

WIPO



SCT/8/7Prov.2
ORIGINAL:English
DATE:November8,2002

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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON THE LAW OF TRADE MARKS, INDUSTRIAL DESIGNS AND GEOGRAPHICAL INDICATIONS

Eighth Session
Geneva, May 27 to 31, 2002

DRAFT REPORT

prepared by the Secretariat of WIPO

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 eighth session, in Geneva, from May 27 to 31, 2002.
2. The following States members of WIPO and/or the Paris Union for the Protection of Industrial Property were represented at the meeting: Albania, Algeria, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Czech Republic, Democratic Republic of Congo, Denmark, Dominican Republic, Egypt, El Salvador, Ecuador, Finland, France, Germany, Greece, Guatemala, Haiti, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Latvia, Lebanon, Lithuania, Luxembourg, Mauritius, Mexico, Morocco, Netherlands, Niger, Norway,

Paraguay, Philippines, Portugal, Qatar, Republic of Moldova, Republic of Korea, Romania, Russian Federation, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Ukraine, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia (78). The European Communities were also represented in their capacity of member of the SCT.

3. The following intergovernmental organizations took part in the meeting in an observer capacity: Benelux Trade Mark Office (BBM), International Vine and Wine Office (OIV), Organization of African Unity (OAU), World Trade Organization (WTO) (4).

4. Representatives of the following international non-governmental organizations took part in the meeting in an observer capacity: American Intellectual Property Law Association (AIPLA), Center for International Industrial Property Studies (CEIPI), European Communities Trade Mark Association (ECTA), International Federation of Wines and Spirits (FIVS), International Federation of Industrial Property Attorneys (FICPI), International Association for the Protection of Industrial Property (AIPPI), International Trademark Association (INTA), International Wine Law Association (AIDV), Japan Patent Attorneys Association (JPAA), Japan Trademark Association (JTA), International Chamber of Commerce (ICC), Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law (MPI) (12).

5. The list of participants is contained in the Annex of this Report.

6. Discussions were based on the following documents prepared by the International Bureau of WIPO: "Agenda" (document SCT/8/1), "Proposals for further Harmonization of Formalities and Procedures in the Field of Marks" (document SCT/8/2), "Suggestions for the Further Development of International Trademark Law" (document SCT/8/3) and, "Document SCT/6/3 Rev. on Geographical Indications: Historical Background, Nature of Rights, Existing Systems for Protection and Obtaining Protection in Other Countries" (document SCT/8/4) and "Addendum to Document SCT/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems for Protection and Obtaining Protection in Other Countries)" (document SCT/8/5).

7. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions on the basis of all the observations made.

Agenda Item 1: Opening of the Session

8. Mr. Shozo Uemura, Deputy Director General, welcomed all the participants on behalf of the Director General of WIPO and presented to the SCT, the new Sector of Trademarks, Industrial Designs, Geographical Indications, and Enforcement, which covers the International Registration Systems (Madrid, The Hague and Lisbon), the International Trademarks and Industrial Designs Classifications and the Development of International Law. Mr. Uemura also informed the SCT that two new countries had acceded to the Trademark Law Treaty (TLT) since the seventh session of the SCT, namely Kyrgyzstan and Slovenia, bringing the total number of members to this Treaty to 28.

9. Mr. Rubio, welcomed all the participants on behalf of the Secretariat and made a short introduction of the issues discussed in the previous meetings of the SCT.

10. Mr. Denis Croze (WIPO) acted as Secretary to the Standing Committee.

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

11. The Delegation of India proposed as Chair of the SCT for the year 2002 Mr. Zeljko Topic (Senior Advisor, State Intellectual Property Office, Republic of Croatia) and as Vice -Chairs Ms. Valentina Orlova (Head, Legal Department, ROSPATENT, Russian Federation) and Ms. Nabila Kadri (Director, Trademarks, Industrial Designs and Appellations of Origin, Intellectual Property Office (INAPI), Algeria).

12. The Delegation of the United States speaking on behalf of Group B and the Delegation of Norway endorsed the proposal.

13. The Standing Committee unanimously elected the Chair and Vice -Chairs as proposed.

Agenda Item 3: Adoption of the Agenda

14. The draft Agenda (document SCT/8/1) was adopted without modifications.

Agenda Item 4: Adoption of the Draft Report of the Seventh Session

15. The Secretariat informed the Standing Committee that, following the procedure adopted by the SCT, comments were made on the Electronic Forum of the SCT in respect of paragraphs 32, 60, 61, 63 and 70. The above mentioned paragraphs were amended consequently in document SCT/7/4Prov.

16. The Delegation of Mexico said that in paragraph 34 the words “collective marks” should be used instead of “certification marks”.

17. The SCT adopted the Draft Report of the seventh session (document SCT/7/4Prov.) as modified.

Agenda Item 5: Trademarks

General remarks

18. The Chair recalled that the TLT was adopted in October 1994 and came into force on August 1, 1996.

19. The Secretariat introduced document SCT/8/2 and emphasized that it contains proposals made by the International Bureau aiming at further harmonizing formalities and procedures in the field of marks. The Secretariat specified that this document should be considered at this stage only as a basis for discussion. The Secretariat also explained that draft provisions on trademark licenses and on administrative and final clauses were put between brackets as

“reserved” since it was felt premature at this stage to include such provisions, pending general orientation being given by the Delegations on the document. The Secretariat added that the amendments to the TLT, introduced in document SCT/8/2, try to harmonize the TLT with similar provisions of the Patent Law Treaty (PLT), adopted in May 2000.

20. The Delegation of Japan inquired about the timetable and procedure which should take place in connection with the draft provisions contained in the document.

21. In response to the Delegation, the Secretariat stated that it was up to the SCT to decide the timetable and the procedure.

22. The Delegation of Germany stated that an amended trademark law came into force in Germany in October 2001, enabling its country to ratify or accede to the TLT in a near future. Only some small technical difficulties have to be solved in this respect.

23. The Delegation of Australia explained that business circles in its country found the TLT very beneficial to their interests since the implementation of this Treaty by Australia. Concerning the timetable and mechanism of adoption of the draft provisions of a revised TLT, the Delegations said that the SCT should have a preliminary discussion before proposing any recommendation to the appropriate body, provided that a consensus existed.

24. The Delegation of Brazil pointed out that the discussions on document SCT/8/2 should not prejudge the final outcome, and stressed that the Committee should only envisage to discuss and identify the issues before talking about the way of adopting the draft provisions. The Delegation expressed concern that soft law instruments, such as the WIPO Joint Recommendations, could be incorporated into treaties.

25. The Representative of AIPPI observed that, when the SCT adopted the provisions of the Joint Recommendation concerning trademark licenses, it was suggested to add them to the TLT. He added that SCT Members also considered, when discussing the future work of the SCT, that a revision of the TLT should be considered as a priority by this Committee. As far as document SCT/8/2 is concerned, the representative suggested to discuss draft Article 8 before discussing other articles.

26. The Representative of INTA stated that it strongly supported the work of the SCT with regard to the revision of the TLT and further harmonization of trademark laws, which would bring important potential benefits to the trademark holders. The representative emphasized the importance for its organization of a revision of the TLT, adding that provisions concerning electronic filing and licenses will encourage new countries to join this treaty. He also added that the SCT should deal with non-traditional marks. As regards geographical indications, INTA strongly supported the work of WIPO, particularly with regard to conflicts between trademarks and geographical indications.

27. As a result of this discussion, the Chairs suggested that the proposals for further harmonization of formalities and procedures in the field of marks (document SCT/8/2) should be discussed first.

28. The Delegation of Australia agreed with the proposal that formalities should be discussed first, beginning with Article 8 (Communications).

29. The Delegation of Switzerland said that the discussions should start with specific proposals contained in the document before talking about the administrative clauses.

Article 8 (Communications)

30. The Secretariat introduced the provision which deals with communications.

31. The Delegation of Egypt preferred to the Agreed Statement adopted by the Diplomatic Conference for the Adoption of the Patent Law Treaty (PLT) aiming at facilitating the implementation of the relevant provisions of the PLT concerning electronic filing. The Diplomatic Conference requested the General Assembly of WIPO and the Contracting Parties to the PLT to provide to the developing and least developed countries and countries in transition with additional technical assistance to meet their obligations under the PLT, even before the entry into force of the Treaty. The Delegation emphasized the position of developing countries in respect of provisions concerning electronic filing which might be difficult to comply with and stressed the importance of this Agreed Statement for these countries. The Delegation added that further comments would be made by its Delegation on this question in the future after having discussed it with its specialists.

32. The Delegation of Australia said that its IPO office had introduced an electronic communications system, positively evaluated by the applicants. However, the Delegation stated that it shared the concerns of the Delegation of Egypt and of other developing countries. The Delegate added that no provision concerning could require Member States to accept electronic filing ~~should not~~ because this would cause problems to the developing countries.

33. The Secretariat introduced paragraph 1(a) and precised that the requirements that a Contracting Party is permitted to apply under this provision are prescribed in Rule 5 bis. The exception in respect of the filing date under Article 5(1) is needed because that Article provides for a filing date to be accorded where the prescribed elements of an application are filed, at the option of the applicant, on paper or as otherwise permitted by the Office, for the purposes of the filing date. The effect of the reference to Article 3(1) in the provision is that, in the case of an application, the requirements in respect of the form or contents of an application under that Article prevail over the provisions under this paragraph. The “form” of communication refers to the physical form of the medium which contains the information (for example, papers, sheets, a floppy disk or an electronically transmitted document). The “means of transmission” refers to the means, whether physical or electronic, used to transmit the communication to the Office. The term “filing of communications” refers to transmission of a communication to the Office. A Contracting Party is not required to accept the filing of communications in any and all electronic forms, or by any and all electronic means of transmission, simply because that Contracting Party permits the filing of communications in electronic form or by electronic means.

34. The Delegation of the European Communities, also speaking on behalf of its Member States, asked whether “electronic means” includes facsimiles and wondered whether the possibility of adding new means of communications in the future should be provided for.

35. Australia stated that according to its national law, electronic communications cover all forms of communications, including e-mails, telefacsimiles and also other future technologies. It said that means of communications should not be defined too closely and that the words used in a treaty should be broad enough to cover future technical developments.

36. In response to the question of the Delegation of the European Communities, the Secretariat stated that Rule 5 *bis*(2), which refers to Article 8, precisely that telefacsimiles are included.

37. The Delegation of Germany suggested that the Secretariat should indicate whether the proposed provisions are identical with the provisions of the PLT.

38. The Delegation of Mexico supported the statement made by the Delegation of Egypt concerning developing countries and stated that in respect of the PLT, the Director General of WIPO had made the commitment that WIPO would provide for the necessary technical assistance to the developing countries before June 2005. The Delegation added that without a similar commitment it would be difficult for developing countries to join a revised TLT.

39. The Representative of AIPPI inquired about the purpose of the time-limit in Article 8(1)(d).

40. The Delegation of Australia drew attention to the fact that Article 8(1) enables the introduction of electronic filing but should not be considered as mandatory. The [referenceto a time-limit in Article 8\(1\)\(d\) does not create either an obligation to introduce electronic communications on the contrary the whole context of Article 8 is intended to make it clear that no such obligation exists.](#)

41. The Secretariat referred to the Notes of the relevant Rules of the PLT and underlined that, according to the provisions, a Contracting Party is obliged to continue to accept the filing of communications on paper for the purpose of complying with a time limit, even where after the deadline fixed in Rule 5 *bis*, a Contracting Party excludes the filing of communications on paper. After that time-limit, countries are permitted to exclude communications on paper. These provisions have no effect on the countries which do not accept other applications than paper applications. Moreover, the obligation to accept filings on paper has been guaranteed for five years after the entry into force of the PLT.

42. The Delegation of the United Kingdom stated that electronic filings should be encouraged. However, the filing on papers should remain as an opportunity for the developing countries.

43. The Representative of AIPPI expressed his opinion that the electronic filings should be encouraged and that the relevant provisions should be an article and not in the Regulations.

44. The Delegation of Mexico explained that the majority of the developing countries did not have equipments, trained staff or software to receive or file electronic communications. Referring to the IMPACT project and to the WIPO net, the Delegations suggested that developing countries receive technical assistance from WIPO in this respect.

45. The Delegation of Egypt agreed with the statement made by the Delegation of Mexico. National Trademark Offices need to be modernized as it has been done already in respect of Patent Offices.

46. The Delegation of the United States of America stated that the revision of the TLT has a primary importance for its country and that the aim should be the convening of a diplomatic conference for the revision of the Treaty. As a recent member of the TLT, the United States of America found it very valuable for applicants. The Delegation also stressed its interest for the development of electronic filing at each own discretion, taking into account the differences of development of the IP offices.

47. The Delegation of Croatia suggested to redraft paragraphs (b) and (c) by saying “A Contracting Party may exclude the filing of communications...”

48. The Delegation of Yugoslavia supported the Delegation of the United Kingdom with regard to the aim of the provisions which should encourage electronic filing. However, the provisions should not provide only for filing by electronic means and exclude filing on paper.

49. The Delegation of Australia referred to the comments made by the Delegation of Croatia and wondered whether the TLT provision on electronic communications should exactly reflect the provision of the PLT or whether a clearer language should be adopted. The Delegation indicated that it considered that consistency with the approach of PLT was desirable. However, where the meaning of the PLT provision is not clear, which this debate indicates is the case in this provision, the SCT should take the opportunity to improve it.

The Delegations said that it would favor a clearer language and raised the question whether paragraph (d) should be deleted.

50. The Delegation of the United Kingdom stated that the TLT should be consistent with the PLT and raised a general question concerning the main purpose of the provision, i.e., promoting electronic filing.

51. The Representative of the CEIPI said that one should pay attention to the danger of imposing a time limit for obliging electronic filing. Supporting the Delegations of Egypt and Mexico, he stated that the experience in the PCT has shown that problems are not limited to developing countries.

52. The Delegation of China pointed out that nothing in the proposed Article 8(1) would prevent members from keeping filing on paper and said that paragraph (d) seems to be superfluous.

53. The Delegation of Colombia suggested to draft paragraphs 1(b) and (c) in an affirmative form.

54. The Delegation of Belgium noted that Article 8(1)(d) of the ePLT reads “shall,” whether it says “may” in the proposed TLT. The Delegation therefore suggested to delete (d) in the provisions since it is already covered by (c).

55. The Delegation of Spain had some reservations as to the deletion of Article 8(1)(d) although it agreed that (d) is included in (c). However, it preferred to keep (d) as it is because it deals specifically with the compliance with a time limit.

56. The Delegation of Sudan supported the position of the Delegations of Mexico and Egypt. The Delegation did not favor an excessive encouragement of electronic filing and stressed that the needs of developing countries should be taken into account with a view for these countries to have the sufficient time to implement electronic filing.

57. The Delegation of France supported the Delegation of Belgium as far as the differences between the TLT and the PLT are concerned, stating that these differences are not essential since they only relate to a possibility.

58. The Delegation of Uruguay agreed with the Delegation of Colombia concerning paragraphs (b) and (c) of Article 8. The negative phrasing may lead to confusion and the wording should be clearer in the affirmative. In respect to paragraph (d), the Delegation thought it was not a good idea to delete it, provided that (b) and (c) stay in the negative.

59. The Representative of the AIPPI sought clarification as to whether there were two obligations or one obligation under the PLT for the possibility to have electronic filing.

60. The Representative of the CEIPI pointed out that the PLT creates an obligation for the offices to accept the filing of communications on paper for the purpose of complying with a time limit. It suggested to maintain Article 8(d) as it is and change “may” to “shall.”

61. The Representative of the AIPLA supported the suggestion of the CEIPI.

62. The Representative of the AIPPI, referring to the comments made by the Delegation of the United Kingdom, stated that the discussions should focus on what the SCT wishes to achieve and not the wording. On the basis of the consensus on the introduction of electronic filing and the possibility to maintain paper filing, he suggested that the Secretariat rewrite Article 8(1) and Rule 5bis for the next meeting in a clearer language.

63. The Delegation of Australia referred to the statement of the Representative of the AIPPI and underlined that the issue is twofold: firstly, whether or not in reaching an agreement in the SCT on the electronic filing, an obligation is imposed on the legal system of Member States. Secondly, whether Member States are permitted to create obligations for nationals of other States who wish to file an application in these States. Then comes a third issue relating to the exception to be provided: the filing date and time limits.

64. The Chairman agreed with the statement of the Delegation of Australia relating to the aim of the provision. He summarized the discussion saying that the SCT seems to agree to encourage electronic filing and to avoid compulsory obligation on offices that are not in favor of electronic filing. He suggested that the International Bureau should prepare a new draft provision on the basis of the discussions.

65. The Delegation of China stated that it is of the view that the provision neither creates an obligation on any Contracting Party to introduce electronic filing nor prevents contracting parties from doing so.

66. The Delegation of Mexico agreed with the conclusion of the Chairman. However, it raised some concerns relating to the fact that the introduction of an electronic filing procedure by a country creates obligations on others. The Delegation of Mexico is not opposed to the proposed provision, provided that a clearer drafting be proposed, taking into account the

compromise achieved within the framework of the PLT. The technical assistance given to countries to receive electronic filings should also be related to the sending of electronic filing to offices that exclude paper. The Delegation added that the problem of the deadline to be fixed by some offices to exclude paper filing has also to be solved.

67. The Delegation of the United Kingdom thought there was a consensus to encourage electronic filing but not disadvantaging paper filing.

68. The Delegation of Brazil supported the Delegation of Mexico.

69. The Representative of the AIPPI precised that even if electronic filing was imposed, foreign applicants would have to go through a local representative whom they may receive the communications on paper, and then send them electronically.

70. The Chairman concluded that Article 8(1) should be redrafted for the next session of the SCT to include the suggestion expressed by the Delegations. e

Article 8(2)

71. The Secretariat noted that Article 8(2) (Language of Communications) is similar to Article 3(3) of the existing TLT with two modifications relating to the introduction of the words “holder or other interested person” and the deletion of the word “application” replaced by “communications.” Articles 10(1)(c) (Changes in Names and Addresses), 11(2) (Change in Ownership) and 13(3) (Renewal) also had a similar language. Article 8(2) should not only cover the filing of an application but should apply to all the subsequent procedures of a mark in an office.

