

## **Working Group on the Development of the Lisbon System (Appellations of Origin)**

**Third Session**  
**Geneva, May 23 to May 27, 2011**

REVISED DRAFT REPORT

*prepared by the Secretariat*

1. The Working Group on the Development of the Lisbon System (Appellations of Origin) (hereinafter referred to as “the Working Group”) held its third session, in Geneva, from May 23 to May 26, 2011.
2. The following Contracting Parties of the Lisbon Union were represented at the session: Algeria, Bulgaria, Burkina Faso, Congo, Czech Republic, France, Haiti, Hungary, Iran (Islamic Republic of), Italy, Mexico, Nicaragua, Peru, Portugal, Republic of Moldova, Serbia, Togo, Tunisia (18).
3. The following States were represented as observers: Australia, Chile, China, El Salvador, Germany, Iraq, Madagascar, Romania, Spain, Switzerland, United Arab Emirates, United States of America (12).
4. Representatives of the following international intergovernmental organizations took part in the session in an observer capacity: African Intellectual Property Organization (OAPI), European Union (EU) (2).
5. Representatives of the following international non-governmental organizations took part in the session in an observer capacity: Centre for International Intellectual Property Studies (CEIPI), European Communities Trade Mark Association (ECTA), International Trademark Association (INTA), MARQUES (Association of European Trademark Owners), Organization for an International Geographical Indications Network (OriGIN) (5).
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, opened the session and welcomed the participants. Before turning to the objectives of the present meeting, he first wished to recall a number of developments that had taken place concerning the Lisbon system since the second session of the Working Group.

8. He indicated that, in January 2011, two new publications concerning the Lisbon system had been issued by WIPO. First, he drew the attention to the new edition of WIPO Publication No. 264 containing the legal texts underlying the Lisbon system. This publication had been updated as a result of three developments that had taken place, namely (i) the entry into force of a number of amendments to the Regulations under the Lisbon Agreement, as adopted by the Lisbon Union Assembly in October 2009; (ii) the establishment of Administrative Instructions, as in force since January 1, 2010; and (iii) the correction of a number of translation errors in the previous editions of the official English and Spanish texts of the Lisbon Agreement, after consultation with member States. Second, the Director General referred to the new WIPO Publication No. 942, which concerned a promotional flyer on the advantages and benefits of the Lisbon system. He said that these publications were, at present, available in English, French and Spanish, but other language versions were in preparation.

9. The Director General also gave an update on IT-based developments relating to the Lisbon system. In this regard, he first underlined that good progress had been made in expanding the use of e-mail for the communication of international applications and notifications under the Lisbon procedures. He further specified that, to date, e-mail had been established as the principal means of communication under the Lisbon procedures between WIPO and the competent authorities of 14 member States, i.e. half the membership of the Lisbon Agreement. He added that the Secretariat was in contact with the other half of the membership and that his hope was that soon the competent authorities of all member States would be using e-mail for the dispatch of international applications and the receipt of notifications under the Lisbon procedures.

10. Continuing, he indicated that the WIPO *Bulletin Appellations of Origin* had become fully electronic and that the last paper edition to be published was Issue No. 39 of January 2011. Henceforth, the *Bulletin* would only be published in electronic form on the WIPO website, free of charge. He added that all past editions of the *Bulletin* had been made available on the WIPO website as well.

11. As regards Lisbon Express, the Director General recalled that, in March 2011, WIPO had launched on its website, the Global Brand Database, which provided a simple and user-friendly portal to WIPO's three brand-related databases, namely ROMARIN, Lisbon Express and *6ter* Express, concerning, respectively, international trademark registrations under the Madrid System Concerning the International Registration of Marks, international registrations of appellations of origin under the Lisbon system and notifications under Article *6ter* of the Paris Convention concerning armorial bearings, flags and other State emblems as well the names, abbreviations and emblems of intergovernmental organizations. The Director General said that it was the Organization's intention to expand the *Global Brand Database* in the future since the Organization had automation or digitization programs in over 60 developing countries at the present date and that the Organization would thus be bringing in national collections of trademarks into the database the first of which would appear in the course of the year. He encouraged participants to explore the functionality of the search engine on the database because in his view it was a very good search engine which also created an enormous range of possibilities for searching the collections that were available through it.

12. As regards the objectives of the third session of the Working Group, the Director General recalled that the Working Group had been established in September 2008 by the Lisbon Union Assembly and that its first session was held in March 2009. As a result of the recommendations agreed at that session, the Assembly had extended the mandate of the Working Group, so as to allow the Working Group to engage in a full-fledged review of the Lisbon system for the protection of appellations of origin and their international registration to determine how to make it more attractive. Since over 50 years had passed since the Lisbon Agreement was concluded and that there still were only 27 member States. Mr. Gurry was of the view that everyone would like to see a situation in which such system would become, like other systems, a truly global or a much more global system than a membership of 27.

13. The Director General also recalled that in order to assist the Working Group in such review, the International Bureau had been requested to prepare two documents: (1) a document reflecting the results of a survey on the Lisbon system among stakeholders, in the widest possible sense, i.e. member State and non-member State governments, intergovernmental organizations, non-governmental organizations and interested circles; and (2) a document reflecting a study on the relationship between regional systems for the protection of geographical indications and the Lisbon system and the conditions for the possible accession to the Lisbon Agreement by competent intergovernmental organizations.

14. The Director General noted that the Working Group had discussed those two documents at its second session, in August/September 2010 and, as a result, the International Bureau had been requested to prepare, for the present session of the Working Group, draft provisions on a number of topics, including, *inter alia*, definitions for geographical indications and appellations of origin, the scope of protection for geographical indications and appellations of origin, prior use, applications for geographical indications and appellations of origin concerning products from trans-border areas, accession criteria for intergovernmental organizations, and procedures in Contracting Parties prior to the issuance of possible refusals and for challenging refusals issued.

15. In response to such request from the Working Group, the Director General said that the International Bureau had prepared the working document for the present meeting, which had already been made available to participants on March 16, 2011, and which presented draft provisions divided over two Annexes. Annex I contained two proposals for amendment of the Lisbon Regulations and Annex II seven draft provisions concerning topics that might need to be addressed in the context of a possible revision of the Lisbon Agreement or in a new treaty supplementing the Lisbon Agreement.

16. As a result, the Director General was of the view that the task of the Working Group at the present session was two-fold. Firstly, participants were invited to indicate whether the proposed amendments of the Lisbon Regulations could be submitted to the Lisbon Union Assembly for adoption. And secondly, the Working Group should undertake a general reflection as to the maturity of its review of the Lisbon system and the process towards a possible new instrument reflecting the results of this review.

## **AGENDA ITEM 2: ELECTION OF A CHAIR AND TWO VICE-CHAIRS**

17. Mr. Mihály Ficsor (Hungary) was unanimously elected as Chair of the Working Group, while Mr. Hossein Gharibi (Iran (Islamic Republic of)) and Mr. Alberto Monjaras Osorio (Mexico) were respectively elected as Vice-Chairs.

18. Mr. Matthijs Geuze (WIPO) acted as Secretary to the Working Group.

### **AGENDA ITEM 3: ADOPTION OF THE AGENDA**

19. The Working Group adopted the draft agenda (document LI/WG/DEV/3/1 Prov.) without any modification.

### **AGENDA ITEM 4: ADOPTION OF THE REPORT OF THE SECOND SESSION OF THE WORKING GROUP ON THE DEVELOPMENT OF THE LISBON SYSTEM (APPELLATIONS OF ORIGIN)**

20. The Working Group adopted the revised draft report of the second session of the Working Group on the Development of the Lisbon System (Appellations of Origin), as contained in document LI/WG/DEV/2/5 Prov. 2, without any modification.

### **AGENDA ITEM 5: DRAFT PROVISIONS ON CERTAIN MATTERS ADDRESSED BY THE WORKING GROUP IN THE CONTEXT OF THE REVIEW OF THE LISBON SYSTEM**

21. Discussions were based on document LI/WG/DEV/3/2.

22. The Chair recalled the background for such document, namely that at the second session the Working Group had requested the International Bureau to prepare for the present third session draft provisions on the various topics addressed under questions 1 to 9 of the Survey on the Lisbon system, taking into account all comments made during the second session of the Working Group, with a clear expectation that an in-depth discussion of concrete proposals might allow the work on the development of the Lisbon system to become more focused. The Chair pointed out that the working document under consideration had two main parts: an Annex I which contained proposals for amending regulations which the Working Group might already be willing to submit to the Assembly for adoption at its upcoming session in September of that year, and also an Annex II which presented draft provisions on certain other matters discussed at the second session of the Working Group. He underlined that those draft provisions left open the question as to the legal instrument by which they might be formalized, in which respect participants were invited to give directions.

### **ANNEX I: PROPOSED AMENDMENTS TO THE LISBON REGULATIONS**

#### Proposed Amendment to Rule 5(3) Concerning Optional Contents of the International Application

23. The Secretariat recalled that of the proposals that had resulted from the Survey on the Lisbon system and which related to the application and registration procedures, the proposed draft provision had gained sufficient backing from member States. While Rule 5(2) of the Regulations listed the mandatory requirements for international applications, Rule 5(3) continued with possible items that could be included in international applications. The working document under consideration proposed to introduce a sixth item, concerning information that would help clarify for countries other than the applicant country what the basis for the grant of protection in respect of an appellation of origin had been in its country of origin. Currently, such information was not contained in the Lisbon Register, but for transparency reasons it would be useful to have it recorded in the International Register so that the information in question could be published in one of the Lisbon working languages and thereby become more easily available to anyone consulting the Lisbon Register or the Lisbon Express database on the WIPO website.

The Secretariat recalled that the type of information that was specifically mentioned in that connection was information concerning the delimitation of the area of production of a product that fell under an appellation of origin or any information about the link between the specific quality or characteristics of the product and the geographical environment of the production area, namely the human and natural factors involved. The Secretariat clarified that the text proposed in the document under consideration was based on a text that had been advanced in response to the Survey and which had been slightly modified in the course of the discussions at the last session of the Working Group.

24. As to the actual wording of the article, the Delegation of Algeria felt that the terms “*informations ou les données*” were redundant and consequently requested explanations in that regard. The Delegation also requested an explanation concerning the use of the term “*caractères*” of the product, rather than “*caractéristiques*” of the product.

25. The Delegation of the Republic of Moldova observed that in the French version of the draft provision the word “*notamment*” was used, whereas in the English version the term “including” had been used instead of the corresponding translation “namely”, and therefore requested additional explanations in that regard.

26. The Delegation of Bulgaria said that it fully supported the comment made by Algeria regarding the use of “information or data”, and that they were also of the view that one of the two terms would be sufficient. The Delegation added that since the term “information” was an all-embracing notion the proposed simplification would not raise questions in the heads of those who would provide additional data or information in the future.

27. As regards the proposed introduction of a sixth item to Rule 5(3), the Representative of CEIPI wished first of all to express his support for the remark and the proposal made by the Delegation of Algeria, given that he also failed to see what the expression “*ou les données*” could usefully add to the expression “*des informations*”. Moreover, he agreed with the Delegation of the Republic of Moldova and considered that it would undoubtedly be preferable to replace the word “*notamment*” by “*y compris*” in the French version of the document. Furthermore, the words “*en question*” as contained in the second line of Rule 5(3)(vi) appeared to be superfluous, given that “*l'appellation d'origine*” was the subject of all the other items contained in that Rule, meaning that there was no need for further clarification through the use of the phrase “*en question*”. The use of the word “*frontières*” in the second line constituted a somewhat delicate matter as it seemed to refer to State borders. Finally, he added that the final words of subparagraph (vi) “*en faveur de l'octroi de la protection*” appeared to be superfluous and could therefore be deleted, given that the idea that they expressed had already been included at the beginning of subparagraph (vi), that was to say “*les motifs sur la base desquels la protection a été accordée*”.

28. The Representative of INTA sought clarification on how the possibility to include information on the boundaries of the production area would recoup the mandatory requirement in Rule 5(2)(a)(v) which required to indicate in the application the “area of production of the product”. His concern was that such mandatory requirement could be somewhat diluted by the optional possibility to include information on the boundaries of the production area. For the rest, he indicated that he fully agreed with the drafting suggestions proposed by the Delegations of Algeria, Bulgaria, Republic of Moldova and by the Representative of CEIPI, but still wished to make an additional suggestion in respect of the first line of Rule 5(3)(vi) and wondered whether it would not be sufficient to say “summarizing the grounds on which” rather than “the grounds on the basis of which”.

29. The Delegation of Spain recalled that it was an observer member of the Lisbon Agreement, owing to the fact that it had signed but not ratified the text in question. Furthermore, work was ongoing at an internal level to assess the possibility of ratifying the Agreement, given that Spain had a strong interest in the text due to the importance and value of appellations of origin in Spain. The Delegation stated that it welcomed any changes designed to make the system more flexible, simpler and more effective, and that it would closely follow the discussions that were to take place during the third session of the Working Group, while attempting, from its position as an observer, to make constructive contributions to the talks. In that regard, the Delegation requested clarification concerning an issue which had already been raised by the Representative of INTA, the relationship between Rule 5(2)(a)(v) and the proposed addition of subparagraph (vi) on the boundaries of the area of production.

30. The Secretariat referred to the suggestions made by a number of delegations concerning the French version only and more particularly the remarks concerning the use of the word “*notamment*” and indicated that the Secretariat fully agreed with the proposal to replace the word “*notamment*” by “*y compris*”. The Secretariat then referred to the point made by the Delegation of Algeria concerning the reference to the words “*les caractères*”, which in their view had to read “*les caractéristiques*”, and pointed out that the text of Article 2 of the Lisbon Agreement also referred to “*les caractères*”. It was the Agreement on Trade-Related Aspects of Intellectual Property (hereinafter referred to as the “TRIPS Agreement”) which referred to “*caractéristiques*”. Regarding another point raised by the Delegation of Algeria concerning the superfluous use of the terms “ou les données” right after “les informations”, the Secretariat recalled that the word “data”, or “données”, in French was used in various provisions of the Regulations. As far as the use of the words “les frontières” in the French text was concerned, the Secretariat clarified that through those words the text was actually referring to the delimitation of the area and therefore suggested using the expression “delimitation of the production area” instead of the “boundaries of the production area” in the English version. Regarding the comment made by the Representative of CEIPI on the superfluous use of the words “used in support of its grant”, the Secretariat indicated that the reason for using that phrase was to make it absolutely clear that the information or data referred to should concern, in particular, the reasons for which the country in question had decided to protect the appellation of origin. The Secretariat did not agree with the Representative of INTA that the information on the delimitation would actually dilute the mandatory requirements under Rule 5(2)(a)(v), which required the production area to be mentioned in the international application, as, on the contrary, the additional information or data would help other countries to understand better the reasons why the country in question had decided to grant an appellation of origin in respect of a particular product and how this related to the production area in question.

31. The Representative of CEIPI pointed out that his suggestion to delete the words “*en question*” in the second line also applied to the English and Spanish versions if necessary, and not just the French version. He added that, with regard to the new item (vi), he did not really understand the difference in terms of substance between “*les informations ou les données relatives aux frontières de la zone de production*” and the mandatory indication of the area of production of the product, as had previously been raised by the Representative of INTA. In other words, he wished to know how “*l'aire de production du produit*” was indicated in practice in the mandatory content. In that regard, he added that, given that he supposed that there was an indication of the boundaries, he wondered what more Rule 5(3)(vi) could add to Rule 5(2)(a)(v). He further stated that should the proposed addition of a sixth item to Rule 5(3) gain acceptance, it would, in his view, be more appropriate to state in French “*relatives aux limites de l'aire de production*”, given that Rule 5(2)(a)(v) referred to “*aire*” and not to “*zone*”.

32. As to the issue regarding the added value of subparagraph (vi) under Rule 5(3), in terms of information or data relating to the boundaries of the production area, the Chair indicated that under Rule 5(2)(v) the area of production of the product appeared as an element of the mandatory contents of the international application and added that, if his recollection was

correct, during the second session of the Working Group there had been interventions to the effect that more information on the boundaries of the production area would be helpful because in some applications only the name of the area was given and therefore third parties or other Contracting States might be left in the dark as to where such area was specifically located. He concluded by saying that such was the background for including an additional subparagraph (vi) under Rule 5(3).

33. Referring to the comment made by the Representative of INTA, the Representative of ECTA was of the view that the simple solution could be to use the terms “additional information”, thereby making it clear that information must be given and that only additional information is requested.

34. A revised text for subparagraph (vi) of Rule 5(3), as prepared by the Secretariat, was presented to the Working Group. This text read as follows: “(vi) any further information the competent authority of the country of origin wishes to provide concerning the protection granted to the appellation of origin in that country, such as additional details of the production area and a description of the connection between the specific quality or characteristics of the product and its geographical environment”.

35. The Representative of MARQUES pointed out that the revised text mentioned “country of origin” which appeared to be inconsistent with the rest of the project and more particularly with the possible accession of intergovernmental organizations. He therefore suggested drafting the provision accordingly.

36. The Chair said that the proposal concerned an amendment to the current Regulations under the current text of the Lisbon Agreement, whereas the other draft provisions to which the Representative of MARQUES had referred were the subject of a longer term exercise.

37. The Representative of CEIPI supported the proposed new wording in that it certainly improved the draft. However, he highlighted that the word “specific” did not appear in the French version and therefore suggested harmonizing the various language versions in that regard.

38. The Delegation of France noted that the term “*spécifique*” had been added to item (vi), in the phrase “*entre la qualité ou les caractères spécifiques du produit*”. The Delegation did, however, highlight that, given that that detail appeared neither in the Lisbon Agreement, nor in the French version of the proposal, it felt that new elements should not be added so long as the substance of the definition had not been discussed. The Delegation therefore proposed that the term “*spécifique*” should not be maintained and that the exact wording of the definition as included in the Lisbon Agreement should be preserved.

39. Following some further fine-tuning, the Working Group agreed that the proposed amendment to Rule 5(3), thus revised<sup>1</sup>, be submitted to the Assembly of the Lisbon Union for adoption.

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<sup>1</sup> See the Summary of the Chair, as adopted by the Working Group, which contains the draft thus revised in its Annex.

