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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 5 March 2009

*Chairman: Ambassador C. Trevor Clarke (Barbados)*

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A. ADOPTION OF AGENDA

1. The Chairman proposed that under "Other business" the Special Session briefly discuss its future work.

2. The twenty-first Special Session agreed to adopt the agenda as set out in WTO/AIR/3317.

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

3. The Chairman recalled that, at the last formal meeting of the Special Session in October 2008, calls had been made for an intensification of work on the technical issues. Since then he had held a series of consultations and informal meetings. He thanked all delegations consulted for their frank and helpful comments and suggestions.

4. At those meetings, Members had understood that his mandate was limited to the negotiation of a multilateral system of notification and registration of geographical indications for wines and spirits.

5. At those meetings, the delegation of the European Communities (EC) had clarified the status of its proposal. It had confirmed that the proposals contained in document TN/C/W/52, entitled "Draft modalities for TRIPS related issues", dated 19 July 2008, and in particular paragraphs 1 to 3, reflected the EC's position on the register. The EC had also indicated that the proposal on the register was supported by more than 100 Members. At the open-ended meetings of 4 and 5 December several delegations of the Joint Proposal Group as well as the delegation of Singapore sought clarifications regarding the register proposed in TN/C/W/52. The EC gave oral replies at those meetings. In response to requests made by other delegations, the EC had recently provided a written compilation of the elements of its oral interventions made in December. The compilation was faxed to all delegations on 25 February asking that requests for further clarifications, if needed, be addressed to the EC delegation before 3 March in order to ensure an efficient meeting. The Secretariat had made available some copies of the EC's replies at the back of the room for those delegations who might not have them. The Chairman said that he understood that some delegations had communicated further comments and requests for clarification to the EC, and thanked those delegations who had copied their communications to the Chair and the Secretariat.

6. As had been done at the December meetings, the Chairman suggested that the discussion be organized by clusters of elements based on the categorization made by his predecessor in paragraph 4 of his report contained in TN/IP/18, namely: (i) legal effects and participation; (ii) notification and registration; and (iii) other elements such as fees, costs and administrative burdens, particularly for developing and least-developed countries, and special and differential treatment (S&D). The questions posed by several delegations at the meetings of 4 and 5 December as well as the replies given by the EC could be placed in such clusters.

7. He also encouraged delegations to seek clarifications and make comments on the joint proposal contained in TN/IP/W/10/Rev.2 as well as on the Hong Kong, China proposal contained in TN/IP/W/8.

8. Finally, he asked delegations to bring concrete examples of concerns and explain how the registration of trademarks and GIs operated at their domestic level so as to have a wide-ranging discussion on each of the issues.

9. The Special Session so agreed.

(i) *Cluster 1 (Legal effects and participation)*

10. The representative of the European Communities said that because of the importance his delegation and the other 107 co-sponsors of document TN/C/W/52 attached to this issue, his delegation had circulated in writing the elements of the replies it had given during the Special Session meetings of 4 and 5 December. Further to this circulation it had received additional requests for clarification. As suggested by the Chairman, he would structure his intervention according to the three clusters.

11. Recalling his delegation's full support of each and every part of document TN/C/W/52, he said that that document reflected the EC's position on the register. There were some issues regarding notification and registration or other issues which had voluntarily not been touched upon in TN/C/W/52. Certain key questions had been settled, and his delegation would therefore build upon the work done in the past instead of reinventing the wheel.

12. On the important issue of development, he noted that TN/C/W/52 was the only proposal that addressed the key interests of developing countries in a TRIPS amendment to include a disclosure requirement in patent applications and the extension of the additional GI protection currently enjoyed by geographical indications (GIs) for wines and spirits to GIs for other products. The EC had substantially adjusted its views on the disclosure issue to better take into account the interests of developing countries. Secondly, TN/C/W/52 was the only proposal that included provisions on special and differential treatment for developing countries and in particular for least-developed countries. Finally, TN/C/W/52 was the only proposal which was supported by a vast majority of developing countries. There was no comparison in terms of support by those countries between this proposal and others.

13. He recalled that his delegation had expanded at length on the important issue of the legal effects of registrations at the meeting of last December. He wished to address a few aspects which had not been touched upon:

- When and by whom would the register be consulted? Document TN/C/W/52 stipulated that the register would be consulted and its information be taken into account: (i) by domestic authorities; (ii) in the framework of existing procedures provided for by national law; and, (iii) in relation to decisions regarding registration and protection of trademarks and GIs. Under the proposal, domestic authorities would consult the register and take this information into account when making decisions regarding the registration and protection of trademarks and GIs. In response to question 47, he said that such decisions might be made in the framework of administrative procedures regarding trademark or GI applications, e.g. examination procedures and third parties' opposition procedures, but that this answer also applied to judicial decisions regarding the protection of trademarks and GIs.
- What would be the consequences of a registration for the national system of a third country? What would be the changes brought by the proposal contained in TN/C/W/52 in comparison with the EC's previous proposals? The issue of the consequences of a registration was one of those where his delegation had shown much flexibility. TN/C/W/52 had incorporated changes such as the elimination of the opposition procedure at international level. He recalled that in November 2007 the EC's new ideas had proposed a rebuttable presumption regarding three elements: (i) that the a name on the register was a GI in accordance with the definition of TRIPS Article 22.1; (ii) that it was not a generic; and (iii) that it did not falsely represent to the public the true origin of the goods. In contrast, document TN/C/W/52 focused on only two consequences of the register. The first one would be that a name on the register would enjoy the prima facie evidence that it met the definition of a GI under TRIPS Article 22.1. As the rebuttable presumption seemed to have raised concerns in some countries, TN/C/W/52 had made clear that the information of the register should be considered on its appearance, i.e. at first sight as attesting only a fact. In other words, the register with all the information notified by the country of origin would provide the evidence that the name was, on its appearance, a GI. The second consequence of an entry on the register would be that any assertion regarding the genericness of the name should be substantiated. There would no longer be any rebuttable presumptions, and actually not even a prima facie evidence concerning genericness. These were significant changes, showing that the proposal in TN/C/W/52 was a compromise. He added that this compromise on the consequences of a registration had been made to address, as part of S&D negotiations, the developmental aspect.
- In response to the question why the other exceptions under Article 24 had not been mentioned, he said that this related to a critical element in the proposal of TN/C/W/52, namely the clear distinction that should be made between GI definition and GI protection. Prima facie evidence related only to the GI definition: the entry of a name on the register did not imply automatic GI protection. To be protected in a third country, the GI would have to follow the procedures

provided for in that country. When consulting the register and taking its information into account, the domestic authorities would continue to handle the procedure, the evidence, the legal arguments and take the final decision on the matter at stake in light of all elements available. In other words, when domestic authorities examined whether or not a GI could be protected, they would continue to be able to rely upon the domestic rules regarding, for example, the exceptions of genericness or of prior trademark rights. Under the proposal contained in TN/C/W/52, Article 24 TRIPS and all its exceptions would continue to be available.

- As regards the meaning of the words "evidence", "proof" and "substantiate", he said that the proposal contained in TN/C/W/52 did not aim at providing a legal definition of each of them. He would, however, give some clarifications. Firstly, "prima facie evidence" was evidence, which on its appearance, or literally put, attested at first sight to a certain fact: the register with all the information notified by the country of origin regarding a geographical name would provide evidence that a name was, on its appearance, a GI. "Proof" related to the elements of the GI definition under Article 22.1. It could take any form provided for under domestic law. It would be up to each domestic authority to assess whether or not the proof provided actually related to the elements of the GI definition. Regarding the meaning of the requirement that "assertions on the genericness must be substantiated", he said that the provision would be implemented by each Member according to its domestic legal system and practice. At this stage, his delegation did not see the need for agreeing a precise definition of those terms; however, if Members so wished, his delegation could enter into such an exercise.
- As regarded questions on procedure, he said that first each GI would go through a domestic process of approval - which could be administrative or judicial - in a Member in accordance with its IP legislation, which had been duly notified and scrutinized by other Members. In other words, the registration of the GI on the register would have been accompanied by all the necessary information agreed by Members, showing that it had met the definition of Article 22.1. A GI would remain in the register as long as it was protected in the country of origin in accordance with the TRIPS Agreement. The register would be consulted in the course of trademark procedures, which actually would not be different from the proposal in document TN/C/W/10/Rev.2. The register would not, however, entail protection: the fact that a name had been recorded on the register could not be treated as a ground for refusing, for example, a trademark application by a third party. Using the example of the GI "Bordeaux", he said that the register would contain all the supporting information checked by the EC and France that "Bordeaux" met the TRIPS GI definition and was protected in the country of origin in accordance with the TRIPS Agreement. If the GI right holders of "Bordeaux" wanted to protect it in a third country, they would have to go to the competent national authority to seek the type of protection provided for in that country. They would have to follow the procedure described and submit the information they had provided. In the course of that procedure the authority of that third country would consult the register and note that "Bordeaux" was not on the register. There would be two options possible. Option 1: no third party had submitted any information. The authority would not look further into the issue of the GI definition and would treat it in accordance with its national procedure, it being understood that the authority might deny protection to "Bordeaux" on any other grounds in accordance with its national law or any relevant international treaties to which the country was bound. Option 2: if on the contrary the national authority held proof that the GI on the register did not meet the GI definition or if a third party had provided information on the GI, the authority might decide to dig further into the case. It might ask the GI right holder to provide more supporting information and the national authority would, on the basis of the elements collected, decide whether or not "Bordeaux" met the GI definition. It went without saying that the authority would decide on the overall question of whether or not "Bordeaux"

should be protected in its territory in accordance with its domestic law. Whatever decision was or were to be taken, it might be revised at any time if the national procedures so allowed.

- On Member coverage or participation, he said that TN/C/W/52 had clearly indicated that "Each WTO Member shall provide that domestic authorities will consult the register and take its information into account ...". In other words, the register would apply to all Members.

14. The representative of El Salvador thanked the EC delegation for its explanations. She wished to focus on the statement made by the EC representative that the procedure for the registration of GIs would take into account the principle of territoriality and respect the rule that procedures would be based on the domestic legislation of each Member. In the first option mentioned by the representative of the EC, the competent administrative authority in El Salvador, the registrar, could accept the application provided that it had complied with all the requirements of the domestic legislation. In the second option, he could reject the application because he had the information or was aware, based on his discretionary powers, that there was indeed a GI, but that this GI was not protected within the national territory. The registrar would reject the application and, in accordance with the legal procedures, parties would be duly notified and have, under her country's legislation, a time-limit to appeal before the last instance in El Salvador, the Supreme Court, which might decide that the application was not eligible for protection. She asked what the situation would therefore be if, on the one hand, the GI had been definitely rejected at the last instance in a Member and, on the other hand, the GI had been registered on the multilateral register. Could a final decision by the last judicial instance of a Member be overturned by the multilateral register?

15. The representative of Canada thanked the European Communities for having provided a written version of their oral answers. This had been useful in better understanding some of the EC's propositions. While the EC paper had answered many of Canada's questions, there were still others that needed to be addressed, and replies that would require further clarifications and explanations. His delegation did not see why the discussion should be limited to only a few items. There should be a wide discussion to ensure that all Members had a better understanding of the EC's proposal.

16. His delegation also considered it useful to compare the EC's ideas with the ideas in the joint proposal. In this regard, he pointed out that there were not "proponents" on one side and "opponents" on the other but rather "supporters" of another approach. The joint proposal fully satisfied the mandate. As was suggested by the Chairman, questions from the floor on the joint proposal would be welcome.

