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APPELLATIONS OF ORIGIN
POSITION OF CHILE'S VINEYARDS IN THE CONCERT OF THE NEW WORLD, AND IN RELATION TO THE NEGOTIATIONS WITH THE EUROPEAN UNION

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While indications of source, appellations of origin and other geographical indications are differentiated concepts in legal literature and in much legislation, for the purposes of this

study I shall use the expression that the TRIPS Agreement uses, namely "geographical indication."

Chile is a member of the WTO and, having signed the TRIPS Agreement, is in the process of approving the draft provisions amending its domestic law.

The only legally recognized Chilean geographical indications are "pisco," "pajarete" and "vino asoleado." They are reserved for certain alcoholic beverages produced and bottled in particular areas of the country. However, Decree 464 of the Ministry of Agriculture lays down a viticultural zoning scheme and introduces the names of each zone as the appellation of origin for wines produced and bottled in it. Those are the Chilean geographical indications recognized in our legislation. The zoning scheme has been recognized by the European Union. It is a short list containing Creole names, generally with aboriginal roots, which makes the risk of similarity to geographical indications of other countries more remote, except as mentioned below in the case of "pisco."

Chile forms part of the informal group knowing as the Group of Wine Producing Countries of the New World. The Group is composed of both public and private-sector entities of Argentina, South Africa, the United States of America, Australia, New Zealand, Canada and Mexico as well as Chile. Uruguay has attended some of its meetings. It serves as a forum for information exchange and as a driving force for legislation and reform to loosen up the international wine trade. It has achieved agreements on aspects of wine growing by means of the adoption of a treaty on mutual acceptance, which will be formally signed in Toronto on December 18. The same grouping will come to an agreement on the harmonization of wine labelling. Both agreements form part of the Group's search for free wine trading, and they cover subject matter like wine growing practices and labelling which have been used for the precise purpose of hampering free trade in wine and viticultural products. Whenever it has met the Group has exchanged information on the negotiations that each member is conducting with the European Union, and all have unanimously expressed concern at the stance of the Old Continent, which is reiterating its claim to the use of geographical names that have long been in use in a number of wine producing countries of the New World, and are duly protected by the TRIPS Agreement.

Of the Chilean geographical denominations referred to above, "pisco" is the only one that is challenged by another country. "Pisco" is a legally recognized geographical indication in Chile, an any conflict existing with the equivalent Peruvian denomination should be settled by appropriate negotiations within the framework of the rights and obligations laid down ininternational law.

Outside the international commitments of multilateral character that Chile has made, there are two bilateral free trade agreements that deal with the matter of geographical names; they are with Mexico (Chile has undertaken to recognize "tequila" and "mezcal") and with Canada ("Canadian whisky"). In exchange, Mexico and Canada recognize the Chilean geographical indications mentioned above.

Talking of geographical indications, on what do the discussions concentrate at gatherings of wine producing countries of the New World and in Chilean dealings with Europe? The controversy focuses on those expressions in use in Chile (and other New World countries) that the European Union regards as belonging solely to it.

The geographical indications used in Chile (and in other countries) which are provided for in Article 24 paragraphs 4, 5 and 6 of the TRIPS Agreement, a situation in our opinion shared by the wine producers of the New World, have taken on characteristics of genericity or common use owing to their customary, bona fide use since the beginning of the last

century. Indeed Chilean legislation itself uses geographical indications as generic or everyday words. What is more, in Chile and also in other countries, a number of geographical denominations have come to be owned or controlled by compatriots of ours, including in the form of trademarks, through labelling, which of course makes tougher and indeed unworkable any negotiation that touches on the economic rights of specific producers.

Article 15 of the law that laids down standards for alcohol and alcoholic beverages uses a number of expressions as generic terms. It refers for instance to the fact that, for the manufacture of "cognac, armagnac, brandy and eau-de-vie, only wine alcohol may be used."

