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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
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## **STANDING COMMITTEE ON THE LAW OF TRADEMARKS, INDUSTRIAL DESIGNS AND GEOGRAPHICAL INDICATIONS**

**Nineteenth Session**  
**Geneva, July 21 to 25, 2008**

REPORT\*

*adopted by the Standing Committee*

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\* This report was adopted at the twentieth session of the SCT.

## INTRODUCTION

1. The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (hereinafter referred to as “the Standing Committee” or “the SCT”) held its nineteenth session, in Geneva, from July 21 to 25, 2008.
2. The following Member States of WIPO and/or the Paris Union for the Protection of Industrial Property were represented at the meeting: Afghanistan, Albania, Algeria, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, China, Congo, Costa Rica, Côte d’Ivoire, Croatia, Czech Republic, Cuba, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Germany, Ghana, Greece, Haiti, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Jamaica, Japan, Jordan, Kenya, Latvia, Lebanon, Lesotho, Lithuania, Malaysia, Mauritania, Mexico, Morocco, Netherlands, Nigeria, Norway, Panama, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Serbia, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Kingdom, United States of America, Uruguay (81). The European Community was represented in its capacity as member of the SCT.
3. The following intergovernmental organizations took part in the meeting in an observer capacity: African Intellectual Property Organization (OAPI), Benelux Organization for Intellectual Property (BOIP) and the World Trade Organization (WTO) (3).
4. Representatives of the following non-governmental organizations took part in the meeting in an observer capacity: American Intellectual Property Law Association (AIPLA), Asian Patent Attorneys Association (APAA), Brazilian Intellectual Property Association (ABPI), European Brands Association (AIM), European Communities Trade Mark Association (ECTA), Inter-American Association of Industrial Property (ASIPI), International Association for the Protection of Industrial Property (AIPPI), International Federation of Industrial Property Attorneys (FICPI), International Trademark Association (INTA), Japan Patent Attorneys Association (JPAA), Japan Trademark Association (JTA) and Knowledge Ecology International (KEI) (12).
5. The list of participants is contained in Annex II of this Report.
6. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions on the basis of all observations made.

Agenda Item 1: Opening of the Session

7. Mr. Francis Gurry, Deputy Director General, opened the session and welcomed the participants.
8. Mr. Ernesto Rubio, Assistant Director General, reported on the work done by the International Bureau in preparation for the nineteenth session of the Standing Committee in connection with each of the topics proposed for discussion.
9. Mr. Marcus Höpperger (WIPO) acted as Secretary to the Standing Committee.

Agenda Item 2: Election of a Chair and two Vice-Chairs

10. Mr. Michael Arblaster (Australia) was elected as Chair of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) for the year 2008. Mr. Louis Chan (Singapore) and Mr. Imre Gonda (Hungary) were elected as Vice-Chairs for the same period.

Agenda Item 3: Adoption of the Agenda

11. The SCT adopted the Draft Agenda (document SCT/19/1 Prov.2) without modifications.

Agenda Item 4: Accreditation of a Non-Governmental Organization

12. Discussion was based on document SCT/19/7 (Accreditation of a Non-Governmental Organization).
13. The SCT approved the representation in sessions of the Standing Committee of the Brazilian Association of Intellectual Property (ABPI).

Agenda Item 5: Adoption of the Draft Report of the Eighteenth Session

14. The SCT adopted the Draft Report of the Eighteenth Session (document SCT/18/10 Prov.2) with modifications as requested by the Delegations of China and the Russian Federation.

Agenda Item 6: Trademarks

*Representation and Description of Non-Traditional Marks – Possible Areas of Convergence*

15. The discussion was based on document SCT/19/2.

16. The Chair noted that the issue of non-traditional marks had already been raised in connection with the formalities for representation covered by the Singapore Treaty on the Law of Trademarks although at that time, it was felt that Members did not have enough experience with these signs. Thereafter, the Standing Committee had been discussing possible approaches in relation to the representation and description of those marks and attempted to identify areas of convergence in Member State practice, as presented in document SCT/19/2. These were expected to constitute a body of reference that could be beneficial to Members which did not yet provide for the registration of non-traditional marks. The Chair noted that the Singapore Treaty did not impose an obligation on Members to protect any particular type of marks and the work of the Standing Committee was based on that understanding.

17. The Delegation of Japan noted that relatively few countries had experience with the registration of non-traditional marks. Therefore, continuous discussion about the matter was meaningful in order to gather information about the practice in different countries. The Delegation of Japan considered that the previous discussions in the SCT and the documentation prepared by the International Bureau had greatly contributed to make available information on non-traditional marks to anyone interested. The Delegation declared that Japan was in the process of revising its trademark legislation and considered the possibility of introducing the protection of non-traditional marks.

18. The Delegation of the Republic of Korea declared that national trademark law had been recently revised to provide for the protection of some non-traditional visible signs. The Delegation sought clarification as to the distinction made in document SCT/19/2 between motion and gesture marks. The Delegation was not certain as to whether both marks would be covered by national law.

19. The Delegation of Sudan said that the definition of non-traditional mark was a new issue for most developing countries. The Delegation considered that some of the signs such as hologram or three-dimensional marks touched on aspects of industrial design. In the view of the Delegation, the first priority was to agree on definitional aspects.

20. The Delegation of the Russian Federation declared that new trademark legislation had entered into force on January 1, 2008. However the administrative regulations were still being drafted. They took into account the results of previous discussions of the SCT concerning the representation and depiction of non-traditional marks and the Delegation hoped that at the current session, the SCT could adopt recommendations which might be useful to complete this drafting exercise.

21. The Delegation of Panama noted that the provision on subject matter of protection in the national law of Panama was broad enough to allow for the registration of non-traditional marks. The national Office had already registered a sound mark. A draft amendment act was under elaboration and the Delegation was seeking to collect any useful information from Members of the SCT, which had more ample experience with the registration of those signs.

22. The Delegation of Germany declared that the national legal framework of Germany was sufficiently broad to accommodate the protection of several non-traditional marks. The Delegation recalled that the extent of protection of trademark law in Germany was dependent on the harmonization of European law, which resulted from the application of European Court of Justice (ECJ) case law.

23. The Delegation of Colombia considered it necessary to determine the publication requirements of non-traditional marks. This was important for third parties to learn about the mark and be able to file an opposition, if necessary. The Delegation noted that the public probably needed to get a more complete perception of these signs, as compared to word or figurative marks. Issues relating to publication might be further developed by the SCT in order to reach a certain level of convergence.

24. The Delegation of the United States of America agreed with the characterization made by the Chair that the nature of the work the SCT was trying to accomplish was “creating a body of reference” available for countries to access if and when they decide to accept non-traditional marks for registration. The Delegation believed that the main focus of the discussion was to reach an outcome that would be readily available and understandable for Offices. Trademark practitioners and owners were moving into new marketing and advertising techniques, for which they wanted flexibility as to the available subject matter that they used to identify their goods and services. The Delegation believed it was important for the Standing Committee to reach conclusions about the areas of convergence proposed in document SCT/19/2, so they could be used as a reference tool by Offices that had less experience with the registration of those marks. The Delegation trusted that other Members’ experiences would indicate where efficiencies had been gained and practical issues and problems were addressed, which led them to find that a particular practice was the way forward.

25. The Representative of the European Community said that it supported the discussion in this area and considered it important for users worldwide to have a common understanding of the formalities relating to the representation of non-traditional marks. The Representative considered, however, that it might be too early to fix a bundle of harmonized approaches on the representation of non-traditional marks. The Representative said that European trademark law, and in particular the EC Directive, was currently the subject of a comprehensive evaluation exercise, which might take some time. In that context, the requirements for graphic representation of non-traditional marks might also be assessed, but at present, the guidelines established by recent case law needed to be complied with. The Representative noted that under current requirements in the European Community, it would be difficult to accept a simple description as the basis for proper representation of a non-traditional mark. The Representative also noted that additional forms of representation might imply access to fully electronic systems, which did not seem to be a generalized feature in Offices worldwide.

26. The Delegation of Norway said that the areas of convergence listed in document SCT/19/2 seemed like a positive development and expressed full support for the comment made by the Chair to the effect that they constitute a body of reference.

27. The Delegation of Brazil recalled that under national legislation only signs that are capable of graphic representation may be accepted for registration. Nevertheless, the Delegation wished to engage in the current discussion, on the understanding that each Member retained the freedom to decide if when to provide for the registration of these signs. The Delegation believed that the SCT should continue its technical work in this area, as it allowed Members to share their experiences and learn from each other.

28. The Delegation of Canada supported the notion that the document under discussion could be termed as a “body of reference” and noted that the work of the SCT was helpful for offices to reach consistency of outcomes.
29. The Delegation of the Republic of Korea believed that some non-traditional marks required secondary meaning before they were registered. Thus the Delegation asked whether it was not necessary to publish all the details of the mark before registration. The Delegation suggested that the SCT concentrate its work on visible signs. However, it could be helpful to have experience on how to publish non-visual signs.
30. The Delegation of China said that document SCT/19/2 constituted a summary of the work already achieved by the Standing Committee in relation to non-traditional marks. In the view of the Delegation, two issues seemed important in this connection. Firstly the fact that some of these marks acquired distinctiveness through use and secondly, the type of technology that was available in most offices, which currently demanded that the representation of marks had to be submitted on paper. The Delegation noted that the work of the SCT could make progress in these two areas.
31. The Delegation of Indonesia supported the continuation of discussions in this area and the attempt made to identify possible areas of convergence. The Delegation suggested that it would be useful if the substantive discussions would embark on agreed definitions.
32. The Delegation of Uruguay agreed with the notion that the protection of non-traditional marks did not need to be an obligation on Contracting Parties, but it had to be dealt with independently by each national Office. The Delegation noted that generally, the scope of the possible areas of convergence seemed sufficiently broad, and this was important for establishing general criteria. The relevant details could be fixed at a later stage.
33. The Delegation of Slovenia expressed support for continued discussions on the basis of the areas of convergence presented in document SCT/19/2, in order to answer some of the questions that may still exist. The Delegation believed that this and previous documents on the subject had already been useful to Offices and users.
34. The Representative of INTA said that the organization attached considerable importance to the work of the SCT on the difficult issue of the representation of non-traditional marks. The exchanges of experiences among members of the Standing Committee were helpful to raising awareness on the protection of those marks across jurisdictions.
35. The Chair indicated that this discussion did not impose any obligation on Members of the SCT to provide for the registration of non-traditional marks. Each Member may decide whether and when to provide for the registration of non-traditional marks.
36. The Chair noted that the work of the SCT on possible areas of convergence for the representation and description of non-traditional marks had already proved to be useful and was worthwhile pursuing in order to create a body of reference that would promote consistency of outcomes under various national procedures.

Possible area of convergence No. 1 (three-dimensional marks)

37. The Delegation of Spain declared that under national law it was sufficient to provide a two-dimensional representation of the mark showing its three-dimensional character in order to receive a filing date. During examination, the applicant may be required to furnish to the Office up to six views of the mark and a description when the nature of the sign was not clear. However, the Delegation believed that it was not necessary to publish the six different views although the applicant was allowed to provide additional views after publication if it was deemed necessary for compliance with legal requirements or for comparison with preexisting marks.

38. The Delegation of Greece said that under national legislation, a representation of the mark indicating its three-dimensional character from one single perspective was sufficient to secure the filing date. The applicant might also submit a specimen of the mark in order to ascertain its nature and characteristics.

39. The Delegation of Japan considered that a filing date may be accorded to an application that contains, at the option of the applicant, a two-dimensional graphic reproduction of the mark presented as a single view or several different views. With regard to the number of views of the mark that should be published, the Delegation recalled that the purpose of publication was enabling third parties to clearly understand the nature of the sign. Therefore, the Office should publish either one single view or all different views submitted by the applicant.

40. The Delegation of Germany declared that a representation of the mark containing one single view of the mark was sufficient to grant a filing date. However, the applicant might provide up to six views. The single view had to be sufficiently clear and show the three-dimensional character of the mark. This might be difficult in some cases and therefore it was necessary to indicate that the application concerned a three-dimensional mark. The Delegation noted that a single view of the mark might also restrict the scope of protection of the sign only to matter that was visible from the representation.

