

Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications

Twenty-Third Session
Geneva, June 30 to July 2, 2010

REPORT*

adopted by the Standing Committee

INTRODUCTION

1. The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (hereinafter referred to as “the Standing Committee” or “the SCT”) held its twenty-third session, in Geneva, from June 30 to July 2, 2010.
2. The following Member States of WIPO and/or the Paris Union for the Protection of Industrial Property were represented at the meeting: Algeria, Angola, Argentina, Australia, Austria, Bangladesh, Barbados, Belgium, Brazil, Canada, Chile, China, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lesotho, Lithuania, Madagascar, Mali, Montenegro, Mexico, Morocco, Myanmar, Nicaragua, Norway, Oman, Peru, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, South Africa, Sudan, Spain, Sweden, Switzerland, Syrian Arab Republic, Turkey, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States of America, Ukraine, Uruguay, Viet Nam, Zambia (78). The European Union was represented in its capacity as a special member of the SCT.

* This report was adopted at the twenty-fourth session of the SCT.

3. The following intergovernmental organization took part in the meeting in an observer capacity: Benelux Organization for Intellectual Property (BOIP), African Intellectual Property Organization (OAPI) (2).
4. Representatives of the following non-governmental organizations took part in the meeting in an observer capacity: American Intellectual Property Law Association (AIPLA), Association of European Trademark Owners (MARQUES), Brazilian Intellectual Property Association (ABPI), European Brands Association (AIM), European Communities Trade Mark Association (ECTA), European Law Students' Association (ELSA International), Inter-American Association of Industrial Property (ASIPI), International Chamber of Commerce (ICC), International Federation of Industrial Property Attorneys (FICPI), International Trademark Association (INTA), Japan Patent Attorneys Association (JPAA), Japan Trademark Association (JTA), Organization for an International Geographical Indications Network (OriGIn), Union of European Practitioners in Industrial Property (UNION) (14).
5. The list of participants is contained in Annex II of this Report.
6. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions on the basis of all observations made.

Agenda Item 1: Opening of the Session

7. Ms. Binying Wang, Deputy Director General, opened the twenty-third session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) and welcomed the participants.
8. Ms. Binying Wang reported on the work done by the International Bureau in preparation for the twenty-third session of the SCT in connection with each of the topics proposed for discussion.
9. Mr. Marcus Höpferger (WIPO) acted as Secretary to the SCT.

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

10. Mr. Adil El Maliki (Morocco) was elected as Chair of the twenty-third session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), and Messrs. Imre Gonda (Hungary) and Joseph Kahwagi Rage (Mexico) were elected as Vice-Chairs for the twenty-third session of the SCT.

Agenda Item 3: Adoption of the Agenda

11. The SCT adopted the Draft Agenda (document SCT/23/1 Prov.) without modifications.

Agenda Item 4: Adoption of the Revised Draft Report of the Twenty-Second Session

12. Discussion was based on document SCT/22/9 Prov.2.
13. The SCT adopted the Report of the Twenty-Second Session based on document SCT/22/9 Prov.2, with modifications to paragraphs 126, 127, 143 and 213 as requested by the Representative of INTA.

Agenda Item 5: Industrial Designs

POSSIBLE AREAS OF CONVERGENCE IN INDUSTRIAL DESIGN LAW AND PRACTICE

14. Discussion was based on document SCT/23/5.

POTENTIAL BENEFITS DERIVING FROM CONVERGENCE AMONG MEMBER STATES IN INDUSTRIAL DESIGN LAW AND PRACTICE

15. The Delegation of Japan stated that important progress had been made by the Committee in the discussion of industrial design law and practice and that the Committee should continue its effort towards harmonization in this area, for the benefit of users.
16. The representative of FICPI said that the potential benefits set out in document SCT/23/5 reflected the concerns of users about filing formalities.

POSSIBLE AREAS OF CONVERGENCE

- (a) Form of Reproduction
17. There were no comments on this matter.
- (b) Number of Copies of Reproduction
18. There were no comments on this matter.
- (c) Views
19. The representative of FICPI suggested that it be made clear in the text of this possible area of convergence that the views were needed exclusively for the purpose of fully disclosing the industrial design for which protection was sought.
20. Responding to an intervention of the Delegation of Spain as to the maximum number of views, the Chair indicated that, at this stage, the text aimed at setting a general principle, and not at fixing an actual number of views.
- (d) Other Contents of the Application Generally Required
21. There were no comments on this matter.
- (e) Formalities Where There is a Requirement to File the Application in the Name of the Creator
22. There were no comments on this matter.
- (f) Division of Applications
23. There were no comments on this matter.
- (g) Communications
24. There were no comments on this matter.