72. The Delegation of Australia supported Article 8(2) and ~~wondered whether~~ suggested that there was no need for the language provision in other articles ~~should to~~ be maintained.

73. The Delegation of Switzerland stated that the language provision in Article 10(1)(c) (Changes in Names and Addresses) and Article 13(3) (Renewal) should be maintained for the sake of clarity. or the

74. The Representative of the AIPPI supported Article 8(2) but considered that maintaining Articles 10(1)(c) and 13(3) would constitute a superfluous repetition of Article 8(2).

75. The Representative of the CEIP I, although sharing the views of the Representative of the AIPPI, sought a clarification on the original purpose of the second sentence of Article 8(2), particularly for multilingual countries like Switzerland which may use different languages in the trade mark applications.

76. The Representative of the AIPPI said that Switzerland allows the filing in three languages, but obliges that the list of goods and services for international applications be only in French for convenience purposes in its Office.

Article 8(3)

77. The Secretariat noted that this article was a global provision, as in Article 8(2), providing that a Contracting Party shall accept communications filed on Model International Forms, as in the existing provisions of the TLT. The effect of the words “subject to paragraph 1(b)” is that the Contracting Party which does not accept a communication other than on paper is not obliged to accept the filing of a communication on a Model International Form that applies, for example, to communications filed by electronic means of transmittal.

78. The Delegation of Spain suggested that, in the Spanish text, the words “sujeto a lo dispuesto” (subject to) should be replaced by “de acuerdo con lo dispuesto” and that the words “del contenido” (of the contents) should be deleted.

79. The Delegation of Australia observed that for simplicity reasons since it is a generic provision for communication, similar provision in other articles should be deleted. The Delegation also noted that the English text, as the Spanish text, could be clarified with regard to the wording “presentation of the contents” and suggested to say “a Contracting Party shall accept the presentation of a communication on a Form which corresponds to the Model International Form.”

Article 8(4)

80. The Secretariat commented that Article 8(4) (Signature) was modified because of the specific nature of electronic filing. Since discussions on electronic signature are still under way at the international level, this provision is conceived in broad terms and makes an express reference to the Regulations where details may be fixed. The Regulations concerning signature therefore covers signature on paper and when filing electronically. Paragraph (b) of Article 8(4) obliges Contracting Parties to accept the signature of a person as a sufficient authentication of a communication without the need for further authentication by way of attestation, notarization, authentication or legalization of that signature. This provision falls within the spirit of the TLT in that it reduces the administrative burden on applicants and also IP offices. Paragraph (c) provides, as it is already the case in the existing TLT, that in case of reasonable doubt on the authenticity of the signature, the office can require the applicant to file any evidence of authenticity of this signature. Such evidence, at the option of the applicant, holder or any other interested person, can be in the form of a certification even if that certification may not be required by the office under Article 4. The Regulations also provide that the office may be obliged to inform the applicant of the reason for its doubts concerning the authenticity of the signature.

81. The Delegation of Spain said that the wording of this provision could be improved in order to make clear that where a Contracting Party requires “that a communication be signed” that Contracting Party shall accept any signature that complies with the requirements prescribed in the Regulations. The Delegation specified that a Contracting Party may not require a signature for any communication.

82. The Delegation of Austria asked whether the Secretariat could clarify why this provision is different from the provision of the PLT since it is limited to the surrender of a registration in the proposed text and since the PLT also covers all quasi-judicial proceedings.

83. The International Bureau said that this provision was a compromise between what is in the current TLT and what is in the PLT resulting in a broader approach in the TLT than in the PLT.

84. The Representative of the AIPPI precised that the purpose of the TLT provision is to avoid attestation, notarization, authentication or legalization of a signature. The Representative recalled that this provision, which already exists in the TLT, was a major achievement of this treaty and should therefore be maintained.

85. The Delegation of Australia supported the AIPPI and added that it was not in favor of a new provision concerning the authentication of a signature because of its proved usefulness from the users point of view. The Delegation added that Article 8(4)(b) is not a proposal by the Secretariat but the existing provision of the eTLT which should be restricted to the surrender of a registration. With regard to the quasi-judicial actions before the office, some situations in Australia require some form of statutory declaration. However, it is not the signature itself that needs authentication or notarization.

Article 8(5)

86. The Secretariat noted that this provision should be precised in the Regulations, with regard to specific indications to be provided under Article 8(5), or other indications relating to the representative.

87. The Delegation of the European Communities, speaking on behalf of its Member States, thought that since the regulations do not contain at this stage of the discussions any provision in this respect, it would be coherent to leave it flexible for the moment.

88. The Representative of the AIPPI shared the views of the Delegation of the European Communities and suggested to leave this provision between brackets pending further discussions. The Representative was concerned by the fact that it might open the door to additional requirements which would endanger the existing requirements which can be asked by IP offices.

89. The Delegation of Sweden supported the comments made by the Delegation of the AIPPI and the European Communities.

90. The Delegation of Australia supported the comments made by the Delegations of the AIPPI, the European Communities and Sweden. The Delegation thought that this provision should be rewritten in the negative along the following line: "A Contracting Party may not require that a communication contains any indication other than those prescribed in the Regulations" otherwise the Delegations said that it would prefer to delete the provision.

91. The Representative of the CEIP supported the comments made by the previous Delegations and pointed out that excluding this provision would have no consequence since nothing in Article 8(5) forbids contracting parties from applying other demands. He said that the provisions could provide for a general clause on communication, not limited to the signature as in Article 4(b), but would prefer, as proposed by Australia, a negative redrafting of this provision.

92. The Chairman said that even if this provision is redrafted in a negative way, there is still need for some proposals concerning the rules. He therefore asked the SCT for its comments.

93. The Delegation of Mexico said that Article 8(5) should be maintained given its link with Rule 7 and wondered to what rule Article 8(5) could refer otherwise.

94. The Delegation of the European Communities, also speaking on behalf of its Member States, asked for a clarification with regard to the scope of this provision. It asked whether in a communication in an opposition procedure, it would be possible to require that the agent or the domicile be identified? The Delegation wondered whether this would be one of the cases where this rule will apply or whether the regulations would stipulate that in the case of an opposition procedure, other conditions could not be required. Given that the regulations will not foresee each individual case, it would be difficult to restrict the office not to ask for information that would be necessary. The Delegation said that Rule 7 is a general rule that applies to all kinds of situation and asked for some clarification on this provision.

95. The Representative of the AIPPI observed that it is difficult to make concrete propositions at this stage because this proposed rule is new to all the Member States. He suggested to leave Article 8(5) between brackets and to have it in a negative way. Furthermore, he proposed that time be given to study closely this article and to come up with concrete proposals having in mind that Article 8(5) deal only with indications which are not excluded by other articles.

96. The Delegation of Australia underlined that this article does not refer to Rule 7. The Delegation said that the proposal was good but had nevertheless a reservation about it in that it could open the door to let in new requirements that might interfere with other provisions. This new provision on communications should apply to all communications in front of an IP office. Anything to be added should be restricted to all applicable procedures in front of an IP office. This would be difficult without interacting with the provisions already dealt with. The Delegation agreed with the proposal to give more time to Member States to think about this provision.

97. The Chairman concluded that this discussion was to put this provision between brackets giving time to the Member States to further study it before sending their comments to the Secretariat.

98. The Delegation of Australia agreed with the proposal of the Chairman.

99. The Chairman made a summary of the discussion of the first day of the SCT meeting. The Committee extensively discussed the provisions of paragraphs (1)(2)(3)(4) and (5) of Article 8 and Rule 5bis.

Article 8(6)

100. The Secretariat explained that what constitutes an address in this provision, depends of the applicable law of each Member State. This provision does not require a lot of explanation. Paragraph (iii) was intended to provide for any future developments which

might necessitate a Contracting Party requiring another address besides the one under (i) and (ii), for example an e-mail address. For the moment, the regulations do not provide for something specific concerning (iii). Concerning (ii), in the existing TLT, the words “address for service” are used instead of “address for legal service” used in the PLT.

101. The Delegation of Australia stated that it preferred the wording as amended. The wording of (i) and (ii) draws a clear distinction between an address where correspondence could be sent and an address which can satisfy the requirements under domestic laws for documents to be served on parties in proceedings before a court. Therefore, this wording makes the distinction more clear than in the current TLT. Although paragraph (iii) has some merits, it leaves out the question of adding further requirements with which the Delegation is hesitant.

102. The Delegation of Algeria wanted to know whether “other interested person” could be replaced by “representative” because it is a third party who is intervening here.

103. The Secretariat said that this should be dealt with in the context of Article 1 (Abbreviated Expressions) to see whether the concept needs to be specifically defined. These words are used in the PLT and are conceived in broad terms to cover in particular, a natural person and a legal entity.

104. The Delegation of Japan sought clarification of the meaning of “legal service” and about the difference between “legal address” and “address for correspondence.”

105. The Chairman said that this issue has been referred to by the Delegation of Australia, “Legal service” makes a reference to the national legal system of Member States.

106. The Delegation of Australia added that “address for correspondence” was the place where all type of information could be sent whereas “address for legal service” was the place where legal documents could be served referring to—in judicial and quasi-judicial situations. An “address for correspondence” could be an e-mail or a post office box under Australian law.

107. The Delegation of Canada stated that in Canada for prosecution or registration of a trademark, an agent or a lawyer is not necessary since the applicant can act by himself. Therefore, only an “address for correspondence” is required. However, in opposition proceedings, an agent or a lawyer is required and therefore an “address for legal service” is required.

108. The Delegation of Yugoslavia stated that, in its country, the applicant can file an application without a representative, except for foreign applicants. In revocation proceedings, especially when a mark is registered under the Madrid Agreement, if a foreign applicant does not have a local representative, the IP offices should communicate with him through a temporary local representative who will receive the communications. The Delegation thought that this is why there is this distinction in this provision.

109. The Delegation of China stated that in China and in Hong Kong, SAR, the indication of the address for legal service had nothing to do with the appointment of a legal representative but with legal actions in Courts or in the IP offices. The address is regarded as an address within the jurisdiction where the judgement at the end of the proceedings could be enforced.

110. The Delegation of Croatia wondered whether a Contracting Party could ask for any type of address and wanted to know whether (i) to (i) and (ii) were cumulative. In case they are not cumulative, the word “or” could be added between (i) and (ii). The Delegation also suggested to replace “legal service” by “any other appropriate address.”

111. The Secretariat stated that sub-paragraphs (i), (ii) and (iii) were not cumulative. Contracting parties may require them accordingly with their national laws.

112. The Delegation of Australia wondered whether this provision was at the appropriate places since it could suggest that in each correspondence with the IPO office, a Contracting Party may require each of those indications.

Article 8(7)

113. The Secretariat explained that Article 8(7) (Notification) provided for a time limit which is not yet provided for in the regulations. Member States views on the relevant time limit were welcomed in order to draft a rule for the next session.

114. In the absence of comments, the Chairman moved to Article 8(8) (Non-Compliance with Other Requirements).

Article 8(8)

115. The Secretariat noted that the time limit under this provision should also be included in the regulations. The effect of the reference to Article 5 is that, where an application complies with the requirements under that article for according the filing date, a Contracting Party is obliged to accord that filing date and cannot revoke the filing date for failure to comply with the requirements applied under paragraphs (1) to (6), even where the application is subsequently refused or considered withdrawn under this.

116. In the absence of comments, the Chairman decided to close the discussion on Article 8 and to proceed with Article 13 *bis* and Article 13 *ter*.

Article 13 bis and 13 ter

117. The Secretariat explained that Article 13 *bis* and Article 13 *ter* were new articles as in the PLT. Article 13 *bis* obliges a Contracting Party to provide relief in respect of time limits. Such relief could be in the form of an extension of the time limit or a continued processing, and is subject only to the filing of a request in accordance with the requirements of paragraph (1) or (2) and Rule 9. In addition, the relief is subject to the payment of any fee required under paragraph (4). The Secretariat stressed that the relief under paragraphs (1) and (2) is restricted to the time limit “fixed by the office for action in a procedure before the office.” “Procedure before the office” is not defined in the current TLT and could be defined when Article 1 (Abbreviated Expressions) will be discussed. An example of a time limit that is fixed by the office, is the time limit for response to a substantive examination report. It is pointed out that Article 13 *bis* does not deal with time limits not fixed by the office and therefore does not apply for actions in front of a Court. A Contracting Party may provide for

both reliefs stated in (i) and (ii). The details are developed in Rule 9. If the Contracting Party does provide for an extension after the expiration of the time limit under (ii) then, this Contracting Party must provide for continued processing as stated in paragraph 2.

118. The Delegation of Switzerland supported Article 13 *bis* because it leaves a choice to contracting parties. However, this Delegation sought a clarification on the list of exceptions in Rule 9(5) particularly with regard to sub -paragraph (iv) and (v) which are not time limits fixed by the office. s

119. The Delegation of Japan stated that if relief were allowed for priority rights, it would hamper third party rights.

120. The Delegation of Brazil stated that thenon -compliance of a time limit under Article 13 *bis* without sanctions would not be in compliance with Brazilian law and suggested to draft the provision to include the possibility of imposing sanctions. The Delegation asked the Secretariat whether Rule 9 (5) could be understood as giving Contracting Parties the possibility to include sanctions and wondered why the exceptions could not be included in the provisions instead of the regulations.

121. The Secretariat, in reply to the Delegation of Switzerland, stated that the exceptions in Rule 9 (5) in principle do not apply to time limits laid down by national law, however (iv) and (v) were mentioned in the PLT.

122. The Delegation of Switzerland said that it would favor more exceptions being added to Rule 9(5).

123. The Delegation of Australia sought clarification as to whether Article 13 *bis* applies to time limits set by IP offices for practical matters and not to time limits fixed by national legislation.

124. The Representative of CEIP said in response to the Japanese Delegation, that time limits fixed for priority rights are set by national legislation in most cases. The Representative suggested that the word "mark" should be replaced by "registration of a mark" in Article 13 *bis* and Article 13 *ter* as well as in other provisions in order to comply with Article 1.

125. The Delegation of Australia indicated that the goal of the provision is to limit the possibility for IP offices to impose additional time periods in addition to those set by national legislation. Because of the complexity of this provision, this Delegation asked whether it was worth fixing this problem.

126. The Secretariat took note of the drafting suggestion made by the Representative of CEIP concerning the wording "registration of a mark." In reply to the Delegation of Australia, it precised that the aim of this provision is to try to harmonize IP offices practices. Although this provision is less important in the field of trademark than for patents, it might be worthwhile having it for trademark owners.

127. The Delegation of the European Communities, speaking also on behalf of its Member States, wondered about the possibility of extending this processing to time limits set by positive law with regard to Article 13 *bis* and suggested that the SCT consider this idea.

128. On Article 13 *bis* (2), the Secretariat stated that this paragraph obliges a Contracting Party to provide for relief in the form of continued processing, after the applicant has failed to comply with a time limit fixed by the office, where that Contracting Party does not provide for the extension of time limits under paragraph 1 (ii). The effect of such continued processing is that the office continues with the procedure concerned as if that time limit had complied with the requirements in respect of the request referred to in Items (i) and (ii) as prescribed in Rule 10(1) and (2).

129. The Delegation of the United Kingdom suggested to include a provision, which could be optional, giving the applicant the opportunity to explain why he or she did not comply with the time limit.

130. The Delegation of Spain suggested that Article 13 *bis* (2) should not be an obligation in order to give more freedom of action to the Contracting Party, particularly when continued processing cannot be pursued.

131. The Delegation of Brazil supported the statement made by the Delegation of Spain.

132. The Delegation of Finland asked whether it would be possible to have continued processing even without getting a notification from the Office that the applicant that he or she did not comply with the time limit. Such a possibility is currently provided for — in a — A draft trademark law under preparation in Finland. Finland provides for that the applicant may file a request for continued processing within two months from the expiry of the time limit.

133. The Delegation of Australia considered that making this provision optional will undermine it and preferred to leave this provision as it is with provision — defining exceptions.

134. The Delegation of the European Communities, also speaking on behalf of its Member States, agreed with the comment made by the Delegation of Finland and asked whether this provision applies only to time limits set by IP offices or also to time limits specified by law.

135. The Secretariat replied that Article 13 *bis* only deals with time limits fixed by IP offices.

136. The Delegation of Australia suggested that in the perspective of harmonization, it could be envisaged that this provision also apply to time limits specified by law.

137. The Delegation of the European Communities, also speaking on behalf of its Member States, stated that an explanatory note should point out that this article should be applied in accordance with national laws.

138. The Secretariat said that it was up to the Committee to decide on an extension beyond the time limits set by the offices. However, it recalled that this might create incompatibilities for some IP offices with their national legislation. Rights of third parties might also be damaged as was stated by the Delegation of Japan.

139. The Chairman opened the floor for comments on Article 13 *bis* (3) (Exceptions).

140. The Delegation of Switzerland suggested to add other exceptions in Rule 9(5).

141. The Secretariat suggested that (vi) of Rule 9 should explicitly precis e hat it does not apply to the right of priority. The right of priority is an important one which is not dealt with in SCT/8/2 contrary to the PLT which provides in its Article 13 with a restoration of a right of priority. For next session, the Secretariat could come up with a new draft if Member States wish to have a specific provision on this problem.

142. On Article 13 bis (4) and (5) the Secretariat stated that, concerning Article 13 bis (4), a Contracting Party is not obliged to require that a fee be paid. Article 13 bis (5) is a provision which reflects similar provisions in the existing TLT and prohibits a Contracting Party from imposing requirements additional to those provided under paragraphs (1) to (4). In particular, the applicant cannot be forced to state the grounds on which the request is based or to send evidence to the office. The Secretariat said that the PLT in paragraph (6) provides for the opportunity to make observations in case of intended refusal. A similar provision should be included in the revised draft of the TLT for the next session. e

143. The Delegation of the Republic of Korea said that the word “may” in this provision opens the possibility for contracting parties to require such requirements in other provisions. For this reason, this Delegation would prefer to change it to “shall.” The same thing applies to Article 3(5).

144. The Secretariat underlined that even with the word “may,” no Contracting Party can require something that is not in the provision or the regulations.

145. The Delegation of Australia observed that there were no substantial differences between no party “may” and no party “shall” and pointed out that the word “shall” had always been used in the TLT.

