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

Ninth Session
Geneva, November 11 to 15, 2002

DRAFT REPORT

Document prepared by the Secretariat

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 ninth session, in Geneva, from November 11 to 15, 2002.
2. The following Member States of WIPO and/or the Paris Union for the Protection of Industrial Property were represented at the meeting: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Central African Republic, China, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Egypt, Ecuador,

El Salvador, Eritrea, Estonia, Finland, France, Germany, Ghana, Greece, Guatemala, Guinea, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Japan, Kazakhstan, Latvia, Lebanon, Lesotho, Lithuania, Malawi, Malta, Mauritius, Mexico, Morocco, Netherlands, Niger, Norway, Panama, Portugal, the Republic of Korea, the Republic of Moldova, Romania, Russian Federation, Rwanda, Sao Tome and Principe, Sierra Leone, Slovakia, Slovenia, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Tonga, Trinidad and Tobago, Turkey, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen, (78). The European Communities were also represented in their capacity of member of the SCT.

3. The following intergovernmental organizations took part in the meeting in an observer capacity: African Intellectual Property Organization (OAPI), Benelux Trademark Office (BBM), International Vine and Wine Office (OIV), League of Arab States (LAS), Organization of African Unity (OAU), World Trade Organization (WTO) (6).

4. Representatives of the following international non-governmental organizations took part in the meeting in an observer capacity: American Intellectual Property Law Association (AIPLA), Center for International Industrial Property Studies (CEIPI), European Communities Trade Mark Association (ECTA), European Brands Association (AIM), International Federation of Wines and Spirits (FIVS), International Federation of Industrial Property Attorneys (FICPI), International Association for the Protection of Industrial Property (AIPPI), International Trademark Association (INTA), International Wine Law Association (AIDV), Japan Patent Attorneys Association (JPAA), Japan Trademark Association (JTA), International Chamber of Commerce (ICC), Committee of National Institutes of Patent Agents (CNIPA) (13)

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

6. Discussions were based on the following documents prepared by the International Bureau of WIPO: "Agenda" (document SCT/9/1 Rev.2), "Proposals for further Harmonization of Formalities and Procedures in the Field of Marks" (document SCT/9/2), "Further Development of International Trademark Law and Convergence of Trademark Practices" (document SCT/9/3), "The Definition of Geographical Indications" (document SCT/9/4), "Geographical Indications and the Territoriality Principle" (document SCT/9/5), "Industrial Designs and their Relation with Works of Applied Art and Three-Dimensional Marks" (document SCT/9/6), "Internet Domain Names" (document SCT/9/7), and WIPO General Assembly documents: WO/GA/28/3, WO/GA/28/3 Add. and Add. 2 on Internet Domain Names, and an extract from the WIPO General Assembly Report (document WO/GA/28/7) on Internet Domain Names.

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

AgendaItem1:OpeningoftheSession

8. IntheabsenceofMr.Topic,ChairoftheSCT,Ms.ValentinaOrlova,Vice-Chair, actedasChairandopenedthemeeting.
9. Mr.ShozoUemura,DeputyDirectorGeneral,welcomedalltheparticipantson behalfoftheDirectorGeneralofWIPOandmadeashortintroductionoftheissues discussedinthepreviousmeetingsoftheSCT.
10. Mr.DenisCroze(WIPO)actedasSecretarytotheStandingCommittee.

AgendaItem2:AdoptionoftheAgenda

11. TheDraftAgenda(documentSCT/9/1Rev.2)wasadoptedwithmodifications relatingtotheorderofdiscussionoftheissuesonInternetDomainNames.

AgendaItem3:AdoptionoftheDraftReportoftheEighthSession

12. TheSecretariatinformedtheStandingCommitteethat,followingtheprocedure adoptedbytheSCT, commentsweremadebyseveraldelegationsontheElectronic ForumoftheSCT:Australiainrespectofparagraphs32,40,49,72,101,106,145,211, 221,233,257,290,305,308,347,353,355,360and385;Finland,paragraph 132; Germany,paragraph328 ;Japan,paragraphs216and252;RepublicofMoldova, paragraph366,andtheRepresentativeofECTAandINTA,paragraphs341and367.The abovementionedparagraphswereamendedconsequentlyindocumentSCT/8/7Prov2.
13. TheRepresentativeof CEIPirequestedthatinparagraph124,thewording “registrationofamark”bereplacedby“registration”andalsoinparagraph126the wording“registrationofamark”bereplacedby“markandregistration.”
14. TheSCTadoptedtheDraftReport oftheeighthsession (documentSCT/8/7Prov.2)asmodified.

AgendaItem4:GeographicalIndications

15. TheSecretariatintroduceddocumentSCT/9/4,whichdealtwiththepactical differencesbetweensystemsofprotectionsuchasappellationsoforiginandsystemsof protectionofgeographicalindicationsundercollectiveorc certificationmarks.The documentalsoincludedissuesdiscussedbytheSCTatitseighthsession.
16. TheDelegationoftheEuropeanCommunities,alsospeakingonbehalfofits MemberStates,pointedoutthatinthelastsessiontheimportanceofthedefinitionof geographicalindicationsassuchhadbeenstressed,morespecificallyasameanstodistinguishvariousrightsthroughwhichgeographicalindicationswereprotected.

Member States were free to protect geographical indications through laws on collective or certification marks, or through laws on geographical indications. However, it seemed that the rights granted under these laws were not totally equivalent, thus the question of the definition allowed to appreciate the differences between these industrial property concepts. When dealing with collective marks, document SCT/9/4, paragraph 34, indicated that the use of collective marks was governed by regulations which delimited the geographical area of production or the standards. A collective mark enabled producers who applied for it to register the mark even if it did not contain all the elements which had to be present in a geographical indication. The Delegation recalled that, at the last meeting Member States had agreed to use the definition contained in Article 22.1 of the TRIPS Agreement as the minimum common denominator. Producers aspiring to gain exclusive use of a name needed to provide proof before registration that all the elements were covered, so as to establish the link between the geographical name and the product. In addition, there had to be some form of control of the regularity of the product, although this aspect was not part of the definition.

17. In reply to the intervention made by the Delegation of the European Communities, the Delegation of the United States of America supported by four other delegations (the Republic of Korea, Australia, Germany and the Russian Federation) and the Representative of an non-governmental organization (AIPPI), said that this intervention had been helpful in identifying that Article 22.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) was a starting place in terms of definition. The Delegation noted that the pre-registration check which existed in the European Communities system was not a requirement or a part of the Article 22.1 definition. It was important then, to look at this existing definition and examine how currently different legal systems worked to ensure that those indications set forth as geographical indications indeed met the criteria, and were examined as trademarks or as other rights asserted by third parties.

18. Referring to document SCT/9/4, the Delegation of Australia commented the system of certification marks in that country, which included, *inter alia* the protection of geographical indications. The Australian certification marks system covered a much wider class of rights, but to the extent that protection for a geographical indication was sought in that country as a certification mark, the owner of the mark had to present both the specifications associated with the sign, the rules concerning the use of the sign, and a range of other requirements which would then be checked by an independent authority against two broad criteria: first a general public interest criteria and secondly a criteria which assessed whether or not the certifying agency had a capability to make the assessments that were being claimed. The protection which TRIPS obliged Australia to provide was two-fold: a mechanism for use by those who actually had a claim on a geographical indication, but also an obligation to prevent use by others who were not in such a position.

19. The Delegation of Germany said that, as a minimum standard treaty, the TRIPS Agreement did not prevent other countries or regions to allow for stronger protection in their territory. However, this protection would not automatically apply outside of those territories, except in the case of existing multilateral or bilateral agreements. The

Delegation enquired those countries which had a system of certification marks, how the protection provided in Article 23 of TRIPS operated in their jurisdictions, since that article provided for a higher level of protection, while using the same definition contained in Article 22.1. In the delegation's view, one could read the definition in Article 22.1 as "geographical indications are for the purpose of this agreement indications which identify a wine or a spirit as originating in the territory...", and then for the general level of protection provided by Article 22, the definition could read "geographical indications are for the purpose of this agreement indications which identify products other than wines and spirits as originating...". The delegation also wondered whether countries using the certification mark systems would need to change their systems if the balance between Articles 22 and 23 changed, including also the exceptions provided for in Article 24 of the TRIPS Agreement.

20. The Delegation of the Russian Federation noted that although that country was not a member of the WTO, accession negotiations were under way for a long time and in that connection, amendments had been introduced into their legislation with regard to geographical indications. In previous meetings of the SCT the Delegation had stated that, direct protection for geographical indications was provided only for one type of geographical indications which were indications of source. This had been deemed to be in compliance with the definition of the TRIPS Agreement. The Delegation also inquired those countries which currently used the certification mark system to give additional details on the protection provided, in particular for wines and spirits. In the Russian Federation, regulations provided for a pre-registration check, and since other countries had more experience in this field, the Delegation thought it was useful to look at the bodies charged with such checks and the documents required by them.

21. In reply to the requests for information on the protection of geographical indications through the system of certification marks, the Delegation of the United States of America explained that, as to the question of whether the system of certification marks provided TRIPS Article 23 level of protection to goods other than wines and spirits, the Trademarks Act had been amended on December 8, 1994, to provide a higher level of protection for certification marks for wines and spirits than for certification marks identifying other goods. The Delegation noted that in the United States of America, a number of foreign applicants had taken advantage of the certification mark system to obtain protection for their geographical indications. The Delegation further noted that, as a country following the common law tradition, the United States of America had, in addition to registration, a system that acknowledged actual use as the basis for creation of rights in geographical indications and gave certain examples: Cognac, Colombian coffee, Comté cheese, Jamaica Blue Mountain Coffee, Halum cheese, Parma Ham, Parmigiano Reggiano, Prosciutto di Parma, Roquefort cheese, Stilton cheese, and Swiss chocolate and products of chocolate. In certain cases, the owners of these geographical indications had exercised their right to prevent confusingly similar trademark registrations and had also benefited from border enforcement.

22. In reaction to these comments, the Delegation of the European Communities, also speaking on behalf of its Member States, noted that the purpose of this exercise was not to check compliance of any particular legislative system with the TRIPS Agreement.

The Delegation proposed instead to look at the differences amongst several systems of protection, by using the definition as a starting point. It was certain that protection could be granted to a geographical indication through collective marks but attention needed to be given to the definition, otherwise the consumer could be misled. Apart from the debate on responsibility, it was necessary to recall that protection under collective marks implied that the product could be qualified as a geographical indication under Article 22.1. With regard to the intervention by the Delegation of the United States of America, the Delegation noted that all of the geographical indications mentioned were well-known, and also protected in the European Communities. However, when these products had arrived in the United States of America, they were not defined in the same manner, but under collective or certification marks, which was the only system of protection available. The Delegation saw a problem in keeping with the definition when a geographical indication was protected as a collective mark, because the product "could" and not "should" be defined by certain characteristics.

23. The Delegation of France noted that individual or collective marks, and geographical indications were two different subject matters while marks were private rights, geographical indications were collective rights, and in France the protection of geographical indications was based on a structure where recognition and registration of geographical indications was public, with a role played by the producers. In certain countries, there was a question of choice of legislation to protect geographical indications, whereas in other countries, the lack of legal means forced owners to protect geographical indications as trademarks.

24. In reply to the intervention made by the Delegation of France, the Delegation of Australia explained that, in that country the emphasis in the protection of geographical indications was not on government control but rather on a private or collective role. Australia protected geographical indications through certification marks and this was acceptable under Article 22 of the TRIPS Agreement. The Delegation further explained that the Wine and Brandy Act had been enacted and that this legislation dealt with geographical indications in relation to wines and spirits. In a number of instances, protection was sought through the certification marks system which was thought to add value to the protection of the geographical indications for wines and spirits.

25. The Delegation of the United States of America noted that the TRIPS Agreement identified intellectual property rights as private rights, either where the rights were asserted by government agencies (national or sectional) or by legal or natural persons. The Delegation added that it was not necessary to conclude bilateral, multilateral or free trade agreements, to get protection for foreign geographical indications in the United States of America. The Delegation felt that the main objective of this protection was to prevent that consumers be deceived about the source and the quality of goods and services, to which end competition was the best means.

26. In response to a comment made by the Delegation of the European Communities, the Delegation of Australia explained that in this country there was no risk of confusion in the public. The certification marks system provided for examination prior to registration, and at that stage it was necessary to prove the existence of an objective link

between the product and the place from where the origin was claimed. In addition, another sign containing an identical or similar geographical name could not be registered.

27. The Representative of AIPPI pointed out that the TRIPS Agreement did not require any special type of protection. Article 23.4 only referred to negotiations for a registration system of geographical indications for wines and spirits. TRIPS called for protection against misleading use of geographical indications, or their registration as trademarks. Therefore, a law on unfair competition or misleading advertising could be used to fulfill the requirements. Registration of geographical indications was done through various systems: a system of appellations of origin (i.e. in France), a *suigeneris* system (i.e. the European Communities) and systems of collective marks and/or certification marks. With regard to paragraph 32 of document SCT/9/4, the Representative felt that it was not appropriate to say that a collective mark informed the public about certain particular features of the product, because an applicant of a collective mark did not have to show the characteristics of the goods or services for which registration was sought. The Representative further noted that the system of certification mark was more appropriate for geographical indications.

28. The Delegation of the European Communities, also speaking on behalf of its Member States, noted that in that jurisdiction, it was possible to register collective and certification marks. Producers could always choose how they wanted to protect themselves against unfair use, however the best way to protect geographical indications was according to a law on geographical indications. The Delegation acknowledged that the TRIPS Agreement did not force Member States to implement a registration system for the protection of geographical indications but provided for protection in cases of undue use. As to the protection of geographical indications through collective or certification marks, a question concerning applicable law could arise for the examiner, and at a later stage for courts, in case of undue use. For this reason, the Delegation suggested that it was necessary to draw a clear distinction between the different types of industrial property protection.

29. In response to the intervention made by the Delegation of the European Communities, the Delegation of Australia noted that, in many countries interested persons could consult existing databases to confirm whether or not the elements of the definition were present in a given designation. In Australia the registration of certification marks relating to geographical indications was governed by two sets of rules, firstly those rules which applied to all certification marks and secondly, rules which permitted the examiner to determine the link between the good and its geographical origin. The Delegation added that in that country, there was no problem with choice of law, as Trademark Law, which governed the certification marks system, provided the means to protect geographical indications. In case of dispute, the competent authority would apply that set of rules to examine the process and determine infringement action.

30. The Delegation of Canada recalled that the TRIPS Agreement gave Member States flexibility as to how they wished to implement their obligations and explained that its country fulfilled its obligation through a certification marks system. The system provided for national treatment and was cost effective.

31. The Delegation of Panama explained that the law of that country contained precise definitions for appellations of origin and indications of source. The definition of appellations of origin was similar to that of Article 22.1 of the TRIPS Agreement, and the link between the sign and the geographical place was established in addition to a specified quality. In Panama, the holder of national appellations of origin was the State, whereas indications of source could be used by any person established in the country who undertook a commercial or industrial activity or provided services. In addition, the law defined indications of source as the expression or the sign used to indicate that a product or service comes from a country or from a group of countries, a region or a specified place. With regard to collective marks it was necessary that the applicant be part of an association of producers and that he comply with pre-established regulations for the use of the mark, and as to certification marks, they could only be used by individuals who were duly authorized and controlled by the holder of the mark, according to the relevant regulations.