Proposed Amendment to Rule 16(1) Concerning Notifications of Invalidation

40. The Secretariat introduced the proposed amendment to Rule 16(1) of the Lisbon Regulations recalling that Rule 16 of the Lisbon Regulations laid down the procedure for notifying invalidations of the effect of an international registration that had been pronounced in a Contracting Party. At the previous session of the Working Group, for the sake of improving transparency, the participants had discussed at some length the suggestion that had been made to require Contracting Parties notifying such invalidations to specify the grounds that had been used to invalidate the effects of the appellation of origin in the notification sent to the International Bureau. The Secretariat said that it was true that the current Rule 16 already required the Contracting Party in question to add to its notification a copy of the decision taken by a court to pronounce the invalidation, but such copy would be in the language of the notifying country and not necessarily in a language of the Lisbon system. Precisely that was one of the reasons why the proposal to improve transparency of the notifications had been suggested in the first place, the other reason being that even if one had a copy of the decision in question it might still not be obvious to know the ground on the basis of which the invalidation had been pronounced.
41. The Delegation of France stated that it had no particular comments to make, but did, however, express doubt regarding the possibility of addressing invalidation in the Regulations when it was not provided for in the Agreement itself.
42. The Secretariat indicated that this issue had been discussed at length at the previous session of the Working Group and also pointed out that Rule 16 on Invalidation was already included in the Regulations.
43. The Representative of CEIPI noted that subparagraph (iii) of Rule 16(1) read “the date on which the invalidation was pronounced” and therefore suggested replacing “has been” by “was” in the proposed subparagraph (v) for the sake of consistency.
44. The Chair agreed that it would be more appropriate to indicate “the grounds on the basis of which the invalidation was pronounced” in the proposed Rule 16(1)(v) as it would follow the language used in subparagraph (iii) of Rule 16(1).
45. A revised draft was prepared by the Secretariat and presented to the Working Group.
46. The Delegation of Nicaragua suggested replacing “*la fecha en la que se haya pronunciado la invalidación*” with “*la fecha en la que se pronunció la invalidación*” in subparagraph (iii), in order to ensure compliance with Rule 16(1)(v).
47. The Delegation of Spain stated that, in Spain, people differentiated between the present perfect and the simple past and that, from its point of view, “*se ha pronunciado*” suggested a recent event, while “*pronunció*” hinted at an event which had taken place further back in time. Therefore, in that case, the Delegation considered that the wording “*se ha pronunciado*” should be maintained.
48. The Representative of MARQUES fully supported the comments made by the Delegation of Spain.
49. The Chair pointed out that the current Spanish version of the Lisbon Regulations used the words “*se haya pronunciado*” in Rule 16(1)(iii) and suggested following the same formulation in Rule 16(1)(v) so that the text would read “*se ha pronunciado*”.



50. The Working Group agreed that the proposed amendment to Rule 16(1), thus revised<sup>2</sup>, be submitted to the Assembly of the Lisbon Union for adoption.

## ANNEX II: DRAFT PROVISIONS FOR A POSSIBLE REVISION OF THE LISBON AGREEMENT OR A NEW TREATY SUPPLEMENTING THE LISBON AGREEMENT

### Basis for Protection and Definitions (Draft Provision A)

51. The Secretariat indicated that Draft Provision A combined the suggestions made during the discussions that had taken place at the last session of the Working Group, and more particularly the suggestions made on the issue of definitions and basis for protection in the country of origin. The Secretariat added that the approach chosen for the preparation of Draft Provision A was based on four elements that had come out of the discussions at the previous session of the Working Group. Firstly, there had been general agreement to have two separate definitions, one for appellations of origin modeled after the current provisions of Article 2 of the Lisbon Agreement, and one for geographical indications along the lines of Article 22.1 of the TRIPS Agreement. Secondly, it had also been agreed that the definition of appellations of origin should not only include geographical denominations strictly speaking, but also denominations which, while not in themselves geographical, had acquired a meaning as relating to a geographical area. Thirdly, there should be a concept of country of origin that would extend to international intergovernmental organizations, as it had also been agreed that a possibility should be introduced for the accession of intergovernmental organizations. Finally, an opportunity should be created for the registration of geographical indications and appellations of origin in respect of products originating in areas belonging to more than one country, such as trans-border areas or a group of island countries.

52. In preparing the proposed draft, the Secretariat had come to the conclusion that it was no longer useful to work on the basis of a concept of “country of origin”, meaning that another “attachment” concept should be used instead. The reason for that was twofold. First, if intergovernmental organizations could be Contracting Parties, then a particular geographical indication or appellation of origin could be a geographical indication or an appellation of origin originating in two Contracting Parties, namely the intergovernmental organization and the member State of that intergovernmental organization where the geographical area was actually situated. Consequently, there would be two possible Contracting Parties of origin. Second, in the case of trans-border areas there would by definition be two Contracting Parties of origin. For that very reason, the Secretariat had decided to look for another “attachment” and was Draft Provision A presenting as such “attachment” the law on the basis of which the appellation of origin or geographical indication had been granted.

53. In that regard, the Secretariat went on to say that if one took the example of a geographical indication in France, then France would be able to apply for international registration if the international application in question was based on the protection that had been granted on the basis of a French law, whereas, if the application was based on the protection granted on the basis of an EU law, the EU should apply.

54. Continuing, the Secretariat said that, while it was suggested to no longer use a concept as stipulated in Article 2(2) of the Lisbon Agreement, nevertheless, one element of the definition of “country of origin” in that provision had to be retained, namely the element of reputation. This had been done by incorporating reputation in the definition of “appellation or origin” in paragraph (6)(b) of Draft Provision A.

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<sup>2</sup> See the Summary of the Chair, as adopted by the Working Group, which contains the draft thus revised in its Annex.

55. Turning to the alternatives presented in the bracketed parts of paragraph (6)(b) of Draft Provision A, the Secretariat explained that these reflected differences of view that had emerged from the discussions that had taken place during the previous session of the Working Group. First, where the current definition of “appellation of origin” in the Lisbon Agreement referred to “natural and human factors”, it had been suggested that this had better read “natural or human factors”. However, there had also been opposition to such a change. The Secretariat pointed out that “natural or human factors” would not exclude an appellation of origin to be based on “natural and human factors”. For that reason, Draft Provision A presented three possibilities: “natural and human factors”, “natural or human factors”, and “natural and/or human factors”. Second, where under Draft Provision A appellations of origin were presented as a sub-category of geographical indications and the definition of “geographical indications” worked on the basis of the concept of geographical origin, the question had arisen whether the definition of “appellation of origin” should still refer to the area of production or rather to the area of origin.

56. Referring to paragraph (2) of Draft Provision A, the Secretariat indicated that, although such provision, if adopted, would require Contracting Parties to protect both geographical indications and appellations of origin, it would not create an obligation for contracting parties to protect under their national law geographical indications and appellations of origin necessarily as separate titles of protection. Geographical indications would be the genus and appellations of origin would be a specific category of geographical indications, for which Contracting Parties would not be required to introduce a separate title of protection in their law, but which they would be allowed to deal with in the same way as other geographical indications.

57. With regard to the question of dependency that was dealt with in paragraph (3) of Draft Provision A, the Secretariat recalled that under the Lisbon Agreement an international registration could only take place if an appellation of origin was already registered in the country of origin and also referred in that regard to Article 6 of the Lisbon Agreement which stated that “protection has to be granted to an appellation of origin registered under the Lisbon system as long as it is protected in the country of origin”. The TRIPS Agreement contained a similar requirement, where it stated that “there shall be no obligation to protect geographical indications which are not protected in their country of origin”.

58. Finally, referring to the question of whether a country would be obliged to protect appellations of origin and geographical indications by *sui generis* legislation or whether they would be free to provide the protection by other means as long as they provided such protection in line with the definitions and scope of protection of the treaty, the Secretariat recalled that the outcome of the discussion during the previous session of the Working Group on that particular issue had been, that there should be complete freedom as regards the legal means of protection at the national level and pointed out that such conclusion had been reflected in paragraph (4) of Draft Provision A, which explicitly mentioned that “protection shall be provided whether through *sui generis* legislation or other legislation”.

59. The Delegation of France thanked the Secretariat for having provided it with a basis for work that made it possible to move on from theory to practice, before referring more specifically to paragraphs (6) and (7) of Draft Provision A on the definition of appellations of origin and geographical indications. With regard to the proposed definition of geographical indications, the Delegation noted that it was essentially the same as the definition contained in the TRIPS Agreement and that it therefore had very little to say in that regard. However, turning to the definition of appellation of origin, the Delegation stated that, when looking through the previous work of the Working Group, it had been unable to identify requests for modification such as those that had been presented to them in the working document. In fact, the Delegation had identified two applications for modification that raised a number of questions. Moreover, the Delegation expressed its wish to see an open and free discussion on that subject, without any official positions being taken, in order to hear the views of other delegations regarding those issues. The first point involved the reputation requirement and the Delegation recalled in that

regard that, in all their work up to the current time, the members of the Working Group had seen the criterion of reputation as underlying the definition of appellation of origin, in particular when it was stated that appellation of origin should be recognized and protected on account of reputation, or when the requirement of reputation also formed part of the definition of the country of origin. In the current version of the Lisbon Agreement, reputation was one of the criteria set for recognition of appellations. The Delegation was not, in principle, opposed to the inclusion of that criterion in the definition, however, it did point out that having discussed the matter with other delegations, it had come to the conclusion that difficulties might arise due, above all, to the fact that reputation was invariably the first criterion to be used because it was the first factor to be required prior to any verification of natural or human factors and that, therefore, the criteria had been completely reversed with regard to the provisions that had been made previously. Another issue which arose was the question of which country would be responsible for assessing reputation and, in that regard, the Delegation requested the Secretariat to inform it as to whether a State which had received an application for the international registration of an appellation of origin would from then on be responsible for assessing the reputation of the appellation in question, and, if that were the case, whether it be obliged to carry out such an assessment concerning the situation in its own country or that in the country of origin of the appellation.

60. The Delegation of France then highlighted that the proposed definition had also given rise to the issue of the alternative nature of the factors which made up the characteristics of the geographical environment, the “natural and human factors“ or “natural or human factors”. It had seemed to the Delegation that that point had not been raised before and, in any case, natural and human factors were two inseparable elements which gave products their characteristics. The Delegation had some difficulty in understanding what the desired aim was, in particular because, in the Delegation’s opinion, both in the case of human and natural factors, the category of geographical indications, with its broader notion of a single reference to geographical origin, could certainly be included.

61. Finally, the Delegation of France wished for the notion of “indication” in the definition of appellation of origin contained in paragraph 6(b) of Draft Provision A to be replaced by the notions contained in paragraph (7) of Draft Provision A.

62. The Delegation of Iran (Islamic Republic of) recalled that at the previous meeting several delegations had emphasized that the integrity and the principles of the Lisbon Agreement had to be preserved. Referring to paragraph (2) of Draft Provision A and more particularly to the phrase “in accordance with Draft Provision E”, the Delegation expressed the view that it would, therefore, be preferable to retain the phrase “in accordance with the terms of this Agreement” as contained in Article 1(2) of the Lisbon Agreement. Moreover, the requirement under Article 1(2) of the Lisbon Agreement that the appellation of origin had to be “recognized and protected as such in the country of origin” before international registration under the Lisbon Agreement could take place was, in the Delegation’s view, not fully captured by the phrase “registered in accordance with the procedure under Draft Provisions B and D” in Draft Provision A. The Delegation suggested that these words be replaced by the phrase “recognized and protected in the contracting party of origin”. Furthermore, in paragraph (3) of Draft Provision A, the notion of “geographical area of origin” had better be replaced by “contracting party of origin”. In that regard, the Delegation stressed that the benefits of the Lisbon Agreement had to remain available primarily for “countries”. The Delegation expressed doubts as regards the conditional nature of the phrase “provided it provides protection, as stipulated in Draft Provision E” in paragraph (4) of Draft Provision A. Lastly, the Delegation spoke in favor of the option “and/or” in paragraph (6)(b) of Draft Provision A.

63. The representative of OriGIn saw the introduction of the definition of geographical indication together with the definition of appellations of origin in a positive manner as that reflected the work of the previous meetings, but shared the comments made by the Delegation of France with regard to the “reputation” element which, although already included in the current text of the Lisbon Agreement, seemed to acquire a major importance in the proposed Draft Provision A. With regard to (6)(b) of Draft Provision A, he expressed his preference for the option “and”, the main reason being that, in view of the introduction of a definition of geographical indications, in which the requirement of a link with the territory was less strong than in the case of appellations of origin, there was no need for watering down the definition of appellation of origin. Neither was it necessary to add either the phrase “in the area of origin” or “in the area of production”, because it was already quite clear that the quality or characteristics had to be due to “the geographical environment”. Finally, with regard to the basis for protection, he agreed that there had been a consensus at the previous session of the Working Group that any system for the protection of appellations of origin could be satisfactory as long as it fully respected the definition and the level of protection required under the Lisbon Agreement. However, was such flexibility not already sufficiently provided for in Rule 5(2)(a)(vi) of the Regulations under the Lisbon Agreement?

64. The Representative of MARQUES said that paragraph (6)(a) of Draft Provision A, in the light of its paragraph (7), appeared to broaden the concept of geographical indication so as to cover not only traditional denominations, such as *Cava* or *Feta*, but also other elements that did not qualify as names or even words, such as designs, for example. He expressed doubts as to the appropriateness of such a broad concept and wondered why paragraph (7) only clarified that appellations of origin could only consist of a geographical name or a traditional denomination and did not provide such clarification or restriction in respect of geographical indications.

65. The Representative of ECTA shared the comments made by the Delegation of France with regard to the notion of “reputation” in paragraph (6)(b) of Draft Provision A. He also shared the doubts expressed by the Representative of MARQUES regarding the implied broad interpretation of the notion of “indication”.

66. The Representative of INTA supported the position taken by the Representative of MARQUES and shared the concerns about the inclusion of a very broad definition of geographical indications and also the broadening of the definition of appellations of origin since paragraph (7) of Draft Provision A would appear to go much beyond the way in which individual member States had so far interpreted the provisions of the Lisbon Agreement. She noted that the definition of geographical indication would appear to be broader than the one contained in the TRIPS Agreement. Its wording would significantly increase the area of potential conflicts with generic terms and prior trademarks. The Representative recalled that, in previous sessions of the Working Group, concerns had been expressed about the need to maintain the integrity of the Lisbon system, and in particular the integrity of the appellation of origin definition, and said that the proposed wording of paragraphs (6) and (7) of Draft Provision A would appear to devalue the actual concept of appellations of origin.

67. The Representative of CEIPI noted that paragraph (3) of Draft Provision A contained two conditions that had to be complied with, the first condition being that the geographical indication or appellation of origin had to meet the corresponding definition of paragraph (6) of Draft Provision A and the second condition being that the geographical indication or appellation of origin had to enjoy protection in the geographical area of origin. In that regard, the Representative recalled that the Secretariat had rightly referred to Article 6 of the Lisbon Agreement to clarify that the protection to be granted by the other Contracting Parties was dependent upon the geographical indication or appellation of origin enjoying protection in the country of origin. In his view, the proposed wording of paragraph (3) of Draft Provision A was slightly ambiguous in that respect and he, therefore, suggested to add the words “as long as it”

before the words “enjoys protection”. Turning to paragraph (6)(b) of Draft Provision A, he said that the notion of “reputation” was attached to the product whereas, in Article 2(2) of the Lisbon Agreement, “reputation” was attached to the appellation of origin, in other words to the denomination. Further, natural and human factors both had to remain prerequisites for appellation of origin. Consequently, he expressed support for the option “and”, as the option “and/or” would not require natural and human factors to be present in all cases and would broaden the definition too much. He suggested to stick to the structure of the current provision of Article 2(1) of the Lisbon Agreement and also to put the definitions up front instead of at the end of Draft Provision A. Finally, the Representative of CEIPI wondered whether paragraph (7) of Draft Provision A could not be integrated into its paragraph (6)(b). He added that his understanding was that the expression “traditionally known as referring to the geographical area of origin or production” would be used to designate special cases such as, for example, the term *Reblochon* for a French cheese which was traditionally associated with the *Haute-Savoie* region, even though it was not a geographical name as such. In that regard, he said that he did not consider the broadening of the scope of the notion of appellation of origin as a bad thing, and that he was instead of the view that any term that had acquired a geographical meaning deserved to be recognized as an appellation of origin.

68. The Delegation of Portugal spoke in favor of Draft Provision A as presented, while expressing support for the option “and” in paragraph (6)(b), for the reasons advanced by the Delegation of France and the Representative of Origin.

69. The Chair noted that an interesting and instructive discussion had taken place on Draft Provision A and highlighted some of the comments made. One issue seemed to be the concept of “reputation” and the way in which such concept should be dealt with in the context of a new definition of appellation of origin, namely whether reputation should be linked to the product or to the name. Questions had also been raised as to the relationship between reputation and the “quality or other characteristics of the product” and whether what was being proposed under paragraph (6)(b) correctly reflected the current understanding in that regard under the Lisbon Agreement. The Chair also noted the almost unanimous view that had been expressed for the maintenance of the notion of “natural and human factors” as contained in the current wording of the Lisbon Agreement. He thought that, at the previous session of the Working Group, there had been general agreement on the idea that appellations of origin had to have some sort of geographical connotation and could be either a geographical name or another denomination containing such a name or any other denomination provided it had been known and used traditionally as referring to a certain geographical area, but noted that, this time, questions had been raised in this regard. He also noted that some considered the definition of paragraph (6)(a) of Draft Provision A to be broader than the definition contained in Article 22(1) of the TRIPS Agreement. Questions had also been raised as to the appropriateness of no longer working on the basis of the notion of “Contracting Party of Origin” and regarding the conditional nature of the second part of paragraph (4) of Draft Provision A.

