

Geographical Indications: Important Issues for Industrialized and Developing Countries

In an increasingly globalized economy geographical indications (GIs) can act as a guarantee of quality for consumers and reward producers from a given geographical area for their long-term investment in building up the reputation of a product.

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Issue: Geographical indications (GIs) are intellectual property rights which identify a good as originating in a certain territory or a region where a given quality, reputation or other characteristic is essentially attributable to its geographical origin. In an increasingly globalized economy, such a connection between products, their method of production and the region of origin allows for niche marketing, brand development and extracting value from reputable indications.

Relevance: The appropriate use of GIs can be of considerable economic value because they reward producers from a given geographical area for their long lasting investment in informal innovation and in building up the reputation of a product. The protection of GIs is of particular relevance for producers who invest in research and development for high quality products with a long tradition behind them, whether in industrial or in developing countries.

Introduction

Geographical indications (GIs) are intellectual property rights which identify products as originating in a certain territory or a region where a given quality, reputation or other characteristic is essentially attributable to its geographical origin

Geographical indications (GIs) are intellectual property rights which identify a good as originating in a certain territory or a region where a given quality, reputation or other characteristic is essentially attributable to its geographical origin. In a knowledge-driven economy, the role and significance of knowledge for economic activities has fundamentally changed. The dynamics of the economy are coming to rest on investments in physical capital and more and more on learning or investment in knowledge creation. One has to recognize that all economic activity rests on knowledge, not only in a high-tech society but also on the products and methods of production in rural societies.

The new dimension of the knowledge driven society is that knowledge lies at the heart of growth of a different order of magnitude than has been the case historically. Knowledge is increasingly treated as a commodity. It is packaged, bought and sold in ways and to extents never seen before. The knowledge driven economy has increased the importance of competitive strategies based on innovation and proprietary knowledge. This has strong implications for intellectual property rights protection. We are now living in an era where intellectual property rights (IPRs) are considerably more important than they were in the past. The change in the structure of the industry implies on the one side that the use of intellectual property is at the core of knowledge creation, and that, on the other side, intellectual property rights are increasingly important to ensure a return on investment.

The world's present IPR mechanisms were designed to meet the needs of modern R&D based industries. Technological knowledge in developed countries is mainly the result of profit-based research and is promoted by private firms. Its focus is on economically exploitable knowledge and market potential. On the one hand, patents, trademarks and other established IPRs have been adapted to satisfy this objective. On the other hand, innovative processes are inevitably institutionalized by calls for a legal framework. Innovation in this sense becomes a 'formal' procedure trying to comply with given legal parameters.

Research and development in the industrialized world falls under what is now defined as 'formal innovation'. Knowledge, however, is often interlaced with the agricultural, social and cultural structures and long standing traditions of local communities. Innovation which is not recognized within legal structures is known as 'informal innovation'. Indeed, indigenous farmers and communities never planned (or provided) for their knowledge to be protected in a formal way. 'Formal innovation' is based on the idea that innovation is the product of individuals, whereas 'informal innovation' belongs to entire communities and therefore can hardly be attributed to distinct individuals.

When specific knowledge has its origin in a whole region it is impossible to determine priority for recognizing and rewarding it, or to identify an individual right-holder, since that knowledge has already been shared and is public. The global community, therefore, needs to address the issue of establishing new legal structures for such informal innovation and further develop those intellectual property rights which already suit the particular requirements of 'informal innovation' at an international level. Geographical indications (GIs) and their protection is a suitable means to protect 'informal innovation', particularly because the right is related to the product itself and it does not depend on a specific right-holder. As such, GIs are increasingly being recognized as a tool for securing the link between product quality, its methods of traditional production and the region of geographical origin.

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The economics of geographical indications

Economic analysis would suggest market failure as the rationale for GI protection. Consumers are unable to assess the quality of products on the market. This is particularly the case with high-quality goods, where information asymmetries between sellers and buyers may prevent market transactions. Together with trademarks, GIs are one solution to this dilemma.

Producers from a certain geographical region develop a reputation for quality over time. The geographical indication helps consumers to distinguish between premium-quality and low-end products. Trust in the geographical indication is the reason why consumers may be willing to pay a premium for products from that region. Free-riding on the good reputation of the GI good would clearly create the risk of the region's reputation being undermined. As a consequence consumers would be willing to pay less for GI quality goods and producers would –from a socially optimal point of view– underinvest in informal innovation and in the development of products offering higher quality and safety.