41. The Delegation of Singapore supported the wording of the first area of convergence and declared that under national legislation, an applicant had the option to file one single or several views of the mark. However, the registrar reserved the right to request up to six views of the mark and a description in words, in the event that the mark as lodged did not sufficiently show the particulars of the sign or did not allow proper examination. At any time, the registrar may also require a further representation to be filed if the existing representations of the mark were not satisfactory.

42. The Delegation of Slovenia noted that national Regulations were silent on the number of views to be published. According to Office practice, where there was an indication to the effect that the application concerned a three-dimensional mark and this was not clear from the representation, the applicant was required to provide additional views. However, those additional views were not published, even if the applicant so requested.

43. The Delegation of Mexico said that the representation of a three-dimensional mark should be clear to allow the Office to determine the scope of protection. If the representation submitted with the application consisted of only one view and was not sufficient to understand the nature of the mark, up to three additional views were required. When there

was a variation between the original and the subsequent views submitted, and the Office determined there had actually been a change in the representation, the filing date would change accordingly. All the views submitted were published.

44. The Delegation of Morocco declared that only one view of the three-dimensional mark was published.

45. The Delegation of Croatia noted that under national legislation the applicant could file a single view or up to six views of the mark. If the applicant filed only one view, the Office would not ask for more, but protection would be limited to what is apparent from the application. The Office would publish up to six views if submitted.

46. The Delegation of the Republic of Korea said that an applicant could submit one single view or up to five views of the three-dimensional mark. Only one view was published and the filing date was granted when a single view showing the three-dimensional features was submitted, even if additional views were supplied.

47. The Delegation of The former Yugoslav Republic of Macedonia said that according to national legislation, applicants were required to provide a two-dimensional reproduction of the sign to be placed in the 8 x 8 cm area designated in the application form. A representation showing the features of the mark from a single perspective was sufficient to secure the filing date. It was also important to indicate that the sign applied for was a three-dimensional mark. If additional views of the sign or a description were submitted, they were not published.

48. The Delegation of Sweden declared that under national legislation, the Office required a statement that the sign applied for was a three-dimensional mark. A single view of the mark was required, but if the Office considered it necessary, it could require samples. Only one view was published, even if the applicant had supplied several views.

49. The Delegation of the United States of America said that national rules provided that the drawing of a three-dimensional mark should present a single rendition of the mark in three dimensions. The general rule was “one mark, one drawing”. However, it could be that a single rendition of the mark did not show all the features of the mark and in that case, it was possible for the applicant to petition for a waiver of the rule, to submit additional renditions. There was no limitation as to the number of additional renditions that could be submitted.

50. The Delegation of Algeria declared that the scope of protection of a three-dimensional mark was granted according to the representation filed by the applicant. All the views submitted were published.

51. The Delegation of Romania said that an express indication of the type of sign was required. A two-dimensional representation of the mark was required to be included in the 8 x 8 cm space provided in the application form. The applicant might submit a description of the mark if it so wished. The Office did not require a specimen of the mark, but it might require up to six additional views if the reproduction submitted did not sufficiently show the three-dimensional character of the mark.

52. The Delegation of Jordan noted that the national Office required three views to be submitted from top, bottom and side. However, only one view was published.



53. The Delegation of Serbia said that the general rule in national legislation provided that a three-dimensional mark should be published in the same way as it appeared in the register. This meant that if the mark was presented in several views, all those views had to be published.

54. The Delegation of Panama declared that an indication of the type of mark was required to be included in the application. The representation of the mark had to be sufficient to reflect the nature of the mark. Only one view of the mark was published and national legislation did not limit the number of views to be published. A filing date was granted once the minimum documentation was submitted to the Office. If photographic or digital images were submitted, they had to be of sufficient quality to permit proper publication on paper and subsequent reproductions if so required.

55. The Delegation of the United States of America informed that following a change in national regulations, the Office required the applicant to provide a description if the sign was a three-dimensional mark or any other mark containing a design element. This was done to help examiners determine the proper code under the Vienna Classification. The Office also required the use of dotted lines in drawings to indicate matter that was not claimed as part of the mark. The description was, however, not part of the filing date requirements; it could be submitted during examination and was only published if it was considered useful to clarify the scope of protection of the mark.

56. The Delegation of Algeria clarified that the representation of the mark had to be presented in the 8 x 8 cm space provided for in the application form. It was not mandatory to provide a description of the mark and where submitted, it was not published.

57. The Representative of the European Community declared that the Office for Harmonization in the Internal Market (OHIM) did not require the applicant to provide additional views of a three-dimensional mark if the view supplied with the application was unclear. However, the applicant had the choice of submitting with the application up to six different views of the three-dimensional mark. According to Office practice, if the representation was not clear, the Office asked for a description, which was published but did not form part of the mark.

58. The Delegation of the Russian Federation said that national regulations required a clear indication that the application concerned a three-dimensional mark. The applicant submitted the view which best characterized the nature of the mark, although it had the option to submit additional views for the purposes of examination. Only one view was published. However, if the examiner found that in those additional views the claim had changed, this fact could have an impact on the filing date. The Delegation noted that a description was always required, but it was not published and did not have an impact on the filing date.

59. The Representative of the INTA noted that several delegations had indicated that their national regulations provided for a specific size of the representations or reproductions to be included in the application, namely 8 x 8 cm. The Representative said that in relation to three-dimensional marks this limitation caused difficulties to applicants, especially if they had to fit several views of the mark in such a small space. The Representative further noted that it was important to allow for the indication through a description or a disclaimer, of the parts of the representation for which protection was not sought.

60. The Chair said that these seemed to be horizontal issues which could be addressed at a later stage.

61. There was agreement in the SCT that a sufficiently clear representation showing one single view of a three-dimensional mark was sufficient for the granting of a filing date. Nevertheless, Offices may require more views or a description of the three-dimensional mark for the purposes of examination. However, there were diverging opinions as to the number of different views of a three-dimensional mark that should be published by the Office.

Possible area of convergence No. 2 (color marks)

62. The Delegation of Norway said that according to national regulations, an applicant needed to supply a sample of the color on paper to receive a filing date. Consequently, the Delegation suggested changing the wording in area of convergence No. 2 from “could” to “should” consist of a sample of the color in order to reflect national practice.

63. The Delegation of the Russian Federation referred to the last sentence of area of convergence No. 2, allowing Offices to require a written description on how the color is applied on the goods or used in relation to the services. The Delegation noted that in the Russian Federation there had been a case where absent this indication, the mark was registered as a normal figurative mark and once litigation was started, it was not possible for the courts to determine the scope of protection of the mark. The Delegation believed that the proposition made in this area of convergence was interesting and asked other delegations if they would require such an indication or additional graphic representations of the mark.

64. The Delegation of El Salvador declared that under the legislation currently in force, a color *per se* cannot be a trademark. However, combinations of color could be subject to protection as a mark but the scope of protection was limited to how the mark was granted. This was the way in which the applicant had to use the mark on the products or in relation to the services covered by the registration.

65. The Delegation of the United Kingdom said that it could not agree to a suggestion of making mandatory the requirement for a sample of the color on paper. According to national practice, it was considered that an applicant who identified the color by reference to an internationally accepted code (PANTONE®, RAL, etc.) met the requirement for graphic representation. The national Office did not ask for samples of color on paper as these samples could fade and electronic representations might appear differently on various computer monitors. The Delegation noted that its Office interpreted the relevant ECJ case law as allowing a verbal description of the color mark.

66. The Delegation of Switzerland suggested keeping the wording of possible area of convergence No. 2 as proposed in the paper, because it made it possible for an Office to require a sample of the color mark.

67. The Delegation of Sudan declared that under national legislation it was not possible to register color *per se* as a trademark, because colors were in the public domain.

68. The Delegation of Panama declared that under national law and practice only combinations of color or color as part of a figurative element were subject to protection as trademarks.
69. The Chair recalled that the current discussion did not concern the inclusion of new categories for trademark protection in systems where such protection did not already exist. The question was rather how non-traditional signs should be represented or described if they are accepted for registration in a specific jurisdiction.
70. The Delegation of Spain agreed with the Delegation of Switzerland that the wording of area of convergence No. 2 should be maintained and asked that the Spanish version of the text be revised accordingly.
71. The Delegation of Greece declared that national law required color marks to be represented by a sample of the color or colors on paper and an indication of the type of mark in the application. The Delegation expressed concerns, however, as to whether a color *per se* was sufficiently distinctive.
72. The Delegation of Uruguay supported the positions expressed by the Delegations of Spain and Switzerland, but declared that under national legislation only combinations of color were accepted for registration as trademarks.
73. The Delegation of the United States of America referred to the question asked by the Delegation of the Russian Federation as to what would be an acceptable statement in a color mark application as to how color applied to goods or to services. The Delegation provided the example of the color *per se* registration for services of a well-known parcel delivery service: “the mark consists of the color chocolate brown which is the approximate equivalent of PANTONE Matching System 462C as applied to the entire surface of vehicles and uniforms. The mark consists of the color brown alone.”
74. The Delegation of Sweden declared that the national Office received color *per se* applications when it was proven that the sign was sufficiently distinctive, for example through a survey among the consuming public. The applicant had to supply a sample of the color on paper, a description of the mark or the indication of an internationally recognized color code.
75. The Delegation of Italy said that color *per se* marks were accepted for registration if the applicant could prove that they were sufficiently distinctive. The application requirements included a sample of the color on paper or an electronic image. No description was necessary. The Delegation supported the text of area of convergence No. 2 as proposed.
76. The Delegation of El Salvador declared that there was no ground in national law and the applicable regulations to require the indication of an internationally recognized color code.
77. The Delegation of Germany said that national law did not provide a basis to require indication of an internationally recognized color code. The national Office considered such indications useful and it accepted them if provided. However, it was important to note that color schemes used by industry, for example, the RAL system, was updated only every five years and during that period, new colors were not covered.

78. The Delegation of Denmark noted that national application requirements included a sample of the color on paper and indication of an internationally recognized color code.
79. The Delegation of Singapore declared that the national Office accepted an application for color *per se* or a combination of colors with reference to an internationally recognized color code. The Office considered that this reference was useful particularly in the case of electronic applications, because an electronic color image might be distorted.
80. The Delegation of India asked whether national offices in other countries would accept an application for a product mark consisting of the color red to be used on fire extinguishers or a service mark consisting of the color green for services related to the environment.
81. The Delegation of the United States of America noted that according to national practice, the applications suggested by the Delegation of India might be refused as these colors would be found common to the trade and therefore non-distinctive. It would seem that they would not be found eligible even with secondary meaning and there could also be a functionality analysis.
82. The Delegation of Ecuador said that its experience with color *per se* marks was limited. However, it seemed useful to accept the indication of an internationally recognized color code, even though national law did not provide for this requirement. The Delegation asked what had been the experience of other Offices in relation to color marks for services.
83. The Representative of the European Community declared that its Office required a color reproduction of the mark. The applicant was free to describe the sign and an indication of a color code could be added. The Representative explained that this indication was not compulsory for practical reasons. The Office considered that the decision of the ECJ in the *Libertel* case was concerned with paper applications, whereas in OHIM 80% of applications were filed electronically. Color codes would not be helpful in that case and generally the color matching systems were only valid if at the receiving end the appropriate ink and paper quality were available. Regarding the question asked by the Delegation of India, the Representative indicated that he broadly agreed with the analysis made by the Delegation of the United States of America.
84. The Delegation of Slovenia noted that the indication of color codes was accepted but not required. If supplied by the applicant, such codes were published. The Delegation further noted that color *per se* was considered a figurative mark and suggested that a way of identifying these marks in Office publications might be through the Vienna Classification. However, not all examiners were in agreement on this aspect.
85. The Delegation of The former Yugoslav Republic of Macedonia said that the applicant was required to indicate the color in words. If color codes were supplied, they were accepted but not published.
86. The Representative of INTA expressed support for the indication of internationally recognized color codes. He suggested that this indication could be required only when the Office does not issue publications in color.

