Chapter 3 - The Evolution and development of Protection to Geographical Indications under the WTO: An assessment

Backdrop

By taking into consideration the background provided in chapter two on geographical inductions it is clear that the local and national laws protecting the geographical origin of products have existed for hundreds of years in Europe. With the expansion of international trade during the 19th century, GI protection was included in international agreements on the protection of intellectual property. France was the first country to take the initiative and enact a comprehensive system for the protection of geographical indications that later influenced the making of both national laws and international treaties.

The TRIPS Agreement is not the first invocation of GIs in international law, though it can be said that it is the most important. GI protection was part of the Paris Convention for the protection of Industrial Property (1883), but under a different label (‘false indication’). The 1891 Madrid Agreement for the Repression of False or Deceptive Indications also addressed GIs, though it has relatively few parties. In the 20th century, the Lisbon Agreement on Appellation of Origin

(1958) set the standard until the negotiation of TRIPS. National laws on GIs are even older\textsuperscript{144}.

The TRIPs Agreement’s protection of geographical indications is quite unusual, in that the Agreement first provides for general protection for all geographical indications, and then affords special, elevated protection to geographical indications that concern wine and spirits\textsuperscript{145}. An interesting aspect of the TRIPs Agreement’s on geographical indications protection is the fact that the TRIPs Agreement itself calls for continued negotiations regarding further protection of geographical indications in certain areas of the Agreement. The same have been discussed at length later in this chapter.

This chapter deals with the negotiations on the protection of GIs before the TRIPs. Further explains contemporary application of GI under TRIPs agreement, and also further provides the current issues being faced by looking into aspect few issues of the Doha Development Agreement.


The Pre TRIPs Provisions

The pre TRIPs agreements, did not seek to provide protection for GIs as a prescriptive matter. Rather, all of these agreements addressed particular needs, gaps, and challenges in cross-border trade in goods.\textsuperscript{146}

The international protection of GIs, in one form or another, dates back to the time of the adoption of the Paris Convention for the protection of Industrial Property in 1883. Under the Paris Convention, the scope of protected subject matter, in terms of Article 1.2 included ‘indications of source and appellations of origin’.

The protection required to be offered by the members of the Paris Convention was to assure nationals of other Convention members’ effective protection against unfair competition.

Article 10bis of the Paris Convention defines an act of unfair competition as ‘ any act of competition country to honest practices in industrial and commercial matters’.\textsuperscript{147}

Acts specifically prohibited by the Paris Convention include, among others, ‘indications or allegations the use of which in the course of trade is liable to


\textsuperscript{147} http://www.wipo.int/treaties/en/ip/paris/trtdocs.wo020.html#p213.35515
mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods’.

A few years after the Paris Convention, The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods came into force in 1891. The Madrid Agreement expanded protection by prohibiting products with false and deceptive indications of origin.

However, the Madrid Agreement did not protect generic terms and further allowed national courts to determine which indications of origin are generic. As a result, with the exception of wine, which is specifically excluded from generic treatment by Article 4, the national courts were free to develop different approaches to the Madrid Agreement and often have provided limited protection for foreign GIs. This article is noteworthy, since it constitutes a departure from the general rule that the conditions of protection of an indication of source and, in particular, whether a specific indication of source is considered generic, are to be determined by the country in which protection is sought.

Moreover, the small number of signatories, thirty-five in all, has limited the scope of the international GI protection the Madrid Agreement provides. One of the results of the Lisbon Diplomatic Conference of 1958, which had attempted, inter alia, to improve the international protection for geographical indications
within the framework of the Paris Convention and the Madrid Agreement on Indications of Source, was the adoption of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration\textsuperscript{148}.

The Lisbon Agreement was adopted in 1958 and revised at Stockholm in 1967. It entered into force on September 25, 1966, and is administered by the International Bureau of WIPO, which keeps the International Register of Appellations of Origin\textsuperscript{149}.