Unlike other forms of intellectual property right protection, the protected good, i.e. product quality, is not a public good but typically a private good. Preventing free-riding on reputation and quality is socially desirable. GI protection does not prevent manufacturers from other regions to produce the same kind of product, it only prohibits them to sell it under the same geographical indication. Consequently, product markets with GI protection remain competitive vis-à-vis the product category.

Potential benefits of GI protection are, firstly that with the absence of counterfeiting, legitimate producers can expand sales, allowing them to achieve economies of scale. Secondly, GIs essentially contribute to product safety as producers can more easily be identified and held responsible for their products. Thirdly, GIs can encourage informal innovation. Producers with a solid reputation of high quality products are more likely to invest continuously in upgrading their product portfolio to maintain competitive edge (Fink, Smarzynska, 2002).

GIs are of highest importance for all kind of products and methods of production. Traditional goods produced using low technology production processes such as 'Hereke' for carpets 'Basmati' for rice and 'Ulmo' for honey, and many more¹, are of particular interest for developing countries. GI protection covers also medium tech goods such as 'Jena' for glass and 'Swiss' for watches. For all different types of products and their production technologies, GIs serve to protect intangible assets such as market

differentiation, reputation and quality standards. GIs indeed convey the cultural identity of a nation, region or specific area without referring to one specific producer in the geographical region. They make it possible to add value to the natural riches of a country and to the skills of its population, and they give local products a distinguishable identity. They are not the only means to establish a good reputation with consumers but they are an important means for complying with high quality standards and for meeting consumers' expectations with confidence (OECD, 2000).

GIs serve to protect intangible assets such as market differentiation, reputation and quality standards. Also, they convey the cultural identity of a nation, region or specific area without referring to one specific producer in the geographical region

Regrettably, the protection of GIs at the international level is far from being adequate. Except for wines and spirits, it is all too easy to misuse GIs. The case of Basmati rice is perhaps a good illustration² (see Watal, 2001).

Convinced of the economic benefit inherent in GIs, many countries around the world, among them many developing and least-developed countries, but also the European Union, EFTA member states and many Central and Eastern European countries are actively working within the World Trade Organization (WTO) to have the existing protection granted by the TRIPS Agreement to GIs for wines and spirits extended to cover GIs identifying all products³.

Protection for geographical indications under the TRIPS Agreement

Current protection

With the signature of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) on April 15, 1994, the international regulatory framework for geographical indications improved. For the first time, countries agreed on a definition for GIs and on an international dispute settlement mechanism. In Part II, Section 3, of the Agreement, there are three Articles dealing with GIs:

- Article 22 (definition of GIs and standards of protection);
- Article 23 (additional protection for wines and spirits);
- Article 24 (requirements for future negotiations and exceptions).

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) includes three articles dealing with GIs

The important requirement under the definition of a GI under the TRIPS Agreement is that products identified by a GI have a certain quality, reputation or other characteristic which is essentially attributable to the geographical origin of the goods they identify. Article 22 protection applies to GIs for all products and protects them against all uses that are misleading to the public or which constitute an act of unfair competition. The additional level of protection under Article 23.2 protects wines and spirits even when the GI is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like. Article 23 offers protection whether or not there is the risk the public being misled or the presence of an act of unfair competition, which is beyond the general protection provided by Article 22. To make the distinction clear, under Article 22, designations such as “Roquefort cheese, produced in Norway” or “Hereke carpets, made in U.S.A.” are currently permissible (they clearly do not relate to wines and spirits, covered by article 23).

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Extension

In the June 2002 session of the WTO/TRIPS Council, several WTO Members (Bulgaria, Cuba, Cyprus, the Czech Republic, the European Community Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey) tabled a communication describing the main elements for addressing the issue of extension of the additional protection of Article 23 to GIs for *all* products.⁴ In this communication they made three proposals:

1. The protection of Article 23 of the TRIPS Agreement should apply to the GIs for all products.
2. The multilateral register to be established should be open for GIs for all products. Such a system would assure increased predictability, reverse the burden of proof and put the legitimate users in a better position in enforcement proceedings.
3. The exceptions contained in TRIPS Article 24 should apply *mutatis mutandis*. ‘Extension’ would not affect the current use of names which coincide with protected GIs, provided that such use conforms to the TRIPS Agreement.