87. The Delegation of the United Kingdom said that the national Office required reference to an internationally recognized color code system. However, it seemed important to take into account the issues raised by the Delegation of Germany and the Representative of the European Community.

88. The Delegation of Mauritania supported by the Representative of OAPI declared that the Bangui Agreement required graphic representation of the mark on the paper application form. There was no legal basis to require the indication of a color code. When supplied, such indication was accepted but it was not published.

89. The Delegation of Singapore declared that while the national Office accepted a color *per se* mark for services, the applicant was required to include a clause indicating how the color would be used in relation to services and provided the example of a trademark consisting of the color green in relation to petrol stations. The Delegation further noted that the applicant was required to furnish extensive pre-filing evidence of use of the mark.

90. The Representative of APAA said that it might be difficult to determine the range of rights of a mark consisting of a combination of colors without delineated contours. In such cases, it was useful to indicate in the description the ratio or distribution of the colors used.

91. The SCT was in agreement with the text for an area of convergence on color marks, subject to amending the words: “a representation of such marks could consist of ...” to “Offices may require that a representation of such marks consist ....”.

Possible area of convergence No. 3 (hologram marks)

92. The Chair asked delegations to discuss the possibilities of allowing, not allowing or requiring a description in applications concerning hologram marks.

93. The Delegation of El Salvador declared that national legislation did not specifically contemplate hologram marks. However, the Office would not refuse such an application if the applicant included a sufficient description of the holographic effect or any other relevant detail of the mark.

94. The Delegation of Germany said that in principle holograms could be protected as trademarks in Germany. However, the German Federal Patent Court in that country had determined that a hologram mark that was applied for with a graphic representation and a description that was changed several times could not be registered as it was not properly represented. The Delegation believed that it might be impossible to show the full holographic effect in one single view.

95. The Delegation of the United States of America said that the national Office had registered marks containing holograms. It seemed difficult to accept for registration holograms by themselves because there was a real question as to whether they would be perceived by consumers as a mark. Holograms were often used as anti-counterfeiting devices and in that case, they would probably not be perceived as a mark. With regard to the drawing, national practice indicated that if a hologram had more than one view and the two views were different from each other, two marks were applied for and the application would be refused. Two different views of the same element could also suggest that the application concerns a motion mark.

96. The Delegation of Australia indicated that the national Office had limited experience with the registration of hologram marks. There was a tendency to treat them more like motion marks than as a separate category. The applicant was requested to supply sufficient views to identify the different elements of the mark as well as a description setting out how the different views related to each other. However, this could be problematic because if only one view or insufficient views are provided at the time of application, it might not be possible to provide additional views later. The latter would be too much of an amendment to the mark.

97. The Representative of INTA noted that in general, a single drawing or even a series of drawings could not accurately represent a hologram and in reality, holograms were typically identified by a description of the mark. For this reason, he suggested changing the words “could include” by “could be required to include” in the second sentence of area of convergence No. 3.

98. The Representative of the European Community said that the practice of OHIM was similar to that described by the Delegation of Australia. If the applicant supplied one or several views that were inadequate to show the nature of the hologram, he would not be allowed to file further views. The Representative noted that while the text for area of convergence No. 3 seemed acceptable, in practice, it was extremely difficult using paper or pictures to adequately reproduce a hologram. The Representative believed this was one of the areas which could only be solved in an electronic environment. It might be adequate to supplement the text with a short comment indicating the practical problems that had been noted by delegations.

99. The Delegation of Germany supported the views expressed by the Representative of the European Community that a sentence should be added in area of convergence No. 3 indicating the problems raised by delegations in relation to hologram marks.

100. The Delegation of France said that under national regulations a description was never required. Therefore, if any amendment were to be included in the text, it should make it clear that an Office “may” require.

101. The Delegation of the United States of America expressed doubts as to whether the additional text indicating that there are problems with hologram marks was necessary. In fact, there seemed to be certain problems with all types of non-traditional marks but it might sound discouraging to include language that singled out hologram marks as being more problematic than the others.

102. The Chair suggested that the concept about the practical difficulties in relation to holograms could be incorporated as a comment to the discussion, but would not be part of the text. The comment could also form part of the paper to be prepared for the next session of the SCT.

103. The Delegation of Germany said that it might still be worth noting that there were different degrees of practical problems with some non-traditional marks.

104. The SCT was in agreement with the text for an area of convergence on hologram marks, subject to amending the text to the effect that Offices may require a description of the hologram mark where a single drawing or a series of drawings did not accurately represent the hologram.

Possible area of convergence No. 4 (motion or multimedia marks)

105. The Delegation of Colombia considered that the representation of a motion mark should include the complete series of movements, so that third parties decide whether or not to file an opposition. If the application was made by electronic means, the sign had to be provided in electronic format.

106. The Delegation of Japan asked whether an indication in the application that the sign is a motion or multimedia mark was mandatory in any jurisdiction.

107. The Chair noted that an indication of the type of mark might be a requirement for several types of non-traditional marks, as it helped determine the scope of protection of the mark. The Chair asked delegations if they required this indication at filing.

108. The Delegation of the Russian Federation said that the applicant was required to include an indication of the type of mark. The national Office used Internationally agreed Numbers for the Identification of Bibliographic Data (INID codes) to identify the particular types of mark. However, there were no specific codes for all non-traditional marks, thus motion marks were indicated generally with code 550, which was the general indication relating to the nature or kind of mark. In addition to the indication, the applicant had to provide a description of the features of the mark.

109. The Delegation of Denmark declared that an indication of the type of mark was required at filing and if there was any doubt on this, the Office required the applicant to clarify the nature of the sign.

110. The Delegation of the United States of America said that an indication of the type of mark was not a filing requirement according to national procedures. For a motion or movement mark, the applicant may supply a drawing that depicts a single point in the movement or a drawing that depicts up to five frames showing various points in the movement, whichever best depicts the commercial impression of the mark. If it is unclear, the examiner would require a full description of the movement and the indication of the movement might be contained in that description, but there was no separate field for that indication in the application form. For particular applications where specimens of use were required the applicant would submit a specimen in digital format indicating the motion and the way in which it is used to identify the goods or in relation to the services.

111. The Delegation of Singapore declared that the national Office required an indication of the type of mark and a depiction of the sequence of images constituting the motion or movement. A description of the mark was also required.

112. The Representative of INTA was of the view that a series of still images alone could not make clear the nature of the mark. A description or a recording of the sign could be required, to the extent that it could be published. The Representative believed that this type of representation was more appropriate than a series of still images. In relation to area of convergence No. 4, he doubted whether it was practical to require a recording in analog format.

113. The Delegation of Japan supported the comments made by the Representative of INTA. Although the national office had no experience with motion or multimedia signs, it was considering introducing the protection of these signs. In this context, the Delegation observed that no country required the submission of these signs in electronic media. The Delegation wondered why Offices which accepted motion or multimedia signs for registration required still images, when electronic media would be the best mode of representation.

114. The Delegation of Australia said that the national Office accepted still images in the early days, since there was no other possibility. The current practice was to accept a recording and to provide an Internet link as a way of making the sign available to the public.

115. The Delegation of the Russian Federation noted that an applicant for this kind of sign was not required to provide still images. It was sufficient to indicate the type of sign, provide a description of the movement and attach a recording. The sign would then be uploaded on the Office website, which is open to anyone interested.

116. The Representative of ECTA supported the comments made by the Representative of INTA and noted that it was very important for third parties to have descriptions or other indications which clarify the scope of the mark. To the extent possible, these elements should be published or otherwise be available through inspection of the files. This could probably be a principle to be applied to all non-traditional marks.

117. The Representative of the European Community indicated that electronic reproduction of these signs was probably the most suitable. However, it seemed that at present, the technology existed but the rules were lagging behind. OHIM still accepted still images accompanied by a description in some cases. As mentioned previously, the statutory law in this field was under review.

118. The Delegation of Norway said that under national practice, the applicant for a motion or multimedia sign was required to indicate the nature of the mark in the application or in later correspondence with the Office. The national Office required a representation of the mark consisting of still pictures showing the movement in order to grant a filing date. The Office also required a description of the sign in words and a data file showing the motion mark. Publication of the mark included the still pictures together with the description. In the near future, it was foreseen to publish the moving image itself, as the Office Gazette was already published electronically. In relation to area of convergence No. 4, the Delegation proposed that the last sentence be replaced with the following text "where electronic filing is available, an electronic file of the motion could be submitted with the application" in a manner similar to area of convergence No. 7.

119. The Delegation of the United States of America said that the experience of the national Office was similar to that described by the Delegation of Australia. The current electronic systems could not take an electronic format drawing as the reproduction of the mark in the Office database. It was not possible to receive any electronic submissions such as data files directly and these were made available through a link to a different server where the information was hosted. The Delegation informed that a change to the electronic systems was under consideration.



120. The SCT was in agreement with the text for an area of convergence on motion or multimedia marks, subject to amending the text to the effect that Offices may require that the application include a written description explaining the movement. Furthermore, the Chair noted that a number of delegations that had experience with the registration of motion or multimedia marks had observed that the character of such marks was best captured if the mark was represented in motion. Where electronic filing was available, an electronic file could be submitted with the application.

Possible area of convergence No. 5 (position marks)

121. The Delegation of Colombia believed that additional information was necessary to determine whether it was justified to consider this type of mark as a separate category.

122. The Delegation of Canada said that the national Office would probably accept a representation consisting of a dotted outline of a product indicating the particular position of the trademark. It was possible for the applicant to provide one or several views, but the Office preferred only one view, if it was clear, since multiple views might indicate that more than one mark was being applied for protection.

123. The Representative of the European Community said that OHIM had granted trademark registrations for what the applicants themselves claimed as position marks. This was not a separate category in the EC Regulations but rather a subset of other types of marks, such as three-dimensional or color marks. In terms of representation, one view of the mark was sufficient, although up to six views might be supplied by the applicant.

124. The SCT was in agreement with the text for an area of convergence on position marks as presented.

Possible area of convergence No. 6 (gesture marks)

125. The Delegation of Japan referred to an example of a gesture mark mentioned in the literature and reflected in one of the footnotes of document SCT/16/2. The Delegation noted that it had found the description of that gesture to be “the gesture made by a person by tapping one side of his or her nose with an extended finger”. The Delegation wondered if in that case, the application sought protection for the movement itself, independently of the person making the movement. The Delegation wished to know if other Offices would agree with its interpretation of the subject matter of protection of a gesture mark or how this type of mark could be defined in detail.

126. The Delegation of Australia said that although national regulations did not contain an express definition of a gesture mark, protection might be granted on the basis of the description of the mark in the application. Furthermore, if no image was provided, the scope of the right might be the gesture irrespective of the person who was doing it. If however, the application included a video clip of a person with the gesture, it would no longer be clear whether the scope of protection included the individual, and that issue might be something to be decided by the Courts.

127. The Delegation of Germany expressed doubts as to whether gesture marks could be considered a separate category but rather a form of movement or figurative mark.

128. The Delegation of Sudan asked for clarification as to how a gesture mark could be defined and represented, in particular, whether the applicant should be required to provide one single view, a picture, an electronic file or a description.

129. The Chair noted that different jurisdictions seemed to accept a series of still images which define the sign, a description of the gesture, an electronic file, or a combination of those elements.

130. The Representative of ABPI noted that gesture marks had been the subject of debate at international trademark congresses in the past. In such meetings, the example was given of gestures made by soccer players, which later became trademarks, although no indication was provided about the technical details of those applications.

131. The Representative of INTA said that gesture marks were treated as motion or movement marks in the INTA examination guidelines. The guidelines recommended that the representation of these marks consist of pictures and a written description of the movement, or a recording.

132. The Delegation of Mexico noted that several delegations had declared that gesture marks were not identified as such, according to national law and practice, but as a form of movement or figurative mark. That being the case, it might not be necessary to retain the reference to gesture marks as a separate category of non-traditional sign.

