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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 4 March 2010

Chairman: Ambassador D. Mwapa (Zambia)

Subjects discussed — Page No.

A. ELECTION OF CHAIRPERSON

1. The Special Session confirmed the appointment of Ambassador Darlington Mwape (Zambia) as Chairman.

2. The Special Session agreed to adopt the agenda as set out in WTO/AIR/3513.

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

3. The Chairman said that he would seek to ensure progress and hoped to build on the achievements of his predecessors towards an outcome that was acceptable to all delegations. He was thankful to Ambassador Trevor Clarke for his efforts and inspiration in taking the work of the Special Session forward in a positive and constructive spirit and for his masterly report that took note of the progress achieved and would serve as a basis for further developments. The Chairman also expressed his appreciation to Ambassador Karen Tan (Singapore) for her dedication in chairing the Special Session as *pro tempore* Chair following the departure of Ambassador Clarke.

4. Ambassador Karen Tan, the representative of Singapore, congratulated the Chairman on his election and said that her delegation would continue to support his efforts in leading the negotiations of the Special Session. She then reported on the informal consultations she had undertaken as *pro tempore* Chair of the TRIPS Special Session since December 2009. During that time she held informal consultations with the group sponsoring TN/IP/W/10/Rev.2 (hereinafter "joint proposal") on

16 December 2009 and with the group sponsoring TN/C/W/52 or "modalities proposal" (hereinafter "TN/C/W/52 proposal") as well as with Hong Kong, China, who had tabled TN/IP/W/8, on 4 February 2010. To ensure transparency and to report to the wider Membership on these consultations, she had also held an open-ended informal meeting of the TRIPS Special Session on 5 February 2010. She said that the remarks she was going to make largely reflected the views she had shared with Members at that 5 February meeting.

5. As an overall assessment, although the fundamental positions of delegations had not changed, it had been her sense that there was a genuine and sincere desire on the part of delegations to move forward and resolve the remaining differences in these negotiations, so as to be ready to contribute to any movements in the wider context of the Doha Round negotiations.

6. More specifically, she had noted Members had expressed their appreciation of Ambassador Trevor Clarke's report in TN/IP/19 as a fair and balanced reflection of the state of play and of remaining challenges, in particular in the two key areas of legal effects and participation, even if some points and suggestions made in the report were not shared by all delegations. With regard to the five "Guiding Principles for Future Work" in Part C of the report ("The Way Forward"), she had noted a general agreement as to the usefulness of these principles for future work of the Special Session. Individual principles enjoyed different levels of Members' enthusiasm. Some delegations had highlighted particular concerns and there were finely nuanced views on what role they should play in the future work of the Special Session. It seemed nonetheless clear that the guiding principles represented a succinct crystallisation of both common ground and remaining differences in these negotiations, even though there was no suggestion that they should form the basis of negotiations.

7. As regards the structure of future work, there was a widespread view among delegations that the discussion should avoid rhetorical debates and follow a practical approach, focusing in part on concrete practical examples and concerns regarding the implementation of each proposal at the national level. To this end, several delegations had indicated their willingness to make or develop case studies, examples and scenarios regarding the implementation of the different proposals in their national law.

8. She said that it was evident that the method to structure the discussion around the clusters of issues identified by previous Chairs was well accepted by Members, and that the list of questions posed by Ambassador Clarke had been successful in further focusing the discussion among Members on critical areas of convergence or divergence.

9. It was her own view that, in terms of structuring the future discussions in the Special Session, merit lay in utilizing all the elements that had been developed and already used to ensure that none of the work done hitherto would be lost, that discussions among Members should move forward rather than repeat existing positions, and that the gaps identified between Members could eventually be bridged.

10. In closing, she wished the Chairman much success in his Chairmanship and in steering the Special Session.

11. The Chairman said that he had held consultations with the group supporting TN/C/W/52, the Joint Proposal Group, and the Hong Kong, China delegation. The purpose of these consultations had been for him to become acquainted with some of the delegations and to gain a sense of the issues under consideration, with a view to organizing future work, taking advantage of the presence in Geneva of capital-based experts, as well as sharing with these delegations his own understanding of the issues.

12. He recalled that the three clusters of issues identified by Ambassador Manzoor Ahmad (Pakistan) were: legal effects/consequences of registration and participation; notification and registration; and other issues, including fees, costs, administrative and other burdens, in particular for developing countries and least developed countries, and special and differential treatment. In October 2009, Ambassador Trevor Clarke had circulated a list of four questions concerning legal effects/consequences of registration, participation, and special and differential treatment, with the aim of focusing Members' discussions and structuring them around these questions. It was his understanding that delegations had an excellent discussion on the basis of this list of questions. Though it had not bridged the main gaps, the clarifications, case studies and presentations they had sparked had shed light on various issues. That kind of technical discussion had probably provided Ambassador Trevor Clarke with some material to make suggestions on the way forward, including the five guiding principles outlined in paragraph 16 of his report (TN/IP/19).

13. With regard to the guiding principles, he was aware that, while all delegations agreed that they were a useful tool for their work, some opposed them as a basis for negotiations, and others said they should not be used as an excuse to continue rhetoric debates on well-known concepts such as "multilateral" or "to facilitate". With all this in mind, he proposed that for their future work Members continue to build on their achievements.

14. He therefore suggested:

(i) that Members continue to structure their work around the three clusters identified by Ambassador Manzoor Ahmad (paragraph 4 of TN/IP/18);

(ii) that, while doing that, Members continue to use Ambassador Trevor Clarke's list of questions on legal effects, participation and special and differential treatment (paragraph 5 of TN/IP/19); and

(iii) that, while discussing each issue, Members should seek to see how their concerns could be reconciled in the light of continuing explanations as to how Members would actually implement different options within their national systems, bearing in mind the guiding principles in TN/IP/19, without negotiating on those principles as such and recognizing that delegations might have some reservations on certain aspects of those principles.

15. In short, Members would continue with the three clusters of issues, using the four questions to focus the discussions, while bearing in mind the five guiding principles. He expressed his hope that this three-four-five approach would eventually end in one working document. To this end, time was needed to work through some specific questions. While it was up to the Members to consider how their concerns would best be met, he would encourage a focused exchange of questions and answers, in order to create the clearest and most informative basis from which to work. He suggested that the clusters of issues be taken one by one and that therefore the issue of legal effects/consequences of registrations be addressed first. As had been underlined by some delegations, this issue was crucial to the resolution of other issues, including participation.

16. The Chairman recalled the four questions posed by Ambassador Trevor Clarke:

"(i) What legal obligations would be acceptable for the Register to facilitate the protection of geographical indications for wines and spirits, as mandated by Article 23.4 of the TRIPS Agreement?

(ii) When making decisions regarding the registration and protection of trademarks and geographical indications, what significance and weight should national authorities give to the information on the Register?

(iii) Are there any options regarding participation, other than voluntary and mandatory participation. If so, what criteria could be envisaged?

(iv) What form could special and differential treatment take with regard to the Register?"

17. On the subject of registration and notification, he said he would invite delegations who wished to add anything new under this cluster to do so.