32. The Delegation of Argentina raised a general question concerning the last phrase of paragraph 7 of document SCT/9/4, which stated that the criteria defining geographical indications seemed less restrictive than the criteria defining appellations of origin. This Delegation also considered that the last phrase of paragraph 52 was premature as it stated that in the case of geographical indications, the production of the raw materials and the development of the product were not necessarily situated in the defined geographical area. The Delegation pointed out that in paragraph 50, Agricultural Labels were included, although this topic had not been previously discussed in the framework of the SCT and probably was not connected with intellectual property rights.

33. In reply to the intervention by the Delegation of Argentina, the International Bureau explained that document SCT/5/3, paragraph 15 summarized the differences between the criteria defining geographical indications and appellations of origin. In respect of the first line of paragraph 52, the Spanish version mentioned “apelación de origen” instead of “denominación de origen,” thus the Spanish text would need to be amended. Agricultural Labels had been included in view of the comprehensive character of the document.

34. In response to a question by the Delegation of Sri Lanka, as to the type of criteria used by Member States to examine certification and collective marks for geographical indications, the Delegation of Australia clarified that in this country, there was a two-step process, the first step took place at the Trademark Office, and the second before an independent body, the Consumer and Competition Commission, where issues of public interest were raised. There was a detailed analysis of the capacity of the applicant to comply with the rules concerning the mark. There was also the assessment of the link to the place of origin, and of the characteristics. The application for certification marks was published for oppositions by both domestic and foreign parties. After registration, the mark could be challenged if it was deceptive or misleading, or where there was no link with the place of origin.

35. On the same question, the Delegation of the United States of America pointed out that the system in that country also included a two-step approach. For parties seeking registration as a certification mark, there was first an administrative review, which took place at the Patent and Trademark Office, with regard to the statutory and regulatory guidelines. Then the mark was published to allow for oppositions prior to registration. However, at any point during the life of the registered mark or at any renewal, the mark could be challenged by third parties if it was deceptive. The Delegation inquired of other Member States, and particularly those applying *suu generis* systems of protection about the legal means available in their jurisdictions for foreign interested parties to challenge registrations.

36. The Delegation of France explained that the procedure in its country was initiated by an application from the producers of a region, which was submitted to the National Institute of Appellations of Origin for initial investigation. The application was then published in the press at local, regional and national level to allow for any third party, including trademark owners, to make comments which were examined by the body and which could eventually bring down the procedure for registration. At the end of the entire procedure, there was a Decree, which was published in the Official Journal of the French Republic, a widely accessible means, and even at this stage, the appellation of origin could be contested by third parties.

37. The Delegation of Switzerland stated that some countries had in their legislations the concept of appellations of origin in addition to the concept of geographical indications, and the former was more restrictive because the link to the place of origin was stronger since all the factors of production had to come from the same region. Although the definition of Article 22.1 of the TRIPS Agreement, did not contain this requirement, it did not prevent members from granting more extensive protection, such as "qualified" geographical indications, (i.e. appellations of origin). Furthermore, this Delegation pointed out that the nationality of the opponent did not play a role in the availability of means to contest a geographical indication.

38. The Delegation of Romania noted that in the law of that country the definition of geographical indications was inspired from the TRIPS Agreement. There was a procedure for registration with the industrial property office and normally the applicant was an association of producers which carried out activities in the geographical area concerned. The office granted a registration only after the Ministry of Agriculture had certified the characteristics of the products and their origin. There was an opposition period after publication in the Industrial Property Bulletin, and the registration could be cancelled from the register in the case of non-compliance with the regulations.

39. With reference to the intervention made by the Delegation of Argentina earlier in the session, the Representative of AIPPI disagreed with the view expressed by that Delegation concerning paragraph 7 of document SCT/9/4 and stated that it was clear that the definition of appellations of origin, as set forth in the Lisbon Agreement was much more restrictive than that contained in the TRIPS Agreement. In addition, an appellation of origin had to be a geographical name, whereas a geographical indication could be another name or indication, and under Lisbon the product had to have quality and

characteristics, while according to TRIPS the product had to have quality or any other characteristics. Regarding paragraph 52, whether all the raw materials had to come from the region concerned or whether some could come from other regions or countries, the Representative concurred with Argentina that this question could not be deducted from the definition and that, it could perhaps be a subject for further discussion, together with other questions, such as whether producers located in proximity to the geographical area could be allowed to use the geographical indication.

40. The Delegation of Australia underlined that the TRIPS definition implied that not all of the raw materials or the entire process needed to come from the geographical area. The Delegation inquired of other Member States as to the way in which this question was interpreted in their jurisdictions, and in particular whether producers in adjoining areas were allowed to use a geographical indication or whether materials could be sourced from other places.

41. The Delegation of the Republic of Korea, supported by the Delegation of Mexico noted that this discussion had been a good opportunity to learn about the legal systems and practices of other countries regarding the protection of geographical indications and suggested that the International Bureau prepare a collection to be used by Member States of the SCT.

42. As to the requirement that all raw materials and parts of the production process come from a defined geographical area, the Delegation of Sri Lanka noted that it was useful in this context to compare the definitions contained in TRIPS and in the Lisbon Agreements. The definition in the Lisbon Agreement had two essential features, firstly the name that was used should serve to designate a product originating therein, and secondly, the geographical environment was essential. Very similar wording was used in the TRIPS definition: the indication had to identify goods as originating in a territory and secondly, it had to have a characteristic, quality or other reputation which was essentially attributable to that origin. In both definitions, the wording referring to the essential attributes remained the same, therefore whatever the position was under the Lisbon Agreement in relation to the use of raw materials, products, etc., this remained essentially the same as far as the TRIPS definition was concerned.

43. In reaction to the comment made by the Delegation of Sri Lanka, the Delegation of Australia noted that there were clear links between the two definitions. One important feature of the TRIPS definition was that a given quality, reputation or other characteristic of the good was essentially attributable to its geographical origin and while the Delegation of Australia recognized that each Member was free to apply this provision as it understood it in its own legislation, the TRIPS requirement was a very high standard equivalent to the Lisbon standard.

44. The Delegation of Mexico was of the view that, while both definitions were indeed very similar, the definition of appellations of origin was more restrictive. A geographical indication allowed for a part of the production process to take place outside of the geographical area, since the requirement was that the quality, reputation or other characteristic be "essentially" attributable to the place of origin, while according to the

Lisbon definition, even the process had to come from the same geographical area, because the quality and reputation were linked to human and other factors particular to the area.

45. As to the suggestion made, that the Secretariat prepare a comparative study of laws on geographical indications in different Member States, the Delegation of the European Communities, also speaking on behalf of its Member States expressed the opinion that this study was perhaps not a priority, as any interested party could consult the relevant legal texts in the already existing collections, both at WIPO and at the WTO. The Delegation agreed with the Delegation of Argentina that it was up to each Member to appreciate the conformity of its legislation with the minimum eligibility criteria for geographical indications in the TRIPS Agreement. As to the observations made by several delegations about the requirement that the entire process occur in a limited geographical area, this Delegation recalled that Article 22.1 did not explicitly provide for this, but it required that the geographic link be established in a convincing manner. The way in which this was applied to concrete cases depended on the nature of the product. Sometimes the link could be an animal species or a plant variety indigenous to a determined geographical area. The aspect of reputation was also important in determining a geographical indication and creating a reputation sometimes involved significant economic investment, which also justified the need for protection.

46. The Delegation of the United States of America expressed the view that some of the language included in Article 22.1 of the TRIPS Agreement was difficult to interpret, for example the notion of reputation, and in this context the Delegation wondered whether the relationship just noted by the Delegation of the European Communities between reputation and economic investment was appropriate. If this were the case, products currently identified by trademarks (i.e. Coca-Cola, Budweiser), which represented reputation as coming from a particular Member State and where there had been significant investment to create and maintain that reputation, could be eligible for protection as geographical indications. f

47. The Delegation of Moldova stressed the fact that there were substantial differences between the notions of geographical indications and appellations of origin. There was an analogy between the two notions on the element of geographical origin, however appellations of origin were more rare and more valuable. The two objects of protection were different and this Delegation wondered if there was a need to protect both. The Delegation asked whether other Member States had legislation allowing protection for geographical indications and also for appellations of origin.

48. Concerning the observation made by the Delegation of the United States of America, the Delegation of the European Communities, speaking also on behalf of its Member States, noted that reputation was certainly one of the elements of the definition of geographical indications in Article 22.1 of the TRIPS Agreement. However, this element was not to be considered in isolation and every product seeking to obtain protection had to fully satisfy the criteria of eligibility contained in that Article, which was a minimum standard.

49. The Delegation of the Russian Federation said that it was preferable to keep the concepts of trademarks and geographical indications separate. A geographical indication existed without external participation, while a trademark was a creative element, invented by a human being.
50. The Representative of AIPPI supported by the Representative of another non-governmental organization (CCI) pointed out that, the question raised by the Delegation of the United States of America of America helped illustrate the difference between trademarks, geographical indications, and appellations of origin. A trademark, and even a well-known trademark (i.e. Coca-Cola), was not the name of a place or territory. The fact that the headquarters of the trademark owner were located in a particular country did not grant it a particular origin, because a company could be incorporated anywhere. The requirement in a geographical indication was that the name identify a product as originating in the territory of a Member. Although in some cases trademarks, and specially well-known trademarks suggested a particular origin, this was not their main function according to trademark law. In some cases, geographical indications could become trademarks, but the reverse was hardly foreseeable.
51. The Delegation of Australia asked Member States of the SCT to provide details on how they assessed the objective link in their jurisdictions, particularly those countries which were Lisbon Members. Referring to the “Coca-Cola” example mentioned earlier in the session, the Delegation wondered if such an extreme case could help push the boundaries of the discussion to better understand the concepts under review.
52. The Delegation of European Communities, also speaking on behalf of its Member States, supported by the Delegation of the Republic of Korea, affirmed that using extreme cases could not contribute to the discussion on the definition of geographical indications. Perhaps every day examples could be more illustrative and allow Member States to share their national experiences. The Delegations said that, apart from the definition itself, it was important to look at aspects of its application to concrete cases. In the European Communities, once an application for the registration of a geographical indication was received, a file was established and the distinctive character of the proposed indication was checked just as with trademarks.
53. The Delegation of Yemen said that while there was an agreement amongst Member States on the definition of geographical indications, there seemed to be differences as to the means and methods employed to ensure protection of this type of intellectual property right. There was some ambiguity with respect to geographical indications because they were separate from trademarks. Some geographical indications were famous but others were less known and information existing in one office was not transferred to other offices. In Yemen, registration of geographical indications, both national and foreign, was done through trademark law and the procedure included verification and publication as well as an opportunity for opposition. Indications were not registered if they were likely to lead the consumer public to confusion. It was also possible to cancel registrations by judicial order.

54. The Delegation of Argentina agreed with the comment made by the Delegation of Australia that the link between the place of origin and the product was fundamental to determine a geographical indication. In the opinion of the Delegation, the question to be addressed was whether or not a geographical indication could be protected on the basis of reputation, without taking into consideration any other characteristics linking it to the geographical area. The Delegation objected to the idea that the link could be established through investments made in the promotion of a product. Could one claim a geographical indication solely on the basis of reputation and independently of the idea that the consumer or the public at large had of this indication? What was really the basis of reputation? Did reputation mean knowledge by third parties? Did it mean that consumers should know that a product had a direct link with a certain territory? The Delegation added that perhaps parameters were needed to determine reputation, just as parameters had been established to determine well-known marks.

55. The Delegation of the European Communities, also speaking on behalf of its Member States clarified that in its view, one of the ways to prove the link was reputation, and one important aspect behind reputation was the economic value of the investment made to promote that reputation. In fact, reputation was territorial, and was determined by each member with reference to specific cases. Reputation needed not be national or regional, as many geographical indications were only known in one locality and were never exported. The legal and economic implications of this type of indications were obviously very different to those of famous indications.

56. The Delegation of Guinea noted that with regard to the definition of geographical indications, the basic principle to be followed was territoriality and the link to be considered was the link of a product to human factors. If a trademark was well-known through investment, human factors might not be taken into consideration, thus a product protected by a trademark would not be suitable for protection as a geographical indication. In fact, the same product, with the same qualities could be produced outside of the territory of origin. This was precisely the case with "Coca-Cola" a well-known mark around the world, and a product which could be produced in many countries under different conditions.

57. The Representative of ECTA expressed the opinion that a broad definition of geographical indications could become an impediment to the free flow of goods around the world. This was incompatible with the object and purpose of the TRIPS Agreement. According to the Representative, throughout the history of geographical indications, names which had no link with the geographical area had been registered both under the Lisbon Agreement and under bilateral agreements. The Representative also recalled that recently, in the "Parma Ham" case before the European Court of Justice, the Advocate General had pointed out that there was a tendency to protect designations as geographical indications and thereby create barriers to trade.

58. In reply to a question by the Delegation of Australia, the Delegation of France explained that the recognition of geographical indications in this country was a lengthy process, which took into account different parameters such as: the link between the product and the geographical origin, the know-how of the producers, etc. In order to

determine these elements, there were technical investigations and an inquiry commission was designated. Another important parameter was reputation and all appellations of origin and geographical indications were by definition well-known although at different levels. Some of them were known regionally or nationally and the concept of territoriality applied. The Delegation added that geographical indications applied to products which already existed and which had a reputation based on a particular method of processing. To develop that reputation, economic investment was required, with the objective of developing high-quality products.

59. The Delegation of Cuba commented the experience of that country with the registration of geographical indications, and in particular appellations of origin. In order to establish the link, the applicant, whether a natural or legal person had to be established in the geographical area of production, and this was an aspect of paramount importance. In Cuba, the application procedure was transparent, it included a publication and the possibility of filing observations and objections by any person. In case of non-compliance with all the legal criteria required, there was also a possibility to request nullification and cancellation of the registry.

60. With reference to comments made earlier in the session, the Delegation of the European Communities, also speaking on behalf of its Member States explained that, according to their legislation when a request for geographical indication was contested, the contesting party could initiate a cancellation procedure. Then, it was up to the courts to decide whether the designation applied for was a geographical indication or not, and since there was the possibility of judicial review, it was not appropriate to say that many geographical indications were abusively registered. The Delegation added that the example of bilateral agreements was not useful for the general approach which was needed in the context of this discussion.

61. The Delegation of the Russian Federation affirmed that, in fact most if not all trademarks were related to a country of origin and thereby implicitly referred to a geographical indication. Thus, either one had to accept that a trademark could at the same time be a geographical indication, or else draw a clear distinction between the two concepts.

62. In reaction to the comments made by the Delegation of the Russian Federation, the Delegation of France concurred that there should be a clear distinction between trademarks and geographical indications, however most of the time there was a peaceful coexistence between the two types of protection. For example, in the case of the appellation of origin "Champagne," there was on the one hand the name of the protected appellation displayed on the label of bottles and on the other, the trademarks of different producers. The trademark distinguished the producer of the champagne and possibly his know-how. Thus, for the same appellation of origin there could be several trademarks.

63. The Delegation of United Kingdom observed that part of the difficulty in making progress on the discussion was perhaps the fact that some countries used the trademark system to protect geographical indications and others did not. According to the Delegation, it seemed that, when there was only one product of one producer trademark

protection was appropriate but when there were products produced by more than one producer the general concepts of geographical indications or certification trademarks were more appropriate. The Delegation questioned whether it was useful to pursue the line of whether a product was produced by more than one supplier.