17. In response to the EC's fax of 25 February, Canada had identified, and communicated to the EC, a number of questions that had not been answered or only partly answered. His delegation had some difficulties in fully understanding the EC's ideas on elements such as *prima facie* evidence, burden of proof and genericness exceptions, for various reasons: partly because they had not fully understood the EC's explanations, partly because of basic policy disagreement and partly because they did not see how these elements would fit into the Doha mandate. Some of Canada's requests for clarification and related policy, legal and procedural questions had been addressed in the EC's statement. The EC had indicated in many instances that key legal and procedural issues would be decided according to the receiving country's domestic laws and procedures, which was in compliance with Article 1.1 of the TRIPS Agreement. As an exporter of wines and spirits, Canada was seeking information on how individual co-sponsors, the EC and the other Members, saw key issues in relation to their legal systems and processes. The EC representative had, at a previous meeting, said that the WTO was about market access and practical effects and not just policy. His delegation wished to have a better understanding of the effects of the EC's ideas in those regards. Finally, the EC itself had chosen not to answer certain questions. As many of them were important to assess the EC's latest ideas, his delegation would therefore reiterate them.

18. On legal effects, his delegation wished to receive replies in greater detail from the EC and other co-sponsors of TN/C/W/52 with regard to how some issues were being addressed in their respective systems. It was indicated that decisions and procedures would be left to domestic authorities. This would raise two questions. Firstly, would all Members have the same view regarding terms such as "proof", "evidence to the contrary" and "substantiation", or would they not be creating a new fertile area for disputes in the WTO? Secondly, as his country was a producer and exporter of wines and spirits, he wished to know what Canadian producers and exporters could expect in key foreign markets of interest. In this regard, he noted that the joint proposal would not create the same type of uncertainties.

19. On participation, he recalled that this negotiating group's mandate clearly referred to "those Members participating in the system" only, and that wine and spirits trade was of interest to a subset of WTO Members only. Why did the EC want to require all WTO Members to participate? In contrast, the joint proposal did not require participation by all Members.

20. In response to the EC's request that delegations should further reflect on the replies it had given, his delegation would try to expand on some of them, and hoped it would receive full answers. Question 27 dealt with the situation where two countries would take two different decisions on the same GI: for example, the national authorities of one country could decide that the notified GI did not meet the Article 22.1 definition while the authorities of another country could decide the opposite. Would the GI that was registered on the multilateral register still be considered to meet the definition of a GI? In this connection, Canada's view was that the definition of a GI on the register also related to whether it was a wine or a spirit and would not be limited to Article 22.1. He asked whether or not the GI would be removed from the register if it failed to be considered a GI in one WTO Member.

21. Question 30 raised the issue of what would happen if a person was of the view that the registered GI did not meet the TRIPS definition. What would this person need to do to rebut the presumption?

22. Question 32 concerned the issue of evidential burden. Was it the EC's intention to have the party opposing the GI bear a greater evidential burden than the party seeking to register the GI? As regarded question 34, could the EC clarify whether it was the intention of the co-sponsors of TN/C/W/52 to change established WTO jurisprudence as to the burden of proof?

23. Finally, question 9 on how GIs protected through tradition or by convention would be treated under the EC's ideas was of particular interest to Canada and other common law countries.

24. The Chairman agreed that it would be more correct to say that there were no "opponents" to the register as all Members supported the idea of a register but that certain elements of the proposal were not acceptable to some Members.

25. The representative of New Zealand welcomed the provision of additional information by the EC. The EC paper had allowed his delegation to develop a better understanding about how paragraphs 1-3 of TN/C/W/52 on the register of GIs for wines and spirits would operate in practice. In his delegation's view, this sort of process had been lacking over the past few years and it was a welcome step forward in terms of New Zealand's shared commitment to intensify the register negotiations. Although the EC paper had been received only a few days ago, his delegation had been able to identify some questions arising from the paper, and which had been communicated to the EC delegation at its request. The paper would be further examined by technical experts from all relevant agencies in Wellington. It was anticipated that there would be further questions about the EC's latest set of new ideas for the register negotiations. His delegation welcomed the EC's willingness to provide the additional information to the membership and looked forward to comparing how this new thinking would sit alongside the joint proposal.

26. On legal effect, his delegation had a few questions on the term "and in the absence of proof to the contrary". As already put forward by the Joint Proposal Group in question 23, would the newly proposed legal effect be really different from a presumption? Although the EC's representative had said that the concept of "rebuttable presumption" had been removed due to concerns expressed, and had been replaced by other terms, "*prima facie* evidence" and "in the absence proof to the contrary", it was not clear to his delegation that there was actually a substantive difference. Was that the understanding of all TN/C/W/52 proponents? He recalled the statement made by the EC on patents at the 3 March meeting of the regular session of the TRIPS Council in relation to an issue raised by India and Brazil that, when an IP right holder brought a case to a court, it would be up to him to prove the alleged infringement of IP rights. What the EC had said about patents equally applied to GIs. According to this principle, those controlling the GI in the country of origin would have to assert their IP rights in another jurisdiction. Against this background, his delegation was of the view that the legal effects proposed in TN/C/W/52 would be to reverse the burden of proof in favour of GI right holders, who would be able to prove an alleged infringement in other jurisdictions merely by pointing to a name recorded on a register in Geneva. Those opposing the GI would bear the burden of showing proof to the contrary. The clarifications requested by his delegation on the meaning of the terms "*prima facie* evidence", "proof to the contrary" and "substantiated" were contained in questions 24, 30 and 31.

27. He said that there was much clarity in the two types of answer given by the EC delegation. First, the meaning of the terms would be subject to negotiation and, second, their meaning could be determined by domestic legislation and procedures. If the meaning were to be determined by domestic procedures, it would be necessary to take some time in this Special Session to explore with key trading partners how these arrangements might be implemented under domestic procedures. His delegation would welcome comments from the key proponents of TN/C/W/52, e.g. the EC, China, India and Brazil. It would also be interesting to see how these provisions would apply in other key markets for New Zealand wine and spirits exports such as the United States, Australia and many countries in Asia. This sort of discussion would be crucial to a real understanding of what the EC's new thinking might mean in practice. He suggested that the Chairman invite Members to come prepared for a discussion at a future meeting of the Special Session.

28. Another question for the EC, which could be followed up in writing, was whether or not domestic procedures were paramount. If they were paramount, would it be correct to assume that the WTO dispute settlement mechanism would not apply? Should it apply, on what basis could a dispute be brought to the WTO, assuming that domestic procedures were TRIPS-consistent?

29. As regards the term "proof", he said that it was a stronger requirement than "evidence". It could be read to mean that any evidence provided must conclusively prove that the term did not satisfy the definition of a GI. That would effectively tie the domestic authorities' hands, requiring them to accept the name on the register as a GI unless there was conclusive proof to the contrary. This would remove the domestic authorities' discretion when evidence fell below the standard of proof, which in his view would interfere with the current domestic procedures. While acknowledging that the EC had, on page 8 of its paper, attempted to address this uncertainty by stating that this negotiating group could have a debate later about what "proof" meant or that the term might be left open for domestic authorities to define, his delegation continued to have concerns about that term, particularly in light of the reference to "evidence" in the modality proposal. His delegation would therefore definitely want to see this term further elaborated in a full legal text proposal.

30. The EC paper was not clear on who might provide the required proof. On the one hand, it referred to examination of the proof upon request and, on the other, it said that domestic authorities would be able to find out information on their own initiative. He asked the EC to confirm that its new thinking would allow domestic authorities to generate their own information as part of their

assessment of whether a GI met the definition in their own territory, and that a third party with a legitimate trading or systemic interest could provide domestic authorities with relevant information.

31. On the issue of whether a name on the register enjoyed *prima facie* evidence that the registered GI met the definition of a GI under Article 22.1, the EC paper provided useful clarifications that the reference to "that Member" in the second sentence of paragraph 2 of TN/C/W/52 related to the Member consulting the register. For his delegation, this had clarified that the proposal cut across the key principle of territoriality, which applied to other IP rights. TN/C/W/52 would therefore require New Zealand to accept that the term recognized as being a GI in one jurisdiction would be a GI in all other jurisdictions. This was expressly acknowledged in the EC paper, which suggested that Article 23.1 of TRIPS need not be applied territorially. Was this view supported by all the other proponents of TN/C/W/52? His delegation agreed with the statements made by the representatives of Brazil, India and China in the regular session of the TRIPS Council that the principle of territoriality was the cornerstone of the international IPR system, including the TRIPS Agreement. For his delegation, the territoriality principle was particularly important for GIs as the domestic context would be highly relevant and could lead to quite different outcomes in different territories: a term might meet the definition of a GI in the EC but not in New Zealand. The EC had sought to rebut this territoriality argument on page 7 of its paper, which stated that "the entry of a GI in the GI Register will not result in automatic protection in any WTO Member". While the decision on the protection of a name would continue to remain entirely in the hands of domestic authorities and TN/C/W/52 no longer contained an irrebuttable presumption, domestic authorities would still have their hands tied. They would be required to accept that a term was a GI without undertaking the domestic examination process which currently was required and which was at the heart of the principle of territoriality to which many delegations attached importance. So, while it had been said that domestic authorities would be the ones to take decisions, the decisions would actually be made for them unless there was "proof to the contrary". As a result, the abandonment of the territoriality principle would elevate the status of GIs above all other IPRs, which would cause New Zealand serious concerns.

32. The proposed presumption would also cause problems in the case of conflicting claims on homonymous GIs. Members would be required to do the impossible, namely consider two mutually inconsistent presumptions.

33. His delegation had serious concerns about the EC new thinking regarding genericness in TN/C/W/52. This element would upset the delicate balance between Articles 23 and 24. The EC paper had claimed that the proposal did nothing more than encapsulate a general principle of good administration and common procedural requirements in Members' systems. He disagreed with this assertion, and said that, even if it were the case, why would it be necessary to amend the TRIPS Agreement with a new requirement on "substantiation"?

34. The EC had for some reason isolated the genericness exception as the only exception within Article 24 and added new requirements. His delegation would welcome details from the EC, India, Brazil and Switzerland regarding any enforcement problems that they were currently facing in relation to wines and spirits GIs due to the lack of an explicit requirement for substantiation of genericness. He asked whether the EC had the same concerns for the other exceptions of Article 24 as for the genericness one. The proposed new requirement regarding the exception of Article 24.6 on genericness would, in his delegation's view, alter the balance of rights and obligations within the TRIPS Agreement, which his delegation would oppose.

35. Finally, on participation or Member coverage, he said that there would still be a significant number of Members who would be very uncomfortable with the EC proposal for participation by all Members. The proposal would require them to establish a process to effectively provide protection for terms relating to products which they had chosen for economic, religious or moral reasons not to trade. To avoid any misunderstandings, his delegation wished to ask all the co-sponsors of



TN/C/W/52 to confirm that they supported mandatory participation in the register of GIs for wines and spirits.

36. His delegation associated itself with Canada's characterization of the joint proposal: it was fully consistent with the mandate given by ministers and would also deliver good benefits in terms of the central focus of this Round, namely development. All of the problems his delegation was raising regarding legal consequences would be avoided by the joint proposal, which would fully respect the cornerstone of the TRIPS Agreement, namely the principle of territoriality. The joint proposal provided for voluntary participation, consistent with the mandate, and would also be more development-friendly as it would not force Members with no, or limited, capacity to, trade in wines and spirits to take on the costs and burdens of implementing a register.