COMMON TRENDS

(a) Filing-Date Requirements

25. The Delegation of Japan expressed the view that offices should be given the possibility of requiring that, for the purpose of according a filing date, the applicable elements be submitted in a language acceptable to the office concerned. The Delegation further indicated that, in Japan, an indication of the product was a filing-date requirement.
26. The Delegation of the United States of America, observing that in its country only a clear reproduction and a claim were required to obtain a filing date, asked how the filing-date requirements listed in this document and those under the Geneva Act of the Hague Agreement, which comprised an indication of the identity of the creator and a claim, could be reconciled.
27. The Delegation of the Russian Federation indicated that, in order for a filing date to be accorded in its country, an indication of the product incorporating the design, the field of use and a representation of the design were required. The Delegation expressed the view that the elements set out in part III(d)(iii) of the document should be included in part IV(a).
28. The Delegation of Brazil, observing that Brazilian legislation required a claim, a reproduction of the design, and an indication of the identity of the creator where he or she was not the applicant, expressed the view that all those elements should be reflected in the document.
29. The Secretariat indicated that the list of filing-date requirements mentioned in document SCT/23/5 reflected the common trend, as it resulted from the responses to the questionnaires on industrial design law and practice. With respect to the Geneva Act of the Hague Agreement, the Secretariat pointed out that Contracting Parties to that Act could, through a declaration, require certain elements, namely a claim, a description and an indication of the identity of the creator, for the purpose of according a filing date. However, the Geneva Act considered those elements as an exception to the standard filing-date requirements under that Act, applicable only to certain Contracting Parties under certain specific circumstances.

(b) Deferment of Publication and Secret Design

30. The Delegation of Peru said that national legislation did not provide for deferment of publication.

(c) Grace Period for Filing in the Event of Disclosure

31. The Delegation of Australia said that national legislation did not provide for a grace period in the event of disclosure.
32. The Delegation of China pointed out that national legislation allowed for a six-month grace period, but only in a limited number of situations.

(d) Structure of Period of Protection

33. The Delegations of Chile and Peru said that protection for an industrial design was granted in their countries for a single ten-year period.
34. The Delegation of the United States of America observed that designs were granted protection in its country for a non-renewable period of 14 years, which would be raised to 15 years once its country implemented the Geneva Act of the Hague Agreement.

35. The Delegations of Uruguay and Kyrgyzstan said that industrial designs were registered for an initial 10-year term from the date of filing, and could be renewed for five more years.
36. The Delegation of China said that the term of protection for industrial designs was 10 years. It was not compulsory for applicants to pay annuities on a year-by-year basis, which meant that an applicant might either make a payment every year or make a payment covering several years. If the annuities were to be paid once every five years when the period of protection actually needed for the industrial design was shorter than five years, the applicant would end up paying more. The mode of payment in China was therefore more flexible and economical for applicants.
37. The Delegation of the Russian Federation, pointing out that protection was presently granted in its country for 15 years, renewable for 10 more years, informed that the new legislation which was currently under preparation reflected the structure set out in document SCT/23/5.
38. The Delegation of Japan said that industrial designs were protected for a maximum of 20 years, subject to the payment of maintenance fees, which could be paid every year or for several years, up to 20, at the choice of the holder.
39. The Delegation of Nicaragua said that national legislation provided for a protection of 10 years, renewable for another 10 years.

(e) Relief Measures

40. The Representative of OAPI, while agreeing in principle with the text of this common trend, expressed the view that a distinction should be made concerning the availability or not of relief measures, depending on the type of procedure and, in particular, on whether or not failure to comply with a time limit resulted in a total loss of rights.

NO COMMON TREND AT PRESENT

41. There were no comments on this matter.
42. The Delegation of Argentina, indicating that photographs were not accepted under national law, said that the outcome of the discussion should not be a binding instrument.

FUTURE WORK

43. The Delegation of the United Kingdom, introducing a non-paper on future work on harmonization of designs law, said that document SCT/23/5 could be viewed as a key transitional paper, moving from a position where the SCT discussed factual procedures and differences between countries, to a position where the SCT categorized areas of convergence and common trends.
44. The Delegation of Spain, speaking on behalf of the European Union and its Member States, referred to possible areas of convergence in industrial design law and practice and considered that efficient and effective design protection was becoming increasingly important. The Delegation stated that harmonization and simplification of design registration formalities and procedures would bring significant benefits both to users and administrations. The European Union and its Member States acknowledged that the SCT had already carried out substantial and valuable work in relation to industrial design law and practice and, in particular, made very promising progress in identifying possible areas of convergence in this field. Therefore, the Delegation, on behalf of the European Union and its Member States, supported intensifying related discussions in the Committee with the aim of recommending to the General Assembly the convening of a diplomatic conference in the biennium 2012-2013, which would consider an international instrument harmonizing and simplifying design registration formalities and procedures.

