

WIPO



MM/LD/WG/6/7

ORIGINAL: English

DATE: July 10, 2009

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

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WORKING GROUP ON THE LEGAL DEVELOPMENT OF THE MADRID SYSTEM FOR THE INTERNATIONAL REGISTRATION OF MARKS

Sixth Session
Geneva, November 24 to 26, 2008

REPORT

adopted by the Working Group

I. INTRODUCTION

1. The Working Group on the Legal Development of the Madrid System for the International Registration of Marks (hereinafter referred to as “the Working Group”) held its sixth session, in Geneva, from November 24 to 26, 2008.

2. The following Contracting Parties of the Madrid Union were represented at the session: Algeria, Antigua and Barbuda, Australia, Austria, Belgium, Bosnia and Herzegovina, China, Cuba, Czech Republic, Denmark, Estonia, European Community, Finland, France, Germany, Ghana, Hungary, Iran (Islamic Republic of), Italy, Japan, Latvia, Lithuania, Montenegro, Netherlands, Norway, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Serbia, Sierra Leone, Singapore, Slovenia, Spain, Sudan, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom, United States of America (44).

3. The following States were represented by observers: Argentina, Brazil, Canada, Ecuador, Jamaica, Jordan, Mexico, Qatar, Thailand (9).

4. A representative of the following international intergovernmental organization (IGO) took part in the session in an observer capacity: Benelux Organisation for Intellectual Property (BOIP) (1).
5. Representatives of the following international non-governmental organizations (NGOs) took part in the session in an observer capacity: Centre for International Industrial Property Studies (CEIPI), European Brands Association (AIM), European Communities Trade Mark Association (ECTA), German Association for the Protection of Industrial Property and Copyright Law (GRUR), International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), International Chamber of Commerce (ICC), International Federation of Industrial Property Attorneys (FICPI), International Trademark Association (INTA), Japan Patent Attorneys Association (JPAA), Japan Trademark Association (JTA), MARQUES (Association of European Trademark Owners) (11).
6. The list of participants is contained in Annex II to this Report.

Agenda Item 1: Opening of the Session

7. Mr. Francis Gurry, Director General of the World Intellectual Property Organization (WIPO), opened the session and welcomed the participants. Mr. Gurry recalled that the accession of Ghana to the Madrid Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (hereinafter referred to as “the Protocol”) on September 16, 2008, and the forthcoming accession of Sao Tome and Principe to the Protocol on December 8, 2008, would bring the total membership of the Madrid Union to 84. Mr. Gurry also noted that Bosnia-Herzegovina, already a Contracting Party to the Madrid Agreement Concerning the International Registration of Marks (hereinafter referred to as “the Agreement”), had deposited its instrument of accession to the Protocol. As a result of this accession, which would come into force on January 27, 2009, the number of Contracting Parties to the Protocol would increase to 78, and only six States would still remain bound only by the Agreement. As a consequence, the membership of the Madrid system was approaching uniformity.
8. Mr. Gurry recalled that the repeal of the safeguard clause had been effective as from September 1, 2008, i.e., the date on which the amendment of Article 9*sexies* of the Protocol, as adopted by the Assembly of the Madrid Union, in 2007, came into force. Thus, the Protocol now regulated the situation between Contracting Parties bound by both treaties, namely the Agreement and the Protocol. In order to ensure a smooth implementation for users and offices of this fundamental shift in the operation of the Madrid system, a wealth of information was issued by the International Bureau, including the adoption of a new Internationally agreed Number for the Identification of (bibliographic) Data (INID) code to clearly identify those designations governed by the Protocol by virtue of Article 9*sexies*.

9. Mr. Gurry further recalled that, following a recommendation of the Working Group, the Assembly of the Madrid Union had adopted, in September 2008, amendments to the Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement (hereinafter referred to as “the Common Regulations”). These amendments, which would come into force on September 1, 2009, consisted of a regulatory framework for the refusal procedure, with a view to enhancing the level of information concerning the fate of international registrations in designated Contracting Parties.

10. As regards procedures relating to replacement, under Article 4*bis* of the Agreement and the Protocol, Mr. Gurry noted that, in July 2008, the International Bureau had circulated a new invitation to the Offices of Contracting Parties to the Agreement and the Protocol to reply to the questionnaire on replacement, issued by the International Bureau, in November 2007, and revised in July 2008. He concluded that a total of 58 offices had replied to the questionnaire and thanked those offices having already replied and encouraged offices that had not yet been in a position to reply to the questionnaire, to do so. The International Bureau would continue to make all the replies available on the WIPO website.

11. Mr. Gurry said that the Assembly of the Madrid Union, in September 2008, had considered favorably a proposal to study the introduction of additional filing languages in the Madrid system. As decided by the Assembly, the International Bureau would conduct that study. Mr. Gurry further emphasized the importance of the input of the Working Group in that matter.

12. Mr. Gurry also referred to the developments in the field of information technology as regards the operations of the Madrid system. He noted, in particular, the improvements in the ROMARIN database, which now contained a specific indication to the effect that, in relation to the designation of a Contracting Party in an international registration, the applicable refusal period had ended without a notification of refusal having been received. The International Bureau had also made operational an interface for the electronic payment of fees, notably by credit card, in respect of procedures under the Madrid system and the Hague system for the International Registration of Industrial Designs (hereinafter referred to as “the Hague system”). Under the Madrid system, this means was available in respect of the payment of the second-part of the designation fee for certain Contracting Parties, and for any pending application or request, in respect of which an invitation to pay the fees had been issued by the International Bureau.

13. Finally, Mr. Gurry referred to the Revised Proposal by Norway, as contained in document MM/LD/WG/6/2, which he defined as a radical proposal. Mr. Gurry encouraged the Working Group to consider that proposal in light of the best future development of the Madrid system. He recalled the expanding membership of the Madrid Union and invited the Working Group to elaborate on how that proposal would serve the future of the system in the global context of the 21st century.

14. Mr. Ernesto Rubio, Assistant Director General, introduced the draft agenda, as contained in document MM/LD/WG/6/1 Prov. 2. Mr. Rubio explained that the present session of the Working Group would focus on the Contribution by Japan and the Revised Proposal by Norway concerning the future legal development of the Madrid system, as contained in documents MM/LD/WG/6/3 and MM/LD/WG/6/2, respectively. He further recalled that, in order to assist the offices in implementing the amendments to the Common Regulations, which were adopted by the Assembly of the Madrid Union in 2008, the Secretariat had prepared a series of draft model forms. The Working Group would be invited to comment on the contents of those forms, applicable for the issuing of statements of grant of protection and for the refusal procedures.

15. Mr. Rubio further pointed out that, under item “Other Matters” of the agenda, the Secretariat would give an update on information technology development projects and, under that item, the Working Group would also be invited to discuss the future work of the Working Group. He also suggested that, in view of a possible recommendation to the Assembly of the Madrid Union, the study on the introduction of additional filing languages in the Madrid system be discussed at the next meeting of the Working Group.

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

16. Mr. António Campinos (Portugal) was unanimously elected as Chair of the Working Group, and Mr. Chan Ken Yu Louis (Singapore) and Mr. Vladimir Oplachko (Russian Federation) were elected as Vice-Chairs.

17. Mr. Grégoire Bisson (WIPO) acted as Secretary to the Working Group.

Agenda Item 3: Adoption of the Agenda

18. The Working Group adopted the draft agenda (document MM/LD/WG/6/1 Prov. 2) without modification.

Agenda Item 4: Contribution by Japan and Revised Proposal by Norway

19. Discussions were based on documents MM/LD/WG/6/3 and MM/LD/WG/6/2, containing a contribution by the Delegation of Japan and a revised proposal by the Delegation of Norway, respectively, for the future legal development of the Madrid system, and on document MM/LD/WG/6/5, prepared by the Secretariat, and entitled “Considerations Relating to the Proposal by Norway”.

20. The Chair opened the discussions by inviting the Working Group to discuss the Contribution by Japan and the Revised Proposal by Norway that suggested changes to the operating principle of the Madrid system. He stressed that the profound nature of those changes should not prevent the Working Group from discussing the improvement of the Madrid system, with a view to simplifying it so that the number of users of the system and the number of States joining the system would increase.

21. At the invitation of the Chair, the Delegation of Japan introduced document MM/LD/WG/6/3 to the Working Group. The Delegation expressed its congratulations to the Secretariat for the documents prepared for the meeting and said that certain aspects of the Madrid system were considered as a burden by the Japanese users. The Delegation referred to the variety of languages in the Asian region and said that, in order to resolve problems relating to the linguistic diversity in that region, the Delegation was proposing the introduction of more flexibility in the Madrid system as regards the requirement of a basic mark. The Delegation, however, noted the difficulties that would be involved in the introduction of its proposal, due to the lack of concrete methods of operation.