37. Finally, he reminded the Special Session that its mandate was limited to wine and spirit GIs.

38. The representative of Korea thanked the EC delegation for having provided a paper compiling elements of its oral replies given last December and for giving additional explanations on the questions. The Joint Proposal Group had posed many questions which it thought were essential to understand the EC's idea. It seemed, however, that some of the answers to the key questions were still hiding behind the ambiguous term of "modalities". For example, the EC had, on page 5 of its paper, given the following response to questions 23 and 24 on the definition of "proof": "At this stage we see no need in agreeing a precise definition of 'proof'. Should this appear necessary, we may do so when entering legal drafting after Modalities". It would therefore seem that this negotiating group should first agree on modalities before discussing any point. This was an approach his delegation could not accept. Although the EC delegation had given additional clarifications regarding "*prima facie* evidence", "proof" and "substantiate", the matter remained still unclear. In that light, his delegation would ask the EC to submit a full draft legal text to enable a discussion of all the key concepts paragraph by paragraph and line by line. As Canada had pointed out, there were still unanswered or partly answered questions. He would therefore ask the EC to reorganize the answers number by number to the questions of the joint proposal.

39. The representative of Argentina thanked the EC delegation for having given a written compilation of its oral replies of December 2008. Referring to a general comment made by the EC representative regarding the supporters of TN/C/W/52 and the development dimension in that proposal, he said that Argentina and many other developing countries did not share the content of the proposal and considered that some of its elements were against the development dimension. The EC's comment that document TN/C/W/52 should be considered as a whole and the explanations it had given on registration, put together with the reference to extension to other products, were creating serious concerns for his delegation. While recognizing that there had been some evolution in the thinking of the European Communities, which had clarified a few points, he said that in substance the EC approach had not changed regarding the main elements.

40. As regards the explanations given by the EC in relation to certain new terms, he said that the EC had actually not departed from its initial position and that his delegation could not accept a mandatory register. To compare the terms "rebuttal presumption" and "*prima facie* evidence", he said that, in the case of a presumption, legal proof to the contrary could be given while *prima facie* evidence would be based on facts as mentioned by the EC. If the entry into a register was to be considered a "fact", then his delegation would have a serious problem. This would deprive his authorities of the authority they currently had under Argentina's legal system to decide whether or not the registered name was a GI. If the respective authorities of two Members arrived at two different decisions regarding the definition of a GI put on the register, there would be some conflict. So, the main problem was the legal nature of the register: what would be the legal status and the actual legal effects of the GIs registered on the register and what should be taken into account as *prima facie* evidence?

41. As regards the EC's comment that its position on mandatory participation was final, he recalled that, in an earlier proposal made in 2005 in WT/GC/W/547-TN/C/W/26-TN/IP/W/11, the EC had referred to "participating" and "non-participating Members". He also referred to two earlier ideas put forward by the EC: one was to make participation mandatory for those Members above a certain share in the world trade in wine and spirits (idea of November 2007); the second one, reflected in WT/GC/W/547-TN/C/W/26-TN/IP/W/11, was to provide for a transition period for LDCs. Would the new proposal in TN/C/W/52 cover all Members, including LDCs?

42. The representative of the United States said that her delegation, which had only received the EC written statement last week, reserved its right to raise any additional questions and comments at a later time. Her delegation had questions similar to those posed by Canada, New Zealand and others. She would also like to address some differences between the joint proposal and the EC paper, in particular on the issues of territoriality and administrative burden and costs. The joint proposal respected the principle of territoriality and minimized administrative burden and costs. The paper circulated by the EC and others did not appear to do the same.

43. As regards the question of proving prior rights, the United States was concerned that, under the EC paper, prior rights, including trademarks, might be disregarded when a Member determined that a designation on the register should be protected. In the United States and in some other countries, priority of rights, in keeping with the principle of territoriality, would be determined in the context of the domestic territory and domestic consumers. Generally, priority could be established in the following ways: (i) by the filing day of an application to register the designation with the domestic or regional trademark office; (ii) through prior use in commerce in the United States - including interstate commerce or commerce between the United States and a foreign country - which, in accordance with the American Constitution, was regulated by the United States Congress; or (iii) by the date of established reputation in the country where protection was sought such that the domestic consumer would not be misled or deceived by the unauthorized use of the designation. Most notably, no priority, no rights and no presumptions would be created in the United States, based solely on an entry on an international list that would neither serve as an application nor show use in commerce nor establish reputation in the United States. The system as described in part on page 5 of the EC paper appeared to require countries to establish a right or presumption as well as priority merely by virtue of a determination that a GI was protected as such in the country of origin and had been notified to the WTO and put on the register. The EC paper appeared to disregard the principle that protection was granted, based on a determination by the domestic law of the country in which protection was sought, such as use in commerce, as well as on the basis of what would be likely to confuse, mislead or deceive the domestic consumer. She asked whether or not, in the system proposed by the EC and others, priority in the country where protection would be sought would be established solely based on the placement of a GI on the register.

44. Another key concern that related to territoriality was how the definition of a GI would be handled. The joint proposal specifically allowed countries to define GIs according to their domestic system. It had been stated that the system set forth in the EC paper would also allow countries to define GIs in accordance with their national laws. However, the proposed system appeared to require that any designation on the register must be considered as a GI by all WTO Members, and the burden would be shifted to other countries to prove the contrary. In other words, if a GI were notified by the EC to the GI register and registered at the WTO, unless rebutted by proof to the contrary it would be a GI in all 153 WTO Members. This was reflected on page 6 of the EC's response, where it was noted that "a name on the Register shall be considered as a *prima facie* evidence that, in that Member, the registered GI meets the definition of 'geographical indication' laid down in TRIPS Article 22.1". The EC had further clarified that by putting a name on the register it would be on its face a fact that the designation met this definition. Indeed, the EC response had made clear that, in the case of a GI in the EC, it was the European domestic authority that had made the determination. That system, if

implemented, would effectively superimpose the EC domestic authorities' determination of what constituted a GI on all WTO Members.

45. In addition to the legal consequences that would result from the system described in the EC paper there would also be considerable costs and resource issues arising from such a system. This was particularly important when considering that, as clarified on page 8 of the response, the EC was proposing a mandatory system as opposed to the voluntary system of the joint proposal. Specifically, in order to implement this legal burden, countries might be required to devote considerable additional resources. For example, countries would effectively be required to administer and enforce hundreds, maybe thousands, of foreign GIs through their domestic system. There would also likely be a significant increase in litigation, thereby increasing the burden on the judicial system in each country. Implementing the system as proposed in the EC paper might require legislative as well as administrative changes. Her delegation was interested in hearing from other countries how they envisioned implementing this system. In contrast, the joint proposal would not create this legal presumption that would give rise to these additional costs.

46. The representative of Chinese Taipei thanked the EC for providing the written version of the interventions made last December. It was important for all Members to get a better understanding of the EC's new thinking, as elaborated in the relevant paragraphs of document TN/C/W/52. While his capital was still examining the responses, his delegation would air some preliminary questions and comments to the EC and the co-sponsors of TN/C/W/52. The questions and comments would be given to the EC in written form in order to facilitate the discussion.

47. Regarding the time-frame issue mentioned on page 4, where it had been said that "For instance, if there is a time-frame for the authority to gather information before taking a decision, the consultation of the register will occur within that time-frame. Failing any time-frame for decision-making, there will be none for the consultation either". Did this mean that, if the authorities failed to make a decision within the time-frame under their domestic laws, there would be no other chances for them to fulfil the obligation of "consulting the register", and therefore they would never be regarded as having fulfilled that obligation? If the answer is "yes", this might have an impact on the authorities' allocation of resources between examining GI applications and other work. In contrast, there would not be any such impact from the joint proposal, because Members would be deemed to have fulfilled their obligations once they had ensured that their examination procedures included the provision to consult the database.

48. Through page 6 to the middle part of page 7, the EC had tried to explain why it was reasonable that a name on the register should enjoy the legal effect of *prima facie* evidence that the registered GI met the GI definition in Members other than the notifying Member. His delegation could reasonably understand why the registered GI met the definition in the notifying Member, but failed to understand why the notified GI should enjoy *prima facie* evidence in another Member's territory. The EC seemed to suggest that, because the notifying Member had conducted an examination of the notified GI in its own territory, all other WTO Members should be bound by this examination to give the notified GI a certain legal effect in their territories. For his delegation this seemed to contradict the principle of territoriality. One of the EC's arguments seemed to be that recognition of *prima facie* evidence was not the same as, or equal to, eligibility for protection, and therefore its new thinking still respected that principle. His delegation had some reservations about this argument, and wished to bring it up for reconsideration by the whole Membership.

49. His delegation had been advocating that the EC and other co-sponsors table a complete proposal for a GI register of wines and spirits, based on the related paragraphs in TN/C/W/52. This call was not a tactical way of trying to break up the alliance behind TN/C/W/52, because the different positions of the proponents on the linkage or so-called "parallelism" issues were already well known. The only reason was that, without a complete proposal, it would be difficult to fully understand the

impact and benefits of the EC's new thinking. The EC kept saying that many other issues could be discussed or negotiated after the decision on the so-called "modalities" or "key parameters". But, to use an old saying, his delegation feared that the devil would be in the detail. A complete proposal by the EC and the other co-sponsors would give other Members a full picture in order to properly compare it with the other two proposals.

50. The representative of Hong Kong, China thanked the European Communities for the written compilation of the oral replies of last December. She said that the EC's flexibilities and concessions as highlighted were much appreciated and that it was encouraging to see Members' active participation and level of engagement in the recent discussions and the questions and answers process. Although Members had not been able to resolve the issues, notably the key issues of participation, legal effects and product coverage, which were still at stalemate, the process had at least helped forge a better understanding of the proposal and Members' positions.

51. She recalled that Hong Kong, China had submitted its own proposal in TN/IP/W/8 back in April 2003 on the basis of its own interpretation of the negotiating mandate under Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Ministerial Declaration. Hong Kong, China's position, systemic interest and objectives in these negotiations were already set out in a statement at the last formal meeting on 29 October 2008, and reflected in paragraphs 28 and 29 of document TN/IP/M/20. Hong Kong, China had proposed a voluntary register with limited legal effects necessary to facilitate protection of GIs. Non-participating Members would not be required to bear any costs of the register. Hong Kong, China's proposal and the other two proposals on the table did share some common features on the proposed notification and registration system of GIs for wines and spirits, even with respect to the key issues of participation and legal effects.

52. She expressed support for the Chair's suggestion to proceed with the discussions by clusters. She further said that Members should keep the pace of the negotiations in the coming months and continue technical discussions on the key issues and other elements dependent on the key issues. More importantly, the negotiating group should start to make progress and preserve that already made, however limited, with a view to reaching a final compromise solution as early as possible.

53. The representative of Switzerland said that it was not because it was a new year that all of the work done since the beginning of this negotiation could be forgotten. There had been many reports, compilations, exchanges of questions and replies on the various proposals put forward. Agreeing with Hong Kong, China's comments on process, she said that it would be useful for this negotiating group to move to a more substantive phase of work as soon as possible, since the essential elements that should be included in the register had been put on the table, including those in the compromise proposal of TN/C/W/52. With the EC's replies given in December 2008 and received in writing last week, the co-sponsors of the TN/C/W/52 proposal, including Switzerland, hoped that they had now clarified the thrust of their register proposal.

54. She said that the compromise proposal for the register was an integral part of a broader compromise proposal covering two other TRIPS-related issues, namely the extension of protection of Article 23 to GIs for all other products and the requirement for a disclosure of genetic resources and associated traditional knowledge in patent applications. Her delegation welcomed the Director-General's forthcoming consultations on these two issues and hoped that they would be just as productive in the future. A process which would help these three issues move together in parallel was necessary in view of the substantial linkages between these three elements but also to understand the full meaning of the proposals.