18. The representative of the European Union congratulated the Chairman on his appointment and said that he could count on the support, trust and full cooperation of the European Union in seeking a mutually-agreed outcome to the negotiations. Recalling that his delegation was a member of a coalition of 108 Members, representing a two-third majority of the Membership, he reiterated its support for the negotiations on a multilateral register for geographical indications for wines and spirits, coupled with negotiations on the issues of GI extension and TRIPS/CBD (Convention on Biological Diversity). Under the TN/C/W/52 proposal, the three issues should be dealt with in parallel, and, while some Members opposed this linkage, it was a political reality that had to be taken into account. The group supporting TN/C/W/52 had contributed a great deal to the register negotiations and, due to its ability to listen, had been a driving force in terms of making proposals. Given that a proposal that gathered the support of a two-third majority of the Membership could itself only be the fruit of compromise, the Members sponsoring TN/C/W/52 had seriously recalibrated their past positions to achieve this common position.

19. He said that his delegation fully agreed with the Chairman's assessment that the two pivotal elements of the negotiations were the issues of legal effects and participation, and that these should be addressed immediately, in the hope that once these had been agreed the rest would fall into place. The European Union further supported the Chairman's proposal of continuing work on the basis of the suggested clusters, starting with the first two of the four questions that had been circulated on 2 October 2009, on legal effects. These two issues had been clearly addressed on several occasions, notably in a thirteen-page explanatory document circulated by the European Union on 25 February 2009, capturing a reply to a total of 64 questions relating to the majority proposal on the register. On 10 June 2009 his delegation had again provided explanations on how the register would function under this proposal. His delegation was ready to address any further questions that Members might have. However, as the Chairman had stated, any new questions should not cover old ground as the negotiation process should not be delayed.

20. On the issue of legal effects, he said that, under the TN/C/W/52 proposal, the entry of a name into a register would not amount to automatic GI protection. Rather, it would trigger two legal effects: first, the name entered in the register would merely represent prima facie evidence that it was a geographical indication, that the goods originated from a specific place and owed at least one of their characteristics, its quality or its reputation to this origin. He said that beyond that, domestic authorities would have all latitude to decide for or against protection of the term on the basis of contrary evidence provided by themselves or brought by any third party. In this regard, the sponsors of the TN/C/W/52 proposal considered that the issue of alleged extra-territoriality had been addressed, as the final decision on protection lay exclusively with domestic authorities. Even if the domestic authorities agreed that the name met the definition of a geographical indication, it did not necessarily mean that the term would be protected because all the exceptions of Article 24 remained available. The second aspect of the proposal provided that any assertion of one of these exceptions, namely the generic exception, had to be substantiated. As his delegation and other supporters of the proposal had been informed by Members opposing that proposal that this was already the case in their systems, i.e.

that any assertions on genericness already had to be substantiated, this should therefore not represent a problem. He reiterated that the checks and balances of the exceptions provided in Article 24 would remain unchanged.

21. In contrast, he said, the Members opposed to TN/C/W/52 had not yet explained how they would implement the obligation to "consult and take into account" the information on the register. While this formulation had so far only been expressed orally and not been put in writing, his delegation believed that this was how these Members would have domestic authorities treat the information on the register, but the details were not yet clear. As legal uncertainties for market operators, whether they were GI or non-GI operators, had to be avoided, there was need for further explanations on this issue. He said that if there were a compulsory system of taking the term on the register into account in domestic decision-making, this might well be very similar to the TN/C/W/52 proposal.

22. He said that Members should not open or re-open semantic debates but focus on the Special Session's mandate and the purpose of the register, which was to facilitate the protection of GIs and not to facilitate the protection of domestic authorities or of trademark owners.

23. The representative of New Zealand congratulated the Chairman on his appointment and expressed his support to the Chairman for his proposal on the way forward. He also thanked Ambassador Tan for her constructive and useful work over the past months.

24. On questions one and two of the Chair's list of four questions of October 2009, he referred Members to the responses contained in a room document circulated on 23 October 2009 to the Chairman's questions by the delegations of Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Korea, New Zealand, Nicaragua, Paraguay, South Africa, the United States and Uruguay. With respect to the first question regarding the consequences that should flow from an entry on the international register, the room document noted the two general approaches that were on the table, namely that (a) an entry should result in better information being available to and used by decision makers and national systems, and (b) that an entry should result in a legal presumption in national systems. As set out in the document, New Zealand considered that a legal presumption was not acceptable for a number of reasons: firstly, a legal presumption would increase the legal protection for GIs, and this would be outside the scope of this negotiation, which was only about facilitating protection; secondly, a legal presumption would violate the principle of territoriality; and, thirdly, a legal presumption would alter the balance of rights and obligations in the TRIPS Agreement.

25. The joint proposal (TN/IP/W/10/Rev.2) had suggested an obligation for Members to consult the register when making decisions regarding trademarks and GIs. Such an obligation would ensure that better information would be made available to decision-makers in domestic systems to facilitate the protection of GIs notified to the register.

26. With respect to the second question on the significance and weight that domestic decision-makers should give to the information on the register, he said that this was a complicated legal issue which varied from case to case and according to the functioning of Members' different systems. There clearly was a fundamental difference between the two approaches on the table regarding whether or not domestic decision makers should be left with the flexibility to weigh information appropriately in accordance with their domestic systems. Under the TN/C/W/52 proposal, that weight was actually predetermined and that ensured that the substance before the decision makers was biased towards a particular outcome.

27. For instance, when faced with conflicting claims as to whether a term was a GI or a generic term under the TN/C/W/52 proposal, it was his delegation's understanding that the party seeking the

intellectual property right (IPR) would be at a significant advantage because the burden of proof would be on the party arguing that the term was generic. This allocation of the burden of proof was clearly the wrong way round and went against the nature of IPRs. He said that IPRs created monopolies for right holders, and were therefore exceptions by their very nature. The *quid pro quo* for that monopoly was that those seeking the monopoly had to bear the burden of proving that they were entitled to it. The burden of proof should not be on users of generic terms.

28. In terms of the way forward, the room document circulated in October 2009 contained a practical approach for Members to exchange information regarding how decision makers in domestic systems would consult the register and what mechanical steps they would take. Some Members had already reported to the Special Session in this regard and he noted that the minutes of the Special Session of June 2009 contained a detailed record of information from Canada and other Members, including Japan, New Zealand and Korea, regarding the practical details for the implementation of the register in their systems. He said that this kind of practical engagement was still lacking from the sponsors of TN/C/W/52.

29. The European Union had described in June 2009 how the TN/C/W/52 proposal would be implemented in a fictitious country called "Ruritania". New Zealand considered this example too abstract and therefore not particularly helpful. It would welcome hearing about how its main trading partners such as the European Union, Brazil, India, and the United States would implement the proposal.

30. With regard to the European Union's written replies to questions posed by several Members in 2009, he said that, while those written responses had been useful, they had remained at a somewhat abstract level, and with regard to the crux of the issues the answer had invariably been that this would depend on domestic procedures. He said that, while these issues should depend on domestic procedures, it would nevertheless be helpful to have a detailed account from individual Members regarding what those national procedures were and how a register would be implemented in those procedures. This was the idea behind the suggestion to examine the practical details of implementing the proposals in different systems that most Members seemed to find useful. He expressed his delegation's support of the Chairman's intention to incorporate this aspect into the Special Session's work.