70. The Secretariat recalled that the objective of the review exercise, in which the Working Group was engaged, was to work towards a treaty which would provide the necessary flexibility for it to attract a much larger membership than the Lisbon Agreement currently had and noted, in that regard, that several of the suggestions made would not appear to match with this objective. Moreover, some interventions would even appear to deny the flexibilities already applied in the context of the current Lisbon system. Paragraph (7) of Draft Provision A, for example, did not only reflect what the Working Group had agreed at its previous session, but also tried to capture the gist of a decision of the Lisbon Union Council in 1970 regarding the question that had arisen as to whether non-geographical names could be registered as appellations of origin in the Lisbon Register. *Reblochon*, for example, was an appellation of origin from France consisting of a denomination that was not in itself geographical, but which was traditionally known in France as referring to a cheese coming from a specific geographical area in the *Haute-Savoie* region. The Lisbon Union Council had agreed that such

denominations could be registered as appellations of origin under the Lisbon Agreement and, as a result, “*Reblochon*” is recorded as such in the International Register. Another example of an appellation that had been recorded in the International Register of the Lisbon Agreement was “*Bons Bois*”, which was an appellation of origin consisting of a non-geographical denomination referring to a specific geographical territory within the “*Cognac*” area. Despite this flexible interpretation, in 1970, of the notion of “geographical denomination” by the Lisbon membership, nevertheless, since 1970, one of the main complaints advanced with regard to the Lisbon Agreement had been that it would not allow for the registration of non-geographical names and thereby prevented many countries from joining the Lisbon system. It was, therefore, in the view of the Secretariat, important to codify the interpretation agreed by the Lisbon membership in 1970.

71. The Secretariat did not agree with the comments made that paragraph (7) would be too broad, given that the provision in question was obviously linked to the provision of paragraph (6)(b), which captured the definition of “appellation of origin” of the Lisbon Agreement, albeit in a different way than the Lisbon Agreement did, in order to reflect the approach chosen in the draft under consideration that appellations of origin were a subcategory of geographical indications. Consequently, the same starting-point had been chosen for appellations of origin as in the definition of “geographical indications”, i.e., “indication”. However, as it had been agreed at the previous session of the Working Group that an appellation of origin could not consist of any “indication”, paragraph (7) limited the scope of the notion “indication” of paragraph (6)(b) by excluding that appellations of origin could, for example, be a picture or a symbol and by stipulating that appellations of origin could only be indications consisting of a geographical denomination, or a combination which included the geographical denomination, or a denomination which was known as referring to a geographical area.

72. Referring to the comments concerning paragraph (4) of Draft Provision A, the Secretariat recalled that at the last meeting, and also in response to the Survey, many comments had been made that the words “as such” in Article 1(2) of the Lisbon Agreement were a major obstacle that prevented many countries from joining the Lisbon system. Therefore, several delegations had suggested to remove them from the provision or to add a footnote to the provision that the term “as such” did not necessarily mean that a country had to have an appellations of origin law but that it could also protect appellations of origin on the basis of another type of law, as long as that law provided protection to appellations of origin as stipulated in the Agreement. In that regard, the Secretariat clarified that paragraph (4) simply specified that protection could be provided through *sui generis* legislation or other legislation as long as the protection was provided as stipulated in the Agreement.

73. As regards the issue of whether the text should read “natural and human factors” or “natural or human factors” or “natural and/or human factors”, the Secretariat wished to recall that there were countries that protected geographical indications on the basis of a definition drafted along the lines of the definition of the Lisbon Agreement with two exceptions: the word “reputation” was added as a qualifying notion – as in the definition of the TRIPS Agreement – and “natural or human factors” was substituted for “natural and human factors”. Moreover, in particular for handicraft products, it might often not be possible to establish “natural and human factors” as underlying their protection. While the human factor would be present, the natural factor might not. Nevertheless, the Secretariat did not believe that the Working Group would want to preclude such products from being protected under the Lisbon system.

74. As to whether the notion of “reputation” in the current Lisbon Agreement related to the denomination or to the product, the Secretariat said that Article 2(2) of the Lisbon Agreement stipulated that “the country of origin is the country whose name constitutes the appellation of origin which has given the product its reputation”. Paragraph (6)(b) of Draft Provision A similarly stated that “In this Agreement, [...] (b) an indication identifying such a product which has a reputation [...]”.

75. The Chair noted that there were perhaps two ways of achieving greater flexibility. On the one hand, one could keep the provisions of the Lisbon Agreement and its Regulations more or less in their current state and only add new provisions to allow, in addition to appellations of origin, also for the international registration of geographical indications. On the other hand, one could also, in addition, look at the existing provisions of the Lisbon Agreement and its Regulations and modify some provisions that appeared to stand in the way of the prospective accession of new members. In any event, the ultimate goal should be the establishment of an international registration and protection system to which a lot more countries and intergovernmental organizations could accede than the current membership of the Lisbon Union.

76. The Representative of CEIPI stated that he withdrew his remark concerning the issue of whether or not reputation was attached to the product, given that the explanation provided by the Secretariat had convinced him to the extent that appellations of origin actually designated products, rather than simply identifying them. Consequently, he suggested maintaining the term “*désigner*” rather than “*identifier*” in the definition, to the extent that the latter term referred more to geographical indications because it was employed in Article 22(1) of the TRIPS Agreement. The main innovation in terms of the new treaty would be the inclusion of geographical indications which did not constitute appellations of origin. It was precisely that change that would make the system more attractive and therefore it mattered little whether the current definition of appellation of origin was maintained or not.

77. The Delegation of France recalled that the members of the Working Group had come together at the current meeting and had set aside time to discuss the draft version of the provisions prepared by the Secretariat precisely because they wanted to see progress made. However, it was important to preserve the gains represented by the Lisbon Agreement and one of the concessions that had been made when opening up the system had been to integrate geographical indication in a way that was beneficial to all, in other words, in a way that took into account all legislations and products. The Delegation clarified that it had no objection to anyone further developing the definition of appellation of origin, the possibility of the definition covering images, symbols or sounds remained entirely theoretical and, consequently, paragraph (7) did not seem to be absolutely necessary in that regard. The additions which had been included in order to signal an opening-up of the system were perhaps not completely indispensable in the case of paragraph (3), in which it was stated that a legislative or administrative act, or a judicial decision or registration were all possible. In that regard, the Delegation stated that, under French law for example, the term “*loi*” covered a category of very specific acts within the national legislation, and that it was not certain that the term would be useful in all countries. The term “*instrument juridique*” seemed to be more than satisfactory.

78. The Secretariat said that the addition of the definition of a geographical indication so as to allow the registration of geographical indications in the Lisbon Register would certainly accommodate those products that did not meet the definition of an appellation of origin. However, as Draft Provision E provided for a difference in level of protection for geographical indications compared to appellations of origin, it was important to establish a clear distinction between the two. Referring to the comment made by The Delegation of France concerning a possible redundancy between paragraphs (3) and (4) of Draft Provision A, the Secretariat clarified that when paragraph (3) of Draft Provision A mentioned “a legislative or administrative act, a judicial decision or registration” it was not referring to the legal instrument under which the protection was granted, but to the act by which a specific individual geographical indication or appellation of origin had been granted protection. The legal instrument referred to in paragraph (4) said what could be protected as an appellation of origin or as a geographical indication, but if there was an individual geographical indication or appellation of origin that met the requirements for protection, it would have to be the subject of an administrative or legislative act, a judicial decision or a registration, which would then establish the protection for that specific geographical indication or appellation of origin.

79. As regards paragraph (3), the Representative of MARQUES suggested replacing “a judicial decision” by “a final judicial decision”.

80. The Delegation of Iran (Islamic Republic of) thanked the Secretariat for its useful explanation of paragraph (6)(b) because it was true that in some cases and for some particular products it was the human factor rather than the natural factor that was determinant, while in other cases it was the opposite. In that regard, the Delegation also noted that the Secretariat had rightly mentioned the case of handicrafts which in some instances were made by nomad people who moved from one place to the other and agreed that in such cases the human factor was clearly dominant.

#### Filing International Applications (Draft Provision B)

81. Introducing Draft Provision B, the Secretariat referred to paragraph 12 of Annex II and said that Draft Provision B dealt with four aspects of international applications, namely (1) where should international applications be filed, (2) the criteria for determining who has standing to file international applications, (3) the details that have to be indicated in the international application, and (4) the irregularities affecting the date of international registration. The Secretariat pointed out that Draft Provision B was presented as an adapted version of the existing provisions, namely Article 5(1) of the Lisbon Agreement and Rules 5 and 8 of the Lisbon Regulations. Paragraphs (1) and (2) followed the existing provisions of the Lisbon system when determining that the international application had to be filed with the International Bureau in the name of the beneficiaries of the geographical indication or appellation of origin. Draft Provision B differed from the current system in that it no longer referred to a country of origin but to the “legislative or administrative act, a judicial decision or registration” by virtue of which the protection was granted to the geographical indication or appellation of origin. Paragraphs (3) to (7) contained were three different options for the filing procedure and indicated that the reason for providing different options was to reflect the various suggestions that had been made at the previous meeting. Option 1 followed the concept of the existing Lisbon system, namely that international applications had to be filed by a competent authority identified by the Government of the Lisbon member State. In that regard, the current Lisbon system referred to the competent authority of “the country of origin”. However, should that notion no longer be retained, as proposed in Draft Provision A, then that also had to be reflected in Option 1 of Draft Provision B. For example, if an appellation of origin was protected in Hungary on the basis of Hungarian law, then it would be the competent authority of Hungary that would have to present the international application under Lisbon. However, if the protection was based on a legislative instrument of the EU, then it would have to be the competent authority of the EU, once the EU would be member of the Lisbon system. The Secretariat indicated that Option 2 provided an alternative to such procedure as it would allow the holders of the right to use the geographical indication or appellation of origin to present the international application themselves, under the condition that the competent authority certified that the details in the international application corresponded to the details in the “legislative or administrative act, a judicial decision or registration” on the basis of which the geographical indication or appellation of origin was protected in the applicant country. Option 2 would also allow federations or associations representing holders of the rights to use the geographical indication or appellation to file such applications on their behalf. Finally, the third option was based on a suggestion made at the previous meeting by the Delegation of the Republic of Moldova, aimed to align the procedure of the Lisbon system with the procedure that existed under the Madrid system for the international registration of trademarks. Thus, an international application would be presented to the International Bureau through the competent authority of the country where the geographical indication or appellation of origin was protected. The Secretariat indicated that paragraph (4) added a number of modifications to the requirements to be indicated in the international application, and paragraph (6) followed by specifying which of those requirements were minimum requirements which would affect the date of the international registration if they



were not met. Paragraph (7) also incorporated a consequence that followed from the suggestion made by the Republic of Moldova to align the procedure with that of the Madrid system, namely that an international application would bear the date on which it was received by the competent authority, provided that it was passed on to the International Bureau within a period of two months. If such application was passed on after a period longer than two months, it would not bear the date on which it was received by the competent authority in the applicant country but the date on which it was received by the International Bureau.

82. The Delegation of the Republic of Moldova asked the Secretariat to explain the application procedure in the case of trans-border areas, specifically if only one of the concerned countries would be party to the Agreement. Would both countries have to be party to the Agreement to be able to issue a joint application?

83. The Secretariat indicated that there would be no obligation for countries sharing a geographical area to file a joint application. If those countries wished to do so they could still file separate applications and protect the appellation of origin or geographical indication, as it applied, under their respective domestic laws. The Secretariat added that if one of those countries was not a member of the Lisbon system that country would obviously not be able to apply, which did not prevent the country that was a member of the Lisbon system to apply only for that part of the territory which was situated in its territory.

84. The Representative of OriGIn said that Option 2 accurately reflected a suggestion made by OriGIn at the previous meeting and also wished to restate the reasons behind that suggestion. In some countries, once the title of protection had been obtained at the national level, there might be a problem in terms of the competent authority not having the right or the necessary resources to transmit an international application to the International Bureau. Hence, the possibility under Option 2 would give the right to the association of producers to submit such application directly. Should that option be retained, he suggested slightly amending the wording given that in some jurisdictions the notion of property of the appellation of origin or geographical indication was not commonly understood and therefore, at a later stage, he suggested using the phrase “beneficiary of the right to use the appellation” instead of “holder”.

85. The Delegation of France requested clarification concerning the link between paragraph (2) and Option 3, given that it was stated in paragraph (2) that applications shall be presented in the name of any natural persons, leading the reader to conclude that applications could not under any circumstances be presented directly, when, in fact, it was stated in Option 3 that the application shall be presented by the holder of the right. Consequently, the Delegation wished to know how the two paragraphs in question could be harmonized. The Delegation considered that Option 2 brought with it a degree of openness in that it took into account the specific character of certain systems in a number of States which were not equipped with the appropriate administrative tools fully to manage mechanisms for registration of geographical indications or appellations of origin. It was not therefore inconceivable that the idea of providing for certification of the elements of the application for geographical indication and making a transmission via the competent authority might amount to the same thing. In that regard, the Delegation considered that, if the aim was to achieve greater flexibility, then such certification on the part of the administration of the State of origin did not seem to be desirable.

86. The Representatives of INTA and MARQUES, referring to Option 2, paragraph (3)(b) which stated that “the international application could be presented by the holder or holders of the right to use the geographical indication [...] or a federation or association having legal standing to assert such rights”, pointed out that in the case of a geographical indication which was protected in the country of origin by a certification mark, the holder of the certification mark could, under the applicable law, be prohibited from using the certification mark and therefore would not qualify as the holder of the right to use. The Representative of INTA added that the

owner of the certification mark may not necessarily be a federation or an association as it may also be a company or a private individual, and therefore he suggested replacing “federation or association” by “a legal entity or a physical person having legal standing to assert such rights”.

87. With regard to the entitlement to submit an application and the identification of who would be allowed to apply for registration of an international geographical indication or appellation of origin, the Delegation of Hungary was of the view that the current system had to be maintained and that the national authority should remain entitled to apply for an international geographical indication because in their opinion those questions had to be dealt at the national level. Yet, the Delegation also understood the well-founded reasons behind Option 2.

88. The Delegation of Iran (Islamic Republic of) referred to paragraph (1) which stated “the registration of geographical indications and appellations of origin under this Agreement shall be effected with the International Bureau” and suggested adding the terms “at the request of the authorities of the countries of the special Union” or “at the request of the Contracting Parties”. In doing so, the Delegation was of the view that the three proposed options thereafter would no longer be necessary in the text of the Agreement itself, and that it would still be possible to insert them in the Lisbon Regulations for greater clarity, if necessary.

89. In view of what had been said by Hungary, the Representative of ECTA was of the view that Option 2(b) could perhaps be introduced only for geographical indications.

90. The Secretariat indicated that Article 5 of the Lisbon Agreement referred to “natural persons or legal entities, public or private, having according to their national legislation the right to use such appellations”, while Rule 5 referred to the “holder or the holders of the right to use the appellation of origin”. In Draft Provision B, this terminology had been retained. In response to the comment made by INTA concerning the holder of a certification mark, the Secretariat indicated that the underlying idea was that, even in respect of geographical indications that were protected by a certification mark, the procedure of paragraph (3)(b) would concern applications filed on behalf of those “who have the right to use”; as these persons were not necessarily the same as “the owner of the certification mark”. The Secretariat clarified that the idea, also in respect of certification marks, was to refer to those persons who had the right to use the geographical indication in question. In response to the Delegation of France, the Secretariat said that one notable difference between Options 1 and 3 was that, under Option 3, the competent authority did not have the right to not send the international application to the International Bureau, while under Option 1 it did. If, for whatever reason, the competent authority was of the opinion that a particular appellation of origin or geographical indication should not be internationally registered, it could do so.

91. The Delegation of the Republic of Moldova supported the position under which the international application would be considered as valid when submitted by the competent authority because she could not envisage any case in which the competent authority would not want to transmit an international application.

92. As to Option 2, the Delegation of Algeria noted that it was stated that “Alternatively, the international application may be presented directly to the International Bureau”. The Delegation wished to know who decided on such an alternative and in particular whether it was the competent authority. In the second point, it was stated that “the international application may be presented directly to the International Bureau by the holder or holders of the right to use the geographical indication or appellation of origin in question, or a federation or association having legal standing to assert such rights”. In that regard, the Delegation wondered whether a federation or an association did not in themselves constitute holders of rights.

93. As regards paragraph (3), the Representative of CEIPI suggested that the provisions under all three Options should start with “The international application” instead of “Such an international application”. The same comment applied to paragraph (6) which referred to “an international application” rather than to “the international application”. Noting that paragraph (4)(iv) referred to “a product category” while other provisions in the document referred to “a kind of product”, the Representative of CEIPI said that it would be useful to know what the differences were in that respect, if any, and that these should be explained in the notes. On the contrary, if there were no differences, he was of the view that a single expression had to be used throughout the document. Finally, referring to paragraph (4)(v) he suggested adding the words “to which the geographical indication or appellation of origin applies” after “the geographical area of origin of the product”. He noted that such an expression was already used in paragraph (6)(iv), so it would simply be a matter of aligning the text of the two provisions.

94. Referring to paragraph (4)(iii), which established as a mandatory requirement that the appellation of origin had to be indicated “in the official language or official languages of the Contracting Party or Contracting Parties”, the Representative of INTA wondered whether it would not be more appropriate to link that to the official language in the area of production and also to link that to the extent that the term in question would be protected in the relevant Contracting Party. In that regard, the Representative of INTA noted for example that in spite of the fact that 23 official languages were used in the EU system, geographical indications were not registered in all 23 languages. Instead, the official language in the area of production would always be used for registration purposes.

95. In response to the Delegation of Algeria, regarding the meaning of the word “alternatively” in paragraph (3)(b) of Option 2, the Secretariat indicated that the provision of paragraph (3)(b) would create a right for the beneficiaries to file directly with the International Bureau and the word “alternatively” was used to make it clear that, instead, applicants could also request the competent authority to submit the application to the International Bureau. As regards the reference to “federations or associations having legal standing to assert the rights in the geographical indication or appellation of origin”, the Secretariat recalled that at the last meeting the Representative of OriGIn had suggested that it would be useful if the beneficiaries themselves could submit applications in some countries, and he added in that regard that since producers of geographical indications or appellations of origin often cooperated with each other through federations which took care of their rights in a collective way it seemed logical to give such federations or associations the possibility of representing their members under paragraph (3)(b). Moreover, the phrase “federations or associations having legal standing to assert such rights” was also used in Article 10<sup>ter</sup> of the Paris Convention and in the footnote to Article 42 of the TRIPS Agreement.