55. Recalling an informal consultation early this week where it had been explained how much the co-sponsors of TN/C/W/52 had moved towards each other in order to reach a compromise proposal, she highlighted the changes her delegation had accepted, downsizing its initial demands regarding the

register in order to establish a notification and registration system which would be as simple as possible and would, as mandated, facilitate the protection of GIs as compared to the current situation without increasing that protection. She recalled the key elements of the mandate: to respect the principle of territoriality; to facilitate the protection of GIs without increasing it; to preserve the existing balance of rights and obligations in the TRIPS Agreement; and to respect Members' freedom to determine the appropriate method of implementing the provisions of the TRIPS Agreement within their own legal system and practice. Those elements had continued to be at the fore of her delegation's thinking and had made it support the proposal contained in TN/C/W/52. She pointed out that Switzerland had over the years accepted to lower its ambitions, namely, to give up the idea of creating an international arbitration system as originally proposed by Hungary for conflicting notified geographical indications, and to renounce the proposal for a rebuttable presumption regarding misleading identical names or genericness following a period of 18 months. That should be taken into account to see the movement leading up to TN/C/W/52. To be able to negotiate, both sides had to move. For her delegation, it was not clear to what extent the proponents of TN/IP/W/10/Rev.2 had moved towards convergence. Her delegation was still confronted with a proposal which provided for the creation of a simple database that Members' authorities might or might not consult, and which was unclear about the effect to be given to the information contained in that database if the authorities consulted it.

56. As regards Canada's offer to answer questions regarding the joint proposal, she said that the proposal had already been discussed in detail over the years so that there were no further questions to address. In her delegation's view, the parameters contained in TN/C/W/52 remedied some of the shortcomings of the joint proposal.

57. On the issue of the mandate "to facilitate" the protection of GIs, her delegation was of the view that it had become indispensable that consultation should be made obligatory, that there should be some clear assurances that the domestic authorities dealing with geographical indications - be they trademark examiners, judges or other administrative authorities - would not only have an obligation to consult the information contained in the multilateral register when taking any decision but that they would also take due account of this information in their decision. In other words, they should give the necessary weight to that information. Only such a procedure would truly facilitate the protection of GIs. The elements contained in TN/C/W/52 reflected such a procedure. In other words, the effect would be a *prima facie* evidence that the GI met a definition, whose elements might be challenged at any time. Document TN/C/W/52 also stated that a genericness claim could be maintained only if it was substantiated. These two elements would facilitate the right holders' recognition of their rights without affecting the exceptions of Article 24 while respecting the principle of territoriality since the decision would be taken at a national level in each country providing protection according to the procedures it had in place. Recalling that some of the proponents of TN/IP/W/10/Rev.2 had indicated at the last November and December meetings that they would be willing to commit themselves to take account of the information contained in the database proposed, she asked why this commitment could not be put down in writing as it was done in TN/C/W/52.

58. On participation, she said that it would be necessary to go beyond the plurilateral systems of WIPO, such as the Lisbon Agreement, and to be able to establish in the WTO a system which would give full meaning to the word "multilateral" as mandated in Article 23.4 of the TRIPS Agreement. This was an essential element for her delegation. The logical consequences of this mandate would be that all WTO Members, who would be free to notify their domestic GIs or not, would have to take account of the registrations placed on the multilateral register. She reminded delegations that there was no attempt to increase the protection for geographical indications and that all WTO Members already had an obligation under Articles 22 and 23 to provide protection to geographical indications, subject to the transitional period for least-developed countries. Her delegation had proposed that under S&D the needs of developing countries be taken into account.

59. The representative of Japan said that technical discussions were necessary given the complexity of a GI registration system. He said that his delegation wished to reserve its right to make further comments at a later stage as the EC paper had been circulated at short notice.

60. He noted that the EC had replaced the term "rebuttable presumption" by *prima facie* evidence, but the difference between the two notions remained unclear. It seemed to his delegation that the EC wanted to keep the definition of some terms ambiguous. However, precise definitions would be indispensable to understand the GI registration system as proposed by the EC. He further said that the joint proposal in TN/IP/W/10, which his country had co-sponsored, was a clearer and more pragmatic approach.

61. The representative of Ecuador thanked the EC for the written compilation of the oral statements made at last December's meeting. He said that his country, regardless of its participation in the alliance on TRIPS-related issues, expressed full support to the proposal in TN/IP/W/10/Rev.2. As was stated by the representative of Argentina, the joint proposal, co-sponsored by Ecuador, fully reflected the developmental dimension and therefore the development concerns of developing countries in the Doha Round. His delegation was concerned by the fact that the EC's new thoughts of establishing legal presumptions, such as the *prima facie* evidence that a name put by a Member on the register would comply with the definition of GI in another Member where protection was being sought, or that any claim that the name was generic should be substantiated. For Ecuador, such assumptions would undermine the principle of territoriality, as already stated by the delegation of the United States. The principle of territoriality, guaranteed by the TRIPS Agreement, had been intensively defended during this week's regular session of the TRIPS Council.

62. His delegation was concerned by commitments of such a magnitude that would limit the legal capacity of the intellectual property authorities in Ecuador. The legislation of Ecuador stated that a name that did not comply with the definition contained in the national legislation could not be declared a "geographical indication". It would run counter to tradition or mislead the consumers as to the characteristics, features and qualities of the products concerned if that name was declared a GI while it was a generic term for the specialists in the area or for the public at large. The new approach developed by the EC would definitely imply that Ecuador's current legislation would make the principle of territoriality negotiable, and would, therefore, limit the legal capacity of the national IP authorities to assess the merits of an application for GI protection by reversing the burden of proof. He asked the EC to further clarify the issues, and associated his delegation with the question raised by the delegation of El Salvador on final decisions by national courts.

63. As regards participation, the clear proposal presented by the European Communities was exactly what Ecuador did not want. Participation should be voluntary.

64. The representative of Australia thanked the delegation of the European Communities for having elaborated on the ideas it had set out on the register in TN/C/W/52. He expressed his delegation's satisfaction to see this negotiating body make progress on the technical discussions that were required to fulfil its mandate after rather slow progress in previous years, when the joint proposal and Hong Kong, China's proposal had been tabled without attracting the attention and discussion they should have deserved. He said that the relevant agencies in Australia were still considering the EC paper.

65. His delegation endorsed many of the comments made by other delegations, e.g. Canada and New Zealand, on some of the areas where his delegation's understanding remained incomplete. These delegations had identified some key areas where the EC paper seemed to have left some gaps in understanding, such as mandatory participation, particularly in relation to special and differential treatment.

66. In response to a general comment made by the European Communities that the register proposal was a "development proposal", and that it included a special mention of special and differential treatment for developing and least-developed country Members, he said that logically the most effective means of special and differential treatment would be voluntary participation as proposed in the joint proposal. He noted the contention made by several developing country proponents of the joint proposal that this proposal was fully in line with the Doha Round's development focus. This was supported by the impression from reading the EC paper that there could be a considerable administrative burden if participation in such a system were to be mandatory. The first reaction of his IP agencies, which was already telling, was that there would certainly be considerable resource implications and that the processing of thousands, or potentially tens of thousands of applications, would be rather demanding, to say the least.

67. Another area where his delegation shared many of the concerns expressed at this meeting related to the issue of legal effects. It continued to have some doubt as to whether the use of the concept of "*prima facie* evidence", which could be rebutted by proof to the contrary, was very different from the concept of "rebuttable presumption".

68. A point related to the structure of the EC's elaborated ideas and also to the structure of the discussion was that the matters to be notified to a register had an intrinsic relationship to what legal effects would be reasonable for the information on the register. According to the EC's ideas, Australian domestic authorities should take this evidence as *prima facie* evidence, and they would have to seek proof that was contrary to the evidence of the register to rebut it or to decide against it. It would therefore be important to know what that evidence might be. This was all the more relevant to the issue of legal effect because of the nature of the GI definition. The Lisbon Agreement contained a definition of "appellation of origin", which arguably would include the name of a place and which would entail finding some objective characteristic that linked a product to that name. It seemed to his delegation that the definition of GIs in the TRIPS Agreement had purposely been made rather broader and therefore included a subjective element, for example with regard to reputation. A subjective element could only be assessed by a Member in regard to its own territory. GI applications submitted in countries that had dedicated GI registration systems had not always shown that they were completely relying on objective grounds that a court could consider as *prima facie* evidence. So, the evidence to be notified, and therefore what was notified and what was registered, would be very important and not a matter to be left for a later stage. The issue of linkages between all the areas and all the key subjects brought to the fore the fact that what this negotiating group really needed to have would be a fully developed proposal as the next step towards the substantive discussion that Members had called for.

69. He further said that the EC's example of "Bordeaux" presupposed a domestic GI registration procedure. Recalling the comment made by the EC that, once the name "Bordeaux" had been registered, the competent authority of another Member would examine the registration and decide whether or not to register it, he asked whether or not all Members, including all those Members supporting TN/C/W/52, actually had a dedicated GI registration procedure for wines and spirits. While many had one, many others might not have any. It was difficult to see how the EC's ideas would work in those Members that had chosen not to set up such a system. His delegation would therefore be interested in hearing from the proponents of TN/C/W/52 how they would implement the system.

70. Finally, he said that he was reassured by Switzerland's characterization of its needs on legal effects. What was perplexing was that Switzerland's characterization of its needs did not seem to match his delegation's understanding of the effects of the EC's elaborated ideas. Switzerland and no doubt other proponents of the ideas in TN/C/W/52 seemed to require more than an obligation to consult, a clear assurance that domestic authorities concerned would have to take due account of the information in the register and that they would give it its necessary weight. He assured the Special

Session that in Australia – as well as in other Members - that would be exactly the effect of the joint proposal. In other words, any information in an international register for which there was an obligation to consult and to give the necessary weight would be a matter of domestic procedure as the proponents of TN/C/W/52 had proposed and the EC and Switzerland had explained. He said there had been many interesting ideas raised at this meeting and in the EC paper.

71. The representative of India said that India, as one of the proponents of TN/C/W/52, supported the key parameters for a register as explained by the EC delegation and would like to see reflected in a ministerial decision the key parameters for the three TRIPS issues of GI register, TRIPS/CBD and GI extension. As had been mentioned several times in the past, the process of finalization of TN/C/W/52 had necessitated intensive negotiations between some 110 Members. His delegation would support negotiations on the GI register on that basis, and did not see any need for clarifying its support element by element. The elements proposed by the EC in TN/C/W/52 were not a proposal on the GI register alone, but on all three TRIPS issues. He expressed his delegation's concerns about the lack of progress and the absence of a process on TRIPS/CBD and GI extension since July 2008. However, it was satisfied that, as called for in the Hong Kong Ministerial Declaration of 2005, Director-General Lamy had decided to resume consultations at his level on TRIPS/CBD and GI extension. His delegation looked forward to meaningful and constructive engagement by Members in Director-General Lamy's consultations so that the three TRIPS issues could progress apace.

72. The representative of Brazil said that he was perplexed by the continuous calls for manifestation of support from all the proponents of TN/C/W/52. As in every other negotiating group in the WTO, if a proposal had been submitted in writing by a number of delegations, and if those delegations attended a meeting, it could be assumed that, in the absence of proof to the contrary, there was a *prima facie* evidence that it was supported by those who had signed that proposal. It seemed purposeless to keep asking whether or not every particular item of TN/C/W/52 had been agreed to by each and every co-sponsor.