146. The Delegation of Canada stated that “shall” must be understood like “must” in Canada’s law and suggested, if the intention of Article 13 bis (5) is to be absolute, that “may” be changed to “shall.”

147. The Delegation of Australia while not opposing a change from “may” to “shall” thought it should be done cautiously. The Delegation suggested to the Secretariat to look at this issue and the historical background of this wording, for the next meeting.

148. The Delegation of the Republic of Korea supported the suggestion made by the Delegation of Australia and also pointed to this problem in Article 3(5).

149. No additional comments were raised on Article 13 bis (4) and (5). The Chairman therefore asked the Secretariat to present Article 13 ter (Reinstatement of Rights After a Finding of Due Care or Unintentionally by the Office).

150. On Article 13 ter the Secretariat explained that it obliges a Contracting Party to provide for the reinstatement of rights with respect to an application or a registration, following failure to comply with a time limit for an action in a procedure before the office. In contrast to Article 13 bis, such reinstatement of rights is subject to a finding by the office that the failure occurred despite due care required by the circumstances, or was unintentional. Furthermore, also in contrast to Article 13 bis, this Article is not restricted to time limits fixed by the office

although it is subject to certain exceptions under paragraph (2) and Rule 10(3). The phrasing “that failure has the direct consequence of causing a loss of rights” covers the situation where a failure to comply with that time limit causes a loss of rights with respect to the ability to maintain or obtain a registration of a mark.

151. The Delegation of China questioned the need for such a provision, in addition to Article 13 *ter*, in the field of trademarks. The Delegation precised that this provision is understandable for patents because novelty is an important issue and a loss of rights is equal to the loss of the patent right definitively. However, in the field of trademarks, the applicant can always reapply.

152. The Delegation of Japan said that there is statement of rights as provided in this provision might slow the procedure in IP offices particularly with regard to speedy applications.

153. The Delegation of Switzerland agreed with the comments made by the Delegation of Japan and observed that this legal means plays a minor role in the field of marks contrary to patents.

154. The Delegation of the European Communities, also speaking on behalf of its Member States, wanted to point out that if for patents, novelty and the right of priority were very important, it was also the case in the field of trademarks.

155. The Representative of the AIPPI agreed with the importance of this provision which it considered more important than Article 13 *bis*.

156. The Delegation of China said that there were differences between the laws of the Member States. In China, the difference between patents and trademarks is very clear, priority being fundamental for patents and just a procedural matter for trademarks.

157. The Delegation of the AIPPI said it understands the concern of the Japanese Delegation about the delay in speedy applications. This was an argument for Article 13 *bis*. In Article 13 *ter*, (i), (ii) and (iii) are cumulative. All three points had to be fulfilled to make such a request.

158. The Delegation of Yugoslavians noted that Article 13 *ter*(1) constitutes a strong obligation for Contracting Parties to provide there is statement of rights in accordance with Rule 10. However, the time limit in Rule 10 is too long and will cause legal uncertainty.

159. The Representative of the AIPPI also considered the time limit too long. The Representative also suggested to delete Rule 9(5)(iii) which is more important for patents.

160. Upon request, the Secretariat summarized the discussions concerning the proposal for further harmonization of formalities and procedures in the field of marks. As regards Article 8(1), paragraphs (a), (b) and (c) were accepted as to substance. In Article 8(1)(d) the expression “a Contracting Party may accept...” should be replaced by “shall be accepted...” Article 8(2) is a global provision which enables to delete the reference to languages in other articles. In Article 8(3), the expression “the contents of” should be deleted and the wording

should be “shall accept the presentation of a communication on a Form.” As regards Article 8(4), the expression “requires a signature” should be replaced by the expression “requires a communication to be signed.” Paragraph (5) should be put between brackets. In respect of paragraphs (6), (7) and (8) no specific comments were made. Notes will be prepared by the International Bureau on this Article for the next session.

161. Concerning discussions on Articles 13 *bis* and 13 *ter* the Secretariat further summarized that these articles will be revised in order to clearly differentiate them. As regards Article 13 *bis*(3), in accordance with the suggestion of the Delegation of Switzerland, a claim of priority may be added to the list in Rule 9(5) as in the PLT. For the next session, the International Bureau will insert a new paragraph (6) in Article 13 *bis* which enables that observations may be made within a reasonable time limit. Similar provision is provided for in the PLT. With regard to the “may” provision, the Secretariat will make some research in order to see if there is a clear internationally agreed distinction between the words “may” and “shall.”

162. The Secretariat also stated that Rule 9(4) which referred to Article 13 *bis*(2) would be amended in accordance with the proposals made by some Delegations. The time limit should be two months from the reception of the notification. Moreover, the time limit fixed in Rule 10(2) will be reduced.

163. Finally, the Secretariat confirmed that a revised draft will be put on the SCT Electronic Forum for comments on Articles 8, 13 *bis* and 13 *ter* and the relevant rules, as soon as possible after the eighth session.

164. In the absence of additional comments, the Chairman concluded the discussion on document SCT/8/2.

Suggestions for the further development of International Trademark Law

165. Referring to the Program and Budget for 2002 -2003 which provides for the convening of four meetings of the SCT for the revision of the TLT and harmonization of substantive trademark law. The Chairman pointed out that, at the sixth and seventh sessions of the SCT, a number of Delegations and representatives of governmental and non-governmental organizations expressed the wish to consider issues related to substantive harmonization of laws for the protection of marks.

166. The Secretariat noted that document SCT/8/3 constitutes a first basis for discussion. The subjects are treated in a broad manner in order to cover all existing systems. For the next meeting, the Secretariat will prepare an extended paper based on the discussions in the SCT.

167. The Chairman invited the Delegations to make general remarks concerning the substantive harmonization of trademark laws.

168. The Delegation of Australia explained that as the implementation of the TLT had turned out to be very beneficial to Australian trademark owners, similar benefits are expected from substantive harmonization of trademark laws.

169. The Representative of the ICC suggested that the traditional expression on “trademark” be replaced by the word “mark” as it was the case in French and in Spanish.

Definition of a mark

170. The Delegation of Uruguay supported the substantive harmonization of trademark laws but considered premature to deal with non-traditional marks.

171. The Delegation of Yugoslavia stated that the examination and publication of sound marks and smell marks are problematic. It stressed that offices which examine relative grounds have an impossible task in determining the similarity with earlier rights and need specialized examiners. In the same respect, three-dimensional marks also cause problems because they have to be examined with regard to industrial designs. The difference between trademarks and designs is that trademarks can be protected indefinitely while the protection for designs is granted for 10 or 15 years. In conclusion, the Delegation considered that a discussion on sound and smell marks was premature.

172. The Delegation of Japan was in favor of discussing non-traditional marks and suggested that Member States should have the option of accepting them or not.

173. The Delegation of Barbados expressed its concern with regard to new marks, stressing the difficulties in connection with sound marks infringing copyrights. The Delegation invited other Delegations to describe their experiences with the registration of sound and smell marks.

174. The Delegation of the European Communities also speaking on behalf of its Member States said that the real issue is less the definition of a sign (which should be distinctive) than to discuss under what conditions a mark should be accepted. As regards sound marks, the Delegation indicated that they do not cause problems as long as musical sounds are concerned but are more problematic when they cannot be expressed graphically, as for example a dog's barking. As regards smell marks, the problem is linked to the fact that they might often be graphically similar.

175. The Delegation of Australia stated that the definition should be broad and that it would favor a discussion on the conditions for registration. The conditions for registrability should be that the mark is distinctive and can be represented graphically.

176. The Delegation of the United Kingdom stated that to represent graphically a smell is a difficult problem. A case concerning smell marks is pending with the European Court of Justice.

177. The Delegation of Germany said that its country has a broad definition, along the lines with the TRIPS Agreement. Sound marks are accepted in Germany but not olfactory or hologram marks which are difficult to represent. The Federal Patent Court has concluded that in principle smell marks are registrable but graphical representation remains a major problem. A case brought up by Germany to the European Court of Justice which will issue a decision on this matter soon will clarify this issue.

178. The Delegation of Algeria explained that its country was preparing a revised trademark law which might include sound marks. The problem for the time being is that the Courts shall only accept proof on paper but not diskettes or tapes. The Delegation asked under which class of the Vienna classification sound marks can be registered.

179. The Delegation of Spain stated that the new trademark law which will enter into force on August 1, 2002, provides for two conditions, i.e., the marks should be distinctive and capable of being represented graphically. In Spain, few sound marks have already been registered, in respect of services in class 36. Three-dimensional marks are also accepted and the main problem relates to the border with industrial designs. Holograms and smell marks are not accepted.

180. The Delegation of France stated that sound marks, hologram marks and three-dimensional marks were protected in France. Problems arise in respect of smell marks. France is also waiting for the decision of the European Community Court of Justice in this respect.

181. The Representative of INTA said that the scope of the protection should be as broad as possible and should follow the international developments of case-law. There should be no limitation to any specific type of marks.

182. The Representative of the AIPPI agreed with the representative of INTA and emphasized that the definition could go beyond the TRIPS Agreement definition in stating that the signs shall be capable of being represented graphically, which is broader than "visually perceptible." The expression "represented graphically" is implemented in many laws and covers sound marks, hologram marks and three-dimensional marks. Only olfactory marks may not be covered, but the number of this type of marks is very limited. If one considers registration statistics, two thirds of trademark applications concern words, one third device marks and approximately 1% concerns non-traditional marks. The Representative said that the SCT should not make a recommendation that all countries should accept applications for non-traditional marks but should issue guidelines to help IP offices who wish to accept such marks to be used when receiving such applications.

Absolute grounds for refusal

183. The Representative of the AIPPI explained that subparagraph (ii) relating to signs not capable of distinguishing the goods and services has an identical meaning to subparagraph (iv) relating to signs being generic. According to the Paris Convention, descriptive marks may also be marks which have become customary, for example the word "net" which has become customary. The representative suggested to draft the list of absolute grounds for refusal adding "signs not capable of being graphically represented" in (i) and rewording (ii) concerning non-distinctiveness. In any case, the list of absolute grounds should not be exhaustive.

184. The Delegation of Japan favored a non-exhaustive list of absolute grounds in order, for example, to take account of the changes in business circumstances.

185. The Representative of INTA suggested to add to the list three topics: (1) a general provision where a mark is confusingly similar to prior marks, (2) a bad faith registration and dilution of a well-known mark and (3) violation of earlier rights such as copyright.
186. The Delegation of Canada supported the proposal of Japan and preferred an exhaustive list of absolute grounds, which could also include some elements dealt with under paragraph 10 (conflicts with prior rights).
187. The Delegation of Yugoslavia supported the Delegations of Japan and Canada and said that the offices have a public function to protect trademark owners and consumers.
188. The Delegation of Spain explained that the TRIPS Agreement refers to appellations of origin as absolute grounds for refusal, which should be added to the list.
189. The Delegation of the European Communities also speaking on behalf of its Member States did not agree with the three suggestions made by INTA.
190. The Representative of the AIPPI explained that it is reasonable that offices which examine absolute grounds also examine some points mentioned by the Representative of INTA although they are considered as relative grounds. The Representative underlined that the offices should not refuse marks on other grounds than those mentioned in the Paris Convention and repeated that they would prefer an exhaustive list of absolute grounds.
191. The Delegation of the Russian Federation stated that it was sometimes difficult to draw a line between absolute and relative grounds. In respect of absolute grounds, the list should be exhaustive and as regards relative grounds it should be non-exhaustive.
192. The Representative of INTA explained that they did not make a distinction between absolute and relative grounds. The important thing is the registrability.
193. The Representative of AIPLA said that the functionality of a mark according to the EC Directives should be looked at.
194. The Delegation of Canada explained that the Canadian legislation protects, among others, the royal names and the name of the Red Cross and asked whether these signs should be added to the list.
195. The Representative of the AIPPI answered that these signs are already protected by Article 6 *ter* of the Paris Convention.

Conflicts with prior rights

196. The Representative of the AIPPI stated that relative grounds have to be considered either by the office, the opponent or the Court. The list of the different relative grounds may be broad. The Representative also pointed out that in paragraph 10 (iii), first line, the word "confusingly" should be deleted since a standard has been adopted with respect to well-known marks.

197. The Delegation of Yugoslavia suggested to precise the words “entail a risk of dilution of a well-known mark” which are not clear.

198. The Secretariat explained that paragraph 10 was intended to cover all the different situations existing in the different legislations, and was therefore conceived in broad terms.

199. The Delegation of Japan inquired whether the expression “unfair prejudice” would refer to well-known trade names.

200. The Delegation of France stated that the list of relative grounds should be non-exhaustive.

201. The Representative of the AIPPI explained that paragraph 10(iii) is restricted to well-known trade names.

202. The Secretariat pointed out that in paragraph 10(iv) trade names were mentioned as prior rights.

203. The Representative of the AIPPI confirmed that both the above-mentioned paragraphs include trade names.

Other optional grounds

204. The Chairman proposed that the next topic to be discussed would be the optional grounds for refusal.

205. The Secretariat explained that the basis for discussion could be the conflicts between industrial designs and trademarks and between copyrights and trademarks.

206. The Delegation of Yugoslavia explained that in accordance with the legislation of its country, both copyrights and industrial designs are considered as earlier rights and constitute possible grounds for refusal of a mark. The IP office which registers trademarks and designs will make a search for possible conflicts. As regards copyrights, the IP office checks with the copyright office. Conflicts between marks and copyrights are decided before a Court.

207. The Delegation of the European Communities, also speaking on behalf of its Member States, stated that industrial designs, copyrights, appellations of origin and geographical indications should be considered as earlier rights. Such an approach should not be optional for IP offices.

208. The Delegation of Uruguay stated that the infringement of rights in a protected industrial design or a work protected by copyright should be investigated in depth, particularly with respect to the criteria of novelty.

209. The Delegation of Sweden emphasized that in Article 4.4(c) of the ECD Directive, a right to a name, a right to a personal portrayal, a copyright and an industrial property right were mentioned in particular as earlier rights.

210. The Delegation of Canada found the conflicts between trademarks and copyright very interesting and to look at, and pointed out that the protection of a copyright is 50 or 70 years after the death of a person. The Delegation asked whether a copyright which has fallen in the public domain could be registered as a trademark.

211. The Delegation of Australia said that the protection of copyrights, industrial designs and trademarks were different, their forms of use were different and the rights granted were different. However, these other forms of rights can often represent ownership in material which is the subject of a trademark application. It would therefore be appropriate to allow the Member States, whose legislations so permit, to oppose registration of a mark under these grounds.

212. The Delegation of the United Kingdom referred to the Remington case brought to the European Court of Justice which will draw the line between trademarks and industrial designs.

213. The Delegation of France stated that it is important that industrial designs, copyrights and appellations of origin be included among prior rights.

214. The Representative of the AIPPI confirmed that copyrights and industrial designs should be considered as prior rights and precised that a cumulative protection was possible as a three-dimensional mark and an industrial design. The criterion to take into account concerning a three-dimensional mark should be its distinctiveness.

Rights conferred by Registration

215. The Secretariat noted that Article 16(1) of the TRIPS Agreement defined the rights conferred. The possible subjects for discussion might be the definition of the expression "in the course of trade" and the clarification of the terms "likelihood of confusion" and "likelihood of association." Also the appropriate use of the commonly known signs "TM" and ® could be discussed.

216. The Delegation of Japan asked the Secretariat whether the term "trademark" in subparagraph 14(ii) was also covering well-known meant well-known marks.

217. The Secretariat replied that his subparagraph intended to cover different situations, including well-known marks.

218. The Delegation of Spain stated that the rights conferred by registrations should not be defined only by a negative approach but should also illustrate the positive rights deriving from a registration. An example of positive rights would be the use of a mark in the course of trade. The Delegation emphasized that the rights conferred should also cover the use of the signs on the Internet, as mentioned in the document.

219. The Representative of the AIPPI shared the views of the Delegation of Spain and explained that the registration gives an exclusive right to prevent others from using the mark but also a positive right which should be affirmed. The Representative added that subparagraph 14(ii), as far as dilution or unfair prejudice were concerned, covers marks, and suggested that the standards agreed upon in the Joint Recommendation on the protection of

well-known marks should be included in the discussions. Concerning the terms “confusion” and “association” which constitute a very important question, he precised that the standard in Europe is that likelihood of confusion includes association.

220. The Delegation of Uruguay supported the proposal of the Delegation of Spain and underlined that paragraph 14 is present in most legislations of the Latin American countries.

221. The Delegation of Australia supported the positive approach proposed by the Delegation of Spain and suggested ~~to~~ the International Bureau to further develop this approach in the document to be prepared for the next session. Referring to Australian law, the Delegation explained that there is no positive right to use the work in the course of trade. The Delegation, therefore suggested a non-mandatory provision in this respect.

222. The Delegation of Yugoslavia wondered whether (i) and (ii) should be cumulative and asked for a clarification in the future document. The Delegations supported further discussion on the use of a mark by an unauthorized third party and stated that it should be an important goal for harmonization.

223. The Delegation of Australia emphasized that the different forms of use as mentioned in paragraph 15 of document SCT/8/3 should be discussed.

224. The Delegation of Sweden referred to Article 6.1 of the EC Directive stating that generic terms may be used in the course of trade provided that they are used in accordance with fair commercial practices. This Delegation further mentioned that non-commercial use of a mark is allowed in many countries and agreed with other Delegations that the matter would require further consideration.

225. The Delegation of Canada supported the principle of a positive approach to the ~~rights~~ ^{rights} conferred, although common law countries may have some difficulties with it. The Delegation also supported further discussion on the use of a mark.

226. The Delegation of the United Kingdom said that the European Court Justice case law should be considered.

227. The Representative of the AIPPI said that paragraph 14(i) should remain as it is. Article 16.1 of the TRIPS Agreement stipulates that in case of the use of an identical sign for identical goods or services, a likelihood of confusion is presumed. The owner of the mark must be able to intervene in this kind of a situation. The Representative also pointed out that generic names as defined by Sweden could be used, but that the issues should require further consideration.

228. The Delegation of Australia agreed with the Representative of the AIPPI that paragraph 14(i) should be kept as is. Generic terms should be used in such a way that they do not jeopardize the distinctiveness of a mark.

229. The Delegation of Sweden said that no meaning other than the one expressed by the Representative of the AIPPI and the Delegation of Australia should be accepted as regards generic terms.

