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MULTILATERAL SYSTEM OF NOTIFICATION AND REGISTRATION OF GEOGRAPHICAL INDICATIONS FOR WINES (AND SPIRITS)

Communication from Argentina, Australia, Canada, Chile,
New Zealand and the United States

By means of a communication dated 19 September 2002, the following text has been received from the Permanent Mission of Argentina on behalf of the delegations of Argentina, Australia, Canada, Chile, New Zealand and the United States. It was circulated as an advance copy on 20 September 2002.

The present communication refers to the issues proposed by the Chair in the Special Session of the Council for TRIPS for discussion in the meeting held on 28 June 2002. It expresses some general considerations about the multilateral system of notification and registration of geographical indications for wines (and spirits).

INTRODUCTION: NATURE AND SCOPE OF MEMBERS' OBLIGATIONS IN RELATION TO GEOGRAPHICAL INDICATIONS

1. In accordance with Article 1.1 of the TRIPS Agreement, Members are free to determine the level of protection (provided it does not contravene the provisions of the Agreement) and the appropriate method of applying its provisions within their own legal system and practice.

2. Article 1.1 grants Members the right to establish in their national systems their own criteria for determining eligibility for protection of geographical indications, within the parameters of Section 3, Part II of the Agreement.

3. In the negotiations under Article 23.4 of a multilateral system of notification and registration of geographical indications for wines (and spirits), this fact must be borne in mind as that right cannot be restricted or limited by such a system. In addition, none of the provisions of the TRIPS Agreement establishes that Members shall exercise that right through the multilateral system of notifications and registration of geographical indications for wines (and spirits).

A. DEFINITION OF THE TERM "GEOGRAPHICAL INDICATIONS" AND ELIGIBILITY OF GEOGRAPHICAL INDICATIONS FOR WINES (AND SPIRITS) FOR INCLUSION IN THE SYSTEM

4. Article 22.1 of the TRIPS Agreement defines "geographical indications" as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin".

5. The definition of Article 22.1 is applicable to all kinds of products, including wines and spirits, thus rendering unnecessary the elaboration of a new one.

6. In accordance with this provision, the following elements must be ascertained:

- (i) the existence of a specific product;
- (ii) the product must have a given quality, reputation or other characteristic that is essentially attributable to its geographical origin;
- (iii) the product must originate in the territory of a Member or in a region or locality in that territory.

7. The national legislation of each WTO Member defines the scope and the eligibility criteria to establish the link between the product and the geographical origin. The protection of the geographical indications is granted according to the criteria established in Members' national laws. Discrepancies regarding whether or not certain indications meet the definition of Article 22.1 should not be resolved in the context of the multilateral system of notification and registration. Each individual Member, in accordance with its national legal system, should decide upon these issues.

8. The following concepts do not fall within the definition of geographical indications provided for in Article 22.1 of the TRIPS Agreement:

- (a) Indication of origin: they only refer to the places where the products originate, and by themselves do not provide for the necessary link between the origin and the quality, reputation or other characteristic of the product, as required by the TRIPS Agreement;
- (b) Traditional expressions and terms: they are common language generic terms.

9. It is necessary to guarantee that the system of notification and registration of geographical indications for wines (and spirits) does not undermine WTO Members' right to decide the eligibility of individual geographical indications for protection within their territories. It is important to bear in mind that geographical indications are territorial rights; therefore, the conditions for granting and exercising them are established in the national legislation of WTO Members.

10. Furthermore, it should be noted that Article 23.4 refers to "...geographical indications for wines eligible for protection in those Members participating in the system". It does not refer to "geographical indications for wines protected in those Members participating in the system". This provision recognizes that a geographical indication protected in accordance with national legislation by a WTO Member participating in the system can appear on the register even though another WTO Member participating in the system does not consider that same geographical indication for wine (and spirit) as eligible in its territory.

B. THE PURPOSE OF THE NOTIFICATION AND REGISTRATION SYSTEM FOR WINES (AND SPIRITS)

11.1 The system must facilitate the protection of geographical indications for wines (and spirits) without imposing additional obligations and burdens upon WTO Members.

11.2 To achieve that balance, the concept "facilitate" in the context of the notification and registration system for wines (and spirits) should be understood as meaning "to inform the geographical indications for wines (and spirits) protected by each WTO Member participating in the system". To "facilitate" protection should not lead to the acquisition or grant, through the system, of a higher level of protection than the one established by Article 23.

12. A system of notification and registration does not give rise to rights. "Notify" and "register" must be construed as elements of the same system: WTO Members that voluntarily participate in the system will notify the geographical indications for wines (and spirits) protected under their national laws, which shall be incorporated into a registry. The system should only aim at "facilitating" the protection of geographical indications for wines (and spirits) within the meaning of Section 3, Part II of the TRIPS Agreement. The terms "notify" and "register" do not determine the legal effects of the system.