Extending the additional protection for wines and spirits under the TRIPS Agreement would lead to a satisfactory and balanced international minimal level of protection for the GIs of all products (Addor, Grazioli, 2002).

A number of countries recently proposed that Article 23 of the TRIPS agreement, which currently protects GIs in the case of wines and spirits only, should be extended to all products

Advantages and disadvantages of extension

Effects on producers

Opponents of extended protection for all GIs⁵ argue that such conditions would effectively be protectionism. In their view, GIs are a means to close off future market access opportunities for emerging industries. GIs would impose serious trade restrictions in new and emerging dairy and processed agricultural industries. Viewed from a negative point of view, one could even argue that the free and fair imitation of GI-protected products would enhance the intrinsic value of the original good. 'Extension' would also cause significant costs to producers who have been legally using a specific GIs and suddenly have to give it up.

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The use of GIs by others than the original producer, even by adding delocalizing expressions like 'made in', 'imitation', 'style' or 'type' contributes to the risk of a GI becoming generic which consequently could seriously harm the original producer. The eliminating opportunities for free-riding on the one hand must be balanced against market expansion possibilities for original producers on the other. A full level of protection will raise market entry barriers and will provide access to new and lucrative trade opportunities in emerging markets. However, GIs have no exclusive character with respect to production: Anyone outside the designated area can still produce and sell the goods in question, just under another name i.e. not using the original geographical indication (Rangnekar, 2002).

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With 'extension', protection is not limited to cases where the abusive use of the GIs misleads the public or constitutes an act of unfair competition. It will suffice to prove that the products using abusively the GI do not have that origin.

Effects on Consumers

Although opponents of 'extension' for all goods have argued that it would reduce competition, encourage monopoly positions for producers and, consequently, raise consumer prices, what matters are long-term effects and the guarantee of sustainable and fair competition

Some delegations in the WTO negotiations have argued that 'extension' for all goods would reduce competition, encourage monopoly positions for producers and, consequently, raise consumer prices. In addition, search and transaction costs would increase and consumers would be confused by re-naming and re-labelling of products. This argumentation is short-sighted. What matters are long-term effects and the guarantee of sustainable and fair competition. In this respect, the attribution of a better level of protection to all goods would establish a clearer solution. Re-labelling would not be a wide-spread consequence of 'extension' due to the exceptions provided under Article 24 of the TRIPS agreement. 'Extension' is first and foremost an effort to improve the protection of geographical indications for the future.

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Extension would facilitate consumers' choice since they would be assured that products using a GI actually originate from where the GI indicates. Consumers would be free to decide whether to buy a product with a specific geographical origin and a GI indicating specific characteristics and quality, or to buy a similar, maybe cheaper product, which however does not share the same geographical indication/characteristics. Extension, however, would ensure that they can trust in their choice when opting for a product using a GI⁶. In the long run, products will compete on their own merits under their own name and their own geographical indication.

Administrative costs and burdens

Delegations to the WTO with a critical attitude towards 'extension' fear that it would require substantial re-labelling of products, resulting in administrative costs and confusion for consumers. Proponents of 'extension' on the other hand, claim that 'extension' would not lead to a need for substantial change or re-labelling. The exceptions contained in Article 24 would apply to 'extension' just as they currently do for GIs for wines and spirits today. They take due account of hitherto existing good faith use of GIs for products without the relevant origin. If, however, such use happened in a bad faith with the intention to "free-ride" on the reputation of a GI, it would not qualify for an exception under Article 24. The obligation to re-label the product would be appropriate. The economic long-term benefits of extending the

more effective protection of GIs to all products would clearly in any case outweigh the costs for the few cases where re-labelling might be necessary (Rangnekar, 2002). The second administrative concern regarding producers outside the GI region regards extensive examinations to determine the right to use a GI. 'Extension' would eliminate such legal uncertainty (Addor, Grazioli, 2002): A simple test by the court of whether a product comes from the place and whether it has the quality designated by the GI will be sufficient.