The Lisbon Agreement provided additional protection for GIs. The Lisbon Agreement defined an appellation of origin under Article 2[1] as

\begin{quote}
‘the geographical 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\textsuperscript{150}.
\end{quote}

The Lisbon Agreement however only protects GIs to the extent they are protected in the country of origin. Article 2[2] of the Lisbon Agreement defines the ‘country of origin’ as the ‘the country whose name, or the country in which is

\textsuperscript{148} See WIPO Document No: WIPO/GEO/SFO/03/1
\textsuperscript{149} Amy P Cotton, ‘123 years At the Negotiating Table and Still No Dessert? The Case in Support Of Trips Geographical Indication Protections’, Chicago-Kent Review [Vol 82:3] 2007, pg. 1295-1316
\textsuperscript{150} \url{http://www.wipo.int/lisbon/en/general/}
situated the region or locality whose name, constitutes the appellation of origin that has given the product its reputation’.

Under this definition\(^{151}\), the requirement that the appellation of origin should be the geographical denomination of a country, region or locality means that the appellation is to consist of a denomination that identifies a geographical entity in the country of origin. Secondly, the requirement that the appellation of origin must serve to designate a product originating in the country, region or locality concerned means that, in addition to identifying a place, the geographical denomination in question must be known as the designation of a product originating in that place – requirement of reputation.

The third requirement concerns the quality or characteristics of the product to which the appellation of origin relates, which must be due exclusively or essentially to the geographical environment of the place where the product originates. The reference to the geographical environment means that there is to be a qualitative connection between the product and the place in which the product originates. The geographical environment is determined on the one hand by a set of natural factors [such as soil and climate], and on the other hand

by a set of human factors- for instance, the traditional knowledge or know how used in the place where the product originates.

The impact of the Lisbon Agreement’s GI protection however has been limited mainly because many states have been unwilling to enact legislation enforcing added GI protection. However, an effect of registration under the Lisbon Agreement is that the international registration of an appellation of origin assures it of protection, without any need for renewal, for as long as the appellation is protected in the country of origin\(^\text{152}\).

Under the Lisbon Agreement International registration must be applied for by the competent office of the country of origin, in the name of any natural persons or legal entities, public or private, having a right to use the appellation according to the applicable national legislation. The International Bureau of WIPO has no competence to examine the application with respect to substance; it may only make an examination as to form. Under Article 5[2] of the Lisbon Agreement, the International Bureau notifies the registration without delay to the Offices of the countries party to the Lisbon Agreement\(^\text{153}\).


\(^{153}\) www.wipo.int/lisbon/en/legal.texts/lisbon.agreement.html
In accordance with Article 5[3] to [5], the office of any state party to the Lisbon Agreement may, within a period of one year from the receipt of the notification of registration, declare that it cannot ensure the protection of a given appellation, indicating the grounds for refusal as discretionally determined by each country. The registered appellation enjoys protection in all countries not having refused it. However, under Art:5[6] if third parties had been using the appellation prior to the notification of the registration, the office of that country may grant them a maximum of two years in which to terminate such use.

The protection conferred by international registration is unlimited in time. Art: 6 of the Agreement provides that an appellation that has been granted protection cannot be deemed to have become generic, as long as it is protected as an appellation of origin in the country of origin154.

It should be noted that the registration under Art:7 need not be renewed and is subject to payment of a single fee. An international registration ceases to have effect only in two cases: either the registered appellation has become a generic name in the country of origin, or the international registration has been cancelled by the International Bureau at the request of the Office of the country of origin155.

154 Protection of Geographical Indications on the International Level through Multilateral Treaties at http://www.wipo.int/edocs/mdocs/sme/en/wipo.wasme.ipr.ge.03/wipe.wasme.ipr.ge.03.2.pdf
Like the Madrid Agreement, the Lisbon Agreement too has a small membership and as on date there are only twenty–seven members [contracting parties].

In the pre-TRIPs period, there was also a multiplicity of regional and bilateral agreements on GIs involving both developed and developing countries as well as product specific treaties. One of the earliest bilateral agreements is the 1932 Convention between El Salvador and France concerning the Protection of Appellations of Origin. Product specific agreements included the International Convention for the Use of Appellation D’Origine and Denominations of Cheeses commonly known as the Stresa Convention of 1951 and the International Agreement on Olive Oil and Table Olives of 1986.