45. The Delegation of Norway, noting that a Design Law Treaty would be of great benefit for applicants, designers, trade circles, agents and national offices, expressed support for the way further indicated in the non-paper by the United Kingdom.
46. The Delegation of Japan said that it considered important to hold discussions towards harmonization and that it basically shared the view expressed in the non-paper submitted by the United Kingdom. The Delegation considered, however, that it was premature to decide at this stage on the type of instrument that would result from the discussion, and proposed to continue the discussion based on specific draft articles, without prejudging a time limit or type of output.
47. The Delegation of Mexico, noting that it would be beneficial to establish firstly the minimum elements required for the filing of applications, declared that it would be in a position to support a proposal to recommend to the General Assembly the convening of a Diplomatic Conference for the biennium 2012-2013, subject to the Committee attaining specific progress on the matter.
48. The Delegation of Morocco said that its country was committed to creating a modern and flexible legal framework for industrial designs to accompany the implementation of national strategies relating to, in particular, the promotion of the handicraft industry. Considering that harmonization of industrial design formalities would contribute to that strategy, as it would result in a reduction of administrative burdens and an increase of legal certainty, for the benefit of users, the Delegation declared that it supported the statement made in the non-paper submitted by the United Kingdom.
49. The Delegation of Switzerland, expressing its support for the proposal made by the United Kingdom, stated that it considered it important to continue the discussion on industrial designs within the SCT.
50. The Delegation of Uruguay declared that it concurred with the views expressed by the Delegation of Mexico.
51. The Delegation of Brazil, supporting the continuation of the discussion on industrial designs within the SCT, stated that it considered it to be premature to convene a Diplomatic Conference at this stage.
52. The Delegation of the United States of America, considering that additional work was required, expressed support for the continuation of the work on industrial designs. The Delegation was of the view that, although it was premature to decide what would be the outcome of the discussion, it would be reasonable to recommend to the General Assembly to allocate funds for a Diplomatic Conference in the budget for the biennium 2012-2013.
53. The Delegation of China stated that some issues, although seemingly formal, might involve substantive issues, for instance dotted or stippled lines in relation to the protected subject matter. It further stated that China hoped that the meetings of the SCT could discuss in greater depth the "Possible Areas of Convergence" and the "Common Trends" and that China was willing to participate actively in discussions and studies in this regard.
54. The Delegation of Brazil declared that, at this stage, it did not support recommending to the General Assembly the allocation of funds for a Diplomatic Conference in the budget of the biennium 2012-2013.
55. The Delegation of Germany said that it could be advantageous to allocate funds for the convening of a Diplomatic Conference in the budget of the biennium 2012-2013. Such funds would thus be already available, should progress be achieved by the SCT.
56. The Delegation of the Russian Federation said that it considered document SCT/23/5 to be a good basis for an international instrument, the type of which could be decided later. The Delegation further said that, in its view, the type of instrument could be an international agreement similar to those existing in the sphere of patents and trademarks.

57. The Representative of MARQUES introduced a submission to the SCT on possible areas of convergence in industrial design law and practice. The Representative pointed out that the submission presented to the SCT reflected the input of different groups of users, from frequent filers to occasional users. The Representative further highlighted some recent changes in society which were particularly relevant to the filing of industrial designs on the international level, such as market internationalization, rapid development of new products, instant communication, development of exact reproduction technology without loss of clarity and the global economic crisis. Those changes explained the interest of users for more simplified and cost-effective formalities to file on the international level.
58. Referring to the common trends set out in document SCT/23/5, the Representative highlighted, in particular, the importance of keeping filing-date requirements to a minimum, as the failure to obtain a filing date in a design application could lead to an irrevocable loss of rights. Provision for, and harmonization of, deferment and grace periods were also important for users. With respect to the structure of the period of protection, the Representative pointed out that many products developed very quickly and had a short life cycle. For those products, long periods of protection for a single fee covering the entire period were less attractive. Finally, pointing out that modern reproduction technology rendered unnecessary the use of specimens, the Representative said that the issue of specimens did not agitate users.
59. The Representative of ECTA stated that ECTA fully agreed with the document presented by MARQUES, without prejudice of producing its own position document in the future. The Representative further expressed the full agreement of ECTA with the non-paper submitted by the Delegation of the United Kingdom.
60. The Chair concluded that all delegations attached great importance to the work of the SCT on possible convergences in the industrial design law and practice of Member States and that the SCT supported the advancement of that work. To that effect, the Secretariat was requested to prepare a revised working document, for consideration and future work of the SCT at its 24th session, taking into account the conclusions presented in document SCT/23/5, as well as the comments made by delegations at the twenty-third session of the SCT.

DIGITAL ACCESS SERVICE FOR PRIORITY DOCUMENTS

61. The Delegation of the United States of America, pointing out that extension of the “Digital Access Service for Priority Documents” (“DAS”) to trademarks and designs would be beneficial for users in terms of time and money, expressed support for such extension and requested the Secretariat to provide information, at the next session of the SCT, on the status of the project to establish it.
62. The Delegations of the United Kingdom and Switzerland, as well as the Representative of FICPI, expressed their interest for an extension of the “DAS” to trademarks and designs, and supported the request made by the Delegation of the United States of America for an update on the state of the project on such extension at the next session of the SCT.
63. The Chair noted that the Secretariat was requested to make a presentation at the next session of the SCT concerning the current state of work on the WIPO Digital Access Service for Priority Documents for industrial designs and trademarks.

