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**REPRESENTATION AND DESCRIPTION OF NON-TRADITIONAL MARKS
POSSIBLE AREAS OF CONVERGENCE**

Document prepared by the Secretariat

CONTENTS

	<u>Page</u>
I. INTRODUCTION	2
II. REPRESENTATION AND DESCRIPTION OF NON-TRADITIONAL MARKS – POSSIBLE AREAS OF CONVERGENCE	3
(a) Visible Signs.....	4
(i) Three-dimensional marks	4
(ii) Color marks	5
(iii) Holograms	6
(iv) Motion or multimedia signs.....	7
(v) Position marks	8
(vi) Gesture marks	8
(b) Non-Visible Signs	9
(i) Sound marks	9
(ii) Olfactory marks	10
(iii) Taste marks.....	10
(iv) Texture or feel marks.....	11
III. OTHER ISSUES.....	11
(a) Publication of Non-Traditional Marks	11
(b) Costs for Applicants and Offices.....	12
IV. CONCLUSION.....	13

I. INTRODUCTION

1. At the fifteenth session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), held in Geneva from November 28 to December 2, 2005, the SCT asked the International Bureau to prepare an issues paper on non-traditional marks (see document SCT/15/4, paragraph 8). Accordingly, the Secretariat prepared document SCT/16/2, which describes various non-traditional marks and discusses particular issues related to such marks.
2. Document SCT/16/2 is largely based on information provided in the replies to the WIPO Questionnaire on Trademark Law and Practice, as presented in WIPO document WIPO/STrad/INF/1 (hereinafter referred to as “the Questionnaire”) and on *ad hoc* contributions of individual SCT Members. It includes an Annex containing examples of the marks dealt with in the document.
3. After discussion of this document at its sixteenth session (held in Geneva from November 13 to 17, 2006), the SCT requested the International Bureau to develop a new working document for discussion at the next session, setting out existing methods of representation and description of non-traditional marks. The document would identify areas of convergence amongst SCT Members and any other issues, including the possibility of additional costs, particularly in developing countries (see document SCT/16/8, paragraph 9).
4. Accordingly, the Secretariat prepared document SCT/17/2 on the basis of the preliminary findings contained in document SCT/16/2 and information submitted by the following members of the SCT: Australia, Brazil, Belgium (through the Benelux Organization for Intellectual Property (BOIP)), Bulgaria, Chile, China, Croatia, Denmark, Ecuador, Finland, France, Germany, Italy, Japan, Luxembourg (through the Benelux Organization for Intellectual Property (BOIP)), Moldova, Morocco, Netherlands (through the Benelux Organization for Intellectual Property (BOIP)), Norway, Republic of Korea, Russian Federation, Slovenia, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, United Kingdom, United States of America, and the European Community.
5. Document SCT/17/2 was discussed by the SCT at its seventeenth session (held in Geneva from May 7 to 11, 2007), at the conclusion of which, the SCT requested the Secretariat to prepare a working document for the next session, taking into account the deliberations of the Standing Committee and presenting “key learnings” for Member States in relation to the representation of those types of marks that the SCT had considered during the seventeenth session and any further submissions from SCT Members specifically addressing the issue of key learnings (see document SCT/17/7, paragraphs 7 and 8).
6. The Secretariat prepared document SCT/18/2 on the basis of the discussions that the SCT undertook on three dimensional marks, color and sound marks at its seventeenth session (see document SCT/17/8 Prov., paragraphs 14 to 97). Document SCT/18/2 is also based on additional information submitted by members of the SCT, prior to its seventeenth session and takes into account the information submitted by Brazil and Turkey after the seventeenth session of the SCT.
7. At its eighteenth session, the SCT requested the Secretariat to prepare a new document for the current session relating to methods of representation and description of

non-traditional marks, identifying possible areas of convergence, based on documents SCT/17/2 and SCT/18/2 and the report of the eighteenth session. In particular, the document would focus on those areas where there has been less widespread experience and which have not been addressed comprehensively in the Singapore Treaty on the Law of Trademarks (see document SCT/18/9, paragraphs 5 and 6).

8. The present document identifies possible areas of convergence in relation to the representation and description of those non-traditional marks that were discussed by SCT Members during three consecutive sessions (Section II) and further elaborates on the information included in Member State submissions. The document also discusses additional issues relating to the publication of non-traditional marks and the costs for applicants and Offices that have been addressed by the Standing Committee (Section III).

