

# codex alimentarius commission



FOOD AND AGRICULTURE  
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## JOINT FAO/WHO FOOD STANDARDS PROGRAMME

### CODEX ALIMENTARIUS COMMISSION

#### *Twenty-eighth Session*

*FAO Headquarters, Rome, 4 – 9 July 2005*

### **QUESTIONS RAISED BY THE CODEX COMMITTEE ON MILK AND MILK PRODUCTS (Sixth Session, Auckland, New Zealand, 26-30 April 2004)**

The present document contains the following background materials for information of the Commission:

- I. “Appellation d’Origine” and International Food Standards – Background note prepared by the Legal Office of FAO (CX/EXEC 72/18/11): Annex A to this document
- II. Opinion of the Legal Offices of FAO and WHO on the legal aspects involved in the questions raised by the Committee on Milk and Milk Products (Appendix X of ALINORM 04/27/41): Annex B to this document
- III. Exchange of correspondence between FAO and WHO and the World Intellectual Property Organization (WIPO): Annex C to this document

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JOINT FAO/WHO FOOD STANDARDS PROGRAMME  
EXECUTIVE COMMITTEE OF THE CODEX ALIMENTARIUS COMMISSION  
EIGHTEENTH SESSION  
Rome, 15-19 May 1972

"APPELLATIONS D'ORIGINE" AND INTERNATIONAL FOOD STANDARDS  
Background Note prepared by the Legal Office of FAO

I. Introduction

The Codex Alimentarius Commission, while examining at its Eighth Session matters arising from the work of the Committee of Government Experts on the Code of Principles concerning Milk and Milk Products, noted the questions that had arisen with regard to the implications of "appellations d'origine" for the elaboration, adoption and acceptance of food standards for certain cheese varieties. Considering that the problems connected with the concept of "appellation d'origine" may extend beyond the sphere of competence of the Committee on Milk and Milk Products, the Commission

"agreed that some consideration should be given to this subject by the Executive Committee at its next session insofar as the work of the Commission was concerned, in the light of background materials to be made available by the Legal Office of FAO." 1/

2. While "appellations d'origine" may apply to all types of commodities and while the question of their implications for the adoption of Codex standards thus concerns a problem of a general nature rather than a technical problem falling exclusively within the competence of any subsidiary body dealing with specific commodities, it appears that concrete problems have presented themselves only in the field of cheese varieties. This is due to the fact that all other standards are being drawn up under designations of a generic character and that wines and spirits which would raise such problems to an even greater extent than cheeses, are not at present under consideration by the Codex Alimentarius Commission or its subsidiary bodies.

II. Discussions of the Committee on Milk and Milk Products regarding cheese varieties with "appellation d'origine"

3. The problem of cheeses with an internationally or nationally protected "appellation d'origine" was first raised at the Seventh Session (1964) of the Committee on Milk and Milk Products and has been discussed at all

1/ Report of the Eighth Session, paragraph 178.

\* The Executive Committee of the Codex Alimentarius Commission has requested that this document be sent to the Committee of Government Experts on Milk and Milk Products for information.

subsequent sessions; it is also included in the Agenda of the Fiftieth Session to be held in September 1972. The cheese varieties directly involved at present are three cheeses originating in Italy (Gorgonzola, Parmigiano Reggiano and Pecorino Romano) and one cheese produced in the United Kingdom (Blue Stilton).

4. A number of different views were expressed in the course of the discussions with regard to the question whether standards should be elaborated and adopted for these cheeses and other cheese varieties with denominations similarly protected in one or several countries. The principal solutions which were proposed may be summarized as follows:

- (i) The country of origin which had "appellation d'origine" prescribed in its national legislation could, when making an application for an international cheese standard, propose a restriction on the geographical area in which the cheese could be made. 2/
- (ii) The Committee should forego consideration of any request aimed at establishing an international standard for any individual cheese identified by an "appellation d'origine" 3/ - at least if the originating country was opposed to it. 4/ Standards might however be adopted under generic names. 5/
- (iii) Any cheese coming regularly into international trade should be considered by the Committee, if only to accept that the particular standard attached to the "appellation d'origine" in the traditional area of manufacture be included in the Code and extended to world-wide trade; adequate safeguards against misleading use of the designation of cheese varieties could be achieved through labelling provisions requiring clear indication of the producing country. 6/
- (iv) Complete participation of all countries interested in a particular cheese variety could be ensured by making it possible for a country to declare in its acceptance of a standard that in view of existing international agreements on the protection of an "appellation d'origine" for this variety, cheese corresponding to the standard could be sold in its territory only under an alternate name. 7/ It is not clear whether under this proposal for a practical solution, the same would apply where the "appellation d'origine" is only established under internal legislation and does not form the subject of any international agreement and whether the solution would also

- 2/ Report of the Eighth Session of the Committee on Milk and Milk Products, para.33 as reworded in para. 9 of the Report of the 9th Session
- 3/ Report of tripartite meeting of government experts from Italy, France and Switzerland, MDS 68/6(a), para.5.4; this view was also backed by the Permanent Council of the International Stresa Convention on Cheeses, cf. Report of the Eleventh Session of the Committee on Milk and Milk Products, para. 17.
- 4/ Report of the Ninth Session, para. 11. Other governments, however, objected to such right of veto of the originating country, cf. for instance MDS 67/12(c), pages 1 and 3.
- 5/ Comments of Switzerland, MDS 67/12(c), page 4.
- 6/ Report of the 7th Session, paras 24-25; MDS 67/12(c), page 4, para.5.
- 7/ Solution suggested by the United States of America, MDS 70/8(a); cf. also Report of the 13th Session, para. 52 and MDS 71/7.

