

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

Draft Report by the Chairman, Ambassador C. Trevor Clarke (Barbados)

1. This report on the negotiations on the establishment of a multilateral system of notification and registration ("Register") of geographical indications for wines and spirits is submitted on my own responsibility and is without prejudice to the position of any delegation and to the outcome of the negotiations.
2. On 29 October 2008, the twentieth formal meeting of the Special Session of the Council for TRIPS confirmed my appointment as Chairman in replacement of Ambassador Manzoor Ahmad (Pakistan), who had relinquished his post at the end of July 2008. The report made by my predecessor in document TN/IP/18, dated 9 June 2008, remains valid in many respects. This report focuses on the work done since I have taken up my task as Chairman of the Special Session.

PART A – WORK UNDERTAKEN

3. As reported on previous occasions, three formal proposals have been tabled. Document TN/IP/W/8, tabled in April 2003, contains the proposal by Hong Kong, China and remains unchanged. Document TN/IP/W/10, tabled in March 2005, contains the "joint proposal" and has been revised to reflect additional co-sponsors. The list of Members currently co-sponsoring TN/IP/W/10/Rev.2, dated 24 July 2008, is as follows: Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Korea, Mexico, New Zealand, Nicaragua, Paraguay, South Africa, Chinese Taipei and the United States ("Joint Proposal Group"). Document TN/C/W/52, dated 19 July 2008, and its Addenda 1-3 contains a proposal for "Draft Modalities for TRIPS Related Issues", co-sponsored by Albania, Brazil, China, Colombia, Croatia, Ecuador, the European Communities, Georgia, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, Moldova, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the ACP Group and the African Group. Under the sub-heading "GI-Register: draft Modality text", paragraphs 1-3 of document TN/C/W/52 specifically address the issues relating to the Register of geographical indications for wines and spirits. Paragraph 9 of TN/C/W/52 refers to special and differential treatment.
4. At the meeting of 29 October 2008 Members called for an "intensification of work" of the Special Session. Following that session I held a series of informal meetings and consultations in various formats during which useful clarifications were made, in particular by the European Communities in respect of its earlier proposals. At an open-ended informal consultation on 1 December 2008 the European Communities circulated a statement that paragraphs 1-3 of document TN/C/W/52 superseded all previous EC proposals, i.e. TN/IP/W/11 of 2005 and the so-called "new thinking" of November 2007. On 4 December, several Members of the Joint Proposal Group circulated a list containing 64 questions to the European Communities and the other co-sponsors of TN/C/W/52. Singapore also circulated a list of questions. At an informal meeting on 4 and 5 December, as well as at the formal meeting on 5 March 2009, there were intensive exchanges of

questions and replies on the basis of the questions posed.¹ Speaking on behalf of the proponents of TN/C/W/52, the European Communities grouped its answers into the three categories identified by my predecessor in his report in document TN/IP/18, namely:

- (1) the two key issues of consequences/legal effects of registration and participation where there kept being fundamental differences;
- (2) issues of notification and registration; and
- (3) issues such as fees, costs and administrative burdens, in particular for developing and least-developed country Members, and special and differential treatment.

5. In 2009 I held [four] formal meetings, on 5 March, 10 June, 23 and 28 October² and [27] November. Between those formal meetings, I held informal consultations, including open-ended meetings for transparency purposes. At the March and June meetings, discussions were structured around the three categories or clusters of issues mentioned above in paragraph 4. In order to move from a repetition of positions and proposals to a discussion on the substantive issues and negotiations, I suggested that delegations focus on a list of four questions that I posed on my own responsibility. The four questions are:

- (i) What legal obligations would be acceptable for the Register to facilitate the protection of geographical indications for wines and spirits, as mandated by Article 23.4 of the TRIPS Agreement?
- (ii) When making decisions regarding the registration and protection of trademarks and geographical indications, what significance and weight should national authorities give to the information on the Register?
- (iii) Are there any options regarding participation, other than voluntary and mandatory participation? If so, what criteria could be envisaged?
- (iv) What form could special and differential treatment take with regard to the Register?