II. REPRESENTATION AND DESCRIPTION OF NON-TRADITIONAL MARKS – POSSIBLE AREAS OF CONVERGENCE

9. It is a generally accepted feature of trademark registration procedures around the world that an application must contain a representation of the sign for which registration is sought. A sufficiently clear representation of the mark constitutes a filing date requirement in most if not all systems. Very often, this representation takes the form of a graphic or photographic reproduction of the mark, although certain national or regional laws may authorize other modes of representation for particular kinds of marks, such as non-traditional marks.

10. Other types of representation may include: a description in words, a series of photographs, a sample of an object bearing the mark or consisting of the mark itself, a digital reproduction, or an analog or digital audio or video recording. However, the form of graphic representation used should allow anyone consulting the register to understand the nature of the mark. Therefore, highly technical descriptions or other unusual modes of representation would not be considered suitable.

11. Most importantly, in relation to non-traditional marks, the representation should demonstrate the nature of the mark and show its features clearly enough to permit proper examination and at a later stage, adequate determination of the nature and scope of the protection granted to a particular sign. For the purposes of examination, a statement or indication of the type of mark sought to be registered is also a usual requirement, the absence of which may have consequences when determining the non-traditional character of the sign.

12. In order to summarize existing or proposed methods of representation, this document follows the same structure as previous documents prepared by Secretariat (namely documents SCT/16/2 and SCT/17/2), and provides for two broad categories: visible and non-visible signs. Since the scope of the document and proposed conclusions are limited to issues on representation and description of non-traditional marks, slogans and titles of books and films, which were covered in previous documents, will not be mentioned in this document, as those signs are usually represented as traditional word or figurative marks.

(a) Visible Signs

(i) *Three-dimensional marks*

13. Three-dimensional marks (e.g., product shape, product packaging and containers) are considered to be more established than other categories of non-traditional marks. These have also been addressed in national and international trademark law, namely the Trademark Law Treaty (TLT) 1994 and the Singapore Treaty on the Law of Trademarks (the Singapore Treaty) 2006. Nevertheless, a number of differences still exist in relation to the representation of these signs, as recorded during the discussions that took place in three consecutive sessions of the SCT.

14. Both the Regulations under the TLT¹ and the Singapore Treaty² contain similar provisions covering issues of representation of three-dimensional signs. It is provided that an application for a three-dimensional mark should contain a statement or indication of the type of mark. At filing, the representation furnished may, at the option of the applicant consist of one single view or of several different views of the mark. There is no specific requirement as to the size of the reproductions in the text of the treaty or the regulations³.

15. Once the Office has received the application, it may consider that the representation of the mark furnished by the applicant does not sufficiently show the particulars of the three-dimensional mark and invite the applicant to furnish, within a reasonable time limit fixed in the invitation, up to six different views of the mark and/or a description by words of that mark.

16. At a third stage, if an Office considers that the different views and/or the description of the mark still do not sufficiently show the particulars of the three-dimensional mark, it may invite the applicant to furnish, within a reasonable time limit fixed in the invitation, a specimen of the mark.

17. As noted above, both the Regulations under the TLT and the Singapore Treaty establish a certain order according to which an applicant may have to provide different elements. An indication that the mark is three-dimensional will determine not only the way in which the Office will appreciate the sign, but also the possible need for other requirements. An Office may consider that a graphic representation (e.g., perspective or isometric drawing or photograph) is in itself sufficient to show the particulars of the three-dimensional mark. However, Offices are free to require additional views of the three-dimensional sign, a description or a specimen if they deem it necessary. Likewise, applicants may submit more than one view of the three-dimensional mark.

18. Offices may consider that additional views of the sign are required because the reproduction provided does not sufficiently present the three-dimensional features of the sign or there is obscured matter not visible. During different sessions of the SCT, there has been some discussion as to the number of views that should be published when multiple views have been submitted by the applicant. In that connection, the question arises as to the number and the size of representations or views supplied by the applicant. In essence, there does not seem to be a generalized practice. Some Offices may publish all the views submitted by the applicant, and others will only publish the representation showing one view of the mark, even if the applicant has submitted additional views.