64. The Delegation of the Republic of Moldova informed the SCT that, following the recent accession of that country to the Lisbon Agreement, 763 requests for appellations of origin had been considered. The conformity of these requests with national legislation had been checked. Applications could be refused if they did not comply with the definition contained in the Lisbon Agreement. The appellation needed to come from a territory of the country, it had to include the historic name of the product, it had to be used for the designation of a product with special qualities, determined by natural factors. The legislation of the Republic of Moldova provided that a foreign applicant needed to furnish proof that he intended to use the appellation in the country of origin, and it was up to authorities in that country to appreciate the qualities of the product, the natural and geographical factors. The question of priority was also important.

65. In response to the comments made by Delegation of the United Kingdom, the Delegation of the European Communities, also speaking on behalf of its Member States, said that geographical indications were collective rights, and this was a fundamental feature. Only in exceptional cases the regulations provided that the applicant of a geographical indication could be an individual and there were some well-known examples in the United Kingdom. However, individual applications did not prevent other producers in the same geographical area to apply for the right to use the name. One of the consequences of geographical indications was to allow a group of producers to apply for a collective right, which was a comprehensive concept and not a permanent "acquis", as others who respected the criteria could state rights in this connection.

66. The Delegation of the United Kingdom endorsed the comments made by the Delegation of the European Communities that geographical indications were collective rights, although in some cases there could be only one user of the collective right. However, a single user could be in a weaker position than if he had simple trademark rights. The Delegation noted that recently the trademark owners of "Plymouth Gin" had asked why they had geographical indications protection, as they also had a trademark protection. In the view of the Delegation, at least from one perspective, the owners of this trademark weakened their rights by having a geographical indication, because other producers in the same area could start producing gin to the same standards, which would not happen if they had simple trademark protection. In addition, differences between collective rights and certification rights were fundamental to the general issue of geographical indication protection.

67. The Delegation of Mexico noted the distinction between appellations of origin and geographical indications and said that the first was more restrictive than the latter. In Mexico, two systems coexisted: registered appellations of origin and collective marks for geographical indications. In the case of appellations of origin, the objective link included natural and human characteristics. It was required that the whole process take place in the region. The protection of geographical indications as collective marks normally

applied to a group of producers, and in that case part of the process could take place elsewhere and some of the raw materials could even be imported, because the crucial factor was the particular know-how of the producers of the region.

68. The Delegation of Switzerland explained that trademarks identified products as originating from a company while geographical indications identified products as originating in a defined area. Geographical indications did not give a monopoly in favor of one producer but gave an exclusive right of use to producers in an area, whomet the pre-established criteria. With regard to comments made earlier by the Delegation of the United Kingdom as to the advantage of having a trademark over a geographical indication to be able to exclude others from producing the same product, the Delegation said that this would not be so if certification marks were used to protect geographical indications.

69. The Delegation of Slovenia recalled that in many countries registration of geographical indications was done by the competent ministry, whereas all procedures for the registration of trademarks were done at the trademark office. The Delegation inquired how in such cases, trademark offices could determine whether a trademark application included a geographical indication and how they determined absolute grounds for refusal.

70. The Delegation of Algeria said that the commercial and economic impact of a geographical indication should be taken into account. The TRIPS definition did not solve all questions involved in the determination of the objective link. Territoriality was of paramount importance to define a geographical indication, and reputation could only go along with it but could not substitute for it. In Algeria, geographical indications were not protected if they were contrary to public order or if they were likely to mislead the public as to the origin of the goods, and an invalidation procedure could take place even after registration. Artisanal products which had reputation often existed in countries which lacked the means to promote them, and the Delegation wondered how then necessary promotion could be achieved for these particular geographical indications.

71. The Delegation of Indonesia stated that in that country geographical indications were protected as signs indicating the place of origin of goods, including geographical and environment factors, natural and human factors or a combination of both the characteristics and the quality. Protection was granted on the basis of registration, and the application had to be made by an institution representing the producers of the area.

72. In reply to the question by the Delegation of Slovenia, the Representative of AIDV pointed out that this illustrated the administrative and organizational problems faced by right holders in relation to the protection of geographical indications. Different offices in the same country dealt with trademarks and with geographical indications and the question arose how they could resolve issues which concerned matters within the competence of other authorities. The Representative referred in this context to cases where administrative tribunals, usually dealing only with trademark issues had to receive and decide on arguments by third parties that the trademark applied for had elements of a geographical indication or an appellation of origin. Normally, the answer was that they

were only concerned with the elements of trademark law, and vice versa, the authority competent for the examination of wine labels, for example, was not concerned with elements of trademarks.

73. In this connection, the Delegation of Australia explained that in this country, there were two separate mechanisms: firstly the protection through specific legislation for wines and spirits, and secondly, the certification marks system which was also used by many wine producers. In dealing with an application for a certification mark which included a geographic reference, an examiner would have to look at the rules which were associated with the application and to the extent that the link between the mark and the place was demonstrated, the mark would be allowed. In the particular case of wines and spirits, there was a slightly more elaborate process by which prior to registration of the geographical indication, the certifying agency went through a number of consultative processes to ensure that the proposed registration did not impinge on existing trademark rights. In addition, a public consultation process also took place in the region concerned, to allow other producers to assert their claims. In relation to labels, producers had to follow a number of guidelines.

74. The Delegation of the United States of America observed that in that country, notifications under Article 6 *ter* of the Paris Convention, in connection with certain designations, had raised administrative issues. However, certification marks could be challenged at the Trademark Trial and Appeal Board (TTAB). As an example, the Delegation explained that an opposition filed by the National Institute of Appellations of Origin in France against a mark "Cognac" had been successful at the TTAB. Also Scotch Whisky had been considered by this tribunal as a well-known geographical indication which could not be used by other parties.

75. The Representative of AIPPI explained that in most countries, the registration of geographical indications concerned more than one office and usually the Ministry of Agriculture. The determination of absolute grounds for refusal had to be seen in relation to national law and the examiner would normally check if the sign was confusing, descriptive or misleading. With regard to prior rights, an *ex officio* examination could take place if a database on geographical indications was available. Otherwise, a trademark could not be refused and it would be published for oppositions by third parties. In the case that the laws of a country did not provide for opposition, the trademark could be invalidated afterwards through Court procedures.

76. The Delegation of Panama expressed the view that products having a specific geographical origin could be commercialized as collective marks. In some countries, protection offered through geographical indications could be generally extended to indications identifying a producer as coming from a country, a region or a locality within a region and where the registry may or may not be required if a given quality or characteristic of the product to which it owed its reputation was essentially attributable to its geographical origin. Collective marks were generally defined as signs allowing to distinguish the geographical origin, the material, the method of production and other common characteristics of the goods and services of different enterprises using the mark. Collective marks were often used to promote products which were characteristic of a

given region. Certification marks were granted to products which complied with defined requirements, although the applicant needed not be a member of any organization or entity.

77. In reaction to these comments, the Delegation of the European Communities, also speaking on behalf of its Member States, explained that, the system in place in the European Union was based on a legal instrument which provided that, every producer located in a defined area, whose product met the criteria of eligibility could request to be incorporated, and allowed to use the geographical indication. Therefore, the system was open to any producer, and this situation was parallel to the situation under a system of certification marks. With regard to the principle of territoriality, the Delegations said that in paragraph 15 of document SCT/9/5, the International Bureau had stated that generic terms were not considered to be distinctive, and this way of introducing the subject was not necessarily relevant to the law on geographical indications, as “generic” was a concept of trademark law. In the law of geographical indications it was more appropriate to refer to “common terms”. As Article 24.6 of the TRIPS Agreement said “a term customary in common language as the common name...”. It was more appropriate to use generic to refer to absolute grounds for refusal in trademark law.

78. The Delegation of the United States of America explained that, in this country the principle of territoriality, as applied to industrial property in general, and to geographical indications and trademarks in particular, referred to the idea that intellectual property obligations could be implemented in various ways at the national level, in a manner consistent with international obligations. The Delegation wondered whether in some systems the concept of territoriality was close to the concept of “*terroir*” (the relationship of the product to a particular place within a territory). The Delegation further noted that, in relation to generic terms and geographical indications, the concept of generic terms was not relevant only to trademarks and cited as examples the terms: Parmesan, Chablis, Cheddar and Champagne, which were generic terms in the United States of America and used to describe types of products, while they were proprietary names in other Member States and perhaps even geographical indications. Thus, in the field of geographical indications as much as in the field of Trademarks, some terms were generic, they were in the public domain and were considered in common language the common name for the goods or services. In addition, genericness could be governed by the principle of territoriality.

79. The Delegation of the European Communities, also speaking on behalf of its Member States, noted that its understanding of the two concepts was identical as that expressed by the Delegation of the United States of America, from a legal point of view. This was also clearly explained in the document prepared by the Secretariat. An entirely different question was how that concept was applied in practice and in what manner a member decided whether a term was generic or not.

80. The Delegation of the Republic of Korea stated that the principle of territoriality was an established principle and a basic doctrine of industrial property laws. Geographical indications did not have to be treated differently. The country where

protection was sought had the authority to determine whether or not the name applied for was a geographical indication or whether it was a generic term.

81. In relation to a point raised by the Delegation of the European Communities, the Delegation of the United States of America sought clarification as to the possibility, under European Communities geographical indications law, to allow any producer established in a specific geographical area and whose products met the standards, to use the geographical indication. The Delegation inquired specifically how this protection applied to foreign producers seeking for protection of geographical indications in the European Communities.

82. The Delegation of Australia also sought clarification from the Delegation of the European Communities as to how the concept of generic term in relation to geographical indications was understood in that jurisdiction and how this concept was different in relation to trademarks.

83. In reply to the comment made by the Delegation of Australia, the Delegation of the European Communities, speaking also on behalf of its Member States clarified that, according to the principle of territoriality, seen as a legal principle applied for both trademarks and geographical indications, it was up to every member to define whether a name, a term or a designation was a geographical indication in its territory or whether it had become a generic term. Under the European Communities system, the definition used was that of Article 24.6 of the TRIPS Agreement, because their understanding of generic terms was in the framework of geographical indications and they did not use the term non-distinctive as equivalent to common use in everyday parlance. In reply to the comment made by the United States of America, the Delegation explained that if a foreign producer established himself in a geographical area delimited for a given geographical indication and fulfilled the requirements, the geographical indication would certainly be open to that producer.

84. The Delegation of the United States of America further inquired how foreign and homonymus geographical indications were protected under the European Communities system. The Delegation of the European Communities, also speaking on behalf of its Member States replied that protection to foreign nationals was given in accordance with the obligations established under the TRIPS Agreement. In particular, the TRIPS Agreement obliged Member States to give nationals of other WTO Member States protection against undue use of their geographical indications in the territory of the European Communities. The TRIPS Agreement did not, however, establish that registrations should be a requirement for protection, but in the European Communities the courts were open to receive complaints against undue use, under Articles 22 or 23, depending on the product. European producers would certainly receive the same type of protection in other Member States.

85. In relation to the discussion on generic designations, as reflected in paragraph 15 of document SCT/9/5, the Representative of an non-governmental organization (AIPPI) expressed the opinion that a generic term was a term incapable of distinguishing, which could therefore never become a trademark. However, a generic term was also one which

was absolutely needed by consumers and traders to describe an object, and it was necessary to prevent appropriation of that term. On the issue of territoriality, the Representative said that, in his opinion, there was a big difference between trademarks and geographical indications. In the first case, both the Paris Convention and the TRIPS Agreement provided for the territorial nature of trademark rights - with the exception of well-known marks - whereas in the case of geographical indications, Articles 22 and 23 of the TRIPS Agreement provided for absolute protection for wines and spirits in every country.

86. The Delegation of Germany noted that, in relation to the question posed by the Delegation of the United States of America on the protection of foreign geographical indications within the territory of the European Communities, the Courts in Germany would not apply the text of the TRIPS Agreement directly, however through national law, this country complied with the basic obligations imposed on all WTO Member States to provide legal means of protection in case of misleading use of geographical indications. There were two basic ways to protect geographical indications: one through the Law on Trademarks and Other Signs, whereby protection was granted on the basis of the existence of a geographical indication, without the need for registration and the law did not distinguish between national and foreign geographical indications. The second form of protection was through the Act against Unfair Competition, and in this field, the question of whether an indication was national or foreign was also irrelevant. This system was, of course, independent from the registered geographical indications at the European Communities level.

87. The Representative of ECTA disagreed with the opinion expressed by the Representative of AIPPI as to the notion that, protection of geographical indications under the TRIPS Agreement constituted an exception to the principle of territoriality. On the contrary, every state had the right to determine whether a geographical indication existed or not. In addition, the terms of Article 24.6 of the TRIPS Agreement were broadly defined and therefore, this did not mean that a geographical indication could not be refused on other grounds. The definition of Article 24.6 "a term customary in common language" was in his view broader than European Community Law, under which, there were terms that had always been customary and others which had become customary. Genericness, needed to be examined by every country separately, according to its own standards. The Representative, added that there was some degree of controversy as to whether or not a registered term could become generic, and an example which illustrated that controversy was the registration of the indication "Feta" in the European Communities. The Representative further noted that, under the Lisbon Agreement, registered appellations of origin were not to become generic. However, in his opinion, at least ten terms included in the Lisbon list had become generic terms in some countries.

88. In response to the comments made by the Representatives of AIPPI and ECTA, the Delegation of the European Communities, also speaking on behalf of its Member States, clarified that in their system, generic terms could not be registered as geographical indications. In order to determine genericness within the territory of the European Communities, it was necessary to refer to the elements of the definition of geographical indications and to criteria laid down in the appropriate legislation. All of these checks

had to be carried out prior to the registration of a name . This had been the case of the indication Feta, where the producers had presented ample evidence before the Commission, to prove that the term was neither generic, nor had become generic. According to the European Community regulation, there was a possibility of judicial review, thus any person who felt affected by this registration could apply for its nullification.

89. The Delegation of Mexico agreed with previous delegations that determination of whether a term was generic or not had to be done by the authorities of each country. As a result, names which were generic in one jurisdiction, could be geographical indications in another, and cited the case of Manchego cheese, which was a protected geographical indication in the European Communities, whereas in Mexico it was considered a type of cheese (a generic). The Delegation added however, that it was important to consider the time factor, in other words, once a geographical indication had been registered and protection had been granted in a given territory, that designation could not become generic.

90. The Representative of ECTA raised the point that the TRIPS Agreement established, under Article 16 the principle of "first in time, first in right," which meant that if there were other industrial property rights such as trademarks prior to the request for protection of a geographical indication and if the request was conflicting with those rights, the Member State did not have an obligation to grant protection.

91. The Delegation of Switzerland, referring to the comments made by the Representative of ECTA and stated the TRIPS Agreement applied the principle of territoriality for the protection of geographical indications. However, as regarded the country of origin, parameter needed to be established to determine the link. As to the relationship between geographical indications and trademarks within the framework of the TRIPS Agreement, there was a clear difference between the two concepts, and Article 24.5 established the possibility of coexistence between them. This tempered the possibility provided under Articles 22.3 and 23.2 to register a mark in the cases considered in these articles, but the Delegation did not see the principle of first in time, first in right in their relationship between geographical indications and trademarks.

92. The Representative of ECTA reacted to the comments made by the Delegation of Switzerland, by saying that a distinction had to be made between Articles 24.5 and 16 of the TRIPS Agreement. Article 16 clearly stated that the owner of a registered trademark should have the exclusive right to prevent third parties from using in the course of trade, an identical or similar sign and it was clear that the term sign also included geographical indications. In addition, the second sentence of Article 16.1 of the TRIPS Agreement clearly established the principle of prior rights. Article 24.5 in connection with Article 23 granted absolute protection to geographical indications for wines and spirits and Article 24.5 provided for coexistence.