- 3 -

extend to names protected not by "appellation d'origine" but by essentially similar means, such as a "certification trade mark". 8/

5. The legal, historical and technical aspects of the foregoing alternatives have been examined by the Committee on Milk and Milk Products on the basis of written submissions of interested governments 9/ and background notes prepared by the Secretariat. Their implications will be summarized in paragraphs 16-20 below.

### III. International Protection of "appellations d'origine"

6. Geographical denominations designating agricultural or industrial products may be protected by international agreements or national legislation in a number of ways, in particular through "appellation d'origine", registered "certification trademarks" and provisions against false or deceptive indications of source on goods and against unfair competition in general. As it would be virtually impossible in the present framework to summarize with a sufficient degree of completeness and accuracy the principles of national law governing the subject in the various countries, this Note is confined to a summary of the relevant provisions of international conventions, in particular those concluded under the auspices of the World Industrial Property Organization (WIPO) or its predecessor organizations; these conventions may, however, be considered as reflecting the essential elements of common features of national legislation. 10/

7. The Paris Convention, of 20 March 1883, for the Protection of Industrial Property (Parties: nearly 80 States) deals only marginally with "appellation d'origine" and related subjects. While generally including indications of source or appellations of origin in the sphere of industrial property to be protected (Article 1, para. (2)), the Convention contains only a rule providing for sanctions "in cases of direct or indirect use of a false indication of the source of the product" (Article 10, para. (1)).

8. More specific provisions are to be found in the Madrid Agreement of 14 April 1891, for the Repression of False or Deceptive Indications of Source on Goods (Parties: approximately 30 States) which provides for seizure or import prohibitions with regard to goods bearing a false or deceptive indication of source, by which one of the countries to which the Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin (Articles 1 and 3 bis). It is reserved to the courts of each country to decide what

8/ E.g. "Blue Stilton" which enjoys in the United Kingdom (and possibly in other countries) protection under a "certification trademark" reserving the use of the word "Stilton", cf. MDS 69/7(a) and 70/8(b).

9/ The Governments of the USA and Italy are at present engaged in informal negotiations and a proposal has also been made for a European meeting of Government Experts in order to seek the most appropriate solution (cf. MDS 70/8(b) para. 12 and Report of the 14th Session, para. 69).

10/ For a comparative study, cf. Bureau International pour la Protection de la Propriété Industrielle (BIRPI): Les indications des provenance et les appellations d'origine dans la législation de certains pays de l'Union de Paris pour la protection de la propriété industrielle. Berne, 1958.

appellations do not, on account of their generic character, come under the stipulations of the Agreement. It should be noted that an "indication of source" merely designates the place of manufacture and can be used for any kind of products; the designation is not restricted to characteristic products manufactured in accordance with specific quality standards or production methods in a given area.

9. The designation and protection characteristic products is the purpose of "appellations d'origine" as envisaged by the Lisbon Agreement of 31 October 1958, for the Protection of Appellations of Origin and their International Registration (Parties: 9 States) which in Article 2 defines the term as the

"geographic name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment including natural and human factors".

Such names may be registered by the International Bureau (WIPO) and must be protected in all contracting countries, (unless a country makes a declaration to the contrary within a year), i.e. the use of the name (even in translated form or accompanied by words like "type" or "limitation" and by a clear indication of source) must not be permitted for any other goods than those produced in the originating area (Article 3). Once registered as "appellation d'origine", a name cannot at a later stage be considered as having taken on a generic character (Article 6).

10. Of specific relevance for the names of cheese varieties is the International Convention for the use of Appellations d'origine and Denominations of Cheeses signed at Stresa on 1 June 1951, known as the "Stresa Convention", (an additional protocol was signed at The Hague on 18 July 1951)<sup>11/</sup> by eight important cheese producing European countries. "Denominations" may be used under this Convention not only by the country which has first used them but also by the other contracting countries, provided they have the characteristics specified for the cheese in question (Article 4.4 of the Code). "Appellations d'origine" on the other hand enjoy a stronger protection as set out in Article 3 of the Code:

Article 3.1 The "appellations d'origine" which are the object of internal legislation reserving their use, within the territorial confines of one of the Contracting Parties, to cheese manufactured or matured in traditional regions, by virtue of local, loyal and uninterrupted usages, are listed country by country in Annex A; they are exclusively reserved to these cheeses whether they are used alone or accompanied by a qualifying or even corrective term such as "type", "kind", "imitation", or other term.

Article 3.2 With the exception of the cheeses "Gorgonzola" and "Parmigiano Reggiano", the provisions of paragraph 1 of this Article shall however apply only to cheeses made from milk other than cow's milk.

Article 3.3 In their trade with countries not adhering to the present Convention, Contracting Parties may use the two "appellations d'origine" of cheeses mentioned in paragraph 2 of this Article, provided that the indication of the manufacturing country is added."

<sup>11/</sup> A simplified working text integrating the Convention, the Protocols and certain subsequent interpretations is to be found in the Stresa Convention "Code" adopted in 1958 by the Permanent Council and issued in 1959 by the Italian Government.

The protection of "appellation d'origine" under the Stresa Convention extends at present only to the following cheese varieties included in Annex A: Roquefort, Gorgonzola, Parmigiano Reggiano and Pecorino Romano.