In general, however, it is fair to say that until the entry into force of the TRIPS Agreement, global protection of GIs was mainly based on the limited protection offered under the Paris Convention. It would also be significant to note that the Paris Convention and the Lisbon Agreement had great influence on the TRIPS Agreement, specifically in relation to GIs.

The Negotiations on the protection of GIs ‘Before’ the TRIPs

As with many other issues subject to international agreements, the regulation of GIs in TRIPs was the result of a compromise among conflicting economic, political, legal interests. Nevertheless, what can be considered to this particular
compromise as compared to other forms of Intellectual Property in the TRIPs Agreement is the different negotiating countries had to fill in order to agree to the present regime of international regulation of GI, many countries at the beginning of the negotiations, which started with general discussions about the objectives to be reached and principles of international law to be applied\(^{156}\) did not have a clear understanding of the nature, specific characteristics, and relevance of GIs and openly questioned, whether it was appropriate to deal with this particular form of Intellectual Property in the Negotiation Group\(^{157}\), in their opinion, there were no Trade Related Aspects connected with them or at least none that could not be resolved through the international regulation of trademarks\(^{158}\).

On the other side of the spectrum were other countries, such as the EU and Switzerland, for which the protection of GIs was of extreme significance given the long-term establishment of GIs in their economies and legal tradition. They

---

\(^{156}\) This initial stage, which started, in April 1987, was then followed by the submission of proposals by the different delegations, both on specific issues and on more general subjects, which constituted the bases for the subsequent discussions made by the Negotiating Group in 1988 and 1989. Minutes of the Negotiating Group on Trade Related Aspects of Intellectual Property Rights, including Trade in counterfeit Goods [‘TRIPs Negotiating Group Minutes’], MTN.GNG/NG11/pg 1.

\(^{157}\) TRIPs Negotiating Group Minutes, MTN.GNG/NG11/pg 9 [OCT. 13, 1988].

\(^{158}\) In particular the delegation from Japan at this early stage of the negotiation expressed concerns about this issue and explained that its proposal did not include GIs, as this form of IP was still under study by its government. It is important to keep in mind in these regards that the negotiations leading to the TRIPs agreement developed within the General Agreement on Tariffs and Trade [GATT] framework [and in particular within the Uruguay Round which was launched at Punta del este in 1986] as a measure to eliminate trade distortion caused by the excessive, insufficient, or absence of protection of IP. Indeed, as made clear by the Chairman [Ambassador Lars E.E. Anell from Sweden] in the March 25, 1987 meeting.
underscored the importance of this particular form of IP for their government and noted on more than one occasion that they “could not see the logic in accepting that GATT could deal with some substantive standards of Intellectual Property and, at the same time, claiming that other intellectual property rights could not be discussed”

In between these two positions were those countries, such as Australia, Chile, and the United States, which although familiar with GIs, had a different legal tradition. These countries provided protection for these geographic terms through trademark law, unfair competition and certification marks and not through a *sui generis* GI law. Many of them had significant economic interests in these kinds of identifiers that in their territory, consisted either of trademarks or generic terms, and thus considered the position held by the EU and Switzerland to be over reaching. Indeed, these countries main objection to the EU proposal was the issue of how to deal with generic terms and trademarks incorporating geographic terms originating from other countries.

These concerns were made clear by Australia in 1989 when one of its representatives, while comparing the EU and Australian proposals, said that “his

---

159 TRIPS Negotiating Group Minutes MTN.GNG/NG11
160 This was particularly true for wine producing countries, such as Australia and Chile whose economic interest in specific GIs was equal to one of their European counterparts. TRIPS Negotiation Group Minutes, MTN.GNG/NG11/14[Sept. 12, 1989]
161 TRIPS Negotiating Group Minutes MTN.GNG/NG11
delegation supported the protection of [GIs] including appellations of origin and could agree widely with the proposal of the communities; the differences between his country [of origin] and the community on this matter [were] essentially in regard to him “many of the terms in question no longer reflected a geographical indication but had become associated with a general set of characteristics that pertained to a particular product”. Finally, he added that “as long as there was no intention, or effect, of deceiving the consumer, his delegation did not consider it necessary to protect names that had become truly generic”. This position was also shared by the United States, whose representative shortly thereafter pointed out that “his country... recognized that over time terms would become so widely used as to become generic” and that therefore there were concerns in his delegation about the establishment in the TRIPs Agreement of a level of protection for GIs that was too high.