93. With respect to the exceptions discussed in paragraph 13 of document SCT/9/5, i.e. generic character of geographical indications or continued use of terms, the Delegation of Argentina stated there was a further very important exception, according to

the TRIPS Agreement: continued use overtime, but without any link to a prior intellectual property right, in which case the use of expression that had occurred over a long period of time was allowed to continue. In addition, the Delegation disagreed with the approach of paragraph 14 of the document, as the two exceptions mentioned above did not stem from relatively rare contexts prior to the entry into force of national or international regulations. Indeed, they were more common than protection by *suigeneris* systems. Furthermore, the fact that a name had become generic in many countries was due to processes of immigration and colonization, as in Latin America.

94. In reply to the comments made by the Delegation of Argentina, the International Bureau explained that perhaps there was a problem with the drafting or the understanding of paragraph 14. Indeed, reference was made to the situation existing today, as inherited from the past. There were obviously movements of populations which created situations of fact. These needed to be dealt with the introduction of the “grandfather clause”, applicable to those periods when there were no legal norms.

95. The Delegation of Australia raised the issue of the protection of geographical indications abroad and referred to document SCT/8/5, starting in paragraph 23. The Delegations said that the document provided a useful overview of possible ways to protect geographical indications in foreign countries, namely through bilateral agreements, protection of European Community geographical indications, protection of appellations of origin through the Lisbon Agreement, and protection through certification and collective marks by way of the Madrid Agreement and Protocol. The Delegation explained that several foreign holders of geographical indications had sought and obtained protection through the certification mark system in Australia (Stilton, Ceylon Tea, etc.) and by doing so they had been able to establish certainty as to how Courts in that country understood such protection. The Delegation recalled that the Delegations of Germany and the European Communities had mentioned that protection against misuse of a geographical indication in those countries was possible through the tribunals. However, the Delegation wondered if other countries had a mechanism of positive protection for foreign geographical indications, which could provide security to the Courts.

96. The Representative of AI PPI observed that there seemed to be a great difference between specific registrations systems for geographical indications and registration of collective or certification marks. Normally, it was possible for foreigners to apply for collective and certification marks, on the basis of the Paris Convention, but an equal possibility did not exist for geographical indications registrations systems, and for this reason the European Union system was limited to residents of the EU territory, except maybe through bilateral agreements. In the view of the Representative, it was more appropriate to register geographical indications as certification marks, although a large number of countries protected geographical indications as collective marks. Most countries of the European Community allowed registration as collective marks of terms with a geographical origin, even though they were descriptive, and every member of the association who fulfilled the requirements could use the mark. The Representative further noted that this could be a way to protect foreign geographical indications, for example in the European Community. However, the protection granted through

collective marks would be lower than the protection under certification marks or a sui generis system of registration.

97. Referring to paragraph 33 of document SCT/8/5, the Delegation of the United States of America emphasized that the Madrid Agreement and Protocol provided for the protection of certification marks. Since this was an open system, which allowed for notice and for the possibility of opposition and cancellation, and was used by a fairly large number of WTO Member States, it could provide an easy international mechanism for the protection of geographical indications via the certification mark system.

98. In reaction to this comment, the Delegation of Switzerland noted that although certain Member States of the Madrid Agreement used trademark law to protect geographical indications, this was not the case in all Member States. When a country under the Madrid Agreement or Protocol received an application for the registration of a mark, which included or consisted of a geographical indication, the country would examine the application according to its own criteria, and on the basis of the conditions for validity of the trademark, i.e. distinctiveness, origin of the products, etc. This meant that in many countries, if the mark was a simple geographical indication, it could not be registered as a trademark because it did not have a distinctive character, but it would rather be registered as a geographical indication.

99. The Delegation of the United States of America, said that some of the recent interventions had stressed the existing differences between the common law and civil law systems and stressed the importance of establishing definitions. The Delegation wondered whether it would be more suitable for the SCT to focus on the elements which led to protection. For example, elements that attended to establish the characteristics of the good, or the meaning of "essentially attributable to its geographical origin" and how this concept was established. Perhaps by reaching common understandings on these points, it would be possible to reach a common understanding on the definition of geographical indications.

100. The Delegation of the European Communities, also speaking on behalf of its Member States, said that in document SCT/9/4, the Secretariat had clarified the differences between trademarks and geographical indications, and other parts of this document had already addressed the concerns raised by the Delegation of the United States of America.

101. In response to a question raised by the Delegation of Argentina as to the impact of registering geographical indications as collective trademarks, on the substantive rights of holders, the Delegation of Germany explained that such registrations were possible only when they were contemplated in the national legislation of the receiving country, as was the case for Germany. The Delegation of the European Communities, also speaking on behalf of its Member States, added that in certain cases, a product which received protection as a geographical indication or appellation of origin under national legislation had to be protected by a collective mark if the country where that product was exported did not provide for another type of protection.

Internet Domain Names and Geographical Indications

102. The Delegation of the European Communities noted that the question of protection of geographical indications in the domain names system (DNS) is a complex matter, and requested the International Bureau to prepare a summary document, setting out the advantages and disadvantages, clarifying objectives and describing the steps involved in implementing protection for geographical indications in the DNS. The Delegations of Malta, Mexico, Sweden, Sri Lanka and Turkey supported this request. The Delegation of Switzerland supported the request for such a study, and added that it should examine the extent to which the protection accorded to trademarks under the uniform administrative dispute resolution policy (UDRP) could apply to geographical indications.

103. The Delegation of the United States of America stated that, while it did not object in principle to the carrying out of such a study, this exercise was likely to be controversial and the International Bureau should be permitted to fully explore the issues raised, including the current facility for complainants holding collective or certification marks to access the UDRP with respect to geographical indications, the relationship between notifications under Article 6ter and actions brought under the UDRP, the role of traditional expressions as geographical indications, and how homonymous geographical indications would be treated.

104. The Delegation of Australia strongly supported the request for a study by the International Bureau that compiled discussions of the issues raised by protection of geographical indications in the DNS, but expressed its reservation to discussion of the advantages and disadvantages of such protection, noting that this implied a statement of views on the part of the International Bureau. The Delegation of Australia further noted that it was important that any implementation of protection of geographical indications in the DNS was not granting new rights in such names, but recognizing an existing intellectual property right for protection against abusive or bad faith use of such indications in the DNS.

105. The Delegation of Japan emphasized that it was important to take account of the rapid changes in the Internet society, and that excessive protection of names such as geographical indications could create problems for registration authorities and decision-makers attempting to decide the scope of protection. The Delegation noted the diversity of opinions in discussions on this issue, including in the TRIPS Council and SCT, over fundamental issues concerning protection of geographical indications in the physical world, including their definition, means and scope of protection, and exceptions to protection. The Delegation expressed strong doubt as to whether it was possible at this time to usefully discuss this issue in the context of the DNS, and suggested that such discussions be postponed until there was further development in discussions on protection of geographical indications in the physical world. The Delegations of Argentina, Australia, Canada, Czech Republic, Mexico, the Republic of Korea, Turkey and the United States of America of America, expressed similar concerns.

106. The Delegation of Mexico added that protection should only be extended to geographical indications in the DNS once there exists legal certainty or minimum consensus as to how to protect such indicators in the physical world. In the absence of such consensus, the Delegation requested that these discussions be postponed. The Delegation of Argentina agreed with this remark, and noted that lengthy discussions concerning protection of geographical indications in the physical world had not yet been resolved.

107. The Delegation of the European Communities noted that, by its decision in September 2001, the General Assembly required the SCT to discuss the issue of protection of geographical indications in the DNS, and to reach a decision. The Delegation noted that it had shown flexibility in earlier discussions and requests concerning geographical indications, and that similar flexibility should now be extended to consider protection of geographical indications in the DNS, which was an issue of importance to its Member States. The Delegation noted that, after three years of discussions, a constructive resolution was now required to the problem of registration of geographical indications as domain names by persons not entitled to use such identifiers, as established by the TRIPS Agreement. The Delegation noted that no consensus was required as to a single system for protection of geographical indications in the DNS, but that the minimum protection required by the TRIPS Agreement could be accorded through various means of protection, and that this was consistent with extending a measure of protection to geographical indications in the DNS.

108. The Representative of AIDV noted the recent resolution of its General Assembly that expressed the AIDV's concern with the registration of domain names containing all or part of geographical indications by persons not entitled to rights in such names. The Representative emphasized the need for respect for such intellectual property rights, as established in the TRIPS Agreement, and stated that geographical indications should be accorded protections similar to that granted to trademarks in the DNS.

109. The Delegation of Sri Lanka noted that, while there exists a divergence of views as to how to protect geographical indications, there is a general agreement on the need and obligation to protect such indicators under the TRIPS Agreement. The issue is therefore the manner in which such identifiers must be protected. The Delegation stressed the urgency with which this issue must be addressed, and a study conducted by the International Bureau, and noted that any delay would allow third parties to register geographical indications as domain names, thereby aggravating the question of alleged acquired rights.

110. The Delegation of Sweden agreed with this proposal.

111. The Delegation of Australia noted the divergence of views on this issue and proposed that, while such discussions should continue in the SCT, clarification was required as to the substance and timing of future work in this area.

112. The Delegation of Argentina emphasized that the issue of protection of geographical indications in the DNS implicated broader questions as to the scope, object and manner of protection that required a coherence or agreement on the underlying issues (for example, what lists of names would be protected in the DNS, and what treatment would be given to generic terms).

113. The Delegation of the European Communities noted that no list of names of geographical indications was required in order to grant protection in the DNS, in the same way that no such list existed in order to grant protection to trademarks. The Delegation noted that, in the case that a domain name registrant had a right to use the geographical indication and its use was non-abusive, then the first-come, first-served principle of domain name registration would apply.

114. The Representative of INTA noted the fundamental principle of comparative law that different legal systems could achieve a similar solution by means of different procedures or terminology – for example, the protection of business entities under corporate law in common law jurisdictions, and as SARL in civil law jurisdictions. The Delegation noted that discussions in the SCT revealed a common approach to the issue of protection of geographical indications in the DNS.

115. The Delegation of France, referring to the intervention of the Representative of INTA, noted that geographical indications were subject to various forms of protection, including as collective or certification marks that were eligible for protection under the current UDRP.

116. The Chair concluded that all Delegations supported further examination of the question of protection of geographical indications in the domain namespace (DNS), and had requested the International Bureau report to the Committee and outline approaches for future discussion.

117. The International Bureau indicated that the requested study would summarize the issue of protection for geographical indications in the DNS, set out the advantages and disadvantages of including the protection of geographical indications in the uniform administrative dispute resolution policy (UDRP), and note the challenges and differing views in this area.

Internet Domain Names and Country Names

118. Discussions on the protection of country names in the Domain Name System (DNS) were based on documents WO/GA/28/7, WO/GA/28/3 and SCT/9/7.

119. The International Bureau recalled that, at its meeting from September 23 to October 1, 2002, the General Assembly of Member States of WIPO had noted that all delegations had approved the recommendations of the SCT concerning country names with the exception of those of Australia, Canada and the United States of America of

America. It added that the General Assembly had further noted that a number of issues concerning the protection of country names in the DNS required examination in greater depth. It specified the following three questions:

(a) the list to be relied upon to identify the country names that would benefit from the protection envisaged;

(b) the extension of the deadline for the notification to the Secretariat of names by which countries are commonly known;

(c) how to deal with acquired rights.

120. The Secretariat recalled that the General Assembly had decided that the debate should continue within the framework of the SCT with a view to reaching a final decision.

121. The Delegation of Mexico, on reading document SCT/9/7, expressed surprise at the small number of countries that had notified the International Bureau of the names by which they were commonly known. It wondered finally whether that was an indication that few countries that actually wanted country name protection in the DNS.

122. Replying to a question raised by the Delegation of Australia on the wisdom of drawing up a list of country names, the Secretariat recalled that the SCT recommendations on country names, approved by most delegations in September 2002, included the extension of protection to potentially misleading variations on country names. It mentioned a certain number of examples of such potentially misleading variations, including "Holland" for the Netherlands, "Russia" for the Russian Federation, or the more difficult matter of "Siam" for Thailand. It recalled that the idea behind the drawing up of a list of countries was to accommodate these few instances of potentially misleading variations on names in order to ensure that they too were protected. It also added that the concept of potentially misleading variations should not only with the name itself but also with the risk of possible association between the owner of the domain name and the constitutional authorities of the country concerned.

123. The Delegation of Japan, while favoring the proposal to consider the question of country name protection in the DNS, said that it was necessary to discuss the legal foundation underlying that protection. The Delegation also pointed out that it did not wish to have UDRP principles extended to country names. It was however in favor of registries being provided with a list of country names.

124. The Delegation of Canada recognized that, even though most delegations wished to have country names protected in the DNS, the manner in which the protection system would be administered in practice was still unclear. The Delegation emphasized the importance of an effective and inexpensive domain name registrations system that allowed for the evolution of the Internet, adding in that connection that it was of prime importance that the rules to be laid down for the virtual world should be relevant to the rules that

already existed in the real world. The Delegation made it clear that it supported in principle the control of country name abuse in the DNS, but that it did not recognize the rights of countries in their names. Consequently it did not support the idea of a country being able to reserve its name in the DNS in order that the domain name corresponding to the name of the country in question might be used only by that country's constitutional authorities. The Delegation maintained that, before ICANN could take any action with a view to protecting country names in the DNS, States should introduce the right degree level of protection to be afforded to country names under generally applicable international principles and treaties. In that connection the Delegation considered it inappropriate to ask ICANN to establish new rights while States were not even capable of setting the appropriate level of protection. It ended by declaring itself in favor of the consensual approach which consisted in continuing the discussions on the protection of country names in the DNS.

125. Like the Delegation of Canada, the delegations of Australia, United States of America and the Representative of INTA dismissed the idea of a country being allowed to reserve its own name in the DNS.

126. While some delegations were seen to be sceptical regarding the establishment of a list of country names, the delegations of Australia, Egypt, France, Germany, Greece, Mexico, Spain, Sri Lanka and the United Kingdom declared themselves in favor of establishing such a list, which would be based on the UN Terminology Bulletin. Several delegations (Australia, Egypt, Spain, Sri Lanka, United Kingdom) said that the list could also include the names by which countries were commonly known and two delegations (Australia and Sri Lanka) were also in favour of including to the list potentially misleading variations.

127. The Delegation of the European Communities suggested that the period allowed for the notification to WIPO by Member States of the names by which their countries were commonly known should be extended.

128. The Delegation of Australia, while recalling that it was not itself in favor of protecting country names in the DNS, pointed out the General Assembly had decided on such protection, and that attention should therefore be returned to its procedural aspects. In that connection the Delegation declared itself in favor of drawing up a list containing the official names of States in both the long and the shorter forms, the names by which the countries were commonly known and also potentially misleading variations.

129. The Delegation of Brazil declared itself in favor of continuing discussions on the question of the protection of country names in the DNS. It added that examination of the replies to the questionnaire on country names circulated among WIPO Member States by the International Bureau would allow the essential features of this issue to be identified, and could serve as a basis for future discussion.