Agenda Item 6: Trademarks

GROUNDINGS FOR REFUSAL OF ALL TYPES OF MARKS

64. Discussion was based on document SCT/23/2.
65. The Delegation of Uruguay requested that in the Spanish version of Annex I of document SCT/23/2 the following clarifications be made. In paragraph 6, the phrase “*esté desprovista de carácter descriptivo*” should be changed for “*tenga carácter descriptivo*” and in paragraph 8, second sentence; the phrase “*de carácter descriptivo, de carácter genérico y de carácter engañoso*” be changed for “*o la presencia de carácter descriptivo, genérico o engañoso*”.
66. The Delegation of the Russian Federation requested that the document include examples of scent marks that are not descriptive. The Delegation felt that some examples presented in the document did not represent the practice of the Russian Federation and suggested that other examples included in that delegation’s submission be included in the document.
67. The Delegation of Germany expressed support for the proposal to publish document SCT/23/2 as a SCT reference document. The Delegation noted that some of the examples presented in the document did not represent the practice of Germany either, but it understood that this was mainly due to the legislation applying in different jurisdictions. As stated in paragraph 73 of Annex I, document SCT/23/2 cannot serve as a reference for addressing specific issues in particular jurisdictions. The Delegation requested that this paragraph be inserted in a more prominent part of the document.
68. The Delegation of the United States of America believed that document SCT/23/2 was ready for publication and noted that the document would be useful in illustrating different practices around the world. The United States Patent and Trademark Office (USPTO) would use this document as reference material for the examination training classes conducted at the USPTO. In response to the question raised by the Delegation of the Russian Federation, regarding an example of scent mark registered by the USPTO, the Delegation pointed out that with regard to the application of a scent mark, two different analyses were made: firstly as to the distinctiveness of the sign and secondly as to the functionality of the sign. Applicants were required to show that the mark was distinctive and not functional with regard to the goods or services for which it was applied. Supporting evidence to be submitted could consist of affidavits, surveys, and proof of use in commerce.
69. The Delegation of Brazil noted that the examples submitted by its Office and presented in paragraphs 49, 50, 61 and 64 of document SCT/23/2 were hypothetical and not actual applications submitted or registrations accepted by that Office. The examples were meant to explain how those particular grounds for refusal would apply in Brazil, and asked the Secretariat to clarify this point in the final version of the document prior to publication.
70. The Delegation of Montenegro noted that only a few examples were included in the document in relation to bad faith as a ground for refusal. In the view of the Delegation, the lack of an international definition of bad faith was an area of concern and it would be helpful to provide elements of that definition to assist national administrations and courts.
71. The Delegation of Ecuador drew the attention of the Standing Committee to paragraphs 62 and 63 of the document and noted that according to the Andean Community legislation a mark that consists of or includes copyrighted material can be registered if it does not cause confusion in the market. As a practical example of the application of Andean Community law, the Delegation noted that the trademark “Terminator” had been registered and used for medicines. In such a case, the Andean Court of Justice determined that the consumer could not be confused between the trademark and the character protected by copyright.

72. The Delegation of Spain considered that the document was complete and well illustrated with examples. The Delegation informed the Standing Committee that the following trademark applications were refused in relation to sunglasses and jewelry, because the graphical elements used on the words were considered identical to those of the famous brands "Chanel" and "Dolce & Gabbana".
73. The Delegation of Slovenia noted that the document provided an overview of the grounds for refusal most commonly found in the trademark legislation of SCT Members. The Delegation considered that the document was ready for publication although grounds for refusal which were not common to all SCT Members were not discussed.
74. The Delegations of Australia, Brazil, Germany, Japan, Mexico, Nicaragua, Norway and the Russian Federation supported the notion that document SCT/23/2 be published as a SCT reference document, taking into account all comments made by delegations at this session. The document would provide useful insight to IP owners, professionals and researchers about how various jurisdictions consider different aspects of trademark protection.
75. While supporting the suggestion made by the preceding delegations, the Representative of OAPI added that it would be useful to update the document in the future.
76. The Delegation of Kyrgyzstan suggested that the document be published in all six working languages of WIPO.
77. The Chair concluded that the Secretariat was requested to finalize document SCT/23/2 on grounds for refusal of all types of marks, by taking into account the comments made by delegations during the session, and to publish it as a reference document.

TECHNICAL AND PROCEDURAL ASPECTS RELATING TO THE REGISTRATION OF CERTIFICATION AND COLLECTIVE MARKS

78. Discussion was based on document SCT/23/3.
79. The Delegation of Australia, supported by the Delegations of Brazil and Spain stated that in its current form, the document was comprehensive and informative, and it should be published on the WIPO Website for future reference purposes.
80. The Delegation of the Russian Federation noted that, while it also supported the publication of the document for reference purposes, it still wished to request that two additional clarifications be inserted in the document. Firstly, the Delegation pointed out that paragraph 22 of document SCT/23/3 referred to the distinguishing character of a mark and the possibility that signs, which may serve in trade to designate the geographical origin of the products or services may, as an exception to the usual grounds for refusal of ordinary marks, be granted as collective and certification marks. In that context, it did not seem appropriate to include in footnote number 24 to that paragraph, a reference to legislation in the Russian Federation allowing the transformation of a collective mark into an individual mark and vice versa. The Delegation believed that a new paragraph should be added after paragraph 12 in the section dealing with collective marks in national systems, reflecting this specific feature of national legislation which was described in the second submission of the Russian Federation.
81. Secondly, and in relation to paragraphs 55 and 56 of document SCT/23/3, concerning licensing and assignment of collective and certification marks, the Delegation declared that in the Russian Federation, national law contains a prohibition to grant licenses in respect of collective marks, as this leads to confusion about the nature of the products covered by the mark. In fact, if a product meets all the requirements stated in the regulations, the mark holder may authorize the producer to use the collective mark, but not on the basis of a license. According to national legislation, the assignment of a collective mark to any other person is forbidden.

82. The Chair concluded that the Secretariat was requested to finalize document SCT/23/3 on Technical and Procedural Aspects Relating to the Registration of Certification and Collective Marks, by taking into account the comments made by delegations during the session, and to publish it as a reference document.