19. Other elements have been mentioned in the Member State submissions and during the discussions of the SCT. These refer to the reproduction of the mark when it comprises only a portion of the product, in which case, dotted or broken lines should be used in the reproduction to indicate the part of the product that is not claimed as part of the mark.
20. The issue of whether the presentation of several different views should be treated as a filing date requirement or whether such different views can or have to be submitted during examination is independent from the question of how many different views of a three-dimensional mark should be published.
21. As to the description, there seem to be different ways of appreciating this element, ranging from mere additional information supplied by the applicant, to a requirement that needs to fulfill certain conditions as to length and contents and which may be subject to amendment for accuracy.
22. Although specimens seem to be more relevant for use-based systems, they have also been mentioned as an element that would help determine the nature and the scope of three-dimensional signs. However, it has not been clarified whether the specimen should consist of an actual sample of the product, a picture or photograph.

Possible area of convergence No. 1

With regard to an application for the registration of a three-dimensional mark, it could be considered whether a representation of the three-dimensional mark showing its three-dimensional features from one perspective could be sufficient to secure the filing date. Offices could be free to require additional views at a later stage in the examination process, if they deem that such additional views are necessary for determining the registrability of the three-dimensional mark. If additional views and other elements, such as a description of the three-dimensional mark or a specimen of the mark are required, the applicant should be given reasonable time limits to supply them. The number and type of additional elements required could be limited by the practical need to clarify the nature of the mark and the scope of the rights claimed. As regards the publication of a three-dimensional mark, it could be considered whether it is necessary to publish different views of one and the same three-dimensional mark. In case of an understanding that only one view of a three-dimensional mark should be published, it could be asked whether the applicant should retain the freedom to file various views of one and the same three-dimensional mark.⁴

(ii) Color marks

23. Companies are making deliberate and consistent use of colors and color combinations, not only for their products and packaging, but also in advertising and even in their sales outlets. Color *per se* and combinations of color without delineated contours have been included in the category of non-traditional marks and accepted for registration in several jurisdictions.

24. National or regional trademark Offices usually require the applicant to indicate that the sign applied for is a *color per se* mark⁵ or a combination of colors, together with a sample of the color(s) on paper. Additional requirements may include, in the case of color combinations, an indication of the proportion of each color and how they appear on the mark, and for *color per se* marks a representation without contours.

25. There may also be a requirement to provide a written description of the mark and in particular how the color applies to the goods when in use, or in relation to the services applied for registration. The applicant may also be required to describe the color(s) using their common names.

26. Rule 3(5) of the Regulations to the Singapore Treaty provides that where the application contains a statement to the effect that the mark is a color mark, a Contracting Party may require one or more reproductions of the mark and details concerning the mark as prescribed by the law of that Contracting Party⁶. No other provision of the Singapore Treaty addresses issues on the representation of *color per se* or combinations of color.

27. The point has been made by several delegations during the SCT discussions that a representation of color on paper may and in some cases should be supplemented by an indication of the corresponding color code from an internationally recognized identification system, such as: PANTONE®, RAL, Focoltone®, RGB, etc. Color codes are deemed to be precise and stable and their use in trademark applications would contribute to clarify the nature and the scope of color marks.

28. As with other kinds of non-traditional marks, special thought should be given to the use of specialized technical means of reproduction or description of *color per se* marks, such as chromatograms, since the information contained in the register of marks should remain accessible to the general public.

Possible area of convergence No. 2

With regard to an application for the registration of a color per se mark or a combination of colors without delineated contours, a representation of such marks could consist of a sample of the color(s) on paper or in an electronic format. Offices could require a designation of the color(s) by using their common names. Furthermore, Offices should allow the indication of recognized color codes to be chosen by applicants. Offices could also require a written description on how the color is applied to the goods or used in relation to the services.

(iii) Holograms

29. Holograms may optically store and retrieve an image in three dimensions. The image might change depending on the angle chosen by the viewer and this feature may be difficult to capture on a paper reproduction. Nevertheless, a number of Offices have accepted for registration hologram marks and required a graphic representation of such signs.

30. The graphic representation of a hologram may consist of a single picture that captures the holographic effect in its entirety, together with a statement or indication of the type of mark and usually a description. There may however be different types of holograms requiring slightly diverse representations.