133. The Delegation of the United States of America stated that under national practice, protection was granted to the trademark as represented and there was no requirement to identify the sign as a movement or gesture mark. There could be gestures without movement and in that case, the sign would be something of its own. It was preferable to note that this was an emerging field although the term was used by industry and keep the reference to gesture marks.

134. The Chair noted that the term gesture mark was used by industry, but not necessarily in legal statutes. Based on this understanding, the SCT was in agreement with the text for an area of convergence on gesture marks as presented.

Possible area of convergence No. 7 (sound marks)

135. The Representative of the European Community noted that musical notation had been identified as proper representation of sound marks. However, if trademark offices decided to go beyond that requirement, it seemed that electronic filing was the best way to cover both musical and non-musical sounds.

136. The Delegation of Ecuador said that the national Office had experienced some difficulty in determining whether the musical notation and the recording submitted with a sound mark application corresponded with each other. In such cases, the Office debated whether it was necessary to seek for expert advice and asked what the experience of other Offices had been with similar situations.

137. The Delegation of Serbia declared that the term used in national law was “musical mark” instead of sound mark. The idea was to exclude from protection sounds that are not musical because it seemed impossible to get an appropriate graphic representation of such

signs. According to national regulations, a musical mark must be represented by musical notation. The Delegation believed that it was not possible to describe music in words. Finally, there was no limitation as to the length of the musical mark.

138. The Delegation of Greece noted that the current work of the SCT was important and timely, as national authorities were finalizing the regulations on representation of sound marks.

139. The Representative of the European Community said that only musical sounds were accepted for registration as community trademarks. Non-musical sounds were not accepted for registration due to lack of proper graphical representation, following the ECJ decision in the *Shield Mark* case. Even the possibility of providing the actual representation of the mark as an audio file attached to an electronic application was problematic.

140. The Delegation of Japan declared that the current applicable law did not provide protection for sound marks. National authorities were discussing a number of changes to the law and in that context the Delegation noted that some countries accepted musical notation or other visible signs as representation of sound marks. A few countries accepted a media recording of the sound, but none required the medium itself. The Delegation believed that the media recording would be a better means of representing the sound and wondered why the requirement of musical notation was still kept.

141. The Delegation of Australia noted that in the past, the national Office had accepted sound mark applications for which the sound was simply described. For more recent applications, the Office had accepted sound files, although it was not yet possible to access these signs directly, but through a link to a server that was made available to the public upon request.

142. The Delegation of Spain said that the requirement for musical notation on a staff was set out in national law. An applicant had the option to provide a description of the mark, but this was not a required element at filing. The examiner could also request an analog or digital recording of the sound.

143. The Delegation of Sweden declared that the national practice was similar to that indicated by the Representative of the European Community. For sound marks, the applicant had to provide musical notation on a staff. It was not possible to provide media files with an electronic application and non-musical sounds were not accepted for registration.

144. The Delegation of the United States of America noted that the national Office did not require musical notation on a staff or other graphical representation of a sound mark. The applicant was free to provide musical notes as part of the description of the mark. In cases where the applicant was required to provide a specimen of use of the mark in commerce, they would have to submit on electronic file or an analog recording. In other cases, the examining attorney might require an electronic file with the sound recording, and that file was part of the public record but was not available in the search database. It was foreseen to provide for that functionality in the future.

145. The Delegation of Bulgaria said that the national Office had accepted for registration as trademarks only musical sounds. Musical notation was required as graphic representation of those marks, which consisted mainly of radio and television transmissions.

146. The Delegation of Uruguay declared that the national Office accepted the registration of non-visible signs since 1998. An indication of the type of sign was required, as well as graphic representation in the form of musical notes. The applicant was requested to provide a recording of the sound in a material support, for example a compact disk.

147. The Delegation of the Russian Federation noted that the national Office published the information concerning trademark registrations electronically and provided access to the database over the Internet. For this reason, the applicant was required to provide the sound in audio tape or compact disk, regardless of whether the musical sound could be represented by musical notes on a staff. It was a requirement to indicate the type of sign in the application by marking INID code 556 for sound marks, as this would facilitate the future searches.

148. The Delegation of Norway declared that the national Office had only received applications for musical marks. National legislation required that the applicant submit musical notation on a staff, a written description of the mark and a sample of the sound in an MP3 file. The written description would indicate the instruments used the notes that were played, the tempo, the beat and the length of the sound. If the mark was accepted for registration, the Office would publish it electronically together with the notes and the description, and would make available the sound through an icon on its Webpage.

149. The Delegation of Morocco said that national legislation provided for the registration of sound marks. The national Office had accepted five sound mark registrations concerning musical sounds, which were represented with musical notation. The publication of those marks included the musical notes.

150. The Representative of ABPI considered that the instruments used would not be a relevant detail for the protection of a musical sound as a trademark. This could even become a contentious element if it were held that the same melody played with different instruments was a different mark.

151. The Delegation of Serbia indicated that it had reservations with regard to the portion in area of convergence No. 7 relating to a description of the mark which may indicate the instruments used, the notes that are played, the length and any other characteristics of the sound. In the view of the Delegation, all the details concerning a musical piece were contained in the musical notation and it was not necessary to rely on a description. Furthermore, it seemed difficult to explain the musical notes by words, while with musical notation it was possible to reproduce the sound applied for as a trademark.

152. The Delegation of Australia noted that document SCT/19/2 seemed to recognize that a more flexible interpretation existed as to what could constitute graphic representation of sound marks in different countries, including the acceptability of written words and sound recordings. The Delegation said that the national Office had accepted marks incorporating sound without requiring staves and musical notes and had relied on descriptions of the music and/or the sound in conjunction with an example of the sound.

153. The Delegation of Panama informed that the national Office had accepted for registration as a sound mark an animal sound, for which the applicant supplied a recording and a description.

154. The Delegation of the United States of America suggested changing the wording of area of convergence No. 7 to indicate that the representation of a sound mark could be alternatively: musical notation on a stave, a written description of the mark, or the sound recording itself. This was currently reflected in the second paragraph of the area of convergence in relation to non-musical sounds. However, it seemed that the recording submitted with the application of a musical sound actually corresponded to the drawing of the mark for purposes of complying with national representation requirements. With a forward-looking perspective, it was important to consider that the representation of the mark could be musical notation, a description of the sound, or the sound itself.

155. The Representative of the European Community supported the suggestion to redraft area of convergence No. 7 and noted that the wording would be further improved by providing that the representation of a sound mark could also be any combination of the elements proposed.

156. The SCT agreed that an area of convergence for sound marks would not distinguish between musical and non-musical sounds. Offices may require that the representation of sound marks could consist of a musical notation on a stave, or a description of the sound constituting the mark, or of an analog or digital recording of that sound, or of any combination thereof. Where electronic filing was available, an electronic file could be submitted with the application. However, for some jurisdictions, only a musical notation on a stave could be considered as adequately representing the mark.

Possible area of convergence No. 8 (olfactory marks)

157. The Delegation of Colombia said that possible area of convergence No. 8 had to be further analyzed. In the view of the Delegation, the representation of olfactory marks for the purposes of publication seemed to pose problems and recalled that certain jurisdictions had excluded a number of representation methods, such as a chemical formula, a sample of the scent or a description of the sign.

158. The Delegation of the United Kingdom declared that in the past, the national Office had protected scent marks. However, the ECJ relevant jurisprudence had ruled out a written description, a chemical formula and a specimen as meeting the requirement of graphical representation. Although in theory, scent marks could be registered if they could be graphically represented, it did not seem that current technology standards allowed for a suitable representation of such marks.

159. The Representative of the European Community noted that OHIM had limited experience in relation to smell marks. One smell mark application was refused by the examiner but accepted by the Board of Appeal. That particular mark consisted of a description and was registered. However, the registration had not been renewed, so the mark was no longer on the register. Subsequently, the position on smell marks had been clarified by the ECJ decision on the *Sieckmann* case which effectively made smell marks unregistrable in the European Community, due to the problem of graphic representation. The Representative believed that if at some point, technology would allow for the representation of smell marks, the *Sieckmann* judgment would no longer be an obstacle.

160. The Chair asked whether in relation to the smell mark that had been registered, OHIM or the Board of Appeal had considered at some point that the written description was sufficient to adequately describe the scope of the mark, at least to the point of allowing an examiner to consider questions relating to distinctiveness and registrability.

161. The Representative of the European Community held that probably the description in itself was not sufficient to clearly identify the smell mark, even leaving aside the *Sieckmann* doctrine.

162. The Delegation of the Russian Federation said that the national Office had not registered scent marks. However, the legislation did not contain limitations regarding that type of mark. National authorities were trying to identify the adequate requirements for scent mark applications. One alternative consisted of a description of the sign accompanied by a sample of the scented material. Submission of a sample might present several difficulties, such as providing the scent in an appropriate container that would allow to keep the scent, while at the same time allowing interested parties to analyze parts of it. There was also a question as to whether giving access to those samples implied considerably higher costs for the Office. National authorities had reached the conclusion that the requirement could be limited to a description of the scent.

163. The Delegation of the United States of America declared that the national Office had registered several scents for particular products. The representation requirement consisted of a rather simple description. The applicant was not required to provide a sample of the scent as applied to the goods. In cases where a specimen of use was required, the applicant submitted representations of the packaging at the point of sale, which indicated that the scent was a feature of the mark. The most important element was that the owner or the user treated the scent as a mark and that it was so perceived by the consuming public. The applicant was usually required to provide substantial evidence to prove the distinctive character of the mark.

164. The Delegation of Singapore said that the national Office had not registered any olfactory marks, although national legislation allowed for the registration of such marks. The Delegation supported the views expressed by the Delegation of the United Kingdom and the Representative of the European Community on the point that there was currently no suitable method to graphically represent scent marks.

165. The Chair noted that the SCT could not identify an area of convergence as regards the representation of olfactory marks. Some jurisdictions had accepted that such marks could be represented through a description, whereas for other jurisdictions, a description could not adequately represent the character of such marks.

Possible area of convergence No. 9 (taste marks)

166. The Delegation of the United States of America declared that a taste mark had been applied for with the national Office. At examination, the trademark had been refused because the flavor was found to be functional as it made the goods more palatable. On appeal, the Trademark Trial and Appeal Board confirmed the decision of the examiner but noted that taste could be a trademark if it was sufficiently distinctive and non-functional.

167. The Delegation of Mexico said that it might be difficult to determine whether flavor could function as a distinctive sign. The consumer would have to taste the product before making his choice and only then the trademark would serve to distinguish the products of one undertaking from another.

168. The Chair noted that there could be a case where the applicant launched an advertising campaign encouraging consumers to purchase “a product that tasted like” and if that taste was sufficiently recognized by consumers through television advertising, magazines or even point of sale advertising, it might function as a mark without having to actually taste it before purchase.

169. The Chair noted that the SCT could not identify an area of convergence as regards the representation of taste marks. Some jurisdictions had accepted that such marks could be represented through a description, whereas for other jurisdictions, a description could not adequately represent the character of such marks.

Possible area of convergence No. 10 (texture or feel marks)

170. The Delegation of the United States of America declared that the national Office had registered a texture mark for which the applicant supplied a description and a drawing depicting the surface of a wine bottle covered by the texture. The Delegation noted that the Office had received an application for a trademark consisting of a name in Braille characters and an explanation in words. The second application was published for opposition.

171. The Representative of the European Community declared that OHIM had received two applications which consisted of textures covering wine bottles. In both cases, the applicant provided a picture and a description of the sign. These applications were not accepted by the Office and the decision was appealed to the ECJ. However, for OHIM both applications were considered three-dimensional marks and not texture or feel marks.

172. The Chair inquired whether the European Community system would allow for an application consisting of Braille characters with what might constitute a translation of them.

173. The Representative of the European Community said that OHIM would normally treat a mark in Braille as a figurative mark, unless it was reproduced as a three-dimensional mark. In the second case, the applicant would have to submit a sufficient number of views to clarify the nature of the sign. The Representative doubted whether OHIM would examine the word content of the mark.