96. Regarding the comment made by CEIPI on the use of the words “category of products” and “kind of products” and whether there was a difference between the two, the Secretariat indicated that different words were used because there was indeed a difference. International applications under the Lisbon system had to contain a reference to the product to which the appellation of origin applied. The practice among member States in this regard had not been very consistent; there was in fact a wide variety in the way in which applications referred to the product to which the appellation of origin applied. In the statistics concerning international registrations under the Lisbon system, as published by the International Bureau in the *Bulletin Appellations of Origin*, the International Bureau had categorized these products, nonetheless, for the sake of clarity and research facilitation purposes, by subdividing them in three categories of products, namely (1) beverages and related products, (2) food products or related products and (3) non-food products. In the *Lisbon Express* database, the International Bureau had gone one step further by also subdividing those three categories into several sub-categories. The Secretariat indicated that such categorization was not intended to affect the scope of protection for the appellations in question but simply to improve transparency on

the kinds of products that were actually covered, and added that he had referred to “kinds of products” because there were different kinds of products in a particular category or sub-category. For example, a general category of products such as “wine” included “white wines”, “red wines”, “yellow wines”, or “green wines”, which were all kinds of wine. The Secretariat added that, in the context of the scope of protection, the protection would be for the same kind of product to which the appellation of origin or geographical indication applied, or similar kinds, or even dissimilar kinds; the notion of “category” was not used in that context.

97. The Delegation of France requested additional explanations regarding the Secretariat’s reply concerning the question raised by the Delegation of Algeria. The Delegation further stated that it had understood, from the explanations that had already been given, that the possibility of a federation or the holder of the right presenting an application directly would result from the Agreement itself and that there would, therefore, be no steps to be taken by the member countries of the Agreement, in other words, such an approach would arise from the treaty and, consequently, States would have no option but to accept it. That was an issue which required further examination because in such a case it would be up to the International Bureau to assess the receivability of the application that had been submitted directly. The Delegation added that the possibility might arise of a State authority not certifying the particulars but that the authority would then find itself in a difficult position regarding an obligation contained in a treaty. The alternative should be the work of the authority of the member State, given that it was the member State that managed the way in which such files were presented.

98. The Secretariat indicated that it would not be alien to the international registration system in general to have the option for a country to opt out. In other words, a provision stating that a country would be able to indicate in a declaration that applications from its national territory should only be submitted to the International Bureau through the competent authority could also be introduced in the Draft Provisions if members of the Working Group agreed with such proposal. The Secretariat noted that the issue under consideration also applied in several areas under the Madrid and the Hague systems.

99. In response to a comment from the Representative of INTA, the Secretariat corrected an error in paragraph (4), which should also require “the product to which the geographical indication or the appellation of origin applied” to be indicated (as mentioned in paragraph (6)(iv)).

100. In response to a question from the Chair, the Secretariat confirmed that, unlike the indication of the product, the indication of the product category would not be a minimum requirement.

101. Concerning Option 2, paragraph (3)(b), the Chair said that it was his understanding that consideration should be given to the idea of leaving it to the national law of the Contracting Party concerned to decide whether it would allow international applications to be presented directly to the International Bureau or not.

#### Accession Criteria for Intergovernmental Organizations (Draft Provision C)

102. The Secretariat recalled that from the outset the topics addressed by Draft Provision C had been one of the key elements of the Working Group’s review of the Lisbon system. The document under consideration did not contain draft provisions concerning all elements that had to be dealt with in a treaty if the possibility for accession by an intergovernmental organization would be included in such treaty; the reason for this was that there were still some preliminary questions which had to be dealt with by the Working Group. In this regard, the Secretariat referred to the Notes concerning Draft Provision C in paragraphs 23 and 24 of Annex II of the working document. In particular, “should Draft Provision C explicitly allow an intergovernmental organization to accede if its legislation for the protection of geographical indications or

appellations of origin, or both, is not applicable in respect of all categories of products?" For example, should an intergovernmental organization which administered a regional system for geographical indications for wines only be allowed to accede to the new treaty? The Secretariat recalled that the Lisbon Agreement did not exclude any product category from the definition of its Article 2. It was for the Working Group to indicate whether such system should be retained or whether exceptions should be permitted in the context of allowing accession by intergovernmental organizations. The issue under consideration was not merely theoretical, since there were regional systems concerning specific product categories only, as in the case of the European Union. The Representative of the Secretariat referred to the document concerning the study on the relationship between regional systems for the protection of geographical indications and the Lisbon system that had been discussed by the Working Group at the previous session and recalled that that document contained an Annex which reflected in full the provisions that existed under other WIPO-administered treaties in respect of the possible accession by intergovernmental organizations, namely the Geneva Act of the Hague Agreement, the Madrid Protocol, the Singapore Treaty, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Patent Law Treaty and the UPOV Convention. The Secretariat pointed out that the document under consideration only contained provisions concerning the eligibility for becoming a Contracting Party for the reasons previously mentioned. As regards the drafting of Draft Provision C, the Secretariat indicated that the International Bureau had looked at the existing provisions in the other WIPO-administered treaties to identify those that would appear to come closest to those that may appear in a new treaty concerning the international registration of geographical indications and appellations of origin.

103. The Representative of CEIPI referred to paragraph (1) on eligibility for becoming party and stated that the essential question which arose was whether it was appropriate to allow any State which was party to the Paris Convention or which was a member of WIPO to become party to the new Agreement. He had not carried out a complete comparative study like that undertaken by the International Bureau, rather, he had consulted the Singapore Treaty and the Geneva Act of the Hague Agreement, noting as a result that those two treaties allowed States which were simply members of WIPO to become a contracting party without necessarily being party to the Paris Convention. He also highlighted that, under such circumstances, the treaties in question contained a provision that seemed to be missing in the proposed text and which, in the case of Article 15 of the Singapore Treaty, provided that "Any Contracting Party shall comply with the provisions of the Paris Convention which concern marks" and in the case of Article 2(2) of the Geneva Act of the Hague Agreement, provided that "Each Contracting Party shall comply with the provisions of the Paris Convention which concern industrial designs". Consequently, if Member States of WIPO which were not members of the Paris Union were to be offered the possibility of becoming party to the new Agreement, a similar provision would have to be provided for in order to ensure that those countries respected the basic principle of national treatment. Furthermore, looking at Draft Provision A (1), where it was stated in particular that "The Contracting Parties to which this Agreement applies constitute a special Union within the framework of the Union for the Protection of Industrial Property", it seemed that there was a contradiction between the various provisions and that if a Special Union was actually involved then membership of the Paris Union should be a pre-requisite for all countries. From a practical point of view, he emphasized that 11 countries were currently Members of WIPO without being bound by the Paris Union. In conclusion, there were three possible solutions: (i) that which had been put forward in the Draft Provisions but which should, however, be complemented by a provision similar to Article 15 of the Singapore Treaty, or Article 2(2) of the Geneva Act of the Hague Agreement; (ii) the solution which consisted in deleting the words "or which is a member of the Organization" in order to remain squarely within the framework of a special Union within the more general framework of the Paris Union and which was the solution currently favored by the Lisbon Agreement, and finally; (iii) the solution which consisted in simply saying "any State which is a member of the Organization", and consequently deleting any requirement for membership of the Paris Union while adding the provision contained in the Singapore Treaty

or the Geneva Act referred to in the first solution. As to paragraph (1) of Draft Provision C, he considered that the wording was not very clear in the part where it was stated “in respect of which titles of protection may be granted, either administered by the State itself or by an intergovernmental organization” and enquired in particular as to why granting should be distinguished from administration, rather than simply stating “the granting of titles of protection”, as had been done in other texts. It should first of all have been made clear that the titles of protection in question were for geographical indications and appellations of origin, given that such information was missing from the text of paragraph (1).

104. It was the understanding of the Chair that, if members of the Working Group were ready to take on board the comments or suggestions made by the Representative of CEIPI, any conclusion that might be drawn from these suggestions could and should apply also to paragraph (2) which contained similar wording as it referred to “at least one member State of that intergovernmental organization is a party to the Paris Convention or a member of the Organization”. The Chair added that it would be useful if delegations could indicate whether they could go along with a wider membership, namely opening up the Lisbon system to all Members of WIPO whether they were parties to the Paris Convention or not, and if so, whether they would still want to link their eligibility for becoming a party to their meeting the Paris Convention criteria with respect to the protection of geographical indications and appellations of origin. Of course, he also invited members of the Working Group to indicate whether they would prefer to stick to the current text of the Lisbon Agreement under Article 14(2)(a) where it was a pre-condition for a State’s accession that it should also be party to the Paris Convention.

105. The Delegation of Algeria suggested adding a provision to paragraph (2) that would stipulate that “any contracting party shall conform to the provisions of the Paris Convention”.

106. The Delegation of Bulgaria supported what had been said by the Representative of CEIPI and the Delegation of Algeria, while adding that, as members of the World Trade Organization (WTO) also had an obligation to comply with the substantive provisions of the Paris Convention, the new instrument could also be open for accession by members of the WTO.

107. The Representative of INTA said that the suggestion from the Delegation of Bulgaria would appear to be problematic to the extent that it would allow accession by WTO members that were not a State or an intergovernmental organization.

108. The Chair noted that the question that was still left open was whether Members of WIPO that were not parties to the Paris Convention should also be allowed to become parties to the new instrument, and if so whether they should be required to comply with the Paris Convention.

109. The Chair said that it was his understanding that there was wide support for an as wide a membership as possible, but also for linking the eligibility for becoming a party to compliance with the Paris Convention and that this should be reflected in a revised version of the text.

110. The Delegation of France stated that it could not give an opinion on that option at that stage.

111. The Representative of INTA indicated that paragraph (1) referred to “titles of protection” which seemed to point to specific registration systems even though it had been agreed that the protection for a geographical indication could come from other types of legislation including unfair competition law or judicial decisions, and therefore wondered to what extent one could really speak of titles of protection in those cases.

112. Referring to the comments made by the Representatives of INTA and CEIPI, the Secretariat indicated that, as reflected in paragraph 20 of Annex II of the working document, it had been agreed at the previous meeting that “intergovernmental organizations should be required to have the ability to grant titles of protection in respect of geographical indications, or

geographical indications and appellations of origin, and provide protection in respect of geographical indications, or geographical indications and appellations of origin, in accordance with Draft Provision E". In other words there were two conditions, namely that the intergovernmental organization should be in a position to grant titles of protection, but also that the protection available under the regional system should be at the level of the one stipulated in the treaty, and that was precisely the reason why the words "titles of protection" had been introduced in Draft Provision C. The Secretariat went on to say that there did not seem to be a good reason why States should not be subject to the same requirement. Therefore, a similar provision had been included in paragraph (1) of Draft Provision C. He acknowledged that the question as to whether an international registration could also be effected on the basis of protection in the country of origin under unfair competition law had been raised at the previous session of the Working Group, but there had been no conclusion on that discussion, so that the question was still open. Delegations were invited to give feedback in that respect, and more specifically on the issue of how one could apply for international registration for a geographical indication if one only had protection in one's own country under unfair competition law. In other words, how would the geographical indication in question be identified in the international application? Referring to the issue raised by the Representative of CEIPI as to why there was a distinction between "grant" and "administration" in Draft Provision C, the Secretariat recalled that there had been agreement that eligibility for becoming party to the system would depend on the ability of the organization administering the regional system to grant titles of protection in respect of geographical indications or appellations of origin. The Secretariat went on to say that the reference to the "administration of the right" was there because under the Madrid Protocol and the Singapore Treaty the accession criteria were actually linked to the registration role of the registration office within the regional system rather than to the grant of protection. As regards paragraph (1), the Secretariat clarified that the purpose of the phrase "either administered by the State itself or by an intergovernmental organization" was to reflect the fact that the titles granted could be administered by a government agency of the State itself or by an agency common to a group of States, like the Benelux countries, or by an intergovernmental organization of which the State was a member State like the EU.

113. The Delegation of France wished to focus on the wording of paragraph (1) which had not originally been the subject of the work of the Working Group given that the group's brief had been to address the accession of intergovernmental or regional organizations, and that consequently the Delegation considered that if specific conditions on eligibility for becoming party were to be defined by the States, then they should be in line with the contents of Draft Provision A since that Provision did not refer to the notion of "title" in any way, but rather to a varied series of acts which could be legally qualified in different ways and that it was therefore desirable to have a text that would truly be in line with Draft Provision A which referred to the specific conditions on the basis of which it was possible to protect an appellation of origin or a geographical indication. The Delegation also wished to return to a point which had been brought up by the Representative of INTA concerning the admittance of protection based on unfair competition law, and stated in that regard that it considered that no elements which could serve as a basis for protection, such as unfair competition or consumer deception, should be excluded in principle, however such protection would need to be conveyed in an act or a decision. It was not possible, in principle, to admit something which could not be identified. The Delegation recalled that the point in question had already been addressed at the time of the previous session of the Working Group. Consequently, the Delegation stated that it could accept the principle of protection in light of a court ruling recognizing the existence of an appellation of origin or a geographical indication on the basis of "unfair competition or consumer deception" legislation, but that, at some point, there must be identification of the appellation of origin or geographical indication and that some kind of formalization must be carried out, although not necessarily in the form of a certificate issued by the competent administration. In conclusion, there was a real problem in terms of consistency between Provision A and the conditions concerning eligibility for becoming party, indeed, the question arose as to whether it was really necessary to set conditions concerning eligibility for becoming party for States.

114. The Delegation of the Republic of Moldova expressed support for the proposal to extend the list of States that would be able to accede to the Agreement to those that were Members of the Organization, subject to the addition of a requirement to comply with the Paris Convention. As regards paragraph (1) of Draft Provision C, the Delegation suggested keeping the text of the Lisbon Agreement. Referring to paragraph (2) of Draft Provision C, the Delegation suggested deleting the term “titles of protection” and to insert right after “and declares that it has its own legislation binding on all its member states” the phrase “under which protection is granted in respect of the subject-matter covered by the Agreement”.

115. The Delegation of Hungary generally supported the idea of opening the Lisbon system to intergovernmental organizations while pointing out that a certain number of issues had been raised, such as the coverage of the geographical indication protection that an intergovernmental organization could provide, which also applied to States where the national protection system did not cover all types of goods. The Delegation’s understanding was that the Lisbon Agreement provided protection for all types of products and allowed accession only by those Contracting Parties that provided a similar level of protection in their respective territory. The Delegation was of the view that an optimal solution would be to preserve such principle, yet they also suggested considering as a second option the possibility of having a new legal international instrument that would be open for those States or intergovernmental organizations that could only provide protection for certain groups of products.

116. As regards the questions related to the possible accession of OAPI, as addressed in the study on the relationship between regional systems and the Lisbon system contained in document LI/WG/DEV/2/3, the Secretariat invited the Representative of OAPI to provide some clarification on the questions raised in paragraphs (62) and (63) of that document. The Secretariat then quoted, word for word, the paragraphs in question and stated in particular that, with regard to the possible accession of OAPI, paragraph (62) stated that “It should be noted that, if provisions concerning accession by intergovernmental organizations would be introduced into the Lisbon Agreement and OAPI would make use of the possibility thus created to accede, a number of questions would have to be dealt with. In view of the fact that OAPI administers a regional system for the protection of geographical indications on the basis of unified legislation for its member States, it is presumed that international registrations under the Lisbon system would have effect as OAPI registrations, throughout the territories of all OAPI member States, subject to the possible refusal within the prescribed one-year time-limit, or to invalidation by a tribunal thereafter. This would also apply in respect of all international registrations existing at the moment of OAPI’s accession. As these international registrations will already be under protection from a prior date in those OAPI member States that had already become party to the Lisbon Agreement, the question arises as to whether Article 12(3) of the Revised Bangui Agreement would need to be amended so as to ensure that rights acquired in those OAPI member States in respect of those international registrations prior to OAPI’s accession be respected, or would a refusal by OAPI prevail over such acquired rights?” The Secretariat then read out paragraph (63) of the document, which stated that “Another question to be clarified, in view of OAPI’s unified legislation and central procedure for the registration of geographical indications, concerns the effect of Lisbon registrations inscribed after OAPI’s accession in OAPI member States that are themselves also party to the Lisbon Agreement. Would these have effect both as OAPI registrations and as registrations under Article 12(3) of the Revised Bangui Agreement in the OAPI member States that are party to the Lisbon Agreement, or just as OAPI registrations?” The Secretariat concluded by stating that those questions were relevant and that it would be very useful if the Representative of OAPI could provide clarification in that regard.

117. The Representative of OAPI stated that his organization welcomed the attention that the Lisbon Union had drawn to his request for the reexamination of the texts in order to provide for the accession of intergovernmental organizations responsible for intellectual property issues related to the Lisbon system. He added that OAPI closely followed developments concerning the work of the Working Group and was delighted at the prospect of their successful conclusion.



The main characteristics of the OAPI system were that it provided a single legal framework for all member States and a single Office responsible for granting intellectual property titles. Under that system, a single application was made and a single title granted which had effect in the 16 OAPI member States. He highlighted that, in the context of OAPI, there were no national protection systems responsible for granting titles at the same time as the regional system. Disputes concerning titles granted by OAPI were heard by the courts of the member States. OAPI hoped that appropriate responses to the concerns surrounding its future accession to the Lisbon system would be found through the review of the Lisbon system. However, those issues which should receive priority treatment and which had previously been mentioned by the Secretariat were not the only matters pending but could, undoubtedly, be examined in greater depth at future meetings between OAPI and OAPI member State experts and representatives of the International Bureau.