22. The Delegation explained that some Japanese users filed international applications for marks, which were modified into the language of the designated countries and which were never intended to be used in Japan (“modified marks”). The requirement of identity between the basic mark and the mark that was the subject of an international application, prevented applicants from filing international applications in respect of such “modified marks”, without first filing a basic application for the same mark. The Delegation mentioned two possible ways to increase flexibility concerning the requirement of a basic mark, namely the identification of the sameness of a sound, or of the sameness of a meaning, of “the modified mark” and the basic mark. In this respect, however, the Delegation observed that even if the transliteration into Latin characters of the basic mark was provided, the Office of origin might not be certain about the correct pronunciation of “the modified mark” in the language, in which that mark was presented. Thus, the identity of the sound of the basic mark and of “the modified mark” could not be established. As regards the sameness of the meaning of the marks, the Delegation observed that while the meaning of a word might be verified in a dictionary, this, however, would not be possible for coined words, which were not listed in a dictionary.

23. The Delegation further pointed out that, if the requirement of a certification by the Office of origin of the identity between the basic mark and the mark that is the subject of an international application was eliminated from the Madrid system, this would, in practice, mean the same as eliminating the requirement of a basic mark. The Delegation added that, if the applicant was to certify the sameness of those marks, the Office of each designated country would have to judge the sameness of “the modified mark” and the basic mark.

24. The Delegation noted the advantages of the proposal by Norway concerning the elimination of the requirement of a basic mark. The Delegation, however, cautioned that eliminating that requirement would be equivalent to establishing a new registration system for marks, and thus, further detailed consideration was required. The Delegation stressed that research on the effects on users and on the operations caused by the elimination of the basic mark was needed.

25. Finally, the Delegation referred to national statistics in its country, according to which, between 2000 and 2007, out of 4,559 international applications filed through the Office of its country, only four international registrations were totally cancelled as a result of a cancellation of the basic registration, through oppositions, or demands for trial for invalidation by a third party. The Delegation noted that an international registration, which was cancelled due to central attack, could be transformed into a national application. Therefore, in the view of the Delegation, central attack should not be regarded as a significant advantage for a third party.

26. In conclusion, the Delegation emphasized that the ability of the Madrid system to correspond to the linguistic diversity in the world was so crucial that further discussion on this matter was required, including the discussion on the elimination of the requirement of a basic mark but with careful consideration.

27. The Delegation of Norway thanked the Secretariat for its excellent work in preparing the documents for the meeting. The Delegation also expressed its gratitude to the Working Group for its willingness and open-mindedness to discuss the future aspects of the Madrid system. As background to its proposal, the Delegation explained that the focus of the proposal was to engage the Working Group in discussing a future Madrid system that would be more effective, dynamic and customer-friendly, by looking at some of the features of the system that might be changed.

28. The Delegation recalled that the Madrid system had been gradually amended, in particular, by introducing Spanish as a third language, and through the repeal of the safeguard clause. In the view of the Delegation, the system might still be further improved. The Delegation stressed that the system would have to attract users and face future challenges.

29. The Delegation highlighted that its main proposal to delete the requirement of a basic application or registration, would mean a user-friendlier system for holders of international registrations from Contracting Parties using a different language from the language of the chosen market for trade. In such a system, the holder would be able to also designate his own Contracting Party. The Delegation pointed out that, under the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs (hereinafter referred to as “the Geneva Act”), this possibility already existed. Thus, the trademark holder could focus on one registration, and did not need to worry about the basic application or registration.

30. The Delegation observed the divergence of views in the Working Group concerning the proposal to delete the five-year dependency period. The Delegation clarified that central attack was considered as an efficient mechanism to persuade the holder to limit the list of goods and/or services or to give consent to a registration of a similar or identical mark. On the other hand, under the Protocol, the holder had the option of transforming the international registration into a national application, thus meaning that “the attacker” might have to further contest the rights of the holder in each designated Contracting Party, in which the transformation had taken place. The Delegation concluded that the deletion of the requirement of a basic mark would imply that the provision regarding transformation would no longer be invoked.

31. The Delegation clarified that, in the absence of the requirement of a basic mark, an applicant could file international applications directly with the International Bureau or through the Office of his Contracting Party, if that Contracting Party allowed it. The Delegation informed the Working Group that its country would ratify the Geneva Act in the near future and that under the Geneva Act, it would offer the possibility for users to file through its Office. The Delegation further noted that, under the Geneva Act, the Office might charge a fee for transmitting the application to the International Bureau.

32. The alternative proposal of the Delegation, in the event that the requirement of a basic mark was maintained, was that the holder of an international registration could designate his own Contracting Party after the expiry of the five-year dependency period. By doing so, the holder would have to follow only one international registration. Thus, the administration of the trademark portfolio would be easier for the holder.

33. The Delegation emphasized that, in a long-term perspective, the convening of a Diplomatic Conference for the adoption of the changes in the Madrid system would be necessary. The Delegation felt that it was important to start discussion on that subject matter.

34. Finally, the Delegation observed that the holder of an industrial design registration might also apply for a trademark registration, and *vice versa*. From this perspective, a further harmonization between the Geneva Act and the Protocol would be of great benefit for users, especially for small and medium-sized corporations.

35. The Delegation concluded that it understood the concerns that some delegations might have about its proposals but expressed a wish that the discussions in the Working Group would shed light on those concerns. The Delegation said that through discussions in the Working Group, it would be possible to discover whether these proposals were a viable way forward or, whether the Working Group would come up with other proposals more suitable to meet the needs of the users.

36. The Secretariat introduced document MM/LD/WG/6/5, “Considerations Relating to the Proposal by Norway”, prepared by the Secretariat, stating that it did not constitute a proposal by the Secretariat but tried to identify a number of issues relating to the proposal by Norway. In this respect, the Secretariat referred to the Trademark Registration Treaty (TRT) noting that although the TRT was not successful, its conception as a base-free system made it a relevant precedent to consider. For this reason, the history of its development was recalled in document MM/LD/WG/6/5.

37. The Secretariat recalled that the deletion of the requirement of a basic mark did not necessarily imply that international applications could no longer be filed through an Office of origin, and invited the Working Group to consider what an Office’s subsidizing role could then be in that regard. Referring to recent statistics showing that some 60% of international applications originating from Contracting Parties bound by the Protocol only were based on a mere basic application, as opposed to 25% in Agreement and Protocol jurisdictions, the Secretariat indicated that following the repeal, on September 1, 2008, of the safeguard clause, that higher figure might very well become the standard throughout the system. The Secretariat thus invited the Working Group to take this into consideration, so as to have an “honest look” at the added value of the certification by the Office of origin in this new context.

38. In the event of the elimination of the requirement of a basic mark, the Secretariat inquired as to whether an alternative mechanism replacing central attack should be created. In the absence of a basic mark, the introduction of self-designation of the Contracting Party of the holder could be considered. The Secretariat stressed that, even without the elimination of the requirement of a basic mark, the introduction of self-designation would require the convening of a Diplomatic Conference for the revision of the Protocol.

39. The Chair invited the delegations to comment on the contribution by Japan and the proposal by Norway. The Chair raised some questions as to the role of the national offices in the Madrid system, if the requirement of a basic mark were eliminated. The Chair inquired as to whether a certification by the Office of origin was necessary and whether more freedom in the choice of the Office of origin was needed.

40. The Delegation of Slovenia emphasized that, although the contribution by Japan and the proposal by Norway were radical, and indeed revolutionary, they were very interesting and worthy of discussion. The Delegation pointed out that it had not yet carried out consultations with interested circles, but that it intended to do so at the beginning of the following year, in order to be able to adopt a more concrete position on the proposals in question.

41. The Delegation of Slovenia informed the Working Group of the concerns of its office regarding the change in the role of national offices that the proposals might involve. The Delegation stressed that organizational structures dedicated to the Madrid system had been set up within offices, and that a change in the Madrid system would imply a change in the role and organization of the national office, which could be problematic for small offices, even though they were very flexible. The Delegation also stated that such changes would also have fee implications for national offices.

42. The Delegation of Slovenia underlined that some informal discussions with interested circles had revealed that, on the one hand, they feared that modifying the Madrid system would prevent them from going through the national office and, on the other hand, small enterprises felt that it was more advantageous to go through the national office, even if they had to pay a fee. Going through the national office made it easier for small enterprises with no agents to file an international application. Finally, the Delegation of Slovenia pointed out that small enterprises had always trusted the national office to know how to correctly file an application that would subsequently be forwarded to the International Bureau.