6. In my view the substantive discussions on the basis of this list of questions were extremely useful in focusing Members' interventions on substantive questions, particularly in the areas of participation and consequences/legal effects of registration. Several delegations usefully explained what the implementation of their proposed systems would entail in their current domestic laws. The point has been made that the issue of participation is linked to the consequences/legal effects of registration.

7. This report does not describe the range of views that have been expressed on issues of linkage between work in the Special Session and work on the relationship between the TRIPS Agreement and the Convention on Biological Diversity and on GI extension, including in regard to the coverage of the GI register and in regard to procedural parallelism between these three TRIPS issues. This is because the issues of GI extension and TRIPS/CBD relate to matters which go beyond the mandate of the Special Session, including its limitation to GIs for wines and spirits. I repeatedly made the point that the mandate of the TRIPS Special Session is limited in that way.

¹ A record of the exchanges at the meeting on 5 March 2009 can be found in document TN/IP/M/21 of 28 May 2009.

² A record of the exchanges at the meetings on 10 June and 23 and 28 October 2009 can be found in documents TN/IP/M/22 and TN/IP/M/23, respectively.

PART B – STATUS OF ISSUES

8. The three proposals by Members currently on the table are the proposal by Hong Kong, China, the joint proposal and the proposal on modalities.³ With respect to the status of issues, the work undertaken since my predecessor's report has continued to be structured around the three categories of elements he had identified.

(1) *Consequences/Legal Effects of Registration and Participation*

With respect to the first category, the issues of consequences/legal effects of registration and participation remain the central questions of this negotiation where fundamental differences of view continue to exist among Members. The detailed discussion of the new position in paragraphs 1-3 of TN/C/W/52 as a modalities proposal vis-à-vis the two proposed legal texts in TN/IP/W/8 and TN/IP/W/10/Rev.2, as well as Members' responses to questions (i)-(iii) of my list of questions, have further deepened the understanding of where these differences lie.

With respect to the consequences/legal effects of registration, in my view there seems to be scope for convergence on the expectation that consulting the information on the Register would include taking that information into account "when making decisions regarding registration and protection of trademarks and geographical indications" in the relevant domestic procedures. Differences remain as to what significance and weight should be given to the information on the Register. With respect to participation, while Members have discussed different ideas in this regard, Members' views remain unchanged.

(2) *Notification and Registration*

With respect to the second category, the issues of notification and registration, a considerable amount of detailed work has been done in the past. The assessment of points of convergence and divergence on these issues reflected in TN/IP/18, in particular paragraphs 4 and 12-20, remains valid.

(3) *Other Issues*

With respect to the third category, the issues of fees, costs and administrative burdens, in particular for developing and least-developed country Members, and special and differential treatment depend substantially on the key policy choices to be made, in particular on the questions of participation and consequences/legal effects.

Of those issues, Members discussed special and differential treatment in response to question (iv) of my list. Members held on to their long-standing positions, namely on the one hand, that special and differential treatment was embodied in the proposed voluntary nature of the Register and, on the other hand, that devising rules on special and differential treatment would best be left for discussions at a later stage after the main elements of the Register had been agreed.

³ The texts of the three proposals can be found in documents TN/IP/W/8, TN/IP/W/10/Rev.2 and in paragraphs 1-3 of TN/C/W/52, respectively.

PART C – THE WAY FORWARD

9. The mandate for the negotiations on the system of notification and registration of geographical indications for wines and spirits is contained in Article 23.4 of the TRIPS Agreement and the first sentence of paragraph 18 of the Doha Ministerial Declaration. Article 23.4 provides as follows:

"In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system."

The first sentence of paragraph 18 of the Doha Ministerial Declaration indicates that the negotiations on the Register are not limited to GIs for wines, but also extend to GIs for spirits.

10. Several Members have called for a greater focus on the mandate. I therefore revisit the two crucial issues of participation and consequences/legal effects of registration in light of the mandate to further examine the elements thereof that give rise to the different positions in critical areas of the negotiations. The purpose of this examination is to make suggestions which may be capable of moving the negotiations forward when Members feel the time is right.