73. He further said that, as always in the WTO, discussions were a mixture of technical and political issues. This was the case for terms such as "proof", "evidence" or "burden". As was clearly stated in the EC's replies, "proof" for example would take the form that was provided under domestic law. Terms like that one would very often be translated with the same words, as would be the case in Portuguese. However, the concept of and requirements for "proof" could be different depending on whether it was an administrative, an intellectual property or a criminal issue. He asked whether this negotiating group really wanted to negotiate a common definition of "proof", or would rather delegate the matter, as was currently the case, to domestic procedures, statutory law and customary law. He found some contradiction among those who upheld the principle of territoriality - which Brazil also did – but who, at the same time, wanted a full agreement among all Members on a unique concept, applicable to all possible circumstances. What should be done would be to go beyond that phase and actually engage in a negotiation of a solution acceptable to all.

74. He said that he felt encouraged by the statement made by the delegation of Australia that his authorities would "take into account" the information on the register. This would be a quite substantial point. He therefore thought that it should not be impossible for all Members to get to a language which would translate the matter into an obligation acceptable to all.

75. He also felt encouraged by those delegations that had expressed concerns about the administrative burdens that would follow from the implementation of the system. He recalled that Brazil was concerned with that too and this should also be adequately taken into account in devising the register. He pointed out that this question was not limited to the register and that the issue of administrative burdens was a horizontal one in the TRIPS area. The sensitivity shown by some delegations was a positive sign.



76. Finally, he said that this negotiation was a very important part of an even greater political issue, which was the updating of the TRIPS Agreement in a manner that would ensure its continued relevance in the future. His delegation would therefore be looking forward to the Director-General's consultations the following week on the other two TRIPS issues, which were essential to Brazil.

77. The representative of Costa Rica expressed his country's commitment to the mandate of the register for GIs for wines and spirits. The register must be of a voluntary nature, be simple and straightforward, should not disrupt the current balance of rights and obligations, and should facilitate the protection of GIs as mandated in Article 23.4 of the Agreement.

78. He thanked the European Communities for the document that they had distributed last week on their new ideas on "modalities". He said that the paper was circulated at short notice in English only. While regretting that it was a systemic problem to have a formal meeting discussing an informal document in one WTO official language only, he would not object to it since his delegation had really been looking forward to this discussion for a long time. He would, however, request the European Communities to come forward with a legal draft text in a formal way, as had been suggested by Australia. This would really help Members to make a better analysis and comparison with the joint proposal and the Hong Kong, China proposal.

79. He further said that his country had the same concerns and questions raised by New Zealand, El Salvador and Canada regarding legal effects. The EC's new idea of "*prima facie* evidence" would actually lead to the same effects as a rebuttable presumption.

80. His delegation did not agree with the EC's statement that its proposal did abide by development principles because it also covered the TRIPS/CBD issues. While the TRIPS/CBD issues were within the development dimension, they were not, however, part of the mandate of this Special Session. In response to the comment made by the EC that TN/C/W/52 was the only document having S&D components regarding the register of GIs for wines and spirits, he concurred with the delegation of Australia that the best way to ensure special and differential treatment would be to make participation voluntary. His delegation had co-sponsored the joint proposal in TN/IP/W/10/Rev.2 because it proposed a voluntary system, which would best meet the development objectives.

81. The representative of Guatemala thanked the European Communities for circulating the main elements of its statements made in the informal meetings of last December. She noted the European Communities' statement that special and differential treatment would be an integral part of the negotiations, and the European Communities' willingness to adopt special measures in favour of developing countries and in particular the least-developed countries. Guatemala welcomed this positive message from the European Communities and requested more concrete indications regarding what special measures were being considered, specifically with regard to the multilateral register rather than with regard to the TRIPS/CBD.

82. She said that Guatemala as a developing country supported the joint proposal which contained favourable elements and practical answers to the developing countries' problems. In addition to recognizing voluntary participation in the register, the joint proposal also provided a practical and realistic mechanism for consultation, which guaranteed the facilitation of protection of GIs for wines and spirits. The fact that countries were encouraged to consult the system or database would ensure that developing countries could become familiarized with the system without having to take on obligations immediately. This was particularly useful for countries such as Guatemala that did not have a tradition in geographical indications and that did not have trained human resources with experience in this area.

83. The representative of Chile reiterated his delegation's support for the joint proposal and for the statements made by other co-sponsors of the proposal, in particular that of Costa Rica. As his

delegation had received the EC paper only a few days ago, and only in English, analysing it would take more time. His delegation also requested that the proposal be put in the form of a legal text, as was the case with the joint proposal or with the EC's proposal of 2005. That would make it easier to compare and analyse the different proposals. As Chile had stated at the last meeting, the supporters of TN/C/W/52 had reached agreement on these four simple paragraphs close to a year ago. Thus, the 108 Members who had signed the proposal should now be able to reach an agreement and come out with a more elaborated text.

84. He recognized that there had been an improvement and movement on the EC side, but that was simply because the EC's initial position had been so extreme that it had been easy for it to move. The same comment applied to Switzerland, who had also referred to Hungary's proposal, when it said that it had moved several times.

85. He had been surprised to hear that the EC had claimed its proposal to be the only one containing special and differential treatment provisions. He reiterated that the joint proposal provided for voluntary participation, which was the best form of S&D that any WTO Member could enjoy. His delegation believed that the EC proposal would involve considerable costs, particularly for developing countries. It had already been raised in previous meetings that for Chile, which was not party to the Lisbon Agreement, obtaining oppositions by some Lisbon members to the registration – by another country party to the Lisbon Agreement – of a geographical indication to which Chile considered to be entitled, had involved huge financial and human resources. Furthermore, this effort to protect Chile's rights, which were finally recognized by the Lisbon Agreement members, had only been successful three days before the time-limit expired. This experience showed how difficult it was to apply rules that were already 40 years old, and that was the reason why those members would initiate a process of revising the text of the Lisbon Agreement. Against that background his delegation considered it important to define the concepts contained in the EC proposal. While he agreed with Brazil that it was not a good idea to define every term, he believed that the current proposal was bad for Members as it was too vague.

86. The representative of China thanked the European Communities for having clarified the flexibilities of the register proposal. His delegation was of the view that the GI multilateral register should cover GIs for all products to correct the current imbalance in the TRIPS Agreement. Noting the difficulties that developing country Members, particularly least-developed country Members, might encounter in dealing with applications from the future GI multilateral register and in making full use of it, his delegation believed that special and differential treatment should be fully addressed in any solutions.

87. China, as a co-sponsor of TN/C/W/52 which was now supported by 108 Members, believed that after nine years of discussion, the three TRIPS-related issues, namely the relationship between TRIPS and CBD, GI extension and the GI multilateral register, were politically and technically mature to enter into text-based negotiations. Therefore, his delegation preferred that these three issues be dealt with in parallel.

88. The representative of South Africa thanked the European Communities for the responses and said that he had been heartened to hear the European Communities make several comments about S&D. His delegation reserved its right to make more detailed comments at a later stage. His preliminary comment was that South Africa shared the same concerns as El Salvador, New Zealand and Canada, and that the questions posed by the Joint Proposal Group had not been answered adequately, if at all. He believed that the information requested was vital for the debate to go forward, and like other co-sponsors of the joint proposal, his delegation urged the European Communities to submit this document as a formal legal negotiating proposal so that the register issue could be discussed more constructively.

89. In response to the question from El Salvador, the representative of the European Communities said that the status of a final decision on GI protection in a Member would not be a problem, as the proposal in TN/C/W/52 fully respected the principle of territoriality. He underlined, in view of questions by other delegations, that such decisions would be up to the respective national authorities. The word "authorities" was used purposefully because in the diverse legal systems around the world, "authorities" could be courts, trademark offices, GI offices or IP offices. The proposal left each Member fully free to use its own authorities, systems and procedures, and to have its own findings, which by definition could be different from one country to another.

90. In response to the questions on participation by Canada, Australia and other Members, he said that, for his delegation, the reason why all Members should be using the register lay in the world "multilateral" of Article 23, paragraph 4. Some delegations might disagree, but this was the reading of 108 Members of the WTO, including the EC.

91. He said that Canada had also claimed that some of its questions remained unanswered without pointing out which ones. He would answer four open questions that he had noted with the hope that he would then have exhausted Canada's questions. First, Canada had mentioned question 27 on what would happen if two countries made different decisions regarding a registered GI. He had already answered this question with regard to consequences for other countries. Regarding consequences for the register, he said that the GI would remain on the register as long as it was protected in the country of origin. The mere fact that the GI remained on the register did not bind the Canadian authorities in any way regarding the consequences for the protection of this GI in their territory.

92. He said that Canada had also specifically mentioned question 32 asking the co-sponsors of TN/C/W/52 to confirm that their intention was to require the party opposing the GI to bear a greater evidential burden than the party seeking to register a term. In response, he said that it would again be up to the domestic authorities to evaluate the information they had, which might sometimes be contradictory. It would also be for the domestic authorities of a national jurisdiction to determine what exactly would be required to invalidate the *prima facie* evidence and to establish proof to the contrary, showing that the registered name did not meet the definition. He noted the Brazilian intervention, which had eloquently shown the contradiction between complaining on the one hand that the system was extraterritorial, and at the same time complaining that national authorities might arrive at different findings. His delegation fully agreed that there should not be any extraterritorial effect. This was why the proposal left national authorities free to make determinations according to their law, which could result in different findings in different Members.

93. He said that Canada had further referred to question 34 on whether it was the proponents' intention to change the established WTO jurisprudence on the burden of proof. The answer was no.

94. Finally, Canada had specifically mentioned question 9 on whether the system proposed by TN/C/W/52 would cover GIs protected through tradition or by convention, for example, through common law systems. The answer was yes. The register, as proposed, did not prejudice, in any manner, the form of protection used by Members.

95. On the issue of costs and burdens that had been raised several times, he said that the proponents of TN/C/W/52 had not demanded that as a consequence of establishing the WTO register Members would have to create national registers or national administrations of GIs. The proposal did not change anything as to the existing TRIPS requirements in this regard.

96. The EC representative said that New Zealand had referred to question 23 on the difference between a rebuttable presumption and *prima facie* evidence. This question might be to some extent academic since the concept of "rebuttable presumption" no longer existed in the TN/C/W/52 proposal. *Prima facie* evidence was a concept that everybody understood. If there were various understandings

of its meaning, this would not be a problem as the proposal left the national authorities of each Member completely free to interpret this concept.

97. He said that New Zealand had further asked why "genericness" assertions needed to be substantiated by those who made them in order to be taken into account. This requirement addressed an issue that several right holders had reported being confronted with in third countries. While the TRIPS Agreement mentioned "genericness" as an exception to the protection of GIs, these right holders had actually been faced with the impossibility of proving that their terms were not generic. While it was possible to positively prove the existence of an element, it was not possible to prove that it did not exist. There were two possibilities with regard to these reported difficulties. Either such situations did not exist, in which case there was no problem with requiring those claiming a right to benefit from an exception like "genericness" to substantiate it, or such situation did exist, in which case the proposal was aiming at redressing the situation.

98. He recalled that Argentina had also asked questions on the concept of *prima facie* evidence, and had asserted that the proposal would deprive national authorities of making their own findings or determinations. He hoped that he had been sufficiently clear in explaining that the mere fact of a name having been placed on the register would in no way deprive national authorities of the right to make such interpretations precisely because it were those national authorities that would interpret what *prima facie* evidence would mean.

99. Argentina, as well as other delegations such as Guatemala and Australia, had also asked questions on S&D provisions. He confirmed that, as was written in black and white in the proposal, there would be S&D provisions, and that they would be discussed after modalities.

100. With regard to the comment made by the United States that under the TN/C/W/52 proposal prior trademark rights could be disregarded, he said that this was not written anywhere, and that the proposal did not change anything regarding the possibility of claiming the exception of prior trademarks. On the comment made by the United States that countries would need to establish a priority as for the other IP rights, he asked for further clarification.