230. The Representative of INTA stated that the generic use of trademarks should be prevented and supported the suggestions of Sweden and the AIPPI.

231. The Chairman asked the SCT for specific comments on the concepts of confusion and association, use in the course of trade, and use of the TM and ® symbols.

232. The Delegation of Yugoslavia explained that in its country the use of the TM and ® symbols was not prohibited and not prescribed. In the future law of Yugoslavia the use of the symbol ® may only be allowed to holders of registered trademarks.

233. The Delegation of Australia stated that the law of its country did not ~~contain the concepts of confusion or association. Only provisions dealing with the reputation of a mark are provided for as well as provisions concerning~~ require the owner to prove that use of a sign resulted in confusion or false association. Simple use of a sign as a trademark or “use in the course of trade” , on related goods, was sufficient to establish infringement. As regards the use of the TM and ® symbols, a broader international understanding would be beneficial. In particular, the use of the sign ® should be allowed only to the holders of registered marks. However, in the common law countries the use of a mark is allowed without registration. The Delegation would welcome discussions on confusion and association as well as on the use of the TM and ® symbols.

234. The Delegation of France pointed out that according to a decision of the EC Court of Justice, the risk of association was considered as a sub-category of the risk of confusion. In France, there is no legislation concerning the use of the TM or ® symbols, however it can be noted that these symbols are generally used when the distinctive character of the mark is very weak.

235. The Delegation of Spain explained that as regards the use of the symbols TM or ®, there was no legislation in Spain. The decision whether the use of these symbols is misleading is left to the Court to be judged.

236. The Delegation of Belgium said that confusion and association are very important notions which had caused some problems to the Benelux legislation. The Delegation supported work on these points, particularly within the framework of law harmonization.

237. The Representative of the AIPPI pointed out that Article 5.D of the Paris Convention states that no indication or mention of the registration of the trademark shall be required upon the goods as a condition of recognition of the right to protection. The use of the TM and ® symbol can therefore be only an option. Furthermore, according to the Lanham Act in the United States, if the symbol ® is not used, this may have an effect on the damage to be compensated. The symbol ® is however a useful tool where the mark is registered. Conversely, the symbol TM means legally nothing. Therefore this Delegation suggested that the use of the symbol TM should not be promoted.

238. The Delegation of the United States explained that the registration of a mark does not confer a right in the United States. The use in commerce establishes the right in a mark. The ® symbol is allowed to be used after the registration; however, exceptions are allowed where the mark is registered in other countries.

239. The Delegation of Australia did not wish to promote the use of the symbol TM but would favor the promotion of a better understanding of the use of those symbols which should be restricted to certain circumstances. There is some jurisprudence in Australia where the Courts have taken note of the existence of the TM symbol.

240. The Delegation of Uruguay supported further discussion on the notions of confusion and association and stated that in its country there was no legislation concerning the use of the symbols TM or ® and that the IP office cannot control the use of these signs in commerce, which is a matter of the competency of the Courts.

241. The Delegation of Canada also supported further work on confusion and concerning the use of the symbols TM and ®. It noted that the use of the TM symbol is more common in respect of very weak marks and said that it is up to the Courts to decide on the use of these symbols.

242. The Delegation of the Russian Federation stated that in this country there was no provision concerning confusion. The holder has the right to use the mark and to prevent others from using identical marks. Also the protection of well-known marks is provided for. The Delegation said that it would be fair to grant to the trademark holder the possibility to use the symbol TM in respect of their marks. In the future Russian trademark law, the use of the symbols TM and ® will be stipulated.

243. The Delegation of the United States stated that the Courts decide of the rights conferred by trademarks.

244. The Delegation of Switzerland said that its legislation does not deal with the use of the TM and ® symbols but discussing the issue would be useful. The Delegation suggested to discuss where such a symbol should be located, since a mark may contain parts which are not protected as such.

245. The Representative of INTA explained that the TM symbol was important to the owners of a mark who did not wish to register the mark. Use of these symbols in publications is very convenient and important.

246. The Delegation of Algeria pointed out that the ® symbol was increasingly used in international trade. This symbol is also very useful for quality control programs and for customs officials in order to demonstrate that the product is not a fraud or a counterfeited product.

247. The Representative of the ICC said that the ® symbol allowed the possibility to show to consumers and the public in general that the mark is protected. The Representative also suggested that penalties should be provided for an abusive use of these symbols.

248. The Representative of INTA said that the use of the ® symbol should be permitted. The standards for packaging in the international market and the use on the Internet should also be considered.

Requirement of Use, Use of the mark

249. The Representative of CEIP stated that there should be no requirement of use at the time of the application, since this is already stipulated by Article 15.3 of the TRIPS Agreement. The Representative wondered whether the principles should be left in the document.

250. The Delegation of Spain suggested that the circumstances referred to in paragraph 18(iii) should be identified (such as *forcemajeure*). The criteria should not be limited to the independence of the will of the owner of the mark but also to the level of importance of these circumstances. As regards paragraph 18(iv), in Spain there is no provision concerning the cancellation of a trademark *ex officio* by the office. The office does not either ask for proof of use when the mark is renewed.

251. The Delegation of Yugoslavia asked whether the period of non-use in paragraph 18(ii) could be computed also from the moment where the trademark was last used. The causes mentioned in paragraph (iii) might be *forcemajeure* or acts of God, the distinction between the two being worthwhile clarifying. As regards cancellation, the initiative usually comes from an interested party. The *ex officio* cancellation of a registration by the office would require too much work.

252. The Delegation of Japan ~~asked whether~~ proposed that the period mentioned in ~~sub~~ paragraph 18(ii) ~~was~~ be computed from the date of registration or from the date of ~~the~~ last use. ~~In the case where the owner has~~ There is a reason for this proposal is that even if the owner of the right used the mark only once ~~, would such a use also~~ such use would still interrupt the period of non-use. Furthermore, the Delegation referred to Article 5C of the Paris Convention, which provides ~~for~~ that registration ~~to~~ be cancelled only if the person concerned does not justify his inaction. ~~As regards paragraph 19, the~~ The Delegation suggested to ~~include Article 5~~ inclusion in paragraph 19 of Article 5 of the WIPO Joint Recommendation concerning trademark licenses ~~in this paragraph~~.

253. The Delegation of Algeria stated that in its country only the Courts may cancel the registration but not the office.

254. The Delegation of the European Communities stated that the EC legislation did not provide for *ex officio* cancellation by the office and had some concerns with such a possibility being introduced. Moreover, the requirement of use is stipulated by Article 15.3 of the TRIPS Agreement. The expression “independently” in subparagraph 18(iii) is too broad since the inaction has to be justified.

255. The Representative of the AIPPI suggested that paragraph 18 should be left out because the provisions were already in the TRIPS Agreement. However, paragraph 19 should remain.

256. The Secretariat noted that the suggestions in document SCT/8/3 are based on the Paris Convention or on the TRIPS Agreement but nevertheless may be required to be precised. The period of non-use, as described for example in subparagraph 18(ii), varies from country to country, therefore it would be useful to have a common approach in order that the holder would know when the period of non-use starts. Subparagraph 18(iv) is meant to be optional and creates a possibility for IP offices to eliminate the so-called “deadwood” from its registry.

257. The Delegation of Australia supported paragraph 18 as a whole. With regard to (ii), it suggested a grace period for the owner of the mark ~~before~~ during which nobody could take actions because of non-use. This grace period would be calculated from the date of registration. A question has also to be ~~replied~~ addressed as to when the delay ~~being~~ counted for a non-use for an uninterrupted period starts. The Delegation disagreed with the AIPPI and stated that although subparagraph 18(iii) is similar to other treaty provisions, such a reference is nevertheless needed. Subparagraph (iv), although difficult from a practical point of view is a new topic worth while discussing. As regards subparagraph (v) the use of the mark should be expressed positively.

258. The Delegation of Sweden stated that subparagraph (iv) should not be binding. The cancellation of a registration should be made at the request of third parties.

259. The Delegation of Mauritius said that the implementation of the TLT is difficult for small IP offices. The specific needs of these offices should be taken into account, both with regard to documents SCT/8/2 and SCT/8/3.

260. The Delegation of Canada supported further discussion on paragraph 18 and stated that these in paragraphs 15, 18 and 19 should be defined in the same way.

261. The Delegation of France supported the Delegation of Australia in that paragraph 18 should be kept and the relevant provisions of the Paris Convention or the TRIPS Agreement should be indicated. The Delegation also referred to Article 12 of the EC Directive according to which the commencement of presumption of use within a period of three months preceding the filing of the application for revocation shall be disregarded where preparations for the commencement or resumption occur only after the proprietor becomes aware that the application for revocation may be filed. This aspect should also be covered in paragraph 18.

262. The Delegation of Yugoslavia supported the suggestions of Canada and Australia as well as the three-month time limit mentioned by the Delegation of France. Regarding Article 19, problems may arise concerning the use in respect of services. The use in advertising should be enough in respect of services. This Delegation also raised the question whether parallel import would be considered as a use of a mark.

263. The Representative of the ICC said that, irrespective of the existing legislations, everything which is possible should be considered by the SCT at this stage. As regards paragraph 18, it is important to define from which point the period of non-use should be computed. Subparagraph 18(v) is very important since the distinctive character of a mark is the cornerstone for trademark users, IP offices and Courts. This criterion should be further discussed in order to establish guidelines for those who have to deal with trademarks, whether users, IP offices or Courts.

264. The Representative of the AIPPI added that in some countries, in opposition procedures, the opponent should prove that the mark has not been used.

265. The Representative of CEPI explained that discussions in the special session of the SCT regarding the abusive use of domain names showed that the protection of unregistered trademarks remains a problem before the UDRP, because some countries do not recognize unregistered marks. The experiences of countries who do recognize unregistered marks would be beneficial in this respect.

266. The Delegation of the Republic of Korea stated that the term “cancellation” had a different meaning in paragraphs 16 and 18. In paragraph 16, the term “invalidation” should be used instead of “cancellation”.

267. The Secretariat suggested to circulate a questionnaire to Member States in order for the International Bureau to further elaborate a new document based on document SCT/8/3. This expanded document would include references to case laws and existing treaties and would take into account the discussion at the eighth session relating to the following issues:

- Definition of a Mark: non-traditional marks, interface of trademarks with copyright and industrial designs.
- Grounds for Refusal.
- Prior Rights: examples raised by Member States.
- Rights Conferred by Registration: positive approach, concepts of confusion and association.
- Use of the symbols “TM” and “®”.
- Criteria of distinctiveness; generic terms, usage of foreign expressions.
- Non-Registered Trademarks.

268. The Delegation of Spain asked whether the new document would be ready for the next meeting of the SCT in November.

269. The Secretariat responded that in principle the documents should be sent to Member States in advance for discussion at the next SCT meeting in November.

270. The Delegation of Uruguay asked whether paragraph 20 on enforcement in document SCT/8/3 was going to be dealt with in the next document.

271. The Secretariat remarked that some points in document SCT/8/3 had not yet been dealt with among which “Enforcement,” “Registrability of a Mark,” “Trademark Administration and Registration” and “Cancellation.” The Secretariat said that the SCT should decide whether it wanted them to be included in the new document.

272. The Delegation of Uruguay said it wanted paragraph 20 called “Enforcement” to be included in the expanded document. It was important for this Delegation to consider some studies by the International Bureau.

273. The Secretariat informed the SCT that the Advisory Committee on Enforcement would in principle meet in September 2002 and might discuss, among others, this issue.

274. The Delegation of Egypt stated that the expanded papers should only deal with the paragraphs discussed at this session.

275. The Representative of the ICC asked whether the expanded document would combine document SCT/8/2 and document SCT/8/3.

276. The Secretariat replied that there would be no merging of document SCT/8/2 and document SCT/8/3 and stressed that the expanded document based on document SCT/8/3 will take into account the discussions at this session and, if possible, replies to the questionnaire to be sent to Member States.

277. With regard to the meeting of the Advisory Committee on Enforcement, the Secretariat stated that work had started on the organization of its next meeting. This meeting should take place in September but the final date and the name of the meeting had not been set up yet. Member States should soon be informed thereof.

Agenda Item 6: Geographical Indications

278. The Chairman stated that past discussions on geographical indications were based on document SCT/5/3 "Possible Solutions for Conflicts between Trademarks and Geographical Indications and for Conflicts between Homonymous Geographical Indications." After discussing this document at the fifth session, a new document called SCT/6/3 was presented at the sixth session. This document was slightly revised and bears now the reference SCT/8/4. There was also a new document called SCT/8/5, which was an addendum.

279. At the request of the Chairman, the Secretariat introduced document SCT/8/4, pointing out that it is almost similar to document SCT/6/3 but was slightly amended on the basis of the comments made by Member States at the last session. The following amendments had been made:

- A new line was added at the end of paragraph 1.
- Line 2 of paragraph 8 was amended.
- Paragraph 33 was added.
- Paragraphs 92 and 95 were slightly amended.
- Footnote 43 was added to paragraph 105.

280. On document SCT/8/5, the Secretariat recalled that document SCT/8/4 contains an overview of the historical background of geographical indications, the nature of rights, the existing systems for protection and obtaining protection in other countries. At the seventh session of the SCT, Member States agreed that the International Bureau should, in preparation for discussion at the eighth session, supplement this document with an addendum dealing with the following non-exhaustive list of issues: definition of geographical indications, protection of a geographical indication in its country of origin, protection of geographical indications abroad, generic terms, conflicts between geographical indications and trademarks, and conflicts between homonymous geographical indications. The Secretariat stated that the question of definition and applicable terminology is the point of departure from which the discussions could start. Historically, a number of terms have been used as mentioned in paragraph 5 and 6: indications of source, appellations of origin, geographical indications.

These terms cover different approaches and these terms are taken from different international instruments. However the definition of geographical indications in Article 22.1 of the TRIPS Agreement, seemed to prevail in international forums, including at theseventh session of the SCT. Paragraph 6 deals with other definitions of geographical indications. The Secretariat thought this Committee should deal with the definition and the applicable terminology without prejudging at this stage of the discussions any legal implications that the definitions might have.

281. The Delegation of Germany stated that both documents were most comprehensive and constituted a great source of information. The Delegation believed that the discussion of these documents would facilitate a broader and better understanding of the issues at stake on the basis of information presented in a neutral way and asked whether he was right in believing that that was precisely the aim of having included this topic in the Agenda of the SCT.

282. The Secretariat stated that that was exactly the aim of the discussions on this Agenda Item at the SCT.

283. The Chairman opened the floor for comments on Part II of document SCT/8/5.

284. The Delegation of Yugoslavia stated that there were a lot of problems regarding the definition of geographical indications, not only from a linguistic point of view but also with regard to the legal consequence of the definitions. These problems were caused by the introduction of the term "geographical indications" in the TRIPS Agreement while that term was previously used in WIPO as a comprehensive term designating indications of source and appellations of origin. In three different international agreements, there were three different definitions of the rights and each of those rights had its own scope and a different scope of protection of those rights. This Delegation therefore suggested to adopt the term "indications of geographical origin." The other possibility was to use the indication of source as an all-comprehensive term since geographical indications and appellations of origin are included in the category of indications of source. From the point of view of this Delegation, the Secretariat should consider in the future the use of indications of geographical origin as a term that would cover practically all the traditional definitions concerning appellations of origin, indications of source or geographical indication.

285. The Delegation of Argentina thought this Committee should not be looking for new definitions at this moment. The Secretariat of the WTO, in recapitulating proposals made by its Member States, was facing problems posed by the multiplicity of definitions existing at the national, regional or international level. The Delegations said that it preferred the use of the TRIPS Agreement definition. This definition covers the largest number of States member of a multilateral agreement. The Delegation thought that the starting point would have to be the definition provided in Article 22.1 of the TRIPS Agreement.

286. The Delegation of Yugoslavia clarified that its proposal was just for consideration by WIPO. According to this Delegation, the TRIPS Agreement definition of geographical indications is very close to the definition of appellation of origin in the Lisbon Agreement, to which 20 countries are members, but the TRIPS Agreement definition alone is not sufficient for defining appellations of origin under the Lisbon Agreement. The Delegation underlined that at the international level, there were three international agreements with three different definitions: appellations of origin, geographical indications and indications of source. The

Delegation considered that appellations of origin and geographical indications are part of indications of source although not all indications of source could qualify for geographical indications protection and not all geographical indications could qualify for appellation of origin protection.

287. The Delegation of the European Communities, also speaking on behalf of its Member States, agreed with the comments made by the Delegation of Argentina and said that although different terminologies exist, the common denominator should be Article 22.1 of the TRIPS Agreement. The EC legislation provides for a protection of geographical indications and appellations of origin. Document SCT/8/5 deals with this issue with a good approach and is a good basis for discussing it. The Delegation thought the discussions at this Committee should be based on the definition given in Article 22.1 of the TRIPS Agreement because it deals with the issues of objective links and reputation, two important elements. The contents of the definition provides a foundation for the elements which serve to protect geographical indications. Article 22.1 of the TRIPS Agreement fulfills this requirement.

288. The Delegation of Germany endorsed the statements made by the Delegations of Argentina and of the European Communities. It was also the understanding of this Delegation that, in the context of the TRIPS Agreement Council of the WTO, another term was proposed for practical purposes, as neutral as possible. The Delegation pointed out that paragraphs 5 to 9 of the document could be discussed under two aspects: a description of the existing terminology and a look at the development of the system in the future. Articles 22 and 23 of the TRIPS Agreement have two different levels of protection, while both articles are using the same terminology, geographical indications. A legislation with different levels of protection, using different terms to designate each type of protection, may be imagined but the Delegation considered such an issue somewhat premature. The Delegation concluded that it supported the suggestion made by the European Communities to use the definition of Article 22.1 of the TRIPS Agreement as a starting point of the discussions in the SCT.