130. The Delegation of the United States of America returned to the statements made by the Delegations of Canada and Japan, and said that, in view of the lack of consensus on the legal foundation that should underlie country name protection in the DNS, a

preliminary study should be undertaken in order to identify the general principles of intellectual property law. It also noted that, if UDRP principles were extended to country names, the question of a sovereign State invoking its immunity where a defendant went to court would arise even when there were no consensus on the matter of sovereign immunity. That however was a matter with which the SCT should not have to concern itself, and so the Delegation concluded that it did not wish to continue to work on the question for the time being.

131. The Delegation of Mexico said that, if it were decided that protection would be confined to those names alone that appeared in the UN Bulletin, it was willing to have the name “República Mexicana” removed from the list of commonly used country names notified to the International Bureau.

132. The Delegation of Japan said that UDRP principles should not be extended to country names. As for the list to be used, the Delegations said that it wished to have the list based on that appearing in ISO Standard 3166. It added that it wished to prohibit the misuse of country names in the DNS, but that a discussion in greater depth was necessary.

133. A certain number of delegations (Mexico, Spain, United States of America) expressed concern regarding the possibility of making comments on the list of commonly used country names notified to the International Bureau.

134. In reply to a question made by the Delegation of Australia as to whether States were willing to give up their immunity in connection with the UDRP principles, the Secretariat recalled a certain number of provisions applicable in the framework of the UDRP. Among other things it mentioned that, on filing a complaint, the plaintiff undertook to recognize, in the event of the defendant going to court, the jurisdiction of the place in which the registry was located or that of the defendant's domicile. A certain number of States, including Australia, Norway and Turkey, had lodged complaints under the UDRP and in doing so had renounced their immunity. The International Bureau added that, as far as the extension of UDRP principles to the names and acronyms of intergovernmental organizations was concerned, the organizations had said that they did not wish to submit to the jurisdiction of one country in particular, and that it had actually been agreed that the UDRP would be amended to provide for *denovo* examination in connection with an arbitration procedure, and therefore to rule out recourse to the courts.

135. The Chair recalled that it had been proposed that the list of country names to be protected should be based either on the list appearing in the ISO Standard 3166 or on the UN Bulletin, or alternatively that work should continue on that question. She proposed setting December 31, 2002, as the date on which work on the issues should be completed, and ended with a reminder that the matter of acquired rights had also to be dealt with.

136. The Delegation of Mexico endorsed the Chair's conclusions, adding that it might be useful for the International Bureau to draw up a document containing suggestions for possible options available to the owner of a domain name in the event of a State party to a dispute refusing to renounce its immunity.

137. The Delegation of Australia declared its concern regarding the question of extending the time limit to December 31, 2002, while there was not even a process concerning the fate of the list.
138. The Delegation of Yugoslavia wondered how in a case of a country changing its name would be dealt with.
139. The International Bureau took the opportunity to mention that the UN Bulletin was a sound basis in as much as its regular updating reflected any changes that might have been made to a country name.
140. The Delegation of Venezuela wondered whether certain terms appearing in the UN Bulletins such as “Government” or “Confederation” were also going to be protected as such.
141. The Secretariat stated once again that a decision had to be taken regarding the list on which the protection of country names in the DNS should be based, namely the list appearing in ISO Standard 3166 or the UN Terminology Bulletin. It emphasized in that connection that the discussions had revealed a majority of delegations favoring the use of the UN Bulletin. While recalling that conclusions had to be reached on the matter of acquired rights, some delegations at the special sessions had proposed the payment of compensation to the owners of domain name registrations that corresponded to country names where those owners had no connection with the constitutional authorities of the countries concerned. It did however point out that such an approach would raise a certain number of difficulties, such as the calculation of the amount of compensation. It suggested that the simplest approach might be to protect country names against future registration as domain names in gTLDs. It added that such an approach could more easily be applied in the ICANN framework.
142. The delegations of Australia, Germany, Greece, Japan, Mexico, Spain and the United Kingdom supported the approach proposed by the International Bureau, which consisted in protecting country names against future registration as domain names in gTLDs.
143. The Delegation of Spain said on the other hand that, in the case of registration in bad faith, UDRP principles could be applied retroactively.
144. The Delegation of Greece said that, if the principle of retroactivity were accepted, it saw no objection to it being applied.
145. The Delegation of the United States of America said that, as far as acquired rights were concerned, a trademark for instance could very well incorporate a country name, and also that certain generic terms in English could correspond to country names, “Turkey” being an example. The Delegation highlighted the fact that that was an instance of intellectual property rights being used in good faith as domain names.

146. On the matter of sovereign immunity, the Delegation of Mexico asked the International Bureau to explain to it why *denovo* examination could be considered in the case of an international intergovernmental organization, but not for a State. The Delegation finally wondered whether other systems existed that allowed States not to renounce their immunity.

147. The International Bureau said it was acknowledged in international law that international intergovernmental organizations could object to any recognition of national jurisdiction and opt for recourse to arbitration. It said that, in the course of discussion on the protection of the names and acronyms of intergovernmental organizations in the DNS, the legal advisers of the United Nations had proposed a procedure whereby *denovo* examination could be considered in the case of arbitration. The International Bureau said that the option was available in the case of States.

148. While the delegations of France, Germany and Spain stated expressly that they were in favor of extending UDRP principles to country names, delegations of Germany, Spain and Greece declared their preference for the lifting of sovereign immunity in such cases.

149. The Chair drew the following conclusions:

(a) Recalling the decision taken by the General Assembly at its September 2002 session, the majority of delegations had declared themselves in favor of amending the Uniform Domain Name Dispute Resolution Policy (UDRP) with a view to having country names protected in the DNS.

(b) As far as the procedure for that protection was concerned * the delegations had spoken in favor of the following measures:

(i) protection should cover the names of countries in their long and shorter forms as appearing in the UN Terminology Bulletin;

(ii) protection should make it possible to combat the registration or use of a domain name identical or confusingly similar to a country name where the owner of the domain name had no right or legitimate interest in the name, and where the domain name was of such a nature that users were liable to be wrongly led to believe that there was an association between the owner of the domain name and the constitutional authorities of the country concerned;

(iii) every country name should be protected in the official language or languages of the country concerned and in the six official languages of the United Nations;

(iv) protection should extend to all future registrations of domain names in generic top-level domains (gTLDs).

* See WIPO document WO/GA/28/3 of June 24, 2002 ("Internet Domain Names").

(c) The delegations had declared themselves in favor of continuing discussions on the following points:

(i) extension of protection to the names by which the countries are commonly known; the delegations had also agreed that any additional name of that kind should be communicated to the Secretariat by December 31, 2002;

(ii) retrospective application of protection to existing domain names and registrations in which rights invoked might have been acquired;

(iii) the matter of the sovereign immunity of States party before the courts of other countries regarding the procedures for the protection of country names in the DNS.

(d) The delegations asked the Secretariat to convey the recommendation to the Internet Corporation for Assigned Names and Numbers (ICANN).

(e) The Delegations of Australia, Canada and the United States of America dissociated themselves from the decision.

(f) The Delegation of Japan considered that, while it was not opposed to the decision to extend protection to country names in the DNS, further discussions were necessary regarding the legal foundation of that protection, and it expressed reservations regarding paragraph 2 above, with the exception of its subparagraph (iv).

Trademarks

150. The Secretariat informed the SCT that two new countries had acceded to the Trademark Law Treaty (TLT) since the eighth session of the Committee, namely Kazakhstan and Estonia, bringing to thirty the total number of Member States to this treaty, by the end of January 2003. The Secretariat also announced the publication of the Joint Recommendation concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, as WIPO publication No. 845.

Proposals for further harmonization of formalities and procedures in the field of marks

151. The Secretariat introduced document SCT/9/2 which reflected the changes suggested by SCT Member States at its last session. The Secretariat proposed to begin discussions with Article 8 of the TLT regarding Communications and the relevant Rule 5*bis* of the draft Revised Treaty. The Secretariat explained that concerns were raised at the eighth session as to the proposed language of subparagraphs (b) and (c) which, reproduced the language of the Patent Law Treaty (PLT) and was worded in the negative. Concerns were also expressed as to whether a contracting party could be forced to accept communications other than on paper. Some delegations also expressed the desire of introducing some form of incentive or a statement recalling the importance of electronic filing particularly for trademark users. To reflect these concerns, the

Secretariat had reproduced the existing paragraphs (b) and (c) as Alternative A, and as Alternative B new wording bearing in mind these concerns.

Article 8

152. The Delegation of the United States of America noted that, in its view, the approach used in Article 8 seemed to limit the right of offices to choose the means through which they wished to receive communications. The Delegation further explained that although the United States of America had currently no plan to shift to mandatory electronic communications, it was of the opinion that a treaty should be forward-looking and therefore it should not tie offices to a particular form of communication. The Delegation presented some statistics on filings of trademark applications from foreign applicants at the USPTO, in the period 2000–2001, which showed that, contrary to certain offices, applicants who have experience with the electronic filing preferred this form of filing. For this reason, the Delegation explained that it would not support a treaty which limited offices from moving into the future.

153. The Delegation of Spain, supported by the delegations of Germany, Panama, the Republic of Korea, the Russian Federation and Ukraine favored Alternative B in the text, as it provided a positive language and was clearer than Alternative A.

154. The Delegation of Australia noted that although this Delegation had expressed its preference for a positive wording of the provision on communications, it did not consider that the sense of Alternatives A and B was equivalent. The Delegation noted that Alternative B could more accurately reflect Alternative A if it read “Any Contracting Party may require the filing of communications on paper and other than on paper.” As it stood, alternative B meant that Contracting Parties were free to decide whether or not they would accept communications on paper and other than on paper, but it did not say whether they were free “to require” the presentation of communications in a particular way. Referring to the intervention made by the Delegation of the United States of America that offices should be allowed to determine the means of transmittal of correspondence, this Delegation noted that neither Alternative A or B reflected that position.

155. The Delegation of the United Kingdom indicated that neither Alternatives A or B conveyed the message that encouragement was needed to use electronic filing, although one should not deter applicants from using more traditional methods. Perhaps this underlying message was lacking in these alternatives rather than any precise legal wording.

156. The Delegation of the European Communities said that, in principle it welcomed the statement made by Australia at the last session asking for a positive wording for Article 8. However, the Delegation did not think that the two alternatives presented at this meeting had equivalent meaning. It wondered if it would not be preferable to say exactly what was expected from these provisions, and suggested that a wording should be found allowing Offices to accept communications both electronically and on paper.

Perhaps the appropriate wording could be drawn from the explanations contained in the notes.

157. The Delegation of Canada supported the position expressed by the Delegation of Australia and the Delegation of the European Communities. While the Delegation had some sympathy for Alternative B as a more positive approach, it thought that the drafting was confusing. The Delegation was of the opinion that the suggestion put forward by Australia, allowing Contracting Parties to receive communications on paper and other than on paper would make clearer that it was up to the Office to decide what type of communication it would require. This position seemed to follow the meaning of the first part of Article 8.1, which set out the requirements that a Contracting Party was allowed to establish. If this part limited the requirements, there had to be a part allowing a Contracting Party to require the filing of communications on paper or other than on paper.

158. The Representative of OAPI, expressed support for Alternative A which took into account the concern expressed by the Delegation of the United States of America in letter (c), allowing other forms of communication (i.e. by electronic means). The Representative also referred to two previous articles of the draft: Article 1(i) on the definition of "Office," which in the view of the Representative, excluded regional offices serving various contracting parties, such as ARIPO or OAPI. Thus the wording of this paragraph should be changed to "...the agency entrusted by one or more Contracting Parties..." Concerning Article 3(a)(iii) which read "...the applicant has a real and effective industrial or commercial establishment..." the Representative suggested to delete the term "real" as it was subjective and it could mean different things in different jurisdictions.

159. Following the suggestion previously made by the Delegation of the European Communities, the Delegation of Australia noted that, there was a third alternative wording for Article 8, which was to use, with slight modifications, the explanation contained in the Notes as it spelled out relatively well the purpose of the provision. In relation to the intervention made by the Representative of OAPI on Article 1(i), this Delegation noted that in most instances, reference to an Office was to the Office of a Contracting Party and it was in relation to one application. With regard to Article 3(a)(iii) the expression "real and effective" had to be seen in relation to other intellectual property instruments such as the Patent Law Treaty and the Madrid Agreement. In Australia there had already been a case law on the interpretation of these terms, and the Delegation cautioned against introducing any changes in the text which may disrupt the interpretation of the various instruments.

160. In reaction to these comments, the International Bureau explained that, both Articles 1 and 3 were not yet the subject of discussion, as the SCT had decided at the last meeting to first deal with Articles 8 and 13. However, for the sake of clarification, it noted that the language in the TLT followed closely the language of the Paris Convention.

161. The Representative of CEIPI agreed with the views expressed by the Delegations of Australia, Canada and the European Communities that the text contained in Alternative B was not a positive expression of the language contained in Alternative A. The Representative expressed some sympathy for Alternative A, if paragraphs (b) and (c) left offices free to choose the means of communication. This provision was similar to the corresponding provision in the Patent Law Treaty and there was some merit in having the same principle for both patents and trademarks, to avoid future generations having different interpretations in these two fields. This provision had been the subject of intensive discussions during the Diplomatic Conference for the adoption of the PLT and at the end, it gathered consensus as being the language which unambiguously provided offices with the freedom to choose the means of communication. With respect to an encouragement for offices to move to a system of electronic filing, the Representative was of the view that this aspect should be dealt with elsewhere for example in an agreed statement of the Conference adopting the treaty, but not in the text of the treaty itself. A treaty should express rights and obligations and not encouragements.

162. The Delegation of Egypt, supported by the delegations of Brazil, Belgium, France, Moldova, Slovenia, and Switzerland agreed with the comments made by CEIPI and stated that it preferred Alternative A, since this had been the language adopted for the PLT, and in that framework there had been no particular problems for having this formulation in negative terms. In addition, that Delegation reiterated the comments put forward in the last session, that developing countries needed to be allowed as much time and freedom as possible with regard to electronic filing. The Delegation further noted that there needed to be an agreed statement with regard to technical assistance for developing countries to receive assistance in the implementation of electronic filing.

163. The Delegation of the Republic of Korea first announced that its country was close to acceding to the TLT. Secondly, with respect to Article 8, the Delegation informed that the Republic of the Republic of Korea had implemented an electronic filing system since 1999 and based on that experience, could affirm that the system contributed to an increase in filings and to administrative efficiency. The IPO Office continued however to handle paper filing. The Delegation believed that each State had the right to choose the form of filing, and that exclusive electronic filings should be postponed until at least five years after the adoption of the treaty.

164. The Delegation of the United States of America, supported by three other delegations (Mexico, the Netherlands and the European Communities) said that it had become clear that the real concern was to give Contracting Parties the right to choose the means of transmittal by which they receive communications. Therefore it proposed the following wording "Any Contracting Party may choose the means of transmittal by which it receives communications" to make it clear that any Contracting Party could determine how it wished to receive communications, either on paper or electronically, according to its development.

165. The Delegation of Guinea stated that although it recognized the efficiency of electronic means of transmittal, not all the countries had such means. Paper filing had

always existed in its country and had functioned well. Thus the Delegation expected that the system could be maintained, although it wished that electronic means could be implemented in the future.