PROTECTION OF NAMES OF STATES

83. Discussion was based on document SCT/23/4.
84. The Delegation of Switzerland requested that two sub-questions be added in question 1 as follows: “excluded from registration as trademark for goods if they can be considered as incorrect in respect of the origin of the products for which registration is sought” and “excluded from registration as trademark for goods for other reasons; if yes, specify the reasons”. The Delegation also suggested that the choice “not applicable” be removed as it was uncertain how the answers to that question would be interpreted. Moreover, the Delegation proposed the addition of two sub-questions in question 2: “excluded from registration as trademark for services if they can be considered incorrect as to the origin of the services for which registration is sought” and “excluded from registration as trademark for services for other reasons; if yes, specify the reasons”. In respect of questions 3 and 4, the Delegation noted that the idea of a possible conflict between a State name and a trademark for goods or for services was not clear and therefore suggested the following reformulation of the introductory sentences in those questions to read: “If the name of a State is excluded from registration as trademark...”. In addition, the Delegation proposed to add a sub-question to questions 3 and 4: “if the answer to the sub-question above is in the affirmative, can this ground be raised independently from other grounds or only together with other grounds?”. Finally, and for the sake of coherence with questions 1 and 2, the Delegation requested that question 6 be reformulated to read: “if under the applicable legislation, names of States are generally excluded from registration as trademark for goods and/or services, are there any exceptions to such exclusion? If yes, specify”.
85. The Delegation of France said that national legislation did not provide for any particular regime for the protection of names of States because it protected them as other geographical references and names. The Delegation indicated that recent decisions of the Court of Appeal of Paris approved refusals by the national Office of denominations using an English translation of “Morocco”, for being easily understandable by the French public and therefore not being distinctive for the products concerned, since Morocco is renowned for the production of products like leather and jewels. If the products concerned did not actually come from Morocco, the denominations could be deceptive for the consumers. Finally, the Delegation requested a modification of the French version of sub-question 4 in question 2, to read “excluded from registration as a trademark if they otherwise lack any distinctive character”.
86. The Delegation of Peru suggested the following changes affecting the Spanish version of the document. In question 2 sub-questions number 3 and 4, second line, the term “*productos*” should be replaced by “*servicios*”. In addition, the Delegation requested adding the word “*o nulidad*” next to “*cancelación*” in sub-question 4 of questions 3 and 4, to reflect those systems that provide for invalidation, such as the Andean Community legislation.
87. The Delegation of Spain stated that, provisionally, and in view of the absence of legal provisions in its jurisdiction, the term “Spain” could be registered as a trademark when it formed part of a verbal or graphic group which is sufficiently characteristic and distinctive if it does not deceive the public or suggests a guarantee or an official recognition of which it lacks, and could never be registrable in isolation.

88. The Delegation of Ukraine suggested including historical names of States in the general part of the questionnaire, as well as taking into account international country codes.
89. The Representative of INTA suggested amending the last part of question 5 so that it would read "the goods and/or services on or in connection with the trademark...". Moreover, he supported the view of the Delegation of Switzerland concerning the indication "non applicable", in particular in question 1, and suggested that the SCT review whether that option was pertinent in each case.
90. The Delegation of China said that national legislation excluded not only the registration of names of States as trademarks but also the registration of marks connected with or including names of States. The Delegation suggested that a question reflecting this absolute prohibition be included in the questionnaire.
91. The Representative of INTA expressed the view that some of the changes requested in the first part of the questionnaire would have to apply to the second part as well. He noted in particular that in the first part of the questionnaire the wording "is excluded from" was used, while in the second part the wording used was "protected against". In addition, question 12 should specify that it referred to the use of names "as trademarks".
92. The Delegation of Jamaica recommended including in question 10 the possibility to specify exceptions.
93. The Secretariat noted that, as requested by the Standing Committee, the option "non applicable" would be removed. A reference to the historical names of States would be added in footnote number 1. Regarding country codes it seemed that these were often seen as an abbreviation of State names, and were therefore covered by that concept.
94. The Delegation of the United States of America suggested reviewing the draft questionnaire on the basis of the interventions made during the current session and presenting it back to the Standing Committee for approval.
95. The Chair proposed that the questionnaire be finalized and circulated by July 15 and that replies be submitted to the Secretariat before September 15, 2010. A compilation of the replies would be presented to the twenty-fourth session of the SCT.
96. The Delegation of Jamaica agreed with the proposed timelines and expressed the view that the outcome of that process should not prejudice the continuation of the discussion on the possible need to amend Article 6*ter* of the Paris Convention, or a negotiation of a multilateral treaty protecting names of States.
97. The Delegation of Barbados thanked the Secretariat for preparing the revised Draft Questionnaire Concerning the Protection of Names of States against Registration and Use as Trademarks. The Delegation noted that using country names without the authorization of the country concerned as trademarks on products which bore no relation to the country in which the products were manufactured was a matter that affected not only developed countries, but developing as well. Indeed such use was particularly detrimental to some small island developing states with small economies such as Barbados. Barbados faced challenges, such as the high cost of labor and the lack of economies of scale which rendered manufactured products uncompetitive both at home and abroad. Manufacturers had to therefore rely on Barbados' reputation as a tourist destination which produces good quality products to facilitate the sale of their products.
98. The Delegation indicated that Barbados' economy was based on vulnerable sectors and the need to diversify was clear. The tourism sector, Barbados' main foreign exchange earner, was highly susceptible to natural disasters and other climate change impacts in the region, airline decisions, international security issues, the changing tastes of tourists and possible pandemics. The existence and operation of the international business sector was largely dependent on decisions taken by major developed countries. More reliance had to be placed on the manufacturing sector notwithstanding the challenges that Barbados faced as a small economy. It was therefore important for Barbados to use

IP as a tool for economic development. To this end the Barbados Government continued to encourage persons to produce and to brand their products and to export these products. The trademark on these products could consist of the Barbados name as an element thereof.