31. It has been noted that where the hologram is constituted by the image of one single object which does not modify itself, the applicant may be required to represent this object, either in three dimensions or from different angles. When, following a point of view, the hologram represents several objects or an object which modifies itself, the application form may include each one of those objects.
32. For the purposes of examination, the Office may require several views of the hologram in various frames with description of angle and appearance. The description serves the purpose of precisely defining the subject matter for which protection is sought. However, in certain cases, the Office might ask the applicant to submit a description of the mark only when the representation in different views is not considered sufficient.
33. As regards the representation of a hologram mark as a filing date requirement and the publication of such marks, issues arise that are similar to the ones encountered with the representation of three-dimensional marks. In particular, the question can be asked whether one view of the hologram could be considered sufficient in order to accord a filing date to the respective hologram mark. Furthermore, it would have to be determined whether it is necessary to publish the hologram mark in all its various constituting views.

Possible area of convergence No. 3

With regard to an application for the registration of a hologram mark, the representation of such a mark could consist of one single view of the sign which captures the holographic effect in its entirety or, where necessary, multiple views of the hologram from different angles. The applicant could include a description explaining the holographic effect or any other relevant details of the mark, particularly in cases where the hologram comprises multiple elements. Furthermore, it could be considered whether one representation of the hologram consisting of a single picture that captures the holographic effect in its entirety could be sufficient for according a filing date to such an application. It could also be considered whether in cases in which the applicant submitted a representation of a hologram mark consisting of several views of the hologram, for example consisting of separate pictures in separate frames, all such views should be published.

(iv) Motion or multimedia signs

34. These signs may consist of or contain elements of motion. The moving image may be a film-clip, video, moving logo for TV-shows, etc. Two main ways of representing motion or multimedia signs have been identified in countries where they are accepted for registration as trademarks. The first method would be to provide a series of still images that clearly depict the motion, together with a detailed written description of the mark.
35. There may be an additional requirement to specify the chronological order of the images, by numbering the series of frames or including that sequence in the written description. In some systems, there may be a limitation as to the number of frames to be provided. Other elements of the description may include the duration, the direction and the frequency of the motion. A statement or indication of the type of mark would normally be required.

36. The second method of representation may consist of a short movie that will be filed together with the application and a written description outlining the nature of the mark and describing the movement. In this case, a recording of the motion in analog or digital format will be required. If applications can be filed electronically, an electronic file of the motion may be submitted.

Possible area of convergence No. 4

With regard to an application for the registration of a motion or multimedia mark, the representation of such marks could consist of a series of still images, which put together, will depict movement. The application could include a written description explaining the movement. Alternatively, Offices could require a recording of the sign in analog or digital format.

(v) *Position marks*

37. The particular and distinctive location of a sign in relation to a product may constitute a trademark in certain systems. Position marks are usually treated as figurative marks and only one representation with one single view of the sign is generally required.

38. The representation of the sign should nevertheless allow the Office to clearly define the object for which protection is claimed. To this end, the applicant may use dotted or broken lines to indicate the part of the object for which protection is not claimed.

39. Most Offices require an indication of the type of mark and depending on the representation submitted, the applicant may be asked to provide a written description defining the location of the sign (label, pocket, button, stripe, etc.) in relation to the product.

Possible area of convergence No. 5

With regard to an application for the registration of a position mark, the representation of such a mark could consist of a single view of the mark. It could be required that matter for which protection is not claimed, be represented in broken or dotted lines. A written description explaining the position of the mark in relation to the product could also be required if the graphic representation supplied is not sufficient.

(vi) *Gesture marks*

40. A gesture has been mentioned as another kind of non-traditional mark. Even though the registration of this type of sign remains exceptional, it would seem that representation may be achieved in two ways. Where the sign is treated as a figurative mark, the representation would consist of a single picture or several frames depicting the movement, accompanied by a written description.

41. If the sign is considered as a motion mark, it may be represented with a series of still pictures, together with a description of the mark indicating the gesture concerned. Alternatively, an analog or digital recording of the gesture may be presented. If applications can be filed electronically, an electronic file showing the gesture may be submitted. In both cases, an indication of the type of mark will be required.

Possible area of convergence No. 6

With regard to an application for the registration of a gesture mark, the representation of such a mark could consist of a single picture when the mark is treated as a figurative mark or several frames depicting the gesture if the mark is considered a motion mark. A written description explaining the gesture may also be submitted. For the rest, the considerations under possible area of convergence No. 4 would apply.

(b) Non-Visible Signs

(i) *Sound marks*

42. Sound marks may consist of musical sounds, either pre-existing or specially commissioned for the purposes of trademark registration. They may also consist of non-musical sounds, either existing in nature (e.g., animal sounds or sounds produced by meteorological or geographical features) or produced by machines and other man-made devices.