166. Referring to the statements made by several delegations in support of a harmonization of the provisions of the PLT and the TLT, the Delegation of Australia said that, although in some instances resorting to the language of the PLT could be useful, there was a need to go beyond that treaty. When revising the TLT, the SCT needed to be clear, first about the purpose of the provisions and secondly, on the fact that the text of the provisions clearly reflected that purpose leaving as little room as possible for other interpretations. Alternative A did not give Offices enough freedom to choose the means of filing, and it also allowed for a wide interpretation, which was the reason for concern. If the SCT tied itself to the language contained in the PLT, it would be restricted only to the improvements contained in that treaty. Users of intellectual property community could benefit most if the future TLT Conference could use work already achieved by the PLT Conference in order to move ahead. The Delegation wondered whether the way forward was for the SCT to ask the Secretariat to propose alternative wording, on the basis of the deliberations.

167. In reply to the comments made by the Delegation of Australia, the Delegation of Mexico stated that the implications of the provision contained in Alternative A differ from the previous provision which contained a preceding sentence indicating a limit date for the acceptance of paper filing. In the PLT the date to exclude paper filing was June 2, 2005, and in the last session concerns had been expressed by many delegations about having a combination between the date and alternative A, which would offer a possibility of excluding paper filing. In the current text of alternative A there was no longer a date, and this offered greater freedom to Offices. However, this Delegation agreed with the Delegation of Australia that there was no absolute need to harmonize this treaty with the PLT. Since trademark and patent laws were different, the Delegation was also in favor of drafting an entirely new text, not based on the PLT.

168. The Delegation of Canada agreed with previous delegations that, in the particular context of Article 8, there was no need to follow the language of the PLT. That language had been adopted in the PLT, especially in connection with a rule, equivalent to Rule 5*bis*, which established the June 2005 deadline for Contracting Parties to accept communications on paper. This Delegation was of the opinion that, in the context of trademarks, there was no need for such a restriction. Thus, a provision could be drafted in simpler terms, combining Alternatives A and B and Rule 5*bis*, particularly in view of the fact that, at the present meeting, a consensus had been built around the notion that Offices needed flexibility to choose the form in which they wanted to receive communications. The Delegation recognized, nevertheless, the concern expressed by some Delegations that developing countries needed time to implement electronic filing, and proposed the following wording: "Any Contracting Party may exclude the filing of communications on paper or may exclude the filing of communications other than on paper."

169. The Delegation of Australia further noted that the SCT had to take into account in its deliberations one electronic filing, that there were two constituencies in every country, one was the office, and the impact that electronic filing could have in the workload of the Office and its capacity to deal with such load. The other constituency were users of the trademarks system. Referring to the comment put forward by the Delegation of Mexico in relation to the date contained in the PLT, the Delegation of Australia noted that this date had been designed to protect owners of patents in a situation where Offices would rush to implement electronic filing without permitting paper filing. The issue of dates was however not as critical in the discussion of the TLTA as was the issue of the impact of electronic filing on offices and on users. It was important to think about nationals filing overseas and overseas nationals filing nationally, and this was there as to engage in harmonization of law and requirements in the first place.

170. To help advance the discussions on this item, the Secretariat presented a document to the SCT containing four proposals suggested by various delegations as alternative wording for Article 8(1).

171. The Delegation of Sri Lanka suggested to keep in mind the interest of national offices (capability to process e-filing if required) and the interest of prospective trademark owners (access to computers and to electronic filing). Imposing electronic filing might scare some countries to join the TLT. For this reason, the Delegation favored alternate proposal A because it gave some flexibility to national offices, and looked after the interest of developing countries and prospective trademark owners in developing countries.

172. The Delegation of Australia questioned whether paragraph 1(d) and Rule 5bis should be maintained and said that the SCT should not focus on the words but rather on the goal this article was trying to achieve. If the goal is for national offices to be free to choose, then the wording of the “chapeau” for Article 8, 1(b), 1(c), 1(d) and Rule 5bis was complicated.

173. The Delegation of Brazil stated that it could not choose one of these proposals until they were submitted to the proper authorities in its country. However, safeguarding the interest of various constituents was important and, for this reason, alternate proposal A seemed to be the most appropriate.

174. For the Delegation of the United States of America supported by one Representative of a non-governmental organization (INTA), Article 8(1) should be a general principle stating that national offices choose the means of transmission. Regarding the concern that national offices may impose their means of communication on others, the Delegation declared it unlikely because most offices would want to serve all prospective trademark owners. From experience, the Delegations said that electronic filing was done by applicants without the help of attorneys, and since national offices knew best their constituents, it was for them to choose the means of communication. To conclude, the Delegation of the United States of America proposed Article 8(1) to become a general principle reading as follows “a contracting party may choose the means of transmittal of communications”.

175. In response to the proposal made by the Delegation of the United States of America, the Delegation of Australia supported by one delegation (Panama) felt that a general principle should not be stated in Article 8(1) but rather in Rule 5bis. The Delegation of Australia noted that large and medium enterprises looking for export markets would file their trademarks electronically in the United States of America to export their products in this country. However, since other enterprises did not have the means to file electronically, allowing national offices to decide the means of transmittal of communications would disadvantage them. The Delegation favored taking out all references to filing date and complying with a time limit and have a general provision stating that Offices may choose the means of transmittal of communication.

176. The Representative of the CCI indicated that at this time it could not choose a particular wording for this Article. Moreover, it declared it was up to the users to decide on the best means of communication.

177. The Representative of AIPPI, supported by one delegation (United Kingdom), said that the wording of Article 8(1) was inaccurate in light of the four new proposals and suggested to include an alternate proposal E in Article 8(1); or to leave Article 8(1) as it was and put (b), (c) and (d) in the rule. The Representative explained that the rules might change because new means of transmittal of communication will come up in the future. In addition, he noted that changing the rules was easier than articles which required a diplomatic conference.

178. The Delegation of Australia stated that 30% of applications were electronically filed in its country. Fifty percent of these applications were filed by applicants not represented by an agent and more than half of those chose to file electronically. They were small businesses and people without larger resources. Those who did not have a computer used the services of an agent who did have a computer to file electronically.

179. The International Bureau summarized the discussion on Article 8(1) by stating that the SCT seemed to agree on the fact that it was for national offices to decide on the means of transmittal of communications. The SCT needed however to make a choice on the various alternatives, and decide where to include it and list the exception to this general principle. The SCT also had to take a decision on whether there should be a need to encourage electronic filing by fixing a time limit, as in the PLT, or through another approach.

180. In commenting the summary made by the International Bureau, the Delegation of Brazil, supported by the Delegation of Egypt, said that the special needs of developing countries should guide the SCT and that this issue was linked with technical assistance to Offices, about which the SCT should make a declaration. The Delegation expressed concern regarding implications of some alternative proposals for Article 8(1) for developing countries. Maximum flexibility should be provided, because the same technological means were not available for all the Offices and also the exporting firms in developing countries might not be technologically advanced. For these reasons, the

Delegation favored Alternative A. The Delegation also expressed doubts about electronic filing being applicable for all countries in the future.

181. The Delegation of the United States of America supported the views of the Delegation of Brazil and Egypt emphasizing that the countries should be free to choose the means of transmittal of communications. The Delegation wondered whether there was a need for a special provision concerning electronic filing and that the harmonization of means of communications should not be an objective. In the view of the Delegation, Alternative E reflected the wishes of the SCT. This alternative permitted the Office to continue to accept communication with whatever means they had chosen.

182. The Delegation of Ukraine expressed a preference for Alternative B since this alternative allowed other forms of communication than on paper to be chosen in the future.

183. The Representative of AIPPI noted that Alternative E could not be interpreted wrongly since it covered everything. In the explanatory notes it should be underlined that no Contracting Party should be obliged to accept the filing of communications other than on paper and should neither be obliged to exclude the filing of communications on paper.

184. The Delegation of Sweden, supported by the Delegation of Norway, favored the view expressed by the Representative of AIPPI. The heading of Article 8(1) should either be kept and have Alternative E in the Regulations or the headings should be deleted and have Alternative E in Article 8(1). This approach would cover the technical solutions of communications which might be different in the future. However, the Delegation preferred the first alternative it proposed.

185. The Delegation of China supported the view of the Delegation of Brazil and Egypt that national conditions should be taken into account. Arguments were more important in respect of patents than in respect of trademarks and many trademark applications were filed on paper by the applicants. Therefore the TLT should not create any obligation for Contracting Parties.

186. The Delegation of Australia observed that the technologically advanced countries should not be constrained to allow filing on paper other than as an exception. The Delegations suggested that a time limit should be fixed, as in Rule 8(1) of the Patent Law Treaty, after which a Contracting Party might exclude the filing of communications on paper. At present, there were only four countries which allowed electronic filing, therefore in almost all cases, applications from abroad were made through agents who had access to electronic filing.

187. The Delegation of Lebanon asked what would be the position of countries which were not, after the specific time period, capable of handling electronic filing. The Delegation cautioned against trademark rights becoming a right of a minority and pointed out the situation of persons, for example in the countryside, who were entitled to file an application but did not have access to electronic filing.

188. The Representative of AIPPI clarified that none of the Alternatives A to F opposed electronic filing. Neither did they impose any Office to apply electronic filing.
189. The Delegation of Mexico expressed a preference for the Alternative E. The Delegation proposed that the International Bureau draft for the next session a revised Article 8(1) and Rule 5 *bis*.
190. The Delegation of the United States of America suggested the deletion of paragraphs (1) and (2) of Rule 5 *bis*.
191. The Representative of the ICC supported the statement made by the Representative of AIPPI and expressed a preference for Alternative E. The general principles should be clarified in the Explanatory Notes.
192. The Delegation of Australia noted that Article 8(1) was unnecessary since it was the Office who decided about the form of communication. The wording of paragraph (3) could be simpler, such as "a Contracting Party shall accept a communication on a Form." Paragraphs (5) and (6) could be put together. In Rule 5 *bis*(2) the reference to language and to different forms of transmittal should be deleted. This paragraph could be reformulated as follows "Where a Contracting Party permits filing other than on paper, the original of the document may be filed within a time limit".
193. The Delegation of the United States of America expressed its reservation concerning Article 8(3) since this provision contained an implication of paper filing. The Delegation proposed to clarify the content of the provision by referring simply to an information and not to a special Form. The Delegation reserved its position also in respect of Rule 5 *bis* concerning time limits.
194. The Delegation of the European Communities stated that it should be clarified that Article 8(2) concerning languages also applied to all attachments to the documents. Moreover, Article 8(7) should not apply to non-compliance with requirements regarding languages. Under national law, it should be allowed to disregard a communication in a foreign language if it was not possible to understand its content.
195. In response to the Delegation of the European Communities, the Chair, referring to Article 1(iv), clarified that the term "communication" was defined as meaning any application, or any request, declaration, document, correspondence or other information relating to an application or a mark which was filed with the Office.
196. The Delegation of Japan, referring to Article 8(2), emphasized that documents, such as declarations or agreements written in a language which was not accepted by the Office, should be translated into the language of the Office. The Delegations suggested adding such a provision to this Article. Provisions concerning translations in Article 11(2) and in the Joint Recommendation concerning Trademark Licenses should be included in this paragraph. As regards notifications of refusal concerning international registrations under the Madrid Protocol which designate Japan, it should be possible for the Office, in this context, to require that the documents submitted by the holder indicate

the goods and services in two languages. This is due to the fact that the Protocol requires entries to be in English.

197. The Delegation of the United States of America sought clarification about the meaning of Article 8(7). If the Office required the communication to be on paper, should the sender of an e-mail containing an application be notified?

198. In reply to the Delegation of the United States of America, the Delegation of Australia noted, that in such a case, the Office would notify the sender that an application was not filed. The Delegation also wondered whether Article 8(3) concerning Model International Forms was needed.

199. The Representative of AIPPI proposed two sets of Model International Forms: one set on paper and the other one in electronic form.

200. The Delegation of Japan explained that Article 8(7) and (8) affected the rapidity of the registration procedure. The Delegation expressed concern about the consequences for the date and effects of the recording. The sanctions and notifications should be left to the discretion of the Contracting Parties. The Japanese law provided for the registration date to be confirmed after the requirements concerning the application were fulfilled.

201. The Delegation of the United States of America stated that it did not share the view of the Representative of AIPPI of reproducing the Model International Forms in electronic form. If the necessary information was submitted to the Office, the Office had to accept the filing.

202. The Delegation of Australia suggested that, instead of Model International Forms, a checklist could be drafted which could be inserted in the TLT.

203. The Representative of CEIP noted that the general structures of paragraphs (4)(b) and (5) were different and should be aligned with each other. As regards Rule 5bis(2), the Representatives shared the view expressed by the Delegation of Australia that this provision should be redrafted but the expression "accompanied by a letter..." should be kept.

204. The Delegation of France, supported by the Delegation of Sri Lanka, expressed reservation concerning Article 8(7), since this provision would complicate and delay the *inter partes* proceedings, such as opposition proceedings, if the communication was not in an official language of the Office.

205. The Delegation of Japan, referring to Article 8(4)(a), stated that a signature could be required for any communication. The Delegation sought a clarification about Article 8(4)(b) concerning the exceptions and said that in Article 8(4)(b) of the Patent Law Treaty quasi-judicial proceedings were mentioned.

206. The Representative of AIPPI, supported by the Representative of INTA, stated that the purpose of the TLT is to set up maximum requirements. The presentation of the

contents of a communication shall correspond to a Model International Form but not necessarily be identical to the International Form. Contracting Parties can simplify or adapt it. As regards signatures, Article 8(4)(b) is a cornerstone of the TL T and should not be weakened. However, he suggested to add “subject to Rule 6(4)” in this article.

207. The Delegation of Australia noted that Article 8(4)(b) was an exception to the general principle. The Delegations suggested that the removal of exceptions could be discussed at the next meeting.

208. The Chair concluded that the appropriate changes to Article 8(1) and Rule 5bis according to the previous discussion, and in conformity with Alternatives A and E, would be made for the next session of the SCT.

209. The Delegation of Australia stated that the revised version of Article 8 should cover Alternatives A to E and also counter proposals.

Articles 13bis, 13ter and 13quater

210. The Delegation of Japan expressed a preference for Alternative A of Article 13bis and pointed out that this provision had a great effect on applications which were accepted on an accelerated basis. Delay in respect of registration procedures should be prevented. The Delegations suggested deleting Article 13bis(2) because of its implication on the proceeding of other applications.

211. The Representative of AIPPI proposed to reformulate the expression “registration of a mark” simply as “registration.”

212. The Delegation of Australia sought clarification about the differences between Articles 13bis(1)(ii) and 13 bis(2).

213. The Delegation of the United States expressed doubt about the practical consequences of Article 13bis since this provision would cause uncertainty among third parties. The Delegation emphasized that in contrast with patents, trademarks could be reapplied. Adding time limits would complicate and delay examination procedures.

214. The Delegation of Japan pointed out that Article 13quater(1), (2) and (3) contained remedies which were not covered by Articles 13bis(2) and 13 bis(3) concerning exceptions specified in Rules 9(5) and 10(3). The Delegations suggested specifying the time related remedies covered by Article 13quater in these Rules.

215. The Delegation of the Republic of Korea observed that Articles 13bis, 13ter and 13quater would lead to a delay in respect of examination procedures. The Delegation raised concern about the potential conflict between the time limits under the Madrid Protocol and these Articles.

216. The Representative of AIPPI suggested examining the background behind the corresponding PLT provisions.

217. The Delegation of Australia said with regard to Article 13bis that a Contracting Party could provide for extension of time limits. Where the extension was not provided for in the national law, the Contracting Party was required to give an additional time limit if requested.

218. The Delegation of Sri Lanka asked whether the Office would continue proceeding on the basis of the elements so far presented by the applicant, if continued processing in accordance with Article 13bis(2) was not provided for.