289. The Delegation of the United States of America said that documents SCT/8/4 and 5 did not propose any specific direction and agreed with the comments made by the Delegations of Argentina, the European Communities and Germany, on the approach to be followed by the SCT regarding the issues of definition and terminology. The SCT could contemplate other work with respect to geographical indications, however it has to begin with the basic question, the eligible subject matter for protection as geographical indications. In this respect, documents SCT/8/4 and 5 present different answers to this problem. The Delegation also raised the question of protecting country names, localities, historical names, place names, devices, 3D signs, phrases and names of places which no longer exist, as geographical indications. The Delegation underlined that as there is an international uniform understanding of what is the eligible subject matter of protection with regard to marks, at least as regards to words, phrases, designs and combination of colors, or service marks, there is a need for a common understanding on what this Committee calls geographical indications. The Delegation therefore proposed to develop a common understanding of what is eligible for protection as a geographical indication, from an intellectual property perspective, without duplicating the work being completed by the WTO. The work at the WTO is trade based and naturally influenced by trade concerns. In contrast, WIPO is a forum where a discussion of geographical indications could be done on the basis of intellectual property principles. The eligible subject matter of geographical indications should have as a starting point Article 22.1 of the TRIPS Agreement.

290. The Delegation of Australia noticed that the documents highlighted a number of issues. This Delegation agreed with the comments made by the Delegations of the European Communities, Germany, Argentina and the United States of America that the definition provided in the TRIPS Agreement was a good starting point, though there were other terminologies that existed in other international agreements. For this reason, it might be appropriate sometimes to refer specifically to those terminologies. The comments made by the Delegation of the European Communities highlighted the elements of objective link and reputation. The relevance of these two issues in various laws is important. The Delegation noted that before the TRIPS Agreement, quite a large number of countries did not have geographical indications protection. In the process of implementing the TRIPS Agreement provisions on geographical indications quite a number of countries have used the definition of Article 22.1 as a basis for their laws, without elaborating on issues such as objective link or which particular goods are eligible for geographical indication protection. The problem of proving a particular reputation attributed to the geographical origin of goods could also be an area for further discussion by the SCT. In this context, the Delegations supported the proposal by the Delegation of the United States of America ~~with regard to that~~ the eligible subject matter of geographical indications was a useful starting point for consideration by this Committee.

291. The Delegation of Sri Lanka did not share most of the comments and opinions that had been made by the previous Delegations but thought that WIPO documents were very useful and that the TRIPS Agreement definition was a good starting point. The Delegation recalled that in WIPO's Model Law of 1975, which some countries followed, the definition of geographical indications was rather indicated as appellations of origin. Before that, these countries had indications of source. For the Delegation, the scope of the definition of geographical indications is between these two concepts. When the TRIPS Agreement came into force, developing countries were required to embody those provisions in their legislation. Therefore, most of them followed the definition provided in Article 22.1 of the TRIPS Agreement. The Delegation stressed that the work of the SCT should not undermine this implementation, currently undertaken by developing countries. The Delegation questioned whether it was in the mandate of this Committee to decide the eligible subject matter of geographical indications, and said that it should be left to the national laws to decide on this point.

292. The Delegation of Canada supported the comments made by the Delegations of the European Communities, Argentina, United States of America and Sri Lanka, with regard to Article 22.1 of the TRIPS Agreement as a good starting point.

293. The Delegation of Mexico supported the comments made by the Delegation of Yugoslavia. One of the major problems with the definition of geographical indications is that it was defined differently by the WTO and WIPO. However, the Delegation believed the definition in the TRIPS Agreement was more widely accepted throughout the world. As was stated by the Delegation of Yugoslavia, the definition of indications of source and the definition of appellations of origin are covered by the definition of geographical indications as provided for in the TRIPS Agreement. The Delegation illustrated the different terms with a basket of eggs: the basket being indications of geographical origin, the yoke of the egg the appellations of origin, the white of the egg geographical indications, and the shell, indications of source.

294. The Delegation of Guatemala stated that the definition of geographical indications should be that of Article 22.1 of the TRIPS Agreement. The Delegation stressed its interest for a study on objective links and reputation. These two issues are very important parts of the definition of geographical indications in the TRIPS Agreement and make the difference between what is a geographical indication and what is not.

295. The Delegation of Argentina stated that, with reference to the indications of source, it did not see the intellectual property element which this concept is protecting. Moreover, as mentioned in paragraph 4 of document SCT/8/4, indications of source do not require specific characteristics of the product and therefore do not comply with the TRIPS Agreement definition. The Delegation added that the words "made in" for example do not provide for any specific intellectual property right protection. In this respect, it would be useful to see the differences, for example, between geographical indications and rules of origin relating to products made in other countries. The Delegation mentioned that the basic problem relating to the definition is that of determining its exact scope of application. It pointed out and agreed with the second sentence of paragraph 10 of document SCT/8/5 which reads: "goods on which a geographical indication is used must necessarily be produced in a particular place." This is the crucial element that should be considered to define the inherent nature of protection of geographical indications with regard to links through which a geographical indication protection could be determined. The Delegation observed that it may not be appropriate to talk of "objective" links because links are interpreted and determined by national legislation at national level. This aspect constitutes an important element to take into account.

296. The Delegation of the European Communities, also speaking on behalf of its Member States, said that each national legislation can have different definitions and different levels of protection. The important point is to get a common reference enabling the Member States to understand that the protection granted to geographical indications is done on an identical basis. The definition of Article 22(1) should therefore constitute the common denominator. The question of how the definition is applied is solved by each national system which has to take into account different constituents. If the conditions of the definition are fulfilled, then the protection can be granted. An important point for the Delegation is, firstly, that each Member State protects geographical indications, whatever system is chosen, and secondly, that within the mechanism of protection, the conditions of the definition are checked and met. It is up to each national legislation to apply the definition in the most appropriate way and according to its own guidelines, as long as the conditions are fulfilled. The Delegation added that it would be interesting to see to what extent the different systems of protection, in particular those relating to certification or collective marks, actually allow for verification that the constituent parts of the definition are met. The Delegation concluded that if the definition is not applied, then the consumers will not get correct information concerning the product.

297. The Delegation of the Czech Republic stated that Article 22.1 of the TRIPS Agreement is a good starting point for discussion. However, as said by the Delegation of Sri Lanka, it is not the appropriate moment to talk about the eligible subject matter of geographical indications. A study on objective links would not be a good basis for discussion because it could be prejudicial to the countries which are in the process of implementing a system of protection of geographical indications.

298. The Delegation of the Republic of Korea stated that Article 22.1 of the TRIPS Agreement should be the starting point since WTO Member States are bound by it. The Republic of Korea has recently implemented a system of registration for geographical indications but experienced difficulties in interpreting the legal meaning of the TRIPS Agreement. Therefore, searching for the exact meaning of geographical indications as defined in Article 22.1 of the TRIPS Agreement would be very useful for this Delegation.

299. The Delegation of Yugoslavia, in reply to the statement made by the Delegation of Argentina, said that there is some experience regarding the protection of indications of source. The Madrid Agreement for the repression of false and deceptive indications of source on goods, which binds more than 30 countries, provides a strong protection for indications of source. One of its provisions obliges its Member States to prevent the import of goods which have a false or deceptive indication of source and to seize those goods if they enter the country. This agreement provides also for additional protection for wines.

300. The Delegation of Romania supported the precedent Delegations suggesting that Article 22.1 of the TRIPS Agreement should be the reference point of discussion.

301. The Delegation of the European Communities, also speaking on behalf of its Member States, reaffirmed that the important point is that the definition is applied by the different systems and the different mechanisms of protection. However, the interpretation of the definition, as regards its elements, should be left to national legislation. The Delegation wondered how the Secretariat could further develop this issue and stated that the discussion on the definitions should be used to differentiate the different protection mechanisms and determine how the definition is applied.

302. The Delegation of Bulgaria shared the concern raised by the Delegation of the European Communities. Like the Delegations of Sri Lanka and the Czech Republic, the Delegation felt that the eligible subject matter, the objective criteria and the question of reputation should be left to national judicial practices. The Delegation was hesitant as to the convenience to study these matters in the SCT.

303. The Delegation of Sri Lanka shared the opinion of the Delegation of the European Communities regarding Article 22.1 of the TRIPS Agreement which provides the elements to be considered under the subject matter issue. The TRIPS Agreement laid down the minimum standards. Interpretation of the definitions should be left to Member States according to the fundamental principle the SCT always worked with. The Delegation would be opposed to the SCT looking into this issue because it is not its mandate. Furthermore, studies undertaken by the WTO with respect to the implementation of Section 3 of the TRIPS Agreement provides some guidance with respect to the different systems and practices that have been adopted by Member States. The Delegation reaffirmed that the definition of the TRIPS Agreement already sets out the eligible criteria.

304. The Delegation of the United States of America reiterated that the starting point of the discussion should be the eligible subject matter of geographical indications. A similar approach has been taken by the SCT with regard to trademark law when the Committee discussed the different types of marks and their relevant protection. The Delegation observed

that it is very important for the SCT to have a uniform understanding of the eligible subject matter. The *reis* is vital to understand what those elements refer to and the best way to do it is to define what a geographical indication means. The Delegation however considered, as the Delegation of the Czech Republic, that it may be premature to study objectively links, although this issue is worth while discussing, before discussing the eligible subject matter.

305. The Delegation of Australia said that interventions by SCT members showed that there was a lot of room for discussion in the Committee and that issues such as the Article 22.1 definition, “objectively link” and “reputation” were highlighted by many Delegations as important ones. The Delegation ~~added that Article 22.1 of the TRIPS Agreement leaves a lot of gaps and~~ agreed that it was not in the mandate of the SCT to define what was in this Article but added that Article 22.1 leaves a lot of room for interpretation as the discussion had shown. It was important that delegates developed a better understanding of these issues.

306. The Delegation of Yugoslavia endorsed the statement made by the Delegation of Australia.

307. The Chairman invited the Committee for suggestions on the way to proceed further on this issue.

308. The Delegation of Australia ~~wondered whether~~ said that it considered that all the issues had been identified on this matter and suggested that the SCT would make no more progress on this issue at this session.

309. The Delegation of Bulgaria agreed with the Delegation of Australia and considered that the SCT should not further discuss the definition but should leave the door open for future discussions.

310. The Delegation of Argentina stated it had no objection discussing links.

311. The Delegation of the European Communities, also speaking on behalf of its Member States, stated that document SCT/8/5 had more points to be discussed and suggested to discuss in the future how the different systems of protection apply the definition of Article 22.1 of the TRIPS Agreement.

312. The Chairman suggested to start discussing the protection of a geographical indication in its country of origin, and opened the floor for comments.

313. The Delegation of Switzerland noted that, as mentioned in document SCT/8/5, the protection in the country of origin introduces a notion linked to territoriality, which should be left to national appreciation. The Delegation observed that very often the protection of geographical indications is granted through registration or by a specific law or decrees but that other options, more flexible and cost effective, also exist. For instance, this is the case of the *suigeneris* protection of geographical indications granted by the law without any registration mechanism, creating a presumption of protection of the geographical indications. This kind of protection allows the legitimate users of a geographical indication to go to Court to defend directly their rights. The Delegation recognized that the protection of geographical indications through registration has serious practical advantages such as the publicity of the registered geographical indication, or information on the geographical area and the characteristics of the product. Both kind of protections are complementary and could be

combined. The Delegation noted that the document did not deal in detail with such way of protection without registration and suggested that explanation on such form of *suigeneris* protection could be developed in the document. Finally, the Delegation pointed out that the example given in subparagraph 18 constitutes a very isolated case in Switzerland.

314. The Delegation of Argentina said that paragraph 16 reflected the necessary balance between the producers, the consumers and the administration, and suggested that this balance should prevail in the discussions and in the protection of geographical indications. The Delegation sought clarification as to the type of necessary elements or links used to get protection as a geographical indication in other countries and wondered whether ISO standards are used for the same purpose as geographical indications.

315. The Delegation of the European Communities, also speaking on behalf of its Member States, supported the comment made by the Delegation of Switzerland with respect to territoriality. Chapter III of the documents should have made clear that the definitions should be appreciated nationally, as the reputation is appreciated on the basis of the geographical indication itself. The Delegation said that the protection is meant to protect a product as a geographical indication because this product has fulfilled all the elements of the definition, not to prevent the commercialization of other products.

316. The Delegation of Australia noted that territoriality is an important issue with linkages to the issue of exceptions. For example, a geographical indication can be a generic term in one country and not in another. The issue of these so-called "grandfathering" exceptions should also be addressed. Moreover, the Delegation considered it would be difficult to benefit from a geographical indication protection if such protection cannot be granted in other countries. In this regard, the Delegation was interested to know how other countries apply the exceptions provided for in the TRIPS Agreement. With reference to paragraph 10 of the document, the Delegation pointed out that there were very different national approaches concerning the fact that goods on which a geographical indication is used must necessarily be produced in a particular place.

317. The Delegation of Argentina supported the Delegation of Australia on the territoriality issue and the exceptions, particularly the generic terms. Furthermore, it was important for its Delegation to see how paragraph 10 is understood by other countries and how the TRIPS Agreement definition of geographical indications has been used in bilateral agreements. Regarding paragraph 17, the Delegation was interested in knowing whether all the criteria listed constituted an integral part of the protection. The interface with rules of origin and labelling would also require clarification.

318. The Delegation of Yugoslavia supported the comments by the Delegations of Australia and Argentina. The link between product and the place of production, as indicated in the last sentence of paragraph 10 is essential for appellations of origin and geographical indications. Referring to the Lisbon Agreement, the Delegation said that the requirements are very precise and even stricter in this Agreement. The Delegation explained that in Yugoslavia, the approach is similar to France where the geographic element and the characteristics of the products linked to the place are both taken into account. The Delegation stated that appellations of origin and geographical indications are linked with certain territories and that this approach should prevail.

319. The Delegation of the European Communities, also speaking on behalf of its Member States, agreed with the last comment made by the Delegation of Yugoslavia and with the Swiss Delegation according to which territoriality, as for all intellectual property rights, is the core of the protection. In this respect, the essence of the protection of geographical indications is the link between the product and the geographical area, whether by objective links or via reputation. Regarding ISO standards, the Delegations said that they are not intellectual property rights. They define the characteristics of a product, as CODEX regarding the production of a good, and have nothing to do with a geographical area.

320. The Delegation of France replied to the Delegations of Argentina and Yugoslavia with regard to paragraph 17 which refers to wine products and appellations of origin as protected in France. The Delegation precised that wines were the first products in France that were given appellations of origin and this sector has been regulated for 65 years. Appellations of origin for wines are regulated by ministerial decrees, which define a geographical area and lay down the relevant conditions of production. The same approach is applied for other products. Concerning hygiene and ISO standards, the Delegations said, as the Delegation of the European Communities, that they were not topics to be discussed in the SCT. The Delegation concluded that it is only the typical nature of the product which determines a geographical indication, not sanitary measures which do not affect the typical nature of the products themselves and therefore should not be considered by this Committee.

321. The Delegation of Australia supported the Delegation of Argentina in questioning the linkage of geographical indications and ISO standards. According to this Delegation there is also a question of linkage between rules of origin and geographical indications. This goes back to the question of whether the entire chain of production for a good, carrying a geographical indication, must occur in one place, in order to satisfy the TRIPS definition. In this respect, the delegation provided the example of a recent case brought before the European Court of Justice concerning Parma Ham, which raised, among other issues, the issue of rules of origin. The Delegations said that although the SCT may not be the forum to resolve these issues, nevertheless, the linkage between geographical indications and these other areas should be kept in mind.

322. The Delegation of Sri Lanka said that there seem to be some confusion with the terminology used in the Committee. Regarding paragraph 17, appellations of origin and geographical indications should be distinguished. Document SCT/8/4 dealt extensively with the scope of these different terms. The definition of geographical indications is broader than the definition of appellations of origin because it refers to indications, while appellations of origin refer to specific conditions. As mentioned in paragraph 17, there are additional criteria which have to be fulfilled in order to get protection of an appellation of origin. Signs that could be used to indicate a region are not necessarily covered by the definition of appellation of origin. The TRIPS definition of geographical indications leaves some flexibility to countries to include products that could be considered as geographical indications, subject to certain exceptions. With regard to the second line of paragraph 10, the Delegations said that the entire chain of production of a good should take place in the same country. The SCT should look into this issue because of the different practices adopted by countries but should not spell out the minimum process handled in the countries. Rather than making an assessment, the SCT members should share their experiences. This Delegation stated that it

agreed with the Delegation of Australia concerning the interest of the linkage of geographical indications and rules of origin but remarked that the SCT was not the forum to discuss this issue. The Delegation explained that, in Sri Lanka, in order to use the trademark "Ceylon Tea," the product has to be produced, packed and labeled in Sri Lanka.

323. The Delegation of the European Communities, also speaking on behalf of its Member States, stressed that ISO and CODEX standards are not intellectual property rights contrary to what was said by some Delegations. They only laid down production standards and certainly did not define or justify a link between a product and a particular geographical area. Concerning the European Court of Justice case referred to by the Delegation of Australia, the Delegation precised that since the case was complex and raised tricky issues, it would be better to wait for the ruling to comment on it. Regarding paragraphs 20 and 21, the Delegation asked for a clarification on how and when a geographical indication or an appellation of origin can exactly be registered as a collective mark. In this respect, the role played by the definitions should be clearly understood. Fulfilling the definition is a fundamental requirement and the elements of a definition are indispensable. They are essential if there is a registration with an *ex ante* examination. If the elements of examination have not been properly witnessed, and properly backed up by evidence, then protection cannot be granted. The Delegation stated that this is the case in a registration procedure for protection of geographical indications, but wondered whether these requirements were also met in other systems of protection of geographical indications.

324. The Delegation of Yugoslavia stated that ISO standards and rules of origin are not intellectual property rights. Rules of origin were established for customs procedures. They are international practical standards which come from international trade and have nothing to do with the territorial concept discussed in the SCT. ISO standards are also a completely different thing. The Delegation explained that, for the registration of an appellation of origin in Yugoslavia, the applicant has always the obligation to name the authority which certifies that the product, for which the protection under an appellation of origin was asked, fulfills the conditions prescribed. The certifying authority, which can be university centers and certain ministries (agriculture in certain cases), needs to be authorized by the State and equipped to certify the product. However the certification does not give rights. It is just a certification stating that certain conditions are fulfilled by the product. The intellectual property rights are established after the registration in the Federal IP Office. Regarding the protection of appellations of origin and geographical indications by collective or certification marks, the Delegations said that when opting for this kind of protection, the applicant has to know that his application will not be treated in the same way as an application for the establishment of an appellation of origin. It will be treated as a trademark application. Therefore, geographical names protected as a collective mark can collapse if the fees are not paid or if they become generic. The Delegation observed that few geographical names which are appellations of origin or geographical indications are protected as collective marks in Yugoslavia. The reason for this is that the scope of protection is narrower than that of an appellation of origin and depends on the kind of goods and services that are applied as collective marks.

