

➤ Geographical Indications: Implications for Africa

by

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Introduction

The issue of geographical indications (GIs) has been around for many years and has long been the subject of heated debate in a number of international fora. The first section of this paper provides a brief definition of a GI and historical background. Some protection has been offered for GIs in the context of the intellectual property regime under the World Intellectual Property Organisation (WIPO). This paper, however, focuses on the discussion on GIs that is currently taking place in the World Trade Organization (WTO). It identifies the key groups that have put forward positions on the issue and looks at the prospects of reaching an agreement on GIs in the lead-up to the Hong Kong Ministerial Meeting. The final section of the paper identifies some of the implications of this debate for the African Group.

Background

There are a number of different definitions of a geographical indication but for the purposes of this paper a GI is defined as 'a designation which identifies certain qualities or other characteristics or the reputation of a particular product to a specific geographical locality' (Botha, 2004: 1). The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) provides protection for GIs under Articles 22 to 24. In a more comprehensive definition, Article 22 of the TRIPS Agreement defines GIs as 'indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin'. GIs are essentially used as a marketing tool. They are intended to 'designate product quality, highlight brand identity and preserve cultural traditions' (www.geographicindications.com, 2005).

Controversy arises around GIs when their protection is considered. Like other intellectual property rights, GIs are sought to be protected by producers so that they can make the most of the associated qualities, characteristics or reputation in a bid to maximise profits. Through the protection of a specific GI, producers from the locality in question are able to create a barrier to entry into the market for that product and exploit monopoly rents by charging consumers higher prices (Botha, 2004:1-2). Such protection will be particularly controversial when the names that are protected in one region are commonly used by producers from another country or locality (www.geographicindications.com, 2005). A number of international intellectual property rights agreements offer some protection of GIs, for example, the Paris Convention of 1883, the Madrid Agreement of 1891, the Stresa Convention of 1951 and the Lisbon Agreement of 1958. WIPO has a standing

committee regarding the protection of GIs. It has developed a model national law (?) and a draft international treaty on GIs.

The TRIPS Agreement establishes the legal regime for GIs that exists within the context of the WTO and is therefore enforceable under the WTO dispute settlement system. Article 22 of the TRIPS Agreement sets out the general level of protection, whilst Article 23 establishes a heightened level of protection for GIs used for wines and spirits. Article 24 establishes a range of important exceptions and provisions that impinge upon the regimes outlined in Articles 22 and 23. Of particular interest for developing countries is the provision in Article 24.9 of the TRIPS Agreement. This provision requires that the country claiming the GI must first protect that GI at home. The formulation of effective domestic legislation and systems is therefore extremely important for GI protection under the TRIPS Agreement.

WTO Issues

The WTO debate about GIs has manifested itself in four ways. The first two of these stem directly from Articles 22-24 of the TRIPS Agreement. The last two are related to a proposal tabled by the European Community in the negotiations on agricultural trade and to a dispute about European Community regulations seeking to protect GIs within its member countries. Each one of these four issues is considered separately below.

Article 23(4): Establishment of Multilateral Register

This provision calls for negotiations on the "establishment of a multilateral system of notification and registration of GIs for wines eligible for protection in those Members participating in the system". Negotiations commenced shortly after the conclusion of the TRIPS Agreement and the establishment of the Council for TRIPS in the WTO. They have been ongoing for the past five years but have yet to reach a conclusion. The issue is part of the Doha Development Agenda (DDA) and there are currently three main proposals under consideration. These have been put forward by the two main groups identified below, with a third proposal from Hong Kong.

The proposal by the EC and others (TP/IP/W/11) seeks to include all products on the register (not just wines) with a presumption of protection. It is not a voluntary system, and if a Member disagrees with the inclusion of a GI, the onus is upon the Member to lodge a reservation within 18 months. The reservation must be based on one or more of a list of limited grounds. Each reservation will then be the subject of bilateral negotiations.

The 'joint proposal' (TN/IP/W/5) suggests a voluntary system for wines only, According to which GIs would be registered in a database upon notification. Members could choose whether to participate. If they did so, they would need to consult the database when taking decisions on protection in their countries. Non-participating members would not be obliged to consult the database (WTO, 2005, p.3).

The key questions in the debate on the multilateral register include what the legal effect within member countries would be, to what extent the effect should apply to countries not participating in the system, and what the administrative and financial costs for governments would entail (WTO, 2005: 3).