Participation

11. With respect to the issue of whether participation in the system should be voluntary or mandatory, some Members interpret the reference in the mandate to *"a multilateral system"* to mean that the system should apply to all Members. Other Members interpret the words *"those Members participating in the system"* to mean that not all Members are expected to participate.

12. There are several areas of WTO negotiations where some Members are excluded from certain obligations for a variety of reasons. At the same time, the formulation *"those Members participating in the system"* does not necessarily mean that participation must be voluntary. Against this background, I would encourage Members to continue searching for an acceptable solution that would determine a participation of Members in the Register that renders it a useful and meaningful tool in line with its purpose to facilitate protection. If the system of notification and registration is to have some meaning and significance, as Members seem to accept, then I would propose that some criteria or some other approach be determined to identify Members for participation.

Consequences/Legal Effects of Registration

13. With respect to the consequences/legal effects of registration, all Members seem to accept an obligation to consult the information on the Register. Members also seem to be willing to take the information on the Register into account "when making decisions regarding registration and protection of trademarks and geographical indications" under their national procedures. However, views differ significantly as to how such information should be taken into account, what weight and significance should be given to it, and whether there should be a specific legal obligation to take the information into account. While some Members are of the view that the mere obligation to consult the Register is not enough to ensure meaningful facilitation of protection of wine and spirit GIs, others are concerned about extra-territorial effects of GI protection.

14. A number of Members have explained how the proposals on the table would technically be implemented in their domestic legal systems. In the course of these explanations, some Members have indicated that implementing an obligation to consult the Register in their domestic systems would in fact ensure at the same time that the information was duly taken into account and given the

appropriate weight in their domestic procedures. Other Members have expressed the view that it would be necessary to agree minimum guidelines as to how the information in the Register would be taken into account and which weight would be appropriate.

15. In light of the above, I feel that negotiating efforts could find an acceptable formulation for an obligation capturing the realities highlighted by Members regarding how domestic authorities would treat information they have derived from a consultation of the Register. Further negotiations are required to address the issue of guidelines for any such obligation.

Guiding Principles for Future Work

16. In order to advance these negotiations, I suggest that some broad acceptance of "Guiding Principles" would be helpful. Building on the contributions of various Members, I therefore propose that future work should be guided by the following principles:

1. The purpose of the Register is to facilitate, not to increase, the protection of GIs for wines and spirits.

The establishment of the Register is intended to facilitate, rather than to increase, the level of substantive protection, which exists under the TRIPS Agreement. At the same time, it seems reasonable to expect that "facilitation" would make obtaining such protection easier. It is also clear that the Register is intended to facilitate protection of wine and spirit GIs, not only the examination process. In my view, Members' negotiations should focus on the crucial question of what are acceptable means of facilitating achievement of the existing level of protection, while ensuring that the substantive level of protection remains the same.

2. The Register should be useful and meaningful to both notifying Members and consulting Members.

The Register should be an accurate, reliable and authentic source of information. The primary responsibility for providing such information to the Register should rest with the notifying Member. It should also be explored how the nature and quality of the information on the system may influence the manner in which Members may take this information into account in their domestic legal systems.

3. The territorial nature of intellectual property rights should be preserved.

The territorial nature of intellectual property rights embodies the accepted view that intellectual property rights are valid only in the territory for which they have been established or granted. While this concept is not questioned by Members in these negotiations, the question is whether and under what circumstances Country A is prepared to give recognition to a protected GI from Country B, or recognize the facts that gave rise to such protection in Country B. Such recognition of legal or factual elements from another jurisdiction is practised under various international agreements and is the consequence of a sovereign decision by countries to do so.

4. The Register should not impose undue financial and administrative burdens on Members.

With respect to financial and administrative burdens, Members seem to accept that *some* financial and administrative burden may be necessary to fulfil the mandate, but that it should as much as possible be proportionate to the use and benefits of the Register.

5. Special and differential treatment should be precise, effective and operational.

Special and differential treatment should be provided through precise and effective provisions targeting developing and least-developed countries, including those that wish to benefit from participating in the system.