The positions of the different delegations over the regulation of GIs continued to be substantially irreconcilable during 1988 and 1989 and became even more problematic towards the beginning of 1990\textsuperscript{162}. Indeed, as the deadline for the conclusion of the negotiations approached, the tension in the negotiations

\textsuperscript{162} The agreement was supposed to be reached by the autumn of 1990 but soon it became clear that it was very unlikely this goal was going to be met as expressly underscored by the chairman of the negotiations when in August 1990 he commented upon the consultations and said: The consultations had been positive and held in a very constructive atmosphere [but they] had not served to narrow significantly the gap on points where there were differences of substance. The number of such points, their complexity and the extent of the gap between participants in respect of many of them were such that the task of reaching an agreement in the Autumn remained a formidable one.
TRIPSs Negotiating Group Minutes, MTN.GNG/NG11/23 [Aug. 22, 1990]
increased and a number of new legal texts were submitted. The first was that of
the EU\textsuperscript{163}, Negotiating Group on Trade Relates Aspects of Intellectual Property
Rights, Including Trade in Counterfeit Goods, communication from Switzerland:
Draft Amendment to the General Agreement on Tariffs and Trade on the
Protection of Trade Related Intellectual Property Rights which was introduced at
the meeting of April 1990 by a representative of its delegation, which
underscored that “the community had decided to reiterate its previously tabled
proposal on this matter in the hope that other participants would make
constructive attempts to address the trade problems in this area\textsuperscript{164}. He also
stressed “the unacceptable nature of the present situation in certain jurisdictions,
mainly created by the absence of adequate protection of appellations of origin in
a few countries to the advantage of a relatively small number of producers, and
to the detriment of the legitimate producers of such appellations in the
community or in other wine producing countries”\textsuperscript{165}.

It became clear at that point that no agreement could have been reached with the
EU without the inclusion in the TRIPs Agreement of some level of protection for
GIs that could have been considered satisfactory from the community
perspective\textsuperscript{166}. The EU proposal was therefore “followed by a series of similar

\textsuperscript{163} TRIPS Negotiating Group Minutes, MTN.GNG/NG11/W/68 [Mar. 29. 1990]
\textsuperscript{164} TRIPS Negotiating Group Minutes, MTN.GNG/NG11/20 [Apr. 24. 1990]
\textsuperscript{165} TRIPS Negotiating Group Minutes, MTN.GNG/NG11
\textsuperscript{166} Indeed such an agreement was highly desired by more than one country. In particular, the United States
was suffering heavy losses from the absence of adequate protection of IPR abroad.
drafts of complete texts of TRIP's Agreement, submitted in May 1990 by the United States, Switzerland, and Japan, all of which ‘borrowed substantially from the community’s text,’. Further in May 1990, for the first time a group of developing countries submitted a proposal. All the aforementioned drafts included provisions that addressed GIs that, to use the words of the EU representative, “still fell short of the community’s ambitions,” but without doubt represented progress towards a possible agreement.

Subsequently the Chairman of the negotiations produced a composite text, that summarized the relevant points and alternatives of the proposals mentioned above. This document represented the basis on which the negotiations, which anticipated the Brussels meeting of December 1990, took place. The Brussels meeting produced tangible results and the Draft Final Act was issued by December 1991. “The subsequent discussions did not yield many substantive provisions different from [the one included in the December 1991 draft],”

The industries in such sectors as computer software and microelectronics, entertainment, chemicals, pharmaceuticals, and biotechnology, had become concerned about the loss of commercial opportunities abroad. In 1987 a survey by the United States International Trade commission [ITC] confirmed, on the basis of public hearing held and questionnaires administered, that the United States firms were loosing some 50 billion dollars, owing to lack of protection abroad of Intellectual Property. A.O. Adede, The Political Economy of the TRIP's Agreement: Origins and History of the Negotiations (2001), http://www.ictsd.org/dlogue/2001-07-30/Adede.pdf 3-4