Introducing extension, would not imply setting up of any new mechanisms or scheme of protection and at the same time achieves cost savings for judicial and administrative authorities

In this way 'extension' supports transparency and at the same time achieves cost savings for judicial and administrative authorities. Introducing extension, would not imply setting up of any new mechanisms or scheme of protection. Thus, on the one side, the fear of a too high administrative weight coming up with the protection of GIs under Art 23 is exaggerated. However, it could well reduce litigation costs. Unlike Article 22, Article 23 does not require evidence of the public being misled nor the proof of an act of unfair competition and would thus exclude the undesirable result that different judges would come to diverging results with their discretionary tests.

Developing countries

GI protection is unlikely to be detrimental to low-income countries, since it does not prevent the development of substitute goods

GI protection is unlikely to be detrimental to low-income countries, since it does not prevent the development of substitute goods. On the contrary, GIs are expected to have a positive impact on developing countries, by increasing the amount of information available to consumers, encouraging investment in quality and reputation, contributing to economies of scale and promoting a production culture of quality and innovation. It is thus frequently argued that developing countries will proportionally carry a greater burden in the implementation and administration of new laws of GI protection because they start at a lower legal and administrative level. Developing countries, however could benefit most from an effective protection of GIs (Escudero, 2001). GIs contribute in a positive way to a business-friendly investment climate. They have features that respond to the needs of indigenous and local communities and farmers (Escudero, 2001) because they are based on collective traditions and decision-making processes. They reward the preservation of traditional products while allowing for continued evolution and they emphasize the relationship between human efforts, culture, land, resources and environment.

GIs could be an efficient tool to promote manufacturing of local products, they could help establish market differentiation and provide access to a very specific group of consumers. Secondly, they could also be an indirect tool to promote tourism by increasing visibility and awareness of exotic products from the regions identified by the GI. (Vivas-Eugui, 2001). Efficient protection would serve to support a marketing tool which allows developing countries to sell their agricultural, handicraft and artisan production on a worldwide level by guaranteeing that abuses, such as the ones shown in the Basmati rice case mentioned earlier cannot take place. 'Extension' could be a special means to foster the development of local rural communities in developing countries (Blakeney, 2001) and it would give them the opportunity to sell their goods on a much broader scale than the national or regional level.

'Extension' could be a special means to foster the development of local rural communities in developing countries giving them the opportunity to sell their goods much more widely than at the national or regional level

Conclusion

In an increasingly globalized economy, geographical indications serve to protect intangible assets such as market differentiation, reputation and quality standards. They guarantee a production culture promoting and sustaining informal innovation. Products identified with GIs are not designed to be sold as commodity goods nor to have a hegemonic preponderance in the market; they simply represent high quality goods on the market. In addition, they convey the cultural identity of a nation, region or locality, and add a human dimension to goods, which are increasingly subject to standardized production for mass consumption (Downes, Laird, 1999).

There is no logical, legal, economic or systemic reason for not protecting GIs for products other than wines and spirits

There is no logical, legal, economic or systemic reason for not protecting GIs for products other than wines and spirits. An extended protection of Article 23 to all GIs under the TRIPS Agreement would represent a major progress because:

- Legitimate producers and manufacturers in developed and developing countries alike would no longer have to fear that other producers could free-ride on the reputation of the GI in an exploitable manner. At the same time, it would facilitate the procedures of enforcing the protection of GIs. Thus, it would ensure better opportunities for the commercialization of the relevant products;

- Extending the scope of the additional protection of Article 23 to all GIs could be particularly attractive for indigenous and local communities and farmers. Giving them collectively the exclusive right to use a specific designation would enable them to benefit from this legal instrument for the protection of certain of their traditional products: those that owe their characteristics essentially to their geographical origin;

As mentioned above, there is no reason why GI protection should apply only to wines and spirits. The improved protection of geographical indications for all products on the level granted at present for wines and spirits, would promote informal innovation, and would create trade and investment advantages, in particular for developing and developed countries which depend on exports of primary commodities.

Keywords

Geographical indications, developing countries, WTO, TRIPS Agreement, extension of additional protection of Article 23 TRIPS to all products, traditional products.

