European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (WT/DS174, WT/DS290)

Comments of the United States on the Reply of the
World Intellectual Property Organization
To the Panel's Letter of July 9, 2004.

September 28, 2004

1. As provided in item 3(k) of the Panel's "Further Revised Timetable for Panel Proceedings", the United States is providing comments below on the reply of the World Intellectual Property Organization ("WIPO") to the Panel's letter of July 9, requesting available factual information relevant to the interpretation of certain provisions of the Paris Convention (in particular, Article 2, related to national treatment).

2. The factual information provided by WIPO consists of excerpts from WIPO's official records of various diplomatic conferences that adopted, amended, or revised provisions currently contained in Articles 2 and 3 of the Paris Convention (Stockholm Act, 1967). As a preliminary matter, the United States notes that, under customary rules of interpretation of international public law, reflected in Article 31 of the *Vienna Convention on the Law of Treaties*, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Throughout this dispute, the United States has applied this approach to interpreting the TRIPS Agreement and Paris Convention provisions at issue in this dispute. Supplemental means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, may only be used for a limited purpose: to confirm the meaning resulting from the application of the general rule of interpretation, or to determine the meaning when that interpretation leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[1]

3. No party to this dispute has argued that the terms of Articles 2 and 3 of the Paris Convention are ambiguous or obscure. Instead, the materials presented by WIPO confirm the interpretation of the Paris Convention presented by the United States in this dispute, applying the customary rules of interpretation of public international law. Indeed, the materials provide useful emphasis in at least two respects.

4. First, the materials confirm that, in adopting Article 2 and its predecessors, the negotiators were keenly aware that, as concerns the protection of industrial property, a Member would have to provide the same advantages to nationals of other Members as it provides to its own nationals, *regardless* of the domestic laws or regulations in those other Members relating to intellectual property. It was clear to the negotiators that, under Article 2, a Member would not be able to condition the protection of industrial property provided to another Member's nationals on that other Member itself having a particular system of protection (or indeed, any system) or

[1] *See Vienna Convention on the Law of Treaties*, Article 32.

having a particular set of substantive or procedural rules in place.[2] Thus, in the example that recurs in the WIPO materials, the United States would have to allow all Member national inventors 17 years of patent protection, with minimal fees and no exploitation requirement, even though other Members imposed significant fees for such protection, provided substantially shorter patent terms, and required exploitation.[3] The delegate from France, who made the initial proposal for Article 2 in 1880, insisted on the importance of providing the same advantages to the nationals of other Members as one provides to one's own nationals, regardless of the protections provided in those other Members, and his successor at the Hague Conference reiterated the same points in 1925, when the national treatment provision of the Paris Convention was last amended.[4] That conference rejected suggestions that the regime be changed to compensate for the perceived problem of requiring that a Member's nationals benefit from strong protections in another Member, even though the first Member does not provide the same protections.[5]

5. A second, and related, issue is that, throughout the negotiations, there was an emphasis on the fact that, under the national treatment obligation, Members were not obliged to change their substantive law, or to put in place legal regimes that they did not currently have.[6] It simply

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[2] As the United States noted in its first submission, citing the same materials as have now been provided by WIPO, the importance of this principle was made clear at the very first negotiating session for the Paris Convention in 1880, where the concept of national treatment in what was to become the Paris Convention was first introduced. In the welcoming remarks for that first session, the French Minister for Agriculture and Commerce stated that the Conference could not achieve a complete international treaty of industrial property because of the difficulty of unifying national laws. He concluded that the Conference should, therefore, strive to find the means to constitute a union which, <u>without encroaching on domestic legislation</u>, would assure national treatment and lay down a number of uniform general principles. Paris Diplomatic Conference (1880/1883), pp. 14-17, at p. 16 (emphasis added). Also provided as Exhibit US-3. In the negotiations on the national treatment provision, the French negotiator who had prepared the initial draft emphasized that, in order to be acceptable, the convention <u>would have to respect the internal legislation of all contracting parties to the extent possible</u>, and to restrict itself to an obligation to extend national treatment to foreigners. Paris Diplomatic Conference (1880/1883), p. 33 (emphasis added). Also provided as Exhibit US-3. In the course of that discussion, the national treatment obligation was <u>clarified by the deletion of the word "reciproquement"</u> from the original draft. *Id.*, pp. 39-45. Also provided as Exhibit US-3. And indeed, in subsequent revisions to this provision, several proposals to include a reciprocity element in the obligation found no support and were withdrawn. For instance, a proposal by the United States to provide for the right to impose upon nationals of the other countries the fulfillment of conditions imposed on its nationals by those countries found no support and was withdrawn. Hague Revision Conference (1925), pp. 413-415 (First Sub-Committee). Also provided as Exhibit US-4.