118. As to the questions raised, in particular that regarding registrations, the Representative of OAPI stated that, should OAPI accede, international registrations carried out within the framework of the Lisbon system would have effect in all the OAPI member States. In other words, the effects of registrations would not simply be limited to OAPI member States which were also party to the Lisbon Agreement. As a part of the review of the Lisbon Agreement, Article 12(3) of the Bangui Agreement would also be amended in order to provide for accompanying measures that would ensure that the effects of the international registration of a geographical indication were not simply limited to OAPI member States which were also party to the Lisbon Agreement. As to the effects of titles granted prior to the accession of OAPI in OAPI member States also party to the Lisbon Agreement, OAPI considered that, if the holders were the same, that situation did not pose any particular problems because the latest OAPI designations would have effects in all OAPI member States. In that regard, OAPI would ensure that all its member States could accede to the Lisbon Agreement, allowing them to benefit from the advantages offered by the Lisbon system. A number of issues remained to be resolved, in particular the question of whether, in the event of the accession of OAPI, the votes of OAPI member States would be taken into account individually alongside that of OAPI, or whether OAPI's vote would represent all of its member States also party to the Lisbon Agreement. Although the question was a purely theoretical one, the Representative of OAPI considered that there was a legal aspect involved, given that voting was carried out by consensus. Accession of OAPI to the Lisbon system would require a number of accompanying measures, some of which were to be taken as a part of the Agreement under review while others would follow in OAPI implementing regulations. The desired aim was nevertheless to achieve harmony at the operational level, as well as to benefit from the advantages of international registration.

119. As to the issue of the right to vote raised by the Representative of OAPI, the Secretariat stated that those questions had not, in fact, been addressed in the working document under consideration, but Appendix I of document LI/WG/DEV/2/3, which had been examined during the course of the previous meeting of the Working Group, summarized all the provisions of the treaties administered by WIPO which allowed the accession of intergovernmental organizations and included more specifically provisions relating to the question raised by the Representative of OAPI such as those contained in the Geneva Act of the Hague Agreement, Article 21(4)(b) of which stated that: "Where a decision cannot be reached by consensus, the matter at issue shall be decided by voting. In such a case, (1) each Contracting Party that is a State shall have one vote and shall vote only in its own name, and (2) any Contracting Party that is an intergovernmental organization may vote, in place of its member States, with a number of votes equal to the number of its member States which are party to this Act, and no such intergovernmental organization shall participate in the vote if any one of its member States exercises its right to vote, and vice versa."

120. The Delegation of Portugal expressed support for the comments made by the Delegation of Hungary.

International Registration and Scope of Protection (Draft Provisions D and E)

121. Introducing Draft Provision E, the Secretariat said that the difficulty that the International Bureau had faced in respect of provisions concerning the scope of protection was that, as a result of the Survey on the Lisbon system, a large number of different suggestions and proposals had been made reflecting a wide variety of positions. Moreover, the discussions that had taken place at the previous meeting had not provided sufficient feedback to narrow down the options. As a result, the International Bureau had had to reflect all the suggestions and proposals made in Draft Provision E. The Secretariat pointed out that so far there had been no consensus on how to approach the issue of scope of protection and referred in that regard to the issue raised by the fact that there were countries which protected geographical indications and appellations of origin on the basis of two definitions, one for geographical indications and one for appellations of origin, while other countries only had a geographical indication definition and protected both geographical indications and appellations of origin under that single definition without any distinction between the two. Thirdly, the Secretariat recalled that at the last meeting the International Bureau had been asked by the Working Group to present draft provisions on scope of protection while reflecting a difference in level of protection between appellations of origin and geographical indications, in light of the fact that there were countries which did provide different levels of protection to geographical indications and appellations of origin.

122. Referring to Draft Provision D, the Secretariat pointed out that paragraph (3) stipulated that whenever a given country X provided protection for both geographical indications and appellations of origin on the basis of two definitions, with two different levels of protection, any international registration for a geographical indication coming from another country Y would then be protected as a geographical indication in country X, while an appellation of origin coming from a country Z that would have protected an appellation of origin in its own territory as an appellation of origin, and that would have probably also registered such appellation as an appellation of origin in the International Register, would obviously also be protected in country X as an appellation of origin. The Secretariat pointed out that the difficulty appeared when a country provided protection for geographical indications on the basis of one definition only, namely the definition for geographical indications, and added that in such instance the issue arose as to whether the product in question would also meet the definition of an appellation of origin under the Lisbon Agreement or not. The Secretariat indicated that in such a case, if the protected product inherently met the definition of an appellation of origin, a decision had to be taken as to whether the Lisbon system would allow the registration of such a product as an appellation of origin in the international register with a requirement for other countries to protect it as an appellation of origin. In that regard, the Secretariat noted that Draft Provision D tried to accommodate that possibility by requiring the applicant country to provide evidence that the definition of an appellation of origin under the international treaty would be met. The Secretariat clarified that it would always be up to the receiving countries to decide whether they agreed that the Lisbon definition had been met or not. The Secretariat noted that, if the level of protection for geographical indications and appellations of origin would be the same, the issue would not be so important. However, since the International Bureau had had to reflect in the Draft Provisions a difference in level of protection between appellations of origin and geographical indications, the issue had had to be addressed that an appellation of origin coming from a country with two levels of protection, one for appellations and another for geographical indications, would only be protected as a geographical indication in a country with one definition and one level of protection, which may be a lower level of protection than the one which existed in the country of origin. Meanwhile, in the reverse situation, if a product coming from a country with only one definition, i.e., for geographical indications, inherently met the definition of an appellation of origin under the treaty, it would be protected in a country with two definitions and two levels of protection at the higher level of protection, i.e., that for appellations of origin. The Secretariat concluded by saying that without an international system the situation would not be

different, in the sense that whenever a particular applicant coming from a country with two levels of protection wanted to obtain protection in a country with only one definition and one level of protection, the applicant in question could not obtain in such country more protection than existed in that country.

123. The Chair underlined the invitation from the Secretariat for guidance on the various options. In addition, he pointed out that the provisions were also based on a distinction as to the protection to be provided against use in respect of products of the same kind as the one to which the appellation of origin or geographical indication related, and the protection to be provided against use in respect of products that were not of the same kind. In that regard, the Chair invited participants to address the question as to whether such distinction was justified and whether Draft Provision E dealt with that distinction in an appropriate manner.

124. The Delegation of the Republic of Moldova expressed support for Draft Provisions D and E. However, paragraphs (1) and (2) of Draft Provision E had to reflect that a Contracting Party only had to protect an international registration if it had not issued a declaration of refusal in respect of that appellation of origin or geographical indication. Referring to Option 1 under paragraph (1) of Draft Provision E, the Delegation suggested an amendment of the provision clarifying that certain uses should not be regarded as usurpation or imitation, such as the use of a geographical denomination protected as an appellation of origin by those producers who simply wished to indicate the origin of their products.

125. The Delegation of Portugal suggested that Options 1 and 2 might be merged.

126. Referring to the overall approach of the issue, the Representative of OriGIn acknowledged that the situations under national laws were often complex and also that there was a need to provide flexibility. However, providing two levels of protection did not serve the goal of transparency and instead made the system unnecessarily complex. The objective of an international treaty should not simply be to take stock of the existing situation, but also to bring about a certain level of harmonization between Contracting Parties. He concluded by saying that OriGIn was in favor of maintaining a single level of protection that had to be agreed to by everyone.

127. The Delegation of France highlighted that the proposal under examination was designed to improve the current arrangement for the protection of appellations of origin, given that it made it possible to address issues not previously tackled by the Working Group, in particular the matter of the use or appropriation of an appellation when there was evocation, and noted that that proposal also explored the possibility of protecting appellations of origin from misappropriation of reputation as the Delegation of France had requested. Turning to the more general point of the introduction of two levels of protection, one level for appellations of origin which was an improvement on the current Lisbon Agreement system and another level of protection for geographical indications which was, to a great extent, inspired by the TRIPS Agreement, the Delegation considered that such a two-level structure was not in line with the objective of improved protection. Although the Lisbon Agreement had to be attractive, it should not be a carbon copy of agreements that no longer allowed for progress to be made concerning international harmonization of the protection of geographical denominations and consequently the Delegation would prefer that there was only one level of protection, irrespective of the description of the geographical name, appellation of origin or geographical indication.

128. The Delegation of Iran (Islamic Republic of) supported the statements made by the Representative of OriGIn and the Delegation of France and agreed that it was very important to provide a unified system of protection that would encompass both geographical indications and appellations of origin. In that regard, the Delegation recalled that the purpose of the exercise was to make things easier so as to attract more countries to join the Agreement. As regards Draft Provision E, Options 1 and 2, he indicated that his Delegation preferred Option 1, and

sought clarification in respect of the second part of Option 1 “if the product originates from within the geographical area of production origin in question but does not meet the qualifications” to understand whether it fell within the jurisdiction of the internal legal system or whether it would be covered under the proposed new instrument. In other words, he wished to know who would examine whether a given product met the qualifications or not. In that regard he expressed the view that it would be preferable that such matter be dealt under national systems rather than in an international agreement.

129. The Delegation of Algeria supported the position of the Delegation of France, as well as that expressed by the Delegation of the Islamic Republic of Iran. Provision should be made for unified protection of appellations of origin and geographical indications in order to avoid any complications. The Working Group’s aim was to make the Agreement more flexible, not more complex.

130. The Delegation of Italy shared the comments expressed by the Representative of OriGIn and the Delegation of France and did not agree with the proposed idea of creating different levels of protection, one for appellations of origin and the other for geographical indications. In that regard, he said that the Italian legislation provided the same level of protection for appellations of origin and geographical indications and therefore the Delegation of Italy preferred to maintain the same level of protection even if they accepted the idea of having two different definitions.

131. From the perspective of trademark owners, the Representative of INTA indicated that any changes to the scope of protection had to serve to clarify the scope of protection. Additional terms that would make the meaning less clear could lead to more confusion and to more areas of conflict with trademarks. INTA wondered whether, for example, the addition of the term “evocation” actually added something substantive to the notion of “usurpation or imitation”. The notion of “evocation” was used in the EU, but the term was also controversial under the European system and the actual meaning of “evocation” was not clear. Referring to the last part of Option 1, namely to the “qualifications on the basis of which the appellation of origin was granted protection”, the Representative of INTA wondered whether that was clear and transparent enough under the Lisbon system. She went on to say that of course under the EU system the specifications would be much more easily accessible and, consequently, it would be easier to understand what the provision meant in the EU context, but in other instances the “qualifications” requirement might not be clear and she therefore suggested removing that term from the proposed provision. As regards the references to trademarks, she wished to make it clear that the provisions in question would apply to trademarks with a later priority, in conformity with the TRIPS Agreement. Concerning the levels of protection, the Representative of INTA agreed that two levels of protection would reflect the reality that appellations of origin were in a sense the “elite” type of geographical indications and had originally been developed as such. She went on to say that, if the same level of protection was provided, the wording of paragraph (2) of Draft Provision E would establish a clear cut provision on the scope of protection that would be easier to apply in practice and which would be much more predictable.

132. As to the possibility of having two levels of protection, the Representative of MARQUES expressed support for the position expressed by the Representative of OriGIn and the Delegations of Italy and France. Two levels of protection would not be a very practical approach, as it would increase the complexity of the system in the international field. Moreover, Draft Provision E did not cater for situations such as existed in the European Union, where no coexistence existed between national and community geographical indications or designations of origin systems, while both the EU and its member States might be Contracting Parties to the treaty.

133. The Delegation of Switzerland stated that it too was opposed to the idea of establishing two different levels of protection for appellations of origin and geographical indications. Bearing in mind the aim of the Working Group, to make the Lisbon system more attractive to new members, it did not seem that the option of reducing in a way the added value of Lisbon in terms of improved protection of geographical indications in general constituted a strategy that would attract new members. The Delegation further pointed out a slight difference between Options 1 and 2, to the extent that Option 1 referred to “any use”, while Option 2 referred to “any direct or indirect commercial use”.

134. Concerning the formulation of the level of protection in Options 1 and 2, the Representative of OriGIn noted that the protection against use and the protection against the registration of trademarks were dealt with in the same paragraph, and wondered whether in a future formulation the articulation of Article 23 of the TRIPS Agreement could be followed so as to have one paragraph on the protection against the use and a paragraph concerning the way in which identical or similar trademarks would be dealt with.

135. The Chair understood the sentiment of the Working Group that in an ideal world one should be heading for simplicity and as much harmonization and unification as possible. However, in his opinion, such views were detached from reality and he was not at all convinced that such plea for simplicity was consistent with the objective to open up the system to a relatively high number of new member states and intergovernmental organizations. The Chair added that he was under the impression that one of the underlying ideas of the exercise was to build another floor open to those who were not necessarily ready to provide specific protection for appellations of origin or to accept the current scope of protection provided under the Lisbon Agreement, while still preserving the principles and objectives of the Agreement. He said that everyone was aware of the fact that under the TRIPS Agreement there was an international regime for protecting geographical indications and also pointed out that such regime did set two levels of protection, namely a general level of protection under Article 22 and an enhanced level of protection under Article 23. Moreover, the Chair also said that until then he had been under the impression that there was some sort of consensus that two definitions would be included into any possible new instrument, one for appellations of origin that would follow the lines of the Lisbon Agreement, and one for geographical indications mirroring the definition contained in the TRIPS Agreement. The Chair indicated that he was aware of the existence of a system with two definitions and a single level of protection such as the EU system, yet he wondered whether that was a very good model to take into consideration. In that regard, he also wondered what the point really was in having two definitions without any legal consequences. The Chair admitted that it would have been optimal to have a single category of geographical indications and also a single level of protection, but he wondered to what extent that was really feasible. On the other hand, the Chair indicated that if he followed the guidance of several Contracting Parties to the Lisbon Agreement to the effect that the basic principles, values and objectives of the Agreement had to be kept, he wondered how that could be achieved without having two definitions and without having two different levels of protection. He said that the other option was to try to convince the outside world of the necessity to subscribe to a Lisbon type of approach, but called the participants’ attention for the still limited number of Contracting Parties to the Agreement. By way of conclusion, the Chair said that he was of the view that the only way to accommodate both concerns was to have a two layer system.

136. Continuing, the Chair said that, under the current system, leaving aside the issue of partial refusals or partial statements of grant of protection, the Chair noted that Contracting Countries basically had two options, one was to refuse and the other was to accept the protection of an appellation of origin in their territory. In that regard, if two distinct categories were introduced, the Chair wondered what would happen whenever a competent authority of a contracting country is faced with an international application for an appellation of origin and such authority subsequently finds out that such denomination does not meet the criteria for appellations of origin but that it does meet the criteria for geographical indications. In other words, would the

authority have to issue a refusal and let the country of origin make another attempt to file a new international application at a lower level for a geographical indication, or could such competent authority simply state that, while it does not recognize the protection at the level of appellations of origin, it does recognize the protection of the denomination at the level of geographical indications?

137. The Delegation of Bulgaria said that he was thinking along the same lines of what had been expressed by the Chair and suggested going back to the mandate of the Working Group which clearly stated that the task of the Working Group was “to develop the Lisbon system to become more focused as regards making the system more attractive for users and prospective new members of the Lisbon Agreement for the Protection of Appellations of Origin”. In that regard, the Delegation was of the view that if one excluded new possibilities one would basically remain with the same system, with the same limited scope and basket. He recalled that the original idea was to widen the system so that it went beyond its actual scope and also applied something that had already been internationally approved under the TRIPS Agreement. Bulgaria would even go further and suggest having three different levels of protection to give countries a chance to have their national systems of protection recognized. In that regard, he recalled that geographical indications were not constituted internationally but were created nationally based on national rules and it was only then that countries sought recognition of their national products or services abroad.

138. The Delegation of France recalled that when the members of the Working Group undertook to carry out the work of improving the Lisbon Agreement, they were informed that the Agreement was not attractive, because it was closed in terms of its definition of the denominations covered and not open enough with regard to systems which might serve as a basis for protection. Moreover, the way in which protection functioned was still not particularly attractive. Only one level of protection was defended in international fora and that was the highest level of protection. The Delegation also raised the question of how the submission of the protection of a geographical indication to the demonstration of consumer deception could constitute a simplifying factor. It was difficult for anyone to demonstrate consumer deception. Holders of appellations of origin would not find it easy to establish consumer deception and those who might wish to use an appellation of origin would find it hard to know at what point they had crossed the boundaries in terms of what had or had not been permitted. The Delegation considered that, bearing in mind the need for legal security, the most simple and least complex applicable rule should be maintained, irrespective of the party concerned. The criterion of consumer deception was not a fixed guideline nor was it easy to apply. Furthermore, the Delegation wished to be informed in what way the TRIPS Agreement system was a simple system for all parties.

139. The Delegation of Spain referred to the issue of whether or not to establish two separate levels of protection for geographical indications and appellations of origin, and said that Spain considered a model equipped with a single level of protection to be more attractive, since such a model offered greater legal security, a much higher level of protection compared to existing regimes and did not in any way pose a contradiction with regard to the existence of two separate definitions. Furthermore, the range of indications covered by a single level of protection could be widened.

140. Referring to the existence of two categories, the Delegation of Switzerland recalled that those two categories had been used for decades, in particular with the aim of informing the consumer, meaning that producers were justified in considering them to be of value. Following on from the questions put to the Secretariat, the Delegation of Switzerland found it difficult to understand to what extent an approach which consisted in recognizing the two levels of protection which existed for geographical indications within the framework of the TRIPS Agreement in order to introduce two different levels also into the Lisbon Agreement could be described as simple. He therefore wished to know what the logical link was between two

different levels based on a difference in products, wines and spirits on the one hand and other products on the other hand, and two different levels of protection such as might be introduced into the Lisbon Agreement based on the legal category of appellation of origin and geographical indication.

141. Referring to the comments made by the Chair, the Representative of OriGIn said that he was not fully convinced that providing a single level of protection for both appellations of origin and geographical indications would automatically exclude other means of protection such as trademarks for example. In that regard, he pointed out that actually there were countries using trademarks to protect geographical indications that provided a high level of protection for wines and spirits according to the requirements of the TRIPS Agreement and therefore concluded by saying that the provision of a high level of protection seemed to be compatible with the trademark system.

142. The Chair agreed that there was no contradiction and indicated that he had not even mentioned trademarks in his statement.