31. He said that his delegation also recalled with interest a statement by Brazil made in October 2009, that while Brazil had had no intention of negotiating away the exceptions of prior trademarks and genericness, it had nevertheless been satisfied that the proposal contained in TN/C/W/52 had taken into account its concerns. He invited Brazil to share with Members some practical information regarding how its domestic system for the protection of GIs would take into account prior trademarks and genericness as well as the reasoning and judgement that had assured Brazil its concerns about prior trademarks and genericness had been accommodated in the TN/C/W/52 proposal.

32. The representative of Canada congratulated the Chairman on his election and thanked Ambassador Tan for her excellent contribution over the past months. As a proponent of the joint proposal, Canada was in favour of a multilateral register for wine and spirit GIs and could accept as legal effect an obligation on domestic decision-makers to consult the register when making decisions regarding the registration or protection of trademarks and geographical indications for wines and spirits. In order to seek greater clarity as to how protection would be facilitated, Canada had suggested that Members exchange information regarding how decision-makers would take this information into consideration. To this end, Canada had made a comprehensive presentation on the implementation the joint proposal register by Canada at the June 2009 meeting, describing how the information on the register would be taken into account in its national decision-making process. In preparing for this meeting, her delegation had attempted to assess the GI register elements contained

in the TN/C/W/52 proposal but had been unable to determine how these elements could be implemented in Canada.

33. She said that unfortunately the TN/C/W/52 proposal seemed to raise more questions than answers. It was Canada's view that to merit consideration a proposal should include all relevant elements and not leave them for future discussions. For Canada, the TN/C/W/52 proposal was not a proposal for the establishment of a register as such, but rather a text for modalities seeking to link this issue, for which there was a clear negotiating mandate, with other intellectual property issues designated by Ministers as implementation issues. Her delegation was willing to advance the negotiations on the register, but was concerned about prejudicing progress by linking it with other issues, as this approach could and would not benefit the wider Membership.

34. The only known elements of the TN/C/W/52 proposal, such as the legal presumption that the registered term met the definition of geographical indication, were clearly outside their mandate. Among other things, this presumption created an imbalance between the right holder of a GI from a given country and the other parties in the country where protection is sought, as it did not put everybody on an equal footing. Under the TN/C/W/52 proposal, a domestic right holder would need to satisfy domestic procedures, including demonstrating that a term met the definition of geographical indication to obtain protection, while foreign owners of GIs would be exempted from that requirement as they would benefit from a legal presumption. She said that this kind of reversed or distorted national treatment was only one of several concerns about that legal presumption.

35. Another concern was the extra-territorial nature of the TN/C/W/52 proposal. For instance, several years ago Canada had entered into negotiation on wines and spirits with the European Communities[1] and had been presented with some 10,000 names of GIs recognized in Europe, in other words: names presumed to be GIs. At the end of a difficult and time-consuming exercise in which each of those names was diligently examined by the Canadian authorities to see whether it referred to a geographical area, and whether it was actually protected in their country of origin, the list was reduced to only 1,500 names that could qualify as GIs. While this process had been time-consuming and laborious, one could imagine how much more difficult and onerous it would be if Members were required to reverse a legal presumption in line with the TN/C/W/52 proposal. Members were being asked to recognize in their legal system decisions taken in other legal systems over which they had no control. While the representative of the European Union had pointed out the need to avoid uncertainty, it was her delegation's view that the EU proposal actually provoked uncertainty. In the example she had provided, the number of GIs had been considerable but the principle remained the same, no matter how many GIs a Member was asked to recognize. She said she doubted whether all Members would have the resources to undertake a similar exercise.

36. In concluding, she said that her delegation wished to move forward with the negotiation on the GI register for wines and spirits. Canada's view, endorsed by the Canadian industry, was that the GI register for wines and spirits would be a valuable tool that would benefit Canadian producers. While the TN/C/W/52 proposal was incomplete and outside the mandate, the joint proposal addressed all the elements required for the implementation of a register, respected the mandate and therefore constituted the best basis for continuing the negotiations.

[1] On 1 December 2009, the Treaty of Lisbon amending the *Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the European Union replaces and succeeds the European Community.

37. The representative of Korea congratulated the Chairman on his appointment and expressed the hope that an outcome to their negotiations would be achievable under his guidance. Like Canada, Korea was concerned by the register proposed in TN/C/W/52. Korean patent officials and IP experts had repeatedly voiced their concerns regarding the difficulty of implementing such a register in Korea. His delegation considered it unfeasible for developing countries to implement any of the elements contained in TN/C/W/52. Although the proposal encompassed special and differential treatment for developing countries, the scope of such treatment was unclear. Developing countries that might already have difficulty in implementing GI protection might be forced to implement a system that would not fit in their domestic system. In this context, he said that, while Ambassador Trevor Clarke's questions had served as a guide to a certain extent, it would be necessary to have more focused discussions on the problems inherent in the TN/C/W/52 proposal, together with more specific and practical questionnaires.

38. He stressed that Korea attached great importance to transparency and inclusiveness in the consultation process and said that ensuring this through regular meetings could be less time-consuming. In this context, Korea would welcome as many open-ended meetings as possible being held in the course of their future work.

39. The representative of Hong Kong, China congratulated the Chairman on his election. She said that Hong Kong, China supported the proposal by the Chairman on the way forward and would continue to help facilitate the negotiations.

40. With regard to the first two of the Chair's four questions posed in October 2009, concerning legal effects and the significance and weight that national authorities should give to the information on the register, she recalled that her delegation had developed four hypothetical case studies illustrating how the Hong Kong, China proposal would function. These case studies had been circulated in a room document and presented by her delegation at the last meeting on 28 October 2009. The first case dealt with a non-contentious notification and registration of a GI from a participating Member at both the domestic and international levels. The fourth case, which actually followed on from the first scenario, dealt with a contentious notification and registration at both the international and domestic level, where the issue was finally resolved at the domestic level in another participating Member.

41. She said that she would not repeat the facts cited in the first case study, which could be found in paragraphs 6-12 of the room document, but would refer Members to paragraph 18 of the room document concerning the fourth case study. Here, the plaintiff from Economy X sought damages for infringement of the GI "Ubique" in a court of law in Economy Y. The respondent in that case did not dispute the ownership of the GI, but chose to bring evidence to rebut the presumption that the term fell within the definition of Article 22.1 of the TRIPS Agreement. He alleged that none of the reputation or quality or characteristics of Ubique did in fact essentially arise from its place of manufacture. He adduced evidence to show that for over a hundred years the wine had been manufactured not only in the "Ubique" region, but also in other regions of Economy X and that the reputation, quality or characteristics of "Ubique" did not essentially derive from its place of manufacture. The court could decide that this evidence was sufficient to rebut the presumption that "Ubique" was a GI as defined by TRIPS and the plaintiff's case could fail accordingly. She said that this described a scenario under the Hong Kong, China proposal, where a contentious dispute would be resolved at the domestic level. Her delegation believed that in this case the principle of territoriality of Members would be respected and the balance between the parties would not be changed.