325. The Delegation of Algeria stated that it was clear that appellations of origin and geographical indications are organically linked to the place of production. Any definition should take into account the territorial link. According to customary practice in Algeria, the protection of an appellation of origin is laid down by ordinance and has to be applied to the IP Office. Various wines had been protected in the context of the Lisbon Agreement. Products like dates, olive oil, oranges or carpets also need a similar protection. Trademark law also

deals with geographical indications since the protection of a mark cannot be granted when the mark is misleading or if there is no legal link between the applicant and the indication. Finally, unfair competition law and customs regulations could also contribute to a better protection of a geographical indication.

326. The Delegation of Switzerland stated there was no need to complicate the discussion by talking about ISO standards and rules of origin, which are not linked to geographical indications. For the Delegation, names and signs can also be protected as geographical indications even if they do not correspond to the name of a particular geographical area as long as the products, they identified, originate in a particular geographical area and have qualities, characteristics or a reputation attributable to this particular area. The Delegation wondered why the protection granted to geographical indications could be understood as preventing the production of certain products. It is the essence of geographical indications to protect the name of products. Making a parallel with trademark protection, the Delegation explained that for example, numerous companies produce soft drinks such as cola but the owner of a specific trademark has legal means to prevent other producers of cola to use his trademark on their products although they produce similar products. Why should the protection for owners of geographical indications not be equivalent? Only producers from the geographical area identified by the geographical indications should be allowed to use the geographical indication on their products. Finally regarding the definition of geographical indications, the Delegation said that, because of the general character of the definition, it is not necessary for all stages of production to be carried out in a particular area in order for the designation of a product to grant the protection as geographical indication. As long as the finished product identified by the geographical indication has characteristics, quality or reputation attributable to that origin, its designation can qualify for a protection as geographical indication. The Delegation stated in conclusion that, for the benefit of the discussions in the SCT, Delegations should stick to statements of general nature instead of dwelling with specific national situations.

327. The Delegation of Australia sought clarification as to the method of production being relevant to definitional issues concerning geographical indications. The Delegation also stated that it did not hear from many delegates that national legislations should be restricted in any way with regard to the implementation of the definition and that it was a fairly common understanding that there should be flexibility to use the appropriate means of protection. From the discussions the Committee had so far, for example on certification marks, the Delegation understood that there would be no evaluation as to what kind of protection would be appropriate nor as to the extent to which various methods used at the national level apply the definition.

328. The Delegation of Germany informed the participants on the situation in Germany since the German system does not have an *ex ante* examination before something can gain protection under statutory law. Germany does not have a registration system at the national level. ~~but geographical indications could be protected under the law of refusal of unfair competition.~~ National legislation is, of course, in line with the EC legislation concerning wines and, ~~to a second degree, foodstuffs that are geographical indications,~~ under the EC Regulation 2081/92. ~~The Trademark Act also provides some protection, with regard to collective marks for example, also foodstuffs.~~ The national Trademark Law (Law on the Protection of Trade Marks and Other Signs) provides further protection for goods other than wine and foodstuffs. The Delegation explained that ~~its country~~ this law provides three levels of protection: first ly, users of a geographical indication ~~product~~ must indicate that the product

comes from a particular place and the geographical indication cannot be used if it does not come from this place or where there is a risk of confusion for the customers. Secondly, where geographical indications are used for products which have a certain quality, or other characteristics, which have a link with this area, the name, term or sign can only be protected as a geographical indication if the product has this quality or these characteristics. However, there is no *ex ante* examination procedures. Finally, if the product geographical indication has aquired a certain reputation, ~~it cannot be used~~ the geographical indication cannot be used for products from other areas, even if there is no consumer confusion involved, since ~~it will be used for other products would~~ dilute this reputation. The Trademark Law also provides some protection with regard to collective marks.

329. The Delegation of Sri Lanka, commenting paragraphs 20 and 21 on certification marks, highlighted that a geographical indication is a property right which does not distinguish between the individual parties who have the right to use the product. At the opposite, certification marks are considered as private rights, not public rights. According to the Delegation, three different types of certification marks exist: marks which certify goods and services generated in a specific geographic region, marks that certify goods and services that meet certain standards in relation to quality, material or manufacturing, and marks that certify the performance of the goods or services that have met certain standards laid down by an organization or a union. These three different approaches have some overlaps and some distinctions but do not seem to include all the elements present in the definition. The Delegation therefore suggested that the SCT should look at the definition of geographical indications provided for in Article 22.1 of the TRIPS Agreement to see whether the system of protection under certification marks really fulfills the elements provided in Article 22.1. The Delegation added that the goal of certification marks is to certify not to indicate the origin. Moreover, there does not seem to be an examination, on the goods which bear a certification mark, that the conditions of the definition are met, thus giving a dangerous opportunity to free riders and for misleading consumers.

330. The Delegation of Argentina wanted to make clear that it does not consider rules of origin as an intellectual property right and raised the point with respect to the interface between geographical indications and rules of origin. The Delegation explained that it is often said that geographical indications facilitate the export of products and make clear origin. It is important to look at the issue of the origin of the product and at the determination of the criteria of eligibility. A name in itself is not protectable without a link with a particular place. The Delegation referred to the opposition of an association of consumers to the protection as a geographical indication of the so-called “viandes échées des Grisons” transformed and processed in Switzerland, because it contained beef from Argentina. Since similar situations exist with regard to other products, the question of the determination of criteria for eligibility should be further discussed.

331. The Delegation of Sudan agreed with the Swiss Delegation and stated that geographical indications should be protected even if not all the stages of production took place in the same geographic area. The Delegation referred to cotton or meat products, produced in Sudan, which are exported to other countries where the raw material is manufactured, but the final product will make no reference to the origin of the raw material.

332. The Delegation of the Czech Republic stated that, as was said by the Delegation of Yugoslavia, there was no relation between ISO standards or rules of origin and geographical indications. The Delegation pointed out that the TRIPS Agreement definition precisely that

the given quality, reputation or other characteristics of the goods should be essentially attributable to the place of origin. However, the TRIPS Agreement definition does not detail what should be considered as the place of origin. Therefore, the Delegations suggested to clarify paragraph 10 precisifying the concept of "production of the good" and the stages of production of the goods which are covered. Referring to the situation in its country, the Delegation explained that a registration procedure exists for all geographical indications which complies with the definition of the TRIPS Agreement and the Lisbon Agreement. Moreover, the Czech legislation was recently amended in order to comply with the EC Directive. The Delegations said that, although the trademark legislation provides for registration of collective or certification marks, protection of geographical indications as certification marks is not possible because a certification mark does not state the certified qualities of the goods attributable to its geographic origin.

333. The Delegation of Yugoslavia said that the problem relating to certification marks is less the applicant, who is generally the authorized organization holding the appellation of origin, but more the lack of information provided on the characteristics of the goods in the certification mark. With regard to goods produced in one country and transformed in another country claiming the geographical indication protection, it added that many countries know such a situation. The Delegation observed that it should not be necessary to establish a connection with the whole chain of production, but to establish the connection between the special quality or characteristics and the place of production of the final product.

334. The Delegation of Switzerland clarified that only signs which identify a product having a quality, reputation or other characteristics attributable to its geographical origin could claim protection as a geographical indication.

335. The Delegation of China stated that the definition of geographical indications provided by the TRIPS Agreement is a good basis for discussion. China used administrative methods to protect geographical indications until December 2001 and, then, included in its legislation specific provisions on geographical indications which are protected as an intellectual property right. Fifty-six geographical indications are recurrently protected in China.

336. The Delegation of Australia reaffirmed its interest in discussions on the interface between rules of origin and geographical indications. The Delegation added that the interface is a reality that should be taken into account when discussing geographical indications, as it is taken into account in other intergovernmental organizations dealing with these topics. The application of a principle according to which the origin of a good can be based on the place where the last substantial transformation occurs could lead to inconsistent results with protection of geographical indications. The Delegation concluded that, for this reason, this issue should remain on the Agenda.

337. The Delegation of Sri Lanka underlined that the owner of a certification mark could not control the nature and quality of the product but only the use of the mark. Moreover, certification marks do not indicate the source of the product.

338. The Delegation of the European Communities, also speaking on behalf of its Member States, stressed that, when the decision was taken at the seventh session to continue to discuss geographical indications, there was a clear understanding among Delegations that the purpose of the discussions was a better understanding of the issue. According to the Delegation, a better understanding should be first based on the definition. The Secretariat should therefore

look further into this issue. The linkage, as mentioned in the definition, refers to different elements that could be proved in different ways. However, the origin of the raw material is not necessarily the most important issue in this respect and should be evaluated on a case-by-case basis, depending on the product itself. In every case, it is essential to demonstrate that the link is based on: its characteristics or the production process, etc., and this should not undermine the definition. The Delegations said again in conclusion that it would support a further study on the different systems from a definition perspective.

339. The Delegation of Argentina pointed out that, because links are a complex issue, it is worthwhile discussing it. Depending on the characteristics of the link that is established, the scope of protection under the definition of Article 22.1 can be interpreted differently. The Delegation disagreed with those Delegations which consider that the raw material has no importance or less importance than the production process method. The Delegation asked whether the holder of a geographical indication has the right to prevent someone from using the same process in another country and wondered whether there might be some interferences with technology transfers or with the technical knowledge of a specific company, particularly in countries with high social and cultural mobility. The Delegation restated its interest in discussing this issue.

340. The Delegation of the United States of America disagreed with the statements made by some Delegations according to which geographical indications are public rights, and pointed out that the preamble of the TRIPS Agreement states clearly that intellectual property rights are private rights. With reference to the examination of certification marks, the Delegation specified that the examiner looks at the specimen used as well as other evidence to determine whether a geographical term is used as a certification mark to indicate the origin of the goods upon which it is used. Finally, the Delegations said that the certifier, although not producing the goods himself, verifies that the said goods qualify certain standards if they come from a particular origin. Geographical indications could be protected as certification marks. The Delegation gave the example of Roquefort or Parmaham which are registered as certification marks in the United States.

341. The Representative of ECTA, also speaking on behalf of INTA, made a joint statement whereby it supported the Delegation of Australia concerning the principle of territoriality and its interest to further discuss paragraph 10 of document SCT/8/5. According to the Representative, the international protection cannot be possible if there is no protection in the country of origin. The geographical indication does not necessarily have to be registered in the country of origin, but protection in the country of origin is a precondition. In addition, the Representative added that it supported the Delegation of Australia with regard to the principle of territoriality which is a well-established principle of intellectual property and should apply to geographical indications. Therefore the protectability of a geographical indication should be examined on a country-by-country basis. Regarding the link between the quality of a product and its geographical origin, the representative emphasized that the more the link between the place name, the geographical name and the geographical indication is weakened and the more the quality link is weakened, and the more there will be conflicts with prior rights and a dilution of the concept of a geographical indication. With regard to certification marks, the representative stated that it would support the idea of further work by the Secretariat on whether the protection as a certification mark is a fully appropriate means

protection. In conclusion, the Representative noted the tension between public and private rights but agreed with the Delegation of the United States of America regarding the fact that, in the TRIPS Agreement, intellectual property rights are private rights, geographical indications included.

342. The Representative of CEIP suggested that the Secretariat should have a look at the potential interface between rules of origin, ISO standards and geographical indications, in order to clarify the issue by underlying the respective roles and objectives of the rules and standards in comparison with geographical indications. The Representative also suggested that an interesting question for further study would be whether and to what extent it is necessary for all stages of production of a product to take place in the area of a geographical indication in order for that geographical indication to be protected. Finally, the Representative supported ECTA with regard to the differences of protection between certification and collective marks on the one hand and geographical indications on the other hand, from a comparative law point of view.

343. The Delegation of Yugoslavia referred to the statements made by the Delegation of Argentina and ECTA and pointed out that geographical indications and appellations of origin protect traditional products of a certain territory. The protection of a geographical indication is not limited to its process, which may be protected as a trade secret, but is linked to the name of the place together with the characteristics of the product. If a product is produced elsewhere than the place of origin, unfair competition laws will provide efficient remedies. The Delegation agreed that geographical indications are private rights, however it specified that they are not individual rights. It pointed out that nothing in the TRIPS Agreement prohibits using others' signs than a place name, for example traditional names, a picture or even music.

344. The Delegation of the European Communities, also speaking on behalf of its Member States, contested the reference to a possible dilution of the definition and stated that everyone has an interest in a better protection of geographical indications. The Delegation explained that Article 22.1 of the TRIPS Agreement allows national laws to be more restrictive in terms of protection as long as the conditions and the link with the characteristics are fulfilled in a strict manner. The Delegation stated that a case-by-case approach should be taken in order to establish the necessary links. The fact that the whole procedure should take place in the same place and that raw material should come from the same place is not appropriate in this context. Regarding territoriality, the Delegation observed that it does not mean that a geographical indication protected in the country of origin cannot be legitimately protected abroad. This would be the case if the geographical indication had become a generic term in a third country but this has to be proven in each specific case. Territoriality applies in both ways. The country of origin interprets the definition of a geographical indication. The Delegation recalled the long-standing and wide experience of the European Communities and its Member States in the field of geographical indications and stated that it should be taken into account.

345. The Delegation of Sri Lanka highlighted the fact that signs and symbols might be geographical indications as well as expressions which identify a place. For example, Basmati is not a geographical name but a traditional expression to identify a unique product originating from a particular geographical area, and therefore fulfills the conditions of the definition. In response to the Delegation of the United States, the Delegation pointed out that the public/private rights approach is not the good approach and the exclusive/non-exclusive

rights should be preferred. Geographical indications are not exclusive rights since they are applicable by all producers in the region. This is why there is a special section in the TRIPS Agreement concerning geographical indications. The Delegation also considered that the notion that a geographical indication should only be linked with the name of a particular geographical location is a wrongful appreciation of the problem. Finally, the Delegation sought clarification as to whether the examiner of an application for a certification mark requires information from the owner of a geographical indication or from the certifying authority.

346. The Delegation of Argentina agreed with the Representative of CEIPI and said that it would also be interested in a study concerning the interface between ISO standards, rules of origin and geographical indications. Referring to the statement made by the Delegation of the European Communities, the Delegation sought clarification as to the eligibility criteria of a geographical indication and its possible extra-territorial effects. The Delegation wondered in this respect whether, when a geographical indication is claimed for protection out of the country of origin, the eligibility criteria are those of the country of origin or those of the country where the protection is sought.

347. The Delegation of Australia requested a clarification of other delegation's views as to whether the definition of a geographical indication reorganized reorganized in the country of origin must *de facto* be accepted as a geographical indication in a third country.

348. The Delegation of Yugoslavia explained that in this respect the Lisbon System is similar to the Madrid System for the international registration of marks. If an appellation of origin is recognized in the country of origin, this appellation of origin will be applied for protection abroad through the national office to the International Bureau of WIPO which would publish it. During a period of one year, the Contracting Parties may refuse the recognition of the said appellation of origin in its territory. Reasons for refusals may be different and are determined according to the national laws. If the protection is refused in a country, then the applicant may start a procedure directly before the national office. The Delegation observed that appellations of origin are collective and exclusive rights, and of great value to the State interested. They are not a private matter of a producer but a status or a symbol of the country. This is illustrated by the fact that members of the Lisbon Agreement were traditionally wine producing countries and not interested in collective marks because producers in these countries wish to exclude others from using these symbols.

349. The Delegation of the European Communities, also speaking on behalf of its Member States, precised that it did not speak about extra-territorial effect. As regards the elements of the definition, the Delegation said that they have to be assessed in the territory of the geographical indication.

350. The Delegation of Australia stressed that historical factors, linked notably to immigration, [reflecting life], should be taken into consideration because they have produced complex situations.

351. The Delegation of Canada supported the idea of having a further study on rules of origin, ISO standards and geographical indications. In response to the question made by the Delegation of Sri Lanka about whether certification marks were exclusive rights, the Delegation explained that, in accordance with the Trademark Act in Canada, certification marks give protection against third parties who are not from that area. It is an exclusive right but anybody within that geographical area may be allowed to use that certification mark.

352. The Delegation of China explained that certification marks were protected in Hong Kong, SAR, China. The holder of the certification mark, i.e. the certifying organism, must allow the use of the mark by producers which produce goods that have the characteristics certified. There is an exclusive right in the sense that the owner can prevent the use of the mark by others who are not located in the said area. Otherwise, the holder of the mark will not be able to oppose its use by others not located in the same area.

353. The Delegation of Australia referred to paragraph 33 of document SCT/8/4 which states that “the competent authority [...] does not necessarily examine details of the application” and described the procedure which exists in Australia as regards certification marks. The Trademark Office examines the ~~application, and there is also a control of the~~ application, and there is also an examination of the rules of certification mark by the Australian Consumer and Competition Commission which has a mandate to examine a wider range of issues ~~issues such as whether a trademark is genuine.~~ There will be an independent certification that the criteria have been met. The credibility of the applicant and of the proposed certifying authority is also taken into consideration. As regards enforcement, it is up to the owner, generally an association or a chamber of commerce having a control in an area, to enforce its rights. The Delegation said in conclusion that the interface between ISO standards, rules of origin and geographical indications, the issue of territoriality, the eligibility and objective links with the regions should be further debated because they are foundational issues of geographical indications.

354. The Delegation of Sri Lanka stated again that the fulfillment of the conditions under the definition seem to be different for certification marks and geographical indications. In accordance with Article 22.1 of the TRIPS Agreement, six conditions should be fulfilled: (1) a geographical indication should identify goods; (2) a geographical indication cannot cover ideas or procedures; (3) the goods must be identified by an indication which does not necessarily have to be a geographical place; (4) the identification must correspond to a territory of a State or a region or a locality of that territory; (5) a geographical indication should identify its origin; (6) there should be a special link between the origin and the quality, reputation or special characteristics of the good. With regard to certification marks, the six conditions of the definition should also be fulfilled. However, the Delegation wondered whether it is the case since the requirements for certification marks are to identify (1) the goods or services as originating from a specific region, (2) the standards of quality and other characteristics with no reference to the origin of the product and (3) the standards fixed by the manufacturers or the performers. The Delegation said it was concerned that the protection of geographical indications by certification marks provides for easy freeriding.