11. There are, however, a number of other cheese designations which by means of bilateral agreements receive a similar protection in the Federal Republic of Germany, France, Greece, Italy and Switzerland. 12/

12. Protection for the names of products including cheese varieties may also be granted in the form of trademarks, collective marks or certification trademarks. While individual trademarks reserved to one manufacturer will not be registered when they consist exclusively of signs or indications which may serve in trade to designate the place of origin of the goods, 13/ it is possible to obtain protection through a collective mark (under Article 7 bis, paragraph 1) that is, according to a definition established by BIRP (predecessor of WIPO) 14/

"any visible sign designated as such and serving to distinguish the origin or any other common characteristic of goods or services of different enterprises which use the mark under the control of the registered owner."

At least one collective mark of this kind has been internationally registered for cheese. 15/ Essentially similar protection can be obtained through "certification trademarks" under the law of the United Kingdom and some other countries. 16/

#### IV. Relevant Provisions of the Codex Alimentarius

13. None of the Codex Alimentarius provisions refers expressly to "appellation d'origine". There are, however, provisions on labelling in the General Standard for Cheese requiring a "clear indication of the producing country" 17/ and in the Recommended General Standard for the Labelling of Prepackaged Foods there is a prohibition on any form of labelling that would "mislead or deceive the consumer in any way whatsoever in respect of the food". 18/ These provisions, while containing

12/ cf. MDS 70/8(b), paragraph 11 and Annex I.

13/ Article 6 quinquies B-2 of the Paris Convention.

14/ BIRPI, Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition, Geneva 1967.

15/ cf. MDS 70/8(b), page 4, paragraph 9.

16/ The text of the relevant section of the UK Trade Marks Act is reproduced in MDS 70/8(b), page 4, paragraph 10.

17/ Paragraph 4.1 of the General Standard for Cheese, cf. also the interpretation of this provision in paragraph 9(d) of the Report of the Seventh Session of the Committee on Milk and Milk Products.

18/ Paragraph 6.1 in conjunction with paragraphs 2 and 3.5 of the Standard for the Labelling of Prepackaged Foods.

adequate safeguards as regards the prevention of false and misleading indications of source and thus appearing in full harmony with the provisions of the Madrid Agreement (cf. paragraph 8 above), would not seem to solve the problem of names protected by "appellation d'origine" as they do not rule out the use of such names, provided they are accompanied by qualifications precluding the assumption that the food was manufactured in the area or country enjoying the right of "appellation d'origine".

14. The question may arise whether a link - or possibly a conflict - could exist between the requirement to respect or protect the "appellation d'origine" and the obligation of a country accepting a Codex Standard not to impede distribution of a product conforming to the standard. Paragraph 4.A(i)(a) and (c) of the General Principles of the Codex Alimentarius defines the effect of full acceptance as follows:

- "(a) Full acceptance means that the country concerned will ensure that a product to which the standard applies will be permitted to be distributed freely, in accordance with (c) below, within its territorial jurisdiction under the name and description laid down in the standard, provided that it complies with all the relevant requirements of the standard. (underlining added).
- (b) .....
- (c) The distribution of any sound products conforming with the standard will not be hindered by any legal or administrative provisions in the country concerned relating to the health of the consumer or to other food standard matters except for considerations of human, plant or animal health which are not specifically dealt with in the standard." (underlining added)

15. The provision in paragraph 4A (i)(c) cited above is intended to ensure that free distribution should not be hindered by legal or administrative provisions relating to health or other specifications germane to food standards. The authority of a country to impose import restrictions on other grounds was to remain unaffected. However, as will be explained in paragraph 18 below, countries which are bound by law or treaty to respect the "appellation d'origine" of a given product may not be in a position to accept a standard pertaining to that product.

#### V. Legal aspects of the various solutions envisaged

16. With reference to the proposed solution mentioned in paragraph 4(i) above, the proposal that a country asserting the right to an "appellation d'origine" should be allowed to insert a corresponding restriction in the international food standard even if goods under the name in question are actually produced in other countries which consider the name as a generic term, would tend to impose on third countries new restrictions for the protection of "appellations d'origine" so far not recognized in their law and thus amount to new international obligations not directly related to the health of the consumer and general quality criteria which are the prime concern of the Codex Alimentarius. In practice, a restrictive provision of this type may well defeat the purpose of an international standard.

17. The choice between the solutions set out in paragraph 4(ii), (iii) and (iv) i.e.

- abstaining from the establishment of any standard for varieties with "appellation d'origine", or

- 7 -

- adopting such standards without any special safeguards for countries considering the name as "appellation d'origine", or
- adopting such standards with a clause safeguarding the right of those countries to maintain the degree of protection for the "appellation d'origine" effectively recognized at present

appears principally to be a question of policy since none of these solutions is either imposed or excluded by the general provisions governing the elaboration of and adoption of Codex standards.

18. The mere elaboration and adoption of a standard without special regard to the protection recognized in certain countries for a given name can in no way alter the law or detract from existing international obligations of those countries. If a government should find that acceptance of a standard would be incompatible with such laws or international obligations, it may wish to decline to accept the standard.

19. On the other hand, the rules governing the work of the Codex Alimentarius Commission do not contain any provision which would enable these countries to prevent the elaboration and adoption of standards for the varieties concerned and under the names which are at present protected in their territory on the basis of national legislation or by virtue of bilateral or multilateral agreements, such as the Lisbon Agreement or the Stresa Convention.