43. Rule 3(6) of the Regulations to the Singapore Treaty provides that where the application contains a statement to the effect that the mark consists of a non-visible sign, a Contracting Party may require one or more representations of the mark, an indication of the type of mark and details concerning the mark, as prescribed by the law of that Contracting Party.

44. The representation of musical sounds usually consists of an indication of the type of mark in the application and by supplying the musical notes on a stave. These basic requirements may be supplemented by a description of the sound in words, indicating the instruments used, the notes that are played, the length and any other characteristics of the sound.

45. Offices of many countries require an analog or digital recording of the sound. Where electronic filing is available, the recording of the sound can be submitted by using an electronic file, such as MP3 or .WAV.

46. The representation of non-musical sounds can be achieved through other methods, including onomatopoeia of the sound, a description in words, an analog or digital sound recording annexed to the application form or filed electronically, or a combination of those methods.

47. Technical means such as oscillograms, spectrograms or sonograms have also been used as means of representing sound signs, usually in combination with an indication of the type of mark and a description. However, there has been some discussion as to whether these forms of representation are sufficiently accessible and understandable to the general public.

Possible area of convergence No. 7

With regard to an application for the registration of a sound mark, the representation of such a sound mark consisting of a musical sound could be a musical notation on a stave together with a written description of the mark, which may indicate the instruments used, the notes that are played, the length and any other characteristics of the sound. Offices could require an analog or digital recording of the sound in a commonly used audio format. Where electronic filing is available, an electronic file of the sound could be submitted with the application.

The representation of a sound mark consisting of a non-musical sound could consist of an onomatopoeia of the sound, a description in words or an analog or digital sound recording submitted with the application. Where electronic filing is available, an electronic file of the sound could be submitted with the application.

(ii) *Olfactory marks*

48. Olfactory or scent marks have been registered in some countries. Even though the registration of this type of sign remains exceptional, it would seem that the representation may consist of a written description of the scent. This representation should be in a form that conveys information to the ordinary person allowing proper identification of the mark. An indication of the type of mark should normally be included⁷.

49. The practice of Offices that accept these marks for registration may differ as to whether a specimen of the sign should be filed with the application or only if it is needed in the course of examination. Like with other non-traditional marks, the tendency is to avoid reference to any highly specialized methods of identifying scents as these would not be comprehensible to the ordinary person.

Possible area of convergence No. 8

With regard to an application for the registration of an olfactory mark, the representation of such a mark could consist of a description of the scent. It could be considered whether the Office should require, in the course of examination, the representation of a specimen of the scented product.

(iii) *Taste marks*

50. This type of sensory mark has been accepted for registration in some countries. In such cases, the applicant supplied a representation of the mark consisting of two elements, namely an indication of the type of mark in the application and a written description depicting the characteristics of the taste. It seems, however, that at present the registration of taste marks remains exceptional.

Possible area of convergence No. 9

With regard to an application for the registration of a taste mark, the representation of such a mark could consist of a description of the taste. It may be considered whether the Office should require, in the course of examination, the presentation a specimen of the product to which the mark is applied.

(iv) *Texture or feel marks*

51. In the case of texture marks, it is the surface of the product that might lead to recognition, for instance because the surface touched has a specific recognizable structure or texture. Although the registration of texture or feel marks remains exceptional, some ways of representing such signs have been identified.

52. It is thus conceivable that, in addition to an indication or statement concerning the type of mark in the application, a detailed written description of the sign and a representation of the surface consisting of a Braille-like sample is submitted to the Office. Also, a graphic representation indicating the location of the mark on the goods and a detailed written description of the texture appears to be a possibility of representing this type of marks.

Possible area of convergence No. 10

With regard to an application for the registration of a texture or feel mark, the representation of such marks could consist of a detailed written description of the mark. It may be considered whether the Office should require some form of graphic representation if the elements supplied are not sufficient to ascertain the nature and characteristics of the mark.

III. OTHER ISSUES

(a) Publication of Non-Traditional Marks

53. Issues pertaining to the publication of non-traditional marks have been discussed by the SCT during its seventeenth and eighteenth sessions (see document SCT/17/2, page 13). The discussion generally indicated that Offices have different approaches in this area, which may consist of a paper publication, publication in electronic format on CD-ROM or on the Internet, or a combination of some of these modes.

