish a database. As indicated in the past, the mere establishment of a database without directly leading to legal effect was not a meaningful solution that the EC were seeking. With regard to special and differential treatment for developing and least-developed countries, the EC shared the view that the registration system should be simple and inexpensive. The system proposed by the EC and their member States was simple and would not entail major costs.

12. The representative of Hungary said that the new submissions made were useful to the extent that they showed the differences between the approaches of the two groups of countries which had different interests in this issue. He further said that the deadline set in paragraph 18 of the Doha Ministerial Declaration was approaching fast, and that the conclusion of these negotiations, which Hungary considered an important part of the ongoing process of agriculture reform, was long overdue. This process had been dragging on for years. The WTO Members had been negotiating the establishment of the register for over five years and, although there had been specific proposals on the table, there had so far not been any real progress. He also said that Hungary was grateful for the Chairperson's concluding remarks made at the end of the June meeting that the scope of the negotiating mandate from Ministers was clear and encompassed spirits in addition to wines. Turning to document TN/IP/W/5, he said that the multilateral system proposed would consist of setting up a computer and hiring a part-time operator for that computer. He assumed that it was "multilateral" because certainly all WTO Members would have access to that computer and it would "facilitate the

protection" because all the names notified would be in the database. Hungary was among those countries that had a different understanding of the implications of Article 23.4 of the TRIPS Agreement and the deadline to fulfil this Agreement. In that spirit, Hungary's understanding was that the mechanics were important because an adequate procedural solution could indeed ensure that the system to be set up was cost-effective and efficient, not more burdensome than necessary for the Members and the WTO Secretariat. Having analysed the major proposals, his delegation felt that there was considerably more convergence on the mechanics than on some of the legal issues, in particular on the legal effect of the register. It hoped that, once the major legal elements were agreed upon, the procedural solution could be found with relative ease.

13. The Chairperson thanked the delegations that had tabled new proposals and believed that they would contribute to the negotiating process. He recalled the suggestion he had made regarding the September meeting as a target date to present new or revised proposals; this did not, however, rule out the possibility of subsequent new or revised proposals at a later stage. Proposals aimed at bridging gaps would be an essential part of the negotiations. He would, therefore, continue to encourage all Members to come up with as many new or revised proposals as possible by the November meeting. He added that a detailed discussion of the papers presented could also take place in the course of discussions relating to the four sets of issues identified in his informal note.

"Mechanics" and what is meant by a "system of notification and registration"

14. The Chairperson proposed to deal first with the third category of issues identified in his informal note ("What is meant by a 'system of notification and registration'"), together with the issue of the "mechanics" of a notification and registration system, including such matters as procedures for notification, opposition, registration and modification as well as issues of cost and the possible role of the Secretariat, since they were closely related, and to address thereafter the other three categories of points and issues identified in his informal note. He indicated that, pursuant to the decision taken by the Special Session at the June meeting (paragraphs 118-119 of document TN/IP/M/2), the Secretariat, with the assistance of the International Bureau of WIPO, had provided factual material about the different types of multilateral registration systems with their main features, procedures and legal effects. The factual material was contained in document TN/IP/W/4 under the title "Multilateral Notification and Registration Systems". He expressed the hope that the factual information might provide the Special Session with some practical ideas with respect to how the Session should deal with the envisaged multilateral system. In order to make discussions more focused and efficient, he suggested sub-dividing the discussions on mechanics into three sub-headings as explained in paragraph 8 of his informal note, namely procedures, costs and the possible role of the Secretariat. As the first of these sub-headings involved many different, but interrelated, issues, such as notification, opposition, registration and modification, he encouraged delegations to be very precise and clear as to the issue they would be addressing. Doing so would not only facilitate structured and efficient discussion, but would also make it easier to follow.

15. The representative of the Secretariat said that document TN/IP/W/4 attempted to respond to the request made by the Special Session to have the Secretariat, with the assistance of the International Bureau of WIPO, prepare a factual background paper on existing multilateral systems of notification and registration. He emphasized that the document, although prepared with the assistance of the International Bureau of WIPO, was circulated on the WTO Secretariat's responsibility only. The International Bureau had contributed in providing two of the annexes of the document as well as in assisting the Secretariat with the remainder of the paper. With regard to notification systems, the paper focused, for reasons of practicality, on multilateral systems in place in the WTO and in the intellectual property field. With regard to the WTO notification systems, Annex 1 reproduced a listing of existing WTO notifications requirements. Annex 2 contained more detailed description of the various notification requirements under the TRIPS Agreement. With regard to other multilateral notification systems relating to intellectual property, the paper focused on those requirements in the context of WIPO; a summary made by the International Bureau of WIPO was reproduced in

Annex 3. With respect to multilateral registration systems, the Secretariat had attempted to summarize the main features of the existing multilateral registration systems in a synoptic and comparable form, in the hope that it would facilitate the task of Members in appreciating these systems. Annex 4 contained a listing and a description, provided by the International Bureau of WIPO, of the WIPO multilateral registration systems. He added that the Secretariat might have inadequately treated in its factual note one system, namely the WTO Central Registry for Notifications (CRN), and would provide the relevant information on the CRN in the form of an addendum to document TN/IP/W/4.

16. The representative of the International Bureau of WIPO thanked the Chairperson for having invited the International Bureau of WIPO in its capacity as expert to attend this specific agenda item. She said that it had a great interest in the discussion of the Special Session not only because of the subject-matter of geographical indications but also because of its long experience and history in the area of international registration systems. It was pleased to have assisted the WTO Secretariat in preparing the document and offered its full cooperation in the future on any of the questions that might arise in the Special Session.

17. The Chairperson thanked the International Bureau of WIPO for its assistance in the preparation of the factual information as well as for its offer to provide future cooperation.

(i) *Procedures*

18. The representative of the European Communities said that document TN/IP/W/4 would be a constructive contribution to the Special Session's work, whatever Members' views were. It struck him that part of the information found in that document was important for the discussions. As the EC delegation has said in the past, it was clear that, if the intention - and the wording of Article 23.4 confirmed it - of the negotiators was to establish a multilateral system of notification and registration, they must have had in mind a system with legal effects. His delegation would further examine the different treaties or international agreements which had been compiled and which had been analysed in that document. In his view, it was important to emphasize that the reading of paragraph 8 of the introductory comments to document TN/IP/W/4 showed that the international agreements examined clearly showed that the systems of registration were meant to have legal effects, admittedly with varying degrees. That was fully in line with the views expressed by the EC delegation and by many other delegations.

19. Regarding the *notification* procedures, he said that notifications should be made to the WTO Secretariat - if it were decided that it would be the Secretariat - possibly through an agreed common format, and should be accompanied by certain information such as copies of national legislative, administrative or judicial decisions, and, if necessary, bilateral, regional or multilateral agreements, and indicate the date on which each geographical indication first received protection in the country of origin. Any time-limit on that protection and the type of product covered by the GI, as well as *prima facie* evidence of the geographical indication's conformity with the provisions of the TRIPS Agreement should also be provided as stated in paragraph B.3 of the proposal made by the EC and their member States (IP/C/W/107/Rev.1). This type of information seemed, to a large extent, to be similar to what a number of countries aiming at a different type of system also had in mind. This information would then be translated either by the notified party or, depending on the circumstances and the arrangement made, by the Secretariat, be published and notified among all WTO Members, at which point the 18-month examination period would begin.

20. As far as the procedure for *opposition* was concerned, during the 18-month examination period, WTO Members could request for further information about individual notifications. At the expiry of that period, a WTO Member must decide whether or not to challenge an individual notification. Challenges should be accompanied by a statement of the grounds for which a Member invoked Article 22, paragraphs 1, 4 or 6 of the TRIPS Agreement. Summary information on

prima facie evidence supporting the claim should also be provided. Regarding this point, he recalled that, under the proposal from a number of countries (TN/IP/W/5), the Secretariat would have no discretion to decline or to accept a geographical indication notified by a WTO Member. He said that his delegation would not necessarily disagree with that statement, but wondered what would happen if a country, as one delegate had indicated in the past, notified the GI "telephone" for a fortified wine. It seemed that under the proposal contained in document TN/IP/W/5, any opposition would have to be launched in the country of origin. Unless that challenge was successful, all WTO Member authorities would have to look at the term "telephone" as a GI for a fortified wine. In his view, it would be necessary to find a system to avoid such abuses. Under the EC proposal, a challenge could be filed with the Secretariat, stating that such a term raised serious doubts as to the fulfilment of the requirements of Article 2.1 of the TRIPS Agreement.

21. As far as *registration* was concerned, at the end of the 18-month period, registration of names would proceed with the relevant annotations of the challenges made, such as the name of the opposing country and the TRIPS provisions invoked. Challenges would preclude the effects of registration in the territory of the notifying party. The notifying party and each of the challenging parties should begin consultations with the view to resolving the disagreement via a mutually satisfactory negotiation.

22. The representative of Australia hoped that every delegation interested in the subject was paying close attention to what seemed to be a very procedural discussion about notification and registration and was clearly understanding the significance of the EC's statement, which, on the face of it seemed very innocuous. The problem about the notification system under the EC proposal was that WTO Members would all be faced with some thousands of notifications from one Member only and that they would all be obliged during the 18-month time-limit to go through all of these GIs in languages other than theirs if they wanted to challenge the GIs. As was the case for other co-sponsors of document TN/IP/W/5, Australia also believed that all the procedural aspects of the envisaged system should be simple, transparent and inexpensive. Undue procedural burdens would deter Members from participating and would not contribute to the goal of facilitating protection. As shown in the synoptic table of the Secretariat's note (TN/IP/W/4), the number of countries participating in certain registration systems was very low.

23. With regard to *notification*, the countries co-sponsoring document TN/IP/W/5 would envisage a system where participating Members would make a simple notification to an agreed contact point in the Secretariat. The system would comprise an initial list of GIs for wines and spirits protected domestically in a Member, with subsequent notifications when a new domestic GI for a wine or a spirit became protected in that Member, and previously notified GIs which ceased to be protected domestically. If a Member decided to cease participating in the system, then all of its notifications would be withdrawn. It would also be necessary for the method of notification to be streamlined and for the information required to be clear and easy to provide.

24. In contrast to notifications, *registration* would be the responsibility of the administrator of the system, who would place the notifications into a specific searchable database. Registration would also entail notification of the notified GIs to Members. Registration would not trigger any legal effect in any other Member, either to protect a GI or to commence consideration of whether a GI was protectable domestically. He recalled that the TRIPS Agreement only required Members to provide the "legal means for interested parties" to obtain protection. The EC's proposal would require Members to establish a system to examine all GIs – thousands of them – which had been notified to the system. In Australia's view, the multilateral system should not force such a regime upon Members who had decided not to implement such a regime domestically. Furthermore, the right of national decision-makers to determine what would be protected in their jurisdiction was fundamental.

25. With regard to *opposition*, he said that, since the proposal co-sponsored by Australia did not trigger legal effects in other participating Members, there was no need for a costly or burdensome

dispute resolution mechanism to be established. Decisions to grant or deny protection for individual GIs would occur at the national level and, in line with the TRIPS Agreement, would be triggered by an interested party seeking protection in that jurisdiction. With regard to a specific international dispute resolution mechanism envisaged by some countries, he said that a number of its aspects were unclear but, more importantly, of fundamental concern to Australia. The exceptions provided for in Article 24 were clearly to be applied on a jurisdiction-by-jurisdiction basis. The proposal put forward by Hungary and supported by others for dispute resolution could involve arbitrators making an adjudication on whether a term fell within one of those exceptions in Article 24. As far as Australia was concerned, that was a determination that could only be made by domestic courts or the administrative body applying domestic law. How could a decision-maker participating in such an international mechanism decide whether a particular term was customary in common language or a common name for certain goods in a "domestic jurisdiction"? Australia had fundamental concerns with the proposals put forward because, contrary to the views of their authors, that would change the level of obligation, change the legal effect and enhance the level of protection, which was not called for in the mandate of the Special Session.