219. The International Bureau informed that at the last session of the SCT there were no disagreement on the purpose of Articles 13bis or 13ter. The purpose of Article 13bis(2) was that when the applicant failed to comply with the time limits and the Contracting Party did not provide for extension of a time limit under paragraph (1)(ii), the Contracting Party should provide for continued processing. Article 13bis(1) applied to time limits fixed by the Office while Article 13ter applied to all time limits.

220. The Delegation of Australia declared that deletion of Article 13bis would merit re-consideration taking into account the reservation expressed at this session.

221. With regard to Article 13bis, the Delegation of Switzerland, supported by two other delegations (Denmark and Sweden) expressed the view that this provision should be retained, as it was necessary to have in the treaty a text regarding the extension of time limits and continued processing with respect to time limits fixed by the office. This would allow freedom to the Contracting Parties to fix special time limits and would also offer guarantees to the holder in certain circumstances. The Delegation was not in favor of the fixed two month period established under Rule 9(2)(a), as this was not in favor of the holder and would unnecessarily extend the application procedure. Determination of the extension of time limits should be left to each Contracting Party. Moreover, if this were the case, there should not be a general obligation to accept reinstatement of rights as provided under Article 13ter and there should not be a provision concerning correction or addition of a priority claim as set out in Article 13quater.

222. The Delegation of Australia reacted to the comments made by the Delegation of Switzerland by saying that its reading of Article 13bis was that where an office provided for an extension of time, this was covered by Article 13bis(1). If an office had decided not to provide for an extension of time, Article 13bis(2) required that it continue the processing of the application, which in the opinion of this Delegation had the same effect as an extension of time. Thus, Article 13bis(2) was intended to remove the options from national offices.

223. The Delegation of Switzerland clarified that its previous intervention referred to the possibility offered under Article 13bis(1), subparagraphs (i) and (ii) to provide for the extension of time limits fixed by the Office prior to the expiration of the time limit or after the expiration of the time limit.

224. The Delegation of Sri Lanka requested clarification as to whether Article 13*bis*(1) established an obligation for Contracting Parties to give a time limit, but only choosing between alternatives (i) and (ii), or whether this provision confirmed the discretion of offices to grant an extension of time if they so decided.

225. In reply to this query, the International Bureau explained that the general idea behind the inclusion of the provisions contained in Articles 13*bis* and 13*ter* was to make the treaty more user-friendly for applicants and thus provide them with recourse in case of time limits which they might not be able to meet or might have failed to meet. Article 13*bis* would only apply to time limits fixed by the office and provided for extension prior to expiration or after expiration. Paragraph (1) was an option, and paragraph (2) came into play if paragraph (1) did not apply. The International Bureau also referred to the Notes on this Article in document SCT/9/2.

226. The Delegation of Australia recalled that, during the discussions at the last session, that Delegation had made a proposal to dispose of Articles 13*bis* and 13*ter*, as the language of the provisions had been taken from the PLT, which did not help to clarify their meaning. The Delegation further suggested to start with entirely new language and include in the TLT a provision allowing for relief to applicants and owners in a situation where offices made administrative, arbitrary and sometimes very short decisions about time limits, which could have also resulted in loss of rights. In any case, the text should be clear at first reading and although the notes could be used to provide additional explanations, they should not be needed to clarify the text.

227. The Delegation of the United States of America supported the comments made by the Delegation of Australia and added that a definition was perhaps needed to clarify the meaning of the various time limits considered in Article 13*bis*: time limits by statute, by regulation or simply published. Clarification was also needed about whether this article imposed on offices the requirement to give the alternatives in sub paragraphs (i) and (ii), or without paragraph (2).

228. The Delegation of the Russian Federation explained that in that country it was considered important for applicants to be able to extend time limits. However, this depended on the Office, as applications sometimes involved intermediate work, such as translation or transfer of documents, which created delays. Current national legislation provided for the Office to respond to requests within two months, but the possibility to apply for extensions was unlimited, which in practice led to a situation where applicants could extend this period even for years, with the consequent damage to other applicants and third parties. New legislation had been drafted to limit the extension of time limits to a six-month period, which was considered fully sufficient. With regard to the explanation given by the International Bureau, this Delegation was of the view that it would not be reasonable to consider other time limits, in addition to those provided in national legislation, and also wondered about the need to retain Article 13*bis*.

229. The Delegation of Canada recalled explanations given by the International Bureau to the effect that Article 13*bis*(1) was optional for Contracting Parties. There was no

obligation to grant extensions according to either sub-paragraphs (i) or (ii). However, if offices granted time after the expiration of the time limit, they would need to have continued processing as in paragraph (2). In the opinion of this Delegation, the real objective of the provision was to allow for some mechanism to solve a situation where a time limit had been missed. Some offices granted an extension of time only after the time limit had been missed, others had a continued processing approach. Therefore, the Delegations suggested to discuss whether countries actually preferred one of the two alternatives or both and on the basis of their preference, arrive to a simpler drafting.

230. The Representative of AIPPI said that, from the point of view of users of the trademarks system, Articles 13*bis* and 13*ter* should be kept in the text of the TLT, since Article 13*bis* was important and helpful for users and may have some harmonizing effect, so that the legislation of countries would include at least one of these systems. It was also important to clarify, as the Delegation of the United States of America had pointed out, which were the cases where an office fixed time limits on its own, apart from the time limits fixed by the regulations, because it was important for users to be able to comply with every time limit. The Representative also said that it was not necessary to change the contents of Article 13*bis* but only its drafting, to offer two possibilities: extension of time limits or continued processing.

231. The Delegation of France expressed reservation with regard to Article 13*bis*. Sub-paragraph (ii) gave Contracting Parties a possibility to extend a time limit after the expiration of the time limit, and then paragraph (2) provided for continued processing. The Delegation had concerns about the relationship between these two paragraphs and the fact that continued processing was required if a Contracting Party did not provide for the extension of a time limit. The Delegation thought it would be clearer if paragraph (2) provided for continued processing only when the extension of a time limit was not possible, whether before or after the expiration, and in this case, sub-paragraph (ii) was superfluous.

232. The Delegation of Spain explained that in its country, a law had been passed in relation to time limits, not only for procedures dealing with industrial property but in general for procedures with the public administration. According to that legislation the length of extension of the time limit was half the length of the original time limit, and the applicant was required to request the extension prior to expiration. This provision had not caused problems to the administration, as it was always possible to determine when an applicant had requested the extension of a time limit and for how long. Although this Delegation was also in favor of maintaining Article 13*bis*, it shared the concerns expressed by France with regard to sub-paragraph (ii).

233. The Delegation of Australia wondered whether a description of the situation in the different jurisdictions with regard to time limits would be helpful for the discussions particularly with regard to time limits established administratively by the office without reference to a statute. In addition, the Delegation thought it would also be useful to hear about the nature of problems that users had in different systems. With regard to continued processing, the Delegations also wondered whether the terminology was helpful in the area of trademarks.

234. The International Bureau raised the issue concerning the extension of a time limit after expiration contained in paragraph 1(ii) as it seemed from the interventions made, that the majority of systems had the extension of time limits before expiration. It further noted that in the field of patents, there were systems which provided for the extension of time limits after expiration. However, if countries did not have that option, then subparagraph (ii), which was closely related with paragraph (2), would not be understandable.

235. The Delegation of Mexico suggested to amend Article 13bis and 13ter to provide for specific time limits to be included for legal certainty, for the benefit of trademark users and to avoid corruption. The new draft should make clear under Article 13ter(iv) what time limits are concerned, the criteria for establishing those time limits and the possibility for the office to determine why the delay occurred.

236. The Delegation of the United States of America concurred with the concerns expressed by the Delegation of Mexico and others regarding arbitrary administrative actions. Arbitrary administrative actions must be balanced with efficient processing and legal certainty for all users of the trademark system. In light of these concerns, the Delegation proposed to revise Article 13bis in order to include a definition of a time limit and Article 13ter to clarify whether the grace period required by the Paris Convention for the renewal of registration was a time limit or an extension.

237. The Delegation of Sweden informed that its trademark law allowed for extension of time limits but for not continued processing. However, a new trademark act, which would likely come into force on January 1, 2004, would allow for continued processing. In Sweden, examiner re-evaluated requests for extension of time limits from applicants and decided whether to grant them or not. Usually, these requests were made to solve a conflict with the holder of a prior right, which was reported by the national office. The IP Office notified the applicant that his application was problematic and that he had one month to solve the problem. The time limit extension was usually 16 weeks but the new trademark act would provide for an automatic extension of a time limit if the payment of a fee is to be made.

238. The Delegation of Germany explained that in its country, the law did not make a difference between a request made prior and after the expiration of the time limit. Furthermore, there were time limits in opposition proceedings, which could be extended if both parties agreed to it. The new trademark act, which would likely come into force in January 2005, would allow for continued processing only when an application is to be rejected. Germany did not have a problem with Article 13ter since German law already provided for reinstatement of rights. However, the Delegation of Germany thought the time limit of two months in Rule 9 was too long.

239. The Delegation of Australia, supported by another delegation (Canada), suggested to present these two articles and other issues of substance out of the general context of the TLT at the next SCT meeting to enable a better understanding of these articles.

240. The Delegation of Slovenia said that in its country, continued processing was frequently used because users were more accustomed to time limits than applicants which were often small companies. For the Delegation, the expression “interested parties” in paragraph 2 was problematic since in Slovenia only applicants could ask for continued processing.

241. The Delegation of the European Communities explained that under EC law, extensions could be granted if the request was made to the OHIM before the expiration of the time limit. The Delegations suggested that the level of administrative requirements in Article 13 *bis* should be reduced, for the benefit of IPO Offices. This was vital for patent law but not for trademark law.

242. The Representative of AIPPI said that Article 13 *ter* was more important than Article 13 *bis* because it dealt with loss of rights and could be applied to all time limits. It was therefore important to safeguard Article 13 *ter* as a general principle.

243. The Representative of INTA was of the view that a one-month time limit was not enough for international practitioners of trademark law. In addition, questions about various time limits needed to be included in the SCT questionnaire to know what they were in different countries. The Representative of INTA felt reasonable extensions should be available and rights should be restored if they were lost.

244. The Representative of AIM stated that it was important for industry to benefit from Articles 13 *bis* and 13 *ter* due to special circumstances that may affect the submission of certain documents and to avoid arbitrary administrative action. It suggested that these two articles should be redrafted for a better understanding, so long as their content was preserved.

245. The Delegation of the Netherlands noted that Article 13 *ter* was included to harmonize the provisions of the TLT with those of the PLT. However, the need for such a procedure was not necessary because reinstatement of rights played a lesser role with trademarks and because time limits could be extended with Article 13 *bis*. The Delegation stressed that extension of time limits is less cumbersome and expensive than a procedure for the reinstatement of rights.

246. The Delegation of the Republic of Korea reiterated its concerns regarding Article 13 *bis* and 13 *ter* which might be contrary with the 18-month grace period to comply with a notification of refusal under the Madrid Agreement. The Delegation hoped that the International Bureau would take into account these concerns when redrafting these articles.

247. The Representative of AIPPI concurred with the intervention of the Delegation of the Netherlands only if Article 13 *bis* was extended to all time limits. In addition, the Representative agreed that Articles 13 *bis* and 13 *ter* were more important for patents but so was the loss of rights in trademarks because of non-compliance with a time limit.

248. The Delegation of the United States of America pointed out that it did not object to Article 13^{ter} now that it had a better understanding of it. However, Article 13^{ter} was problematic and would require legislative changes because processing of applications in the United States of America required applicants to provide, within three years an affidavit of use of the mark. After three years, the application was considered abandoned if the affidavit was not provided. With Article 13^{ter}, another 2 months would have to be given to applicants who did provide an affidavit after 3 years or would have to be included in the list of exceptions. Contrary to what the Delegation of Australia had said about renewal being included in the list of exceptions, it was renewal fees not renewal of the application. In the United States of America, payment of fees was a separate issue from the renewal of registrations. Furthermore, the affidavit of use maintained the registration and had to be filed between the fifth and sixth year after registration or within a six-month grace period after the sixth year. Therefore, Article 13^{ter} would require additional legislative changes to allow reinstatement of rights after finding of due care.

249. The Delegation of Canada supported the intervention made by the Representative of AIPPI and considered it was best to leave both articles because they served different purposes. Article 13^{bis} dealt with time limits set only by national offices whereas Article 13^{ter} dealt with all time limits. In respect to Article 13^{bis}, the Delegation of Canada thought it could be simplified and time limits set by national offices should be defined.

250. The Delegation of France explained that French law provided for reinstatement of rights and that France was about to ratify the TLT. However, Article 13^{ter} and the corresponding rule were too broad in scope because they also applied to renewals. In light of the six-month grace period already provided for by the TLT for the renewal of registration, the Delegation, supported by two other delegations (Australia, Norway) stated that it was not appropriate to allow for the extension of time limits.

251. In response to the intervention made by the Delegation of the United States of America, the Delegation of Australia stated there was no difference between the payment of the renewal fee and the request for renewal in Australia.

252. The Representative of AIPPI stated that extension of time limits for renewals should be included in the exceptions and that each country should look into their trademark law and see what exceptions in the Rule to Article 13^{ter} applied to them. Concerning Article 13^{ter}, he said that it was problematic for the United States of America because it was one of the few countries where a trademark needed to be used before it could be registered.

253. The Representative of OAPI thought that reinstatement of rights should still be allowed following the six-month grace period for renewal, when failure to comply with the time limit was independent of the will of the trademark owner. The mark should not be appropriated by third parties in such a case.

254. The Delegation of Spain felt that Articles 13^{bis} and 13^{ter} should be maintained in the TLT. These provisions were in conformity with Spanish trademark law which

entered into force on June 13, 2002. This law reflected the Community Trademark Regulations and kept in balance the rights of holders and third parties.

255. The Delegation of European Communities explained that the Community Trademark System enabled relief in respect of time limits as well as reinstatement of rights which could go beyond the grace period in respect of renewals.

256. The Delegation of Canada, supported by the Delegation of France, was in favor of maintaining Article 13^{ter} as it was, and suggested that the SCT should discuss the exceptions which applied to 13^{ter}(2), particularly relating to the grace period in respect of renewals. The Delegation expressed doubt about maintaining Article 13^{quater} since it was not aware of any problems regarding priorities.

257. The Delegation of the United States of America reserved its position with regard to Article 13^{quater}. Priority as such was already an exception, therefore a restoration of the priority right would raise concern among the business circles.

258. Delegations of Australia, the European Communities, France, Switzerland, The Netherlands and the Representatives of INTA and AIPPI suggested deleting Article 13^{quater}, which would create uncertainty among trademark holders. In addition, in the field of trademarks, the six-month priority period was long enough.

259. In conclusion, the Chair stated that the International Bureau would redraft Article 13^{bis} and 13^{ter} for the next meeting.

Further development of international trademark law and convergence of trademark practices

260. The International Bureau introduced document SCT/9/3 and noted that during the eighth session of the SCT, the SCT asked the Secretariat to draft a questionnaire on substantive matters relating to trademark law on the basis of the views expressed by the Committee at its eighth session when discussing the set of principles contained in document SCT/8/3. The purpose of the questionnaire was to collect information regarding the national practices of Member States of WIPO and to identify issues which required to be addressed at the international level concerning the further development of international trademark law and the convergence of national trademark practices. This questionnaire was conceived in broad terms in order to cover all existing or possible legislations or practices and therefore, should not be considered as interpreting the provisions of any specific national legislation. The International Bureau invited the SCT to comment, on whether the circulation of the questionnaires should be postponed to a later stage, or should it be discussed in parallel with the TLT. In the latter case, on the basis of the comments at this session and on the SCT Electronic Forum, the questionnaire would be amended and circulated.