43. The Delegation of Italy was in favor of introducing more flexibility in the Madrid system. In simplifying the procedures of the system, the Delegation, however, would not go as far as to eliminate the requirement of a basic mark. The Delegation said that, in consideration of such a fundamental change in the system, strong caution was required. The Delegation observed that in the case of direct filing the users were deprived of the support of the national offices. The Delegation explained that the national offices corrected the irregularities in the classification of goods and/or services, in respect of indications of goods and/or services as well as regarding the applicable forms. In the event of direct communication with the International Bureau, linguistic problems between the users and the international examiners might arise and the users might also have to bear additional costs. The Delegation emphasized the importance of legal certainty in respect of examination of the international applications.

44. The Delegation of Germany expressed its interest in discussing the contribution by Japan and the proposal by Norway. The Delegation explained that the European Commission was currently carrying out an evaluation of the national and regional trademark systems within the European Community. The Delegation considered it premature to express an opinion on the proposals before having the results of that evaluation. The Delegation, however, emphasized that the users appreciated the possibility of filing applications through the national office. The Delegation also spoke of its intention to have consultations with the private sector in order to discuss the future features of the Madrid system.

45. The Delegation of Romania thanked the Delegation of Japan for its contribution and the Delegation of Norway for its proposal, and specified that it was reflecting, along with its national office, on the changes being considered given their radical nature. The Delegation emphasized that the aim was to make the procedure more effective and simpler for offices and users, and that the Delegation had been considering the future role of the office of its country, its organization and the question of fees. Finally, the Delegation stated that it had not yet been in contact or consulted with interested circles and therefore remained, at this stage of discussions, reserved and interested in the discussions of the Working Group.

46. The Delegation of Belgium expressed support for the comments made by other delegations, particularly the comment made by the Delegation of Germany, and stated its reluctance as regards the proposal by Norway. However, the Delegation indicated that it wished to discuss the proposal in order to move towards a more flexible system.

47. The Delegation of Switzerland, after having thanked the Delegations of Japan and Norway, as well as the Secretariat, for their respective contribution, proposal and documents, indicated its interest in discussing any proposal that would enable the simplification of the Madrid system and make it more effective, while striving to avoid making the system heavier. The Delegation informed the Working Group that it concurred with some of the considerations expressed by other delegations previously in the Working Group.

48. The Delegation of Switzerland then stated that it had not yet consulted with interested circles, as it had not known exactly on what to consult them. The Delegation said that it did not yet have a final position and that it was open to and interested in the discussions.

49. Finally, the Delegation of Switzerland mentioned two main questions that it had been asking itself. The first question concerned the role of the national office in a system with no basic mark and no possibility of self-designation. In this connection, the Delegation wondered whether it would be sensible, in such a system, for the national office to carry out a formal and material examination relating only to the national mark and that this examination could somehow be used in the international procedure. The second question concerned the central attack mechanism. The Delegation recalled that the current mechanism was the result of a delicate balance between the various interests involved. In the view of the Delegation, in a system with no basic mark, it would appear difficult to create a system where central attack would still exist. Finally, the Delegation stated that it was interested in hearing the opinions of other delegations and interested circles on this matter.

50. The Delegation of the Russian Federation observed that the contribution by Japan and the proposal by Norway would, in practice, lead to the creation of a new registration system. The Delegation concurred with the position expressed by other delegations that the role of the national offices, both as the Office of origin and as a designated Office, in such a system, should be studied. The Delegation referred to the difficulties in evaluating, for example, a mark in the Cyrillic alphabet, and relating to the classification of goods and/or services. The Delegation cautioned against making the system more complicated. As regards the possibility of designating, after the expiry of the five-year dependency period, the country of origin of the holder in an international registration, the Delegation felt that it simplified the management of the rights of the holder. The Delegation further wondered whether the reason for the failure of the TRT was the establishment of the Protocol.

51. Expressing its support for the comments made by the Delegation of Slovenia and other delegations, the Delegation of the former Yugoslav Republic of Macedonia stated that the elimination of the requirement of a basic mark was a very interesting but very complex question. In the opinion of the Delegation, such an elimination would lead to establishing a new system for the registration of marks and to changing the Madrid system, since that requirement formed the basis of the Madrid system. The Delegation also pointed out that such an elimination would imply a change in the national legislation and probably a reduction in the work, role and importance of national offices. The Delegation felt that, if such changes were accepted, more time would be needed to adapt to them.

52. The Delegation of France thanked the Delegations of Japan and Norway, as well as the Secretariat, for their respective documents, and expressed regret for the late distribution of the French version of document MM/LG/WG/6/5.

53. The Delegation of France indicated that it considered the proposals in question as an interesting basis for discussion for the Working Group. The Delegation recalled that it was in favor of any proposal that would enable to improve the Madrid system. The Delegation emphasized that it had no firm position on the proposal by Norway. The Delegation felt that the documents submitted for discussion at the Working Group did not make it possible to determine the impact of such a change, and, in particular, its economic impact and its impact on the costs that it would generate for national offices, the International Bureau and the users of the system.

54. The Delegation of France concluded with its wish to obtain further details on the reasons why the TRT system did not work and did not have the same success as the Madrid system.

55. The Representative of MARQUES stated that the fact that the requirement of a basic mark was one of the main pillars of the Madrid system should not, however, frighten the Working Group from discussing its possible elimination, as stated in the proposal by Norway. The Representative questioned the real value of a basic application or registration, or whether there was any. The Representative favored the proposal, stressing the difficulties which exporting companies, in consequence of the requirement of the identity between an "export mark" and a basic mark, were facing in the Madrid system. Such companies had to file a basic application for a mark, which they intended to use only abroad. In addition, the basic mark was at risk of being invalidated because of non-use. The Representative also observed the different practices of national offices in respect of limitations in the lists of goods and/or services. The constraints of use of the goods and/or services in the country of origin of the applicant might prevent him from having the same advantages as users from other Contracting Parties, in terms of broader lists of goods and services in international applications. The Representative noted that the elimination of the basic mark would resolve the problems relating to "export marks", or "modified marks", as referred to in the contribution by Japan. This approach would also settle a possible divergence of opinion concerning the classification or concerning the identification of goods and/or services, which sometimes happens between the International Bureau and an office. The Representative mentioned that, in the absence of a basic mark, priority might still be claimed from the first filing in a country party to the Paris Convention for the Protection of Industrial Property. Given the possibility, under the Protocol, of transforming the international registration into a national application, the Representative questioned the importance of the central attack mechanism. The "attacker"

still might have to challenge the possible national applications or registrations resulting from transformation. The Representative did not consider it very likely that there would be a decline in the income of the national offices, as a consequence of the elimination of the requirement of a basic mark, as the country of origin of the holder could be designated in the future. The Representative was in favor of the elimination of the basic mark in order to obtain simplicity in the system. Finally, the Representative wondered whether the reason for concerns regarding the elimination of the requirement of a basic mark, was that this requirement had always been there.

56. The Representative of ECTA pointed out that the Madrid system had worked well over 100 years. The Representative expressed its concern about the future role of national offices and said that the impacts of the proposed changes, in particular, for users, should be studied.

57. The Delegation of China thanked the Delegations of Japan and Norway, as well as the Secretariat, for preparing the documents and providing a platform for discussing the development of the Madrid system.

58. Regarding the proposal by Norway, the Delegation of China noted that, through its years of experience, the Madrid system had become increasingly effective. The Delegation emphasized that, even if the Agreement, based on the registration of a mark, was maybe not very user-friendly for the applicant, it nonetheless made the system more stable, especially in countries such as China, where the office carried out substantive examination, not only on absolute grounds but also on relative grounds which, in the opinion of the Delegation, could in certain cases avoid a fraudulent registration. The Delegation pointed out that the Protocol, which was based on the possibility of a basic registration or application, had made the system more efficient and more favorable to the applicant. Although the elimination of the requirement of a basic application or registration could be more user-friendly and more advantageous for the applicant, the Delegation, nevertheless, expressed its concern that, in some cases, such an elimination could result in large enterprises having to pay more to maintain their rights over their marks.

59. The Delegation of China considered that the contribution by Japan was very interesting but felt, however, that the proposal concerning linguistic flexibility, which was probably in favor of the holder or the applicant, would cause problems in the examination carried out by the Office of origin, especially concerning the transliteration of a mark, for instance. The Delegation considered that, for the certification procedure by the Office of origin, it was difficult to find a more objective criterion than the one put forward in the contribution by Japan, namely the identity of a “meaning” or a “sound” in basic marks and “modified marks”.

60. The Representative of INTA congratulated the Chair on his election and thanked the Secretariat for the excellent document prepared for the Working Group. The Representative stated that INTA had not yet determined its position regarding the proposal by Norway and that it was interested in discussing all the implications of the proposed changes in the system. Like the Representative of MARQUES, he saw the advantages that the elimination of the requirement of a basic mark could have in terms of simplification of the system and also to remove the problems relating to the certification of the identity of the basic mark with the “export mark” by the Office of origin and to the use requirement of the basic mark, as referred to in the contribution by Japan. As an alternative approach, the Representative suggested that one could first ask oneself the question of what the ideal system for the international registration of marks would be like if it were designed today, and then, once that ideal system

was defined, the question of how to move from the current system to the new system. The Representative stressed the considerable expansion of the Protocol in the 12 years since its entry into operation and cautioned against breaking the momentum gained.