26. The representative of Switzerland said that his delegation had found the way in which the discussion had been engaged at the last meeting positive. The fact that the Chairperson had structured the debate according to issues had made it possible for the Special Session to engage in a substantive discussion and to clarify so far a number of points. He said that the Secretariat's note (TN/IP/W/4) gave, in a very useful way, a presentation of various multilateral notification and registration systems and would help participants to have a clearer picture of existing systems. With regard to procedures, he recalled that, at the June meeting, the Swiss delegation had stressed the importance of distinguishing amongst the various phases in the procedure which led to the recording of a GI on a registry. Such sequencing of the procedure was, in the view of the Swiss delegation, indispensable in order for the future system to be able to facilitate protection of geographical indications.

27. The first phase of this procedure should be *notification*. The proposals submitted to date seemed to reach a degree of convergence on this point. The notification phase was to allow Members to indicate their wish to participate actively in this system and to submit a list of the national geographical indications they would like to have placed on the registry, with the indication of the products covered by the registration. This phase - as in fact for the rest of the procedure leading up to the registry of the geographical indication - must be as simple as possible for Members in order to avoid overburdening national administrations and the body which would be responsible for managing the register. However, this procedure should also ensure that there was, in the indications notified, something that could be protected in order to avoid the paralysis of the system caused by an avalanche of designations that did not clearly meet the conditions of the definition in Article 22.1 of the TRIPS Agreement. It might, therefore, be a good idea to provide for certain information documenting the notified geographical indications. Simple copies of national legislative, administrative, judicial decisions or copies of bilateral, regional or multilateral agreements, should be sufficient for this purpose. On the basis of these documents, the body responsible for managing the registry would be able to proceed to a first summary examination as to form, which would be similar to the one in the Lisbon Agreement, as described in Annex 4 of document TN/IP/W/4 (page 90, paragraph 11). If that body considered that a notified indication clearly did not meet the basic conditions, the national authority would be informed and provide confirmatory information, where necessary, for the publication of the geographical indication or otherwise would renounce notifying such indication. This notification phase could be repeated whenever a Member felt that there were one or several indications that could be entered in the registry. With the view to facilitate the management of the system, and as proposed by the EC and their member States, consideration should be given to the designation by each Member of a contact point which would be responsible for centralizing national geographical indications. The body responsible for the management of the registry would have a single contact point per Member and this would satisfy the administrative procedures. Once the notifications had been made, the body responsible for the management of the registry would proceed with the formal summary examination, and, thereafter, with the publication of the notified

geographical indications that had been notified and would communicate them to the Members. Publication of the indications could be done by internet, for example on the WTO website. This could facilitate the administrative procedures and lower costs.

28. The second phase of the procedure would be the *examination* of geographical indications. For his delegation, publication of geographical indications and their communication to Members would trigger a time-limit within which WTO Members could examine the notified GIs and, where applicable, engage in opposition procedure for indications which, in their opinion, did not fill the requirements for protection on their territory or for recording in the registry. An 18-month period for this examination phase, as proposed by several Members, seemed to be appropriate.

29. A *challenge* or *opposition* procedure was an indispensable element to meet the objectives of Article 23.4, namely to avoid abuses. However, this procedure must, as the rest of the procedure, be as simple and easy to access as possible. Therefore, the challenge procedure should be split into two phases. The first phase would be based on the principle of bilateral negotiations between the parties having challenged the protection of a notified indication. The second phase would be based on an arbitration mechanism in cases where bilateral negotiations did not reach a mutually satisfactory solution within a set time-frame. It would, therefore, be up to the arbitrators to determine whether or not the challenge was justified. Their decision would be definitive and binding on the parties concerned. Regarding the challenge procedure, it would be useful for the body responsible for the management of the registry to examine, in a formal and summary way, whether the challenge seemed to be well-founded or not. A simple list of challenged geographical indications should not be considered as sufficient. Otherwise, the risk would be paralysis of the system as a result of an avalanche of challenges which would stop all registrations. The body managing the system could play a useful role by conducting an initial examination of the challenges before sending them to the countries having notified the challenged GI.

30. The next phase concerned the *registration*. First of all, in which cases would there be registration? When a notified indication had not been challenged by a WTO Member, that indication would be registered. Second, what would be the effect of this registration on Members? The effect would be to create a presumption of the right to protection for that geographical indication; WTO Members who had not challenged the geographical indication within the set time-period would have to respect it. Such a registration would have an *erga omnes* effect. In order to establish the effects of registration on the WTO Members, there must be a distinction between the various reasons for challenges. Indications successfully challenged on the grounds that the conditions of Article 22.1 of the TRIPS Agreement were not met should purely and simply not be registered. This was an objective ground which applied to all Members; the result of this type of challenge would have an *erga omnes* effect. If the challenge was based on another reason, such as long use or good faith use of the geographical indications (Article 24.4), or if it was based on the fact that the geographical indication was used as a common name for products or services in the country challenging the indication (Article 24.6), then the geographical indication would be inscribed in the registry with the mention of the challenge. This mention would have the effect that the Member which had validly challenged the geographical indication would not have to protect that indication on its territory. Other Members, however, would have to give protection unless they succeeded in rebutting the presumption. The effect of these challenges would, therefore, only be *inter partes*. He emphasized that registration constituted a presumption of protection of a geographical indication. In order to give legal force to registrations, this presumption should not be questioned for any reason once that registration had taken place and the opposition time-period had expired. That was the reason why it was necessary to provide for an examination phase and an opposition phase. If a registered geographical indication could be questioned for any reason, the register would then be similar to a simple database and would not contribute to achieving the objective of Article 23.4, which was to facilitate protection of geographical indications. On the other hand, other reasons could be invoked at any time before domestic courts such as the right to use the name in the course of commercial operations (Article 24.8) or the fact that the geographical indication was not protected in the country

of origin or fell into disuse (Article 24.9). The advantage of such a presumption would be the reversal of the burden of proof: producers of the region identified by the geographical indication would no longer have the burden of proof, which would be shifted to third parties wishing to use the registered GI for their products. The body responsible for managing this registry would then publish the registered indications just as it had published their notification.

31. With regard to *modification*, he said that the registry should be updated at any time as a result of the registration of new GIs or as a result of a modification of existing registrations, such as a suspension of the obligation of protection on the grounds that the GI was no longer protected in the country of origin or had fallen into disuse in that country. A Member could also ask for the cancellation of a GI it had previously registered.

32. The representative of the United States made some preliminary observations on the Secretariat's note (TN/IP/W/4). First, the note was very useful in helping participants to contrast the notification and registration systems in other agreements with the one contemplated by the drafters of Article 23.4. He invited all the Members, in reviewing the document, to pay attention to the first four pages that summarized the overall theme. Certainly, the drafters of the TRIPS Agreement selected their words very carefully to clearly convey their intent. In paragraph 5 of the Secretariat's paper, it was noted that other agreements were aimed at the acquisition of protection. In Article 23.4, the TRIPS drafters used the word "to facilitate the protection" as contrasted with the notion of acquiring protection. Paragraph 8 of the paper stressed the "application" process and the underlying Agreements or Acts referred to "applications". "Application" suggested a path to acquiring rights and the drafters of Article 23.4 selected the term "notification" and not "application". Thus, they clearly meant something different. Other Articles in the TRIPS Agreement referred to "application" (e.g., Article 15.3) or to "applicant" (e.g., Article 29); it was, therefore, clear that the drafters of Article 23.4 could have used the term application if they had so desired. Except for the Patent Cooperation Treaty, there were few signatories to the Agreements or Acts cited in the synoptic tables. As had been noted by earlier speakers, this fact suggested that the international community had not accepted these types of approaches where the registration process had been an objection procedure and resulted in the granting of substantive rights. For example, only 20 out of the 171 WIPO Members had signed the Lisbon Agreement. The Special Session should not adopt an approach that past history had demonstrated was not acceptable to a large number of countries.

33. Turning to the mechanics of the system, he said that his delegation believed that the procedures for *notification* should be non-burdensome on those Members choosing to participate in the system. The Joint Proposal (TN/IP/W/5) stated that "WTO Members wishing to participate in the system might submit to the Secretariat a list of domestic geographical indications for wines and spirits recognized as eligible for protection under their national legislation, indicating for each indication the date on which recognition was granted by the notifying Member and the date, if any, on which protection would expire". The US delegation believed that the format in which such notifications were to be made could be decided upon after the multilateral system itself was established. That format, however, should be designed to make the Secretariat's task of compiling the initial and subsequent notifications as simple as possible and to make the resulting database as user-friendly as possible. As earlier mentioned by other delegations, the TRIPS Agreement required Members to implement the obligations of the Agreement by using the appropriate method within their own legal system and practice and not in accordance with some supranational system and practice. Article 1.1 also stated that Members "shall not be obliged to implement in their law more extensive protection than is required by this Agreement".

34. He said that *oppositions* to any notified geographical indications should take place in accordance with the method that the notifying Member had provided for within its own legal system and practice. It would, of course, be necessary to ensure that the opposition procedure within the notifying Member's legal system and practice was available to the nationals of all other WTO Members in accordance with the requirements of TRIPS Articles 3 and 4. He recalled that his

delegation had raised some questions about the extent to which all Members had fulfilled that obligation. Not all oppositions would be actions by governments. The system envisioned in the Joint Proposal would also "facilitate" the protection of geographical indications for wines and spirits by notifying to the public the use of a geographical indication of which they might not be aware, and uses that they believed were misuses so that they would have an opportunity to challenge them as provided for in Article 23.1.

35. The representative of the Czech Republic expressed her delegation's appreciation for the Chairperson's effort for a structured discussion as well as for the work done by the WTO and WIPO Secretariats by providing the Council with helpful material. She recalled that, at the last meeting, the Czech Republic had expressed its views and main ideas regarding the four categories of points and issues identified in the Chairperson's note. Turning to the "mechanics", she said that clarifying the views of all interested Members on a key issue like this one was crucial for achieving some progress in the Special Session's work. It was necessary, above all, to establish rules for notification and opposition procedures, which should precede effective registration. As expressed at the previous meeting, the Czech Republic attached great importance to a clear distinction between the two different phases, namely notification and registration.

36. In the course of *notification*, participating Members must notify to the Secretariat all geographical indications corresponding to the definition under Article 22.1 of the TRIPS Agreement. Such a notification must be accompanied by required obligatory information such as the spelling of a GI, the identification of the applicant(s), the territory from which the goods originated and the description of characteristics or qualitative features of goods, relevant national legislative provisions and decisions of national authorities on the protection approval, including the first date of effective protection. Other information could be provided by Members if they found it important or indispensable for the protection of their geographical indications against their use for goods not originating from the appropriate geographical region.

37. An integral part of the notification procedure had to be the *publication* of geographical indications notified by participating Members. For such a publication, a reasonable time-period and appropriate measures should be envisaged.

38. With regard to *opposition*, she said that all WTO Members should be in a position to protect effectively their legitimate interests, especially in cases where they felt threatened by the notification of a geographical indication by another Member. In order to ensure a sufficient basis for this protection, a transparent opposition procedure should be established. In the course of this procedure, some reasonable and proportionate time period should be given to all WTO Members to examine the future possible application and to challenge the notification.