[3] *E.g.,* Brussels Revision Conference (1897/1900), pp. 95-97, 143-144, 195-196.; Hague Revision Conference (1925), pp. 413-415. *See also* Paris Diplomatic Conference (1880/1883), pp. 33-45, clarifying that the national treatment approach should be acceptable to countries, like The Netherlands and Switzerland, that do not protect patents under their national law, because they would not have to treat foreigners better than their own citizens.

[4] Paris Diplomatic Conference (1880/1883), pp. 14-17; Hague Revision Conference (1925), p. 414.

[5] *See* Hague Revision Conference (1925), pp. 413-415 (First Sub-Committee). Also provided as Exhibit US-4.

[6] *See* note 2, *supra.*

required that whatever regime was in place be applied equally to nationals of other Members. For instance, specifically in connection with the national treatment obligation with respect to indications of source, the Belgian representative clarified that the Paris Convention did not obligate Belgium to have a particular legal regime in place for indications of source, but only that, whatever the regime, it would apply even-handedly to all nationals.[7] And it was the expectation that Belgian nationals would receive the same treatment in another Union Member as that Member's nationals, *regardless* of the lack of a particular protection regime in Belgium.

6. These two points are significant because they stand in contrast to the EC GI Regulation. As the United States has described in greater detail in its submissions, oral statements, and answers to Panel questions, the EC will not register and protect the home-based GIs of another Member's nationals unless that Member itself – not the national claiming the right, but the Member – satisfies certain requirements. Among those requirements are that the Member concerned establish an EC-style inspection system for GIs, and that the Member itself demonstrate that the GI is protected in the Member (a requirement that accommodates well Members with an EC-style GI registration system, but presents significant obstacles for Members that protect GIs in other ways). The Member must also be able to assess whether an application for GI registration from one of its nationals satisfies the requirements of the EC GI Regulation, which requires an infrastructure and decision-making capability similar to that possessed by the EC and the EC member States (which also must make that assessment under the GI Regulation). As the United States has pointed out in this dispute, these are effectively requirements that, as a condition of obtaining intellectual property protection in the EC for their nationals, other WTO Members adopt aspects of a GI regime that are similar to what the EC has chosen to adopt. In contrast, as reflected in the materials provided by WIPO, the negotiators of the Paris Convention intended that such intellectual property protections be made available to all nationals of Members *regardless* of the internal laws and regulations of those Members and, in particular, *without* a requirement that those Members adopt particular systems of protection.[8]

7. Indeed, it is also revealing that, in the many pages provided by WIPO, there is considerable discussion of the requirements that Members could impose on foreign *nationals* in order for them to receive the same advantages as domestic nationals. By contrast, there is no discussion that the United States could see concerning any requirements that could be imposed on *other Members* as a condition of their nationals receiving the benefits of intellectual property protections, aside, of course, from the requirement to become a Member of the Union.[9] This, too, is consistent with the views of the United States in this proceeding, based on the customary

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[7] Brussels Revision Conference (1897/1900), p. 246.

[8] Further, at this point it almost goes without saying that the EC's explicit conditions of reciprocity and equivalence in Article 12(1) of the GI Regulation are directly contrary to what the negotiators of the Paris Convention either drafted or intended to draft. Indeed, even the EC has abandoned any defense that these conditions are consistent with national treatment.

[9] Indeed, even if a country did not join the Union, however, its nationals could be eligible for national treatment under Article 3 of the Paris Convention, if they had a real and effective commercial or industrial establishment in the territory of a country of the Union.

rules of interpretation of public international law: it is the *nationals* of other Members, not the Members themselves, to whom national treatment is owed. The EC GI Regulation denies this treatment to non-EC nationals when it imposes conditions that the non-EC national himself cannot meet, but for which he must rely on his government.

8. In sum, the United States reiterates its positions, set forth in its submissions, oral statements, and responses to Panel questions, that the EC GI Regulation is inconsistent with the EC's national treatment obligations under the TRIPS Agreement and the Paris Convention, as properly interpreted using general rules of treaty interpretation, and submits that the materials provided by WIPO confirm and reinforce this interpretation and the inconsistencies of the EC GI Regulation.