20. The introduction of a special clause whereby countries accepting a standard may be allowed to maintain the status quo with regard to the protection of certain names (cf. paragraph 4(iv) above), is neither prescribed nor excluded by any of the rules covering the work of the Codex Alimentarius Commission. Assuming that the quality requirements established by the international standard would be similar to those applicable to the product covered by an "appellation d'origine", countries which consider the name of the particular variety as "appellation d'origine" for products manufactured in a certain area could be enabled, by means of such special clause in the international standard, to accept the standard for the variety concerned, with a declaration

- (1) that the name considered as "appellation d'origine" will be reserved to the products produced in the area of origin in accordance with the traditional local requirements and
- (2) that products corresponding to the standard but manufactured outside that area will have to be sold on their territory under an alternative name.

The inclusion in the standard itself of such an enabling clause and of the alternative name would avoid doubts and disputes as to the validity of any declarations that may be made to this effect by countries accepting the standard.

## VI. Conclusions

21. The choice between the various solutions is a policy question.

22. The legal situation prevailing in any country on the basis of internal law or pre-existing international obligations cannot be affected by the mere elaboration and adoption of an international standard, although it may prevent a country from accepting a standard which failed to provide safeguards of the kind envisaged in paragraph 20.



- 8 -

23. No commodity other than cheeses at present under consideration by the Codex Alimentarius Commission would seem to raise problems of "appellation d'origine".

24. As regards cheese varieties, the Committee on Milk and Milk Products is endeavouring to find a solution that may be acceptable to the great majority if not all members of the Committee. If it should not succeed, the Committee will presumably refer the matter to its parent body, the Codex Alimentarius Commission.

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**OPINION OF THE LEGAL OFFICES OF FAO AND WHO ON THE LEGAL ASPECTS  
INVOLVED IN THE QUESTIONS RAISED BY  
THE COMMITTEE ON MILK AND MILK PRODUCTS<sup>1</sup>**

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**INTRODUCTION**

1. At its Sixth Session, held in Auckland, New Zealand, 26-30 April 2004, the Codex Committee on Milk and Milk Products (CCMMP) discussed the possibility of elaborating an individual cheese for parmesan but was not able to reach agreement on whether or not to proceed with this work. The Committee agreed to the following text in respect of specific questions to be asked to the Codex Alimentarius Commission:

*“The majority of the CCMMP present at the 6<sup>th</sup> Session are of the opinion that the name ‘Parmesan’ is and has been generic for quite some time. On the other hand, the denomination ‘Parmigiano-Reggiano’ is officially registered as a Protected Designation of Origin (PDO) by the European Community. The EC currently considers that there is a ‘indissoluble relationship’ between the words ‘Parmigiano-Reggiano’ and ‘Parmesan’.*

*Reference to EC legislation is preventing a decision on the establishment of a world wide standard for Parmesan Cheese by the CCMMP. Further, the inability to reach a decision on this issue is hindering the work of the CCMMP on this matter and might have important horizontal implications for work in other Codex Committees.*

*Two questions are addressed to the Commission.*

1. *To what extent, if any, should a PDO recognized in EC legislation for a product otherwise considered to be generic by the majority of the members present be grounds for rejecting elaboration of a Codex standard when in the opinion of the majority of members present existing criteria for acceptance of new work have been met?*
2. *Should aspects of intellectual property protection e.g. trademarks, certification marks, geographical indications (GI’s) or PDO’s be considered as legitimate criteria by Codex when deciding on acceptance of new work or adopting standards?*

*If the answers to both questions are that these matters are not legitimate considerations for CCMMP, will the CAC request that the CCMMP begin new work on the promulgation of a standard for Parmesan Cheese?”*

2. The Legal Offices of FAO and WHO were asked to offer their views on the legal aspects involved in the questions raised.

3. Prior to examining the questions raised, in order to place them in a correct perspective, it would be useful to recall the relevant provisions of the Codex Alimentarius Commission’s mandate and procedures governing the decision to elaborate a standard, as well as past consideration of the issues at hand within the Codex Alimentarius Commission.

**RELEVANT PROVISIONS OF THE CODEX ALIMENTARIUS COMMISSION’S MANDATE AND PROCEDURES GOVERNING THE DECISION TO ELABORATE A STANDARD**

4. Under the terms of its Statutes, the Codex Alimentarius is responsible for making proposals on all matters pertaining to the implementation of the Joint FAO/WHO Food Standards Programme, the purpose of which is:

- (a) protecting the health of the consumers and ensuring fair practices in food trade;
- (b) promoting coordination of all food standards work undertaken by international governmental and non-governmental organizations;

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<sup>1</sup> This document was made available to the 27<sup>th</sup> session of the Commission as LIM.15 document.

- (c) determining priorities and initiating and guiding the preparation of draft standards through, and with the aid of, appropriate organizations;
- (d) finalizing standards elaborated under (c) above and, after acceptance by governments, publishing them in a Codex Alimentarius, either as regional or world-wide standards, together with international standards already finalized by other bodies under (b) above, wherever this is practicable; and
- (e) amending published standards, after appropriate survey, in the light of developments.