39. *Registration* took place after the expiration of the time period for opposition procedure. The geographical indication should be entered into the register, if all formal requirements were met. Such a registration should have legal consequences for all WTO Members, except for those who had challenged the registration. The details of this procedure would need more clarification and specification and, on this specific point, the delegation of the Czech Republic did not yet have a clear view on such details. As a next step, the registered geographical indications should be published and Members should be informed of them. Last but not least, clear conditions for cancellation of the registration must be set.

40. The representative of Hungary recalled, with respect to the *notification* procedure, that the mandate in Article 23.4 called for the "establishment of a multilateral system of notification and registration". The mandate itself distinguished between two different phases that were meant to serve different purposes. Therefore, Hungary did not share the understanding of the words "notify" and "register" in paragraph 12 of document TN/IP/W/6 (communication from Argentina, Australia, Canada, Chile, New Zealand and the United States). As was clear from the debate so far, there were a

number of common or similar elements in the two basic approaches, but there were also several important divergences. The similarities regarding the notification element of the two basic proposals were more striking. In Hungary's view, it would and should not be difficult to bridge the differences in respect of this notification element. As a first step, participating WTO Members should notify to the Secretariat the list of geographical indications that identified goods as originating in their territory. Only indications that received protection in the notifying Member at the time of notification and which had not fallen into disuse as meant by Article 24.9 should be notified. The notification should indicate the date on which the geographical indication first received protection as well as any time-limit on protection. The notification should be accompanied by *prima facie* evidence of the conformity of the geographical indication with the provisions of Section III, Part II of the TRIPS Agreement. This was of particular importance with respect to minimizing the number of potential oppositions. In addition, notifying Members should clearly indicate any bilateral, regional or plurilateral agreement under which the notified individual GI had received protection. There should also be a possibility for participating Members to notify new GIs that received protection. Participating Members should be obliged to notify their GIs registered in the multilateral system which ceased to be protected domestically or which fell into disuse. Hungary was not convinced of the need to limit the period during which notifications could be made.

41. With respect to *opposition* procedures, Hungary agreed with the EC proposal that the incorporation of an examination period in the system was essential. It believed that period should start upon the publication of the notification. It seemed necessary to establish a time-frame for the examination phase. Hungary believed that a period of 18 months should be adequate for the examination but was ready to consider other time-frames as well. During the examination phase, participating Members could ask questions and request further information or explanations from the notifying Member. According to the Special Session's negotiating mandate, the objective of the register was to facilitate protection of GIs eligible for protection in those Members participating in the system, and this clearly meant more than notification. To achieve that, in Hungary's view, all those notified GIs that did not fit the definition and were not under other protection in the country of origin should be filtered out. If there were no mechanism at the disposal of Members to filter these notified names, the legal effect of the registration could be contrary to the objective in the mandate. It was exactly the reason why Hungary also advocated, as an indispensable element of the system, the inclusion of a procedure for opposition. He expected that the majority of notifications would not need to be opposed.

42. In case of disagreement over the registration of a notified GI, the notifying and opposing WTO Members should hold *bilateral consultations* with the view to settling the disagreement. Hungary expected that, as in the case of consultations under the DSU, bilateral discussions would result in a mutually agreeable solution for the challenging party and the notifying party. As a last resort, if the direct bilateral discussions did not yield a mutually acceptable solution, a multilateral possibility should be provided to settle the disagreement. This element in particular would provide adequate opportunities for smaller WTO Members, including developing countries, to represent their interests and would prevent the potential abuse of the opposition procedure by ensuring that it was not left to individual Members to determine whether a challenge was justified or not. He recalled Hungary's suggestion that the Council should explore the possibility of establishing a specific *arbitration system*, the decisions of which would be final and binding. Nevertheless, Hungary would be open to any other form of settling disagreements that would have the same multilateral character and would be simple and effective.

43. Turning to the phase of *registration*, he said that GIs which had been notified, published and had not been opposed should be registered after 18 months from the date of publication. As long as a challenge made in connection with the multilateral registration of a GI was not settled by the arbitrator, the notified GI should not be registered. Geographical indications successfully challenged on the basis of Article 22.1 and Article 22.4 of the TRIPS Agreement should not be registered. In other words, the effect of the arbitrator's decision in the case of challenges made pursuant to

Articles 22.1 and 24.9 could be of an *erga omnes* nature: should the arbitrators find that the notified and challenged GI did not fit the definition or was not under protection in its country of origin, it would not be entered into the register. This *erga omnes* effect was important in particular for two reasons. First, it would save time and effort for the participants in the system, since a single successful challenge would prevent the registration of notified names not fitting the definition or not under protection in the country of origin and, therefore, in respect of such names, there would be no legal effects on any WTO Member. Second, this would prevent the unfortunate situation where the failure of participants to challenge a notification and the resulting legal effect of registration in their respect would lead to commercial losses or costs for Members from which the GI in question originated, even if these Members had successfully challenged the registration on the basis of Articles 22.1 or 24.9. Geographical indications successfully challenged on the basis of paragraphs 4, 5 and 6 of Article 24 should be registered and the registration should refer to the successful challenge. In the case of a successful challenge, the notified GI would be registered but noting that the registration did not have a legal effect on the successful challenger. The reason for not having an *erga omnes* effect in the case of challenges was that the applicability of the exceptions in Article 24 could only be determined on a case-by-case basis. To sum up, Hungary's proposal regarding the "mechanics" was not meant to raise the level of protection, but genuinely aimed at helping to facilitate the enforcement of rights in the national courts.

44. The representative of Argentina, referring to the Secretariat's note (TN/IP/W/4), said that paragraph 8(i) of that note made reference to a system, which "[did] not provide for the grant of an international title of protection". In her view, this statement also applied to other agreements. In fact, under the Lisbon Agreement, any contracting party might refuse to protect the appellation of origin. Paragraph 5 of the same note said that the systems were "often referred to as international registration systems", but in her view, this did not mean that they guaranteed the grant of a title of protection.

45. With respect to "mechanics", Argentina fully supported the notification and registration procedure outlined in the Joint Proposal (TN/IP/W/5) and believed that this procedure was the one that would truly facilitate protection without giving additional burdens or incurring extra costs or going beyond what the TRIPS Agreement established. The fundamental element in this proposal was the full implementation of Article 1.1 of the TRIPS Agreement, under which WTO Members were able to make the necessary determination and analyse whether notified GIs were consistent or not with their national legislation. Members' rights would be undermined if they had to protect automatically in their territories registered GIs merely because they were protected in the territory of another contracting party. Referring to proposals made earlier concerning the information to be provided with the notification, i.e., administrative decisions, bilateral, regional and multilateral agreements, she said that the procedure could not be looked at in isolation from the legal effects of the system. What would be the implications of a GI that was notified on the basis that it had been included in a bilateral or multilateral agreement? For example, how would one know whether a notified GI that two countries had committed to protect did not fall under Article 24.9? The proposals made would give rise to uncertainty. The proponents also pretended that multilateral agreements could be used as a basis for the validity of the notified GIs. For Argentina, this would mean that obligations contracted by some Members under multilateral agreements would indirectly be transferred to other WTO Members which had not ratified such multilateral agreements. The proposals relating to information to be provided implied a duplication or a revision of the TRIPS Agreement, which already provided for notification of this type, such as notification of bilateral agreements, legislation and other information. The proposal for a contact point would also be a duplication of another provision in the TRIPS Agreement and constituted an additional burden. Developing countries had already experienced considerable burden in giving a complete notification of their laws and regulations. The proposals made would imply an additional burden, for example the examination of other Members' laws and bilateral agreements and their compliance with the TRIPS provisions on GIs. It would also be impossible, in the light of the current situation, to analyse within the proposed time-frame of 18 months all the information which would accompany every notification.

46. The representative of Canada fully associated her delegation with the interventions made by Australia, the United States, and Argentina. For Canada and others co-sponsors of document TN/IP/W/5, Article 23.4 required the implementation of a two-stage system. Stage 1 was clearly notification, stage 2 registration. Supporters of a mandatory system rather seemed to be proposing a system that provided for a four-stage system: notification, examination or, as the Swiss delegation called it, a summary formal examination, opposition and registration, complete with timelines and burdensome administrative obstacles. Unlike notification and registration, examination and opposition were not part of the procedures foreseen under Article 23.4. Their implementation, in Canada's view, would actually add to the TRIPS obligations for wines and spirits. Furthermore, it would constitute an infringement of the principle of territoriality. The voluntary multilateral system should not include an opposition procedure. The opposition to the recognition of a GI should occur under the national laws and procedures of the notifying Member. This was very different from what the proponents of a mandatory system were supporting which, in Canada's view, was essentially an arbitration system and went well beyond the Special Session's mandate.

47. With the proposed two-stage voluntary system, the first stage, *notification*, would consist of the submission by a Member to the Secretariat of a list of GIs for wines and spirits protected under its national legislation. Notification was aimed at identifying the domestic geographical indications a Member protected nationally.

48. The second stage, *registration*, would be the responsibility of the Secretariat and would consist of a searchable database of all notified GIs for wines and spirits. The database would identify the GIs notified, the notifying Member, the date on which the GI was protected in its country of origin, the expiration date of the GI, if appropriate, and any agreement under which the indication might be protected. The system would also provide for the implementation of Article 23.3. A list of the registered GIs would finally be distributed to every Member and a WTO website would allow for easy retrieval.

49. Finally, she said that her delegation failed to understand why the representative of Hungary was making an association with the on-going discussions on agriculture. The discussion in the Special Session of the TRIPS Council was about fulfilling an existing obligation in the TRIPS Agreement, and as mandated by Ministers at Doha, about concluding the negotiations of a multilateral notification and registration of GIs for wines and spirits only.

50. The representative of Hong Kong, China said that in his delegation's view, there should also be legal obligations for Members to facilitate protection of GIs. With regard to the question of some form of substantive examination as to whether a GI met the criteria set out in Article 22.1, he said that, while he understood the general concern that the register should not be filled with claims which did not meet the criteria of protection, what made him question the procedure was that most Members accepted registration of, for example, petty patents, utility models and industrial designs on the basis of no more than a simple formality examination. If substantial and valuable patent rights could be accepted generally on the basis of a formality examination without any inquiry into whether the subject-matter met the criteria, for example, for patentability, which were extremely complex compared to geographical indications, he wondered why the Special Session needed to be more concerned about GIs on the register fully meeting the criteria contained in Article 22.1, and could not just accept that the most simple and easiest formality examination system could be an adequate basis for entering a GI on the register and any questioning of the validity of a registration or the conformity of a GI, with for example Article 22.1, would be left to local jurisdictions.

51. The representative of Singapore said that the factual information provided by the WTO Secretariat with the assistance of the International Bureau of WIPO would be extremely useful because it would assist the Special Session in decision-making and would help avoid confusion and controversy. He further said that the communications contained in documents TN/IP/W/5 and TN/IP/W/6 were very useful contributions in helping his delegation to understand the aims and

objectives of Article 23.4. After having heard proposals relating to information such as bilateral agreements and administrative decisions and to arbitration, he believed it was necessary for his delegation to reiterate that the procedure should be simple, efficient, cost-effective and not burdensome. What Article 23.4 required was "facilitation", and participants should give "facilitation" its simple meaning. The second point concerned the legal effect: Article 23.4 used the words "in those Members participating in the system"; this seemed clear to his delegation that countries which wished to be part of the system might join it. It followed clearly from there that what was intended to be put in place could not affect the position of countries other than those participating in the system.