For its part, Ministry of Agriculture Decree 78 of 1998 provides that "cognac, armagnac and brandy are eaux-de-vie aged in casks made of noble woods, colored with natural caramel or not, and sweetened." Further on it is provided that "the minimum alcoholic strength of brandy, cognac and armagnac should be 38 degrees and that of whisky, gin, vodka and rum 40 degrees." Where this situation is illustrated even better is in Article 19(e) of the Decree, which defines champagne as "the wine that ends its maturation cycle in closed containers the carbon dioxide content of which has evolved naturally within itself as a result of a second fermentation," adding that the "champenoise" and "charmant" methods are authorized for making it. This definition confirms a widespread claim at "champagne" has evolved from being an appellation of origin to become the name of a product that its made using a particular method.

It is not my wish to focus this presentation solely on champagne, or to refer repeatedly to it; I do not want to place my audience under the misapprehension that Chile's problem with the European Union is confined to champagne alone. The views that we have put forward here are common to all geographical denominations that have taken on the degree of genericity and universality that we referred to earlier.

The generic use that Chilean legislation makes of the word champagne should not be a matter for concern. Even the dictionary of the Royal Academy of Language incorporates it in our language, defining champagne as "a white or pink sparkling wine originating in France." The same Spanish-language dictionary defines "champañazo" as a "Chilean common noun; family celebration at which champagne is drunk."

In our country there is a hard and fast rule on this problem of geographical indications which does no more than repeat the exceptions written into the TRIPS Agreement regarding uses in good faith for periods in excess of ten years, which confer legal security on the use of the expressions "champagne" and "cognac" in Chile. These exception provisions were included at the insistence of ourselves and a number of other Latin American countries. However, we ourselves had to approve, under pressure from the European Union, a provision whereby countries undertook to agree to negotiations for the improvement of the protection of geographical indications at the request of any country believing that its own were suffering prejudice. France has made its position clear, and obviously it could apply for the negotiation process provided for in the TRIPS Agreement, or it raise the matter in connection with the negotiations with the European Union.

For "While in the TRIPS Agreement the prerogatives accorded for geographical indications are considered exceptional, it is nonetheless certain that those exceptions constitute acknowledgement of very ancient situations in which rights have been comprehensively acquired by our fellow citizens. There is clear evidence of the use of the word "champagne" in the United States of America, as a generic term, since 1876. In Chile

there are trademark registrations to distinguish "champaña" or labels containing the word, that date back to the 1930s. Apart from that the word "champaña" now forms part of numerous label-trademarks that constitute indivisible entities from which it cannot be removed without infringing rights enshrined our Constitution."[1]

While the TRIPS Agreement recognizes the need to engage in negotiations to improve the protection of geographical indications, the phrase "engage in negotiations" does not mean that our countries are under the obligation to discontinue their use of such indications or to "give back" their use, as some would have it, as it is in the nature of all negotiations to be either successful or unsuccessful.

The international economic order for free trade that is being pursued as the ultimate aim, or specifically the material progress of individuals, is the very same object that the wine-producing countries of the New World are themselves also pursuing. There is no going back. The rights that the TRIPS Agreement has established are inalienable. The most inappropriate and inconvenient thing that could would be for Europe to find itself forced to obtain through bilateral treaties what it has failed to obtain in the multilateral arena. The geographical indications which by virtue international legal enactments remain outside its exclusive domain are a *fait accompli*. There is no going back in that area either. What is more, to seek to do so in free trade negotiations that encompass the entire economy of a country, making the main issue subject to subsidiary agreements (as in the case of wines), seems to us, I have to say, to be a response to undue pressure. The message that we feel we have received at this stage is as follows: if you want trade with Europe, then give up on your rights in geographical denominations, and renounce your TRIPS rights. This practice strikes us as being unfriendly to say the least, and characteristic of a bygone age in the international trade arena.

The constitutional protection of industrial property in Chile is broad and well structured. Our Constitution assures all persons of the right of ownership in all its forms in relation to every type of corporeal and incorporeal property. No one may, in one situation or another, be deprived of his property, or of one of the essential attributes or faculties of ownership, except by virtue of a law that authorizes expropriation in the public or national interest, as laid down by the legislator.

More specifically, the Constitution guarantees industrial property rights in patents, trademarks, designs, technological processes and other comparable creations for such time as the law provides. Consequently, the only way of depriving someone of industrial property in Chile is by a means of a law that authorizes expropriation in the public or national interest, whereupon the expropriated person always has the right to indemnification for the economic prejudice caused.