Extension of Additional Protection Beyond Wines and Spirits

A proposal has been put forward in the WTO to extend the additional protection offered to the GIs of wines and spirits under Article 23 of the TRIPS Agreement to other products, such as foodstuffs and crafts. This has been hotly debated in the TRIPS Council and was under consideration as part of the DDA negotiations. Finally, this issue was included under paragraph 12 of the Doha Declaration which deals with implementation issues. It was decided that the TRIPS Council would discuss the matter further. This paragraph itself has since become the subject of considerable debate. Proponents of the extension argue that it provides a mandate for negotiations and that it is part of the package of results or the 'single undertaking' in the Doha Round. Others do not agree and argue that the question of an extension of GIs protected under Article 23 is not part of the negotiating agenda for the Doha Round.

EC 'Clawback' Proposal for GI Protection in Agriculture Negotiations

In the context of the negotiations under the Agreement on Agriculture, the EC has put forward a proposal to reserve 41 product terms for the exclusive use of European producers. This has met with considerable opposition from a number of quarters who are opposed to the inclusion of 'non-trade' concerns as part of the negotiations. Some believe that it is a strategy adopted by the EC in a bid to get extended protection for GIs by first trading off the recognition of these 41 products for progress on the three pillars of agricultural reform. Such recognition would set a precedent that would be difficult to ignore in the TRIPS negotiations.

Dispute over EC Protection of GIs

Under a number of Council Regulations the EC has sought to set out rules for the protection of GIs for agricultural products and foodstuffs. These regulations have been challenged by the US and Australia in disputes taken to the WTO. Consultations on the matter started in 1999 but the panel hearing only took place in 2004. The US and Australia argued that the EC regulations were in breach of the national treatment and most-favoured nation provisions of the GATT 1994 and the TRIPS Agreement. The EC regulations did not allow non-EC nationals to apply for GI protection unless their government had adopted an equivalent system of GI protection to the ECs. It was also put forward by the complainants that the regulations diminished the legal protection for trademarks, did not provide means to prevent the misleading or unfair use of GIs and constituted a breach of the Agreement on Technical Barriers to Trade (TBT Agreement).

The findings of the panel in this case were essentially a mixed bag. The panel agreed with some of the points made by the US and Australia. For example, it found that the EC's regime was inconsistent with the EC's obligations under Article 16 of the TRIPS Agreement. The panel did, however, conclude that Article 17 of the TRIPS Agreement allowed the EC to establish some limitations on the rights to be granted to the owners of trademarks. In the context of this paper, the most important finding of the panel was the confirmation that the EC can determine any limitations on trademark rights only with respect to its own territory. It cannot do so with respect to the territory of other WTO members.

Positions Taken

The GIs debate in the WTO is effectively polarised between two camps. On the one hand there is the EC and its supporters who are seeking to achieve broad protection for a wide range of GIs for agricultural and other products. In addition to the extended membership of the European Union, members of this group include Kenya, Mauritius, Nigeria, Pakistan, Sri Lanka, Switzerland and Thailand. Some members of this group cosponsored the proposal tabled in June 2005 (TP/IP/W/11) which addressed both the issue of a multilateral register of GIs and the extension of protection beyond wines and spirits.

The other side of the debate is represented by a group of members who are opposed to the extension of additional protection beyond wines and spirits and who would prefer to see the multilateral register designed in a way that does not place an additional regulatory burden on states. This group includes Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan,

Namibia, New Zealand, the Philippines, Chinese Taipei and the US. Interestingly, this coalition is made up of predominantly members of the Cairns Group of agricultural exporting countries as well as Japan, Namibia, Chinese Taipei and the US. This demonstrates that the GIs debate can not be judged along traditional WTO lines. The 'joint proposal' submitted by this group can be found in WTO document, TN/IP/W/5. At the heart of the concerns of these countries is the need to ensure that GIs do not become a barrier to trade and that the administrative burden of protecting them is not too great. It is argued that existing intellectual property regimes, including trademark rules, provide adequate protection for GIs. South Africa has also aligned itself to this group through adoption of a position that calls for a voluntary and flexible registration system that does not impose a high administrative or financial burden on members (Department of Trade and Industry, 2005: 4).

An additional proposal on the multilateral register contemplated under Article 23.4 of the TRIPS Agreement has been tabled by Hong Kong China (TN/IP/W/8). It is described by Hong Kong China as an attempt at a compromise between the two groups and aims to capture the middle ground. It essentially proposes a less stringent register for wines and spirits than that put forward by the EC. The idea of 'presumption' discussed above is watered down so that the register would be more along the lines of a voluntary system.