101. He said that the United States delegation had further said that the proposal would mean that a GI notified to the register by a Member would thus become a GI in all other WTO Members. This was incorrect. His delegation had explained at length that the mere fact that a GI was notified to the register only meant that there was *prima facie* evidence that it met a definition, that such *prima facie* evidence could be challenged in any manner of the national authorities' choice, and that, even if a GI was considered as meeting the definition, it could still be denied protection on the basis of all the exceptions existing in the TRIPS Agreement, such as prior trademarks, prior use or "genericness".

102. It had been asserted that the TN/C/W/52 proposal would require considerable resources and that it would force Members to create a register of GIs. He said that all that would be required of national authorities was to click on the website of the WTO to know whether or not the GI was on the register, and then they would be free to make any determination. In his delegation's view, this would fulfil the mandate which was to "facilitate" the protection of GIs, not the protection of trademarks.

103. Japan had said that the concept of *prima facie* evidence was ambiguous. He agreed that it might be ambiguous in the sense that it could mean different things in different countries. Such was the principle of territoriality. It would be the Japanese authorities that would determine what *prima facie* evidence meant in Japan.

104. In response to the request for an illustrative example he said that if the producers of "Chianti" had successfully requested Italy or the European Communities to notify the "Chianti" name to the register and then sought protection in Ruritania, they would first of all have to approach the

Ruritanian authorities. Secondly, they could point out to the Ruritanian authorities that they should consult the register to see that "Chianti" was on the register. This would mean one click, which would be the only cost and burden for the Ruritanian authorities. With regard to what would happen next, there were two options. Either nobody challenged that "Chianti" was a GI, in which case "Chianti" would be determined by the national authorities of Ruritania to be a GI. This did not yet mean that it would be protected in Ruritania. Under the second option, a producer from Ruritania, any other person or any third country could claim that "Chianti" did not meet the definition of a GI, in which case there would be a debate or a litigation about this case in Ruritania. There would not be greater debate or litigation under the register because this would, in any event, take place under the existing TRIPS provisions. On the contrary, the fact that a GI was on the register might help the Ruritanian authorities to make their own findings. At the end of this debate, the Ruritanian authorities would decide whether or not "Chianti" was a GI in Ruritania, and not anywhere else. On the question of whether this GI "Chianti" should be protected and whether the "Chianti" producers should have the exclusive right to use the GI, he said that here again there would be a debate in Ruritania. If there was a producer from a third country or from Ruritania that claimed that "Chianti" was generic, it would be up to the Ruritanian authorities to decide. But whoever was claiming "Chianti" to be a generic would have to prove it. His delegation believed that this was the normal application of the genericness exception. Furthermore, if any person had registered or used the name "Chianti" in Ruritania as a prior trademark, the protection of the GI "Chianti" could still be denied in Ruritania. As could be seen from this example, it was up to the Ruritanian authorities to make their own determinations, using their own procedure, without having to create any register, without any extra burden or extra cost. Such determinations would, of course, only be valid in Ruritania.

105. Finally, in response to Chile's complaint that the paper had only been received three days before the meeting, he underlined that nothing in this paper was new compared to what his delegation had already said orally in December 2008.

106. The representative of Canada thanked the European Communities for the additional information and said that his delegation would study its notes and wait for the written version so that it could study the details. In addition to the questions from the list, Canada had included a request for information on how the system would be applied by Canada's trading partners. While the example on Ruritania was informative, his delegation wished to request that the European Communities and, to the extent appropriate, its member States, provide Members with how they would interpret terms such as "*prima facie* evidence", "proof" and "substantiation" and how this would work in a real life situation. He urged other co-sponsors to also provide such information. To know how these requests would be dealt with in each system for wine and spirit GIs would be very beneficial to understanding how the EC's ideas would work in reality.

107. Like other delegations, his delegation reserved its right to come back with additional questions or requests for clarification, as it had only received the written document a short time ago and its experts were still studying it. His delegation also agreed with the suggestion of other Members that the European Communities' ideas be turned into a detailed written proposal so that it could be compared with the joint proposal.

108. The representative of Australia, in response to Brazil's comment on requests for manifestations of support for the various elements of the register section of TN/C/W/52, said that it was not his delegation's wish to have the Special Session spend its time in declarations of support, but to understand how the system would be implemented, not only by the TN/C/W/52 proponents but by all significant trading partners. Under a TN/C/W/52-like system would there be, for instance, an opposition process in Ruritania, in which Australian producers could participate and contribute to the debate that would occur under option 2 of the European Communities' answer? There would be no option 2 unless there was some process by which other voices could be heard on the question of whether or not a particular registered GI met the definition. It was not an unreasonable demand to

want to know how something would work in practice and it should not be too controversial. In negotiations elsewhere in the WTO a Member would also wish to know how many more widgets would be shipped to Ruritania under a particular NAMA coefficient, so that it could judge whether it was in its own interest or not.

109. The representative of the United States said that her delegation's intervention might have been misheard or misunderstood. As had been explained earlier, one of the ways that a priority date for an IPR could be established was by a filing date of an application in the country where protection was sought. Priority was an important factor because the applicant that benefited from an earlier priority date could stop later attempts by others to obtain a registration on a similar designation. The question was, in the system proposed by the European Communities, whether or not a priority date would be established solely on the basis of placing a designation on the register. To be more specific, under the proposed system, would the prior listing of a designation on the register prevent a later applicant from seeking registration of that designation in the country where protection was sought despite the fact that this later applicant was the first to file the application in that country? If that was not the case, she asked the EC to confirm that placement of a designation on the register would have no effect on a determination of priority in the country where protection was sought if the domestic law of the country did not consider it as a basis for determination of priority.

110. Her delegation also agreed with others that had requested that the European Communities prepare a written proposal that could be compared with the joint proposal.

111. The representative of New Zealand thanked the European Communities for its explanations and said that some of the questions had still not been fully answered, and some of the answers given had left his delegation with fundamental questions about other issues, in particular legal effect.

112. In the "Chianti" example, the European Communities had suggested that if the GI was disputed in Ruritania there would be a debate, and at the end the authorities would decide whether "Chianti" was a GI in their jurisdiction. He asked the European Communities to confirm that domestic authorities could only decide that the term was not a GI in their jurisdiction if there was proof to that effect. In other words, would it also be acceptable to refuse to recognize the GI on the basis of evidence even if that did not amount to proof?

113. He said that the European Communities had not answered the question regarding the application of the WTO dispute settlement rules with respect to decisions on GIs. Could the European Communities confirm that, given that domestic procedures would be used to make the determinations, such decisions would not be subject to the WTO dispute settlement system?

114. With regard to the EC's comment that his delegation's question about the difference between a presumption and *prima facie* evidence in the absence of proof to the contrary was somewhat academic and was therefore left unanswered, he said that the question had value for his delegation and that a reply would be welcomed.

115. It had been suggested that Members should not be too worried about the difference between the various terms used in TN/C/W/52. While New Zealand, like other delegations, fully respected the principle of territoriality, he said it would be extremely imprudent for Members to move ahead on the basis of important terms when the commercial consequences of those terms had not been fully understood.

116. His delegation echoed the calls of other delegations that Members should come to the next meeting with the information on how the European Communities' new ideas would operate in the context of their own domestic procedures. While this would not necessarily need to cover all

Members, his delegation believed it would be important for major importers and exporters of wines and spirits to be able to explain how this would work.

117. New Zealand appreciated the European Communities' attempt to answer the questions about why they had singled out the genericness exception. He invited the European Communities to provide the Special Session with further details about the particular cases which had been brought to their attention by right holders, to explore whether there were other solutions which did not alter the balance of rights and benefits in the TRIPS Agreement and could at the same time address these concerns. He further said that the European Communities had not answered the second related question, that was whether or not it shared similar concerns about the application of other exceptions of Article 24.

118. As had been stated by Australia, his delegation shared the Swiss assessment of what the legal effect of the register should be, namely, for the national authorities to consult the register, take the information into account and give appropriate weight to the information on it. He said for the record that this was exactly what the joint proposal would require under New Zealand's existing domestic procedures. In that regard, it could be said that positions were close together, but the legal effect of *prima facie* evidence in the absence of proof to the contrary would go some considerable distance further than that.

119. He said that some questions were still outstanding from New Zealand's perspective. While Members could hear more answers from the European Communities at this meeting he believed it would be more efficient to provide these questions to the European Communities through the Secretariat so that other Members could see and understand how this issue was unfolding. There were four areas where his delegation continued to have concerns, mainly arising from policy differences. These were legal effect, territoriality, genericness, and participation.

120. New Zealand would also join others in requesting that the European Communities put its new ideas into a text proposal which would allow Members to compare it with the joint proposal and to understand how it would work in practice.

121. The representative of Chinese Taipei thanked the European Communities for its responses and said that his delegation's question regarding the time-frame issue described on page 4 of the EC paper had not been answered. The explanation seemed to imply that there would be no means for the authority to fulfil the obligation of consultation after that time-frame. This would lead to the conclusion that it would be better for domestic authorities to remove any time-frame they might have in their current system, which his delegation believed would not be practical under the current situation of many Members. He said that no such risk of misallocating resources existed under the joint proposal.

122. The representative of the European Communities said that Canada's question regarding how the Ruritania example would be implemented in 27 member States of the EC, and in the other WTO Members, would require a consultation of several months with several institutions in 153 Members, which would result not only in confusion, but also in a long delay of this negotiation, which was not the objective. While it was not possible to answer in advance how these concepts would be applied, he pointed out that the concepts of "*prima facie* evidence" or "absence of proof to the contrary" in the proposal were nothing new.

123. The delegation of the United States had asked a technical question on the priority date which he might not have fully understood. However, while there would certainly be a date when the GI was notified to the register, this date would not be the date of automatic protection in the national system, because there would be no automatic protection.

124. New Zealand had asked whether domestic authorities could refuse a term as non-compliant with the definition of a GI without proof of the contrary. The answer was no, because "the *prima facie* evidence" meant evidence "in the absence of proof to the contrary". Therefore, if there was no proof to the contrary, there was indeed evidence that the term met the definition. This did not, however, mean that the GI would be protected because other elements such as exceptions could still apply.

125. New Zealand had further requested examples of European GI producers that had encountered problems. In this respect he said that, first of all, these were private company matters for which this meeting was not the proper arena of debate. Secondly, and more importantly, he believed that it was not really relevant. As he had explained, either there were no cases where the burden of proof had been put on the GI right holder to prove that a term was not a generic, in which case the proposal would not change anything, or if it were these cases, then it did not matter where, when, and by whom, and the TN/C/W/52 proposal was correct in addressing this issue.

126. Regarding the question by New Zealand on why the proposal addressed only genericness and not the other exceptions of the TRIPS Agreement, he said that his delegation could not be accused of upsetting the checks and balances of GI protection with the other exceptions. However, the main reason to single out the genericness had been the cases reported by European producers of the problem of reversal of burden of proof regarding genericness.

(ii) *Cluster 2 (Notification and registration)*

127. The representative of the European Communities said that his delegation had received fewer questions on the second cluster. Regarding notification, the proposal entitled each Member to notify a GI on the condition that it was protected in the notifying Member in accordance with the TRIPS Agreement. The proposal did not impose any details as to the form of such protection and thus left Members free to determine the appropriate method for implementing the relevant GI provisions of the TRIPS Agreement. It also did not require the setting up of national registers.

128. He said that the content of the notification would therefore be fairly simple. Two elements should be included at a minimum, but more could be included at the discretion of the notifying Member. The two minimum elements would be to provide: (i) all the information necessary to enable a verification that the GI met the GI definition; and (ii) the elements which would allow a verification that the GI was protected in the country of origin, i.e. in the notifying country.