143. Referring to paragraph (6) of Draft Provision E, the Secretariat noted that the first sentence read “The provisions of this Agreement shall in no way exclude more extensive protection as may be available in a Contracting Party”. In other words, the levels of protection specified in Draft provision E did not require countries to have those levels of protection as they merely were the minimum levels of protection that a country had to provide. In that regard, the Secretariat specified that if a country or a regional system wanted to provide the same level of protection to both appellations of origin and geographical indications they could do so, and on the contrary, if they wanted to give even stronger protection than the one stipulated under Provision E they could also do so either for both appellations of origin and geographical indications, or for appellations of origin or geographical indications only. The Secretariat indicated that the easiest way of dealing with levels of protection would be to say that the level of protection had to be as specified in national law, and pointed out that in such case there would be no harmonization and there would be no need to comply with treaty obligations requiring that a certain level of protection be provided. The Secretariat went on to say that such situation was not uncommon in international treaties as it existed for example under the Madrid System for the International Registration of Marks. However, in the context of appellations of origin and geographical indications, such a solution had not proven to be possible in the past, because of the important differences in level of protection from country to country. He indicated that if it would be true that the levels of protection that existed in all countries around the world had changed so much since the Lisbon Agreement was concluded in 1958, and that such levels of protection were much closer to each other nowadays than they used to be in the past, then the Working Group might consider following the example of the Madrid system and simply leave it to national law to determine the applicable level of protection. On the contrary, if the Working Group decided to follow the proposed approach, namely specifying in the new treaty a level of protection, then one would arrive at something along the lines of what was proposed in Draft Provisions D and E. As regards the comment that had been made concerning the basis for the different levels of protection between appellations of origin and geographical indications in Draft Provision E, the Secretariat reiterated that the International Bureau had simply followed the instructions given by the Working Group at the end of the previous session, namely to provide draft provisions which would be based on a different level of protection for appellations of origin and geographical indications. As indicated by the Chair, there were still differences in levels of protection around the world which might justify two levels of protection.

144. Continuing, the Secretariat clarified that the reason for proposing two Options under Draft Provision E was that many different proposals had been made in response to the Survey and several of those suggestions were actually following the model of Article 3 of the Lisbon Agreement or were building on that provision in the sense that they used the same language as Article 3 but suggested the addition of notions such as “evocation” or protection

against use on other kinds of products than the one protected by the appellation. He also recalled that there had been a request to reflect in that provision the protection that should be available against use by someone who was entitled to use the appellation but who did not meet the requirements for making the product and indicated that such provision had been incorporated in the second part of Option 1. The Secretariat clarified in that respect that this concerned the use by someone who was allowed to use the appellation but who used such appellation for products which did not meet the necessary requirements. If a comparison was made with situations in the trademark or patent area, it would be possible to compare the situation of the holder of the right to use the appellation with the situation of a licensee, namely someone who had obtained a license to use a trademark or to use a patent but who used such intellectual property rights outside the boundaries of his license. Under many laws, one could not use the trademark or patent title against such infringing use, but could only do so on the basis of the licensing contract.

145. The Secretariat stressed the fact that Option 1 followed more the model of Article 3 of the Lisbon Agreement, while Option 2 contained the suggestions that had been made in response to the Survey which were not modeled after the provisions of Article 3 of the Lisbon Agreement, but which used other concepts that were perhaps more comparable to concepts used in trademark laws. He said that for example the wording "protection against use that would take unfair advantage of or be detrimental to the repute of the appellation of origin" was language which looked very much the same as the protection that existed under the Community Trademark Regulation for marks with a reputation. Referring to paragraph (2) of Draft Provision E which dealt with the protection to be made available in respect of geographical indications, the Secretariat noted that the provisions contained therein were much more comparable to the provisions that could be found in trademark laws such as "use which would result in a likelihood of confusion" or "use which is of such a nature as to mislead the public" or even "dilution". The Secretariat said that there were indeed countries which protected geographical indications through trademark laws and that such reality had to be taken into account by the Working Group in establishing provisions that would eventually feature in a new treaty. Referring to the suggestion made by the Delegation of Portugal to combine Options 1 and 2 of paragraph (1) of Draft Provision E, the Secretariat said that such combination would be possible if there would be agreement on how Draft Provision E paragraph (1) would read, which in turn required that the Working Group understood the concepts used in Options 1 and 2 in the same manner. In that regard, the Secretariat said that there seemed to be general agreement that the expression "taking unfair advantage of the repute of the appellation of origin" was equivalent to "usurping the appellation of origin". Referring to the addition of the notion of "evocation", the Secretariat recalled that there had been strong statements in favor of adding that concept to Draft Provision E paragraph (1), Option 1, but also expressions of serious doubt about the usefulness of that concept. Referring to the question raised by Switzerland about the reason for the difference between Options 1 and 2 of Draft Provision E paragraph (1), and more specifically the reason why Option 1 referred to "protection against any use" while Option 2 referred to "any direct or indirect commercial use" the Secretariat clarified that such difference simply reflected the suggestions made in response to the Survey.

146. The Chair said that he took note of a certain number of statements made by delegations to the effect that they did not really want to give up their ambition that eventually there could be a harmonized level of protection internationally for geographical indications which would correspond to the level of protection provided both under the Lisbon Agreement and also under Article 23 of the TRIPS Agreement. The Chair also took note of a remark that there could still be some merit in having two definitions with a single level of protection for two different categories, as that would serve the purpose of appropriately informing the consumers. He also noticed that at least one delegation had expressed itself in favor of two levels of protection if there were two categories of geographical denominations to be protected, namely appellations of origin and geographical indications.



147. As to paragraph (6) of Draft Provision E, the Representative of CEIPI noted that it referred to the countries of the special Union, thus excluding intergovernmental organizations. He therefore suggested that the paragraph should refer rather to the contracting parties. Furthermore, he added that, unless an article specifically devoted to definitions was to be added, the full name of the TRIPS Agreement should be spelt out in full at the end of paragraph (6).

148. With regard to Provision D, the Delegation of France could see what the subject of the first part of paragraph (1) of the Provision was, but was confused as to what the phrase “or, in the absence of such a definition” meant. The Delegation considered that it meant that the definition of appellation of origin might not exist and therefore it did not understand what the aim of that wording was. Such phrase gave the impression that there were other possibilities in terms of recognition of appellations other than those referred to in the provision in question. As to Draft Provision E paragraph (3) and, more specifically, the presumption of the unlawful nature of use by someone who was not the holder of the right to use the geographical indication or appellation of origin, the Delegation wished be informed at what stage such a presumption would come into effect, given that not all the potential users would necessarily be included in the notification to the International Bureau, which might only refer to federations. In that regard, the Delegation noted that different terminology had been used in the other paragraphs, with the term “*usé*” being employed, rather than “*utilisé*”. The Delegation concluded by saying that not only should the text be harmonized in that regard, but that, above all, it should be determined who exactly would implement the presumption provided for in paragraph (3). As to the relationship between paragraphs (4) and (5), the Delegation noted that it was in accordance with the wording relating to the approach taken regarding homonyms in the TRIPS Agreement, because paragraphs (4) and (5) stated that, in certain cases homonymous denominations could coexist since there was equitable treatment of consumers and a lack of consumer deception, while in other cases they could not since there was a risk of consumer deception. In that regard, the Delegation of France stated that that relationship had been a cause for concern ever since it had formed part of the TRIPS Agreement and that, since it had discovered that article as it stood in the Draft Provision proposed by the Secretariat, the same doubts had arisen for it.

149. As regards the meaning of Draft Provision D paragraph (1), the Secretariat invited the participants to put themselves in the situation of a country that provided protection to geographical indications and appellations of origin on the basis of a definition for geographical indications only and clarified that in such case, whenever a given product inherently met the requirements of the definition of an appellation of origin, the product in question would still only be protectable in that country as a geographical indication, because such country only had a geographical indication definition. The Secretariat pointed out that then the question arose as to whether the product in question, which met the requirements of the appellation of origin definition of the Agreement, could still be registered at the international level as an appellation of origin regardless of its protection as a geographical indication at the national level, because the country of origin only had that form of protection. He went on to say that, if an international registration as an appellation of origin would be allowed even though the protection at the national level in the applicant country would be for geographical indications, then the question arose as to how it could be assured that the product in question indeed met the requirements of the definition of an appellation of origin. The Secretariat added that such verification would require an examination by the applicant country which should determine whether the product in question actually met the treaty definition of an appellation of origin. If that was the case, that information would also have to be included in the application form and that was precisely the idea behind Provision D paragraph (1). Turning to Draft Provision E paragraph (3), the Secretariat clarified that that paragraph took into account the fact that there were countries which provided protection to geographical indications under trademark law and countries which had obligations under the TRIPS Agreement. The Secretariat added that the requirements for the protection of trademarks under the TRIPS Agreement included a provision requiring to protect registered trademarks against use which would result in a likelihood of confusion in

Article 16(1) but also pointed out that such provision continued by stating that “the use by someone who is not entitled to use of a trademark on identical products as the ones contained in the trademark registration a likelihood of confusion shall be presumed”. Paragraph (3) of Draft Provision E simply mirrored that provision. As regards paragraphs (4) and (5) of Draft Provision E, the Secretariat indicated that these provisions mirrored the provisions of Articles 23(3) and 22(4) of the TRIPS Agreement. In that regard, the Secretariat said that, if there were difficulties with the implementation of those provisions of the TRIPS Agreement, as indicated by France, it would be useful to learn more about them.

150. The Delegation of France considered that the existence within Provision D of several alternatives depended essentially on the issue of whether one or two levels of protection would be defined. That question was only significant if it was still of interest to the countries to have their geographical indications registered at the international level in a category which differed from that to which they could aspire at the national level. That point therefore remained pending, as did the issue of whether there would be one or two levels of protection. As to paragraph (3), the Delegation stated that it had noted the explanations given by the Secretariat and that, in the case of points (4) and (5), it looked to the administrators of the TRIPS Agreement for clarification as to how provisions which seemed to be difficult to apply could be implemented.

#### Prior Use (Draft Provision F)

151. The Secretariat referred to paragraphs 34, 35 and 36 of Annex II and recalled that the Chair had concluded at the last meeting that, although the discussion on the responses to the Survey had reflected a clear split on the issue of prior use as addressed in Article 5(6) of the Lisbon Agreement, but that “the divide might not be so deep”. In drafting provision F, the suggestions that had been made to retain Article 5(6) had been captured as that wish had been expressed by several delegations, albeit with the possible introduction of an extended time-limit for “phasing out” of five or ten years. However, those suggestions had been combined with another suggestion that had been made, namely to limit the scope of Article 5(6) to prior use as a generic. In their answers to the Survey, several delegations had indicated that in respect of prior use under a legitimate right they were of the view that Article 5(6) should no longer be applied and that such legitimate right under which prior use took place had to be respected. In this regard, references had also been made to the TRIPS Agreement. In consequence, the Secretariat had thought that it might be appropriate to include in paragraph (1) of Draft Provision F the limitation of the application of that provision to prior use as a generic. The Secretariat clarified that paragraphs (1) and (2) had been split in order to reflect the differences that could be found in the Lisbon Agreement and the TRIPS Agreement on the issue of “generics”. The Lisbon Agreement mentioned the term “generic” in Article 6 without defining it, while the TRIPS Agreement used a phrase circumscribing a “generic” as that had been retained in paragraph (2) of Draft Provision F which read “a term customary in common language as the common name for certain goods or services”. Paragraph (3) of Draft Provision F dealt with prior use under a legitimate right, notably under a prior trademark right, and stipulated that the prior trademark right would be safeguarded unless the right had been acquired in bad faith. Lastly, the Secretariat indicated that paragraph (4) had been added in order to make it absolutely clear that the preceding provisions of Draft Provision F would not preclude the possibility to use prior use as a ground for refusal under Article 5(3) of the Lisbon Agreement or its equivalent under a new treaty.

152. The Delegation of the Republic of Moldova was of the view that it was up to non-Lisbon members to give their opinion as to what would be an appropriate time-limit for “phasing out” prior use, since the Contracting Parties to the Lisbon Agreement had already agreed to a two year period for such “phasing out”. She further requested clarification of the term “grape variety” in paragraph 2(b). As regards prior legitimate rights, the delegation fully agreed with the Secretariat.

153. The Delegation of France stated that, with regard to setting the time limit for “phasing out”, it felt that the proposal of the Republic of Moldova was very much relevant because the Contracting Parties were basically in a situation whereby the time limit should be made as short as possible and that it was therefore up to those who might request that time limit to determine what the most appropriate time limit was. As to paragraph (3), it had several questions on the procedures envisaged concerning the notification of prior trademark rights because direct notification to the International Bureau seemed to be possible. Should that be the case, the Delegation of France wished to know how any bad faith which might be the basis for failure to take into account the existence of a mark could be analyzed and what possible means of recourse would be available should the mark be recorded in the register. Furthermore, the Delegation inquired as to how that provision would be coordinated with paragraph (1), given that there were cases in which a geographical denomination or indication was used in a mark as a generic term. As to paragraph (4) on conditions regarding invalidation, the Delegation recalled that it had been stated that the exceptions to the protection could also serve as means of invalidation and therefore reiterated its request that the reasons for invalidation of the protection of a geographical indication or an appellation of origin should be better framed.

154. The Representative of ECTA asked whether paragraphs (1) and (3) of Draft Provision F only applied to appellations of origin and not to geographical indications. Referring to the provisions under paragraph (1) which reproduced more or less the existing provision of the Lisbon Agreement, the Representative of ECTA was of the view that they amounted to an expropriation of the prior trademark without any compensation and indicated that in their view that had precisely been one of the major obstacles to the accession of other countries to the Lisbon system since those provisions were perceived as being unfair by many. He went on to say that if one of the purposes of the exercise was to have new countries acceding to the system, further reflection was required on that fundamental issue. The Representative of ECTA was of the view that geographical indications and trademarks had to be treated alike, taking into account their specificities but on the basis of the famous principle “first in time, first in right”. The Representative of ECTA was satisfied with the way in which this issue had been addressed in the EU Foodstuffs Regulation, in which Article 14(2) provided that the use in such circumstance of a trademark may continue without any additional condition. Referring to paragraph (3), the Representative of ECTA was of the view that the second condition expressed therein went too far, namely that the holder of a trademark which would fall under the condition of paragraph (3) would have to notify the International Bureau of the existence of its trademark for information purposes. In his view, that was a very difficult condition to fulfill, as it did not only mean that the International Register had to be consulted by trademark owners, but also that trademark owners had to know how to interpret the conditions laid down in Draft Provision E.

155. The Chair said that by virtue of paragraph (2), paragraph (1) applied *mutatis mutandis* to geographical indications and that by way of consequence paragraph (3) would also apply to appellations of origin and geographical indications alike. He added that such interpretation was confirmed by the wording of the last part of paragraph (3), which referred to “an international registration of the appellation of origin or geographical indication concerned”.

156. The Secretariat added that the reference to Draft Provision E at the beginning of paragraph (3) also made it clear that the provisions applied to appellations of origin and geographical indications.

157. The Representative of INTA shared the concerns raised by the Representative of ECTA in respect of paragraph (3) and recalled that INTA had always been a firm supporter of the principle “first in time, first in right” and had expressed the view that conflicts between trademarks and geographical indications had to be resolved on the basis of priority, exclusivity and territoriality. In that regard, she indicated that the requirement for a Contracting Party to notify prior trademarks to WIPO within one year, and the possible consequence of a failure to do so, namely if it was assumed that trademark owners would not be in a position to claim their rights, would raise serious concerns from the perspective of trademark owners. She added that the rights of trademark owners should not be at the mercy of a timely notification by the authorities of the State that had already granted them prior rights in the past, as that would amount to an unlawful expropriation of trademark rights and would be incompatible with the obligations under the TRIPS Agreement as well as the fundamental rights guarantees as recognized in the case “Anheuser-Busch versus Portugal” by the European Court of Human Rights, which had held that trademark rights were protected under the property guarantees of the European Convention on Human Rights. The Representative of INTA also added that there was no need for such a provision from the perspective of holders of rights in geographical indications, given that trademark rights were already publicly available in public registers.

158. As to the issue of transitional periods, the Delegation of Switzerland wished to be provided with an explanation as to why that period had been set at five or 10 years. As to the possibility of coexistence of prior trademark rights and a geographical indication, the Delegation considered that to be an interesting alternative to a straightforward refusal of trademark rights, which would go against the geographical indication and which would be based on that prior right. Consequently, the Delegation wondered whether it would not be useful for both the holder of the mark and the holder of the geographical indication if some time were to be spent reflecting on a provision that would make arrangements for that coexistence with the aim of avoiding any confusion between those products benefitting from the mark and those benefitting from the geographical indication.

159. Referring to paragraph (3), the Representative of OriGIn suggested that the provision had better not be formulated in terms of bad faith and rather read “Draft Provision E does not apply in the case of use based on a prior trademark right in a Contracting Party provided that the trademark was acquired in good faith”, as that would reflect in a better way the formulation of the TRIPS Agreement. As regards paragraph (4), he shared the concern expressed by the Delegation of France concerning the question of invalidation.

160. The Representative of CEIPI noted that the last line of paragraph (4) referred to an “earlier right” and therefore asked whether that notion was the same as the “prior right” referred to in paragraph (3), and concluded by saying that if that was indeed the case the same wording should be used in both paragraphs to avoid any possible confusion.

161. The Delegation of Iran (Islamic Republic of) asked whether there was any background for the proposed periods of five and ten years contained in paragraph (1) and whether it would be possible to indicate a specific time limit and then reserve a right for the trademark holder to renew it for another term.

162. Referring to the comments made by the Republic of Moldova, the Secretariat indicated that paragraph (2) of Draft Provision F only referred to the customary name of a grape variety because it was actually reflecting the provisions of the TRIPS Agreement in that respect, and more specifically the provision on “generics” in its Article 24.6, which referred to “a term customary in common language as the common name for such goods or services” and also to “the customary name of a grape variety”. In other words, whenever a particular geographical indication was identical to the customary name of a grape variety, WTO members were not obliged to provide protection to that geographical indication. As regards the comments from the Delegations of France and Iran (Islamic Republic of) in respect of paragraph (1) concerning the

time limits for phasing out, the Secretariat clarified that those had been retained from the responses to the Survey and the discussions that had taken place at the previous meeting. With respect to the question on invalidation the Secretariat said that the insertion of paragraph (4) in the new treaty would probably help address such concern. As regard ECTA's reference to the EU Foodstuffs Regulation as providing a better approach to the safeguard of prior trademark rights, the Secretariat pointed out that under EU law the provision referred to was limited to well-known marks and that, in respect of trademarks that were not well-known, the EU Foodstuffs Regulation laid down a system of coexistence.