99. The efforts of the Barbados Government to use IP as a tool for economic development were being undermined by the use of the Barbados name by manufacturers in countries with more favorable economic conditions. Such manufacturers were branding their products with trademarks that consisted of the Barbados name. In one country, for example, a product called “Barbados Tender Calming Care – Delicate Oily Skin Balm” was advertised as the flagship product of the corporation. From the website of this corporation it appeared that the word “Barbados” was registered. The use of the Barbados name in this and other ways might, amongst other things, make it difficult, if not impossible, for Barbadians to have products of the same class registered in the country in which the trade mark is registered or is recognized as a well-known mark.
100. The Delegation said that there were a number of things that WIPO Member States could do to assist Small Island Developing States with small economies such as Barbados for whom the country name was part of the manufacturers’ trademark and who would like the use of their country names to be subject to authorization of a competent authority in their country. In the report of the twenty-first session of the SCT, Jamaica suggested and some WIPO Member States supported amending Article 6ter of the Paris Convention. Others were reluctant to amend this article on the basis that a large number of trademarks already contained the names of countries as elements of those trademarks and any amendment could create legal uncertainty with respect to the validity of those marks. This concern could be addressed by providing that any solution to be arrived at could be prospective in nature rather than retrospective.
101. Other reasons advanced for not wanting to amend Article 6ter included that provisions already existed in the Paris Convention and the TRIPS Agreement dealing with this issue. These provisions did not specifically provide that country names could not be registered as elements of a trademark without the authorization of the country concerned. Indeed Article 6quinquies B(2) spoke to the denial of registration where the trademark consisted exclusively of signs or indications that might serve in trade to designate the place of origin. It did not deal with the situation where the country name was but one element of the trademark. Further, this Article seemed to deal with cases where the product had been produced in the country whose name was on the product. As in the case of signs which were devoid of distinctive character, this provision spoke to marks which simply indicated the true origin of the good. It was these marks that might be denied registration.
102. With respect to the argument that the TRIPS Agreement, a minimum standards agreement, already contained provisions dealing with this issue, the Delegation was of a different view. Its view was that with respect to goods other than wines and spirits the TRIPS Agreement spoke to a situation where the mark was misleading and not to the use of the mark without the authorization of the country concerned. The costs of proving that marks were misleading were prohibitive for a number of small economies. More noteworthy, however, was that the TRIPS Agreement authorized the use of country names, and Jamaica’s proposal as the delegation understood it was for there to be a prohibition on the use of country names without the authorization of the competent authority of the country concerned.
103. Another reason offered for not wanting to amend Article 6ter to prohibit the use of country names was that such a prohibition would go beyond the original intent of this provision. The Delegation did not agree with this view as the rationale for protecting the names of international organizations in Article 6ter could be applied to country names. The Delegation remained however, flexible and was willing to consider a solution based on another article of the Paris Convention should that be acceptable to all Member States.

104. Still another reason advanced was that this issue of the use of a country name was covered under the law against unfair competition. In this regard, the Delegation wished to point out that in the absence of an explicit provision at the international level stating that the use of country names without authorization from the competent authority in the country in question was deemed to be unfair competition and therefore prohibited, the law on unfair competition would not provide a practical and workable solution. The reason was that small manufacturers in Barbados who relied on the Barbados name for the sale of their products and the Barbados Government simply did not have the resources to challenge the large manufacturers in other countries who used their country name to facilitate the sale of their products.
105. It had also been stated in the report of SCT/21 that an amendment of Article 6ter requiring permissions from national authorities would create bureaucratic procedures and obstruct free trade of products. In this regard, the Delegation wished to state that bureaucratic procedures which obstruct the free trade of products being marketed under the Barbados name without the approval of a competent authority in Barbados would in fact be a welcomed safeguard to prevent the misappropriate use of the Barbados name by persons who had no connection to Barbados but used the name to the detriment of Barbadian manufacturers. Members had also stated that in their countries registration of designations containing an indication of geographical origin could be refused if such were misleading. Provisions which authorized the use of country names except where such use was misleading would in effect authorize countries to use the name of Barbados regardless of whether that use was misleading given that Barbadian manufacturers and the Barbados Government did not have the necessary resources to challenge each and every trademark which consisted of the Barbados name and was misleading in nature.
106. The Delegation of Barbados was aware that the issue before the SCT concerned the approval of the questionnaire; however, it wished to make some preliminary comments on what it considered to be possible next steps following receipt of the responses to the questionnaire. The Delegation noted that WIPO's Program and Budget 1998-99, contained in document WO/BC/18/2, recognized the need to review all the options available for the progressive development of international intellectual property law to ensure that the interests of Member States were served in a timely, flexible and effective manner. While noting that the binding character of a treaty gives its signatories the strongest guarantees as to the implementation of its subject matter, the document stated that the WIPO General Assembly (or another Assembly) could adopt a resolution recommending that Member States implement certain principles and rules, that the recommendation in question created no legal obligation for any country, but following such a recommendation would produce practical benefits. Quite rightly it was stated that the various approaches, for example adopting a resolution containing a recommendation and/or negotiating a treaty, would not necessarily exclude each other.
107. The Delegation of Barbados saw a Joint Recommendation of both the Paris Union Assembly and the WIPO General Assembly, prohibiting the use of country names without the authorization of the country concerned as a possible next step to address this issue which affected various countries, particularly small economies like Barbados. The Delegation said that it would develop this proposal at the appropriate time.
108. The Delegation of Barbados supported the approval of the questionnaire on the understanding that the questionnaire was not an end in itself but a means to an end. The Delegation looked forward to discussing the next steps in detail in the SCT once the questionnaire would be approved and the responses received. As the issue of protecting country names from being used without authorization was of importance to a number of small economies, it looked forward to this matter being placed on the agenda of the SCT until a solution which would address its concerns was found. This solution could be a carve-out for Small Island Developing States, small economies, developing countries taking into account their special circumstances or could apply to all countries.