174. The Delegation of Germany explained that the national Office had received an application for a feel mark which was refused for lack of graphic representation. The case was appealed to the Federal Court of Justice and the court confirmed that the representation was not clear enough.

175. The Chair noted that the SCT could not identify an area of convergence as regards the representation of texture or feel marks. Some jurisdictions had accepted that such marks could be represented through a description, whereas for other jurisdictions, a description could not adequately represent the character of such marks.

Publication of Non-Traditional Marks

176. The Delegation of Morocco declared that the size of the graphic representation to be published was a maximum of 8 x 8 cm. The Delegation noted that an oversize representation of a sound mark had been reduced to the required standard.

177. The Representative of INTA recalled that he had raised the issue of limitations in size of graphic representations at previous sessions of the SCT, in particular with regard to the representation of three-dimensional marks. Problems were identified in relation to applications received through the Madrid System and perhaps this question would be raised in the context of the Working Group for the Legal Development of the Madrid System.

178. The Delegation of Spain said that national regulations allowed a maximum size of 8 x 12 cm. However, the 8 x 8 cm format was also acceptable. It was considered that providing for a rectangular figure would allow the applicant to better represent its mark.

179. The Delegation of the Russian Federation declared that the national Office published on CD-ROM and also on the Website. If the applicant supplied a description, it was also published. The size format for traditional marks was generally 8 x 8 cm, although the Office also accepted 8 x 10 cm representations. Where labels were provided, the representation should not exceed 8 x 8 cm.

180. The Delegation of Sweden informed that the size requirement for representations in national applications was 8 x 8 cm. The Office scanned the representations provided and got the right format for publication in the Gazette. In case of an international application the 8 x 8 cm standard was strictly applied.

181. The Delegation of Germany said that the national Office allowed for representations to be up to a maximum format of 26 x 17 cm. The Delegation noted that for the case of international applications under the Madrid Agreement and the Protocol, that size needed to be reduced to fit the 8 x 8 cm standard. This seemed particularly problematic when several views of the trademark were submitted in the larger format.

182. The Delegation of Slovenia said that the Office provided for the 8 x 8 cm size of representations. However, that standard was not strictly applied and the Office normally helped the applicant by reducing oversize representations. The Delegation believed that the question of size was much less important with the advent of new technologies.

183. On the publication of non-traditional marks, the Chair noted that with the introduction of new technologies and an increased use of non-traditional marks, limitations of the size of representations were becoming less relevant, with Offices indicating that the clarity of the representation was more important.

184. In conclusion of the discussion on document SCT/19/2, the Chair stated that all comments on possible areas of convergence made by delegations would be recorded in the Report of the meeting. The Secretariat was requested to prepare a new document for consideration at the next session of the SCT, taking into consideration all requests for amendments, and consisting of a general introduction, a description of areas of convergence as amended, and, where appropriate, explanatory notes.



*Trademark Opposition Procedures – Possible Areas of Convergence*

185. Discussion was based on document SCT/19/3.

186. The Delegation of Uruguay declared that the national experience with opposition procedures was positive. The time limit to file an opposition was 30 days following publication of the application.

187. The Delegation of Japan expressed the view that there were different types of opposition systems depending on their purpose and role. The Delegation believed that the discussion in the SCT was not aimed at harmonizing the purposes and roles of different opposition systems, but rather setting out areas of convergence relating to those procedures. The Delegation suggested amending the document by categorizing opposition procedures in two separate systems according to their purpose, and listing each area of convergence under each system.

188. The Delegation of Greece said that according to national procedures, a third party could oppose a decision of the Administrative Trademark Committee within a time limit of four months following publication of the decision.

189. The Delegation of Sudan noted that opposition procedures were useful for solving conflicts between parties. In Sudan, any party that had direct interest or any valid reasons could oppose an application.

190. The Representative of the European Community pointed out to a potential difficulty with the meaning of “relative grounds” used in possible areas of convergence No. 3 and 4. It seemed that reference in those paragraphs to “relative grounds” as “registered prior rights,” was too restrictive. However, the Representative believed that reference to “prior rights” in general terms would be too broad and suggested using “at least registered rights” as a more suitable description of “relative grounds.”

191. The Delegation of El Salvador observed that document SCT/19/3 provided very useful information and said that the national system provided for pre-registration opposition procedures and allowed for observations to be formulated.

192. The Delegation of Romania noted that, while the current legislation provided for a post-registration opposition system, the new draft trademark law included a pre-registration opposition system.

193. The Delegation of Ukraine said that according to national procedures, any third party could object to the registration of a trademark in the course of examination. The Delegation explained that national legislation did not provide for a limited list of grounds for opposition.

Possible Area of Convergence No. 1 (Third Party Intervention in Trademark Registration Procedures)

194. The Delegation of Malaysia noted that national legislation provided for pre-registration opposition procedure in which any party could have standing to oppose. The Delegation said that a major concern was not to unduly delay the registration of a mark and asked other delegations to share their experience in that respect.

195. The Delegation of Nigeria said that according to national law, any person could oppose the registration of a trademark within a time limit of two months following the publication of an application accepted by the examiner.

196. The Delegation of Spain supported the text of area of convergence No. 1 and declared that opposition procedures were a guarantee for the holders of prior rights. Opposition provided greater legal certainty and helped trademark administrations to safeguard the rights that were granted through registration. The Delegation disagreed with the view expressed by the Delegation of Japan that different opposition systems pursued different objectives. In fact, the same objectives could be reached through different opposition procedures.

197. The Delegation of Kenya indicated that national legislation provided for a pre-registration opposition system based on absolute and relative grounds. The concern relating to a potential delay in the registration process was addressed by allowing a maximum 90-day period of extension and requiring that a number of oppositions be heard within a given period.

198. The Delegation of the Russian Federation said that while the national legislation provided for examination by the trademark Office on absolute and relative grounds, it did not provide for an opposition procedure. However, the Office published on the Internet information relating to all applications, and took into account the opinion of third parties if submitted in the course of examination. This practice was aimed at avoiding registration of marks that could be in conflict with prior rights, such as copyright or trade names which were not examined *ex officio* by the Office. The Delegation noted that document SCT/19/3 was very useful in providing an overview of different opposition systems around the world.

199. The Delegation of the United States of America declared that the national system provided an opportunity to oppose applications on absolute, relative and formal grounds. Regarding the concern raised by the Delegation of Malaysia as to possible delays in trademark procedures resulting from opposition, the Delegation noted that in the United States of America one party could request the Trademark Trial and Appeals Board (TTAB) to assess whether or not the other party had reasons justifying a delay. With regard to the last sentence of possible area of convergence No. 1, the Delegation suggested adding the words “third parties” to the list of those for whom the implementation of opposition procedures was useful. This would include non registered parties, such as common law users of a trademark.

200. The Delegation of El Salvador stated that national legislation did not provide for the possibility of requesting extensions or a “cooling-off” period.

201. The Delegation of Nigeria supported the suggestion made by the Delegation of the United States of America, and proposed that areas of convergence No. 3 and 4 also be amended accordingly.

202. The Representative of the European Community said that if accepted, the suggestion made by the Delegation of the United States of America, could generate an expectation that opposition procedures should be open to third parties with no interest in earlier rights. This would be contrary to the CTM system. The Representative suggested that the text state “... and the SCT considers the implementation of opposition procedures in national and regional trademark registration systems to be useful” without indicating for whom those procedures would be useful.

203. The Delegation of Sudan suggested changing the words “interested persons” for “third parties.”
204. The Delegation of the United States of America suggested that the text read “interested third parties” instead of “third parties”, since it was important to set out who would benefit from opposition procedures.
205. The Delegation of India supported the proposal made by the Representative of the European Community.
206. The Representative of AIPLA observed that in some jurisdictions there was no requirement that an opponent be an interested party. Opposition procedures might be useful to the general public, as they contributed to maintaining the purity of the register.
207. The Representative of ABPI suggested that the text indicate why opposition procedures were useful, as opposed to indicating for whom they were useful.
208. The Representative of INTA suggested that the wording at the end of area of convergence No. 1 read: “... and the SCT considers the implementation of opposition procedures in national and regional trademark registration systems to be useful for applicants, right holders, other interested third parties, trademark administrations and the public as a whole.”
209. The Delegation of Japan noted that according to national procedures any person could file an opposition. It also suggested to change the text of area of convergence No. 4 accordingly.

210. The SCT was in agreement with area of convergence No. 1, subject to adding a reference to interested third parties and the public at large. Furthermore, a note would be added clarifying that this area of convergence did not create a presumption of who had legal standing in the procedures mentioned.

211. The SCT noted that the Delegation of Mexico considered that the invalidation procedures conducted at its industrial property office constituted a post-registration opposition procedure

Possible Area of Convergence No. 2 (Relation Between Opposition and Examination Procedures)

212. The Delegation of the United States of America said that the information contained in the table on page 5 of document SCT/19/3 did not reflect its national system, in which pre-registration opposition could also be based on formal grounds.
213. The Delegation of Latvia said that the section of the table on post-registration opposition did not reflect its national system. In Latvia, examination was carried out as to formal and absolute grounds and opposition could be based on absolute and relative grounds.
214. The Delegation of Sweden said that draft new legislation in Sweden provided for examination as to formal and absolute grounds and for opposition on formal, absolute and relative grounds.

215. The Delegation of Mexico observed that the national system provided only for invalidation procedures. This functioned very well and there was no intention to change that system. The Delegation did not support the text proposed for area of convergence No. 1 as it did not seem to contemplate that invalidation procedures were part of the opposition system. In Mexico, examination was carried out on all grounds and an invalidation action could be lodged on all grounds as well. The text of area of convergence No. 1 in conjunction with the third part of the table, entitled “No opposition”, seemed to indicate that invalidation procedures were not part of the opposition system.

216. The Representative of INTA suggested replacing the words “guidelines to be followed by trademark administrations in implementing opposition procedures” in the last sentence of area of convergence No. 2 by “guidelines to be followed by governments in designing opposition procedures.”

217. The Chair noted that in many jurisdictions there was no statutory requirement to implement opposition procedures in the manner mentioned in area of convergence No. 2. It was therefore appropriate that the SCT encourage trademark administrations to consider those factors when implementing the model that was set out in their laws.

218. The Delegation of Sudan said that the word “implement” was suitable.

219. The Delegation of India did not support the expression “preferred model”.

220. The Representative of INTA suggested replacing the words “guidelines” for “factors” and using the words “designing” and “implementing” unless they would pose problems to any delegation.

221. The Delegation of Sudan said that it would have a problem with the word “designing”.

222. The Chair noted that the text proposed seemed to be acceptable to most delegations.

223. The SCT was in agreement with area of convergence No. 2.

#### Possible area of convergence No. 3 (Grounds for Opposition)

224. The Delegation of Norway, supported by the Delegation of Hungary noted that the last part of the text of area of convergence No. 3 seemed to define prior rights as relating to registered rights only. The Delegation suggested deleting that text in accordance with the comments made earlier by the Representative of the European Community.

225. The Chair suggested to change the wording of the last phrase in area of convergence No. 3 to state that oppositions should be available at least on the basis of registered rights. The suggested change would have the effect of also covering unregistered rights.

226. The Delegation of Ukraine noted that rights which entered into conflict with a trademark application were not only registered rights.

227. The Delegation of El Salvador, supported by the Delegation of Uruguay, noted that the wording of the Spanish version of document SCT/19/3 could be improved by replacing “*derechos anteriores registrados*” por “*derechos anteriores adquiridos*”. This formulation would also contemplate rights granted on the basis of use.

228. The Delegation of Sweden, supported by the Delegation of the United States of America, suggested the following wording for the last part of area of convergence No. 3 “allow that oppositions be raised at least on prior rights in the jurisdiction concerned”.

229. The SCT was in agreement with area of convergence No. 3, subject to an amendment to the effect that opposition procedures should allow oppositions to be raised at least based on prior trademark rights in the jurisdiction concerned.

Possible area of convergence No. 4 (Entitlement to File an Opposition)

230. The Chair noted that the wording of the second sentence of the proposed text would need to be changed to reflect that oppositions could be based on prior rights, whether registered or not.