129. With regard to the issue of opposition, he said that this element had been eliminated in response to complaints by Members that an opposition procedure would entail burdens, costs and administrative work. This elimination was also logical because, contrary to other systems such as the Lisbon and Madrid Agreements, under the TN/C/W/52 proposal a mere notification to the register would not entail any automatic protection of the term. He said that this addressed the major concerns that had been raised regarding the excessive government involvement and costs.

130. The representative of Australia said that, if there were no opposition procedure at the time of considering whether or not a GI met the definition, then a debate about "*prima facie* evidence" and "proof to the contrary" became rather hollow, as there would be no opportunity for anyone to establish such proof to the contrary.

131. In response, the representative of the European Communities said that the point made by the delegation of Australia on opposition was a misunderstanding in the sense that there were two different issues. The proposal had eliminated the opposition procedure at the register level, but not the opposition procedures that could take place at the national level to challenge the definition of the



GI and to claim the application of any exceptions under Article 24 of the TRIPS Agreement at any time after protection had been sought at national level.

132. The representative of Canada said that the European Communities' proposal that the registration of a GI constitute *prima facie* evidence would create a burden on others to refute this evidence. His delegation's concern was: firstly, how it could be assured that a notified GI actually met the criteria for being a GI in its home country, including that it was a GI for a wine or a spirit; secondly, how it could be assured that the information continued to be up-to-date as addressed in question 15; and thirdly, how it could be assured that the registration system was not being misused. He noted that the joint proposal provided the same information to be used by domestic authorities but did not create new legal presumptions and did not impose significant new costs. Members should also consider whether or not greater legal effects of the register would possibly necessitate greater safeguards against misuse. While the European Communities' ideas did include greater legal effects without any balancing proposals for protection against misuse, the joint proposal did not create this kind of problem.

133. He said that question 17 regarding sub-appellations and question 59 on removal from the register remained unanswered.

134. The representative of New Zealand said that in regard to notification and registration there were a couple of issues that his delegation would want to take up not only under cluster 2 but also under cluster 3, e.g. the status of GIs that were no longer in use and how these would be removed from the register. He said that, rather than getting into too much detail at this meeting, it would be preferable to examine the European Communities' approach to those issues in the context of a full proposal that could be compared with the existing provisions in the joint proposal, which were comprehensive and simple to understand.

135. The representative of Australia said that with respect to notification the European Communities had stated that one of the crucial elements to be notified would be the information to verify that the GI met the definition of a GI. This related to a point Australia had made earlier that the content of that information was quite relevant to whether the proposed model would be viable and consistent with the principle of territoriality. In his delegation's view, the definition of a GI was not a purely objective standard. Some elements were quite explicitly subjective and related to a particular territory of a particular Member. Therefore, while in the country of origin a particular kind of wine might have a reputation and be felt to have certain characteristics, some of which might be found through chemical analysis while others might relate to an association with the name or the place of origin, that might not be the case in another country. His delegation would appreciate clarification from the European Communities regarding what sort of information Australia, for instance, should provide to the register to allow another country, taking that information as *prima facie* evidence, to establish that a particular location of a wine had meaning in that other country.

136. The representative of Switzerland said that, in order to provide a simple system which could be used by all, the proposal in TN/C/W/52 left to the notifying countries the responsibility for deciding what to do at the national level. They were the ones who would decide what should be protected and what would represent a GI in their territory. It was also the responsibility of the notifying countries to keep their lists up to date and to inform third countries as to the GIs that they were protecting. As had been said several times, this did not mean that there would be automatic protection in other countries. In other words, other Members would have ample room for manoeuvre to look at the definition when deciding whether or not a GI should be protected in their country, and whether this should have any effect, for example, in relation to a prior trademark.

137. She said that an opposition procedure had been provided for in an earlier EC proposal, but most delegations had felt that it was complicated, expensive and cumbersome, so it had been

eliminated. Therefore, it was somewhat contradictory to now claim that the absence of international means of checking whether one of the elements of the definition was being respected would be a problem. The idea was to leave it up to every Member, under the principle of territoriality, to have the responsibility of deciding for themselves whether or not they wanted to protect a GI. The register was there only to facilitate the work by providing information, including at the national level.

138. The representative of the European Communities said that, with regard to the Canadian questions on *prima facie* evidence and how it could be verified, this would be done by the authorities of all Members if the protection was sought by the right holders in all Members, which would be unlikely. It would, of course, depend on the determining element included in a notification. While it could not be presumed what the notifying Member would include, there would be an incentive for that Member to include information as comprehensive as possible and to provide as much evidence as possible that the GI met the definition.

139. Regarding the question on the so-called "misuse" of the system, he said that he was not sure what "misuse" meant in this context. He could only think of the example of GIs that did not exist in the country of origin. While that would be easy to verify, he said that sufficient safeguards had been put into the system by requiring that it be a state, not a private party, a company or a producer, that would notify a GI to the register, that the GI met the definition, and that it be protected as a GI in the notifying country. As Members knew, the IP legislation of the notifying country could be scrutinized by other Members. Furthermore, the fact that the GI was protected in the country of origin would be easily verifiable information as it was impossible to protect a name without making this protection publicly known.

140. Regarding Canada's question 17 on sub-appellations, such as the appellation "Coteaux du Languedoc" followed by the name of a sub-division of the Coteaux du Languedoc, he said that it would be *mutatis mutandis* the same as for any other notified GI. As long as such a sub-appellation of an existing GI met the definition of Article 22.1, it would be eligible for protection.

141. Regarding the removal of a GI, he referred to the answer already given by Switzerland on updating the lists by Members. It would be up to each notifying Member to remove a GI which was either no longer protected in its own territory or which no longer met the definition of a GI.

142. Regarding Australia's question on what element the national authorities of Members would use to verify whether the definition was met or not, he said that there was no single answer. Some countries would presumably refer to books, atlases, or surveys, but it was up to each country to determine which instruments or means to use. Similarly, it was up to the notifying country to provide the information necessary for this verification to be made, because otherwise it would be penalized as its producers, when seeking protection in other Members, would possibly lose the so-called "debate" before the national jurisdictions. For example, the same product could enjoy a different reputation in different countries, and this would have to be verified by each national jurisdiction.

(iii) *Cluster 3 (Other elements such as costs and burdens and special and differential treatment)*

143. The representative of the European Communities said that his delegation believed that progress on these other issues, including costs, could only be made once the so-called "key policy choices" had been made on issues in the first cluster of legal effects and participation because they would flow from those issues. For that reason, the proposal in TN/C/W/52 did not enter into these details at this stage.

144. The representative of Canada recalled that the European Communities had noted in its written answers that a fair amount of detailed work had been done and that there was no need to look at these

issues. He said that he agreed that a fair amount of work had been done on the joint proposal and previous proposals, but the European Communities' new ideas created the need for more work to understand how the new concepts could affect the areas mentioned in this cluster. Canada was prepared to engage in that work to better understand the implications of the European Communities' new ideas and their relation to the joint proposal.

145. On the question of "modalities", the European Communities had said that a number of issues needed to wait until key decisions had been taken. His delegation did not agree with that point. If, as with the joint proposal, a full written proposal from the European Communities and the co-sponsors were made available, Members would be in a good position to look at all of the issues in this third cluster. It behoved Members to take advantage of the time available to do this work when there was time for it.

146. His delegation had flagged a number of questions for the European Communities, some of which had been addressed elsewhere and under other issues. Regarding questions 11 and 19 on costs, his delegation had given some indication of what it believed would happen in the realm of costs, and would be interested in other countries' assessments of how this proposal would affect their costs. Questions on dispute settlement had not received a satisfactory response from the European Communities, and his delegation would appreciate a response in that respect as well.

147. The representative of Chile said that, in response to the European Communities' comment that TN/C/W/52 had taken on board the issue of special and differential treatment, several delegations, from developing countries in particular, had spoken in favour of the joint proposal in the context of costs and S&D, because it basically contained S&D in the form of its strictly voluntary nature. This issue was also related to the two principal issues of legal effects and participation and his delegation would therefore appreciate hearing more from the European Communities on S&D and on the costs that the TN/C/W/52 proposal involved. It would be useful to have a more elaborate written proposal so that these issues could be looked into.

148. In response to Canada's questions on costs, the representative of the European Communities said that costs could be understood in two ways: as costs related to the register itself at the WTO Secretariat level; or costs at national level. His delegation believed that the costs at the level of the WTO Secretariat would simply be the cost of maintaining a list of notified names received, which was negligible compared to the numerous daily notifications and communications already received by the WTO Secretariat now. As to the costs at national level, it would basically be the cost of a click because Members did not need to set up a register at national level, did not need to change their law, did not need to maintain procedures that they would not currently be obliged to maintain, and did not need to have debates if they currently did not provide for such debates in case of disputes related to GIs. The proposal in TN/C/W/52 was not inventing a new TRIPS system for GIs. For the cost of a click, the protection of GIs would be facilitated and the mandate fulfilled.

149. Regarding Chile's intervention, he underlined that no change of law would be required in any Member as a consequence of the TN/C/W/52 proposal.

150. The representative of Chile clarified that he had simply asked the European Communities to better explain S&D treatment in their proposal because many developing country delegations had referred to the fact that the joint proposal clearly covered it, at least through the voluntary participation aspect. He asked what aspect of S&D was proposed in TN/C/W/52 apart from the fact that it was a marriage of convenience with the issue of TRIPS/CBD.

151. On the issue of costs, the European Communities had referred to possible costs for the Secretariat and costs for Members in consulting the list of GIs on the WTO web page. He asked whether the European Communities had foreseen any cost for consumers, or for the users of European

geographical terms which were for example being used in Chile and Argentina. Would there be costs for changes? Would the Chilean producer using a geographical name of European origin incur greater costs than was currently the case in demonstrating that the name was a generic term?

152. On S&D, the representative of the European Communities said: (i) that his delegation could confirm that S&D provisions would certainly be included in the final proposal or final text; (ii) that such S&D provisions would concern the three TRIPS issues mentioned in TN/C/W/52 together, and not only the register; and (iii) that it was not the intention of TN/C/W/52 to deal exhaustively with all these issues. TN/C/W/52 was a paper for modalities, and details would be discussed after modalities.

153. On costs, he said that there would be no costs for consumers or producers as a consequence of the register. One could even argue that the costs would be reduced for the national administrations because the register would simplify their requests for information. Regarding the option where a party claimed that a notified GI was a generic and therefore did not deserve protection, he confirmed that such a claim would have to be substantiated. Since this might already be the case in many instances, he believed that this would not add any cost.

154. The representative of Canada said that his delegation had posed question 44 regarding disputes in domestic courts under "other issues". However, as it had been raised in the meantime by other delegations, he would appreciate it if he could have a response on dispute settlements both at national and WTO levels.

155. The representative of New Zealand recalled that his delegation had asked whether or not it would be correct to assume that the WTO dispute settlement mechanism would not apply to the register if domestic procedures were – as explained by the European Communities – paramount in the proposal. If the WTO dispute settlement mechanism did apply, on what basis could a dispute be brought, assuming that domestic procedures were TRIPS-consistent?

156. The representative of the European Communities said that question 44 from Canada was not so clear, as it requested the co-sponsors of TN/C/W/52 to clarify that disputes would be addressed in domestic courts by domestic authorities. The disputes on whether or not the GI met its definition would of course be addressed by domestic courts, or authorities, or chambers of disputes, whatever the country provided for.