109. The Delegation of Mexico, supported by the Delegations of Australia, Barbados, Brazil, Jamaica, Switzerland, the United States of America and the Representative of OAPI stated that, since some of the proposed amendments affected the content of the draft questionnaire, the document would need to be approved by the Committee at the current session.
110. As requested by the Standing Committee, the Secretariat presented an informal document on the next day of the meeting containing a redrafted questionnaire in the three working languages.
111. The Delegation of Mexico requested that, in the Spanish version of question 1, the term "*inexacto*" be replaced by "*incorrecto*".
112. In reply to a request for clarification made by the Delegation of Peru, the Secretariat explained that the term "incorrect" had been introduced following a request by the Delegation of Switzerland.
113. The Delegation of Switzerland explained that the term incorrect had been proposed to take into account grounds of refusal that would go beyond deception.
114. The Delegations of Australia, Spain and Uruguay agreed with the use of the term "incorrect" in this context.
115. The Chair concluded that, following the adoption of the draft questionnaire by the Committee, the questionnaire would be circulated to Member States with September 15, 2010, as the deadline for returns. The Secretariat was requested to compile the returns to the questionnaire and to present that compilation as a working document for the next session of the SCT.

TRADEMARKS AND INTERNET

116. The Chair, noting that the SCT had finished work on two out of three trademark-related items on its Agenda, suggested that the SCT give consideration to work on a new item concerning trademarks, namely trademarks and the Internet. In particular, he indicated that work on that issue could be initiated at the next session of the SCT on the basis of a background document to be prepared by the Secretariat and summarizing past and current developments in that area, in particular, the WIPO Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, and recent developments within ICANN on domain name issues. SCT members and observers were invited to present their contribution to that work to the Secretariat by September 15, 2010.
117. The Delegations of Australia, Brazil, China, Jamaica, Mexico, Morocco, Spain, Ukraine, Uruguay, the United Kingdom, and the Representative of FICPI supported the proposal made by the Chair.
118. The Delegation of the United States of America, supported by the Delegation of Romania and the Representative of OAPI suggested that the work to be carried out by the Secretariat include the issue of top level domain names.
119. Noting that a large number of delegations supported his suggestion, the Chair concluded that it was agreed by the SCT.

Agenda Item 7: Geographical Indications

120. The Chair recalled that the Summary by the Chair of the twenty-second session of the SCT had noted that delegations would be given an opportunity to express their opinions, at the present session, as to whether they wished to pursue work under that agenda item on the basis of a specific working document.
121. The Delegation of Uruguay supported the proposal by the Chair to pursue work on the basis of a specific working document prepared by the Secretariat.
122. The Delegation of Switzerland, supported by the Delegations of France and Slovenia, expressed concern regarding a possible dispersion of the work of the SCT, and said that it reserved its position on the proposal made by the Chair.
123. The Delegation of OAPI expressed the view that all proposed topics could be addressed concurrently by the SCT, through the creation of working groups.
124. The Delegation of the European Union, considering that work on industrial designs was a matter of priority and that trademarks and the Internet was a vast topic, declared that it agreed with the Delegation of Switzerland.
125. The Delegation of Spain stated that it would prefer focusing on trademarks and the Internet as a new topic, instead of initiating work on two new topics.
126. Indicating that it did not support breaking down into working groups, the Delegation of Australia stated that priority should be given to moving forward the work on industrial designs, as well as to work on trademarks and the Internet.
127. The Delegations of Germany and the United Kingdom concurred with the views expressed by the Delegation of the European Union.
128. The Delegation of Nicaragua, highlighting the importance of the subject, expressed the view that the question of geographical indications should be discussed by the committee.
129. The Delegation of the Russian Federation, observing that several documents on geographical indications had already been discussed by the Committee and that a significant number of questions remained to be resolved, pointed out that a general method for the examination of this topic should be adopted, prior to preparing any further document.
130. Having noted the concerns as expressed by a number of delegations over the workload of the SCT as well as the priorities that they wished to accord to work on industrial designs, names of States and trademarks and the Internet, the Chair concluded that the item on geographical indications would remain on the agenda for the next session of the SCT, at which moment delegations might wish to revisit this issue.