231. The Representative of INTA said that in the context of area of convergence No. 4 the focus was on who could raise prior rights. Therefore, the wording of the second sentence should read “at least the holders of prior rights”.

232. The Chair suggested replacing “holders” by “owners”.

233. The Delegation of Sudan noted that the holders of prior rights had an initial right. The wording “at least” seemed to reinforce the idea that oppositions could also be raised by those who have an interest.

234. The Delegation of Romania supported the proposal made by the Chair and suggested that the area of convergence read “at least the owners of previously acquired rights”. The Delegation explained that this formulation clarified the nature of the person raising an opposition.

235. The SCT was in agreement with area of convergence No. 4, subject to an amendment to the effect that at least owners of prior trademark rights in the jurisdiction concerned should be entitled to raise an opposition.

Possible area of convergence No. 5 (Opposition Period)

236. The Delegation of France suggested changing the wording of the last sentence of area of convergence No. 5 in the French version, from “*de plus de deux mois*” to “*d’au moins deux mois*”.

237. The Chair suggested changing the wording of the last sentence from “would run over two months” to “would be two months”.

238. The Delegation of the Dominican Republic declared that the national system provided for an initial opposition time limit of up to 45 days to be counted from the date of publication of the application. On these grounds, the Delegation did not support a two-month initial time limit.

239. The Chair explained that the wording of area of convergence No. 5 contemplated a maximum, a minimum and an ideal time limit. Therefore, a time limit of up to 45 days seemed to be covered by the text as proposed.

240. The Delegation of Panama supported the text of area of convergence No. 5 with the exception of the last sentence. The Delegation suggested changing the wording in the Spanish version from “*más de dos meses*” to “*dos meses*”.

241. The Representative of INTA supported the text of area of convergence No. 5 and recalled that the users of the system had expressed at previous meetings of the SCT that a one-month initial time limit for opposition was too short, especially for foreign applicants.

242. The SCT was in agreement with area of convergence No. 5, subject to changing the words “would run over two months” to “would be two months.”

#### Possible area of convergence No. 6 (Observations)

243. The Delegation of Italy requested clarification of the last phrase in area of convergence No. 6 “to enter into a formal procedure with the person that has made the observation”.

244. The Chair explained that the purpose of this phrase was to clarify that the filing of observations did not create an obligation on the part of the Office to engage procedures with the person submitting the observation. There should not be an expectation on the part of the applicant to be notified with an observation.

245. The Delegation of the Russian Federation informed that under national procedures, third parties could submit observations or other information in the course of examination. The examiner took these elements into account but did not engage in correspondence with the person submitting the observation. The Delegation supported the text of area of convergence No. 6 as proposed.

246. The Delegation of El Salvador said that according to national procedures, it was possible to file observations, not only at opposition but also at any point of the registration procedure. The information provided as observations was quite often used in cases concerning well-known or famous marks. The Delegation supported the wording of area of convergence No. 6 as proposed.

247. The Delegation of Japan noted that according to national procedures, third parties could submit information to the Office at examination stage but not during opposition procedures. The Delegation further noted that the opposition procedure in Japan was categorized differently than in text proposed for area of convergence No. 6.

248. The Chair indicated that the text proposed was only declaring that observations seemed to be useful in those systems that already had them but there was no suggestion to require SCT Members to introduce this element in their procedures.

249. The Delegation of Switzerland declared that national legislation did not provide for observations. If observations were presented, they were not included in the registration file and the Office was not obliged to reply to the person formulating the observation. The Delegation suggested deleting the last phrase of the text so that area of convergence No. 6 would end as follows: “Nevertheless, observations would not have to engage any obligation on the part of the Office.”

250. The Delegation of Slovenia said that national legislation contemplated the possibility of submitting observations in the manner described in document SCT/19/3. The Delegation noted that it was not always clear whether observations could be filed from the date of publication of the application or the date of registration. The Delegation supported the proposal made by the Delegation of Switzerland.

251. The Delegation of Malaysia declared that national legislation did not specifically provide for observations. The Office received the information submitted but had no obligation to enter into formal correspondence with the person filing it. The Delegation supported the proposal made by the Delegation of Switzerland.

252. The SCT was in agreement with area of convergence No. 6, subject to omitting the words “to enter into a formal procedure with the person that has made the observation.”

Possible area of convergence No. 7 (“Cooling-Off” Period)

253. The Delegation of Turkey explained that the national system provided for pre-registration opposition on absolute and relative grounds. It did not provide for a “cooling-off period”. However, there was a possibility for the parties to request a period of settlement for sharing their views. This possibility was not frequently used.

254. The Delegation of Nigeria declared that according to the national system, the Office did not have the power to extend the time limits to answer an opposition or to file a counterstatement. Additional time limits could be granted to file new documents, but it seemed that if the parties had a serious intention to settle, the “cooling-off period” was a good option.

255. The Delegation of Japan said that the time limit for filing an opposition was 2 months from the date of publication of a granted trademark. There was a time limit of 30 days to file evidence but there was no provision for extension of the time limits or a “cooling-off period”. Generally speaking, the system was not designed to encourage reconciliation of the parties.

256. The Delegation of the Russian Federation noted that the “cooling-off” period seemed to be a valuable instrument for reducing expenses in appeals and other procedures. The Delegation recalled that at past sessions of the SCT, several delegations had mentioned the length of the “cooling-off” period in their jurisdictions. The Delegation considered that it might be appropriate to include a reference to the length of the “cooling-off” period in area of convergence No. 7.

257. The Delegation of Ecuador supported the view expressed by the Delegation of the Russian Federation and said that it was important to fix a time limit for the parties to settle.

258. The Chair explained that the drafting did not include a time limit because there did not seem to be convergence among SCT members on that point.

259. The Delegation of Uruguay expressed agreement with the text of area of convergence No. 7.

260. The Delegation of Italy said that different national systems provided for different lengths of the “cooling-off” period. Furthermore, some systems provided that the period could not be extended. Thus, it did not seem possible to identify a convergence in this area.

261. The Delegation of El Salvador declared that although national legislation did not provide for the “cooling-off” period, it supported the text of area of convergence No. 7.

262. The Delegation of the United Kingdom noted that including a reference to the length of time of the “cooling-off” period would imply a deeper level of convergence. In the United Kingdom, the current length of the period was 12 months, but new draft legislation envisaged 9 months from application with a possibility of extension for an additional period of 9 months. Therefore, the Delegation supported the text of area of convergence No. 7 as proposed.

263. The Delegation of Spain said that national legislation provided for a modality according to which a suspension of opposition procedures could be granted upon a joint request by the parties during the 2-month opposition time limit. The parties were granted 6 months to reach an agreement, and this time limit was considered to be sufficient.

264. The Delegation of Australia noted that current national legislation did not provide for a “cooling-off” period. However, a proposal had been made to introduce a six-month initial “cooling-off period”, with a possibility of extension up to 12 months.

265. The Delegation of the United States of America supported the text of area of convergence No. 7. The Delegation noted that national legislation did not provide for a “cooling-off” period, but the USPTO had a practice of allowing the suspension of proceedings in favor of a settlement by the parties. A suspension of proceedings could be prolonged; however, the Trademark Trial and Appeals Board (TTAB) had the ability to inquire the parties about the progress made and if necessary, could reinstate proceedings. The Delegation believed that it was preferable not to fix the time limit of the “cooling-off” period at this stage.

266. The Delegation of Canada supported the text of area of convergence No. 7. The Delegation said that current national legislation did not provide for a “cooling-off” period, but allowed for extensions of the opposition time limit. It was envisaged to specifically provide, by way of practice, an extension of time amounting to a cooling-off period to allow parties an opportunity to pursue settlement at the beginning of the opposition time limit with the possibility of granting a further extension of time.

267. The Representative of ECTA supported the text of area of convergence No. 7 and noted that the presence of the “cooling-off” period in opposition proceedings before OHIM had contributed to a high percentage of settlements between the parties.



268. The Representative of INTA supported the text of area of convergence No. 7, but suggested that the last sentence be amended to indicate that extensions of the time limits should not be detrimental to any of the parties.

269. The Chair suggested that this could be achieved by deleting the words “in detriment of applicants”.

270. The SCT was in agreement with area of convergence No. 7.

*International Nonproprietary Names for Pharmaceutical Substances (INNs)*

271. The discussion was based on document SCT/19/4.

Proposal for a modified form of transmittal of the information on the publication of the new lists of proposed and recommended INNs

272. The Secretariat introduced the document and drew the attention of the SCT to three communications which had been received from interested parties, namely EFPIA, INTA and MARQUES.

273. The Delegation of Colombia suggested that both types of communication, namely a circular letter and an email alert advising that the information was available on the SCT Forum, be sent to the industrial property offices of WIPO Member States.

274. The Secretariat, noting that the proposal aimed at ensuring a swifter relay of the information, said that the intention of the International Bureau of WIPO was to send a paper communication to offices before the introduction of the new procedure, informing them of the change and inviting them to subscribe to the SCT Forum.

275. The Delegation of Japan said that it supported the proposal, as long as it ensured a secure receipt of the information by the offices.

276. The Chair observed that the CD Rom containing updated lists of proposed and recommended INNs would continue to be distributed to the offices.

277. The Delegation of Germany asked the International Bureau of WIPO whether it would be possible to send email alerts to different people in a given office, depending on the type of information concerned. It further asked the Representative of WHO whether it would be possible to have direct access to MEDNET without previous subscription.

278. The Delegation of Brazil, encouraging WIPO and WHO to pursue cooperation with a view to promoting the dissemination of information on INNs, proposed the creation of a data base containing all INNs, which would facilitate the work of trademark offices.

279. The Delegation of Australia, seconded by the Delegation of Norway, supported the proposal by the Delegations of Brazil and Germany concerning the creation of a public, searchable data base on INNs and INN stems.

280. The Representative of INTA, noting that the users would welcome the proposal by the Delegation of Australia, suggested that the email alert to offices which was contemplated in the proposal be also sent to all interested persons who had subscribed to the SCT Forum.

281. In reply to a question by the Chair, the Delegation of Colombia, supported by the Delegation of Sudan, said that it proposed to maintain the two types of communication.

282. The Chair put forward a proposal whereby an email alert would replace the paper circular letters, except where any member of the SCT requested that the information continue to be sent to it by circular letter.

283. The Delegation of Uruguay said that it supported the new proposal by the Chair, along with the proposal concerning the creation of a data base.

284. The Delegation of Colombia said that it would need to hold consultations with its capital before supporting the proposal by the Chair.

285. The Chair concluded that the Secretariat would continue to circulate information concerning the publication of new lists of proposed and recommended INNs by way of paper circular and, in addition, by an e-mail alert to all offices of SCT Members and to SCT observers that have subscribed to the SCT electronic forum. Furthermore, the SCT requested the Secretariat to explore together with the WHO Secretariat possibilities of developing a publicly searchable database for INNs.

#### Presentation by the Representative of WHO

286. The Representative of WHO thanked WIPO for the ongoing collaboration, and presented the document which had been reproduced in Annex I of document SCT/19/4. The Representative further thanked EFPIA, INTA and MARQUES for the comments contained in the communications sent to WIPO. He said that, while there was clearly a need to adjust the language used in WHO documents, the views expressed in those communications were not in essence in opposition with those of WHO.

287. The Delegation of Mexico stated that the issue under discussion was of considerable importance to its country, and asked whether it would be possible for the examiner of a national office to seek the opinion of an expert at WHO in case of doubt on the relevance of an INN stem in a given case. He further requested more information on the entitlement and procedure to object to a proposed INN.

288. The Representative of WHO pointed out that, while it would be possible for an examiner to contact an expert at WHO, the decision to refuse a trademark application rested on the national office. He further declared that WHO would welcome cooperating with WIPO with a view to further improving the accessibility of the INN data base by IP Offices.

289. The Delegation of Spain explained that the communication of the lists of INN was channeled to the Spanish Trademark Office through the Ministry of Health. The Office checked whether there was any reason to object to a proposed INN, and conveyed any objection to WHO via the Ministry of Health.