61. The Representative of CEIPI expressed its support for the comments made by the representative of INTA, and stated that CEIPI was an academic institution that did not represent users but that it was in favor of a positive examination of the contribution by Japan and the proposal by Norway. The Representative considered that, if an international system for the registration of marks were to be set up now, it would be a system of direct filing, along the same lines as all the more modern systems. The Representative observed, however, that the Madrid system was a prisoner of its own history in that respect.

62. In response to questions raised by the Delegation of Slovenia, the Representative of CEIPI confirmed that, although it would be a fairly fundamental change for national offices, if the proposals by Norway were to be adopted, the change would be gradual with a long transition period allowing the offices to adapt. The Representative also considered that a solution to the question of fees could always be found and that, for small enterprises, the advantage of being assisted by their national office could be maintained, even if the offices did not have an official role to play.

63. In reply to questions raised by the Delegations of the Russian Federation and France concerning the failure of the TRT, the Representative of CEIPI remarked that the main cause for this failure had been the lack of ratification, especially on the part of countries that were not in the Madrid system at that time. The Representative explained that the member countries of the Madrid Union, which had always expressed their satisfaction with the functioning of the system, had not had any intention to ratify the TRT before being sure that it would be ratified by the countries for which the TRT had been created, firstly the United States of America but also other countries such as the United Kingdom and the Scandinavian countries, and indeed this never happened. The Representative mentioned that it would be interesting to know why those countries did not accede to the TRT.

64. The Delegation of Cuba explained that it had studied and paid close attention to the presentation of the above-mentioned documents. The Delegation echoed many of the interventions made on the proposal to eliminate the requirement of a basic application or registration, as the contents of both documents would involve a change to the system.

65. The Delegation concurred with the other delegations that the current system was not very modern. In fact, the system went back two centuries and, therefore, provided a basis for discussion in confirming that its mature design had a solid foundation that, in addition to being flexible, since international registrations based on applications had long been accepted, it was also useful and successful. This was demonstrated by the increasing number of international applications and member countries. The Delegation stated that even though the system spanned two centuries this did not mean that it was irrelevant. The proposals being analyzed in the Working Group involved changes that some delegations had described as drastic, radical and generally troublesome, which demonstrated considerable concern around such a major change.

66. The Delegation stated that, prior to hearing the comments from other delegations it had harbored doubts about whether its position of not accepting the removal of the basic application or registration was cautious, conservative or reactionary. However, the Delegation was now convinced that its doubts were shared by many others with similar interests, such as State institutions that looked after the interests of the users of the system. The Delegation pointed out that the system had worked efficiently and transparently at the international level. The Delegation also observed that a few hours of discussion at the sixth session of the Working Group was not sufficient, and that the issue would have to be explored with much caution and in more detail.

67. The Delegation underlined that the main concern for users was to clarify what the consequences for them would be, if applications were filed without going through the national office, for example: How much would they have to pay to correct any irregularities which could be corrected? How would the applicant know whether his application was acceptable for a range of countries whose legal system the applicant was unfamiliar with? What would the extent of the formal examination carried out by the International Bureau be as regards applications that had not gone through a national office? In the event of a dispute before a court, would the court consider a certification by the International Bureau as having the same value as a certification from an authority of their country? Would the Offices be deprived of valuable information when issuing decisions?

68. The Delegation explained that those and many more questions had arisen. The Delegation stated that the loss of income was irrelevant to the Office of Cuba as its office did not charge fees for processing international applications. The Delegation pointed out that the central attack had become practically irrelevant with the entry into force of the Protocol and observed that the number of central attacks was negligible. The Delegation therefore concurred on the need to study the proposal in more detail and to illustrate and analyze objectively each of the concerns raised by the delegations.

69. The Delegation of Singapore considered the changes suggested by the Delegations of Japan and Norway as interesting and visionary proposals. The Delegation was open to discuss the proposals but shared the concerns of other delegations concerning the future role of the national offices.

70. The Delegation of Spain considered the proposed changes to the Madrid system as fairly radical, both for the national office and users, and that they would lead to the establishment of a new system. Finally, the Delegation pointed out that there had not been enough studies carried out on the proposed changes and expressed its reservation on the matter.

71. The Delegation of Turkey said that, before updating the Madrid system to the 21st century, some crucial points in the proposal by Norway, such as the role of the Office of origin and the increase in the workload of the International Bureau, had to be clarified. The Delegation observed that, according to that proposal, the International Bureau seemed to function as a national office. As regards the contribution by Japan, the Delegation noted that, in infringement cases before a court, a mark might be cancelled because of non-use. For this

reason, judicial considerations as to the concept of protection of marks, such as the protection of an amended mark, were required. The Delegation stressed that the earlier rights deriving from non-registered marks also had to be taken into consideration. The Delegation further referred to the difficulties in the examination, by the Office of origin, of the marks that consisted of abbreviated or creative words.

72. The Delegation of the European Community joined the other delegations in thanking the Delegations of Japan and Norway for opening the discussion on the future of the Madrid system. The Delegation underlined that the European Commission was currently evaluating the different systems of trademarks in the European Community, and therefore, for the time being, expressed its reservation. The Delegation said that it remained very interested in the discussions that would take place, in particular, as a result of the evaluation exercise launched by the European Commission, and on the basis of the document by the Secretariat. Consequently, the Delegation stated that it would be prefer to have the results of the European Commission's exercise before adopting a firm position, and that those results would not be available before the end of the following year.

73. The Delegation of the Russian Federation referred to the wide divergence of interpretations of the concept of replacement, under Article *4bis* of the Agreement and Protocol, and proposed harmonization in that respect. The Delegation suggested the establishment of a task force for drafting model provisions on replacement.

74. The Representative of GRUR observed that its Organization represented users not only in Germany but also in other European countries. The Representative emphasized that German enterprises were top filers both in the Madrid and Community trade mark systems, and familiar with both systems. The Representative shared the opinion of the Representative of INTA stressing that a careful approach was needed in order not to disrupt the successful expansion of the Protocol. The Representative observed that the central filing system was already applied in the Patent Cooperation Treaty (PCT) and the Hague systems. The self designation of the holder's country of origin was not a problem since the designated office would have a full power to examine substantive requirements, and sometimes even formalities.

75. The Delegation of Australia stated that the users of the Madrid system in Australia had already been consulted on key elements of the previous proposal by Norway. The users in Australia had expressed strong support for removal of the requirement of a basic mark and for the related removal of the mechanism for central attack. The Delegation was nonetheless mindful that the requirement of a basic mark was considered fundamental to both the treaties of the Madrid system. In the view of the Delegation, removal of this requirement would constitute a pivotal change with important ramifications. However, the Delegation considered that the potential benefits of removing the requirement of a basic mark were, firstly, making the Protocol more useful to existing members by addressing the script issues. Secondly, the risks inherent in multiple layers of processing for applicants, representatives and Offices of Contracting Parties were reduced. Thirdly, the simplification and streamlining of the administrative procedures and the reducing of the costs would make the system more attractive.

76. The Delegation of the Republic of Moldova said that despite the advantages of the contribution by Japan and the proposal by Norway there were also disadvantages, such as that the number of refusals would increase as a result of the removal of the requirement of a basic mark. The Delegation still needed to consult the users of its country before expressing its position on the contribution and proposal.

77. The Delegation of the United States of America stated that its country had been a party to the Madrid system for only five years. The Delegation had only recently asked advice on the proposal of removing the requirement of a basic mark from its Advisory Committee and, in this respect, would still seek more input from user groups. The Delegation mentioned that its goals with regard to the revision process of the system were, first of all, to increase the transparency of the system. In this respect, the Delegation noted the recent improvements in the ROMARIN database and the introduction of the provision of the obligation to issue statements of grant of protection, to the Common Regulations. Secondly, the Delegation stressed the importance of increasing the level of services by national offices for holders and third parties. Thirdly, more flexibility was needed for the holders from its country, with respect to the use of broader identifications of goods and/or services when filing international applications. Fourthly, simplification of both using the system and for holders in maintaining portfolios, was necessary. Finally, the linguistic diversity for both exporters from its country and for other offices abroad should be addressed.

78. The Delegation further inquired about the experiences of other Contracting Parties, which were bound only by the Protocol. The questions raised by the Delegation were the following:

(1) What are the experiences of other offices with respect to certification of international applications that have not yet been examined? The United States of America likely has an even higher percentage of international applications based on applications than the average of 60% quoted by the Secretariat.