52. The representative of the Slovak Republic expressed his delegation's appreciation for a structured discussion which would help seek a real and workable solution and achieve the mandate from Ministers in Doha. In his delegation's view, the role of the Secretariat should be to collect and keep all notifications and to control all formal requirements of notifications. If in an agreed period (for example 18 months as suggested by the EC), there were no objections from any Member, the notification would be registered. If there were any objection concerning, for example, the right to use a specific geographical indication for a specific product produced in a Member, it should be first solved through bilateral negotiations. If no solution were agreed to, then the arbitration should be set up in order to help solve the dispute. His delegation also supported the suggestions of the EC and Switzerland for a single contact point at the Member's level in order to simplify administrative procedures. He hoped that his delegation's contribution would be helpful in finding and fulfilling the Doha mandate.

53. The representative of New Zealand said, as a preliminary comment on the factual material prepared by the WTO and WIPO Secretariats (TN/IP/W/4), that what struck her delegation was the low level of uptake on the multilateral systems of registration, particularly in the only two examples where registration did provide some sort of automatic presumption of protection.

54. With regard to the issue of the "mechanics", she said that the views on the multilateral system had been well presented by a number of other delegations as well as in the proposal co-sponsored by her delegation. Some statements made earlier had raised concerns to, or created confusion for, her delegation. She agreed with Switzerland that there should not be an avalanche of terms on the register, with all the implications for opposition procedures and costs, both for the administering body of the register and the countries involved in the opposition procedures. The best way to avoid such an avalanche would be to reach a better common understanding of what the definition in Article 22.1 of the TRIPS Agreement actually meant, which would provide the Special Session with at least some *a priori* expectation of what terms could be on the register. She pointed out that the key proponents of the register had explained that one way of avoiding such an avalanche of terms could consist of having in the notification mechanism supporting documents to be made for each geographical indication going on to the register, for example, a judicial decision for each of the terms. She had thought that what was proposed would concern terms already protected in a WTO Member, but it seemed that it would also concern terms eligible for protection in that Member, which would, in fact, mean a greater set of terms which would be eligible for being put on the register. If a term was only eligible for protection in a WTO Member, then it would not always be possible to provide specific documentation making the case that the term was already protected at the national level. This would be the case where Members were implementing a system of GI protection on a common law basis, which did not necessarily require prior registration of a term. In that context, it would be difficult to ask Members to provide judicial decisions or specific documentation for every term which would be going into the register. That pointed to the need for a clear understanding of which terms under Article 22.1 countries would be eligible for protection in WTO Members and which were therefore eligible for being put on the register. This would have a direct impact on the other mechanisms, namely the opposition procedures and the costs.

55. The representative of Chile associated his delegation to the statements made by Canada, Argentina, Australia, New Zealand and others. He asked whether, under the proposal made by the EC

and other Members, the protection of a geographical indication might be questioned or challenged before the courts of the country where that geographical indication was located. What would be achieved at a multilateral level would not stop or deter the possibility of a challenge at a domestic level. On the other hand, if, as had been proposed by the EC, there was a system of opposition with binding effects at a multilateral level, he would then see a case where there might be a ruling by a national jurisdiction which could be the opposite of a ruling at the multilateral level, or vice versa. Which ruling would prevail? As an example, if a traditional expression notified by a group of countries was challenged in the multilateral system and also before a court of a country member of that group, and the decision at the national level was in favour of the traditional expression as a geographical indication and the decision at the multilateral level was the opposite, what would then be the legal situation?

56. Turning to the *opposition* procedure as proposed by the EC and their member States, he said that such an opposition seemed to only have an effect for the challenging Member: a successful challenge only released the country challenging the notification from the obligation of granting protection whereas the other Members which had not challenged would still have the obligation to grant protection to that geographical indication. This would lead to a situation where one geographical indication would be protected only in some countries, whereas, in the others, it would no longer have that protection due to the fact that there was a successful challenge. That aspect should be further examined.

57. Referring to the intervention made by the delegation of Hungary concerning the database, he pointed out that that was the price paid for the results of the Uruguay Round. He said he had no objection to the fact that all geographical indications be put on the same footing, in other words, that there was no special protection for geographical indications for wines and spirits.

58. The representative of Malaysia said her delegation looked at the issues from the perspective of non-wine and spirit producers. Bearing in mind the possible ramification of costs and legal effects, Malaysia would support a system which was simple and non burdensome, with minimal costs and no legal effects. While non-wine and spirit producer countries would be unable to participate in the system in terms of the notification and registration process, Malaysia saw that it could, however, still use the system as a database for search purposes at a later stage when it would proceed to its national determination of GI protection. In this case, Malaysia would have an interest in the notification and registration process.

59. With regard to *notification*, she said that most notifications in the WTO were generally in a simple format and usually additional information was provided by the national contact points. Apart from notifications of legislation or legal reports which were voluminous, most of the other notifications were actually quite simple and were mainly presented in simple format; Malaysia would welcome notifications which were short summaries of the information to be provided. Supporting documents could, of course, be retrieved from the website; circulation to Members would hence not be necessary. This would cut down the costs. With regard to translation cost, which could be a big component of the overall cost of the system, Malaysia would appreciate this cost being borne by the notifying country.

60. Malaysia also saw a contradiction in terms of the *challenge* mechanism suggested by some Members when the end result was only a presumption of eligibility, which would create uncertainty with regard to the legal effects of the outcome of a challenge mechanism.

61. The representative of the European Communities said he was surprised to learn that his delegation had decided and had informed the Special Session they would be notifying thousands of geographical indications. Such a decision had not been taken and should not be taken for granted. He added that the EC would probably not notify one single geographical indication if the future system were reduced to a simple electronic database with no legal effects. It was not his intention to address

this issue because he would have liked to deal with it under the sub-item "role of the Secretariat" or the administrative body in charge of the system. He said, however, that there would probably be no need for a major role for the administrative body or the WTO Secretariat. He agreed that the system should be regularly updated, if appropriate, in light of developments. In bilateral discussions, several delegations had pointed out to him the risk of abuses of the system. One delegation had suggested that the administrative body undertake a preliminary examination to see whether the conditions were *prima facie* fulfilled; another had suggested that it would be sufficient to have a formality examination. He assured Members that the EC would try to find a solution to this kind of problem. He wanted to indicate that the issue was an important one and would in the future need careful examination and a consensus solution.

62. As far as *publication* was concerned, several delegations had mentioned a need for transparency and light procedures. He thought that it was probably feasible that such publication could take place on the WTO website or on the internet and that should deserve serious consideration.

63. The representative of Australia raised the question of translation of geographical indications, which had been mentioned by other delegations in the regular session. He held the view that translation costs would be very significant both to the administrator of the system and to individual Members. He understood that the EC had suggested that the bulk of the translation cost should be passed to the administrator and had foreshadowed that payments could be made on a user fee basis. If it were true that the EC would provide or would notify all their GIs, their relevant legislation, their bilateral agreements and regional agreements, that would mean thousands of GIs. For those Members whose languages were not one of the three WTO official languages, what would that mean? He recalled that Article 23.4 required that a GI for a wine and spirit be also protected in translation. Under the EC-style register, that seemed to place an onus on each Member to translate every GI notified by another Member into its own language and then to compare it and the original language against the relevant reference data bases, so that they could decide whether to challenge the registration under the EC-style of register or not. For example, Japan sold "Sake" with the name in Kanji characters; this name would be notified in Kanji characters to the Secretariat; it would be translated into Japanese Kana writing, into French and into Spanish. China, for example, would receive the GI in English, French and Spanish, but would have to translate it into Mandarin. Recalling that Chinese, Japanese and Korean characters were similar, he wondered what the situation would be for a term that would be common to several WTO Members. For Australia, it was, therefore, important to have a better understanding of the issue of translation of GIs, the need to respect Article 23.4 and the need for those Members whose languages were not one of the three official languages to also respect, in translation, all the GIs that would be notified by a large WTO Member.

64. With regard to *challenges*, Switzerland had suggested that there be some "gate keeper" who would decide whether a notified GI met the definition of Article 22.1 and the criteria of protection in the country of origin. Could Switzerland convince other countries that there would not be any confusion as to the criteria relating to definition and eligibility for example? He recalled the EC's new regulations on wines which claimed that traditional expressions met the definition of a GI. In the regular session, the EC representative said that traditional expressions had nothing to do with GIs. If the EC notified a traditional expression as a GI, this "gate keeper" would have the power to determine whether a name was a GI or not. He expressed doubts on such an approach. If "Basmati" was notified for a wine, who would determine up front whether that met the definition? Referring to the cases of the "Torres" wine company and the Danish Dairy Board, which had challenged the EC regulations on GIs, he said that the money, cost and resources in challenges within the EU had been phenomenal; he therefore drew the attention of those WTO Members who thought that this was just an easy system of registration, notification and opposition. Turning to Hungary's comments, he recalled the proposal, made in the context of DSU, for a standing group of DSU panelists. If GIs were to be dealt with by adjudicators, then there would be a comparable need for a standing group of

adjudicators and DSU specialists to solve all the problems in the area of GIs. This aspect should not be considered lightly.

65. The representative of Hungary reverted to the issue of *challenges*. In his delegation's view, there might be at least two groups of countries: those which did not have a national register, and those which had a certification mark system. To assist his delegation's better understanding of the situation, he asked Members if they operated such systems and, among those providing GI protection, how they would determine which GIs they wished to notify. Was there any examination as to whether a name or sign in a certification mark was in conformity with Article 22.1, in particular, whether there was a given quality, reputation or rather characteristic essentially attributable to the geographical origin of the product? If yes, who would proceed with such an examination and what kind of challenge would be available at the national level? How would the term "eligible for protection" in the case of a GI mean? What would be the basis on which those countries would notify GIs to the register? He said that it would be important to have responses to these questions in order to understand why Hungary and others had proposed the multilateral system. He then recalled that, when the issue of GIs had been raised in the context of negotiations on agriculture, assurances had been given that this issue would be solved in the context of the Special Session of the TRIPS Council. If the outcome of the negotiations in the Special Session was a computer containing a list of names with a part-time operator, he was of the view that there might be no other way than to put the GI issue – since it dealt with agricultural products – in the context of agricultural negotiations because in that forum at least, that would be the maximum possible outcome.

66. The representative of Chinese Taipei said that the database of GIs should be as complete as possible, that is the coverage of the notification should include not only the GIs as defined under Article 23.1 of the TRIPS Agreement, but also other competing GIs under Article 23.3. Furthermore, those indications that were exceptions to GI protection as provided under Article 24 should also be included in this database. With all that information ready and available in the database, the international notification and registration system could then provide a whole picture of any particular GI protection at the global level. For example, when the authority of one WTO Member was confronted with a request for the protection of a foreign GI, it could access the database and retrieve all relevant information such as the GI protection in Member A with a competing claim in Member B and a long time usage exception in Member C (Article 24.4) and, possibly, another exception of common names in Member D (Article 24.6). So, the international registration system ought to be as complete as possible while on a voluntary basis. The delegation of Chinese Taipei believed that registration should be a mechanism where every Member could register its GIs, its objections, and all other exceptions. Lastly, the participation should be open to all Members but strictly on voluntary basis. However, a non-participating Member should be able to access the system.

(ii) *Costs*

67. The Chairperson pointed out that some delegations had already addressed the issue of costs in relation to "procedures".

68. The representative of the United States said that the system that the US delegation was supporting would not be completely without costs. Certainly, those Members choosing to participate would have to compile their notification information in the format decided upon, would have some cost involved with any opposition that might arise under their national law and would have to monitor their own domestic geographical indications to be sure new ones were notified and that those that had been successfully opposed or had lapsed from non-use or otherwise ceased to be used as geographical indications were in fact withdrawn. Members or nationals of Members that opposed, under national law, indications notified by another Member would also bear some costs. The US delegation believed, however, that such costs would certainly not be as great as those they would face under the proposal put forward by other Members. The Secretariat's only task in relation to the system in the Joint Proposal (TN/IP/W/5) would be to design, compile and maintain these notifications in a

searchable format, perhaps accessible through the WTO public website. Providing access through the public website would enable Members to make use of it to determine whether the terms they were considering using were already claimed by others. Those participating in the system would use the database to obtain information for use in any domestic procedure involving consideration of geographical indications. Designing, compiling and maintaining the database would involve some cost for the WTO. In the US' view, it would be inappropriate that those costs be apportioned to all Members, since not all would benefit because they did not produce wines and spirits for international trade and would not likely be participating in the system. This was an issue that a number of Members had raised with the US delegation bilaterally. Finally, the US delegation recommended that Members consider authorizing the Secretariat to apportion fees based on the volume of geographical indications notified. Those Members that benefited most from the system should contribute to its upkeep in proportion to those benefits.