355. The Delegation of Australia explained that in Australia, the system is very flexible. Certification marks cover a broad range of issues rights other than geographical indications. However, in some situations the right being sought is a geographical indication and there is a link between the geographic origin and the quality or reputation of the goods. In this situation it is up to the applicant to choose to include the six conditions mentioned by the Delegation of Sri Lanka and also other conditions—.

356. The Delegation of Switzerland stated that the application of the definition and the eligibility criteria are of the competency of each State. Relating to the question of the protection of geographical indications abroad, the Delegation added that the protection granted under Article 22 of the TRIPS Agreement will be differently appreciated than under Article 23 where objective criteria are fixed, while in Article 22 it is necessary to establish that the public is misled or that there is an act of unfair competition to get the protection. But under both levels of protection the decision will be taken by the judge where the protection is sought. The Delegation also stated that rules of origin and ISO standards are not intellectual property rights and are not falling within the mandate of the SCT.

357. The Delegation of Australia explained that the definition of Article 22.1 of the TRIPS Agreement applies to both protections referred to by the Delegation of Switzerland. The Delegation agreed with the fact that national legislation determines whether a geographical indication is protected in the territory of its country. However, the Delegation questioned whether other countries have to accept this determination or whether they have the right to determine, according to their own legislation implementing the TRIPS Agreement definition, whether a geographical indication is a geographical indication in their territory.

358. The Delegation of the European Communities, also speaking on behalf of its Member States, referred to Articles 22.2 and 23 of the TRIPS Agreement stating that geographical indications are territorial rights. If, under certain circumstances, geographical indications are used illegitimately in a third country, it is up to the Court to decide the matter as provided for by Article 22.2 or 23 of the TRIPS Agreement. Moreover, the Delegation underlined that it was never said that a geographical indication protected in the country of origin must be automatically protected in other countries. The exceptions under article 24 are always available if justified.

359. The Delegation of Argentina stated that there seems to be a consensus in the SCT on the fact that a geographical indication is a territorial right. However, questions need to be further discussed such as the application of the definition and the criteria for eligibility to access protection in a third country.

360. The Delegation of Australia agreed with the Delegate of Argentina that there was consensus on the fact that a geographical indication is a territorial right. Along The Delegation also supported the view of that delegate that, along with definitional issues, the process for granting protection in other countries, and the criteria for assessing eligibility for protection as a geographical indication also requires further discussion.

361. The Delegation of Yugoslavia explained that in accordance with the Lisbon Agreement an appellation of origin has to be first protected in the country of origin, before asking for protection in other countries. Countries may accept or refuse the protection according to their own legislation and there is no reason that a different approach be taken in respect of geographical indications.

362. The Delegation of Australia asked whether it was a general understanding of the SCT that the criteria for eligibility be determined by the country where the protection is sought.

363. In the absence of additional comments on point II of document SCT/8/5, the Chairman opened the floor for discussion on the protection of geographical indications abroad.

364. The Delegation of Sri Lanka suggested that the Secretariat should make a study on the different systems of protection of geographical indications and the conditions to be fulfilled. The Delegations said that the question to be clarified is whether the different systems meet the conditions.

365. The Delegation of Australia referred to the intervention of the Delegation of Sri Lanka and expressed its caution to this kind of study. The Delegation thought that the Secretariat is not in a position to assess the protection under the TRIPS Agreement since this is not in the mandate of the SCT.

366. The Delegation of Republic of Moldova stated that geographical indications such as indications of source, geographical indications, as well as appellations of origin are different from trademarks and industrial designs because they concern the heritage of a country. They represent the qualities of both its nature and people. This was illustrated at the Symposium on the because they are a kind of "national landmark." The International Symposium on geographical indications held in South Africa has illustrated international protection of geographical indications, held in South Africa in 1999, as well as other issues such as the risk of unfair competition and misuse. The Madrid Agreement for the Repression of False or Deceptive Indications of the Source on Goods (1891), one of the first international agreements in the field of protection of industrial property, is devoted to their protection. The Delegation observed that indicated that there were on the one hand, some countries wishing to have their geographical indications protected, and on the other hand countries which agreed to that protection in accordance with the TRIPS Agreement, however, in its opinion, what was missing was the most important component of the system: concrete geographical indications for each country, which needed to be protected. In the opinion of the Delegation, the TRIPS Agreement had settled the protection against unfair use of geographical indications, but not their protection per se. contains provisions similar to Article 6ter of the Paris Convention, Given the specificity of geographical indications, the Delegation of Moldova considered that this position was similar to the protection of emblems and other signs under article 6ter of the Paris Convention, according to which it is to the States in which protection of the signs or symbols of another country is requested, to decide whether to protect, or refuse protection to, these signs or a Member State wishing to protect its national emblems or symbols may notify other countries through the International Bureau of WIPO, and it was up to the States where protection is sought to decide whether to protect or refuse protection of these emblems or symbols, on the basis of objective reasons. It was also remarkable that, as shown in the survey document SCT/8/4, the initial idea of WIPO Members, in light of the symbols. The initial idea of the Paris Convention to create a mechanism of information and notification concerning the protected emblems is an interesting idea which could be further investigated. The WTO has done some work with regard to mutual information revision of the Paris Convention, was to create a system of mutual notification of geographical indications that should be protected. The Delegation agreed with the statement of the Delegation of Yugoslavia that each country should decide the protection itself as it is the case under the Lisbon System. The Delegation said that its country, as a which the countries wanted to protect. The Delegation added that in the Republic of Moldova, only Appellations of Origin of Goods were reprotected by

registration, and being member of the Lisbon Agreement, did not experience any problem with the definition or with the protection granted. — The Moldova also protected the Appellations of Origin of other members of the said Agreement. Registration of geographical indications as forms of industrial property, was not stipulated in the legislation of the Republic of Moldova, nevertheless, protection of geographical indications was provided indirectly, as prohibition of use of false or misleading geographical indications. In other words, the accent was put on the protection of the consumer, but not on the protection of geographical indications. Also, according to the Law on Trademarks and Appellations of Origin of Goods, marks consisting exclusively of geographical names were excluded from protection, as they could not be subject to an exclusive right. In addition, all provisions of the law of Moldova regarding geographical indications were compatible with the TRIPS Agreement. The Delegation of Moldova further indicated that although most positions were clear as to what was possible to register, in practice there were a lot of problems. The first and most difficult problem was that of terminology, and the question remained open. The majority of delegations agreed on the point that article 22.1 of the TRIPS Agreement should be taken only as a basis. That Delegation was of the opinion that the concept "geographical indication" was much wider — protection is indirect, which means that the use of misleading indications is not allowed under the law of Moldova. The Delegation also agreed with the Delegation of Yugoslavia that geographical indication is not the most appropriate term and would prefer the term "indication of source" or — and that it was a generalization for all other indications concerning the geographical origin of goods. It agreed with the opinion of the delegation of Yugoslavia that a more adequate term for the definition given in article 22.1 of the TRIPS Agreement would be "Indication of geographical origin" (in French "*indication de* which would better fit with the definition of Article 22.1 of the TRIPS Agreement. The term "appellation of origin" is appropriate in the way it is used in the Lisbon Agreement. The Delegation also sought clarification as to which indications can be protected as geographical indications: "*l'origine géographique* "). Thus, several notions fell under the concept of geographical indications: (1) *indication de provenance géographique*, because the general common term "*Indication de provenance*" may be used to indicate not only a geographical origin); (2) *Indication de l'origine géographique*; and (3) *Appellation d'origine*.

The Delegation of Moldova also wished to mention that some difficulties were arising in the examination of trademarks, due to the lack of precise criteria to determine that a given geographical name was a geographical indication under the meaning of article 22.1 of the TRIPS Agreement, especially, where there was no information available as to whether a given geographical name was a geographical indication in another country. The Delegation further noted that with regard to trademark examination, there were in principle two alternatives to fulfill the requirements of the TRIPS Agreement: (a) to consider that all geographical names were geographical indications, or (b) to consider that no geographical name was a geographical indication if there was no information to prove the contrary.

367. The Representative of INTA explained that prior rights which may conflict with geographical indications should enjoy an appropriate legal protection. In this respect, he suggested that further research should be made on Article 42 of the TRIPS Agreement in the light of the protection of geographical indications which may jeopardize prior rights. As prior rights, it mentioned *bonafide* registered marks, which may have even developed into well-known brands. The "first in time, first in right" principle defended by INTA means that a prior mark shall prevail against a later geographical indication and has been endorsed by countries like Costa Rica, Hungary, Israel, Mexico, Portugal, Yugoslavia, and all certification mark countries. The Representative regretted that this principle is not widely — was not yet

universally accepted, and stressed the difficulties for the owner of a prior right to litigate against a geographical indication incorporated in a bilateral agreement since Courts do not want to overrule an Act. The result of this kind of conflict is generally a prohibition of the use of the mark, against which the owner of the mark has no remedies. The Representative observed that this situation applies to some extent to multilateral treaties and underlined that it took fifty years to amend the Rules of the Lisbon Agreement and clarify the availability of an appeal to Courts after the one-year period. The Representative suggested that the possibility of oppositions and remedies should be looked at before expanding the protection of geographical indications.

368. The Delegation of Yugoslavia supported the joint statement of ECTA and INTA and explained that in its country when there is a conflict between a prior right and a geographical indication, the good faith of the owner of the mark is evaluated. The Delegation pointed out that, according to Article 22.2 of the TRIPS Agreement, Members shall provide legal means for interested parties. This Delegation suggested that an analysis by the Secretariat of all possible legal means allowing the prevention of the use of false or misleading indications as to the geographical origin of goods would be very useful. This analysis should also include use which constitutes an act of unfair competition.

369. The Delegation of Australia referred to paragraph 10 of Section III of document SCT/8/5 the last sentence of which reads: "The size of the place of origin may vary from a tiny vineyard to an entire country." The Delegation wondered whether there is a general understanding of the SCT that this is an agreed principle.

370. The Delegation of Brazil agreed with the remarks made by the Delegation of Australia. The size of the place may vary, even to an entire country. The Delegation also asked about other countries' experiences in this field.

371. The Delegation of Argentina sought clarification on existing bilateral agreements, as to whether traditional expressions are considered as geographical indications. Furthermore, the Delegation inquired about experiences of bilateral agreements, notably as to whether these bilateral agreements include exceptions to the TRIPS Agreement and if so, how these exceptions are validated and applied.

372. The Delegation of the European Communities, also speaking on behalf of its Member States, in reply to the Delegation of Yugoslavia and ECTA, said that there was a possibility, which depends for each case, of co-existence of rights and of application of the principle "first in time, first in right." With regard to the size of the place to be considered, the Delegation stated that Article 22.1 of the TRIPS Agreement did not specify anything. However, certain national laws contain such provisions. In addition, there has to be a link with the area which should be proved by objective criteria or reputation. When the area is large, it might be difficult to prove the link. However, such possibility is not excluded. Concerning bilateral agreements, the Delegation stated that they are mentioned in the TRIPS Agreement and are based on the free acceptance of the parties to such agreements. With regard to conflicts between marks and geographical indications, the Delegation said that decisions should be made on a case-by-case basis.

373. The Delegation of the United States of America stated that the size of a place may vary, even to a country, and added that there was not necessarily a fundamental conflict between geographical indications and trademarks as regards superiority or priority. The principle "first

intime,firstinright”shouldberespectedasitisthecaseforotherintellectualpropertyrights. TheDelegationhopedthattheSCTwilldevelopabetterunderstandingofbothtypes of protection.

374. TheDelegationofSriLankacommentedthesuggestionmadebytheDelegationof YugoslaviathatArticle22.2oftheTRIPSAgreementshouldbestudiedbytheSecretariatand saidthatPartCofdocumentSCT/6/3alreadyidentified thedifferentapproaches.However, theDelegationconsideredthatfurtheranalysisofthisissuecouldbeenvisagedbytheSCT. Asregardsbilateralagreements,theDelegationobservedthattheyshouldnotconstitutea systematicreferencesincetheyonlybindtwoparties.ThisDelegationsupportedthe interventionoftheDelegationoftheEuropeanCommunitiesinthisrespect.Finally,the DelegationreferredtotheWIPOinternationalSYMPOSIUMONGEOGRAPHICALINDICATIONSIN SouthAfricawherethequestionofconflictsandsolutionstoconflictswaslargelydebated. Thedocumentsofthesymposium,whichshouldbemadeavailablebytheSecretariat,were a goodexampleofnationalpractices.

375. TheDelegationofYugoslaviasaidthataStateby Stateanalysiswaspublishedby WIPOinacomprehensivedocumentin1990.Thedelegationaddedthattraditional expressioncouldbeprotectedasgeographicalindicationsaslongastheysatisfythe conditionsoftheArticle22.1definition.

376. TheDelegationofSwitzerlandsupportedtheDelegationoftheEuropeanCommunities withregardstoapossiblecoexistenceoftrademarkandgeographicalindicationsrightsand statedthattheTRIPSAgreementallowssuchapossibility.Supportingthestatementmadeby theDelegationofYugoslaviaconcerningthesizeofthegeographicalarea,the delegation saidthatalongastheconditionsofthedefinitionofArticle22.1TRIPSArefulfilled,the placeoforigincanbeanythingbetweenasmallvineyardandawholecountry.

377. TheDelegationofAustralia,inreplytotherequestforclarificationmadebythe DelegationofArgentinaconcerningtherelevanceoftraditionalexpressionstodiscussionson geographicalindicationsinthelightofnationalalexperiences,precisedthatAustraliahasnever acceptedthatanyintellectualpropertyrightsvestintraditionalexpressions,andthatthe Australia/ECWineAgreementissilentonthisissue.

378. TheDelegationofRomaniasoughtclarificationastotheinterfacebetweenbilateral agreements,inwhichthepartiesagreeonreciprocalprivileges,andArticle4oftheTRIPS Agreement(Most-FavoredNationTreatment).

379. TheDelegationofArgentinareferredtothestatementmadeby theDelegationof Romaniaasrelevant.Bilateralagreementsmaybediscriminatoryagainsttheaccessof products,suchaswines,fromothercountries.

380. TheRepresentativesofINTAandECTAemphasizedtheimportanceoflegalremedies. Trademarkapplicationswhichincludegeographicalindicationsarerefusedwhenthemarkis descriptive.TheCourtwilldecidewhetheratradingmarkisunlawfullyregisteredorinbad faith.Incontrast,therearenoremadiesagainstgeographicalindicationswhichareprotected inbilateralormultilateral treaties.

381. The Delegation of Australia referred to the statements of the Delegation of Switzerland and ECTA and pointed out that in the case of co-existence of rights, the distinctive character of the mark would be diminished. The Delegations said that the availability of remedies is an important point to discuss.

382. The Delegation of Sri Lanka commented the statement made by the Delegation of Romania and pointed out that Article 24 of the TRIPS Agreement provides for the possibility to conclude bilateral or multilateral agreements. The NAFTA Agreement is one example. In this respect, the TRIPS Council has to be notified of the existence of these agreements. The Delegations said in conclusion that the SCT was not the appropriate forum to discuss such an issue.

383. The Delegation of the European Communities, also speaking on behalf of its Member States, stated in response to the Delegation of Romania that the basis of bilateral agreements was not Article 4 of the TRIPS Agreement but Article 24.1. According to this provision, bilateral or multilateral agreements are tolerated with the aim of increasing the protection of geographical indications. The Delegation stressed that it did not fall within the scope of the SCT to discuss bilateral agreements and that the reference to examples of such agreements was just for information purposes. With regard to non-geographical terms and size of the place, i.e. a country, the Delegations said that Article 22.1 of TRIPS provided for such protection.

384. The Chairman stated that WIPO's established practice is to discuss technical matters in the most objective manner and that, contrary to the discussions in other organizations, the aim of the debate in the SCT is to provide information and not to undertake an evaluation.

385. The Delegation of Australia clarified that its intervention was made in general terms ~~and that it did not want to comment the appropriateness of~~ terms. The delegation advised that the bilateral agreement between Australia and the European Communities which was had been concluded before the entry into force of the TRIPS Agreement. As regard traditional expressions, the Delegation had wanted to make two points. Firstly that the EU/Australia Wine Agreement, while dealing with traditional expressions, made no inference that any intellectual property right was contained in a traditional expression. Secondly, that the delegation wondered how a exclusive link could be established between a word that is a common English language term and a specific place in such a way as to denote or connote a particular quality or reputation in association between that commonly used term and that place.

386. The Delegation of Argentina pointed out that if the bilateral agreement between Australia and the European Communities was concluded before the TRIPS Agreement, it cannot be used as an example on how the TRIPS Agreement was implemented. Moreover, Article 4 of the TRIPS Agreement establishes a clear principle which applies to all subject matters of the TRIPS Agreement. Regarding traditional expressions, the Delegation underlined that the problem is to demonstrate the link with a specific place and that they do not constitute geographical indications in the sense of Article 22.1 of the TRIPS Agreement.

387. The Delegation of Brazil agreed with the Delegation of Argentina and stated that traditional expressions fall outside the scope of geographical indications.

388. The Delegation of Sri Lanka disagreed with the Delegation of Brazil and stated that it is of the view that Article 23 of the TRIPS Agreement covers expressions.

389. The Chairman invited the SCT to make suggestions on the continuation of the work of the SCT on geographical indications.

390. The Delegation of Australia asked for some clarification on the issues discussed. The Delegation considered a discussion on generic terms very important. There needed to be a better understanding of fundamental issues.

391. The Chairman summarized the discussions and said that the SCT seemed to agree that Article 22.1 of the TRIPS Agreement could be the starting point of the discussions. The Chairman noted that Delegations were divided on the issue of eligible subject matter as well as on objective links and rules of origin and ISO standards. The conditions met in different systems relating to the definition in Article 22.1 and the question whether the whole procedure should take place in one place as well as the size of the place of origin were also discussed. Other issues mentioned were the questions of territoriality and grandfathering and the differences between geographical indications and certification marks.

392. The Chairman finally proposed that the issues contained in documents SCT/8/4 and 5 which were not yet discussed, i.e., generic terms, conflicts between trademarks and geographical indications, and conflicts between homonymous geographical indications, should also be discussed.