(2) What are the experiences of other offices confronted with language differences? The Delegation invited other delegations to elaborate on their experiences and possible solutions.

(3) What is the effect of a certification by the Office of origin? The United States of America rejects a number of international applications that would otherwise result in an irregularity. Is this common in other offices, and if so, what effect would the direct filing of these types of irregular applications have on the International Bureau?

(4) Was the mechanism for central attack necessary?

79. The Delegation was interested in hearing from other delegations on their respective statistics on successful central attacks, and said that it would also investigate such statistics before the office of its country. The Delegation questioned what the alternative for central attack would be for a trademark owner faced with a “bad actor”, who had filed first an international application with the International Bureau. The Delegation noted that with central attack, the trademark owner could efficiently stop the “bad actor”. While the provision of transformation had been touted as a way around central attack, a “bad actor” was not likely to go to the trouble of transforming its international registration.

80. The Chair concluded that all the delegations had been in favor of continuing the discussions. He noted the reservations of some delegations because of the fact that they had not yet been able to consult the interested circles of their countries. The Chair invited the delegations to comment on the following issues mentioned during the discussion, firstly, whether there was an alternative to central attack, secondly, what would the role of the national offices be and, thirdly, given that exporting companies faced problems with marks in foreign scripts, could an alternative to the current system be sorted out to deal with those problems.

81. The Delegation of Japan referred to paragraph 41 of its contribution, noting that there were only a few cases, in which an international registration was totally cancelled as a result of the cancellation of the basic mark, through oppositions or, demands for invalidation by a third party. Yet, if the requirement of a basic mark was deleted, it was necessary to balance the desires of applicants and third parties. The Delegation felt it was necessary, if the requirement of a basic mark was deleted, to consider how to compensate the loss of the mechanism of central attack for third parties.

82. The Representative of GRUR recalled that when the TRT was discussed, the delegations were in favor of direct filing. As regards central attack, the Representative observed that the basic mark might be attacked on grounds which did not have anything to do with the situation in designated countries. The Representative further referred to the disadvantages caused by central attack for the holders from Contracting Parties which had a strict examination system, compared to those from Contracting Parties with less examination. On the other hand, central attack provided means for the owner of the earlier rights to protect his rights against fraudulent or bad faith actors. The Representative pointed out that the statistics on central attack did not take into account negotiations carried out between the holders and third parties. The Representative concluded that the users of the system were aware of the advantages and disadvantages regarding central attack. The Representative also noted the various interests involved with a central filing system combined with a mechanism for central attack. In any event, the Representative suggested that, for the broader issue of doing away with the requirement of a basic mark to be discussed, a substitute to central attack should first be looked at. The Representative inquired about the possibility of creating a tribunal in Geneva, similar to the one for domain name disputes.

83. In reaction to an invitation by the Chair to intervene as an expert and following the Chair's own personal intervention as well as those of other delegations, the Delegation of Cuba stated that, in its opinion, the central attack was first introduced because of the interests of users. The mechanism had been improved over time, especially through the entry into force of the Protocol. Those users who might have seen their interests affected had been able to defend themselves in their own countries. The Delegation, therefore, did not understand the fear on the part of users of the system. The Delegation commented that the central attack system worked against any inappropriate actions and that those applicants who operated seriously and responsibly in the market usually had no reason to worry. The Delegation also expressed its interest in finding out statistical data on the central attack and in hearing opinions on central attack patterns in countries where the most applications were filed. As examples, the Delegation mentioned Germany and France but was interested in the experiences of any other country, which might shed light on the matter.

84. The Representative of INTA, referring to the interventions of the Delegation of the United States of America and the Representative of GRUR, stated that the lack of entitlement to file could be a ground for central attack. In the absence of a basic mark, the entitlement to file could be challenged before a panel established with the International Bureau or before the authorities of the Contracting Party (or one of the Contracting Parties) to which the alleged entitlement to file was linked. This kind of solutions could alleviate the concerns about a possible abuse of the system without the filter of the Office of origin. The Representative suggested that bad faith could be another ground for central attack.

85. The Delegation of Cuba expressed a wish for the International Bureau to take note of the need to provide statistics on the number of claims relating to central attack, on the characteristics of patterns in different countries and on the consequences of these claims, as stated earlier.

86. In response to a proposal by the Chair, the Working Group requested the Secretariat to prepare a document for the Working Group session in the second half of 2009, exploring how, in the absence of the requirement of a basic mark, a mechanism of central attack of the international registration could be envisaged, so as to ensure a fair balance between the interests of holders of international registrations, on the one hand, and third parties, on the other. The document would also contain, where possible, relevant statistical data on the system of central attack.

87. The Chair invited the delegations to comment on the role of the national offices, in the absence of the requirement of a basic mark.

88. The Representative of GRUR noted that three kinds of offices were operating in the system, the Office of a designated Contracting Party, the Office of origin and the International Bureau. In the absence of the requirement of a basic mark, the designated "Office of origin" would function as any other designated office. Furthermore, the role of the International Bureau would change substantially. The Representative estimated that the examination of formalities to be carried out by the International Bureau would probably go substantially beyond its current exercise, where the Bureau received international applications certified by the Office of origin. The Representative cautioned against underestimating the difficulties relating to the diversity of filing languages. The Representative queried whether the International Bureau was capable to assume the different tasks to the satisfaction of the users of the system. The Representative also raised the question as to how the decisions of the International Bureau could be challenged. In conclusion, the Representative was positive that, in a long-term perspective, all those problems could be finally solved.

89. The Delegation of Italy observed that the certification work was currently performed by national offices. The Delegation raised the following questions: in the case of direct filing, what kind of documents would be needed, and how would the International Bureau examine them? Would the fees be higher and was there a need for the increase in employees? How would the International Bureau examine that the requirements as to the definition of the mark, according to the national legislations, were fulfilled? What would be the competent court or the Board of Appeal?

90. The Delegation of Germany concluded that the concept of the Office of origin would disappear. The Delegation emphasized that national offices provided a lot of services, in particular, in translation and in correct classification of the lists of goods and/or services. The Delegation expressed concern that these services could not be provided in the absence of the transmittal fees paid to the Office of origin. The Delegation informed the Working Group that the office of its country received some 400 general inquiries every month.

91. The Chair concluded that two separate issues had to be dealt with, first, the maintenance of the level of services of the national offices and, second, the funding of those services.

92. The Representative of MARQUES noted that the removal of the requirement of a basic mark was a problem for any company that did not have an "in-house" trademark expert. Those companies filed, for example, word marks that were totally descriptive in most countries.

93. With reference to a general problem of small and medium-sized enterprises in many sectors, namely the unfamiliarity with industrial property, the Delegation of Cuba explained that it was impossible to avoid that problem, if the requirement of a basic mark were eliminated from the international system. The Delegation stressed that problems had arisen even at present, when the Office of origin still played an irreplaceable role of providing assistance and examining international applications before they were sent to the International Bureau. As an example, the Delegation explained that some applicants had forgotten to pay the fee for colors. After having analyzed the proposal, the Delegation stated that, as a consequence, the support of the national office would be lost and this would therefore lead to higher costs for the applicant and, in the case of its country, also for the State. The Delegation pointed out that through the examination of national offices formal and substantive errors could be avoided, and raised concern about the consequences of the loss of such work.

94. The Delegation of Cuba also indicated that, in the event of a dispute, the competent authority in many countries requested the submission of a certification of the national registration. The Delegation inquired about how the judges, who were used to requesting that certification, would react if the requirement of a basic mark were eliminated. The Delegation explained that, in most cases, the reason for this request was to recognize that there was a registration in the country of origin with the attestation of the effective date. The Delegation noted that the International Bureau would have to issue all such certifications and referred to a particular situation of State enterprises that used the international registration system. The Delegation stressed that these issues had to be looked at and explained that, for this reason, it opposed the proposal. However, the Delegation said that it was open to those issues being subjected to all relevant analyses and to be explored from all perspectives.

95. The Representative of INTA, referring to the interventions of the Delegations of Cuba and Germany stressing the importance of maintaining the level of services to the applicants, noted that, at the option of the Contracting Party and/or the applicant, indirect filing could still be possible.

96. The Delegation of Sudan pointed out that a national mark demonstrated the honest intentions and seriousness of the applicant to use his trademark and this would also prevent others from committing bad faith actions. Deletion of the requirement of a basic mark would open the door to bad faith actions, like piracy.

97. The Chair proposed that the Secretariat prepare a questionnaire, in the beginning of 2009, on the tasks, currently performed by the national and regional offices, relating to the procedures of the international registration system. On the basis of the replies to the questionnaire by the offices, the Secretariat would prepare a document summarizing all those tasks, for consideration by the Working Group.