69. The representative of Japan said that translation was not only a cost problem in the area of GIs. As a preliminary comment on the factual information provided by the Secretariat (TN/IP/W/4), he said that, except for the PCT system, the Lisbon Agreement for appellations of origin, the Madrid system for marks and the Hague Agreement for designs were considered to be international registration systems for applicants seeking national protection through the international system. Therefore, if the information on these systems seemed to be useful for the work of the Special Session, their purposes seemed, however, to be different from the purpose of the system at discussion. As one of the co-sponsors of document TN/IP/W/5, Japan thought it was important to consider two issues for the multilateral system, taking into account the meaning of Article 23.4 of the TRIPS Agreement. First, the burden for each Member, namely the burden of operating the system including operation costs and the resources: such a burden should be minimized because it must be clearly beneficial to not only governments operating the system, but also to the users of the system. Second, considering the various situations of each Member regarding the protection of GIs, for example, based on Article 1.1 of the TRIPS Agreement, each Member was free to determine how to protect GIs, so the legal system for the protection of GIs might be different from one Member to another. A legally non-binding and voluntary system, including opposition, should be established since it was considered to be consistent with the principles of the TRIPS Agreement as well as minimizing the administrative and judicial burden and cost for each Member.

70. The representative of the European Communities said that, contrary to what some delegations had described, the issue of costs for translation might not be such a big problem. He mentioned cases where, in practice, translation might be needed: when a WTO Member might wish to translate a GI notified by another WTO Member in one of the three WTO official languages, English, French or Spanish, or when the WTO Member might wish, for purposes of examination, to translate into its own official language a GI notified in the language of the country of origin, in order to find whether the term in its own language would be eligible for protection. He emphasized, however, that the object of protection was the geographical indication, that is a particular term covered by a particular notification. For example, if the EC notified the term "Bordeaux", only that specific term was to be protected in translation. Therefore, the cost that a national administration would bear would be the translation of that particular term and, basically, that would be within this particular context. If fifty terms were notified, fifty terms should be translated. With regard to the supporting documentation of the notification of a geographical indication, to take an example of the EU system, the summary information sheet which had to be translated and published was no longer than one or two A4 pages. That was the key information to be translated in the three official languages of the WTO. He then referred to the system of translation within the WTO and the various bodies, including the TRIPS Council. Translation needed to be taken care of but it should not become an argument for saying that the meaningful multilateral system that many Members favoured would not be workable. He asked whether the Secretariat could, perhaps for the next meeting, explain how this particular aspect could be dealt with in the context of a future registration system.

71. He further said that his delegation agreed with the statement made by Australia at the June meeting that costs needed to be borne in a fair and equitable way. The question was how to translate this principle into reality. One course of action would indeed be to look at the proportionality rule. There were, in the view of the EC delegation, two particular types of cost in the establishment and functioning of the system: costs to the WTO Secretariat or to any other administrative body which would be in charge of the administration of the system and costs to governments. The costs to the Secretariat would basically consist of the costs of compiling and distributing notifications, possibly translating them, annotating challenges as well as updating the system. In this regard, one suggestion had been made to have the documents accessible on the WTO website.

72. The costs to *governments* stemmed probably from the fact that governments needed the manpower to examine the notifications made to the WTO, within an 18-month period. Costs might also result from the involvement in the negotiations following oppositions. It would be fair to say that, in both cases, the exact cost would depend on the amount of material to be examined by the government and this would vary from case to case. The EC delegation did not believe that there would be other costs involved. For example, under the EC proposal, opposition would prevent registration from having any legal effect. In that case, it was clear that there would be no costs involved. Even if there was no opposition, there would be virtually no costs to governments either. With respect to the protection against the use of a GI, against consumer deception as required by Article 22.2 or even if the true origin was indicated or used in translation, or if the name was preceded by "style", "like" and so on, there would be no costs by virtue of the presumption of validity, as required by Article 23. Governments were under no obligation to police protection of GIs. Governments were free to let GI right holders invoke themselves that presumption before courts or administrative agencies. Therefore, the costs would mainly fall on the shoulders of the right holders. With respect to the prohibition of the registration of trademarks containing a GI, in case of consumer deception as required by Article 22.3 or even if the true origin was indicated as required by Article 23.2, trademark examiners would have an easier task in carrying out those obligations. In countries where those obligations were absolute grounds for refusal, trademark examiners would not only look at the list of previously registered trademarks, but also at the list of WTO registered GIs. To take the example of the European Community Trademark Office, that office would be prompted to verify not only the 130,000 registered trademarks but also the WTO list of GIs. Similar examples could be made with regard to other industrial property offices, some of them having a greater number of registered trademarks. The searches often done via electronic databases similar to a word search like the one used in word processing systems would make those searches longer for a few seconds. The only cost involved there would be that of including the new names in the database via a simple cut and paste operation of the registered terms. For those countries in which those obligations were not "absolute" but "relative grounds of refusal" or just "motives of opposition", or "motives of invalidity" of trademarks, logically that presumption would have to be invoked by right holders, who would then bear the costs in their entirety.

73. With regard to *producers*, it would be useful to make a distinction between two types of categories of producers. The producers who were right holders of registered GIs in the notifying country would actually make savings as they would have easier access to the legal means available to them in having the level of protection prescribed in Articles 22 and 23. Similarly, GI right holders would have a clearer view regarding countries in which their GIs might have become generic. That surely should facilitate investment and export decisions. The second category of producers were those who had been using names which were protected as GIs in other countries but were generic in their own territory. They would not need to re-label their products and would not incur costs. If they had exports in countries in which the names were not generic, they would be able to continue exporting to that country until the legitimate producer challenged that practice. Those exports might continue, if so justifiable under any of the exceptions of Article 24.6 of the TRIPS Agreement. For those cases, exports had taken place by unlawful usurpation of a name and use of that name would have to cease if so demanded by the right holders. In that regard, the situation was not different with a register. If the right holder had challenged such a practice solely under the domestic legislation, the

outcome would have been the same. As these exports had taken place unlawfully under the TRIPS Agreement, these costs needed not be taken into consideration as it was simply piracy. To sum up, as costs were reduced to those to the Secretariat and to governments, the EC delegation would be prepared to find ways and means of ensuring that those costs were borne by those countries using the system in a manner commensurate to that use. One could possibly also consider that producers themselves, instead of governments, would file notifications under the multilateral register. That, of course, would lead to a different situation, but the EC delegation would be prepared to look into that as well as to explore mechanisms that adequately covered the cost to governments and to the WTO Secretariat, as was already the case in the system established by the Madrid Agreement on the International Registration of Marks or the system established by the Patent Cooperation Treaty.

74. The representative of Argentina said that no other Member had the EC's comparative advantage with regard to translations in the sense that for the EC, there would be no additional effort to be made. She further asked the EC's representative clarifications about his statement regarding a Member's wish to translate a notified GI from the language of notification into its own language, in particular in the light of Article 23.1 (prohibition of the use of a GI in translation). How could a country oppose any notification if it did not understand the connotation of a GI notified in a foreign language? What would be the situation where a producer from another country was exporting goods bearing the GI in the language of such other country and there was no evidence for proving that the term used was a translation of the GI? It had been said by the EC's representative that, if there was no opposition, there was no cost to a country. In her view, it was obvious that, if there was no translation, no opposition or no notification of GIs, there would be no cost to a country; that would be the case if a Member became a "passive" subject of the obligation. She also asked how a country would know whether or not a term notified in one language was generic or used in a common language in other countries if there was no translation.

75. The representative of Switzerland said that it went without saying that the establishment of a registration and notification system would generate costs, be it a register or a simple database. However, these costs had to be evaluated in relation to the advantages afforded by the system. For Switzerland, only a system with legal effect for WTO Members would be a really useful tool and would fulfil the requirements of Article 23.4. Furthermore, he stressed the importance of the phase of examination which followed notification. Indeed, this phase made it possible for Members to collect information on geographical indications that had been notified before making formal opposition, which would reduce the number of disputes. Finally, he recalled that it would be up to each Member to determine which geographical indications they wished to notify. To create a system of arbitration might, at first sight, seem a source of additional cost; on the contrary, it should be considered as an "investment" guaranteeing that Members would not undergo negotiations which would last for years. It was most important to see that the procedure for registration be simple while respecting a certain degree of formalism and some rigour, in order to achieve a two-fold objective: on one hand, to make it possible for a maximum number of Members to decide to use this valuable tool through the notification of their GIs, without being deterred by formal requirements and excessive costs; and on the other hand, to ensure that the registration of GIs respect some minimum formal requirements so that the register became a truly useful tool to facilitate the protection of GIs as provided under Article 24.3 of the TRIPS Agreement. Last but not least, who would actually pay for the system and bear the financial costs? One solution would be to determine fees on the basis of the number of notifications made, which was the solution retained by the Lisbon Agreement. It would be rather logical for the Members using the system and benefiting from its advantages to bear the cost. In that event, Members would, of course, be free to determine at the national level who would bear the fees, governments or producers; this would depend on the system of protection chosen. With a view to ensuring a participation as broad as possible in the system, it would be necessary to seek solutions so that these fees did not prevent certain Members from notifying their GIs. One could, for example, imagine financing for these Members through technical cooperation programmes or for certain requests to be free of charge.

76. The representative of Australia said that his delegation was looking at the issue of costs at different levels: costs in administering the system; costs to Members in implementing the changes; costs to producers; and costs to consumers. As far as the administration of the system was concerned, costs would depend on the kind of system to be established and the degree of procedural complexity. In the system proposed by Australia and several other Members, the cost would be negligible. Under the proposal put forward by another group of delegations, the costs would be very substantial. The second determinant in terms of costs would be the volume of GIs that would be notified.

77. Leaving aside the question of who should pay for these costs, he addressed the issue of costs to *governments* in implementing changes. As the proposal co-sponsored by Australia accommodated existing regimes, only minimal changes would be required. Under the other proposal, Members would, at the very least, have to examine every notification that was made. How many governments were presently in a position to set up a group of persons to examine every notification? The answer would depend on the number of notifications per country. Many countries did not have, at this stage, any mechanism to perform this operation and would have to establish new ones. It would be necessary to take into account the cost of putting into place new legislation, new administrative structures as well as the costs for human resources. Australia was concerned that the *demandeurs* were asking others to follow their way of protecting intellectual property rights - a very regulatory, detailed and intrusive system - and to go, for the first time in intellectual property law, from one system based on territorial application to a *supra* national one.

78. The cost to *producers* could be very significant, particularly for those countries who used terms which others believed to be their own. Nothing in the TRIPS Agreement said that a Member had the obligation to follow another Member's form of protection. Using the example of the term "vintage", he said that, if the EC were to register that term as a GI, Australia would have to enter a process of challenge and to come up with evidence showing that "vintage" was generic in Australia and could not be registered. He also understood that, while Australia might not have to protect that term, any other Member not having opposed it within the time-limit of 18 months would be obligated to give such protection and would have to stop the importation of all products bearing the term "vintage" and coming from Australia or any other Member which had opposed the registration of "vintage". He added that this example was not so hypothetical because the wine producing countries, particularly those newer competitive countries, were very sensitive on this subject and the likely implications were well known.