290. The Delegation of Serbia said that, under the Trademark Law of Serbia, a trademark application could be refused because of similarity with a prior protected mark. Considering however that an INN was not a protected mark, there was no legal ground to refuse a trademark application because of similarity between the sign and an INN. The Serbian Office would refuse a trademark application containing an INN if the sign could be considered to be descriptive or misleading.

291. In reply to a question by the Chair regarding the future work of the SCT in connection with INNs, the Delegation of Mexico said that, while the subject was of great interest to it, its only proposal was that IP Offices should have access to the contact details of experts at WHO. It further requested clarification regarding the recognition and relevance of INN stems in a name.

292. The Representative of WHO, observing that there was a publication about INN stems on the website of WHO, said that in assessing the relevance of stems, the same value would in general not be accorded to short stems, such as those composed of two letters, and to longer, more informative stems.

293. In reply to a question by the Delegation of Brazil, the Secretariat explained the procedure for communicating the lists of recommended and proposed INNs and the measures which had been approved by the SCT to improve the accessibility of those lists by the industrial property offices of WIPO Members States.

294. The Delegation of Hungary, raising the issue of INNs and Internet domain names, indicated that the Hungarian pharmaceutical industry continued to encounter problems where, during the selection procedure of INNs, a third party requested a domain name containing a proposed INN. The Delegation recalled that the issue had been addressed in the Second WIPO Internet Domain Name Process in 2001, and that the General Assembly had adopted the recommendation of the SCT with respect to INNs, according to which the Secretariat should, in cooperation with the World Health Organization continue to monitor the situation and, if necessary, bring to the attention of the Member States any material change in the situation. The Delegation asked the Secretariat whether there had been any material change in the situation since the adoption of the recommendation by the General Assembly. It further asked the other delegations whether they were aware of similar problems as the ones encountered by the Hungarian pharmaceutical industry.

295. The Secretariat said that there had not been anything to date that might qualify as a material change in the situation. It reported that WIPO Arbitration and Mediation Center had received some domain name complaints involving INNs, which could be divided into two categories. The first category involved domain names that were identical to INNs. In those cases, WIPO external panelists had decided that, taken into account their nonproprietary nature, INNs did not amount to trademarks protected under the Uniform Domain Name Dispute Resolution Policy. Under the second category of complaints, INNs had been used in conjunction with a trademark in a domain name. In those cases, the panelists had found that the presence of a trademark would allow the panel to order the transfer of the domain name to the trademark owner.

296. The Secretariat also observed that the top filers of complaints under the Uniform Domain Name Dispute Resolution Policy were pharmaceutical companies, which would appear to indicate that this industry was subjected to an important volume of abuse. Finally,

the Secretariat pointed out that the creation of new gTLDs which had been announced by ICANN would presumably have an effect on the number of conflicts between domain names and INNs.

297. The Chair, noting that there were no other comments on this issue, drew the discussion to a close.

*Article 6ter of the Paris Convention*

298. The discussion was based on document SCT 19/5.

299. The Secretariat presented document SCT/19/5 which contained a proposal intended to modernize the communication procedures under Article 6ter. The Secretariat indicated that, in case the SCT would give favorable advice on the proposed change of procedures, this recommendation would be submitted to the next meeting of the Paris Union Assembly in September 2008. If endorsed, the change of procedures could enter into force at the beginning of 2009. The Secretariat also drew the attention of the Committee to a draft decision for the Paris Union Assembly, contained in Annex I of the document.

300. The Delegation of Japan, while supporting the proposal contained in document SCT/19/5, suggested that WIPO consult WTO Members which were not party to the Paris Convention before adopting a final decision concerning Article 6ter procedure, as under Article 2(1) of the TRIPS Agreement, those WTO Members had to comply with the notification procedure set forth in Article 6ter. In addition, the Delegation proposed that the contents of the new electronic publication mirrored the existing paper-based publication, and that the International Bureau communicate to the countries the fact that the publication had taken place, by e-mail or another simple method. Besides, the indication of the last working days of March and September should be specified by a reference to WIPO working days. Finally, recalling that under Article 15 of the Trademark Law Treaty (TLT), any Contracting Party to that treaty had to comply with the provisions of the Paris Convention, the Delegation suggested that the proposal refer to “contracting parties of the TLT that are not party either to the Paris Convention or to the WTO”.

301. The Secretariat said that, while it intended to inform the WTO Secretariat and Members of WTO not party to the Paris Convention about any change in the current procedure for communications, a consultation process with WTO did not appear to be indicated, as the only body that was competent over the administration of Article 6ter was the Paris Union. Moreover, the Secretariat pointed out that, according to paragraph 3 of Article 6ter, States party to Paris Convention had an obligation to make available to their public the contents of communications but that it was for each party to decide in which way they wished to do so. This could be done, for example by reference to the periodical publication on the WIPO website or by a republication in a form the State considered appropriate. As regards the definition of working days, the Secretariat suggested to introduce a footnote in the draft decision referring to the fact that they would be determined according to the WIPO calendar. Finally, the Secretariat pointed out that, although it was not expected that in the future a State would join the TLT or the Singapore Treaty without being part of the Paris Union or a Member of WIPO, a solution to the concern raised by the Delegation of Japan would be to refer to “other parties being bound to apply Article 6ter by virtue of other international agreements”, and omit the reference to the WTO in the draft decision.

302. The Delegation of Japan agreed with the proposed changes based on the comments of the Secretariat.

303. The Secretariat submitted a modification of paragraph 1 of the draft proposal to reflect that a sign communicated under Article 6*ter* is protected only once it has been communicated. The new text would read “signs for which protection under Article 6*ter*(1)(a) and (b) is requested”.

304. The Delegations of Colombia, El Salvador and Spain supported the draft proposal contained in document SCT/19/5, noting that the proposed modernization of the procedures would be useful for the registration departments in their offices.

305. The Delegation of Spain reserved its right to make a request for receiving the electronic publication on a physical carrier.

306. Further to a question raised by the Delegation of Germany, the Chair proposed that, as indicated in paragraph 16 of document SCT/19/5, the proposal refer to a “semiannual” publication instead of a “biannual” publication.

307. The Delegation of Sweden pointed out that it was very important for its country to receive the signs on a physical carrier in order to make them available in its trademark gazette, in accordance with a requirement of its national legislation. It noted therefore that such physical carrier should be sent to the trademark registration office. The Delegation also observed that, if the PDF format were to be used, that might pose problems.

308. The Secretariat specified that the CD-ROM would be made available twice a year and contain all new communications as well as the existing ones.

309. Further to a question made by the Delegation of Nigeria concerning the dates on which the request for receiving the hard carrier would have to be made, the Secretariat indicated that the first publication would be made in March 2009 and that all States party to the Paris Convention and Members of WTO would be informed about the new procedures by a circular inviting them to indicate their wish to receive the publications on a physical carrier. The Chair further added that a request to that effect could be made at any time.

310. The Chair concluded that the SCT agreed to recommend the following draft decision for adoption by the Assembly of the Paris Union:

1. The reciprocal communication through the intermediary of the International Bureau, under Article 6*ter*(3)(a) and (b) of the Paris Convention for the Protection of Industrial Property (“Paris Convention”), of signs for which protection under Article 6*ter*(1)(a) and (b) is requested will be made through a semi-annual publication, in an electronic database on the website of the World Intellectual Property Organization (“WIPO”).

2. This periodical publication will be made on the last working day\* of the months of March and September, respectively, starting in March 2009.
3. The published signs will be transmitted simultaneously in electronic format stored on a hard carrier to the trademark registration administrations of the States party to the Paris Convention and of the Members of the World Trade Organization (WTO) that are not party to the Paris Convention, which have made an express request to that effect.
4. For the purposes of Article 6<sup>ter</sup>(4) and (6) of the Paris Convention, the date of the electronic publication shall be considered to constitute the date of receipt of a communication by any State party to the Paris Convention or any other party bound to apply Article 6<sup>ter</sup> of the Paris Convention.
5. This decision is without prejudice to the application of Article 6<sup>ter</sup>(3)(a) *in fine*.

#### Agenda Item 7: Industrial Designs

*Summary of Replies to the Questionnaires (Parts I and II) on Industrial Design Law and Practice (SCT/18/7 and SCT/18/8 Rev.)*  
*Industrial Design Law and Practice – Analysis of WIPO Questionnaires and Some Conclusions*

311. The discussion was based on documents WIPO/Strad/INF/2 and SCT/19/6.
312. The Secretariat introduced the documents and, indicating that a revised document WIPO/Strad/INF/2 would be issued, invited the members of the SCT which had not replied to the questionnaires to do so.
313. The Delegations of El Salvador, Japan and Spain stated that the documents were very valuable as a basis for future work. The Delegation of Spain further stated that these documents were specially useful in order to harmonize legislations and to facilitate convergence in the area of the industrial designs.
314. In reply to a request by the Delegation of Nigeria regarding the availability of parts I and II of the Questionnaire on Industrial Design Law and Practice, the Chair said that such questionnaires would be made available upon request, and encouraged delegations to reply to them if they had not yet done so.
315. The Delegation of Pakistan, while noting that the documents provided a good basis for discussion, suggested that the Secretariat made another attempt to seek the views of the members of the SCT which had not replied to the questionnaires.

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\* This report was adopted at the twentieth session of the SCT.

316. The Representative of APAA said that the documents were useful for design practitioners, and pointed out that the areas of main interest for those practitioners in Asian countries were the systems of deferment of publication and secret design, respectively available in the European Union and in Japan, as well as the issue of international grace period.

317. The Delegation of Norway, recalling that it was one of the delegations that had previously expressed support for undertaking more detailed work in the field of designs, said that it was pleased to learn that there were areas in which the differences between members of the SCT were less important than it had been anticipated. Noting that the documents were a good basis for any work aiming at convergence in the field of industrial designs, the delegation stated that it was in favor of the SCT considering in the future the feasibility of a treaty in that field. At this stage, the delegation wished that the SCT would pursue work in the areas in which convergence would be most beneficial for users. The Delegation further explained that the reason why deferment of publication was largely avoided in Norway stemmed from structure of the application form. In that form, the applicant had to indicate expressly that he did not wish to benefit from deferred publication, failing which deferment for six months was automatically applicable.

318. The Delegation of El Salvador said that designs could be a very useful tool for SMEs, and requested assistance from the International Bureau in order to acquaint SMEs in its country with that type of industrial property.

319. With reference to paragraph 50 of document SCT/19/6, the Delegation of Germany observed that Germany should not be included among the jurisdictions requiring certification of the signature in case of surrender. In this regard, it pointed out that the corresponding question in part II of the questionnaire had been responded in the affirmative by Germany, insofar only as it referred to "surrender" as one example in which certification of the signature was required.

320. The Delegation of the Russian Federation stated that the documents were a good basis for discussion, and expressed the wish that the SCT would pursue work aiming at a new treaty in the field of industrial designs. The Delegation explained that the examination procedure of industrial designs was very lengthy in the Russian Federation and that, as a result, the publication of industrial designs was deferred in practice for a period of 12 months, in average. The Delegation further expressed interest in knowing the experience of other countries with respect to design samples.

321. The Representative of FICPI, supported by the Representative of ECTA, said that the biggest difficulties for users lay in the different requirements concerning the representations of industrial designs, particularly as regards views and the use of dotted lines. Another area of divergence was the subject matter which could be protected as an industrial design, although there was some convergence as to minimum standards. Those differences resulted in higher costs for users and had a negative effect on SMEs.

322. The Delegation of Saudi Arabia expressed interest in the SCT addressing the issue of multiple priorities in the field of industrial designs.

323. The Delegation of Sudan said that it would be of interest to it to hear more about the experience of other delegations, in particular with respect to the overlap between industrial designs and other rights.

324. The Delegation of Jamaica said that it would be interesting to hear about the experience of other delegations regarding the requirement of specimen as opposed to reproductions.