5. The Codex Alimentarius Commission has developed procedures for the elaboration of Codex Standards and related texts as set out in the Procedural Manual. Under these procedures, the Commission decides, taking into account the Criteria for the Establishment of Work Priorities, to elaborate a world-wide Codex Standard and also decides which subsidiary body or other body should undertake the work. Under such criteria, when a Codex Committee proposes to elaborate a standard within its terms of reference, it should first consider the priorities established by the Commission in the Medium-Term Plan of Work, any specific relevant strategic project currently being undertaken by the Commission and the prospect of completing the work within a reasonable period of time. It should also assess the proposal against the following criteria applicable to commodities:

- (a) consumer protection from the point of view of health and consumer practices<sup>2</sup>;
- (b) volume of production and consumption in individual countries and volume and pattern of trade between countries;
- (c) diversification of national legislations and apparent resultant or potential impediments to international trade;
- (d) international or regional market potential;
- (e) amenability of the commodity to standardization;
- (f) coverage of the main consumer protection and trade issues by existing or proposed general standards;
- (g) number of commodities which would need separate standards indicating whether raw, semi processed or processed; and
- (h) work already undertaken by other international organizations in their field.

#### **PAST CONSIDERATION OF THE MATTER BY THE CODEX ALIMENTARIUS COMMISSION**

6. The issue of whether the Commission could adopt standards with respect to commodities protected under geographical denominations was the subject of much debate in the Sixties and early Seventies. At its Ninth Session, held in 1971, the Commission, after having noted the complexity of the questions connected with “*appellations d’origine*”, agreed that some consideration should be given to this subject by the Executive Committee at its next session, insofar as the work of the Commission was concerned, in the light of background material to be made available by the Legal Office of FAO.

7. The Legal Office of FAO prepared an information note entitled “*Appellations d’origine and international food standards*”. The document reviewed past discussions on the matter within Codex Alimentarius Commission and its subsidiary bodies, international instruments relevant to the protection of “*appellations d’origine*” and the relevant provisions of the Codex Alimentarius. The document indicated that the general provisions on the elaboration of standards did not contain any rules on the matter. On the one hand, the “*mere elaboration and adoption of a standard without special regard to the protection recognized in certain countries for a given name can in no way alter the law or detract from existing international obligations of those countries. If a government should find that acceptance of a standard would be incompatible with such laws or international obligations, it may wish to decline to accept the standard (...)*” On the other hand, the rules governing the work of the Codex Alimentarius Commission do not contain any provision which would enable these countries to prevent the elaboration and adoption of standards for the varieties concerned and under the names which are at present protected in their territory on the basis of national legislation or by virtue of bilateral or multilateral agreements, such as the Lisbon Agreement or the Stresa Convention”. The document further indicated that “*the introduction of a special clause whereby countries accepting a standard may be allowed to maintain the status quo with regard*

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<sup>2</sup> The phrase should read: “consumer protection from the point of view of health and fraudulent practices”.

*to the protection for certain names, is neither prescribed nor excluded by any of the rules covering the work of the Codex Alimentarius Commission”.*

8. At its Tenth Session, held in 1974, the Commission examined the issue of “appellation d’origine” in relation to the work of the Commission in some detail. The Commission noted that the matter had been discussed by the Executive Committee at its May 1972 Session and that it was a question which had arisen in the Committee of Government Experts on the Code of Principles concerning Milk and Milk Products. The Commission noted the recommendation of the Executive Committee on the matter<sup>3</sup>. In particular, the Commission agreed with the view of the Executive Committee that it was not essential to arrive at a definite recommendation at this stage since the controversial issues had been resolved within the Joint FAO/WHO Committee of Government Experts on the Code of Principles concerning Milk and Milk Products on a pragmatic basis and might not arise again in the immediate future. Eventually, in 1978, the Committee of Government Experts on the Code of Principles concerning Milk and Milk Products, completed work on the Standard for Extra Hard Grating Cheese which was adopted as Codex STAN C-35-1978.

9. At its Second Session, in 1996, the Codex Committee on Milk and Milk Products, considered a proposal of Germany to elaborate a new individual cheese standard for “*Parmesan*” and requested Germany to identify products in question and prepare a paper on trade statistics and justification for the elaboration of the Standard for consideration by the Committee at its next session. France and the International Dairy Federation offered to collaborate with Germany (ALINORM 97/11, paragraph 87). At its Third Session in 1998, the Committee noted the request of Italy to delete consideration of a Codex standard for “*Parmesan*” from the Provisional Agenda on the basis that Parmesan (Parmigiano Reggiano) was recognized all over the world. In view of the decision taken at the Second Session, the Committee decided to consider its elaboration as scheduled under Agenda Item 11 (ALINORM 99/11, paragraph 4). The proposal on the matter (CX/MMP 98/11) mentioned, *inter alia*, that Parmesan was a generic name and there is no clear definition of the product at international level. There was considerable trade on cheese under this denomination. The document referred to difficulties to provide statistical data from official sources on the production and marketing of Parmesan as in the majority of countries it was not recorded as a separate item but it was covered by headings such as “*hard cheese*” or “*grated cheese*” or cheese in general. Data provided by the International Dairy Federation indicated that Parmesan cheese was produced in 11 countries; consumed in 19 and that 6 countries had a legal standard. Production was at least 64,620 tons and exports amounted to 11,577 tons.