261. The Delegation of Australia suggested that there is need to have a period of time for comments on the questionnaire on the Electronic Forum. After circulation of the

questionnaire, Offices would have a time limit to answer. The responses from Offices could be discussed at the second session next year.

262. The Delegation of the United States of America thanked the International Bureau for the very comprehensive document. However, the Delegation pointed out that the first priority of the SCT should be the TLT. Substantive harmonization was more difficult, therefore the discussion concerning document SCT/9/3 should be postponed.

263. The Delegation of Canada underlined the importance of the TLT but stated that work should continue also in respect of substantive harmonization. The Delegation requested the International Bureau to prepare explanatory notes to the questions since some of them were difficult to understand for example, question 2 of Part I., which referred to specific categories of signs. As another example which needed clarification, the Delegation indicated question 2 in Part II. A. concerning personal names, and questions 4 and 5 in Part II. D. concerning collective and certification marks.

264. The Delegation of the European Communities, supported by the delegations of France, Sweden and Switzerland and the Representative of AIPPI, favored the view expressed by the Delegation of Canada and invited the SCT to indicate what clarifications regarding the questionnaire were needed. The SCT would continue discussions concerning document SCT/9/3 at the next session or at the second session next year. Comments could be sent within a time limit through the SCT Electronic Forum.

265. The Delegation of Australia stated that the SCT should not spend time to revise the questionnaire at the SCT, but rather that the questionnaire be circulated after receiving comments.

266. The Delegation of the Russian Federation addressed a question to the International Bureau whether it was possible to circulate the questionnaire before the next session and when it would be appropriate to discuss the responses.

267. The Representative of IFC underlined the importance for the private sector to answer the questions, in view of the future work of the SCT.

268. The Delegation of the United States of America reiterated its view that the TLT was a priority for the SCT. By the time the SCT started debating substantive harmonization, the responses to the questionnaire would be out of date. The Agenda of the SCT was too crowded and the SCT should concentrate on few points.

269. The Representative of INTA requested that the questionnaires should relate to the practices of the Industrial Property Offices but that practitioners should also be addressed since they might have different views from the Offices.

270. The Delegation of Germany opposed discussing the questionnaire at the SCT and stressed that the real issue to be discussed was the answer to the questionnaire.

271. In conclusion, the Chair proposed that the questionnaires should be put on the SCT Electronic Forum for comments and that comments should be sent by the end of January, 2003. The International Bureau would then introduce the comments and circulate the new version of the questionnaire before the tenth session of the SCT. At the next session there would be no discussion on the questionnaire, only presentation of the questionnaire by the International Bureau.

272. The Delegation of Switzerland considered premature to distribute the questionnaire because the comments to be made could be contradictory.

273. The International Bureau suggested that the comments on the questionnaire be made by the end of January on the SCT Electronic Forum. After having received the comments, the International Bureau would finalize the questionnaire and send it to the Offices. The responses would be then discussed at the SCT at a later stage.

274. The Representative of ICC took the opportunity to congratulate the Delegation of the United States of America for the envisaged accession of its country to the Madrid Protocol. He welcomed the United States of America to the family of Madrid System for international registration of marks stating that this had been a long term dream for the business circles. He also paid tribute to the work completed by the Director General of WIPO, by the former Director General, Mr. Bogsch, by the former Vice Director General, Mr. François Curchod, by Doctor Gerd Kunze and by Mr. Ludwig Bäumer.

Industrial Designs

275. The International Bureau introduced document SCT/9/6 "Industrial Designs and their relationship with works of applied art and three-dimensional marks," and stated that the subject of industrial designs was explained in a broad way since it was the first time it was dealt with by the SCT.

276. The delegations of France, Japan, Panama, Romania, Switzerland, Ukraine and the Representative of CCI congratulated the International Bureau for this comprehensive and very useful document. The delegations of France and Switzerland informed the SCT that comments would be sent to the International Bureau to be taken into consideration. Finally, the delegations of France, Romania and Switzerland informed the SCT that new legislation on industrial designs had just been enacted in those countries.

277. The Delegation of Japan welcomed the start of discussions on industrial designs. In addition, the Delegation hoped that this subject of great importance would not be forgotten by the SCT in future discussions.

278. The Chair summarized the discussions on industrial designs by stating that the SCT was grateful for document SCT/9/6 and that a number of delegates would send comments to the International Bureau.

Agenda Item 5: Future Work

279. The International Bureau explained that not only issues to be dealt with at next sessions should be discussed but also issues with a longer term perspective. The different issues that the SCT should deal with in the future should be prioritized.

280. The Delegation of Australia requested the International Bureau to make a study setting out issues for general consideration on the protection of geographical indications, looking at the key elements in the TRIPS definition, namely reputation, characteristics and quality which were essentially attributable to geographical origin. This study should be a general overview of systems of protection of geographical indications without addressing the question of whether the different systems were compatible with the TRIPS definition. This study would not aim at the harmonization of different systems but would be a basis for discussion.

281. The Delegation of the United States of America stated that the SCT should devote its next session to the Trademark Law Treaty as a first priority and to working general on geographical indications as a second priority. This Delegation recommended that the SCT focus on these two topics.

282. The Delegation of the European Communities also speaking on behalf of its Member States declared that trademarks were the first priority. As regards geographical indications, one day of the next session would be devoted to this subject. The discussion would be based on a study by the International Bureau which addresses the elements of the TRIPS definition without trying to harmonize the different approaches. The Delegation suggested that an informal exchange of views could take place without being reflected in the report of the session.

283. The Delegation of Australia supported the suggestion made by the Delegation of the United States of America stating that the first priority should be the Trademark Law Treaty together with substantive harmonization and geographical indications. Three-dimensional trademarks and industrial designs might be discussed at a later stage.

284. The Delegation of Switzerland felt that the agenda contained too many issues. As priorities this Delegation mentioned the Trademark Law Treaty, co-existence of industrial designs and three-dimensional marks, and geographical indications. In respect of industrial design and three-dimensional marks, the scope of protection should be addressed as well as the grounds for refusal. The Delegation also favored the continuation of discussions on geographical indications as suggested by the Delegation of European Communities.

285. The Delegation of Mexico stressed that its first priority was geographical indications although it did not oppose discussing also trademarks. Legal certainty concerning the nature of geographical indications was of outmost importance, therefore a full day of the next session should be devoted to geographical indications in order to have a better understanding. The Delegation did not share the opinion of the Delegation of the

European Communities that the discussions should be informal and not reported. Three dimensional marks and industrial designs were not urgent matters to be discussed.

286. The Delegation of Canada supported the suggestion of the Delegation of Australia concerning geographical indications. The SCT should focus on the Trademark Law Treaty and geographical indications. The substantive harmonization of trademark laws was a long term objective. As regarded industrial designs, they had a lower priority.

287. The Delegation of the Czech Republic pointed out that trademarks were the first priority besides industrial designs.

288. The Representative of INTA favored discussions on the Trademark Law Treaty. Also the questionnaire concerning the substantive harmonization of trademark laws should be finalized in this session in order to be circulated after the session.

289. The Representative of ICC emphasized that users and business circles, wished to see more concrete results as regarded the substantive matters concerning trademarks. A half day should be devoted to industrial designs on the basis of document SCT/9/6 which should be studied carefully. Discussions should also continue on geographical indications although concepts for harmonization depended on political matters.

290. The Delegation of the Russian Federation felt that the most important topics were the Trademark Law Treaty and geographical indications.

291. The Delegation of Germany stressed the importance of the Trademark Law Treaty. Germany would submit its instrument of accession to this Treaty after having solved some technical problems. Also substantive matters concerning trademarks were important. Industrial designs were not a priority for this Delegation. The debate on geographical indications depended on the outcome of discussions at the WTO.

292. As a result of this discussion, the International Bureau suggested that three days of the next session be devoted to trademarks, including the Trademark Law Treaty, harmonization of substantive aspects and the relationship between three dimensional marks and industrial designs, one day to geographical indications and one day to various issues, such as domain names and adoption of the Summary by the Chair.

293. The Delegation of the European Communities, supported by the Delegation of the United States of America, welcomed the suggestion of the International Bureau to devote three days to trademarks. However, a half day should be devoted to geographical indications and a half day to conflicts between domain names and geographical indications. Other issues, such as three dimensional marks could be discussed during one day.

Agenda Item 6: Summary by the Chair

294. The Chair proceeded to the adoption of the Summary by the Chair in document SCT/9/8Prov. Paragraphs 1 to 4 of the Summary were adopted without any modifications. The Chair then opened the floor for comments on the following paragraph (Internet Domain Names and Geographical Indications).

295. The Delegation of the European Communities expressed interest in defining the scope of the document requested in paragraph 5 of the Summary by the Chair. In addition, the Delegation stressed that this document should take into account the interim and final reports prepared after the WIPO Second Domain Name Process meeting as well as prior discussions on this subject within the SCT.

296. The Delegation of Australia proposed that paragraph 5 read as follows: "the SCT [...] and requested the International Bureau to prepare a paper summarizing the state of the positions, drawing together work already done by the International Bureau and including the comments made by several delegations at the SCT."

297. The Chair declared this proposal was accepted since no objections were made.

298. The International Bureau read the new paragraph 5 as proposed: "The SCT decided to continue discussions on this issue and requested the International Bureau to prepare a paper summarizing the state of the positions, drawing together work already done by the International Bureau and including the comments made by several delegations at the SCT."

299. The Delegation of the European Communities stated that it could accept this proposal if the report made it clear that a reference to the SCT means also its special sessions.

300. The Delegation of Switzerland thought anything regarding domain names and geographical indications should be left open for discussion.

301. The Delegation of Australia thought the proposed new wording of Agenda Item 5 allowed the International Bureau to prepare a comprehensive paper that dealt with all matters regarding domain names and geographical indications.

302. The Delegation of the United States of America pointed out that it agreed with the new wording of paragraph 5 but recalled that the substance of the paper was summarized earlier during this meeting by the International Bureau and should include information on the state of protection of geographical indications on the Internet, the advantages and disadvantages of this protection in the context of the UDRP and the challenges to protect geographical indications on the Internet.

303. The International Bureau concurred with the intervention made by the Delegation of the United States of America and stated that the three points raised by this Delegation would be reflected in detail in the report of this meeting.

304. The Chair asked whether there was a consensus on paragraph 5. Since there were no objections, the chair moved to the following paragraphs (Internet Domain Names and Country Names)

305. The Delegation of Mexico referred to paragraph 8(iii) and wondered whether Member States would be parties to a dispute or an international treaty. If this paragraph referred to an international treaty, the Delegation of Mexico thought the word “estados” was sufficient. However, if this paragraph referred to a dispute, the correct words should be “estados partes a una disputa.”

306. The Delegation of the United States of America wondered whether paragraph 9 meant that the SCT would transmit its recommendations to ICANN, since paragraph 8 stated that discussions were not over on this subject. The Delegation wondered whether this discussion would continue on the SCT Forum and whether additional names would be included in the resolution to be sent to ICANN.

307. The Delegation of Australia stated that it did not understand the intervention of the Delegation of Mexico and added that it seemed that there was no need in the English version for the word “party.” In response to the intervention of the Delegation of the United States of America, the Delegation proposed to invert the order of paragraphs 8 and 9.

308. The Delegation of Mexico clarified that it proposed to delete the word “parties” and keep the word “states”. In response to the question raised by the Delegation of the United States of America, the Delegation thought it was decided to protect names, extend their protection through the UDRP and submit this recommendation to ICANN. Only after, the items under paragraph 8 would be discussed by the SCT. Finally, the Delegation of Mexico thought that inverting the order of paragraphs 8 and 9 was appropriate.

309. The Delegation of the United States of America indicated that inverting the order of paragraphs 8 and 9 alleviated some of its concerns. However, the Delegation questioned the need for further discussions on country names after their communication to ICANN.

310. The Chair summarized the discussion on Agenda Item 6 by stating that the proposal of Australia seemed to have broad support and clarified the concerns that were raised.

311. The Delegation of Australia noted that inverting the order of paragraphs 8 and 9 meant that two proposals would be sent to ICANN at different times.

312. The Delegation of Sri Lanka supported inverting the order of paragraphs 8 and 9 but wondered whether the SCT should also inform ICANN that further work will be done on this issue.

313. The Delegation of Australia, supported by the Delegation of Germany, concurred with the intervention made by the Delegation Sri Lanka and suggested giving the International Bureau some latitude to convey this issue to ICANN, possibly within the Government Advisory Commission of ICANN.

314. The International Bureau confirmed that the recommendation transmitted to ICANN would include the statements made in paragraphs 6 and 7 of the Summary by the Chair. However, the substance of paragraphs 8, 10, 11 of the Summary by the Chair would also be brought to the attention of ICANN.

315. The Chair proposed to exclude paragraph 9, and then stated that Agenda Item 6 should be left as it was. Since there were no objections, the Chair proceeded to the following paragraph (Trademarks).

316. The Delegation of the Republic of Korea wondered whether paragraph 12 meant that future discussion would be limited to Articles 8, Article 13*bis*, and the related rules.

317. The International Bureau replied that the new draft proposal of Articles 8, 13*bis* and 13*ter* will be presented since suggestions were made during this meeting. However, the discussion at the next SCT meeting may go beyond Articles 8, 13*bis* and 13*ter*.

318. The Chair asked whether there were any objections to include Article 13*ter* and Article 13*quater* to paragraph 12. Since there were no objections, the Chair proceeded to the following paragraph (Further development of international trademark law and convergence of trademark practices).

319. The International Bureau proposed the following new wording for paragraph 13: “The SCT decided that the International Bureau should circulate the questionnaire contained in document SCT/9/3 on the SCT Electronic Forum, inviting for comments by the end of January 2003. On the basis of these comments, the International Bureau shall finalize the questionnaire and circulate it for reply.”

320. The Chair considered paragraphs 12 and 13 adopted since there were no more objections. The Chair opened the floor for comments on the following paragraph (industrial designs).

321. The International Bureau proposed the following summary for industrial designs: “The SCT welcomed the discussion on industrial designs at the SCT and expressed the wish to continue such discussions at future meetings.”

322. Since there were no objections, the Chair opened the floor for comments on the following paragraph (Future work).

323. The Delegation of Australia stated that a synthesis of the questionnaire might not be ready for the next SCT meeting because of priority reasons.

324. The Delegation of Switzerland wanted the wording to be changed in order to state that priority will be given to the revision of the TLT and the harmonization of substantive trademark law. However, the Delegation wondered whether the harmonization of substantive trademark law was premature for the SCT. According to the Delegation, paragraph 14 should simply say “priority will be given to the revision of the TLT and continued work on the questionnaire which might lead to harmonization.”

325. The Delegation of Australia congratulated the Chair for a well managed meeting.

Agenda Item 7 : Closing of the Session

326. The Chair closed the ninth session of the Standing Committee.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS

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* SurunedécisionduComitépermanent,lesCommunautéseuropéennesontobtenulestatutde
membresansdroitdevote.

* BasedonadecisionoftheStandingCommittee,theEuropeanCommunitieswereaccorded
memberstatuswithoutar ighttovote.

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