54. The form of publication chosen by an Office may have an impact on the type of representation requirements that it applies, particularly in the case of non-traditional marks. In discussing the representation of various types of non-traditional marks, this document has already addressed some pertinent issues that are specific to individual types of non-traditional marks. However, there are also some questions that appear to be of relevance for the publication of all types of marks.

55. In particular, the publication of non-visible signs has raised questions as to how the actual nature of the mark could be made available to the public. It would seem easier to publish non-visible signs on an Internet site. For example, to upload an MP3 file and make it available to users by providing a URL or an icon where the sound or multimedia mark may be found. It is clear, however, that a paper publication could only provide for a reference that the non-graphic representation of a non-visible sign could be consulted at a particular place.

56. In countries where there is a combination of methods, for example, paper and CD-ROM publication, or paper and Internet site publication, there might be an issue as to which one of the two is considered as the official publication having certain legal effects. Although traditionally that function was considered to be fulfilled by the paper publication, this might no longer be the case.

57. It has been noted that ideally, publications should be self-contained and provide sufficient information to users and to any third parties wishing to consult pending applications or registered marks, as the case may be. In this connection, it has also been noted that a more generalized use of “Internationally Agreed Numbers for the Identification of Bibliographic Data” (INID codes) should be recommended, so as to facilitate consultation of databases and registers.

(b) Costs for Applicants and Offices

58. The issue of cost was dealt with in document SCT/17/2 (see pages 13 and 14) and was discussed by the SCT at its eighteenth session (see document SCT/18/10 Prov., paragraphs 117 to 127). It was generally observed that the handling of representations for non-traditional marks consisting of visible signs did not seem to imply additional costs for Offices.

59. Regarding non-visible signs, it has been noted that the acceptance for registration of such signs may depend on the actual capacity of Offices to receive, process and publish such applications. It was noted that increasing use of electronic filing would contribute to facilitate the work of Offices in relation to these signs. In particular, this could result in important cost savings, given the fact that electronic publications are considerably less expensive than paper publications.

60. There has been a broad recognition of different levels of development and access to technology in countries around the world when it comes to the application and registration of non-traditional marks. This is a prominent point of the Resolution by the Diplomatic Conference Supplementary to the Singapore Treaty on the Law of Trademarks and the Regulations Thereunder (“the Resolution”).

61. In particular, paragraphs 3 to 7 of the Resolution record the understanding of the Diplomatic Conference to the effect that Articles 2 (Marks to Which the Treaty Applies) and 8 (Communications), are not understood as imposing any obligations on Contracting Parties to register non-traditional marks or implement electronic filing systems or other automation systems. Each Contracting Party may decide whether and when to provide for the registration of non-traditional marks.

62. In addition, and with a view to facilitating the implementation of the Treaty in Developing and Least Developed Countries (LDCs), the Resolution creates a framework for the provision of adequate technical assistance comprising technological, legal and other forms of support to strengthen the institutional capacity of those countries and to enable them to take advantage of the provisions of the Treaty.

63. It would seem that this international framework offers a spectrum of cooperation opportunities, including the exchange of experiences, aimed at developing a collective source of information where applicants, users and Offices alike could draw from.

IV. CONCLUSION

64. The work thus far undertaken by the SCT indicates that non-traditional marks are an area of emerging interest in Member States of WIPO. The survey presented in the Replies to the Questionnaire on Trademark Law and Practice and the information made available by SCT Members in their submissions have shed some light on possible approaches to the representation of non-traditional marks. This document attempts to summarize those approaches and identify possible areas of convergence that could be useful to both applicants and Offices.

65. The SCT is invited to consider the present document and

(i) comment the possible areas for convergence No. 1 to 10;

(ii) amend the possible areas for convergence presented in the document, add further possible areas of convergence or omit any of them;

(iii) consider any further course of action in respect of points (i) and (ii), above.

[End of document]

¹ Rule 3(3)(a) to (e).

² Rule 3(4)(a) to (e).

³ However, Model International Form No. 1 provides for a space of 8 x 8 cm.

⁴ This is currently provided under Rule 3(3)(b) of the Regulations under the TLT and Rule 3(4)(b) of the Regulations under the Singapore Treaty.

⁵ This is reflected in Article 3(1)(a)(x) of the Singapore Treaty.

⁶ Rule 3(5) also applies to hologram marks, motion marks and position marks.

⁷ Rule 3(6) applies to all marks consisting of non-visible signs.