10. Due to time constraints the matter was deferred to the Fourth session of the Committee in 2000. At the Fourth session, the Delegation of Portugal, speaking on behalf of the member States of the European Community, and in view of continuing EC discussions on the question relating to the denomination “*Parmesan*”, indicated that it was premature for the Committee to make a decision at this time. Several delegations and the observer from IDF stated that, utilizing the Criteria for the Elaboration or Revocation of Individual Standards for Cheeses and the data contained in CX/MMP 00/18, the elaboration of a standard for “*Parmesan*” would be justified. Notwithstanding the opinion of several delegations, the Committee agreed that discussions concerning the possibility of a new individual cheese standard for “*Parmesan*” would be deferred until its next session where it would consider whether or not to proceed with work on the basis of CX/MMP 00/18 and preliminary texts of a standard as contained in CX/MMP 00/18-Add.1 (ALINORM 01/11, paragraphs 132-133).

11. At its Fifth Session in 2002, the delegation of Spain, speaking on behalf of the Member States of the European Community present at the Session, requested the postponement of the consideration of the elaboration of a standard, in view of ongoing negotiations within the Community related to the use of the term “*Parmesan*”. It

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<sup>3</sup> The Executive Committee considered the matter on the basis of the document that had been prepared by the FAO Legal Office. The Executive Committee proposed a solution “*which would permit the elaboration and adoption of a Codex standard while at the same time safeguarding the interest of those countries who wished to maintain protection of the appellation d’origine. This might be achieved by the introduction of an alternative name (apart from the appellation d’origine) and of a special clause whereby countries accepting the Standard would be allowed to maintain the status quo with regard to the protection of the appellation d’origine. This special clause would enable governments to accept the standard for the commodity concerned with a declaration 1. that the name as appellation d’origine will be reserved to the products produced in the area of origin in accordance with the traditional local requirements, and 2. that products corresponding to the standard but manufactured outside that area will have to be sold on their territory under an alternative name. The inclusion in the standard itself of such an enabling clause and of the alternative name would avoid doubts and disputes as to the validity of any declarations that may be made to this effect by countries accepting the standard. It would also enable a potential importing country in whose territory the appellation d’origine is protected on the basis of a multilateral or bilateral agreement to accept the international standard in a manner compatible with pre-existing international obligations*”.

was also suggested that the Codex Standard for Extra Hard Grating Cheese (Codex STAN C-35) could be revised, thereby avoiding the naming issue. Other delegations strongly supported the elaboration of a Codex Standard for Parmesan Cheese, and noted that information submitted and compiled in support of the elaboration of a standard was more than adequate to address the Codex Criteria for the Establishment of Work Priorities applicable to commodities, including a large volume of production and trade between countries, diverse national legislation with potential impediments to international trade and substantial market potential. It was also noted that regardless of the negotiations within the Community, a Codex standard would apply to all 165 member states of the Codex Alimentarius Commission, The Committee could not reach a consensus position and therefore, postponed the consideration of the elaboration of a proposed draft Codex Standard for Parmesan until its next meeting. The delegation of the United States objected to this decision (ALINORM 03/11, paragraphs 124-126). At its Sixth Session in 2004, the Committee raised the two questions.

**FIRST QUESTION: TO WHAT EXTENT, IF ANY, SHOULD PDO RECOGNIZED IN EC LEGISLATION FOR A PRODUCT OTHERWISE CONSIDERED TO BE GENERIC BY THE MAJORITY OF THE MEMBERS PRESENT BE GROUNDS FOR REJECTING ELABORATION OF A CODEX STANDARD WHEN, IN THE MAJORITY OF MEMBERS PRESENT EXISTING CRITERIA FOR ACCEPTANCE OF THE NEW WORK HAVE BEEN MET?**

12. The above-mentioned provisions of the Statutes of the Codex Alimentarius Commission, the provisions on the elaboration of Codex Standards and related texts and the Criteria for the Establishment of Work Priorities (Cf. paragraphs 4 to 5 of this document) do not contain any clauses whereby, in deciding whether a standard should be prepared, under the above reference framework, the Commission and its subsidiary committees should be restricted by any national or related legislation regarding protection of geographical indications adopted by its Members. It may be of interest to recall that the same views on this matter were presented in 1972 by the Legal Office of FAO (Cf. paragraph 7 of this document).

13. Accordingly, the fact that Parmigiano-Reggiano is registered as a Protected Designation of Origin by the European Community would not preclude a majority of the Members of the Codex Alimentarius Commission from deciding to elaborate a Codex standard on Parmesan cheese, if applicable criteria for acceptance of new work have been met.

**SECOND QUESTION: SHOULD ASPECTS OF INTELLECTUAL PROPERTY PROTECTION E.G. TRADEMARKS, CERTIFICATION MARKS, GEOGRAPHICAL INDICATIONS (GI'S) OR PDO'S BE CONSIDERED AS LEGITIMATE CRITERIA BY CODEX WHEN DECIDING ON ACCEPTANCE OF NEW WORK OR ADOPTING STANDARDS?**

14. When deciding to elaborate a standard on a particular commodity, the Commission is required to act under the framework established by its mandate, the procedures for the elaboration of standards and the Criteria for the Establishment of Work Priorities and to take into account the criteria laid down in that framework.

15. From a legal point of view, insofar as this would not be precluded or incompatible with these provisions, the Commission could take into consideration additional criteria not listed among those criteria. As reflected earlier in this document, it would be entirely open to the Commission to take into account criteria of political convenience when deciding whether or not to proceed with the elaboration of a particular standard.