42. She said that the second and third case studies were more straightforward. The second case study dealt with a situation where a contentious GI was resolved at the domestic level before any notification or registration at the international level was effected, and the third case study concerned a non-protectable GI that was screened out by a participating Member at the domestic level.

43. In devising these four cases studies, her delegation hoped to illustrate the implementation and functioning of the Hong Kong, China proposal. As explained in paragraph 4 of the room document, they illustrated that questions of conformity with the GI definition and competing claims for a GI would continue to be dealt with under Members' domestic legal systems. The registration of a term on the register would not in itself be conclusive because the presumption could be challenged in national courts and by the authorities, and the exceptions under Articles 22-24 would continue to be applicable and decided in accordance with Members' domestic regimes, and having regard to the local circumstances. The respective parties' substantive rights under the domestic proceedings would not be changed and the principle of territoriality would be respected. It was her delegation's view that, under the system proposed by Hong Kong, China, the legal effects of a registration were limited in scope and there were no legal effects in non-participating Members.

44. She hoped that these case studies would provide some practical illustrations for Members to see the proposal in a more concrete manner, and that Hong Kong, China could continue to facilitate the negotiation on the GI register in this manner.

45. The representative of El Salvador congratulated the Chairman on his election and thanked Ambassador Karen Tan for the transparent and balanced manner in which she had conducted the work in the past months. He said that his delegation, as a sponsor of the joint proposal, supported the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits that would not lead to an increase or decrease of existing rights and obligations of Members under the TRIPS Agreement, regardless of whether or not a Member elected to participate in the system. As the Chairman had stated, the technical discussions on the register were still ongoing. The report by Ambassador Trevor Clarke contained in TN/IP/19 represented a sound basis for the work in progress in the Special Session and included issues such as legal aspects, participation and other elements relating to costs, fees and administrative burdens.

46. In his delegation's view, the issue of special and differential treatment mentioned in that report was of great interest for developing countries, such as El Salvador. In the course of consultations with Ambassador Karen Tan regarding this issue, his delegation had suggested pursuing work, based on technical discussions, as was the practice of other negotiating groups in the WTO. He agreed that discussions should be organized in clusters focusing on aspects on which this Special Session had not commenced discussions, such as special and differential treatment.

47. Like other sponsors of the joint proposal, his delegation would request the Chairman to consider the principle of inclusiveness and transparency and conduct open-ended meetings, so that the broader Membership would be able to participate and express positions on matters that were of special interest to economies such as El Salvador.

48. In addition, he said it would be helpful to have presentations from Members on their national systems and practical case studies, such as the ones circulated by the delegation of Hong Kong, China, which his delegation had found of great value.

49. With respect to the Chairman's proposal for taking the negotiations forward towards having one text on a multilateral register, he said that his delegation could share this approach as long as that text remained under the negotiating mandate of the Special Session.

50. The representative of Guatemala congratulated the Chairman on his election and thanked Ambassador Karen Tan for her work during the past months. She said that the report by Ambassador Tan reflected Members' opinions expressed in this negotiating group. Her delegation noted in particular that the work in this body should be guided by the five guiding principles expressed in the report of Ambassador Clarke (TN/IP/19), and attached particular importance to the fifth principle,

which required that the negotiation take up special and differential treatment that was precise, effective and operational.

51. Her delegation also supported that Members continue the dynamics of Members' presentations to which Canada and New Zealand had recently made contributions. It was very important for authorities to have a clear idea of the practical implications of the joint proposal, as this had enabled Guatemala to determine which areas required further technical assistance. Her delegation believed that continuing this exercise would enable progress in the Special Session as it allowed Members to see the shortcomings and strong points of the various proposals for developing countries such as Guatemala. Members needed to ensure that the work of the Special Session remained within the mandate of Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Declaration, which referred exclusively to negotiations to establish a multilateral register for GIs for wines and spirits.

52. The representative of Cuba congratulated the Chairman on his election and expressed her thanks to the outgoing Chair, Ambassador Karen Tan, for the excellent work achieved.

53. She said that for her country it was important to have due protection of geographical indications at the national and international level. In Cuba, GIs were protected pursuant to Law 228 of 2002. Since 1996 Cuba had been a party to WIPO's the Lisbon Agreement, which sought to facilitate international protection of GIs, and had also subscribed to several international treaties in this area.

54. Having said this, her delegation wished to put on record certain essential matters that should be part of the negotiations on the establishment of a multilateral system of notification and registration of GIs, namely, the preservation of the territorial nature of intellectual property rights and the need for special and differential treatment that was precise, effective and operational. GIs should be granted in keeping with the principle of territoriality and on the basis of applicable laws. With respect to special and differential treatment, the needs of developing countries and least developed countries had to be taken into account in any negotiation. Fulfilling the Ministerial Declaration, and specifically paragraph 44 of the Doha Declaration, was extremely important. The establishment of a registration system should not signify additional excessive fees or administrative burdens and should be accessible for developing countries to the extent that they could use and receive benefits from such a system. It was her delegation's view that the five guiding principles enunciated by Ambassador Trevor Clarke in document TN/IP/19 should be observed in the negotiations, in particular principles three and four.

55. The representative of Chinese Taipei congratulated the Chairman on his election and extended his thanks to Ambassador Tan for her valuable contribution during the past months. He said that his delegation supported the Chairman's three-four-five approach and hoped that it would lead to more practical discussions. On the first two questions regarding the legal consequences of the information in the register, his delegation agreed with New Zealand that it was necessary and useful for Members to exchange information about how their various proposals would be implemented in their domestic systems. In their discussions, Members should bear in mind that the interests of Members who treat other Members' geographical names as generic terms and who export such products to third countries should be given due consideration. This was also in line with the first guiding principle in TN/IP/19, namely that the purpose of the register was to facilitate, not to increase, the protection of GIs for wines and spirits. While the obligation to consult the database under the joint proposal would not affect such interests, it was unclear whether this was also true for the TN/C/W/52 proposal and that was why his delegation would appreciate more discussions on this proposed system.

56. The representative of Australia congratulated the Chairman on his election and expressed her appreciation to Ambassador Trevor Clarke, for his guidance and leadership during 2009, and to

Ambassador Karen Tan for the work she had carried out during the past months. She recalled that Australia was a proponent of the joint proposal (TN/IP/W/10/Rev.2), which articulated a practical, simple and voluntary system that would add real value to the current system, and facilitate, rather than increase, the protection of wine and spirit GIs, while respecting the principle of territoriality. The joint proposal was also the only proposal on the table that was consistent with the negotiating mandate. The TN/C/W/52 proposal, in seeking mandatory participation and calling for prima facie validity, went beyond the Doha negotiating mandate, changed established WTO jurisprudence on the burden of proof, and could seriously limit the availability of exceptions for prior good faith use of generic terms for Australian exporters. She said that this was a serious commercial concern for Australia.

57. Her delegation fully supported the form of work set out by the Chairman and endorsed the need for practical constructive dialogue on how the various proposals would be implemented in national systems. She said that, with that in mind, she would like to set out how the joint proposal would be implemented in the Australian system.