Prospects for Hong Kong

The deadline set by the DDA for completion of negotiations on the multilateral registration system for GIs - wines and spirits - was the Fifth Ministerial Conference in 2003. This deadline was not achieved and the debate has been continuing. There is hope that some progress on the multilateral register might be possible at the Hong Kong Ministerial Meeting in December 2005, but many believe that at this stage the relative positions of the key players are still too far apart. Little real progress has been made in the discussions and they remain largely polarised. It has been suggested that the best outcome that could be expected by the proponents of the multilateral register would be to see negotiations continue in 2006.

Chances of progress being made on the extension of protection to products beyond wine and spirits seem even less likely. There is a difference of opinion on whether or not the DDA mandated negotiations on this issue. The matter was covered in a general paragraph on implementation issues in the Doha Declaration (paragraph 12). Various interpretations of this text have been put forward and the membership remains deeply divided. The EC, in particular, is attaching considerable importance to ensuring that the protection of GIs is extended as part of the total package resulting from the Doha Round.

This is firmly opposed by those members who supported the 'joint proposal' outlined above.

The question of GIs will also need to be dealt with in the context of the agriculture negotiations at Hong Kong. This is due to the proposal by the EC related to the protection of GIs for the 41 agricultural products outlined above. On the surface this number of products does not appear particularly threatening to some members (especially in the context of the EC having already identified over 700 GIs from Europe for foodstuffs and agricultural products). A fear has been expressed that in order to achieve an outcome in the **agriculture negotiations** some members might agree to the protection requested by the EC for the 41 products identified. This would then set a precedent that would be difficult to ignore in the broader negotiations on the expansion of Article 23 of the TRIPS Agreement. The linkage made between GIs and the agriculture negotiations is however strongly opposed by the US, Cairns Group and G-20.

Implications for Africa

The GIs debate in the WTO has a number of implications for Africa. The first relates to the attempts being made by the EC to link the expansion of the protection of GIs to the agriculture negotiations. The African Group has strong interests in the agriculture negotiations and will benefit from the successful conclusion of the DDA in this regard. Any attempts to impose some form of conditionality on the three pillars in the agriculture negotiations are unlikely to be of a positive nature for African members. To date the African Group as a whole has not voiced a strong opinion with regard to the discussion of GIs in the context of the agricultural negotiations. Some African members (namely Kenya, Mauritius and Nigeria), however, are known to support the extension of GI protection to agricultural products. On the other hand, South Africa has made it clear that it considers the agricultural negotiations complex enough, and that the issue of GIs should be dealt with by the TRIPS Council.

Second, concerning the multilateral register for wines and spirits: with the exception of South Africa, the majority of African countries are not producers or exporters of wine and spirits. The interests in this area are therefore largely defensive in terms of the African Group being required to provide additional protection for these products. Given this context, it would be assumed that it would be important to ensure that any system that is adopted is not administratively burdensome and that the compliance costs are not high. Concerns have been expressed that the TRIPS regime is already cumbersome, especially for developing countries. Additional systems put in place must therefore take this into account.

Third, on the expansion of protection for GIs for agricultural products, foodstuffs and crafts, African members could be said to have both offensive and defensive interests -- offensive to the extent that African members have GIs that would benefit from protection. This is the view put forward by Kenya, for example, with regard to its coffee. It is argued that recognition of this GI would ensure that the reputation of Kenyan coffee is maintained and that the farmers of Kenyan coffee would be able to obtain premium prices for their product (Nyaga, 2004: 2). Those who oppose the extension of GI protection argue that, while these offensive interests exist, they are limited. The EC has identified 700 GIs in Europe for foodstuffs and agricultural products. The rest of the world has only specifically mentioned a fraction of that number. The EC has also not been clear as to whether or not it would recognise the GIs suggested by developing countries, such as 'Kenyan coffee'.

The defensive interests focus on the potential loss of market access for some agricultural products if GI protection is extended to them. This could result in considerable costs for producers who may be required to rename and remarket their goods. Governments would also incur costs for administration and compliance. For example, under the current proposal put forward by the EC and others (TN/IP/W/11), governments would become responsible for enforcing GI rights rather than this being the responsibility of industry, as is the case in other intellectual property right regimes. This would also place GIs in a privileged position over other intellectual property tools.

Conclusion

The debate on GIs in the WTO is controversial and is making slow progress. There are some clear proposals on the table with regard to the multilateral register for wines and spirits, but these are poles apart and represent fundamental differences with regard to the approach to GIs. Despite the long existence of GIs in the global trading system, deep-rooted fears remain that their further protection will only benefit a few members of the WTO and severely disadvantage many others, including developing countries. On the other hand, the proponents of greater protection for GIs argue that this is a fundamental issue that needs to be resolved in order to make progress in the liberalisation of agricultural trade.