98. In reply to the proposal by the Chair, the Delegation of Germany stated that the questionnaire on the tasks carried out by the national offices should include a question on whether, in the absence of a basic mark, the national office considered that it was able to continue to offer services to the users of the system.

99. The Representative of INTA noted that the level of services could possibly be maintained against the payment of a fee. The Representative suggested that the proposed questionnaire make a distinction between the tasks performed by the Office of origin as mandated by the treaties and additional tasks that were not so mandated.

100. The Delegation of Cuba was interested in an introduction to the statistics regarding the work carried out by the International Bureau in respect of the applications that it received. Furthermore, the Delegation thought it would be beneficial if statistics from the last three years on the different steps and the pattern of work carried out by the International Bureau in relation to all the documents that it processed were made available.

101. In response to a proposal by the Chair, the Working Group requested the Secretariat to prepare a second document assessing, in the absence of the requirement of a basic mark, the tasks that would be required to be performed with respect to the filing of an international application, and by whom. To that end, the Secretariat would circulate a questionnaire among the Offices of the Contracting Parties to the Madrid system in the early part of 2009, in order to gather information on the range and level of services and tasks that they currently provide and carry out as Offices of origin, in the context of both the international registration procedure, and national/regional registration procedures to the extent that the latter benefit an international application. The questionnaire should also enquire as to what might ensure that users continue to receive at least the level of support and services they currently receive from national/regional Offices, and as to the readiness of such Offices to continue to provide such support and services, in the absence of the requirement of a basic mark. The questionnaire would distinguish between those tasks and services that are mandated by the Madrid treaties and those that are not. Furthermore, in order to establish a context for discussions, the document would contain, where available, statistical data relating to operational aspects of the work carried out by the International Bureau.

102. The Chair invited the delegations to elaborate on possible solutions for problems that exporting companies were facing in connection with marks which they intended to use abroad only.

103. The Delegations of Denmark, Germany and Portugal explained that their national laws provided that affixing a trademark on the goods for export purposes was considered as use in their countries.

104. The Delegation of Singapore understood the problems that the Japanese users and users in other countries that did not use Latin scripts were facing. In the event that the Working Group decided to retain the requirement of a basic mark, the Delegation offered some suggestions to deal with such a situation. Firstly, one alternative avenue worth exploring in light of the current discussions on eliminating the requirement of a basic mark was to refine the existing domestic legislation concerning non-use of the mark. The Delegation explained that its country was not faced with that problem because its national law only provided for the revocation of a mark that had not been used for five years from the date of completion of the registration procedure, if there had been no “proper reasons for non-use”. The Delegation pointed out that the phrase “proper reasons for non-use” and similar phrases were usually not defined in national legislations. Courts, however, could exercise more discretionary powers in interpreting such a phrase to include situations where the mark had not been used for various reasons.

105. Secondly, the Delegation noted that another way of overcoming the problem in question was to ensure that the revocation of the basic mark, during the five-year dependency period, would not affect the international registration based on it. If the basic mark was filed shortly before, or on the same day as, the international application and was registered after the date of the international registration, even if a successful non-use revocation action was filed, that action would, in all probability, fall outside the five-year dependency period, under the Madrid system. In the above-mentioned case, even if the basic mark was cancelled on the basis of non-use, the cancellation would have no bearing on the protection of the mark in the designated Contracting Parties. The Delegation, however, admitted that this was not a solution in the case that the international applicant intended to rely on an already registered basic mark.

106. The Delegation of the European Community referred to Article 10.2.(b) of Council Directive No. 89/104/EEC, to approximate the laws of the member States relating to trade marks, which stated that “affixing of the trade mark to goods or to the packaging thereof in the Member State concerned solely for export purposes” constituted use of the trade mark in that member State. The Delegation further noted that a free choice of the Office of origin might be one solution for the exporting companies.

107. The Representative of CEIPI emphasized that it seemed obvious that the solution lay in national law, and that it would not be possible to solve the problem within the framework of the Madrid system. The Representative considered that the German approach appeared to be the best solution. The Representative suggested that the Delegation of Japan should see how it could amend its national law in order to solve the problem, which appeared feasible at least in theory.

108. The Representative of GRUR referred to the interventions of the Delegations of the European Community and Singapore, which provided solutions to the problem raised in the contribution by Japan. The Representative pointed out that the situation where the mark had only been affixed to goods in the territory of the country of origin could be solved through national legislation. The Representative said that, alternatively, the shortening of the dependency period, under the Madrid system, from five years to three could be considered. A third possible solution would be to abandon the requirement of a basic mark.

109. The Delegation of Cuba explained that, after having analyzed the contribution by Japan, it did not consider linguistic flexibility to be very recommendable. The Delegation was, however, of the opinion that this problem needed ongoing analysis, as the flexibility was related to the examination of the basic application. The Delegation therefore stated that it could not support that proposal until it was clarified.

110. The Delegation of Japan clarified that the national law of its country also recognized as use the affixing of the mark to goods intended for export but added that some companies did not only export but also produced the goods abroad. The Delegation explained that the production of goods abroad was not considered as proper use under the law of its country. Even if the mark was intended to only be used abroad, the Delegation stressed the benefits for the users of being able to file, under the Madrid system, an international application, in one language, through the Office of origin. The Delegation said that this problem should be looked at within the Madrid system.

111. The Delegation of the United States of America stated that if the goods were produced abroad, maybe more flexibility could be introduced in the selection of the Office of origin.

112. The Representative of JPAA emphasized the importance to choose the right mark for each market. The Representative noted that the problem in question was not only a problem in Japan, but also in other countries.

113. Analyzing the statements made concerning the proposal for linguistic flexibility contained in the contribution by Japan and the proposal by Norway, the Delegation of Cuba explained that it considered that marketing problems linked to industrial property were involved and that it was logical for companies to have to apply strategies for their positioning in order to analyze everything that resulted from the situation of its registrations and consequently to invest so as to satisfy the requirements of a given market, which perhaps, not because it was problematic, must be resolved by means of industrial property. The Delegation said that it did not believe that creating greater flexibility was currently the most appropriate way. However, if as a result of the other proposal by Norway another Office of origin could be chosen, the Delegation would not be opposed, as it was part of the existing arrangements.

114. Referring to concerns raised in the contribution by Japan, the Delegation of the Republic of Moldova remarked that, if the holder was producing in another country, the holder already had a real and effective enterprise in that country. Therefore, the holder could use the office of that country as the Office of origin.

115. The Representative of JTA observed that some 100,000 applications were filed every year in Japan, of which only 4,500 were international applications. The Representative recalled that only a few countries from Asia were party to the Protocol and, in order to attract Asian countries, more flexibility in the system was needed.

116. The Chair concluded that on the basis of the Contribution by Japan, the Working Group had had a useful exchange of views on the questions concerning the risk of cancellation of an international registration on grounds of non-use of the basic mark. Several delegations commented upon their experience in seeking solutions to the problem at their domestic level, through a flexible definition of the use requirement.

Other delegations noted that if use is required only within five years from the registration of the basic mark, it is likely that the international registration will not be at risk. The Working Group agreed to continue to keep in mind the question of linguistic diversity in its future work.

Agenda Item 5: Model Forms

117. Discussions were based on document MM/LD/WG/6/4 “Information Relating to the Fate of Designations; Revised Model Forms for Offices of Contracting Parties”, prepared by the Secretariat.

118. The Secretariat introduced document MM/LD/WG/6/4 stating that, as a consequence of the amendments to Rules 16 and 17, and the introduction of new Rules 18*bis* and 18*ter* of the Common Regulations, all of which would enter into force on September 1, 2009, the revision of the existing model forms was necessary, as these amendments introduced a fundamental change in the presentation of information to be communicated in relation to the final disposition of a mark. The Secretariat stressed that offices were not required to use the new model forms if they preferred to use their own standard letters. However, these offices too would need to adapt their letters so as to take into account the amendments, and, in that respect, the revised model forms could also be of assistance to them. The Secretariat also recalled that, despite the availability of revised model forms, with respect to some of the communications envisaged, the International Bureau remained prepared to receive these in data form also or even as simple paper lists.

119. In response to a question raised by the Delegation of Slovenia, the Secretariat, referring to document MM/A/40/1, which was submitted, for adoption, to the Assembly of the Madrid Union in 2008, recalled that the amendments to the Common Regulations, including the new Rules, would enter into force on September 1, 2009. Adjustments reflecting the amendments would therefore have to be made, both by the International Bureau and by the offices, to the contents of communications exchanged. However, an interim provision providing that the obligation for offices to issue statements of grant of protection, as soon as they had concluded that they did not intend to issue a notification of provisional refusal with regard to a given registration, would only be enforceable as of January 1, 2011.