58. An obligation to consult the register on wines and spirits as contained in the joint proposal introduced as a binding obligation upon relevant authorities in Australia, and would have a broad systemic impact affecting a range of actors and laws throughout the GI protection system. These would include, for example, trademark examiners when examining an application for protection of a GI listed on the register or any trademark application in class 33, i.e. wine and spirits, the Australian Wine and Brandy Corporation (AWBC) in examining applications for foreign GIs, and judges of the Federal Court and each State Supreme Court in examining applications under consumer protection and trade practices laws.

59. She said that in Australia trademark examiners currently searched the AWBC Register of Protected Names, a listing of wine GIs registered in Australia, as part of any trademark application in class 33. An obligation to consult would mean that, if a relevant GI was found, the examiner would then be able to consider the similarity of the trademark applied for and the GI, the latter's reputation in Australia, whether it was essentially attributable to its geographical origin, and any other factors relevant to the decision, which were prescribed by legislation and administrative guidelines. She said that opposition procedures in existence under Australian law allowed opponents to challenge the registration of a trademark on the basis that its use would be contrary to law, that the use was likely to deceive or cause confusion because of a connotation it had or a sign it contained within it, that it contained or consisted of a sign that was a GI for goods originating in a particular country, region or locality, and that the goods were similar, or that the use of the trademark in respect of the goods would be likely to deceive or cause confusion. An obligation to consult the register would add further strength to these grounds of opposition. In Australia, the obligation to consult the register would give rise to a right of appeal to a court of law if the foreign GI right holder did not believe that the examiner had adequately complied with it. The judge would then be obliged to make the same fulsome consideration of the register anew. There were, in fact, instances of successful cases brought by foreign entities alleging non-registrability on these grounds, such as the "Adelaide Le Mans" case brought by the Automobile Club de l'Ouest.

60. She said that the procedure for protection of foreign wine GIs under *sui generis* legislation required an application to be made to the AWBC, setting out the proposed GI and the basis for the proposed registration. Legislation in Australia also established a process for considering objections raised by prospective trademark owners. Resolution of any such dispute required the decision-maker to take into account Australia's international obligations, which would, among other considerations, include the obligation to consult the database. Once resolved, the AWBC would have to have regard to the definition of a GI and whether the proposed GI was protected as a GI in its country of origin. A right of appeal to the Administrative Appeals Tribunal existed if the applicant was unhappy with the AWBC's decision. This ensured transparency and procedural fairness. An obligation to consult the

register would add a further factor for the AWBC to consider. Here again, an appeal could compel a judge to engage in the same fulsome consideration of the register afresh.

61. She said that under Australian consumer protection and trade practices legislation the following acts were prohibited: to make a false or misleading representation concerning the place of origin of goods; to falsely represent that goods were of a particular standard, quality, or grade; or to engage in conduct that was misleading or deceptive or likely to mislead or deceive. If right holders were to bring an action alleging infringement of a GI, the judge would then be obliged to consult the register in deciding the action. Again, appeal rights provided a further opportunity for the register to be consulted. Depending on the informational requirements of the register, the obligation to consult could swiftly bring into play a potentially large amount of information to be used in making a decision on GI protection.

62. She said that, contrary to the TN/C/W/52 proposal, the joint proposal did not seek to alter the existing balance of rights and obligations and exceptions in Section 3 of Part II of the TRIPS Agreement. The position that an entry on the register constituted prima facie evidence was not an empty phrase that would be interpreted differently by national authorities, as the European Union had indicated during the last meeting of the Special Session. If the European Union and other Members believed that their proposal would have little legal effect on national decision-making authorities, it might be questioned what legal effect, and therefore value, any register would have.

63. She hoped that her explanation of an Australian implementation of the joint proposal had been useful to Members. Her delegation would welcome similar detailed descriptions from other Members in the room, including the sponsors of TN/C/W/52, as that kind of discussion would allow Members to identify gaps, and how to fill them.

64. In response to the comment by the European Union on linkage, she would like to put on record that Australia continued to oppose the proponents' insistence that engagement on the register be tied to other issues that went beyond the mandate of the Doha Round.

65. The representative of Switzerland congratulated the Chairman on his election and thanked Ambassador Tan for the work she had accomplished between December 2009 and February 2010, and for the report she had just presented. She also welcomed the Chairman's proposal on the way in which the Special Session should conduct its work as being very appropriate, and assured him of Switzerland's support and active participation in the discussions in order to help Members to move forward.

66. She said that, like other sponsors of TN/C/W/52, Switzerland saw the proposal on the register as one of the three elements of TN/C/W/52 which should be dealt with in parallel, GI extension, TRIP/CBD disclosure and the register. Her delegation's position was that the register negotiated in the Special Session should be developed to extend to all products. It was for all these reasons that Switzerland had reduced its ambitions and made concessions on the register throughout the negotiations and had joined the current compromise proposal contained in TN/C/W/52.

67. In order to respond to the first two questions circulated by Ambassador Clarke, and to have a more substantive debate at this very meeting, she wished to emphasize two important elements with respect to the effects of registration: the register to be developed should contain, first, an obligation to consult the information contained in the register and, secondly, an obligation to duly take that information into account. With regard to the second element, the proponents of TN/C/W/52 had not hitherto received assurances from those Members supporting the TN/IP/W/10/Rev.2 proposal: while it was her delegation's understanding from the oral explanations that the information on the register would be taken into account at the national level, that had never been made clear in any written explanations. In contrast, the sponsors of TN/C/W/52 had explained the legal framework of how this

information needed to be taken into account, mentioning the prima facie evidence and the need to substantiate claims on the generic character of a GI.

68. She said that, with regard to TN/IP/W/10/Rev.2, her delegation continued to confront a proposal that called for the establishment of a simple database as a source of information that Members' authorities might or might not consult, and, even if they did consult it, it was not clear which consequences they would attach to the consultation. Her delegation believed that, to respond to the mandate of facilitating the protection of GIs, it seemed essential after so many years of negotiations to foresee at least that, beyond the simple obligation to consult a source of information, Members should provide some clear assurances that the national authorities responsible for GIs - judges, trademark examiners or other authorities – would have the obligation not only to consult the information in the register but also to take due account of this information when making decisions by giving it all the necessary weight. This meant specifically that, when an authority took a decision not to take account of the information on a given GI in the multilateral register, it had made such a decision after having examined the legal situation of the GI in the country of protection, taking into consideration, for instance, other uses or rights which could be in conflict with that GI. Such uses or rights could be, for example, prior trademarks, the fact that the GI was the generic name of a product, or grand-fathered uses. Such elements could, for instance, be dealt with in some trademark examination guidelines requiring national authorities to take them into account. The effects that her delegation was envisaging regarding registrations would actually be to ensure that the authorities would carry out their work diligently.

69. In response to Australia's explanations regarding its opposition procedure, she agreed that this was a useful procedure, but said that the one-sided burden on the GI right holder to monitor all trademark applications in other countries implied considerable work which many producers would not be in a position to carry out. This meant, in consequence, that the authorities had to be more proactive in doing work that would facilitate the protection of the rights of GI right holders. Swiss producers had already highlighted the difficulties they were facing in monitoring the use of trademarks throughout the world, and this would be even more difficult for right holders in developing countries. Her delegation believed that the multilateral register had a useful role to play in that context.