157. Regarding the question of New Zealand on the application of the WTO dispute settlement system, he said that this was not a topic touched upon by the TN/C/W/52 proposal, and that one could only reason logically in this regard. Determinations by countries whether or not an exception applied were sovereign decisions of the relevant national authorities. They would, however, have to apply WTO definitions where these existed. If a national authority claimed for example that a name on the register did or did not meet the three criteria of the definition of Article 22.1, it could not take a decision on that name on the basis of only two criteria. If a GI registration by a Member was considered not to be WTO-compatible, or if a Member's legislation did not apply the TRIPS Agreement, it could be subject to the WTO dispute settlement system. This, however, would not be a change brought about by the TN/C/W/52 proposal as that was already the case now.

158. The representative of New Zealand said that his delegation disagreed with the European Communities' assessment that these issues needed to wait for a new modalities decision. He said that the ministers had already given clear guidance, twice, on modalities for this negotiation. The mandate was clear. Members had spent a lot of time debating the mandate in the past and were now in a situation where there was good momentum in the negotiations. He would therefore welcome the European Communities giving some thought to how they would see the cluster 3 elements unfold under their approach to the cluster 1 elements. That would allow delegations to carefully think through how their proposal would work.

159. The representative of Chinese Taipei said that his delegation was concerned that, if the only obligation were to simply maintain a list, this list could become a shortcut for the GI owners to get applications approved in foreign countries because the registered name would enjoy, under the EC proposal, the *prima facie* evidence effect. When the owners of "Bordeaux" applied for protection in a foreign country, they would submit an application to the domestic authority of that country and refer to the register, which the authority would then examine, and find that the name was on the register. Such a list would become a shortcut because, according to what the European Communities said, if there was no opposition or any prior rights in that country, it would be recognized as meeting the definition of a GI. It would not just be a simple WTO list that the Secretariat maintained, but actually a shortcut for GI owners to get their applications through.

160. The representative of Australia said that his delegation's thoughts were similar to those expressed by the delegation of Chinese Taipei. These other issues needed to be considered holistically as part of a fully developed proposal because domestic costs would affect implementation and the way that the legal effects would operate in practice.

161. He said that an implementing authority or an implementing system might face a choice that some Members who had no particular interest in wine and spirit trade would perhaps rather avoid. It was an invidious choice between having a system that allowed the debate mentioned in the examples of "Chianti" in Ruritania, or "Bordeaux" in Australia, and not having such a system. Some Members might have procedures providing for debates when considering whether a GI met the definition, whether the *prima facie* evidence could be turned down by proof to the contrary, but other Members might not have such rather costly procedures and might accept a term that was on the list as a matter of course. In the latter case, there would in fact be an almost automatic approval of any listing of a GI. While that might not seem of great consequence and would probably be referred to as "a matter for domestic systems", the WTO Members should be mindful that granting monopolies that should not exist would in fact raise costs to consumers, since monopolies, even on a geographical term, would create pricing power. His delegation was concerned about the risk of setting up unwarranted barriers to trade through introducing the system the European Communities had outlined. In contrast, under the joint proposal, a Member with no interest in the register would not need to participate: Members would therefore have an extremely low-cost alternative, which would not create monopolies that would not have been granted if there had been a procedure to examine the cases.

162. In response to the comment made by the delegation of Chinese Taipei on shortcuts, the representative of the European Communities said that there had again been a misunderstanding. Firstly, it was not the "Bordeaux" producers who would notify the "Bordeaux" name to the register, but the Member where this GI originated. This Member could only do so in full respect of its IP legislation, which had to be WTO-compliant. Otherwise the other Members might take it to the WTO dispute settlement system. Secondly, the mere fact that "Bordeaux" was in the register did not entitle "Bordeaux" to be protected in Ruritania. With regard to the option that, where there was no opposition to that GI, it would be deemed to meet the definition, he said that would not be a problem. If there was nobody opposing "Bordeaux" in the Member where protection was being sought, where would be the problem? If there was an opposition, then there would be a debate. "Bordeaux" might be considered not to meet the definition in Ruritania despite its registration in the register. If it was found to meet the definition, that would still not mean that it would be protected: any third party could still claim the exceptions of genericness, prior trademark or prior use. Therefore the system would not create shortcuts but would facilitate protection in accordance with the mandate.

163. Finally, he said that he did not follow Australia's reasoning that the proposed system would entail costs for a country at domestic level. The TN/C/W/52 proposal did not change the current situation: all Members were already obliged, if there was a dispute on a GI, patent or trademark, to provide assistance in settling a dispute. His delegation did therefore not see any extra cost in that regard.

164. The Chairman said that the discussion had been excellent and that more sessions like this would be useful in getting to the bottom of the technical issues.

165. The Special Session took note of the statements made.

C. OTHER BUSINESS

166. The Chairman recalled that, as agreed by Members at the TNC meeting last year, all the negotiating groups should be moving forward. As for other Chairs, his task was to ensure that this group was working at the right pace and that it did not find itself in the situation where it would be the only negotiating group unable to deliver "at the crunch time" because the technical issues had not been addressed in time. While he was not looking to go faster than any other negotiating groups that were supposed to be ahead of this group, at the same time he wanted to constantly encourage Members to keep the right pace so that the rightful position in the overall negotiation scheme would be maintained. In his view, the most appropriate approach would be to continue with these technical discussions and to try to bridge the gaps wherever possible. He believed that Members should continue to take advantage of the participation of the capital-based experts that would come for the regular session of the TRIPS Council. He therefore foreshadowed that the next formal meeting should take place back to back with the meeting of the regular session of the TRIPS Council scheduled for 8 and 9 June. In view of the long period until the June meeting, he believed that these issues should not be allowed to rest for such a long time. If Members agreed, he would suggest to engage in some technical consultations in the period between March and June, and to pace them consistently with what was happening elsewhere in the Doha Round.

167. The representative of the European Communities said his delegation supported the suggested way of moving forward. This issue should not sleep until June and he fully agreed with the proposal to have meetings in between. He added that the issue discussed at this meeting were part of a proposal which also touched on two other topics. His delegation welcomed the Director-General's decision to hold technical consultations on those two other topics the following week.

168. The representative of the United States reiterated the request for a written proposal from the European Communities and the other co-sponsors of TN/C/W/52, and said that it would help to see with more clarity what the proposal would look like and how it would compare with the joint proposal. Until then, she said, it would be premature to have inter-sessional meetings.

169. The representative of New Zealand said that, in light of the ambiguous European Communities' statement that TN/C/W/52 superseded earlier positions with regard to those aspects in earlier proposals that might contradict them, it really would be easier and permit work in a more structured fashion to have a full text proposal. While his delegation was committed to moving the process forward and agreed with the suggested speed at which it should move, it also believed a written proposal would now be the way forward.

170. The representative of Korea said that many developing countries had raised the issue of special and differential treatment at this meeting. In his delegation's view, the European Communities' stance that special and differential treatment would be dealt with in a final text did not enable developing countries to compare the different proposals on special and differential treatment. In this context, his delegation requested the European Communities to give a full explanation of the special and differential treatment propositions in the TN/C/W/52 at the next meeting.

171. The representative of Chile said that his delegation also supported the request that the TN/C/W/52 proposal be put in writing to enable a comparison with the joint proposal. This could help this negotiating group to have a discussion that would also focus on the joint proposal, which the European Communities and Switzerland had consistently refused to address, apart from saying that it

was just a database. His delegation would welcome an opportunity to explain how the joint proposal, unlike the one in TN/C/W/52, would facilitate protection of GIs for wines and spirits without necessarily increasing their protection. In this connection, he welcomed the EC representative's comment that putting names in a database facilitated protection of GIs. This comment took away a slight discrepancy with Chinese Taipei and Australia. Putting names on a database did have a *de facto* effect. With a full written proposal from the sponsors of TN/C/W/52, it would be interesting to hear the exact position of Chile's important trading partners supporting that proposal. Like Korea, Chile thought that it was important to see the special and differential treatment provisions in the European Communities' proposal, and that this issue was linked to the costs issue. Unlike the European Communities, Chile believed that the costs for the current users of names of European origin would be affected.

172. The representative of Brazil said that he had difficulty understanding the request made by Chile and other countries that the proposal should be put in writing. TN/C/W/52 already was a proposal in writing. If they were asking for an additional text, he said, such work could be done together with 108 Members, but it was his understanding that the opponents had already agreed on the basic elements regarding the GI register.

173. With respect to the Chair's suggestion, his delegation believed that it would help to have more sessions between this meeting and June. Parallelism was of the essence. As the Director-General would hold consultations on GI extension and on TRIPS/CBD, it could be agreed that all TRIPS-related issues would be dealt with in parallel.

174. The representative of Costa Rica said that, while TN/C/W/52 was a written proposal, it was not really a legal text such as the joint proposal in TN/IP/W/10/Rev.2, the Hong Kong, China proposal in TN/IP/W/8, or the former European Communities' proposal in WT/GC/W/547-TN/C/W/26-TN/IP/W/11. His delegation believed that the proponents of TN/C/W/52 should be able to come up with a legal text in order to facilitate the discussion of the Special Session.

175. The representative of Japan said that his delegation would like to confirm that the joint proposal was still on the table and should receive new consideration. Japan was also ready to further discuss the European Communities' proposal.

176. The representative of Chile said that, while his delegation could obviously not force any delegation to come forward with a document, it believed that a legal text should normally be submitted, even when others did not accept it. In other WTO bodies such as the negotiating group on trade facilitation, Members were now going through third generation proposals. Initial ideas had become legal texts even if Members did not all like them. A full legal text proposal would be very helpful for important issues for developing countries, including Brazil. He recalled that Brazil had made a very strong statement a year ago on the importance of analysing the costs for developing countries, and since then the cost for developing countries had not become clearer. As regards the European Communities' comment on cost to the Secretariat, his delegation agreed that it would probably be more or less the same as that for the joint proposal, i.e. the cost of having a website and translating it. He also agreed with the European Communities on costs for governments when they consulted this database, but his delegation did not yet see what the costs would be for developing countries, for consumers and for producers who were using terms considered as generic in Chile. That was why it was important to have a legal text to compare with the joint proposal.

177. The representative of India said that his delegation did not understand the insistence on legal texts. There had been legal texts on the GI register and on TRIPS/CBD for a long time, and there had been exhaustive discussions on these issues over the years. Document TN/C/W/52 basically contained key parameters for ministerial decisions, so that Members should be able to somehow move out of this impasse and engage in constructive text-based negotiations.

178. Regarding the pace of work, his delegation could agree with the suggestion made by the Chairman. Its concern was that the consultations on the other two issues should definitely proceed at a fast pace.

179. The Chairman said that he would consult with Members on the best way to structure discussions in the future, but that he would certainly not want to lose this momentum. The momentum, based on the papers on the table, had been very good at this meeting. He was not in a position to make a decision on whether there should be more or fewer papers, or a different kind of paper. He thought that Members had a fairly good grasp of the issues and that there was room for further discussion on the technical issues. While he would agree with the general comment that ideas put in writing would help, he had also been made aware that some of these issues had been discussed for a long time and that Members understood these issues well enough to go a little further without more papers. He said, however, that he was not the person to make the judgement as to whether or not more papers would be required. He was satisfied that this negotiating group had the competence and the interest to address the issues in the serious and technical way that they had been discussed at this meeting. Whether it be in the form of additional papers, questions, answers or explanations on how some legal effects would affect the domestic situation, all of these could be brought to the table and the Special Session would proceed on whatever basis Members agreed to proceed. He said that there was one source of papers that had not been mentioned: he as Chairman could produce a paper with the help of the Secretariat at the time when it was deemed necessary. He did not believe that this was necessary yet. This was how he saw the options for moving forward, and he was confident that with the same goodwill and spirit displayed at this meeting Members would continue to find ways of working on the register and moving the work forward at the right pace.

180. The Special Session took note of the statements made.

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