16. In the same vein, the Commission could decide to take into consideration criteria and aspects related to intellectual property protection such as trade marks, certification marks, geographical indications or protected designations of origin, when deciding to elaborate a particular standard. However, this would be done at the discretion of the Commission and not as a result of any specific legal requirement arising from its mandate, from the procedures for the elaboration of standards or from the Criteria for the Establishment of Work Priorities. Furthermore, the possibility for the Commission to do so would have to take into account the following two legal parameters.

17. First, at the Sixth Session of the Codex Committee on Milk and Milk Products, references were made to work in process under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the so-called TRIPS Agreement). Under Article 22 of the TRIPS Agreement a minimum level of protection is established in respect of all goods for geographical indications which identify a good as originating in the territory of a Member where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic

origin. Under that Article geographical indications have to be protected in order to avoid misleading the public and to prevent unfair competition. A special, reinforced regime is established for geographical indications for wines and spirits in Article 23. As a result of the so-called Doha mandate, work is under way within the WTO on issues related to the extension of the higher level of protection beyond wines and spirits but no consensus on this matter has yet been reached. Once this work is completed, any results might be taken into account by Codex Members when reaching their decisions within the Codex Alimentarius Commission.

18. Second, following on the above observation, the rights and obligations of the Members of the Codex Alimentarius Commission derive from their membership of FAO or WHO and their decision to become Members of the Commission. Consequently, such rights and obligations are defined by the relevant statutory provisions of the Codex Alimentarius Commission which do not foresee, neither in their letter, nor in the practice developed thereunder, that aspects related to intellectual property protection be taken into consideration when deciding to undertake work on a particular standard. Consequently, within the Codex Alimentarius Commission, its Members are expected to act under the legal framework set forth above, as long as that framework is not amended with a view to introducing other criteria. A different approach to issues of the nature of that under consideration, would be likely to undermine the autonomy and integrity of the mandate of the Codex Alimentarius Commission.

19. In view of the foregoing considerations, from a strictly legal point of view, there are no requirements to the effect that aspects of intellectual property protection e.g. trademarks, certification marks, geographical indications (GI's) or PDO's be considered as criteria to be taken into consideration by Codex when deciding on acceptance of new work or adopting standards.

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20. The above considerations are obviously without prejudice to the fulfilment of all relevant criteria and procedural requirements for the elaboration of standards, including the need for a document on the basis of which the Commission would take its decision.

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ORGANISATION MONDIALE  
DE LA PROPRIÉTÉ INTELLECTUELLE

المنظمة العالمية للملكية الفكرية

ВСЕМИРНАЯ ОРГАНИЗАЦИЯ  
ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

July 30, 2004

Dear Director-General Lee,  
Dear Director-General Diouf,

I refer to the opinion of the legal offices of the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) on questions raised by the Codex Committee on Milk and Milk Products (CCMMP), at its Sixth Session held in Auckland, from April 26 to 30, 2004 (document CAC/27 LIM 15).

I note that these questions raise important legal issues directly concerning intellectual property and would like to draw your attention to the fact that certain statements contained in the document referred to, have given rise to considerable concern among the intellectual property community, including States party to treaties administered by the World Intellectual Property Organization (WIPO) and owners of intellectual property rights.

Specifically, paragraphs 12 and 19 of the document do not appear to reflect an important element of the approach taken in 1972 by the Legal Office of FAO, as reproduced in paragraph 7, i.e. the "mere elaboration and adoption of a standard without special regard to the protection recognized in certain countries for a given name can in no way alter the law or detract from existing

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Director-General  
World Health Organization (WHO)  
20, avenue Appia  
1211 Geneva 27

Dr. Jacques Diouf  
Director-General  
Food and Agriculture Organization  
of the United Nations (FAO)  
Viale delle Terme di Caracalla  
Rome 00100  
Italy

Dr. Jong-Wook Lee, Geneva, Dr. Jacques Diouf, Rome - July 30, 2004

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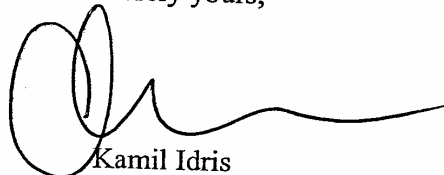
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international obligations of those countries". Paragraph 19 simply concludes that "...there are no requirements to the effect that aspects of intellectual property protection... be considered as criteria to be taken into consideration by Codex when deciding on acceptance of new work or adopting standards". Similarly, paragraph 12 recalls that "...the same views on this matter were presented in 1972 by the Legal Office of FAO...", but fails to recall the element mentioned above.

While it is not the intention of WIPO to interfere with technical issues being considered by the Codex Alimentarius Commission, we believe it is important to bring the concerns of our constituents to your attention. The principal objective of WIPO, as stipulated in Article 3 of the Convention Establishing the World Intellectual Property Organization, is "*to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization*".

I would like to take this opportunity to assure you of our availability to provide any assistance that the Codex Alimentarius Commission may require in this or any other intellectual property issue which may arise in the future and look forward to continued close cooperation between our respective organizations.

Sincerely yours,



Kamil Idris  
Director General



## FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

The Director-General

LEG-DG/04/1429

Rome, 10.IX.2004

Dear Mr. Idris,

I refer to your letter of 30 July 2004 to the Director-General of the World Health Organization (WHO) and to myself regarding the opinion of the legal offices of FAO and WHO on questions raised by the Codex Committee on Milk and Milk Products at its Sixth Session, held in Auckland, New Zealand, from 26 to 30 April 2004.