70. She added that the legal effects of a register that Switzerland would like to have would facilitate the protection of GIs without preventing the application of the exceptions under TRIPS Article 24 and without questioning the principle of territoriality as the final decision – as pointed out by New Zealand and Canada - would always be taken at the national level of the country where the question of protection of a particular GI arose. There was no automatic protection effect for GIs resulting from the TN/C/W/52 proposal.

71. On the question of participation, Switzerland believed that there was no intermediate solution between mandatory or voluntary participation and that therefore, in response to the question identified by Ambassador Clarke, her delegation believed that criteria established for the examination of protection of GIs would have to be accepted by all Members, and for the register to be multilateral it would have to have effect in all Members. Members would nevertheless be free whether or not to notify their GIs.

72. The representative of Venezuela congratulated the Chairman on his appointment and expressed his appreciation for the work accomplished by Ambassador Karen Tan. He said his delegation supported the interventions by El Salvador, Guatemala and Cuba with respect to the need for beginning work on the issue of special and differential treatment. This could not be postponed because a GI register, as part of the Doha Development Agenda, should not imply more financial burdens for developing countries, consistent with the Doha Development Agenda. Participation in the register should be voluntary and GIs should only be valid for the territory in which they had been

granted. His delegation was also concerned that developed countries continued to tell developing countries what would be most appropriate for them.

73. The representative of Japan congratulated the Chairman on his election. He said that his delegation echoed the statements of the other sponsors of the joint proposal, especially the concern voiced over the perceived widening of the Doha Round mandate on the multilateral system. Japan was committed to the joint proposal as the most appropriate solution under that mandate because of its voluntary participation and the degree of burden placed on participating Members. With a view to achieving convergence in these negotiations his delegation believed that more pragmatic and practical discussions would be beneficial, including an explanation by each side on how the provisions of their respective proposals would be implemented domestically.

74. In this context, he recalled his delegation's own explanation regarding how paragraph 5 of the joint proposal, regarding consultation of the database by the authority of the participating Member, could be implemented in Japan without prejudice to actual decisions taken in the future. Pursuant to the joint proposal, the information on GIs notified and registered in a future multilateral system would be placed in a database. When it came to the examination of trademarks in Japan, this data would be imported into the retrieval system for national trademark examiners, so that trademark examiners retrieved information on notified and registered GIs whenever they examined trademark applications. If potentially conflicting GIs were found as a result of a search, examiners would have to consider whether or not to refuse the trademark application, based on the consultation of the GI register during the retrieval process. It was therefore clearly understood that the act of consultation entailed the act of taking into account. One option for implementing paragraph 5 of the joint proposal would be for the manual of examination guidelines simply to state that trademark examiners had to consult the database. While this statement would suffice by itself, a clause could follow the aforementioned sentence if deemed necessary that trademark examiners take into account the result of the retrieval.

75. He added that in Japan, apart from trademarks, there was another administrative measure in place to regulate the use of GIs for wines and spirits, which fell under the jurisdiction of the national tax administration agency. With regard to the relevant criteria in this context, namely the standards in relation to GIs, the same approach as explained with regard to trademark applications could be taken when implementing the joint proposal. He said that the purpose of this brief explanation had been to demonstrate how the joint proposal could be implemented without complicated legislative proceedings.

76. He concluded by saying that, although the joint proposal had only dealt with the issue in only one paragraph, the issue occupied a prominent place in the domestic measures that future participating Members would have to take to implement the proposal.

77. The representative of China congratulated the Chairman on his election and thanked Ambassador Tan for her detailed report on the informal consultations she had undertaken during the past months. As a member of the coalition group of the TN/C/W/52 proposal, it was China's intention to push for the three topics to be dealt with in parallel in the negotiations, and her delegation had fully set out its reasoning at the regular session of the TRIPS Council on 2 March 2010. She further added that China considered that multilateral registration should extend to GIs for products other than wines and spirits.

78. As to the legal effects under discussion, her delegation supported the statement by the European Union that the legal effects under the TN/C/W/52 proposal provided that national authorities would have the final say in the protection of the GIs notified and registered multilaterally.

79. Among the three proposals on the multilateral registration system for GIs for wines and spirits, the Hong Kong, China proposal in TN/IP/W/8 shared the view regarding legal effects that the

notification and registration should have a kind of prima facie evidence effect. Hong Kong, China's interpretation of a hypothetical situation had helped her delegation to see how the registration in the proposed system would work with prima facie evidence. She encouraged delegations to provide illustrations and to reflect on how the system could function.

80. She further said that China considered that special and differential treatment should be an integral part of the negotiating outcome in the Special Session.

81. The representative of Angola, on behalf of the LDC Group, congratulated the Chairman on his election and thanked Ambassador Trevor Clarke for the work accomplished in recent years. He also thanked Ambassador Karen Tan for the informal consultations she had undertaken to facilitate the work of the Special Session.

82. He said that the LDC Group recognized the importance of GI protection through a register under paragraph 18 of the Doha Mandate and supported the Chairman's approach on the way forward. He believed it was essential to have a written document in respect of the procedural steps of the future system. Some delegations had referred to proposals that had been submitted only verbally. His delegation believed that it was important to have written versions in order to enable a thorough consideration of all proposals. In order to ensure the participation of certain Members, he emphasized the need for translations to be available to the national offices. Lastly, he stressed the need for all aspects of special and differential treatment to be taken into account for LDCs and developing countries.

83. The representative of Ecuador congratulated the Chairman on his election and expressed his appreciation to Ambassador Karen Tan for the consultations she had undertaken during the past months. As a sponsor of the joint proposal, he said that his delegation reiterated its support for the room document of 23 October 2009 presented by New Zealand in response to the questions circulated by Ambassador Trevor Clarke. Like Guatemala, his delegation considered that Members could use the guiding principles contained in TN/IP/19 while continuing with their explanations of how the various proposals on the table would be implemented at the national level. Ecuador further considered it would be important in planning future meetings to facilitate the participation of small developing countries, whose delegations were of a limited size and who had limited human resources.

84. The representative of Argentina congratulated the Chairman on his election. She recalled that Argentina did not support the artificial parallelism between the three TRIPS issues as set out in the modalities proposal of TN/C/W/52, for the mandate was limited to negotiations on the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits.

85. Her delegation supported the joint proposal, which complied with the mandate under Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Declaration and enjoyed a high degree of acceptance among the Members. It provided for the establishment of a multilateral system of notification and registration of GIs for wines and spirits, which facilitated the protection of these GIs while preserving the territoriality of intellectual property rights. In keeping with the mandate, participation in the register would be voluntary. She recalled that Argentina was also co-sponsor of the room document that had been presented by New Zealand in response to the questions by Ambassador Trevor Clarke. With regard to legal effects, she said that the prima facie evidence, the extraterritoriality, and the reversal of the burden of proof provided for in TN/C/W/52 were not acceptable for Argentina.