79. Turning to the issue of costs to *consumers*, he took the example of a non-wine product, Bulgarian feta. The Australian consumer at the present time benefitted from a diversity of Bulgarian, Australian, French, Danish, German, or Greek feta. Under the system proposed by the *demandeurs*, if Australia did not challenge the term "feta" as a generic term, it would be obliged to prevent "feta" from being used by any country, except Greece. It would mean that Australia would have to prohibit imports from Bulgaria and any other country, except Greece. He wondered how the consumer in Australia could get any benefit if there were only one cheese that could be called "feta" and the producers of all other countries would have to repackage and re-label their product to call it "white cheese" or whatever. So, the cost to consumers was one that was highly debatable. The other side claimed that this would prevent consumer deception, and would be beneficial to consumers. He thought that this was not going to be a "boom" for consumers at all.

80. The representative of Malaysia said that the issue of the cost for setting up the system was important for her delegation. She asked whether the Secretariat could provide information concerning the costs for setting up a database (cost of hardware, manpower or man hours needed to maintain such a computerized database), an idea of translation costs as well as panel costs for purposes of ascertaining, in the future, the cost of arbitration. Her delegation was also interested in knowing from the EC what exactly they had in mind when they said that they were prepared to discuss costs commensurate with the use of GIs. Referring to the fees charged for the applications under the

systems administered by WIPO, she said it would be helpful to know the costs involved, especially to the Members.

81. The representative of Hungary noted that the issue of cost was a recurring topic in the discussions. He had listened with interest to the detailed analysis of the EC, which tried to show, through the various phases of the use of the system, that the costs were actually not as high as had been mentioned by the opponents. From a more general perspective, his delegation agreed that basically there were at least two types of direct costs: cost accruing from the operation of the system for the WTO Secretariat and costs to governments.

82. With regard to costs to the *Secretariat*, he said that, under Hungary's proposal, the Secretariat would have certain tasks in the management of the system. Hungary was open to the idea to have the WTO Secretariat or, on the basis of a special agreement between the WTO and WIPO, the WIPO Secretariat, perform this task. It was ready to look at the possibility of involving the International Bureau of WIPO in running the system, including for reasons of costs and human resources; with that way of proceeding, the cost for running the system would be cut down quite considerably.

83. With respect to costs to *governments*, Hungary did not question that there were certain limited costs to governments in this field in the same way as for other fields of intellectual property protection. He had listened with great interest to the concerns expressed by a number of countries about the costs to governments, in particular in developing countries. He pointed out that the costs to governments in relation to the implementation of the TRIPS Agreement, including in the fields of enforcement, patents or trademarks, etc., were immeasurably greater than the possible costs for a very limited part of the economy and for a very limited range of countries. He also pointed out that LDCs were, to his knowledge, not producing wines and they, as well as many other developing countries, would not be concerned about the system. It was, in fact, a handful of countries - some of them being highly developed industrial countries, others developing and agricultural exporter countries which were very much in the upper income part of the developing country category and were wine producers - that might have an interest in using the system for their own GIs or, as the case might be, which might be hit by the effect if the protection of GIs were facilitated through the multilateral system.

84. With regard to costs to *producers*, he recalled that his delegation had mentioned the example of Tokay wine in the last meeting. Hungary was able to demonstrate that there would be actual cost to producers. For multinational companies like Baileys and others which used the name "Tokay", the cost would consist in not being able to use this name and have higher prices for wine with a less well-known denomination.

85. With regard to costs to *consumers*, there was no question that there might be some cost especially for those consumers who used to have, as an example, access to Tokay wine which costed less than the real Tokay wine. He compared the situation with a similar one in the field of trademarks, where due to the implementation of the TRIPS Agreement, consumers in Hungary could no longer obtain products at lower prices and had to adjust to the changes. He wondered why the issue of costs to consumers should be different in the area of GIs.

86. The representative of Korea said that the issue of costs was directly linked to the multilateral system to be established. For his delegation, one of the basic principles which could be envisaged would be to have participating Members share the costs commensurately with the percentage of their registered GIs in the multilateral system.

87. The representative of Hong Kong, China shared the experience of Hong Kong, China of a very simple and cheap system, although it did not directly address the question of protection of GIs. The Copyright Law in Hong Kong, China contained a provision which allowed the courts to give *prima facie* recognition to rights and works deposited in overseas copyright registries, for example, the Library of Congress Registry in the United States, which was a large sophisticated registry with a

great number of rights registered for a fee of US\$30. The court in Hong Kong, China, where such a registry was designated in its law, would accept a photocopy of a certificate of registration as *prima facie* evidence of two elements: the subsistence of copyright in a work and the ownership of the copyright. Such evidence was only *prima facie* evidence and was rebuttable; in any litigation, a defendant could demand to cross-examine a witness and question the facts as asserted in the registration certificate. He said that, in his experience, the US registration system had no substantive examination. Hong Kong, China's law further provided that, if a defendant in a copyright infringement called a witness from overseas and his cross-examination only resulted in proving the facts in the certificate, then the court was empowered to order the defendant to pay all costs involved in arranging the attendance of the witness in the court. So, there were provisions to prevent abuses of the right to cross-examine about *prima facie* evidence. This partial reversal of the burden of proof had been judged by experts to be consistent with the normal burden of proof principles of English common law. What were the costs involved here? Of course, the system used in Hong Kong, China was a "parasite" to the American registration system. For the cost of US\$30 plus the cost of a photocopy, parties involved in court proceedings were saving themselves a very substantial sum of money in terms of bringing evidence to court, because they had the *prima facie* evidence provision to rely on. The representative of Hong Kong, China said that the benefits seemed to substantially outweigh the costs of this extremely simple system of copyright protection. He expressed the hope that there would be some will to work towards a system which would be extremely simple and yet maximize outcome while minimizing output.

88. The representative of Argentina associated her delegation with the statement made by the delegation of Australia on costs and supported the view that the administrative cost to the Secretariat would not be substantially different from those accrued to it for administering the WTO system of notifications. She held the view that the more complex a system was, the more costly it would be. In her view, the discussion on costs would not lead anywhere as it was currently taking place. She referred to various possible elements of the cost issue. What would be the administrative cost to the Secretariat? Would the system be self-financing? Would the system involve an increase in Members' shares of contribution? She pointed out that no one knew with what resources the system was going to be established. She would, therefore, suggest that the Secretariat provide concrete estimates on the current costs it had in respect of the implementation of the existing notification system in the WTO. She said it would be useful to have a cost estimate regarding the proposals, to know the parameters and see whether delegations were departing from those parameters or not.

89. She said that Argentina was not ready to accept any system which would mean additional burdens for its government and producers.

90. She finally expressed concerns regarding the tendency of some delegations to make categorization of countries, in particular developing countries, for example into wine producers and non-wine producers, or to refer to competitiveness or cost/price competitiveness. She had also noted that, on the basis of an initial proposal, some delegations had brought in elements which added to the complex nature of the proposal and deserved careful attention.

91. The representative of New Zealand expressed support for pleas made by Argentina and Malaysia for more specific information about the cost issue, including the cost of dispute resolution and arbitration. She also asked whether those Members who currently were implementing registration systems at the national level could share their experience with respect to costs or fees necessary under those systems. As the delegation of Australia had very clearly pointed out, there were a range of costs associated with the register that went beyond just administrative, paper or computer costs. They were costs for producers and consumers, which fell into the basket of "opportunity costs", that is cost for not being able to use terms in third markets if those markets might not have gone through the burdensome opposition procedure under the EC proposal. There were also costs for consumers as an effect of reduced competition. Her delegation also noted that, under the EC proposal, which provided that the obligations flowing from the register would be applied to all WTO Members regardless of

whether they were participating or not, those costs would also be flowing to consumers in all WTO Members, and not just in those Members with interest in producing wines and spirits. Turning to the intervention made by the representative of Hong Kong, China, she thought that the example given would imply that national systems of registration were already in place at the national level for all WTO Members, which actually was not the case.

92. The representative of the European Communities said that it was more important to have some more convergence of views on the essential characteristics of the system before entering into such aspects as cost-sharing, modalities or arbitration or dispute settlement. With regard to arbitration and dispute settlement, he recalled that the EC proposal, tabled together with a number of other Members, had indicated that the way to solve disputes between a notifying country and an opposing country or countries would be through bilateral negotiations. In reply to a comment made by Argentina with regard to Article 23.1, he said that the EC would not dare to question the obligation with regard to any WTO Member concerning that provision. The only thing he had to say was that there was no obligation for a country to translate into its own language a notification of a GI made by another WTO Member. Concerning the question of how a country would know that a GI was generic, he said that one criterion would be the perception by consumers that needed to be demonstrated on the basis of information collected through a survey conducted among a number of consumers, by looking up terms and explanations in dictionaries, by looking at labelling and, possibly, at any other element of proof.

93. The representative of Chile said there were new elements emerging from the discussion that would need careful examination and assessment in his capital. With respect to costs, he said that there were certain global costs that had to be shared by all Members. Other costs would vary, depending on the situation of each Member. As the representative of Argentina had said, there were many elements that were submitted for consideration and it was, therefore, difficult to have a very precise idea of costs to be incurred in the various scenarios. He asked whether the Secretariat could draw up a list of the elements making up the costs: costs to the producers, to governments, to the Secretariat, etc., in a more structured form, so that participants in the negotiations could look at the various elements and put figures according to their own situation and make an assessment. In such a list, the Secretariat could perhaps give an indication as to the sources of information to which participants could refer in order to have more elements and evaluate costs based on the various scenarios or proposals.

94. The representative of Brazil said that his delegation was very sensitive to the issue of costs in implementing a multilateral system of notification and registration of GIs for wines and spirits. One of the important and interesting points had been made by Australia regarding translation of GIs. As a country whose language was not one of the WTO official ones, Brazil was sensitive to the impact and practical application of the system. One of Brazil's objectives was to have the most simple and non-burdensome and low-cost system, particularly for developing countries. His delegation believed that the suggestion made by Chile could be a helpful way for a concrete understanding of the actual cost in implementing the system.

95. The Chairperson asked the Secretariat to share with participants information regarding the issue of costs.

96. The representative of the Secretariat said that it would be easier for the Secretariat to provide information about actual costs in relation to its existing activities than to "speculate" about future costs under a possible system the parameters of which were unknown. If the Special Session so wished, it would be possible to provide information on the direct operating costs of the Central Registry of Notification (CRN) in the addendum to document TN/IP/W/4. He said, however, that that information would probably give an incomplete picture because many costs were absorbed in the WTO general budget and it would be difficult to identify those costs. There were also some direct operating costs, which could be reflected, such as those related to personnel. As regards translation, without knowing the scale of the translation that might be involved in a register and what might be the

distribution of the burden between the notifying country and the Secretariat, it would be difficult to do more than to give a figure for the cost per page. If that would be useful, the Secretariat could provide such information. As regards panels, assessment of costs would be more difficult because panels varied from one to another and the bulk of those costs were absorbed in the Secretariat's general budget; however, if the Special Session so wished, the Secretariat would see whether there was some information about the typical range of costs to the Secretariat in servicing a panel case. As regards sources for additional information, the WTO did not have any information to be shared at that moment. He suggested that the WIPO might have information based on its own experience.

97. The representatives of the International Bureau of WIPO said that they would need more precise guidelines on the kind of precise information requested. At this stage, as far as the Madrid system (trademarks) was concerned, there was a document recently produced by the International Bureau for the Assembly of the Madrid Union, which addressed the question of the possible addition of Spanish language to the Madrid system (MM/A/34/1). This document could perhaps give some guidance.