[Annexes follow]



SCT/23/6
ORIGINAL: ENGLISH
DATE: JULY 2, 2010

Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications

Twenty-Third Session
Geneva, June 30 to July 2, 2010

SUMMARY BY THE CHAIR

adopted by the Committee

Agenda Item 1: Opening of the Session

1. Ms. Binying Wang, Deputy Director General, opened the twenty-third session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) and welcomed the participants on behalf of the Director General.
2. Mr. Marcus Höpferger (WIPO) acted as Secretary to the SCT.

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

3. Mr. Adil El Maliki (Morocco) was elected Chair and Mr. Imre Gonda (Hungary) and Mr. Joseph Kahwagi Rage (Mexico) were elected Vice-Chairs of the Committee.

Agenda Item 3: Adoption of the Agenda

4. The SCT adopted the Draft Agenda (document SCT/23/1 Prov.) without modifications.

Agenda Item 4: Adoption of the Revised Draft Report of the Twenty-Second Session

5. Discussion was based on document SCT/22/9 Prov.2.
6. The SCT adopted the Revised Draft Report of the twenty-second session based on document SCT/22/9 Prov.2, with modifications to paragraphs 126, 127, 143 and 213 as requested by the Representative of INTA.

Agenda Item 5: Industrial Designs

Possible Areas of Convergence in Industrial Design Law and Practice

7. Discussion was based on document SCT/23/5.
8. The SCT considered document SCT/23/5 in detail.
9. The SCT took note of a non-paper originally circulated by the Delegation of the United Kingdom and presented by the European Union and its member States, and of a contribution presented by the Representative of MARQUES.
10. The Chair concluded that all delegations attached great importance to the work of the SCT on possible convergences in the industrial design law and practice of Member States and that the SCT supported the advancement of that work. To that effect, the Secretariat was requested to prepare a revised working document, for consideration and future work in this area by the SCT at its twenty-fourth session, taking into account the conclusions presented in document SCT/23/5, as well as the comments made by delegations at the twenty-third session of the SCT.

Agenda Item 6: Trademarks

GROUNDINGS FOR REFUSAL OF ALL TYPES OF MARKS

11. Discussion was based on document SCT/23/2.
12. A number of delegations underlined the importance of this document as a body of reference for their trademark administrations and users.
13. The Chair concluded that the Secretariat was requested to finalize document SCT/23/2 on grounds for refusal of all types of marks, by taking into account the comments made by delegations during the session, and to publish it as a reference document in all six official languages.

TECHNICAL AND PROCEDURAL ASPECTS RELATING TO THE REGISTRATION OF CERTIFICATION AND COLLECTIVE MARKS

14. Discussion was based on document SCT/23/3.
15. The Chair concluded that the Secretariat was requested to finalize document SCT/23/3 on technical and procedural aspects relating to the registration of certification and collective marks, by taking into account the comments made by delegations during the session, and to publish it as a reference document.

PROTECTION OF NAMES OF STATES

16. Discussion was based on document SCT/23/4.
17. A number of delegations and representatives of observer organizations made drafting suggestions to the draft questionnaire, which were incorporated by the Secretariat and presented to the Committee in the form of an unofficial document. Following the adoption of the draft questionnaire by the Committee, the Chair concluded that the questionnaire would be circulated to Member States with September 15, 2010, as the deadline for returns. The Secretariat was requested to compile the returns to the questionnaire and to present that compilation as a working document for the next session of the SCT.

TRADEMARKS AND INTERNET

18. The Chair, noting that the SCT had finished work on two out of three trademark-related items on its Agenda, suggested that the SCT give consideration to work on a new item concerning trademarks, namely trademarks and the Internet. In particular, he indicated that work on that issue could be initiated at the next session of the SCT on the basis of a background document to be prepared by the Secretariat and summarizing past and current developments in that area, in particular, the *WIPO Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet*, and recent developments within ICANN on domain name issues. SCT members and observers were invited to present their contribution to that work to the Secretariat by September 15, 2010.
19. Noting that a large number of delegations supported his suggestion, the Chair concluded that it was agreed by the SCT.

Agenda Item 7: Geographical Indications

20. The Chair recalled that the Summary by the Chair of the twenty-second session of the SCT had noted that delegations would be given an opportunity to express their opinions, at the present session, whether they wished to pursue work under that agenda item on the basis of a specific working document.
21. Having noted the concerns as expressed by a number of delegations over the workload of the SCT as well as the priorities that they wished to accord to work on industrial designs, names of States and trademarks and the Internet, the Chair concluded that the item on geographical indications would remain on the agenda for the next session of the SCT, at which moment delegations might wish to revisit this issue.

Digital Access Service for Priority Documents

22. The Chair noted that the Secretariat was requested to make a presentation at the next session of the SCT concerning the current state of work on the WIPO Digital Access Service for Priority Documents for industrial designs and trademarks.

Twenty-Fourth Session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT/24)

23. The Chair announced the week from November 1 to 5, 2010, as tentative dates for SCT/24.

Agenda Item 8: Summary by the Chair

24. The SCT approved the Summary by the Chair as contained in the present document.

Agenda Item 9: Closing of the session

25. The Chair closed the session on July 2, 2010.

[Annex II follows]

LIST OF PARTICIPANTS

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

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

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