325. The Delegation of Australia said that it would welcome further discussion on the use of broken lines, in particular the circumstances in which they are used and the interpretation of designs which include them. It would also welcome more information on grace periods, specifically on the benefits in the case of immediate copying, for example in the fashion industry.

326. The Chair concluded that work on the documents for the present session would be continued at the next session of the SCT.

#### Agenda Item 8: Geographical Indications

327. The Chair noted that there were no working documents or proposals for discussion at this meeting.

#### Agenda Item 9: Summary by the Chair

328. The Delegation of Brazil said that with regard to the section entitled “Non-Traditional Marks – Possible Areas of Convergence”, it was important to state that Members of the SCT would remain free as to whether or not to provide for the registration of non-traditional marks. To that end, the Delegation suggested that the following text be added before current paragraph 10: “The Chair indicated that this discussion did not impose any obligation on Members of the SCT to provide for the registration of non-traditional marks. Each Member may decide whether and when to provide for the registration of non-traditional marks.”

329. The Delegation of Germany suggested replacing the term “readily” for “publicly” in the last line of paragraph 33 to clearly indicate that the suggestion made by that delegation concerned a searchable database for INNs that would be open to the public without the need for the user to register and provide personal details.

330. The Standing Committee adopted the draft of the Summary by the Chair contained in document SCT/19/8 Prov. with the modifications suggested by the Delegations of Brazil and Germany. The Summary by the Chair (document SCT/19/8) is reproduced in Annex I.

*Twentieth Session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT/20)*

331. The Chair announced as tentative dates for SCT/20, December 1 to 5, 2008.



Agenda Item 10: Closing of the session

332. The Chair closed the nineteenth session of the Standing Committee.

[Annexes follow]

**WIPO**



**SCT/19/8**

**ORIGINAL:** English

**DATE:** July 25, 2008

**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

**E**

**STANDING COMMITTEE ON THE LAW OF TRADEMARKS,  
INDUSTRIAL DESIGNS AND GEOGRAPHICAL INDICATIONS**

**Nineteenth Session  
Geneva, July 21 to 25, 2008**

SUMMARY BY THE CHAIR

Agenda Item 1: Opening of the Session

1. Mr. Francis Gurry, Deputy Director General, opened the session and welcomed the participants.
2. Mr. Ernesto Rubio, Assistant Director General, reported on the work done by the International Bureau in preparation for the nineteenth session of the Standing Committee in connection with each of the topics proposed for discussion.
3. Mr. Marcus Höpferger (WIPO) acted as Secretary to the Standing Committee.

Agenda Item 2: Election of a Chair and two Vice-Chairs

4. Mr. Michael Arblaster (Australia) was elected as Chair of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) for the year 2008. Mr. Louis Chan (Singapore) and Mr. Imre Gonda (Hungary) were elected as Vice-Chairs for the same period.

Agenda Item 3: Adoption of the Agenda

5. The SCT adopted the Draft Agenda (document SCT/19/1 Prov.2) without modifications.

Agenda Item 4: Accreditation of a Non-Governmental Organization

6. Discussion was based on document SCT/19/7 (Accreditation of a Non-Governmental Organization).

7. The SCT approved the representation in sessions of the Standing Committee of the Brazilian Association of Intellectual Property.

Agenda Item 5: Adoption of the Draft Report of the Eighteenth Session

8. The SCT adopted the Draft Report of the Eighteenth Session (document SCT/18/10 Prov.2) with modifications as requested by the Delegations of China and the Russian Federation.

Agenda Item 6: Trademarks

*Representation and Description of Non-Traditional Marks – Possible Areas of Convergence*

9. Discussion was based on document SCT/19/2.

10. The Chair indicated that this discussion did not impose any obligation on Members of the SCT to provide for the registration of non-traditional marks. Each Member may decide whether and when to provide for the registration of non-traditional marks.

11. The Chair noted that the work of the SCT on possible areas of convergence for the representation and description of non-traditional marks had already proved to be useful and was worthwhile pursuing in order to create a body of reference that would promote consistency of outcomes under various national procedures. Concerning the debate on individual areas of possible convergence, and with reference to the text provided in document SCT/19/2, he noted:

Possible area of convergence No. 1 (three-dimensional marks)

12. There was agreement in the SCT that a sufficiently clear representation showing one single view of a three-dimensional mark was sufficient for the granting of a filing date. Nevertheless, Offices may require more views or a description of the three-dimensional mark for the purposes of examination. However, there were diverging opinions as to the number of different views of a three-dimensional mark that should be published by the Office.

Possible area of convergence No. 2 (color marks)

13. The SCT was in agreement with the text for an area of convergence on color marks, subject to amending the words: “a representation of such marks could consist of ...” to “Offices may require that a representation of such marks consist ....”.

Possible area of convergence No. 3 (hologram marks)

14. The SCT was in agreement with the text for an area of convergence on hologram marks, subject to amending the text to the effect that Offices may require a description of the hologram mark where a single drawing or a series of drawings did not accurately represent the hologram.

Possible area of convergence No. 4 (motion or multimedia marks)

15. The SCT was in agreement with the text for an area of convergence on motion or multimedia marks, subject to amending the text to the effect that Offices may require that the application include a written description explaining the movement. Furthermore, the Chair noted that a number of delegations that had experience with the registration of motion or multimedia marks had observed that the character of such marks was best captured if the mark was represented in motion. Where electronic filing was available, an electronic file could be submitted with the application.

Possible area of convergence No. 5 (position marks)

16. The SCT was in agreement with the text for an area of convergence on position marks as presented.

Possible area of convergence No. 6 (gesture marks)

17. The term gesture mark was used by industry, but not necessarily in legal statutes. Based on this understanding, the SCT was in agreement with the text for an area of convergence on gesture marks as presented.

Possible area of convergence No. 7 (sound marks)

18. There was agreement by the SCT that an area of convergence for sound marks would not distinguish between musical and non-musical sounds. Offices may require that the representation of sound marks could consist of a musical notation on a staff, or a description of the sound constituting the mark, or of an analog or digital recording of that sound, or of any combination thereof. Where electronic filing was available, an electronic file could be submitted with the application. However, for some jurisdictions, only a musical notation on a staff could be considered as adequately representing the mark.

Possible area of convergence No. 8 (olfactory marks)

19. The SCT could not identify an area of convergence as regards the representation of olfactory marks. Some jurisdictions had accepted that such marks could be represented through a description, whereas for other jurisdictions, a description could not adequately represent the character of such marks.

Possible area of convergence No. 9 (taste marks)

20. The SCT could not identify an area of convergence as regards the representation of taste marks. Some jurisdictions had accepted that such marks could be represented through a description, whereas for other jurisdictions, a description could not adequately represent the character of such marks.

Possible area of convergence No. 10 (texture or feel marks)

21. The SCT could not identify an area of convergence as regards the representation of texture or feel marks. Some jurisdictions had accepted that such marks could be represented through a description, whereas for other jurisdictions, a description could not adequately represent the character of such marks.

22. On the publication of non-traditional marks, the Chair noted that with the introduction of new technologies and an increased use of non-traditional marks, limitations of the size of representations were becoming less relevant, with Offices indicating that the clarity of the representation was more important.

23. In conclusion of the discussion on document SCT/19/2, the Chair stated that all comments on possible areas of convergence made by delegations would be recorded in the Report of the meeting. The Secretariat was requested to prepare a new document for consideration at the next session of the SCT, taking into consideration all requests for amendments, and consisting of a general introduction, a description of areas of convergence as amended, and, where appropriate, explanatory notes.

*Trademark Opposition Procedures – Possible Areas of Convergence*

24. Discussion was based on document SCT/19/3. In respect of individual possible areas of convergence, the Chair noted the following:

Possible area of convergence No. 1 (Third Party Intervention in Trademark Registration Procedures)

25. The SCT was in agreement with area of convergence No. 1, subject to adding a reference to interested third parties and the public at large. Furthermore, a note would be added clarifying that this area of convergence did not create a presumption of who had legal standing in the procedures mentioned.

26. The SCT noted that the Delegation of Mexico considers that the invalidation procedures conducted at its industrial property office constituted a post-registration opposition procedure.

Possible area of convergence No. 2 (Relation Between Opposition and Examination Procedures)

27. The SCT was in agreement with area of convergence No. 2.

Possible area of convergence No. 3 (Grounds for Opposition)

28. The SCT was in agreement with area of convergence No. 3, subject to an amendment to the effect that opposition procedures should allow oppositions to be raised at least based on prior trademark rights in the jurisdiction concerned.

Possible area of convergence No. 4 (Entitlement to File an Opposition)

29. The SCT was in agreement with area of convergence No. 4, subject to an amendment to the effect that at least owners of prior trademark rights in the jurisdiction concerned should be entitled to raise an opposition.

Possible area of convergence No. 5 (Opposition Period)

30. The SCT was in agreement with area of convergence No. 5, subject to changing the words “would run over two months” to “would be two months.”

Possible area of convergence No. 6 (Observations)

31. The SCT was in agreement with area of convergence No. 6, subject to omitting the words “to enter into a formal procedure with the person that has made the observation.”

Possible area of convergence No. 7 (“Cooling-Off” Period)

32. The SCT was in agreement with area of convergence No. 7.

*International Nonproprietary Names for Pharmaceutical Substances (INNs)*

33. Discussion was based on document SCT/19/4.

34. The Chair concluded that the Secretariat would continue to circulate information concerning the publication of new lists of proposed and recommended INNs by way of paper circular and, in addition, by an e-mail alert to all offices of SCT Members and to SCT observers that have subscribed to the SCT electronic forum. Furthermore, the SCT requested the Secretariat to explore together with the WHO Secretariat possibilities of developing a publicly searchable database for INNs.

*Article 6ter of the Paris Convention*

35. Discussion was based on document SCT/19/5.

36. The Chair concluded that the SCT agreed to recommend the following draft decision for adoption by the Assembly of the Paris Union:

1. The reciprocal communication through the intermediary of the International Bureau, under Article 6ter(3)(a) and (b) of the Paris Convention for the Protection of Industrial Property (“Paris Convention”), of signs for which protection under Article 6ter(1)(a) and (b) is requested will be made through a semi-annual publication, in an electronic database on the website of the World Intellectual Property Organization (“WIPO”).
2. This periodical publication will be made on the last working day<sup>2</sup> of the months of March and September, respectively, starting in March 2009.
3. The published signs will be transmitted simultaneously in electronic format stored on a hard carrier to the trademark registration administrations of the States party to the Paris Convention and of the Members of the World Trade Organization (WTO) that are not party to the Paris Convention, which have made an express request to that effect.
4. For the purposes of Article 6ter(4) and (6) of the Paris Convention, the date of the electronic publication shall be considered to constitute the date of receipt of a communication by any State party to the Paris Convention or any other party bound to apply Article 6ter of the Paris Convention.
5. This decision is without prejudice to the application of Article 6ter(3)(a) *in fine*.

#### Agenda Item 7: Industrial Designs

*Summary of Replies to the Questionnaires (Parts I and II) on Industrial Design Law and Practice (SCT/18/7 and SCT/18/8 Rev.)*

*Industrial Design Law and Practice – Analysis of WIPO Questionnaires and Some Conclusions*

37. Discussion was based on documents SCT/19/6 and WIPO/STrad/INF/2.
38. The Chair concluded that work on the documents for the present session would be continued at the next session of the SCT.

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<sup>2</sup> According to the WIPO calendar.

Agenda Item 8: Geographical Indications

39. The Chair noted that there were no working documents or proposals for discussion at this meeting.

*Twentieth Session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT/20)*

40. The Chair announced as tentative dates for SCT/20, December 1 to 5, 2008.

[Annex II follows]



ANNEX II

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

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(dans l'ordre alphabétique des noms français des États)  
(in the alphabetical order of the names in French of the States)

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\* Sur une décision du Comité permanent, les Communautés européennes ont obtenu le statut de membre sans droit de vote.

\* Based on a decision of the Standing Committee, the European Communities were accorded member status without a right to vote.

II. ORGANISATIONS INTERNATIONALES INTERGOUVERNEMENTALES/  
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