It is from this angle that we have to consider the case of trademarks which, when they are in the composite form of label-trademarks, contain generic terms.

There are some who wonder whether there is not some contradiction: how can words such as "champagne," "cognac" and others be protected, simultaneously, as both generic terms and trademarks?

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[1] Mario Silva, La Paz Conference.

The reply is simple: their protection as generic terms is accorded them by Article 19 paragraph 23 of the Constitution, which in fact provides conversely that no ownership may be acquired in, therefore use may be made of, goods that nature has made common to all people (including such things as language). Trademark protection, on the other hand, is afforded to label-trademarks that contain the word "champagne" or another similar word within a whole which constitutes an indivisible entity from which nothing can be excised and which cannot be restricted in one form or another.

Trademarks are industrial privileges which constitute a kind of ownership of immaterial things, which in itself is a form of property right. Once trademark ownership has been legally acquired, it enjoys the protection granted by the Constitution, which means that the exclusive rights conferred by trademarks are inalienable.

In Chile there have been labels registered as trademarks since the 1930s which incorporate the word "champagne," and which have been duly accorded the necessary constitutional and legal safeguards, without any mention of the exclusion from that protection of generic elements or terms in common use.

Judicial and administrative precedent has been consistent in recognizing this protection and in considering illegal or arbitrary any practice that threatens, detracts from or disturbs the integrity of those marks. More specifically, an abundant, uniform case law has acknowledged that the extension of trademark coverage includes the generic or everyday components of a composite mark, which becomes part of the property of its owner as registered, and has to be renewed accordingly. It is an incontrovertible fact that such marks enjoy the protection conferred on them by industrial property.

As we see, then, the legal security of such subject matter is total, because it benefits from all the constitutional, legal and jurisprudential guarantees that my country accords to full property or ownership.

However, in the negotiations between Chile and the European Union, the latter bloc actually went much further than we have been saying. Clearly the matter has not stopped at champagne. Put briefly, the proposal by Europe seeks to make Chile (a State that will never have it in its power to do so) quite simply invalidate those trademarks that possess identicalness or "proximity" not only to "geographical denominations" that Europe considers its own, but also to Europe's invented category of "traditional expressions."

Given this broad perspective adopted by the European Union, the scale of the problem in any negotiation with Chile becomes virtually insurmountable. This is not only due to the traditional expressions — constituting an enormous foregone conclusion on the part of Europe for which there is no legal justification atall, certainly not in the TRIPS Agreement, but also because of the geographical indications themselves. What is more, Europe has not achieved a great deal in this area: much is made of the treaty with Australia, but the truth of the matter that this deal was reached before TRIPS (and Australia is bitterly regretting having signed it), and in practice contains only wine-growing subject matter, the intellectual aspects being held in abeyance.

We have engaged in a thorough study of all Chilean marks registered in Class 33, and let me tell you that the catchword champagne draws us into a long list that constitutes a veritable jungle of Chilean marks that would have to be "invalidated," if Europe were have its way. Suffice it to mention the example of Concha y Toro, the greatest Chilean vineyard,

which would risk losing a trademark dating back more than a century because it contains the expression “Toro,” which is a Spanish geographical denomination. Not to mention so-called traditional expressions; with them added, the length of the list would border on the surreal.

In all of this there is undoubtedly a serious lack of realism. Chile is a Spanish-speaking country and it cannot, even if it wanted to, change the unchangeable: our language is also a Latin one, and that accounts for the correspondence of expressions and denominations, not only with Spain of course, but also with Portugal, France or Italy. In our opinion it is a very different matter when Europe goes into this business with English-speaking countries such as the United States of America, Australia or indeed South Africa, as while none of the countries constituting the United Kingdom have ever been wine producers, it does so on behalf of European countries with high levels of wine production. Obviously the degree of similarity in expressions and denominations is going to be very high on the one case and very low in the other. The reason for this is clear: a large proportion of the inhabitants of South America came mainly from Spain and Portugal, but there are also some, indeed many, from Italy and France. So the negotiations cannot take place with one of the parties disregarding the cultural origins of the other as if those elements did not form part of the very essence of the other party’s identity, something that no person can justly pretend to ignore.

This being said, while remaining both realistic and firm, we continue to hope for a satisfactory conclusion to the negotiations with Europe.

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