163. With respect to the comment that had been made by both Representatives of ECTA and INTA concerning the second part of paragraph (3), and in particular the requirement that the holder of the prior trademark or the competent authority should notify the existence of the prior trademark right within one year from the date on which the International Bureau publishes the registration of the appellation of origin or geographical indication in order to safeguard the rights of such holder, the Secretariat said that such solution had been suggested as a means to make it clear within a reasonable period of time that there was a problem for the geographical indication or appellation of origin. Moreover, after the expiration of such time-limit, it would still be possible to obtain an invalidation of the effects of the international registration in the country where an earlier trademark right existed. The Secretariat wondered whether the issuance of the notification referred to in paragraph (3) following a publication in the Lisbon Register would be more cumbersome for a prior trademark owner than opposing the registration of a trademark that would conflict with his/her own trademark right after having checked trademark registers around the world. As regards the compatibility of Draft Provision F with the TRIPS Agreement, the Secretariat referred to the WTO Panel in the case between the United States of America and Australia against the EU on the Foodstuffs Regulation, which had come to the conclusion that the EU system of coexistence of prior trademarks and geographical indications (PDO's and PGI's) under the Foodstuffs Regulation was not incompatible with the TRIPS Agreement.

164. Referring to the question raised by the Delegation of Switzerland concerning the purpose of the time-limit of five to 10 years in paragraph (1), the Secretariat pointed out that a prescribed time limit of two years already existed in Article 5(6) of the Lisbon Agreement to allow prior users sufficient time to adapt to the new situation and to cease the use of the appellation of origin or geographical indication concerned. Referring to the suggestion made by the Representative of OriGIn, namely that it might be preferable to approach the exception under paragraph (3) on the basis of a reference to good faith instead of bad faith as that would be more consistent with international treaties, the Secretariat clarified that Article 6*bis* of the Paris Convention referred to use in bad faith as a possibility to invalidate the registration of a trademark whenever it conflicted with a well-known mark and that such invalidation could be done at any time, while for use in good faith there was a limited time to effect such invalidation.

165. In response to a request for clarification made by the Secretariat, the Delegation of France stated that its question on the procedures for the implementation of paragraph (3) concerned the fact that, under the provision in question, notification had to be carried out regarding the trademark, either by the competent authority of the Contracting Party, or by the right holder of the prior trademark, which gave the impression that that trademark could be transferred directly to the International Bureau. The Delegation added that it was precisely because of that direct transfer scenario that it wished to be informed with regard to the procedure and whether, for example, the International Bureau would make a recording in the register without checking the good or bad faith of the trademark holder, or whether an additional examination would be carried out or whether a certificate would be required in such a case.

166. The Representative of MARQUES pointed out that paragraph (1) read “the Contracting Party shall have the right to grant to such third parties” but did not set out any specific conditions on which Contracting Parties may or may not grant those rights. She also pointed out a discrepancy between the English and the French text which used the conditional form.

167. The Representative of INTA said that she did not consider the situation under paragraph (3) as being directly comparable to an opposition against the registration of a later trademark that would interfere with the rights of the prior trademark, as it was clear that the owner of the prior trademark would not lose his trademark in case he or she did not initiate an opposition procedure. In addition, she pointed out that, in practical terms, problems could arise in connection with the reference in Draft Provision F to Draft Provision E on the scope of protection, in particular where Draft Provision E included a reference to the concept of evocation. The Representative of INTA was of the view that in such a situation it would be quite unfair to basically deprive trademark owners of their prior rights merely on the basis of a failure to meet a formal requirement. As regards TRIPS compatibility, she stressed that the panel had only found that the EU system was compatible with TRIPS under very strict conditions. Moreover, paragraph (3) went much further than the EU Foodstuffs Regulation.

168. In response to a request for clarification from the Secretariat, the Delegation of Iran (Islamic Republic of) said that his suggestion had been to maintain the current two year time period for “phasing out” while allowing, in addition, for the possibility to renew or extend such period for another two years.

169. Referring to paragraph (3) of Draft Provision F, the Secretariat indicated that, in view of the comments that had been made, the International Bureau would have to further reflect upon the drafting of that paragraph, in particular the phrase starting with the words “provided that”. Nonetheless, the Secretariat reminded participants that the purpose of Draft Provision F paragraph (3) was to establish as a default option the coexistence between an earlier trademark and a geographical indication or appellation of origin as stipulated in item 35 (iv) of the working document under consideration. In other words, if there were reasons not to have coexistence then paragraph (4) would still be available to have the effect of not having coexistence and to have instead and invalidation of the effects of the later geographical indication or appellation of origin in the territory of the country concerned. The Secretariat then clarified that, when responding to the comment made by the Representative of ECTA concerning Article 14(2) of the EU Foodstuffs Regulation, he had referred to the wrong article in his response and that, instead of referring to Article 3(4) which established the prevalence of an earlier well-known trademark, he had referred to Article 14(2) which established the coexistence rule for other trademarks.

#### Procedures in Contracting Parties Prior to the Issuance of Possible Refusals and for Challenging Refusals Issued (Draft Provision G)

170. The Secretariat said that Draft Provision G was modeled after Article 5 of the Lisbon Agreement and attempted to improve those provisions in light of the comments and suggestions that had been made in response to the Survey and at the previous session of the Working Group. Paragraph (1) was a slight redraft of Article 5(2) of the Lisbon Agreement, while paragraph (2) expanded on the current provision of Article 5(3) which stipulated that any country party to the system had the right to submit a declaration of refusal in respect of an internationally registered appellation of origin, as that principle would be extended to geographical indications as well. The elements between square brackets in paragraph (2) reflected suggestions that had been made by some participants at the previous meeting but which had not been generally agreed to at that meeting.

171. Continuing, the Secretariat pointed out that the words “duly substantiated” which appeared in square brackets before the word “grant” would, if maintained, require the competent authority submitting a declaration of refusal in respect of an international registration to indicate not only the grounds for refusal, but also the necessary details to understand why the international registration was refused. Rule 9 of the Lisbon Regulations required that, in case of a refusal based on an earlier trademark, the refusal should actually mention the date and filing number, the priority date, the date and registration number, the name and address of the holder, the reproduction of the trademark together with the list of relevant goods and services of the earlier trademark application or registration. Submission of those elements would be considered as a substantiation of the grounds of refusal by the International Bureau. As some had argued that grounds advanced in refusal declarations under the Lisbon procedures were not always clear, the Secretariat said that there was no reason to have such substantiation only in respect of earlier trademarks, but that substantiation might also be required whenever a refusal was based on another ground, for example on the ground that the geographical indication or appellation of origin was considered as being generic in the country concerned.

172. The Secretariat indicated that another phrase that appeared in square brackets in paragraph (2) of Draft Provision G was that the declaration could be submitted by the competent authority *ex officio* or at the request of an interested party. This phrase addressed a concern, as had been advanced by some, that, in some countries, interested parties appeared to have difficulties in finding out which authority was actually competent to decide on the issuance of a refusal. While it was clear that it was the competent authority of that country that had to submit the refusal to the International Bureau, such competent authority was not always the same as the authority that had decided that a refusal would be issued. Besides, several countries did not have opposition procedures in respect of registered geographical indications or appellations of origin. The provision under consideration aimed to recognize the issue and would create a reasonable opportunity for interested parties to file petitions for the competent authority to issue a refusal.

173. The Secretariat said that paragraph (4) of Draft Provision G was a redraft of Article 5(5) of the Lisbon Agreement and had simply been adapted to the other provisions contained in Annex II. Paragraph (5) of Draft Provision G, which dealt with the situation following a refusal issued by a Contracting Party, was intended to provide a reasonable opportunity for interested parties to file an appeal against the decision to issue the refusal. Such principle was contained in Article 5(5) of the Lisbon Agreement but Draft Provision G paragraph (5) expanded that provision in light of the fact that refusals under the Lisbon Agreement were not necessarily the end of the story. Refusals could be subsequently withdrawn and the Lisbon negotiating history made it clear that negotiations for the withdrawal of a refusal were part of the Lisbon system. Regarding the reference to “interested parties”, the Secretariat pointed out that Article 5(5) referred to “the interested party”, i.e., in the singular, whereas Draft Provision G spoke in general of “interested parties”, i.e., in the plural, as it followed the wording of the TRIPS Agreement in that respect, which stipulated rights in respect of “interested parties” in its Section 3 of Part II.

174. Finally, the Secretariat referred to paragraph 39 of Annex II, which indicated that the Working Group might also wish to address the question as to whether Draft Provision G paragraph (5) should specify that interested parties should also have the opportunity to resort to arbitration or mediation. The Secretariat recalled, in this regard, that the Working Group had invited the International Bureau to prepare a study on the possibility of dispute settlement within the Lisbon system, in particular for the benefit of private parties. The International Bureau intended to submit the results of such study to the next session of the Working Group. Meanwhile, it would be very useful to have more input from the Working Group as to the type of procedures that the Working Group had in mind when requesting the preparation of such study.

The Secretariat also pointed out that, on the occasion of the next WIPO Worldwide Symposium on Geographical Indications that would take place in June in Lima, the issue of dispute settlement within the Lisbon system would also be addressed.

175. The Delegation of the Republic of Moldova said that the procedure contained in Draft Proposal G was generally acceptable. However, as regards the specific text in paragraph (4), she was of the view that the word “and” before “holders of the right” was not appropriate given that in most international registrations the holders of the right to use were referred to collectively and not identified individually.

176. With regard to paragraph (3) of Draft Provision G, the Delegation of Chile stated that it was interesting to note the introduction of such types of provision which could be of benefit to interested parties or provide them with an opportunity to enforce their rights and put forward their arguments before the authorities that defined the registration of geographical indications. However, looking at paragraph (5) and the new provision which provided for the possibility of negotiating the withdrawal of a refusal, the Delegation requested clarification in that regard from the Secretariat and in particular wished to be informed as to who would be involved in such negotiations. The Delegation understood that the party interested in obtaining registration would be the one to negotiate with the authority in order to obtain registration, however, if that were the case, then the Delegation wished to know in what form any possible third party rights would be considered in that negotiation process. The provision contained in the Lisbon Agreement made it clear that interested parties might resort to all the judicial and administrative remedies of the national systems and that, in that context, any interested party might be informed of a process that was to become public. However, in the context of the negotiations provided for in paragraph (5), it was unclear in what way third parties could enforce their rights in those negotiations.

177. The Delegation of Spain welcomed the fact that, in paragraph (3), the International Bureau had reflected the need to allow holders of prior rights to enforce those rights in a reasonable manner. However, paragraph (5), as commented upon by the Delegation of Chile and in which the terms “negotiate the withdrawal” were used, required much closer inspection. The fact that the provision referred to administrative or judicial means of challenging refusals, while also referring to the negotiation of the withdrawal of refusals, gave rise to the concern that, if those national refusal procedures covered both reasons of legality and reasons of convenience. Since reasons of legality were difficult to negotiate and were more relevant to judicial, administrative or even arbitration procedures, the reference to negotiation suggested that decisions in that field might be taken based on reasons of convenience. The Delegation thus requested clarification in that respect.

178. The Delegation of France asked whether it would be possible to go back to the provisions of paragraph (1) of Draft Provision F in cases of withdrawal of refusal, in other words, to grant new transitional periods in order to allow prior uses to continue over a given period. Such a possibility had potential. The Delegation further added that the wording of paragraph (5) should be altered, with the term “*raisonnable*”, referring to the opportunity to pursue legal remedies, being replaced by the term “*réelle*”. Consequently, the two elements contained in the same sentence should be separated, with the negotiation being referred to as “*raisonnable*” and the administrative and judicial remedies being described as “*réels*”.

179. The Representative of INTA supported the inclusion of a provision on the possibility for third parties to file petitions for the competent authority to issue a refusal in paragraph (3), however she also wondered whether it would not be better to have a somewhat more robust wording and to directly speak of objection and opposition procedures. Referring to paragraph (4), she also agreed with the comments already made concerning the difficulties to notify a refusal to the holders of the geographical indication, particularly bearing in mind that in the Lisbon Register there were already numerous appellations where there was no defined holder



but instead a reference to the producers in the region. It might actually be sufficient to notify to the Contracting Party from which the appellation originated, bearing in mind that there would always be a publication of the refusal so that any third party could always obtain knowledge thereof. Lastly, with respect to paragraph (5), the Representative of INTA shared the concerns raised by the Delegation of Spain, and added that in particular the inclusion of a “reasonable opportunity” would appear somewhat strange in the context of discussions or procedures relating to prior trademark rights; such issue should not be an object of negotiations between States but it was something that should be dealt with in judicial or administrative procedures.

180. Referring to paragraph (4), the Representative of OriGIn said that it was important to keep the notification to the holder of the right to use and also pointed out that the wording under that provision would have to be coordinated with the wording that would be used in Draft Provision B.

181. As regards the words “duly substantiated grounds” in paragraph (2) of Draft Provision G, the Delegation of Iran (Islamic Republic of) wondered what would happen if one party considered that the grounds were not duly substantiated. He therefore suggested keeping only “the grounds” instead of “duly substantiated grounds”. Referring to paragraph (3), he said that normally everyone had the right to file a petition in judicial systems and therefore said that he did not understand what was actually meant by “reasonable opportunity”. As an example he said that if someone filing a petition with a Court would be told that the hearing would take place within six months or one year, such time period might seem reasonable to some but not to others. He added that the same comment applied to paragraph (5) which required Contracting Parties to establish “a reasonable opportunity to negotiate”. Negotiation was the initial phase of any dispute resolution mechanism. Moreover, what would happen if the refusing country would simply refuse to negotiate with the interested party?

182. The Representative of MARQUES was of the view that the expression “reasonable opportunity” had to be defined in an objective way, for example by also giving a specific time frame since what could be considered reasonable by one country might not be reasonable for another.

183. The Representative of INTA noted that in paragraph (1) of Draft Provision G the phrase “without delay” contained in Article 5(2) of the Lisbon Agreement had been substituted by “once registered” and wondered what the intention behind such modification was. Moreover, the expression “without delay” was more precise.

184. As regards the suggestions made by the Delegation of the Delegation of Moldova concerning paragraph (4), the Secretariat said that the purpose of the provision was to have more certainty that the holders of the right to use or the beneficiaries would actually be informed timely. It was assumed that the interest of the country would be sufficient for the competent authority to actually submit the information to the beneficiaries but it could still be useful to have information on that publicly available. Referring to the comments made by , the Secretariat noted that several delegations concerning the requirement that would be imposed on Contracting Parties under paragraph (5) of Draft Provision G, namely to provide for a possibility for interested parties to have a reasonable opportunity to negotiate the withdrawal of a refusal, the Secretariat noted that questions concerning who would be involved in those procedures and how claims would be filed by interested parties should certainly be addressed in greater detail if the provision was retained in the new instrument that might be negotiated. He stressed, however, that, although Draft Provision G was a novelty in respect of introducing a reasonable opportunity to negotiate the withdrawal of a refusal in a legal text, the possibility of negotiating a withdrawal had actually been foreseen by the negotiators of the Lisbon Agreement, as the Acts of the Diplomatic Conference in 1958 showed. With respect to the points made by the Delegation of Spain and the Representative of INTA concerning the difficulty to negotiate the withdrawal of a refusal based on a legitimate prior right such as a trademark, the Secretariat

agreed but also said that nothing was impossible and that, if the trademark owner agreed, he or she might be prepared to give up his or her trademark on certain conditions. However, the provision would probably be more relevant in connection with prior use as a generic. In that regard, he referred to the comment made by the Delegation of France which referred back to a suggestion that France had made in its response to the Survey, namely to determine specific time limits within which such negotiation of withdrawal should take place. The Secretariat admitted that such provision had not been taken up in Draft Provisions F or G but said that it could still be introduced in a future draft if the Working Group expressed a wish in that sense. Turning to the comment made by the Representative of INTA to use more robust language than the words “reasonable opportunity to file petitions” in paragraph (3), the Secretariat referred to the introductory remarks it had made concerning this wording, which was based on Article 15(5) of the TRIPS Agreement reading: “Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, members may afford an opportunity for the registration of a trademark to be opposed”. In response to the comments made by the Representative of MARQUES and the Delegation of Iran (Islamic Republic of), the Secretariat indicated that Article 62(2) of the TRIPS Agreement read “Where the acquisition of an intellectual property right is subject to the right being granted or registered, members shall ensure that the procedures for grants or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection” and also pointed out that paragraph (4) of Article 62 stated that “Procedures concerning the acquisition or maintenance of intellectual property rights and, where a member’s law provides for such procedures, administrative revocation and *inter partes* procedure such as opposition, revocation and cancellation, shall be governed by the general principles set out in paragraphs (29) and (3) of Article 41” which, in turn, stated that “Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays”. Finally, as regards the comment made by the Representative of INTA relating to paragraph (1) where the words “without delay” had been replaced by “once registered”, the Secretariat said that if delegations had strong feelings about that proposed amendment, the words “without delay” could certainly be re-inserted.