13. The provisions of Article 24 should apply as at present. In this sense, geographical indications for wines (and spirits) eligible for notification and registration in the system should be those protected as such by the WTO Members participating in the system, in accordance with Article 24.9 of the TRIPS Agreement. The exceptions established in Articles 24.4, 24.5, 24.6 and the provisions of Article 23.3 of the TRIPS Agreement would also remain fully applicable.

C. PARTICIPATION IN THE MULTILATERAL SYSTEM OF NOTIFICATION AND REGISTRATION OF GEOGRAPHICAL INDICATIONS FOR WINES (AND SPIRITS)

14. In the context of Article 23.4, the "multilateral" character of the system of notification and registration for wines (and spirits) shall not be understood as embracing all WTO Members. Article 23.4 expressly states that "Members participating in the system" will notify and register their geographical indications. That sentence clearly indicates the possibility that there could be Members not joining the system.

15. If Article 23.4 foresees "Members not participating in the system", that means that participation cannot be compulsory. The multilateral nature of the negotiation should not be construed as encompassing the obligation of participating in the system.

16. The concept "multilateral" should not determine the scope and character of the system and it should not be seen as contrary to the concept of "Members participating in the system".

17. On a multilateral basis, WTO Members can establish a voluntary "multilateral system of notification and registration of geographical indications for wines (and spirits)", aimed at increasing transparency and facilitating information related to the geographical indications protected by their national legal systems. The information thus available will assist the decision-making process of national authorities.

18. The concept "establish a multilateral system" is not contrary or opposed to "Members participating in the system". The multilateral element does not suppress its voluntary nature. Members may consent to participate or not in the system. The system should not have legal effects on participants or non-participants.

D. MEMBERS' PROPOSALS

19. In the proposals submitted by Members, two main approaches can be identified:

(i) Voluntary system of notification and registration for wines (and spirits)

It consists of a procedure for the notification and registration of geographical indications for wines (and spirits) protected under the national law of the notifying Member. Its objective is to make available to participating WTO Members the information submitted for the purpose of transparency. The information will be used by Members participating in the system in decision-making processes for registration under their national laws.

WTO Members are not compelled to participate in the system to obtain full protection of their geographical indications for wines (and spirits) under the TRIPS Agreement.

The voluntary multilateral system will not act as confirmation that the geographical indication for wines (and spirits) notified complies with Article 22.1.

- (ii) Compulsory international system of notification and registration for wines (and spirits)

It is a procedure of registration that obliges all WTO Members (without distinction among participants or non-participants in the system) to protect within their territory the geographical indications of wines (and spirits) notified and registered at the multilateral system, unless a satisfactory opposition procedure has been carried out.

Notwithstanding Members' own national laws, after a limited time period has passed, they could be obligated to protect other WTO Members' geographical indications.

E. FINAL COMMENTS

20. Geographical indications are private rights that are applied on a territorial basis. Therefore, the conditions for their grant and exercise must be established by the national legislation of WTO Members. The criteria for the eligibility for protection of the geographical indications for wines (and spirits) are established by each WTO Member in their own national legal systems. A multilateral system of notification and registration of geographical indications for wines (and spirits) cannot weaken or undermine the WTO Members' rights under Article 1.1 of the TRIPS Agreement.

21. WTO Members, in exercising their sovereign rights, are entitled to conduct the necessary assessment to determine the consistency of foreign geographical indications with their national legislation. WTO Members' rights would be undermined by having to protect in their territories geographical indications of wines (and spirits) notified and registered in the system because they are protected in the territory of another WTO Member. Members should not be compelled to accept the extraterritorial application of the national laws of certain WTO Members participating in the system.

22. If an opposition system was established, the right to invoke the exceptions provided for in Article 24 would be undermined because they would have to be used through the system and subject to the successful result in an opposition procedure.

23. The establishment of an obligatory system of notification and registration for wines (and spirits) within the framework of the WTO would create higher standards of protection for the geographical indications for wines (and spirits), beyond the obligations assumed by Members under the TRIPS Agreement and will imply relinquishing national competences of WTO Members.

24. It must be borne in mind that the access to the multilateral system of notification and registration of geographical indications for wines (and spirits) should not generate major costs or constitute an additional burden for developing country Members.

25. Any Member, whether participating or not, should retain its rights to determine under its national law whether protection will be granted to individual geographical indications for wines (and spirits) in its territory, whether those indications were or were not notified or registered in the system.

26. It is necessary to consider the situation of those Members that have not yet implemented national systems of protection of geographical indications of wines and spirits or are not producers of wines or spirits. The impossibility of notifying or registering national geographical indications cannot represent a disadvantage regarding Members' rights under the Section 3, Part II of the TRIPS

Agreement and, in particular, the right to invoke the exceptions provided for in Article 24 or the right to oppose, in accordance with national laws, to notifications or registrations made by other Members.