In view of the status of the Codex Alimentarius Commission as a joint FAO/WHO statutory body, as well as the nature of the questions raised by the Codex Committee on Milk and Milk Products and dealt with in the above-mentioned legal opinion, the concerns expressed in your letter are being reviewed in close consultation with WHO, the Secretariat of the Codex Alimentarius Commission, as well as other relevant units of the two organizations.

I should like to take this opportunity to thank you for your interest in the Codex Alimentarius Commission and its activities and assure you of my commitment to inter-agency cooperation.

Yours sincerely,

**Jacques Diouf**

Mr. Kamil Idris  
Director-General  
World Intellectual Property Organization  
Geneva



联合国  
粮食及  
农业组织

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OF THE  
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ORGANISATION  
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UNIES POUR  
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Our Ref.:

Your Ref.:

Rome, 16 November 2004

Dear Mr. Idris,

On behalf of the Legal Counsel of WHO and on my own behalf, I wish to refer to your letter of 30 July 2004 concerning the opinion of the legal offices of FAO and the World Health Organization in response to the questions raised by the Codex Committee on Milk and Milk Products (CCMMP), at its Sixth Session, held in Auckland, from 26-30 April 2004.

As you will recall, by letter of 10 September 2004, the Director-General of FAO acknowledged receipt of your letter and informed you that the concerns which you expressed would be reviewed in consultation with WHO and the secretariat of the Codex Alimentarius Commission.

Further to these consultations, we should like to point out, first of all, that the questions raised by the CCMMP concerned the mandate of the Codex Alimentarius Commission, the procedures for the elaboration of standards and the criteria for the establishment of work priorities, as adopted by the Commission and must therefore, be answered in light of the legal framework established by the Statutes of the Commission and the relevant decisions of the latter. In addition, any specific conclusions stated in the opinion should be seen in the context of the opinion, as a whole.

Consequently, as recalled in the opinion, the Members of the Codex Alimentarius Commission are expected to act under the framework established by the Commission and discharge their rights and obligations on that basis. In line with the views expressed by the Legal Office of FAO in 1972, as recalled in the opinion, this is without prejudice to other international obligations that may be binding upon individual Members of the Commission, particularly in the context of other international bodies. Indeed, the opinion makes explicit reference to the Agreement on Trade-Related Aspects of Intellectual Property Rights and could have also made reference to relevant agreements concluded under the aegis of WIPO. Whether such international obligations should be taken into account by the

.../..

Mr. Kamil Idris  
Director-General  
Intellectual Property Organization  
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1211 Geneva 20, Switzerland

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Members of the Codex Alimentarius Commission when deciding to elaborate, or when elaborating particular standards within the Commission, as well as the manner and extent to which that should be done, are matters entirely for the Members of the Commission to consider.

We trust that you will find the above clarification satisfactory and look forward to further cooperation among our respective organizations.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Giuliano Pucci". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

**Giuliano Pucci**  
**Legal Counsel**

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ВСЕМИРНАЯ ОРГАНИЗАЦИЯ  
ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

FAO-07

January 18, 2005

Dear Mr. Pucci,

I refer to your letter of November 16, 2004, addressed to Dr. Kamil Idris, Director General of the World Intellectual Property Organization (WIPO), concerning his letter of July 30, 2004, addressed to Director-General Lee of the World Health Organization (WHO) and to Director-General Diouf of the Food and Agriculture Organization of the United Nations (FAO), on the subject of the opinion of the legal offices of WHO and FAO on the questions raised by the Codex Committee on Milk and Milk Products (CCMMP), at its Sixth Session held in Auckland, from April 26 to 30, 2004.

As explained in Director General Idris' letter of July 30, 2004, the intention of his letter was not to interfere with the technical work of the Codex Alimentarius Commission, but to bring to the attention of the WHO and FAO the concern of WIPO Member States and intellectual property right holders over the legal opinion expressed, in particular, in paragraph 19 of document CAC/27 LIM 15, namely that "there are no requirements to the effect that aspects of intellectual property protection e.g. trademarks, certification marks, geographical indications (GI's) or PDO's be considered as criteria to be taken into consideration by Codex when deciding an acceptance of new work or adopting standards".

/...

Mr. Giuliano Pucci  
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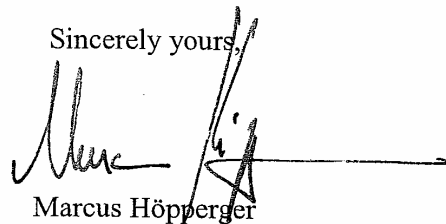
Mr. Giuliano Pucci, Rome – January 18, 2005

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However, the clarification expressed at the end of the penultimate paragraph of your letter of November 16, 2004, i.e., “whether international obligations concerning intellectual property rights should be taken into account by the Members of the Codex Alimentarius Commission when deciding to elaborate, or when elaborating particular standards within the Commission, as well as the manner and extent to which that should be done, *are matters entirely for the Members of the Commission to consider*,” appear to be in line with the opinion of the FAO Legal Office of 1972, as expressed in paragraph 7 of document CAC/27 LIM 15), which was regrettably absent from paragraph 19 of the said document.

We trust that, as far as the interface with intellectual property rights protection is concerned, the work of the Codex Alimentarius Commission will be pursued in the spirit of this legal interpretation, and would like to thank you for clarifying that matter.

Sincerely yours,



Marcus Höpperger  
Acting Director

Trademarks, Industrial Designs and  
Geographical Indications Law Division  
Legal Department