86. The representative of Brazil congratulated the Chairman on his election. She reaffirmed Brazil's support for simultaneous, parallel and joint treatment of the three TRIPS issues, namely the GI register, GI extension and TRIPS/CBD. For this reason, Brazil was strongly committed to the

procedural and substantive parameters contained in document TN/C/W/52, which it considered an inclusive and balanced proposal. The proposal was a sincere attempt by some 108 Members, representing two-thirds of the Membership, to deliver on the mandate of the Doha Development Round. She said that TN/C/W/52 also reflected a positive movement of some Members from their previous positions in order to bring an end to the ongoing deadlock, and hoped that similar willingness would be shown by other Members.

87. She would not repeat the views on the legal effects and on the significance and weight of information on the register that had already been made abundantly clear by the European Union and Switzerland. Her delegation would, however, like to highlight that the TN/C/W/52 proposal was the only one that provided for special and differential treatment as set out in paragraph 9 of that proposal. As Brazil had pointed out at the last meeting, her delegation failed to see how voluntary participation for all Members could be equated with special and differential treatment, as some Members had suggested. In her view, while special and differential provisions could take many forms, such provisions should contemplate a specific commitment to assist developing countries to develop their own GIs. In this context, for the past eight years, Brazil had fostered community-based projects involving local producers, farmers, and ranchers aimed at adding value to local products. As a consequence of this effort, Brazil now had several national GIs for wine, coffee, meat and "Cachaça". Brazil considered it was a responsibility to help producers in developing countries to consolidate their products in their national market and to gain access to markets worldwide.

88. The representative of Chile congratulated the Chairman on his election. He said that Chile attached great importance to discussions at a technical level, as they were helpful in identifying the effects, the benefits and the achievements of the various proposals for a multilateral system of notification and registration of GIs for wines and spirits. Discussions should be based on Article 23.4 of the TRIPS Agreement and paragraph 18 of the Doha Declaration and should not be mixed with extraneous points that made it difficult to establish such a register.

89. With respect to questions one and two of Ambassador Clarke, Chile was in agreement with the statement by New Zealand that a legal presumption as provided for in TN/C/W/52 would not facilitate but increase the protection of GIs, and therefore would go beyond Article 23.4 of the TRIPS Agreement. The proposed legal presumption would impose costs on producers in WTO Members. Very often the terms in question had been used generically or otherwise did not comply with the legislation established for the protection of geographical indications. Given that the number of GIs that would enjoy prima facie evidence status would be in the order of thousands, this would create an avalanche of disputes, leading to further administrative costs for Members, producers and consumers. As dispute settlement was a lengthy process for most Members, this would lead to uncertainty regarding the possibility of using these terms in various markets.

90. He said that the joint proposal, in contrast, would not involve any change for Members wishing to participate in such a system. Members would consult a public database when registering trademarks and GIs. This proposal was in keeping with the negotiating mandate of TRIPS Article 23.4: it would facilitate the protection of GIs, and would be fully consistent with the guiding principles, such as the principle of territoriality. In short, it provided for the establishment of a multilateral system that was voluntary and simple, that did not have legal effects for Members that decided not to participate, and that caused only limited costs and administrative burdens, particularly for developing countries.

91. The representative of India congratulated the Chairman on his appointment and expressed his appreciation to Ambassador Karen Tan for her work as *pro tempore* Chairperson. His delegation agreed with the Chairman's structuring of their future work in the Special Session.

92. He said that the delegations of the European Union and Switzerland before him had elaborated on the legal effects and that he would not reiterate the points they had raised. Some Members, however, had raised questions about special and differential provisions in TN/C/W/52. His delegation wished to spell out the intrinsic linkages existing between the three TRIPS issues of the register, GI extension and TRIPS/CBD in TN/C/W/52 and special and differential treatment that referred to all these three issues, as set out in paragraph 9 of the proposal. He said that the register proposal contained in TN/C/W/52 included not only paragraphs 1, 2, 3 but also paragraph 9. The reason why special and differential had not been further elaborated was because TN/C/W/52 was not a text proposal but contained key parameters for a ministerial decision. Details of several elements of the three TRIPS issues had been left to negotiations following modalities. It was at that stage that it would be more appropriate to work on the details of special and differential treatment provisions. At that stage Members would be clearer about the different elements of the three issues, and special and differential provisions would be worked out accordingly. His delegation noted that in contrast the joint proposal was silent on the issue of special and differential treatment. If the joint proposal proponents considered that voluntary participation was a special and differential provision in a multilateral register, then it was a truly odd special and differential provision in the WTO. His delegation would like to pose the question to the proponents what would be the special and differential provisions under their proposal for developing countries that had finite but not substantial interest in a GI register.

93. The representative of Turkey congratulated the Chairman on his appointment and thanked Ambassador Tan for her leadership and efforts in the consultations she had undertaken. Her delegation agreed with the Chairman's proposed approach for future work. It regarded legal effects and participation as the key elements that should be addressed first. She reiterated her delegation's view that the three TRIPS issues were inextricably linked and should advance in parallel.

94. On the question regarding what would be acceptable for a register to facilitate the protection of GIs, it was her delegation's view that a multilateral register with legal effects would facilitate the protection of geographical indications. It was clear that the proposal contained in TN/C/W/52 was the only proposal with real legal effects and provided for two kinds of obligations: the obligation to consult and the obligation to take into account the information on the register. Her delegation believed that a strong register would provide legal certainty for the right owners as well as for the protection of consumers. It was difficult to envisage how a voluntary system with no legal effects would facilitate protection.

95. With respect to future discussions, her delegation considered that, while sharing national experiences could provide some guidance in these negotiations, it was difficult to see how elements of convergence and divergence could emerge from just discussing the legal complexities and difficulties of implementing the multilateral registration system in various national systems. Even so, she expressed her delegation's willingness, with a view to facilitating and achieving agreement, to explain how the register could be implemented under its legal system.

96. The representative of Nepal congratulated the Chairman on his appointment and noted its importance for least developed countries in the Organization. He also thanked Ambassador Tan for the balanced and efficient work she had accomplished. He said that his delegation supported the TN/C/W/52 proposal, particularly the provisions regarding disclosure of country of origin, prior informed consent and access and benefit sharing. Furthermore, he expressed his delegation's support for the Chairman's approach on the Special Session's future work.

97. The representative of the United States congratulated the Chairman on his appointment and thanked Ambassador Tan for the excellent work achieved. She said that the United States fully appreciated the establishment of a multilateral system of notification and registration of GIs for wines and spirits as being part of the Single Undertaking and was fully committed to fulfilling this mandate.

Her delegation was prepared to continue engaging and thinking creatively with other Members about how to achieve that objective, which was eminently attainable. It was apparent that there were significant gaps on important aspects of the registration system, particularly in the view of a few Members, and that these gaps appeared to have been reinforced and made clearer in the last several meetings and informal discussions of the Special Session.

98. Even so, her delegation considered that the Special Session was well-positioned to continue its work by virtue of the fact that there were detailed text-based proposals under consideration in this negotiation. The United States, as one of the numerous proponents of the joint proposal, continued to support this text as the optimal means by which the Special Session could fulfil the mandate for this negotiation. Her delegation believed that the joint proposal represented the appropriate basis for continued work of the Special Session and the best prospects for a rapid conclusion of its work. It remained the firm position of the United States that the registration system should convey no legal presumptions but should instead be limited, as the mandate made clear, to the facilitation of protection for wine and spirit GIs through a transparent system of information sharing. If progress were to be achieved in these negotiations, all Members had to keep the focus within the parameters of the mandate. She said that her delegation agreed with points made by New Zealand, Canada, Australia and other joint proposal proponents.