185. Referring to paragraph (4), the Chair indicated that, even though he understood the concern of the Republic of Moldova, he was not sure that it would really solve the problem to replace the word “and” by “or”, because in that case one would end up in a situation where the competent authority of the Contracting Party would not necessarily be notified. The Chair was of the view that clearly that was not the intention of the provision and said that if one wanted to keep the idea of notifying the holders of the right to use the geographical indication or appellation of origin, one should keep the word ‘and’ and add some language which might indicate that such notification should be done whenever possible. As regards paragraph (5), the Chair referred to the suggestion made by the Delegation of France to have two separate provisions addressing the negotiations after a refusal separately from the legal remedies that should be open to interested parties in the Contracting Party concerned. Although the Acts of the Diplomatic Conference that had concluded the Lisbon Agreement indicated that after refusal there would be an opportunity for the contracting countries concerned to negotiate a compromise as a result of which the refusal might be withdrawn, the negotiation as foreseen in the Acts of the Diplomatic Conference was of an informal nature. Consequently, it would be appropriate to separate provisions relating to the application of judicial and administrative remedies from those dealing with possible negotiations, if the Working Group agreed that there was a need to reflect in the Draft Provisions the possibility of conducting informal negotiations on the withdrawal of a refusal. Lastly, as regards paragraph (1), the Chair said that he understood that it was the intention of the Secretariat to reflect the current situation where the

International Bureau published the registrations without delay, and if the idea was indeed to maintain the current practice in his opinion that would be better reflected by using the same words, because in doing so one would avoid giving the impression that something different had been introduced in the text.

186. The Representative of CEIPI lent his support to the three comments made by the Chair.

187. As to paragraph (4), the Delegation of France asked whether it would be possible to wait for the final draft in order to have an idea of the options to be maintained regarding the body that would carry out notification concerning the application, and highlighted that, in that case, it was important to notify the body that had made the application. Consequently, once a decision had been taken in Provision B, the wording of paragraph (4) could be adapted, because it was important that the different provisions should be similar in form. In that regard, the Delegation added that, if the competent authority were to be responsible for notifying its nationals, then it should also carry out notification concerning the difficulties relating to protection.

The Delegation further noted that, under the terms of Provision F, if an appellation of origin had been granted protection in a Contracting Party then a transitional period could be granted for prior users. The Delegation therefore wished to know whether the notion of “appellation of origin which has been granted protection” was only valid for the granting of protection at the time of the initial examination, or whether it remained valid following the withdrawal of a refusal. The Delegation stated that it had brought that question up because, often in the negotiating elements of the withdrawal of a refusal, and given its country’s previous experience in negotiating with another State concerning the withdrawal of its refusal, it was important to be able to explain to the State that it could, even subsequent to the refusal, still grant transitional periods to its nationals in order to allow them to adapt to new situations. The Delegation concluded by saying that it had taken the floor in order to obtain confirmation of the fact that the terms “granted protection” could be interpreted in many different ways.

188. Referring to paragraph (5), the Delegation of Spain considered that the negotiation mentioned in that paragraph seemed to be that which might eventually be carried out between the holders of the conflicting rights. Should that be the case, it posed an interesting possibility but one that could already be resolved within the existing legal framework given that nothing prevented the holders of the rights from carrying out informal negotiations and then informing the competent State authority of their outcome in order to allow the authority to withdraw the refusal concerning protection previously granted in accordance with Rule 11 of the Regulations. However, in the case of negotiations between private individuals, it was very difficult for the authorities to ensure that there had actually been a reasonable opportunity to negotiate because, obviously, the two sides would only negotiate if they wished to. Moreover, the fact of expressly mentioning those negotiations in the article might also complicate matters unnecessarily, in that they could, and had, been carried out without the need for an explicit legal framework. Furthermore, the Delegation felt that the reference to the negotiation of the withdrawal seemed to suggest to whoever had communicated the refusal that they constituted the competent authority and that that could give rise to ambiguity concerning the parties to the negotiation and the question of whether the authorities should remain on the sidelines with regard to existing judicial and administrative remedies in order to carry out other types of negotiations, such as extra-legal negotiations. Based on the reasons set out above, the Delegation suggested that any move to introduce something that might obviously prove to be of use at the informal level but which might also give rise to more problems than solutions should be avoided. The Delegation of France’s concerns regarding the application, in cases of withdrawal of refusal of the transitional period with regard to prior third-party use, were perfectly legitimate.

189. Referring to the comment made by the Delegation of France, the Secretariat noted that the question as to whether the time period of two years for “phasing out” prior use also applied in case a refusal was withdrawn had already been raised in a previous session of the Working

Group. The Secretariat recalled that the explanation given at the time was based on ample consideration that the International Bureau had given to the question when it had been asked by one of the Lisbon member States whether in such a situation the member State was bound by the two year time-limit of Article 5(6). Eventually, the country in question had applied the two year time-limit, so that the issue had not actually arisen in practice. The advice that the International Bureau had given at the time was that, in the case of withdrawal of a refusal, Article 5(6) did not apply, firstly because the text of Article 5(6) and the accompanying Rule 12 of the Regulations explicitly referred only to the moment at the end of the one year period within which a refusal could be issued under Article 5(3) and not to a later moment, but secondly also in light of the purpose of protection under the Lisbon Agreement. If the country would be bound by the provisions of Article 5(6) also in such a situation, but would not be in a position to protect the appellation of origin in question within two years from its withdrawal of the refusal, the country in question would probably simply decide not to withdraw the refusal at all until it considered that an appropriate period of time had passed allowing it to submit the withdrawal. Such a consequence would not be favorable for the right holders of the appellation of origin, who would be deprived of the rights to take action against others that might be using the appellation of origin.

190. The Representative of CEIPI requested clarification concerning the reply given by the Secretariat to the question asked by France, when the Secretariat stated that, in the opinion of the International Bureau, Article 5(6) did not apply to situations in which a refusal had been withdrawn, and therefore wished to be informed as to what the practical effect was for third parties. In particular, he asked whether, for example, prior trademark holders should immediately cease use.

191. In response, the Secretariat clarified that if Article 5(6) did not apply at the time that a country withdrew a refusal, Article 3 would be immediately applicable. In other words, the country would wait until it would be ready to provide full protection. The explanation that he had given concerned the period before the withdrawal of a refusal by a given country, which could be as long as the country wanted. The length of the period would result from the negotiation between the countries concerned.

192. The Delegation of Mexico expressed concern regarding the wording of Draft Provision G paragraph (2), which referred to the possibility of the competent authority notifying a declaration *ex officio* if its legislation so permitted. The Delegation added that from its point of view that provision seemed to be compulsory for competent authorities. In other words, if the legislation prevented the authority from acting then it would not act, but if the legislation did not expressly prevent the authority from acting then the Delegation wished to be informed as to whether the authority was obliged to act.

193. The Delegation of Haiti stated that, in the interests of transparency, Rule 16 had been amended, with the Contracting Party being made responsible for justifying the invalidation of a registration. Therefore, it would be preferable to use the term "*notifiera*" rather than "*pourra*", because contracting parties were obliged to justify their decisions following a refusal.

194. The Secretariat pointed out that the word "may" also appeared in the current Article 5(3) in the sentence the "competent authority may declare that protection cannot be assured", in other words that it may notify a declaration of refusal. However he said that he understood the comments made by the Delegations of Mexico and Haiti in that sense that it was less clear from Draft Provision G paragraph (2) that the competent authority in such a case was required to submit the grounds for refusal. He added that the current Article 5(3) stated that "such a refusal can be issued only insofar as it is notified with an indication of the grounds therefore", while Draft Provision G paragraph (2) was somewhat more loose and agreed with the suggestions made to strengthen the language therein.

### Follow-up

195. The Chair invited participants to address the items contained in paragraph (8)(iii) and (iv) of the working document, namely how the Working Group might continue its work on the Draft Provisions contained in Annex II. In this connection, he also referred to paragraph (5) of the working document, which indicated that the Working Group should give directions to the International Bureau concerning the preparation of a process that might result in amendments or a revision of the Lisbon Agreement and/or the conclusion of a protocol or new treaty supplementing the Lisbon Agreement.

196. Continuing, the Chair suggested that the Working Group might ask the Assembly to take note of the considerable progress that had been made by the Working Group in its discussions on the possible development of the Lisbon system while noting that the work would continue with a view to further preparing a process that might result in amendments or a revision of the Lisbon Agreement and/or the conclusion of a protocol or a new treaty supplementing the Lisbon Agreement. He also suggested that further meetings of the Working Group for that purpose be held more frequently, preferably twice a year. Lastly, the Chair suggested that the International Bureau be requested to present a complete draft new instrument containing the Draft Provisions set out in Annex II and revised on the basis of the comments made at the present session as well as any further draft provisions that may appear necessary.

197. The Delegation of Algeria expressed its support for the Chair's position and stated that it was still a little too early to give an opinion on the issue of whether the Agreement should be amended or whether a new treaty should be drawn up. Discussions should continue therefore in order to allow for further reflection on the amendments to be made, before deciding on the future of the work of the Working Group.

198. In response to questions from the Representative of CEIPI, the Chair indicated that the Agreement itself foresaw the possibility of modifications to certain articles of the Agreement either by amendment or revision. In that regard, he noted that certain articles of the Agreement such as Articles 9, 10, 11 and 12 could be amended under a different process, but that these provisions could also be modified at a revision conference. He further suggested that the Working Group might slightly depart from the text contained in paragraph (5) of the working document and suggest that its work should aim at a process that might result in a revision of the Lisbon Agreement and/or the conclusion of a protocol or a new treaty. He further also agreed with the Representative of CEIPI that the draft new instrument to be prepared by the International Bureau should be completed by "any further draft provisions the inclusion of which may appear necessary for making the draft new instrument as complete as possible".

199. The Representative of INTA suggested that it would be useful if the draft new instrument to be prepared by the International Bureau would present definitions of a number of terms upfront, so as to facilitate further drafting and a better understanding of the Draft Provisions themselves. In addition, he suggested that some of the provisions discussed might better fit in draft regulations under the draft new instrument.

### **AGENDA ITEM 6: OTHER MATTERS**

200. The Working Group took note of a statement by the Representative of the EU expressing support for the work on possible improvements to the procedures under the Lisbon Agreement and the preparation of a process that might result in a revision of the Lisbon system. At the same time, the Representative informed the Working Group of recent developments in the EU concerning the protection of geographical indications for non-agricultural products, notably the anticipated launch of a feasibility study involving an analysis of existing legal frameworks in the

member States of the EU, an in-depth assessment of stakeholders' problems and needs, the potential economic impact of protection for non-agricultural geographical indications and the possible creation of a new EU title for such protection.

201. The Delegation of Bulgaria noted that different issues concerning the protection of geographical indications had been discussed and asked whether the establishment of a table on how geographical indications or appellations of origin were protected in different countries would be envisaged by the Secretariat in the near future. In that regard, he believed that it would be useful if the WIPO website would contain information as to what type of protection for geographical indications and/or appellations of origin existed and in which form.

#### **AGENDA ITEM 7: SUMMARY BY THE CHAIR**

202. The Working Group approved the Summary by the Chair as contained in the present document.

203. A draft of the full report of the session of the Working Group would be made available on the WIPO website for comments by the delegations and representatives that had participated in the meeting. Any such comments could be submitted within two months from its publication date, after which the draft report would be amended, as required, and made available to delegations on the WIPO website, for its formal adoption in due course.

#### **AGENDA ITEM 8: CLOSING OF THE SESSION**

204. The Chair closed the session on May 26, 2011.

[Annexes follow]



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**LI/WG/DEV/3/3**  
**ORIGINAL: ENGLISH**  
**DATE: MAY 26, 2011**

## **Working Group on the Development of the Lisbon System (Appellations of Origin)**

**Third Session**  
**Geneva, May 23 to 27, 2011**

### **SUMMARY BY THE CHAIR**

*approved by the Working Group*

1. The Working Group on the Development of the Lisbon System (Appellations of Origin) (hereinafter referred to as “the Working Group”) met in Geneva from May 23 to 26, 2011.
2. The following Contracting Parties of the Lisbon Union were represented at the session: Algeria, Bulgaria, Burkina Faso, Congo, Czech Republic, France, Haiti, Hungary, Iran (Islamic Republic of), Italy, Mexico, Nicaragua, Peru, Portugal, Republic of Moldova, Serbia, Togo, Tunisia (18).
3. The following States were represented as observers: Australia, Chile, China, El Salvador, Germany, Iraq, Madagascar, Romania, Spain, Switzerland, United Arab Emirates, United States of America (12).
4. Representatives of the following international intergovernmental organizations took part in the session in an observer capacity: African Intellectual Property Organization (OAPI), European Union (EU) (2).
5. Representatives of the following international non-governmental organizations took part in the session in an observer capacity: Centre for International Intellectual Property Studies (CEIPI), European Communities Trade Mark Association (ECTA), International Trademark Association (INTA), MARQUES (Association of European Trademark Owners), Organization for an International Geographical Indications Network (OriGIn) (5).

6. The list of participants is contained in document LI/WG/DEV/3/INF/1 Prov. 2\*.

Agenda Item 1: Opening of the Session

7. Mr. Francis Gurry, Director General, opened the session, recalled the mandate of the Working Group and introduced the draft agenda, as contained in document LI/WG/DEV/3/1 Prov.

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

8. Mr. Mihály Ficsor (Hungary) was unanimously elected as Chair of the Working Group, Mr. Hossein Gharibi (Iran (Islamic Republic of)) and Mr. Alberto Monjaras Osorio (Mexico) were elected as Vice-Chairs.
9. Mr. Matthijs Geuze (WIPO) acted as Secretary to the Working Group.

Agenda Item 3: Adoption of the Agenda

10. The Working Group adopted the draft agenda (document LI/WG/DEV/3/1 Prov.) without modification.

Agenda Item 4: Adoption of the Draft Report of the Second Session of the Working Group

11. The Working Group adopted the Revised Draft Report of the Second Session of the Working Group (document LI/WG/DEV/2/5 Prov. 2) without modification.

Agenda Item 5: Draft Provisions on Certain Matters Addressed by the Working Group in the Context of the Review of the Lisbon System

12. Discussions were based on document LI/WG/DEV/3/2.
13. Following discussion of Annex I of document LI/WG/DEV/3/2, the Chair concluded that the Working Group had agreed that the International Bureau submit to the Assembly of the Lisbon Union, for adoption at its session of September/October 2011, the proposed amendments to Rule 5(3) and Rule 16(1) of the Lisbon Regulations, as set out in the Annex to the present document.
14. Following discussion of Annex II of document LI/WG/DEV/3/2, the Chair concluded that the Working Group had agreed that the Assembly of the Lisbon Union be requested to take note, at its session of September/October 2011:

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\* The final list of participants will be made available as an Annex to the report of the session.



- (i) that the Working Group had made considerable progress on the development of the Lisbon system and that work would continue with a view to further preparing a process that might result in a revision of the Lisbon Agreement and/or the conclusion of a protocol or a new treaty supplementing the Lisbon Agreement;
- (ii) that the Working Group had requested the Secretariat to prepare a draft new instrument containing the draft provisions set out in Annex II, as revised on the basis of comments made in the present session of the Working Group, as well as any further draft provisions the inclusion of which would be necessary for making the draft new instrument as complete as possible;
- (iii) that further meetings of the Working Group would be convened and would be held more frequently, preferably twice a year.

Agenda Item 6: Other Matters

15. The Working Group took note of a statement by the Delegation of the European Union (EU) expressing support for the work on possible improvements to the procedures under the Lisbon Agreement and the preparation of a process that might result in a revision of the Lisbon system. At the same time, the Delegation informed the Working Group of recent developments in the European Union concerning the protection of geographical indications for non-agricultural products, notably the anticipated launch of a feasibility study involving an analysis of existing legal frameworks in the member States of the European Union, an in-depth assessment of stakeholders' problems and needs, the potential economic impact of protection for non-agricultural geographical indications and the possible creation of a new EU title for such protection.

Agenda Item 7: Summary by the Chair

16. The Working Group approved the Summary by the Chair as contained in the present document.
17. A draft of the full report of the session of the Working Group will be made available on the WIPO website for comments by the delegations and representatives that participated in the meeting. Any such comments can be submitted within two months from its publication date, after which the draft report will be amended, as required, and made available to delegations on the WIPO website, for its formal adoption in due course.

Agenda Item 8: Closing of the Session

18. The Chair closed the session on May 26, 2011.

**REVISED TEXT OF THE PROPOSED AMENDMENTS TO THE LISBON REGULATIONS  
CONTAINED IN ANNEX I OF DOCUMENT LI/WG/DEV/3/2**

*Rule 5*

*Requirements Concerning the International Application*

[...]

(3) [*Optional Contents of the International Application*] The international application may indicate or contain:

- (i) the addresses of the holders of the right to use the appellation of origin;
- (ii) one or more translations of the appellation of origin, in as many languages as the competent authority of the country of origin wishes;
- (iii) a statement to the effect that protection is not claimed for certain elements of the appellation of origin;
- (iv) a declaration that protection is renounced in one or more contracting countries, designated by name;
- (v) a copy in the original language of the provisions, decisions or registration referred to in paragraph (2)(a)(vi);

**any further information the competent authority of the country of origin wishes to provide concerning the protection granted to the appellation of origin in that country, such as additional particulars of the area of production of the product and a description of the connection between the quality or characteristics of the product and its geographical environment.**

*Rule 16*

*Invalidation*

(1) [*Notification of Invalidation to the International Bureau*] Where the effects of an international registration are invalidated in a contracting country and the invalidation is no longer subject to appeal, the invalidation shall be notified to the International Bureau by the competent authority of that contracting country.

The notification shall indicate or contain:

- (i) the number of the international registration concerned, preferably accompanied by other information enabling the identity of the international registration to be confirmed, such as the name of the appellation of origin;
- (ii) the authority that pronounced the invalidation;
- (iii) the date on which the invalidation was pronounced;
- (iv) where the invalidation concerns certain elements only of the appellation of origin, the elements concerned;

**(v) the grounds on the basis of which the invalidation was pronounced;**

**(vi) a copy of the decision that invalidated the effects of the international registration.**

[Annex II follows]



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**LI/WG/DEV/3/INF/1**  
**ORIGINAL: FRANÇAIS/ENGLISH**  
**DATE: 26 MAI 2011 / MAY 26, 2011**

**Groupe de travail sur le développement du système de Lisbonne  
(appellations d'origine)**

**Troisième session  
Genève, 23 – 27 mai 2011**

**Working Group on the Development of the Lisbon System  
(Appellations of Origin)**

**Third Session  
Geneva, May 23 to 27, 2011**

Liste des participants  
List of Participants

*établie par le Secrétariat*  
*prepared by the Secretariat*

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

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[End of Annex II and of document]