120. In reply to a question from the Delegation of the Russian Federation, the Secretariat explained that the introduction of the obligation for offices to send statements of grant of protection, under new Rule 18*ter*(1), coming into force on January 1, 2011, was independent from the review of Article 9*sexies*(2), which might take place after the expiry of a period of three years from September 1, 2008, i.e., after September 1, 2011.

Model Forms 1 and 2

121. The Secretariat introduced Model Form 1 “Madrid Protocol, Information Relating to Possible Oppositions, Rule 16(1)(a)”, and Model Form 2 “Madrid Protocol, Dates on Which Opposition Period Begins and Ends, Rule 16(1)(b)”.

122. As no comments were raised, the Chair concluded that the Working Group approved Model Forms 1 and 2.

Model Form 3

123. The Secretariat introduced Model Form 3 “Madrid Agreement and Protocol, Provisional Refusal of Protection, Rule 17(1)”.

124. The Delegation of Cuba sought clarification on the contents of the form, which included different items from the form used by the Office of its country. The Delegation asked whether, due to specific characteristics of the legislation of its country, the form used by its Office could be maintained as previously agreed with experts from the International Bureau.

125. In response to a question from the Delegation of Cuba, the Secretariat recalled that the model forms were general templates. The offices might need to modify them in order to adapt them to their respective national legislation, especially in the case of current Model Form A, which corresponded to proposed Model Form 3. The Secretariat confirmed that the work carried out with the Office of Cuba to adapt the template of the forms to its particular situation was not invalidated by the provision of new model forms. The forms had been reviewed in general to adapt them to the amendments to the Common Regulations but adjustments made by offices remained valid, if they still complied with the new requirements.

126. In reply to a question from the Delegation of Slovenia, regarding heading 5 of Model Form 3, the Secretariat recalled that the office had the choice to mention either the goods and services affected or the goods and services accepted. The form was simply a template in which the office should insert its clear statement, such as “all goods and services except the following” or “for class X, only the following goods or services are refused”.

127. The Chair concluded that the Working Group approved Model Form 3.

Model Form 4

128. The Secretariat introduced Model Form 4 “Madrid Agreement and Protocol, Final Disposition on Status of a Mark – Statement of Grant of Protection – Rule 18^{ter}(1)”.

129. The Delegation of the Russian Federation declared that its office did not currently issue statements of grant of protection but that it intended to use the relevant form as soon as possible in the following year. The Delegation considered that the issuing of a statement of grant of protection was necessary and obligatory, insofar as it was important for users to know whether a mark was protected or not. The Delegation felt that it was reasonable to add an additional heading for the reproduction of the mark to all forms.

130. The Delegation of Italy emphasized the importance for the offices to be able to send statements of grant of protection in the form of lists.

131. Referring to the comment made by the Delegation of the Russian Federation, the Secretariat indicated that, given that the reproduction of the mark had not been provided for when the Common Regulations were amended, it would be difficult to accept that element. The Secretariat emphasized that the identification of the international registration was possible because of the indication of the registration number on the form, thereby avoiding any possible ambiguity. However, in view of the acceptance by the International Bureau of

communications relating to the grants of protection in electronic form or in the form of paper lists, it would not be possible to include a reproduction of the mark in the templates. The Secretariat noted that the International Bureau had committed to accepting such communications, when the amendments to the Rules concerned were formulated. The Secretariat wished to reassure the Delegation of Italy on that latter issue.

132. The Chair concluded that the Working Group approved Model Form 4.

Model Forms 5, 6 and 7

133. The Secretariat introduced Model Form 5 “Madrid Agreement and Protocol, Final Disposition on Status of a Mark – Statement of Grant of Protection Following a Provisional Refusal – Rule 18*ter*(2)”, Model Form 6 “Madrid Agreement and Protocol, Final Disposition on Status of a Mark – Confirmation of Total Provisional Refusal – Rule 18*ter*(3)” and Model Form 7 “Madrid Agreement and Protocol, Further Decision Affecting the Protection of Mark, Rule 18*ter*(4)”.

134. As no comments were raised, the Chair concluded that the Working Group approved Model Forms 5, 6 and 7.

Model Form 8

135. The Secretariat introduced Model Form 8 “Madrid Agreement and Protocol, Completion of *Ex officio* Examination – Interim Status of a Mark – Rule 18*bis*(1)(a) and (b)”.

136. In reply to a question from the Delegation of the United States of America, the Secretariat explained that it was not possible to indicate goods and services in Model Form 8. The Secretariat observed that Model Form 8 had to be followed by a final disposition on the status of a mark, in which the goods and services could be indicated.

137. The Representative of INTA questioned the fact that an opposition and an observation had been put on an equal footing in the note for use of Model Form 8. The Representative said that, for example, according to the European Council Regulation (EC) No. 40/94 on the Community Trade Mark (CTM), there was no obligation for the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), to issue a provisional refusal after having received an observation by a third party.

138. The Delegation of the European Community concurred with the position of the Representative of INTA stating that a distinction should be made between the opposition proceedings and an observation filed by a third party. The Representative explained that if OHIM, after the closing of the *ex officio* examination as to the absolute grounds for refusal, received an observation from a third party that the office considered irrelevant, it would not reopen the file and therefore not issue a provisional refusal on absolute grounds.

139. The Delegation of the European Community further declared that the indication of opening and end dates for observations was problematic for OHIM, since there were no fixed dates for filing observations.

140. After some discussion, it was agreed to amend Model Form 8, notably to refer to filing of “observations leading to a refusal”. The Chair circulated for approval a new version of Model Form 8.

141. The Chair concluded that the Working Group indicated its approval of the revised model forms, for use by Offices of Contracting Parties, with slight amendments to Model Form 8 (see Annex I to this document).

Agenda Item 6: Other Matters, Including Discussion on Future Work

142. The Secretariat first provided an update on recent information technology (IT) developments concerning the international registration procedure under the Madrid system.

ROMARIN

143. The Secretariat recalled that since mid-July 2008, whenever a refusal period had expired and the International Bureau had not recorded any notification of provisional refusal from the Office of a given Contracting Party designated in a given registration, ROMARIN indicated this fact. This new feature had already been demonstrated at the meeting of the Working Group in May 2008.

144. As from January 1, 2009, information concerning goods and services affected by provisional refusals would be made available in ROMARIN. This would be done by providing access in ROMARIN to copies of the provisional refusals received from designated Offices (only in the language in which they were submitted).

E-Gazette

145. The Secretariat informed the Working Group that, as from January 1, 2009, the paper version of the *WIPO Gazette of International Marks* (hereinafter referred to as “the Gazette”) would be discontinued and replaced by a web-based system (e-Gazette) on the Madrid system homepage. The Secretariat explained that the international publication date would be the date on which the electronic version of the Gazette was made available on the Madrid pages at: www.wipo.int/madrid/en/gazette/. In order to avoid that the first e-Gazette be published prior to the last paper version of the Gazette, the first e-Gazette would be made available in February 2009.

146. The prescribed contents of the Gazette would remain unchanged, even though its layout might be different. Remarks, declarations made by Contracting Parties, general information and individual fees would be viewable under “shortcut” boxes. Information Notices would continue to be published as PDF files. The Gazette would also remain available in DVD version and in PDF format version online.

E-Payment

147. The Secretariat reminded the Working Group that, as from November 5, 2008, fees notified in irregularity letters and second parts of individual fees could be paid through a newly created e-payment service on the Madrid system homepage. Such payments could be made from a WIPO current account or by credit card.

148. The Secretariat explained that it was exploring whether this e-payment service could also be used for other payments under the Madrid procedures.

E-Communications and E-Notifications

149. The Secretariat pointed out that there were currently eight offices using Input MECA for the submission of international applications and/or other documents under the procedures of the Madrid system. The Secretariat informed the Working Group that work had started between the International Bureau and 13 other offices which aimed to use Input MECA. This work was in different stages of completion, some well advanced, others just started.

150. The Secretariat explained that the International Bureau was currently communicating documents electronically to 51 offices, either through Output MECA or through making available PDF versions of notifications electronically. The PDF versions had been available since 2007, in order to ease the way for offices towards the suppression of paper notifications. To date, paper notifications had been suppressed with respect to notifications sent to 13 offices. The circular letter informing offices of the availability of PDF versions would be resent shortly, in the hope that more offices would be ready to stop receiving paper notifications.

151. The Secretariat said that, in order to facilitate communication on IT matters between offices of the Madrid system and the International Bureau, the International Bureau was about to send a circular letter to offices requesting them to appoint a focal point for this purpose and convey his contact details to the International Bureau.

152. The Secretariat further informed the Working Group that, in order to formalize the existing e-communication arrangements between the International Bureau and offices, the International Bureau would soon be sending a template to the offices concerned aimed at assisting in the drawing up of memoranda of understanding, under Section 11 of the Madrid Administrative Instructions.