Notes

¹ More: "Danablu", "Gorgonzola", "Roquefort", "Manchego" for cheese, "Lübecker" for marzipan, "Basmati" for rice, "Idaho" or "Lapin Puikula" for potatoes, "Antigua" or "Mocha" for coffee, "Ceylon" or "Long Jin" for tea, "Toscano" or "Olympia" for olive oils, "Bordeaux", "Chianti", "Napa Valley", "Coonawarra" for wines, "Havana" for tobacco, "Shetland" for wool, "Bukhara", "Düren" for carpets, "Limoges" or "Meissen" for porcelain, "Talavera", or "Arita" for ceramics, "Glashütter" for watches, "Solingen" for cutlery, "Waterford" or "Baccarat" for crystal ware.

² Basmati rice exports amount to \$350 million for India and \$250 million for Pakistan; these exports might be affected if a non-local version obtains market permission under the designation of Basmati rice and establishes itself in third country markets.

³ See e.g. the communications of these countries in favour of GI 'extension': WTO document IP/C/W/353, IP/C/W/308/Rev.1, IP/C/W/247/Rev.1, IP/C/W/204/Rev.1 and WT/MIN (01)/W/11. All these documents and an update of the state of discussion on GI 'extension' can be found at <http://www.ige.ch/E/jurinfo/j104.htm> and http://www.wto.org/english/docs_e/docs_e.htm.

⁴ See WTO Doc. IP/C/W/353 of June 24, 2002, to be found at <http://www.ige.ch/E/jurinfo/j104.htm> and http://www.wto.org/english/docs_e/docs_e.htm.

⁵ Mainly member states of the Cairns Group (in particular, Argentina, Australia, Canada, Chile, Guatemala, New Zealand, Paraguay, and the United States. See WTO Doc. IP/C/W/289 of 29 June, 2001 and IP/C/W/386 of 8 November, 2002 to be found at http://www.wto.org/english/docs_e/docs_e.htm.

⁶ A study by the Swiss Institute IHA shows that consumers pay much attention to the geographical origin of products at the time of purchase. When buying wine, for example, the place of origin remains the most important purchasing criterion; it accounts for 45% of the decision to purchase, compared with 25% for the price, 11% for the vintage, 10% for the type of grape, 4% for the label, 4% for the producer and 1% for bottle shape; see *Olszak*, 2001, 5.

References

- Addor, F., Grazioli, A., *Geographical Indications beyond Wines and Spirits, A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPS Agreement*, Journal of World Intellectual Property, Vol. 5. 2002, pp. 865-897.
- Blakeney, M., *Proposals for the International Regulation of geographical indications*, Journal of World Intellectual Property, Vol. 4. 2001, pp. 629-652.
- Downes D. R. and Laird S. A., *Innovative Mechanisms for Sharing Benefits of Biodiversity and Related Knowledge: Case Studies on Geographical Indications and Trademarks*, paper prepared for UNCTAD Biotrade Initiative, 1999.
- Escudero S., *International Protection of Geographical Indications and Developing Countries*, TRADE Working Paper no. 10, South Center, Geneva, 2001.
- Fink C., Beata S., *Trademarks, Geographical Indications, and Developing Countries*, in: Development, Trade, and the WTO, A Handbook (Ed.: B. Hoekman, A. Mattoo, P. English) 2002, pp. 403-412.
- OECD, , *Appelations of Origin and Geographical Indications in OECD Member Countries: Economic and Legal Implications*, December 2000, p. 32
COM/AGR/APM/TD/WP(2000)15/FINAL.
- Olszak N., *Droit des appellations d'origine et indications de provenance*, Éditions TEC & DOC, Paris 2001, p. 5.
- Rangnekar D., *Geographical Indications: A Review of Proposals at the TRIPS Council*, UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development, June 2002, pp. 28-29.
- Vivas-Eugui D., *Negotiations on Geographical Indications in the TRIPS Council and their Effect on the WTO Agricultural Negotiations, Implications for Developing Countries and the Case of Venezuela*, Journal of World Intellectual Property, Vol. 4 (2001) pp. 703-728.
- Watal J., *Intellectual Property Rights in the WTO and Developing Countries*, Kluwer Law International, The Hague, 2001 pp. 272-273.

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