98. As regards the PCT system, the International Bureau of WIPO had provided, to the best of its ability, reference to some applicable rules and sources of information of the PCT rules and fees (page 11 of document TN/IP/W/4). To be very precise, apart from the cost of an international patent application filed under the PCT system, there were a number of factors to be taken into account, and it was in fact very different from a registration system or notification system of GIs. The International Bureau would be ready to provide any information that might be relevant to the work of the Special Session in relation to the general filing fees and the fees related to the entry into the national phase, where the translation fees, the fees of national representatives and the fees paid to national administrations for pursuing those patent rights played an important role and could become an issue.

99. The representative of Australia said that it would be useful to have the Secretariat identify, under the two proposals that had been put forward, at what stage in each proposal costs would be incurred, and to split them, for example into costs to governments, to consumers, to producers, or to the Secretariat. Such an exercise would be more helpful than simply have a mechanical listing of costs such as cost per page, application fees, translation cost per page or cost per hour for a panel meeting. To take the example of a country which would make a notification under the EC proposed system, although it would be difficult for the Secretariat to identify how much it would cost, it could, however, give an idea of the number of pages that it would receive (notified GIs, regulations, bilateral agreements and regional agreements, etc.).

100. The representative of Switzerland said that such a paper would be of quite an hypothetical nature at this stage of the discussion since participants did not yet have a clear view on the elements of the multilateral system.

101. The representative of Argentina expressed her support for Australia's comments and suggestions on costs. She said that there was a direct relationship between the structure of the system and the costs involved. The question of cost was important for many countries, including those which were not wine producers. Actual figures concerning cost effectiveness were necessary. She disagreed with Switzerland about the hypothetical exercise nature of the paper. She also noted that the demandeurs were working on the assumption that there would be only three languages, English, French and Spanish, while there were also other languages involved. That was precisely the point she had made earlier to the EC representative when he dealt with the issue of translation: a country must know what it was protecting. If the Special Session wanted to make progress, it would be interesting at least to know the variables involved in each of the scenarios.

102. The representative of Hungary expressed doubts about the usefulness of the exercise. Apart from the hypothetical nature of the paper, he also saw a greater problem: for example, the cost for producers. Which producers would be covered? For whom would it cost more? For the producer

who could not continue to usurp a GI? Or for the producer who rightfully used a GI and who had lower legal and enforcement costs, thanks to the multilateral system which facilitated the protection? He said that he would be interested in knowing what costs might be incurred for the large majority of countries, in particular developing countries who did not produce wines.

103. The representative of the European Communities associated his delegation with the statements made by Hungary and Switzerland. He said that the WTO Secretariat could give some insight as to the matters for which it had experience, such as cost of translations, but it would be in a very difficult position to make a "speculative" study, trying to figure out how a future register would impact on producers or consumers. The impact depended on the type of consumers and producers, on whether producers had been using names from others or not, on the effect of the register, etc. If the Special Session were to "go down that road", it should also evaluate the benefits to be derived from the registration of GIs.

104. The representative of Chile said that the Special Session was engaged in good faith in a negotiation. Many participants in the negotiations did not have the capacity or the elements to assess the proposals. There should, therefore, be an assessment on the legal consequences of every proposal. Each country would have to judge how that would play with its own public policy, how that would impact on its consumers, producers, etc. Without those elements, it would be very difficult to ask many delegations to engage seriously in a discussion where rights and obligations and costs of different types were involved. What was being asked was not "speculation" but a list of items with costs involved under each scenario and any good administrator could prepare such a list. He warned delegations which opposed such a request that they should bear the responsibility of negotiations being slowed down because other delegations could only refuse if they did not have all the elements to take action.

105. The representative of Argentina proposed to add an additional item in the study on economic repercussions of the proposed systems. She had understood from the systems administered by WIPO that, if a system incurred losses, the deficit could be covered with surpluses achieved in other areas. The WTO did not have the same resources and possibilities as WIPO. This important aspect should be taken into consideration for the discussions in the Special Session. When a system was set up, there might be a point where there would not be enough income and the question of how to cover losses would have to be dealt with.

106. The Chairperson said that there was no agreement on how to conduct the research on the implications of costs. One possible way would be to have, on one hand, the assessment of costs made by the proponents of the study and, on the other hand, additional information provided by the Secretariat as indicated by its representative (i.e., translation cost, dispute settlement cost, etc.).

107. The representative of the United States expressed concerns that a precedent would be created whereby specific proposals had to be carried out by those who made them. While he appreciated the Secretariat's willingness to provide delegations with some sample costs, he also noted, as pointed out by previous speakers, that those costs might be too "discreet" to provide any true indication of their relevance to the overall system that was being discussed. He was thinking of going, in an objective way, through each of the two proposals on the table and identifying the points where a cost would emerge for a government, for a producer, or for a party challenging the use of a term by a producer. He said that this useful exercise could be carried out by the Secretariat without being prejudicial to either side. It could just go through the proposals quite expeditiously and identify points of expense, not saying how much or how little, but simply identifying that there was a cost involved at those points.

108. The representative of Bulgaria expressed concerns about the usefulness of the exercise. What was an objective or neutral way? Delegations did not know what they wanted from the Secretariat, which would be put in an awkward position. This would also involve time and costs for the

Secretariat to carry out a study on controversial issues. He thought that the Chairperson's proposal might be of some value if the proponents of the study could give an indication of where and what cost was involved.

109. The representative of Argentina said that the exercise would mainly consist in identifying in each proposal the variables which would involve costs. The exercise would not be useless because there was no point in repeating generalities. The fact that the issues were controversial was not an acceptable argument. Delegations were in the Special Session precisely to find points of convergence. Her delegation was not in a position to accept the Chairperson's suggestions.

110. The Chairperson suggested, as foreshadowed in the informal consultations, to ask the Secretariat to provide the Special Session with a factual compilation of points made in accordance with the four categories of issues and points identified in his informal note of June 2002. That compilation would be made on the basis of the interventions and written communications, which had been received so far. In this factual compilation of points, the Secretariat could list the points which had relevance to the issues of cost. He asked the Secretariat to provide this compilation of points by the end of October, so that participants would have a clearer basis for more focused discussions at the November meeting.

111. It was so agreed.

(iii) *The possible role of the Secretariat*

112. The Chairperson recalled that this issue had already been addressed by several delegations under previous sub-items.

113. The representative of the European Communities reiterated that the EC delegation remained open to the idea of negotiating with other Members the possibility that other international organizations, such as WIPO, could eventually, through an appropriate arrangement with the WTO, take care of the management of such register in light of their expertise. It was clear from its previous interventions that the role of the WTO Secretariat would consist of receiving and distributing all the notifications. The EC delegation remained open to discuss the questions of translation, including at the next session. Under the EC proposal, the Secretariat was supposed to carry out, at the latest at the end of the 18-month period, the registration of all GIs that had been notified as well as the annotation of all changes. The Secretariat would then publish the registered GIs and inform all the Members of such registration. It would also be responsible for updating the system when a notified GI ceased to be protected in the country of origin or fell into disuse in such country.

114. The representative of Hungary said that, as the EC delegation, he saw the possibility of involving the International Bureau of WIPO in running the system to be set up, which obviously could have cost implications. In his delegation's view, the Secretariat should collect, translate, circulate and publish the notifications. It would be responsible for entering into the register the notified geographical indications in accordance with the substantive provisions. It would also be responsible for expunging from the register, on the basis of notifications of Members, registered geographical indications that were no longer protected in the country of origin or which had fallen into disuse. Under Hungary's proposal, it would also service the arbitration panel. Finally, he said that the US proposal to set up and maintain an accessible and searchable electronic database was a good one, provided that there were legal effects flowing from registration.

115. The representative of Kenya expressed support for the suggestions made to involve the International Bureau of WIPO in the administration of the future system.

Further discussion of the other three categories of points and issues

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

116. The representative of Australia first addressed the question of whether a country name was eligible for protection. That question was also being discussed in the regular session of the TRIPS Council. Referring to a statement made by the EC delegation at the June meeting concerning the protection of country names as GIs, he recalled that the EC had said that it would only accept, in exceptional circumstances, country names as GIs. He wondered whether Kenya could ask the protection for "Kenyan Cabernet", Colombia for "Colombian Chablis", or New Zealand for "New Zealand Chardonnay"; in his view, they would not know whether they could protect those names until they run the "gauntlet" of the registration system. In other words, they could notify them under the EC registration system, but if there was an objection, they would be obliged to go through this gauntlet of procedures (providing evidence, surveys, documents, etc.), which could go ultimately, if there was no decision in the bilateral negotiations, to arbitration.

117. The second question related to traditional expressions. Whilst Australia could accept that there was a need for a change in the definition under the TRIPS Agreement of what constituted a GI, it would require a footnote to the effect that a traditional expression was not a GI.

118. The representative of the United States associated his delegation with the statement made by Australia. In looking at the definition under Article 22.1, his delegation had the view that this definition did not require a term to be the name of a geographical area. Therefore, it believed that a non-geographical term, such as "Cachaça" (for a spirit in Brazil), which had come to identify a particular good as originating from a particular geographic area because the good had a particular quality, reputation, or characteristic attributable to its geographic origin, could certainly meet the Article 22.1 definition. He suggested that Members examine closely whether the EC proposal would in fact consider such terms to be notifiable GIs under the EC system.

119. The representative of Kenya, referring to the statement made by Australia, said that "Kenya", other than being a political region, was also a geographical region, and, if there was a product coming from that country and satisfying the conditions of Article 22.1, then there was a reason to recognize "Kenya" as a geographical indication. He was assured by the EC that a country name could be regarded as a geographical indication, and that had also been made clear by the EC representative in the regular session of the TRIPS Council.

120. The representative of Australia agreed that the EC position was that country names could be regarded as GIs but wondered whether the EC would do so. Australia was of the view that, until Members received clear answers, they would never know whether countries would be able, under the registration system suggested by the EC, to succeed in having their country names regarded as GIs and not being opposed.

121. The representative of the European Communities reiterated the position of this delegation with respect to the "non-issue" of country names. Whether a country name met the definition of Article 22.1 would be up to the country concerned to decide. That was the way the TRIPS Agreement worked. In the EC, there were at least two country names that had been registered as geographical indications for products other than wines and spirits. The EC's experience in the field of wines and spirits was not very comforting with regard to country names; the EC had attempted to verify whether country names in those cases met the definition and, in fact, they had not. The EC's experience was that, if a country had 100 or 200 geographical indications with 100 or 200 distinct qualities, it was very difficult to create an "umbrella" geographical indication which should have one unique homogeneous quality. He said that was the experience the EC would like to share with other countries but that it was not up to the EC to decide whether another Member's name would meet the

definition of a geographical indication. That was a question of evidence to be assessed by the national authorities.

122. On the question of traditional expressions, he reiterated that traditional expressions were not protected as geographical indications in the European Union and, accordingly, under Article 24.9 of the TRIPS Agreement, they were not eligible for protection as geographical indications at the international level. They could not, therefore, be subject to notification under the multilateral system and could never be in the multilateral register.

123. The representative of Canada took note of the statement made by the EC representative on country names and said that she would pass the information to her colleagues who were pursuing the bilateral negotiations with the EC because that was not what was happening in these negotiations.

124. The representative of New Zealand said that her country had made a determination at the national level that "New Zealand" was a geographical indication in the context of wines and spirits and with respect to a number of other geographic indications for areas within New Zealand that made up the entire territory. However, when the EC were asked, in the context of bilateral negotiations for a wine agreement, to recognize "New Zealand" as a geographic indication, they had refused it. She said that, if Kenya had received assurances from the EC that its country name would be respected as a geographical indication, she would also ask the EC to give the same assurances to New Zealand.