153. Finally, the Secretariat recalled that, as from October 16, 2007, an e-notification system was available allowing holders and representatives to receive communications under Rules 17, 18 and 22 electronically. However, this service was not yet widely used. The International Bureau was, therefore, exploring possible improvements that would involve notifying, preferably by e-mail, that a copy of the refusal or related communication was available on the WIPO website.

Statistics

154. The Secretariat reminded the Working Group that, in addition to the annual Madrid statistics, monthly statistics were also now available on the WIPO website at www.wipo.int/madrid/en/statistics/.

155. The Delegation of Austria proposed that information that a mark had acquired distinctiveness through use in a Contracting Party should also be made available in ROMARIN.

156. The Delegation of Cuba expressed its gratitude for the measures introduced by the International Bureau to improve services through the use of electronic technology. The Delegation also expressed a wish to be informed of the date of notification by WIPO of a provisional refusal to the holder. The Delegation pointed out that this information was very important for the Office of its country as, in the event of a dispute, the Office had to certify that date before a court.

157. The Chair encouraged the offices to cooperate with the International Bureau in order to enhance the use of electronic communication.

Future Work

158. The Chair recalled that the Working Group would hold two sessions in 2009.

159. Following an invitation by the Chair, the Delegation of the Russian Federation noted that the study on the introduction of additional filing languages in the Madrid system had not been discussed in the Working Group. The Delegation was in support of that study, proposing that the scope of the study be enlarged to also include the languages of publication. In the view of the Delegation, the lists of goods and/or services could be published in additional languages. As regards the revision of Article 9^{sexies} of the Protocol, the Delegation emphasized that the aim of the revision was for the system to be governed by one treaty. The Delegation suggested a program of steps in that direction.

160. The Representative of GRUR proposed that the issue of replacement, under Article 4^{bis} of the Agreement and of the Protocol, be discussed in the Working Group.

161. In reaction to an intervention by the Representative of GRUR, the Chair invited the Representative to submit a proposal on that issue.

162. In reply to an inquiry from the Delegation of Italy, the Secretariat explained that the Assembly of the Madrid Union had requested a study concerning the possibility of introducing four new filing languages into the Madrid system, namely Arabic, Chinese, Portuguese and Russian, which were official languages of WIPO. The Secretariat noted that the concept of introduction of new filing languages would also be relevant in respect of other languages.

163. The Working Group agreed to continue discussions on the topic of the future development of the Madrid Protocol at its eighth session in the second half of 2009 on the basis of, *inter alia*, the two papers requested from the Secretariat, as referred to in paragraphs 86 and 101, above.

164. The Working Group agreed that the next session would focus on the study on the introduction of additional filing languages in the Madrid system, with a view to making recommendations to the Assembly of the Madrid Union in that respect.

165. The Chair concluded the suggestions as other items for possible future work, as follows: the possibility for Contracting Parties to issue communications concerning the acquired distinctiveness of the mark; the communication to Offices of the date of notification of provisional refusals; the review envisaged under Article 9*sexies*(2) of the Madrid Protocol and the future of the Madrid Agreement; and finally, the issue of replacement. With regard to the latter, the Chair invited representatives of users to make their views known.

Agenda Item 7: Summary by the Chair

166. The Delegation of Japan suggested that paragraph 14 of the Draft Summary by the Chair, instead of reading “raised by the Delegation of Japan”, should state “on the basis of the Contribution by Japan”.

167. In reply to a question from the Delegation of the Russian Federation, the Chair referred to paragraph 20 of the Draft Summary by the Chair, which mentioned the issue of replacement.

168. The Working Group approved the Summary by the Chair, as contained in document MM/LD/WG/6/6.

Agenda Item 8: Closing of the Session

169. The Chair closed the Session on November 26, 2008.

[Annexes follow]

ANNEX I

*Model Form 8***MADRID AGREEMENT AND PROTOCOL****COMPLETION OF *EX OFFICIO* EXAMINATION****– INTERIM STATUS OF A MARK –****Rule 18bis(1)(a) and (b)**

This form is to be used in the following situation: the Office confirms that ex officio examination has been completed, but protection of the mark is still subject to possible opposition or observations by third parties.

NOTE: *This statement may optionally be sent by an Office following ex officio examination, including in situations where the Office had notified a provisional refusal, but ex officio procedure has been completed favorably for the holder.*

If, following the present statement, opposition is filed, or observations leading to a refusal are leading to a refusal are filed, a Provisional Refusal of Protection (Model Form 3) should be sent in due course.

If no opposition is filed or no observations leading to a refusal are filed, the present statement should be followed by a Statement of Grant of Protection (Model Form 4 or, where the mark had first been the subject of an ex officio provisional refusal, but the ex officio procedure has been completed favorably for the holder, Model Form 5).

I.	Office sending the statement:
II.	Number of the international registration:
III.	Name of the holder (or other information enabling the identity of the international registration to be confirmed):
IV.	A notification of provisional refusal: <input type="checkbox"/> has not been communicated by the Office (Rule 18bis(1)(a)) <input type="checkbox"/> has been communicated by the Office (Rule 18bis(1)(b))
V.	Date by which opposition or observations may be filed:
VI.	Signature or official seal of the Office sending the statement:
VII.	Date:

[Annex II follows]

ANNEX II

I. MEMBRES/MEMBERS

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

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ANTIGUA-ET-BARBUDA/ANTIGUA AND BARBUDA

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AUSTRALIE/AUSTRALIA

Robyn FOSTER (Ms.), General Manager, Trade Marks and Designs, IP Australia, Woden ACT

Tanya DUTHIE (Ms.), Assistant Director, International Policy, IP Australia, Woden ACT

AUTRICHE/AUSTRIA

Tanja WALCHER (Mrs.), Legal Department, Austrian Patent Office, Vienna

BELGIQUE/BELGIUM

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III. ORGANISATIONS INTERNATIONALES INTERGOUVERNEMENTALES/
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ORGANISATION FOR INTELLECTUAL PROPERTY (BOIP)

Camille JANSSEN, juriste, La Haye

IV. ORGANISATIONS INTERNATIONALES NON GOUVERNEMENTALES/
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Jan WREDE (Law Committee member, Antwerp)
Anne-Laure COVIN (Mrs.) (Legal Co-ordinator, Brussels)

Association des industries de marque (AIM)/European Brands Association (AIM)

Jean BANGERTER (Representative, Lausanne)

Association internationale pour les marques (INTA)/International Trademark Association (INTA)

Bruno MACHADO (Geneva Representative, Rolle)

Association internationale pour la promotion de l'enseignement et de la recherche en propriété intellectuelle (ATRIP)/International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)

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Association japonaise des conseils en brevet (JPAA)/Japan Patent Attorneys Association (JPAA)

Yasuko KUMON (Mrs.) (Vice-Chairman, Trademark Committee, Tokyo)

Fumihiko HIROSE (Member, Tokyo)

Chikako MORI (Ms.) (Member, Trademark Committee, Tokyo)

Association japonaise pour les marques (JTA)/Japan Trademark Association (JTA)

Fumihiko HIROSE (Vice-Chairman, International Activities Committee, Tokyo)

Centre d'études internationales de la propriété industrielle (CEIPI)/Centre for International Industrial Property Studies (CEIPI)

François CURCHOD (représentant permanent auprès de l'OMPI, Genolier)

Chambre de commerce internationale (CCI)/International Chamber of Commerce (ICC)

Gonçalo DE SAMPAIO (Representative, Lisbon)

Fédération internationale des conseils en propriété industrielle (FICPI)/International Federation of Industrial Property Attorneys (FICPI)

Gonçalo DE SAMPAIO (Representative, Lisbon)

MARQUES (Association des propriétaires européens de marques de commerce)/MARQUES (Association of European Trademark Owners)

Tove GRAULUND (Mrs.) (Representative, Leicester)

V. BUREAU/OFFICERS

Président/Chair:	António Serge CAMPINOS (Portugal)
Vice-présidents/Vice-Chairs:	CHAN Ken Yu Louis (Singapour/Singapore) Vladimir OPLACHKO (Fédération de Russie/ Russian Federation)
Secrétaire/Secretary:	Grégoire BISSON (OMPI/WIPO)

VI. **SECRETARIAT DE L'ORGANISATION MONDIALE DE LA
PROPRIÉTÉ INTELLECTUELLE (OMPI)/
SECRETARIAT OF THE WORLD INTELLECTUAL
PROPERTY ORGANIZATION (WIPO)**

Francis GURRY, directeur général/Director General

Ernesto RUBIO, sous-directeur général/Assistant Director General

Grégoire BISSON, chef du Service juridique des systèmes d'enregistrement international/
Head, International Registration Systems Legal Service

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Matthijs GEUZE, conseiller principal au Bureau du sous-directeur général/Senior Counsellor,
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