393. The Delegation of the European Communities, also speaking on behalf of its Member States, asked for a clarification whether in the summary made by the Chairman the scope of the definition was included.

394. The Chairman asked whether there was an agreement of the SCT that the three topics which were not discussed should be dealt with in the future.

395. The Delegation of Australia said that the three topics which were mentioned by the Chairman should be on the Agenda and that the SCT should identify the foundational topics for future discussions.

396. The Delegation of Mexico agreed with the Delegation of Australia and asked the Secretariat for a printed list of the issues mentioned by the Chairman.

397. The Delegation of Uruguay agreed with the three topics mentioned by the Chairman.

398. The Chairman suggested that the future work of the SCT regarding geographical indications could include generic terms, conflicts between trademarks and geographical indications, and between homonymous geographical indications as well as other topics listed in an informal document to be circulated by the Secretariat in the afternoon.

399. The Delegation of Australia stated that it seemed that there was a consensus in the SCT regarding its future work on trademark matters. With regard to geographical indications the Delegation thanked the Secretariat for the informal document called "List of Issues Discussed at the SCT." The Delegations suggested that the lists should be reorganized into two main headings in order to avoid duplication in the items listed. The Delegations suggested the following consolidated listing for future work:

- discussion of the definitional issues, which would include examination of the application of the definition at the national level by the different systems of protection, practical differences of protection between the various systems (with no assessment of the national systems), links, quality, reputation and other characteristics;

- discussion focussing on the issue of territoriality, which would include two aspects: whether the criteria for eligibility are determined by the country of origin of the geographical indication or by the country where the protection is sought, and how the exceptions are applied, particularly with regard to grandfathering and generics.

The Delegation concluded that these topics are foundational and have a high priority and suggested that the Secretariat prepare papers on them for the next session.

400. The Delegation of the United States of America supported the suggestions made by the Delegation of Australia.

401. The Delegation of the Russian Federation stated that the discussions during this meeting were very interesting and helpful for its country. This Delegation noted that some of the issues that had been discussed did not come into practice yet in Russia. The Delegation did not agree with all the comments that had been made during this meeting but said that the discussions had given ample food for thought. The Delegations supported the request to study proposals made by some delegations. The Russian Delegation said it will further study these issues in order to present its views at the next session and looked forward to the discussion on the list of issues contained in the informal document.

402. The Delegation of Switzerland said that the list of issues was too long and stated that it would prefer to finish the discussion of document SCT/8/5 before revisiting to discuss additional issues. The Delegation noted that several delegations had indicated their need to have more information on geographical indications. In that case, it would be better to focalize the discussion on specific points thoroughly rather than disperse the attention of the SCT on quantities of subjects. The Delegation added that it would be important to keep some time in the future to work on trademark or industrial design matters.

403. The Delegation of the European Communities, also speaking on behalf of its Member States, said that it was premature to come up with a list of new issues because of overlaps between them, as was said by the Delegation of Australia, because the Committee should debate the last items of document SCT/8/5 before having discussion on further issues. The Delegation stated that the SCT should not be the place for interpreting provisions of the TRIPS Agreement. In this respect, in the French version of the document called "List of Issues Raised at the SCT," the word "evaluate" should be reconsidered. Finally, the Delegation referred to the debate on the conflicts between domain names and geographical indications, which took place the week before at the Special Session of the SCT. The

Delegation stressed that it was very important for the users that an appropriate solution be found for these types of conflicts and wished that progress could be made in their respect in WIPO in the future.

404. The Delegation of Canada supported the suggestion made by the Delegation of Australia.

405. The Delegation of Argentina stated that the informal document called "List of Issues raised at the SCT" was a good basis to pursue discussions under the principle of exchanges of views. This Delegation regarded the suggestion of the Delegation of Australia as logical. However, the Delegation precised that the SCT should make a distinction between issues for discussion and issues to be covered by studies to be done by the Secretariat. This Delegation recalled a suggestion it had made at previous meetings to have a study prepared on the cost benefit and impact, for developing countries and least developed countries, of broadening the scope of protection of Article 23 of the TRIPS Agreement. The Delegation also referred to the WIPO symposium on the international protection of geographical indications which constituted a very valuable source of information and suggested that the SCT consider recommending to hold the next symposium in Geneva in order to facilitate a broader participation of representatives from a larger number of countries. The Delegation added that, given the importance of the subject of geographical indications at the international level, the organization of such a symposium in Geneva, not only would constitute an important forum for information and discussion for delegates debating the issue at WIPO and the WTO, but would also permit a better understanding of the issues with the participation of owners of rights, producers, consumers, users, government officials, etc. With regard to the domain names issue, the Delegations said that although it considered it as an important issue, it would be difficult to make progress on it before reaching a consensus on the basics of the protection of geographical indications. Finally, the Delegation concluded that, if the topics listed for future work were disregarded by the Committee, it would be a disappointment after two days of interesting and fruitful discussions.

406. The Delegation of the Czech Republic supported the comments made by the Delegations of the European Communities and Switzerland according to which it is premature for the SCT to discuss new issues before completing its work on the three remaining issues which have not yet been discussed.

407. The Delegation of Barbados supported the suggestions made by the Delegation of Australia and stated that there is a need to clarify the basic concepts of geographical indications before dealing with the specific question of the domain names.

408. The Delegation of Mexico stated that the list of issues was a good start and agreed with the grouping proposal made by the Delegation of Australia. Topics for discussions should also include "generic terms," "conflicts between trademarks and geographical indications," and "conflicts between homonymous geographical indications." The Delegations supported the proposal made by the Delegation of Argentina regarding a study on the impact of geographical indication protection in developing countries. The Delegation stated that its understanding of the decision of the Special Session of the SCT on conflicts between domain names and geographical indications was to recommend the WIPO Assembly to take a decision in their respect.

409. The Delegation of Sri Lanka stated that from the point of view of a developing country the discussions at the SCT were very useful, although it did not support all the issues in the list which had been circulated. The Delegation said that it would prefer to finish the discussions on the three topics contained in documents SCT/8/4 and 5 before going further with a list of new issues. This Delegation was disappointed that the discussion was delayed at the Special Session on domain names and geographical indications since they are IP rights, as trademarks, and should be treated equally. Concerning the economic study suggested by the Delegation of Argentina, the Delegation thought the SCT was not the appropriate body to do it and would not be in favour of it.

410. The Delegation of Turkey supported the statements made by the Delegations of the European Communities, Switzerland, Sri Lanka and the Czech Republic. This Committee should discuss the three remaining issues first. The Delegation also stated that other organizations were conducting studies and handling discussions in this field and suggested to avoid a duplication of work.

411. The Delegation of Guatemala said that, as a developing country, it was looking for information and clarification of the concepts and regretted that further discussion on geographical indications was suggested but no studies. The Delegation said that it would be unfair to Delegations not well trained on geographical indications to stop the discussion on this subject. In this respect, the Delegation agreed with the Delegation of Argentina that a symposium in Geneva would be very helpful.

412. The Secretariat stated that the Program and Budget for 2002-2003 provides for a symposium on geographical indications to be organized and also recalled that at the seventh session of the SCT the Secretariat invited any Member State to host the symposium.

413. The Chairman stated that the fact that the three issues not yet discussed were not mentioned did not mean that they were not going to be discussed.

414. The Delegation of Argentina in response to the Delegation of Sri Lanka regarding studies said that the WIPO Standing Committee on Copyright and Related Rights (SCCR) had asked for a study on the impact of databases and that GRULAC had asked at the last WIPO Assemblies for studies on the impact of a world patent for developing countries. The Delegation of Argentina also referred to the Division in WIPO, specifically dealing with economic studies, and to the trend in WIPO concerning the study of the economic impact of IP rights in developing countries. With regard to domain names, the Delegation said that the WIPO Assemblies will discuss the issue and take a decision on that issue on the basis of the suggestion made by the Special Session of the SCT.

415. The Delegation of Australia expressed its disappointment with regard to the lack of consensus on the future work and remarked that this session had been the most productive in the last three years having resulted in substantive and useful discussion on geographical indications. The Delegation added that a discussion of the three remaining items, and also on domain names would not be possible until the basic concepts were clarified. The Delegation stated that under the Doha Development Agenda Declaration, extensive commitments were made on technical assistance. For the Delegation, WIPO, as a specialized agency of the

United Nations in the field of intellectual property, had a role to play in providing this technical assistance, particularly within the SCT. The Delegation therefore firmly requested that studies be done by the Secretariat along the lines which had been suggested by its Delegation.

416. The Delegation of Yugoslavia stated that it could agree with the list of topics suggested since it is broadly conceived and could include questions to be dealt with at a later stage. The Delegations supported those Delegations which expressed the wish to include in the future work of the SCT, discussions on conflicts between geographical indications and domain names. Regarding the suggestion to hold the WIPO symposium on geographical indications in Geneva, the Delegation agreed with such proposal and suggested that participants should be experts interested by the issue. It added that WIPO could also organise through the WIPO Worldwide Academy (WWA), educational courses for the IP offices which feel they need such training.

417. The Delegation of the European Communities, also speaking on behalf of its Member States, stated that it would feel as frustrated as other Delegations if no agreement could be reached on the future work of the SCT. The Delegation wanted to make it very clear that it did not want to lose the debate on the items listed. What was said was that, given the complexity of the subject and the interlinkages between the different issues listed, the Delegation needed more time to study the proposed list in order to identify which points should be taken in the future. The Delegation pointed out that it was not clear within the Committee which issues of the list should be further elaborated in a study by the Secretariat. The Delegation also recalled that the SCT agreed at its previous sessions on a list of issues, contained in the WIPO document, which had not yet been completely discussed, and expressed its surprise that this debate might be delayed. Regarding the economic study on the impact of geographical indications, the Delegation sought clarification as to the fact that at the same time it was said that the definition of geographical indication was not clear and that an economic study on their impact was needed. The Delegation wondered how a study could be done on unclear concepts.

418. The Delegation of the Islamic Republic of Iran supported the Delegations of Australia, Mexico, Sri Lanka and Australia with regard to geographical indications in developing countries. The Delegation also supported further work on geographical indications in the SCT.

419. The Delegation of Sri Lanka clarified its statement on a possible study on the economic impact of geographical indications in developing countries, since it had apparently been misunderstood. What was said is that WIPO cannot make a value judgment or an assessment on the impact, because WIPO's experience is limited to the Lisbon Agreement. This Delegation agreed with the Delegation of the European Communities on the fact that the definition had to be clarified before asking for a study. The Delegation also recalled that at its third session, the SCT decided to deal with conflicts between trademarks and geographical indications, and regretted that a different direction could be taken by the Committee before finishing the work originally mandated. The Delegation referred to paragraph 9 of document SCT/8/5 and said that it would have serious concerns to go further discussing the geographical indications issue on the basis of the list proposed without having a clear understanding of the scope of the proposed studies.

420. The Delegation of Mexico considered the debate non-existent since no objections were raised against further discussion on generic geographical indications, conflicts between trademarks and geographic indications, and between homonymous geographical indications, which are pending issues. Among other topics, there were issues of territoriality and definition. It was important for the Delegation to deal with all the issues pending or listed. The Delegation made a proposal that at the next session of the SCT, a morning and an afternoon session be devoted to discussions on generic geographical indications, homonymous geographical indications and conflicts between trademarks and geographical indications. The remaining time would be left to discuss the definition issue, on the basis of a new study to be done by the Secretariat, which should take into account the suggestions made by the Delegation of Australia and supported by other Delegations. The Delegation clarified its position concerning domain names and precised that the SCT could not make any recommendation on this point since it was already done by the special session which recommended to the Assembly that the issue of domain names come back to the SCT. The Delegations said that it did not object to such recommendation and it would be pleased if the domain name issue were dealt with at the next SCT session as well as the issues of International Nonproprietary Names (INNs) and others.

421. The Delegation of the United States of America supported the proposal of the Delegation of Mexico since it was not opposed to discuss generics and conflicts between trademarks and geographical indications and between homonymous geographical indications. However it was the wish of the Delegation to continue work on the issues listed by the Secretariat and further elaborated by the Delegation of Australia. Further discussions would be beneficial to Member States that have an established system of protection and even more to Member States who are undertaking the critical task of drafting legislation on geographical indications.

422. The Delegation of Egypt stated that there were many complex issues in the list of issues which will require consultation with its relevant national authorities. This would enable the Delegation to have a constructive participation at the next SCT meeting. The Delegation pointed out that the SCT has always worked on a consensus basis and that this approach should continue to prevail in the future.

423. The Delegation of Australia said it supported the proposal of the Delegation of Mexico. Regarding the discussion on the abusive registration of geographical indications in domain names, and the recommendation of the special session of the SCT asking the WIPO General Assembly to refer this issue back to the SCT, the Delegation stated that it is its intention to support this recommendation at the Assembly meetings since it considers that this issue falls clearly within the mandate of the SCT.

424. The Representative of the ICC viewed the discussions in this Committee as a valuable practical study of international comparative law and thanked SCT members for the very interesting exchange of views. Regarding the definition of geographical indications which is the fundamental basic issue, he stressed that in order to obtain a result, a compromise might take time. From the point of view of the ICC, conflicts between trademarks and geographical indications are the most important issue but the definitions should be also clarified.

425. The Delegation of the European Communities, also speaking on behalf of its Member States, noted that, in a spirit of compromise, the proposal of the Delegation of Mexico could be considered as a basis for discussion at the next session. The Delegation stated that it wanted the last statements made by delegations regarding domain name, to be appropriately reflected in the minutes of the meeting.

426. The Delegation of Sri Lanka stated it could not join the consensus and did not associate itself with the proposal made by the Delegation of Mexico because it needed time to consult its national authorities and wished to see the proposal on paper before taking a decision.

Agenda Item 7: Future Work

427. The Delegation of Egypt stated that it would be interested to have more information on the protection of industrial designs, and more particularly on the link between industrial designs and traditional knowledge. The Delegation asked the International Bureau whether it could prepare a paper on this subject for the next session.

428. The Delegation of Switzerland supported the proposal of the Delegation of Egypt to consecrate time to deal with design matters at the next meetings and suggested that the study should focus on the differences between industrial designs and three-dimensional marks.

429. The Delegation of Sudan supported the request made by the Delegations of Egypt and Switzerland and hoped that industrial designs could be discussed at the next SCT meeting.

430. The Delegation of Morocco supported the proposal made by the Delegation of Egypt and thought it was logical and reasonable to ask for this study since it was in the mandate of this Committee.

431. The Delegation of Egypt wanted to clarify that the subject of the study it had asked was the link between industrial designs and traditional knowledge.

432. The Delegation of Uruguay stated that the mandate of this Committee was in respect of trademarks, industrial designs and geographical indications but not in respect of traditional knowledge.

433. The Chairman stated it was too late to begin a discussion on the mandate of the SCT in the field of industrial designs, but clearly, he believed this Committee was empowered to look into industrial designs from various possible angles.

434. The Delegation of Uruguay stated that it agreed with a study on industrial designs but in relation to trade marks.

Agenda Item 8: Summary by the Chair

435. The Chairman concluded the discussion on the future work and asked the Committee to proceed to Agenda Item 8 "Summary by the Chair", of which a draft was circulated.

436. Regarding Agenda Item 4 the Delegation of Mexico requested that the agreed change of the expression “certification marks” to be changed to “collective marks” in paragraph 34 of document SCT/7/4, be reflected.

437. The Delegation of Yugoslavia stated that in the first sentence of Agenda Item 5 of the Summary by the Chair, the phrase “and the corresponding regulation rules” should be added since the rules and regulations of Articles 8, 13bis and 13 ter were discussed.

438. Concerning Agenda Item 6, the Delegation of Sri Lanka stated that it had made a reservation on the consensus reached but could lift it if a consensus could be reached on language according to the suggestion of the Delegation of Australia.

439. The Delegation of Australia said that it suggested the Secretariat prepare two papers. The first one should be on definitional issues (application of the definition at the national level by different systems of protection, practical differences of protection between geographical indications, appellation of origins systems, collective and certification marks (not an assessment of national systems), objective links and reputation). These second papers should deal with territoriality and extraterritoriality with two aspects as listed in the informal list but without the sentence: “(how in this context is understood the application of Article 23 of the TRIPS Agreement).”

440. Upon request, the Secretariat stated that the following text would be inserted under Agenda Item 6, in paragraphs 7 and 8:

“7. The SCT thoroughly discussed the issues of definition of geographical indications, protection of a geographical indication in its country of origin, and protection of geographical indications abroad, on the basis of document SCT/8/5. The SCT decided that two half -day sessions should be devoted at its next session for discussion on the other topics which were not approached (i.e., generics, conflicts between trademarks and geographical indications and between homonymous geographical indications). The SCT further decided that the rest of the available time for this Agenda Item should be devoted to the continuation of the discussions, on the basis of two documents to be prepared by the International Bureau on, respectively, the questions of definition and territoriality.

8. In this respect, the SCT agreed that the following issues, which came out at the eighth session, should be further developed in two documents to be prepared by the International Bureau: As far as the question of definition is concerned: application of the definition at the national level by different systems of protection; practical differences between the system of protection of geographical indications such as appellations of origin and the system of protection under collective and certification marks; links, reputation. This part should also address the questions whether the goods on which a geographical indication is used must necessarily be produced in a particular place; if the product needs to be tied to that place can it not be produced anywhere else; and what can be considered as the size of the place of origin (varying from a tiny vineyard to an entire country). As far as the question of territoriality is concerned, two aspects should be taken into consideration: whether the criteria for eligibility are determined by the country of origin of the geographical indication or by the country where the protection is sought; and how the exceptions are applied, notably relating to the concept of grandfathering and generics.”

441. The Chairman concluded that the Summary by the Chair had been adopted with the changes suggested by the delegations of Mexico, Yugoslavia and Australia.

442. The Secretariat informed that the next session of the SCT would be held from November 11 to 15, 2002, and added that, as decided by the SCT at this session, the draft Agenda for the ninth session would include the following substantive items: Trademarks, Geographical Indications and Industrial Designs.

Agenda Item 9: Closing of the Session

443. The Chairman closed the eighth session of the Standing Committee.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS

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

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Institut Max-Planck de droit étranger et international en matière de brevets, de droit d'auteur et de concurrence (MPI)/Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law (MPI): Eike SCHAPER (Munich <ejs@intelleprop.mpg.de>)

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