99. She also expressed her delegation's appreciation of Australia's detailed intervention on how the joint proposal would be implemented in Australia, and she would welcome hearing from others, specifically the proponents of TN/C/W/52, details on the various steps they would take in implementing their proposal in their domestic systems. Members should focus their discussion on facilitating protection, not increasing protection, as some were seeking. Proposals requiring that the entry of a term on the register would be prima facie evidence that it was a GI under Article 22.1 of the TRIPS Agreement would do just that, as this sought to achieve substantive legal effects in other domestic systems. Instead, she said, Members should focus efforts on developing a system that would aid examining authorities in their evaluation of whether a designation qualified for protection in that Member according to domestic laws.

100. She said that the principle of territoriality needed to be respected. Proposals that sought to require a Member to defer to a foreign authorities' finding of what constituted a geographical indication went well beyond the scope of the mandate and was thus unacceptable to the United States.

101. In order to move the negotiations forward consistently with the mandate under Article 23.4, Members should focus on developing a system to facilitate protection of geographical indications for wines and spirits. For the United States such a system would provide a useful reference that would facilitate the work of their examining authorities without prescribing the significance or weight that the domestic authority afforded to such information when evaluating whether a term qualified for protection as a GI under its domestic laws.

102. She said that the details of the scope and application of the register had to be clearly spelled out. The United States could not endorse any so-called "constructive ambiguities".

103. In concluding, she said that, as the agenda of this Special Session limited the negotiation to the establishment of a multilateral system of notification and registration of GIs for wines and spirits, her delegation objected strongly to any discussion of other TRIPS-related issues in this context. As noted previously, it was neither appropriate nor productive to endeavour to tackle the serious technical issues in this negotiation by lumping them in a broader process linked with other TRIPS issues.

104. The representative of Costa Rica congratulated the Chairman on his appointment and said that, in order to advance the negotiations, Members should respect the mandate, focusing on how to facilitate protection, and not to increase it. The legal obligation of the register acceptable to Costa

Rica was that Members wishing to participate in the system should consult the database and take decisions in accordance with their domestic legislation, while respecting the balance of rights and obligations and the principle of territoriality. He believed that the joint proposal, of which Costa Rica was a sponsor, met this objective and constituted the only proposal that complied with the mandate. He said that those proposing the effect of prima facie evidence sought to change the burden of proof, which would go beyond the facilitation of protection and thus change the balance of rights and obligations.

105. With respect to special and differential treatment, he said that his delegation attached great importance to this issue and it should not be left to be addressed at a later stage. In the view of his delegation, voluntary participation in the register was a way to grant special and differential treatment.

106. Finally, his delegation believed that the establishment of a register that applied to other products than wines and spirits would be inconsistent with the mandate and did not support the artificial parallelism.

107. The representative of Nigeria, speaking on behalf of the African Group, congratulated the Chairman on his election and pledged to work with him in constructive engagement. His delegation believed that the discussion on the register should cover all products, as African countries had GI products other than wines and spirits. The TN/C/W/52 proposal for modalities covered all products, but further elaboration would be necessary when modalities had been adopted.

108. Regarding the issue of special and differential treatment, India had elaborated on this issue and clarified that it covered all three TRIPS issues, namely the register, GI extension, and TRIPS/CBD.

109. The African Group considered that these three issues were interlinked and that negotiations on all the three issues should move in parallel.

110. The representative of El Salvador said that, with respect to special and differential treatment, the joint proposal had the advantage that voluntary participation afforded developing countries the possibility to take decisions in accordance with their national legislation and their administrative capacity for registration. It was important that the established legal system be taken into account. Members had already stated the need to preserve the balance of rights and obligations, and not to impose administrative burdens on Members wishing to participate in keeping with their own system. If the multilateral system was established under the mandate of Article 23.4 of the TRIPS Agreement, there should be no increase in charges and fees for developing countries and least developed countries. Every Member would work, in keeping with the administrative capacities of its intellectual property office, to provide protection to IPR, and any new system should not go against the acquired rights of Members. Against this background, he said that his delegation believed that El Salvador would benefit from special and differential treatment under the joint proposal.

111. The representative of the European Union recalled that his delegation's position had been clearly stated and represented the view of the majority of Members of the issues under consideration.

112. In response to Canada's comments on the large number of GIs belonging to the European Union, he said that the number of European GIs had been vastly exaggerated. He welcomed the Canadian explanation as to how the proposal would be implemented, but reiterated that the TN/IP/W/10/Rev.2 proposal was silent on this issue.

113. He said that although the Australian and Canadian examples had been useful, it would not be feasible to create a compendium comprising examples of how the register would be implemented in each national system, and doing so would not create legal certainty.

114. In response to the argument that the TN/C/W/52 proposal reversed the burden of proof, he said that this was a fallacious argument. Those who argued that the person seeking to benefit from a monopoly would have to bear the burden of proof to fulfil the relevant conditions also had to accept the argument that, once such a right had been established, the person who wanted to benefit from the application of an exception had to bear the burden of proving that the conditions of the exception were fulfilled. Therefore, requiring those claiming genericism of a term to substantiate their claim was no reversal of that principle.

115. With regard to New Zealand's statement that the proposed database would better inform trademark offices and therefore facilitate protection, he said that all the information regarding European GIs, including the conditions for registration, was already available on the Internet and the website of the European Union, and it was therefore doubtful that such a database would represent a real improvement in terms of information. Assuming, however, that the database would indeed be a better way of being informed, his delegation failed to see how that enhanced information would facilitate protection, because the negotiating mandate was not to better inform the trademark offices or the IP national authorities but to facilitate protection of GIs. While this might not please everyone, he reminded Members that the compromise proposal TN/C/W/52 had been accepted by and was acceptable to two-thirds of the Membership.

116. In concluding, the Chairman said that the debate had been useful in helping Members to gain a sense of where they stood and how they saw themselves going forward. It was apparent, however, that the issue of legal effects remained central, and if they were to move forward it was crucial that sufficient detailed examination be made of that issue in order to have greater clarity. He said that Members should move towards having a single document for discussion, identifying, slowly but surely, elements of convergence emerging out of the ongoing discussions in an appropriate time and at a pace at which Members felt comfortable.

C. OTHER BUSINESS

117. The Chairman recalled that a stocktaking exercise was foreseen for the end of March 2010. As far as this negotiating group was concerned, he said he would seek to reflect, where appropriate, any relevant information in his report to the TNC Chairman. This report would be factual and be on his own responsibility and without prejudice to any delegation's position. In order to ensure transparency and inclusiveness he would consult delegations as appropriate in the coming weeks.

118. With regard to their future substantive work, he suggested that the next formal meeting of the Special Session be held on 10 June 2010, back to back with the Regular Session of the TRIPS Council. He did not, however, exclude the possibility of having to meet in some format before the formal session, depending on the overall process.

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