Like WTO membership, the African Group itself is divided on the question of GIs. There are four African countries (Kenya, Mauritius, Namibia and Nigeria) that have specifically aligned themselves with one or the other camp. It is argued by some that the greater protection of GIs would benefit Africa by assisting farmers and craftsmen to market their products (Nyaga, 2004: 1). Others are more wary of the compliance costs involved in such a system as well as the motivation of the proponents. African countries have yet to identify publicly any of the key GIs they might seek to protect, except for 'Kenyan coffee'

and 'Nile perch'. No response has been received from the EC as to whether or not it would accept such GIs under its proposal for extension of protection.

In short, greater work needs to be done to identify both the offensive and defensive interests of the African Group in the WTO debate on GIs. Such work should be undertaken sooner rather than later, especially given the proposal to link extended GI protection with the broader agriculture negotiations. GIs can also be expected to be on the agenda for the negotiation of Economic Partnership Agreements between the EU and the ACP countries in the coming two years. Positions adopted in these negotiations should be consistent with the approach taken multilaterally and with full consideration given to the implications. Lessons can be learnt from the negotiating experience of South Africa with regard to wines and spirits under the Trade and Development Cooperation Agreement with the EU.

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Annex 1: Matrix of Positions on GIs in the DDA

Doha Ministerial Declaration (paragraphs abridged)	European Communities and Others	'Joint Paper' * Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, Philippines, Chinese Taipei, and the United States	Hong Kong China	African Group
<i>Extension of Article 23 protection of GIs beyond wines and spirits</i>				
12. Negotiations on outstanding implementation issues shall be an integral part of the Work Programme. We shall proceed as follows: (a) where we provide a specific negotiating mandate in this declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee.	The EC and its supporters argue that the extension of GI protection is part of the package of results or the single undertaking of the Doha Round. They would like to see protection extended to a wide range of products including foodstuffs and crafts. The proposal for a multilateral register put forward in the TRIPS Council would cover this extended range of GIs.	Most of these countries have vocally opposed the inclusion of the issue of the extension of GI protection as part of the DDA negotiations. It is suggested that the issue was included in part (b) of the paragraph as there was not yet an agreement to begin negotiations on it. It is argued that this is further supported by the last sentence of paragraph 18 that clearly draws a distinction between the multilateral register and the extension issue.	In the past, Hong Kong China tended to side more with the supporters of the 'joint paper' but is now seeking to finding common ground between the two main camps (perhaps as host of the next Ministerial?).	The African Group is divided. The position of the EC has been supported by Kenya, Mauritius and Nigeria. These countries claim to have interests in GIs (e.g. Kenya coffee) that would be protected under an extended Article 23. It is not clear whether this would in fact be the case under the EC proposal.
<i>Multilateral register for GIs for wines and spirits</i>				
18. We agree to negotiate the establishment of a multilateral system of notification and registration of geographical	The EC has proposed a legally binding system of notification and registration of GIs not only for wines and spirits but for	The 'joint paper' proposes a voluntary registration system for wines and spirits. It does not require the	The proposal by Hong Kong China is an attempt to find a middle ground between the EC proposal and the 'joint	Again the African Group is split on the issue of the multilateral register. It does not seem to be as important to many

<p>indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this declaration.</p>	<p>other products as well. The system would not be voluntary and there is a presumption of protection. Members would be required to lodge a reservation about a specific GI within 18 months and this would then be negotiated bilaterally.</p>	<p>participation of all WTO Members. Those who do participate will be required to consult the database of GIs before granting protection under domestic systems.</p>	<p>paper'. It proposes an initially voluntary system for wines and spirits. A database of information about GIs would be established and there would be a 'rebuttable presumption' in favour of those registered as owners of the GIs. This could be used to determine issues surrounding the GIs under domestic legislation.</p>	<p>as they are not major importers or exporters of wine and spirits (with the exception of South Africa). Kenya, Mauritius and Nigeria have however supported the EC proposal (presumably as it also argues for extended protection of GIs). Namibia cosponsored the 'joint paper'. South Africa's position is similar to that reflected in the 'joint paper' – any system adopted should be voluntary, flexible and not place an administrative and costly financial burden on members. It should also not jeopardize the rights as currently contained in the TRIPS Agreement.</p>
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