125. The representative of Chile raised the question of discriminatory treatment. For example, a country might recognize, in certain circumstances, the name of a country as a GI and, under the same circumstances, refuse that to another country. He suggested to draw up certain criteria to avoid discrimination between countries.

126. The representative of Kenya said that the question of "Kenya" being a geographical indication or not was addressed in Article 22.1. His understanding of the practice was that, if Kenya produced, for example, coffee from a region which had some quality or characteristics by virtue of that coffee being grown and produced in that region and then sought for registration, as a geographical indication, of the name of that region, then that region would qualify as a geographical indication. However, if there were more than one region producing different types of coffee with different qualities and all of them qualified to have their names registered as geographical indications, and if Kenya wanted to put the country name to cover all those products, "Kenya" might not qualify as a geographical indication, the reason being that it would be covering several products of different qualities. However, if it were a blend of all the coffees with all the various qualities, then "Kenya" would qualify as a geographical indication. That was his understanding and he stood to be challenged.

127. The representative of Australia said it was a useful exchange of views which got to the heart of the issue. He thought, however, that, under the system put forward by the EC, the EC could object to a country name being used as a GI. The first consequence of such an objection would be to have bilateral discussions, which would not be an inconsiderable expense. Secondly, the countries wanting to have their names as GIs would have to prove the link of the names with a unique quality, reputation or other characteristics. After 18 months, if there was no agreement, the parties must go for arbitration, which entailed costs. What he was trying to demonstrate was that there was nothing under the system proposed by the EC which could guarantee that a country name fulfilling the requirements of Article 22.1 would be accepted by the EC as a GI. He added that he had not heard so far from the EC anything which would persuade him to conclude otherwise.

128. The representative of Brazil asked the EC delegation whether "Cachaça" would be recognized by the EC as a protectable geographical indication if Brazil considered it as such.

129. The representative of the European Communities said, in reply to Brazil, that he did not know the exact situation regarding "Cachaça" within the EU but that the EC would certainly have no

problem in recognizing a non-geographical name as a GI, as had been done in the past for "Cava" or "Vinho verde" or any other names.

- *The purpose of the notification and registration system*

130. The Chairperson recalled that there seemed to be a common view at the June meeting that the purpose of the multilateral system should not be to increase the level of protection of GIs for wines and spirits, but to facilitate the obtaining of the level of protection provided for in the TRIPS Agreement.

131. The representative of the United States said that Article 23.4 made very clear that the purpose of these negotiations was to "facilitate" the protection of geographical indications for wines and spirits. The "Concise Oxford Dictionary of Current English" said "facilitate" meant "make easy, promote, help, forward". "Facilitate" did not mean "make mandatory". So, the purpose of the multilateral system of notification and registration to be established through these negotiations was not to create a list of geographical indications for wines and spirits that must be protected in the territory of every WTO Member. The purpose was to establish a system that made easy, promoted, helped or forwarded the legal means that each Member already had in place that allowed interested parties to prevent the use of an indication identifying wines and spirits which did not originate in the place indicated, so long as the indication met the definition of a geographical indication in that Member's territory, was not a homonymous geographical indication, and none of the exceptions provided for in Article 24 applied. Rather than reading out theoretical and legalistic interpretations of "facilitation", he gave the floor to a practitioner, a colleague from the Federal Bureau of Alcohol, Tobacco and Firearms (BATF), to give the Special Session some sense of the value of the purpose of the negotiations. Part of his colleague's duty was to make use of compilations of GIs in making his daily decisions about wine and spirit labelling.

132. The representative of BATF said that his Bureau approved approximately 70,000 labels a year for distilled spirits, wines and malt beverages. Those labels covered products both domestically produced and imported into the United States. The vast majority of the 70,000 labels covered wine. The BATF employed approximately 35 to 40 employees working full time during the year to process those 70,000 applications. In processing those applications, they would find very useful the type of system (database) described in the communication co-sponsored by Canada and other countries, including the United States. They had to ensure that, when wine was imported into the US with a label bearing a geographical indication, that geographical indication was authorized in the country of production. In order to make that determination, as a current practice, they might have to go to the embassy of that country, to seek out an annex to a bilateral agreement to determine whether that geographical indication was recognized in the country of origin. There were also many secondary sources they might have to go to in order to make that determination. There was, therefore, a significant practical utility and efficiency in having a single database that the BTAF could go to as a regulator to determine whether the country of origin of a particular wine had authorized that geographical indication. That would enable BATF to make sure that the label was truthful in that regard and did not mislead the consumer. Furthermore, having a single database to do that had extreme utility to regulators to ensure that the imported wine crossed the border in a smooth and efficient manner.

133. The representative of the European Communities asked the US delegation whether in the case of a database, the US would be bound to refuse applications containing GIs for wines not originating from the place indicated by the GI. His second question, addressed to all other participants, was whether they had a labelling authority like the US.

134. The representative of Hungary fully agreed with the American delegation that the purpose of the register was the facilitation of the protection of geographical indications. Where his delegation differed was that it believed that the registration system should have a legal effect and it should create

the rebuttable presumption of eligibility for protection. Referring to the remark made by the US delegation that the proposal supported by Hungary would make protection for registered geographical indications mandatory in participating Members, he said that was either a misunderstanding or a misrepresentation of the proposal. The rebuttable presumption of eligibility for protection would be the facilitating effect. That would mean that owners of GIs would still have to go through the national processes but would have to use the legal means that WTO Members had to provide under Article 23 of the TRIPS Agreement. However, the burden of proof in front of the local courts would be reversed. The effect would not be that protection was mandatory for all participating Members.

135. He recalled two questions that his delegation had asked earlier to countries using a certification trademark system, and which had not been replied to (see *supra*, paragraph 65).

136. The representative of Canada, replying partly to the EC questions, said that her country certainly was seeking benefits of a system that was not just for those with a labelling department such as had been described by the United States, but for all countries. Canada, at the moment, was examining some 10,000 names that had been requested for GI protection in Canada by the European Union. Canada did not have a labelling legislation like the US and had to tackle the task with the few officers from the Canadian Intellectual Property Office and with the existing resources. This fact alone caused Canada to support a voluntary database system which facilitated the use of the enhanced protection under Article 23.4.

137. The representative of the United States said, in reply to Hungary's question, that as a general matter, there would be a process, either operated under the BATF system or under the certification mark system, of examining or assessing the various types of GIs before the names were actually put on the list. He would provide a more complete answer to Hungary at the next meeting as far as the certification mark was concerned.

138. In reply to the question posed by the EC delegation, the representative of the BATF said that the Bureau would not be bound by such a list or database, but rather by national law that ensured that the US systems were consistent with the TRIPS obligations as permitted by Article 1.1. However, notwithstanding that fact, such a list still would have extreme utility in ensuring, as the Bureau reviewed, for example, the labels for wines coming across the US borders and claiming geographical indications, that the names of these wines would not raise problems: such a database would facilitate the expeditious movement of those wines across the borders and their introduction into the US market.

139. The representative of the European Communities said that it was interesting to hear from a delegation which had co-sponsored one of the proposals that, in fact, the international registration of GIs would not bind the national authorities. He would pass the information to his producers that whether they notified a GI or not, it was uncertain whether anyone else would have a label refused in the United States even if it was bearing that GI.

140. The representative of United States said that he was not sure that the EC delegation had provided any greater certainty with respect to the names that the US might put forward under the EC proposal, that the EC would be bound to protect them in their domestic markets. In this regard, he expressed doubts whether many countries would be willing to surrender the authority of their domestic regulatory procedures to decide whether or not geographical indications were protected and how they were protected under the TRIPS Agreement. He did not know whether there would be many countries which would be comfortable with surrendering that ability to a supranational authority.

141. The representative of the European Communities said that there was no question for any participant in the negotiations to surrender national sovereignty to any other. On the question of assurances about specific GIs, he said that the present forum was not the right one.

142. The representative of Australia said that, if he had raised specific examples, it was to help better understand the full meaning of the registration system. The second point he wanted to make related to the latest exchange between the US and the EU delegations: it concerned a very substantive issue of policy, namely, that the countries co-sponsoring the proposal in document TN/IP/W/5 strongly believed that the purpose of this exercise was not to enhance protection, because there was no such mandate. On the other side, the EC, Hungary and others saw this as an exercise to create new rights and obligations, which was not acceptable to Australia.

- *Participation*

143. The Chairperson said that this was an area where views were very divided, in particular on the possible consequences for Members not participating in the system. As there was no request for the floor, he suggested returning to this issue at the November meeting.

D. OTHER BUSINESS

144. The Chairperson said that the discussion had been rich and substantive and thanked all the delegations for their cooperation. With regard to the factual compilation of points to be made by the Secretariat according to each category of points and issues identified in his informal note of June 2002 (JOB(02)/49) and to interventions and communications made so far, he said that it should be made available by the end of October 2002. He hoped it would help in having a more focused and efficient discussion at the November meeting as the Special Session was getting to the next stage of its negotiations. As already suggested in June, at the November meeting, a further discussion of the issues taken up at the June and September meetings as well as a detailed examination of the proposals could be envisaged. In this perspective, he encouraged delegations to come forward with new or revised proposals; such proposals should contain as much "treaty language" as possible. Regarding the final negotiating phase he had described at the March meeting, he recalled that, usually, it took place on the basis of a text, treated by the various parties as a common basis for negotiations. In other words, a single document containing common language on the various areas where there was essential commonality of positions and identified options, for example, through square brackets or alternatives in regard to areas where significant differences remained. Originally, he was hoping that such a single text could be prepared by a group of delegations. If this were not the case, he, in his capacity as Chairperson, would have to produce such a paper. He recalled that he had to work with the target date of the Cancún Ministerial Conference in September 2003. He thought that such a paper might be necessary in early 2003. He called upon delegations to work together towards commonality on as many issues as possible.

145. The representative of Australia said that it was true that discussions had been going on for many years, but it was only since Doha that delegations had really focused on the issue and considered the wider implications of these negotiations for other potential issues. He thought that the discussions the Special Session had had on the basis of the list of points and issues identified by the Chairperson had been good. He would, however, urge the Chairperson to be careful about putting any text on the table in early 2003. He did not think that enough progress had been made in getting a full understanding of concepts and implications, and that there was time until September 2003 to begin focusing on a legal text. He suggested not rushing at this stage, but discussing the future roadmap at the next meeting.

146. The representative of the European Communities was in favour of the idea of having a text by early 2003. This would help delegations focus on the issue and ensure the objective of having a system established by the Cancún Ministerial Conference as mandated by the Doha Ministerial Declaration.

147. The representative of the United States thought it would not, in fact, help delegations move closer together if there was an artificially imposed deadline for the Chair to come forward with a text.

In his delegation's view, it would be necessary to work harder to find commonality among the various positions, which would then give the Chair an opportunity to come forward with a document that would help bring the negotiations to a close. He thought that the Special Session had not yet reached such a stage of commonality, and that there would still be an opportunity for it to emerge "organically" from the Special Session. A fixed deadline would only frustrate the efforts.

148. The representative of Bulgaria said that the idea of having a text in early 2003 was a good one because discussions seemed to go in circles. A text from the Chair might help the process get out of those circles. He said that Bulgaria's positions in other negotiations would be influenced by those in the Special Session, so he would welcome some movement.

149. The Chairperson recalled the Doha mandate to complete negotiations by the Fifth Ministerial Conference. While this was possible to accomplish, it would require concerted efforts on all sides to bridge the differences. He took note of all the suggestions and proposed to come back to the question of future "roadmap" at the November meeting. Finally, he reminded participants of the timing of new or revised proposals.