167 TRIPS Negotiating Group Minutes, MTN.GNG/NG11/W/70 [May 14, 1990]
168 TRIPS Negotiating Group Minutes, MTN.GNG/NG11/W/73 [May 14, 1990]
169 TRIPS Negotiating Group Minutes, MTN.GNG/NG11/W/74 [May 14, 1990]
170 Adede, supra note 27, at 20.
171 TRIPS Negotiating Group Minutes, MTN.GNG/NG11/W/70 [May 11, 1990]
172 TRIPS Negotiating Group Minutes, MTN.GNG/NG11/21 [June 22, 1990].
173 TRIPS Negotiating Group Minutes, MTN.GNG/NG11/W/76 [July 23, 1990]
174 Adede, supra note 27, at 25.
175 Adede, supra note 27, at 25.
which therefore is very close to the agreement adopted in Marrakesh in 1994. As for the specific regulation of GIs, it can be said that the final version of the TRIPs Agreement reflects the dynamics and struggles of the negotiations over this issue, as it consists of a hybrid discipline in which identifiers with similar characteristics for similar products are treated in substantially different ways with no logical justification supporting it. Indeed, GIs for wines and spirits enjoy a much higher level of protection than GIs for other potentially identical products. The only plausible explanation for this result can be found in the political pressures exercised on this issue during the negotiations by the EU on one side and the resistance of the other countries adversely affected by a stringent GI regulation on the other.

This result is even more apparent if the drafts of the agreement that were submitted during 1990 by the different delegations are compared. A progressive spectrum of a level of protection for this kind of identifier, that go from a very broad regime whose scope covers all types of products and provides protection for generic terms, to a very narrow regime in which GIs are protected only if their use misled the public, can be identified. The compromise was reached

---

176 Darjeeling, a region of India, is well known for its tea.
177 In particular, see the EU proposal under Protective Measures. Negotiating group on trade related aspects of intellectual property rights, including trade in counterfeit goods, communication from the Europran community: Draft Agreement on Trade in counterfeit goods, communication from the European community: Draft Agreement on Trade Related Aspects of Intellectual Property Rights, MTN.GNG/NG11/W/68 [ Mar. 29, 1990]
somewhere in the middle of this spectrum, and GIs for wines and spirits have particularly benefited from it.

Also, it can be noted that two significant provisions that were present in the EU’s draft disappeared from the final version of the agreement. They referred to the issue of generic terms and provided, on one side, for WTO Member states to establish “appropriate measures under national law to prevent Geographical Indications from developing into a designation of generic character” and, on the other, that it was “understood that appellations of origin for products of the wine were not susceptible to develop into generic designations.

Finally, the initial EU proposal included under “Restricted Acts” that “any usurpation, imitation, even where the true origin of the produce was indicated or the appellation or designation was used in translation or accompanied by expressions such as “kind”, ‘type’, ‘style’, ‘imitation’ or the like. In that context,

178 In particular, see the EU proposal under Protective Measures. Negotiating group on trade related aspects of intellectual property rights, including trade in counterfeit goods, communication from the European community: Draft Agreement on Trade in counterfeit goods, communication from the European community: Draft Agreement on Trade Related Aspects of Intellectual Property Rights, MTN.GNG/NG11/W/68 [Mar. 29, 1990]
179 In particular, see the EU proposal under Protective Measures. Negotiating group on trade related aspects of intellectual property rights, including trade in counterfeit goods, communication from the European community: Draft Agreement on Trade in counterfeit goods, communication from the European community: Draft Agreement on Trade Related Aspects of Intellectual Property Rights, MTN.GNG/NG11/W/68 [Mar. 29, 1990]
181 Negotiating Group on trade related aspects of intellectual property rights including trade in counterfeit goods, communication from the European Community: Draft Agreement on Trade Related Aspects of Intellectual Property Rights, MTN.GNG/NG11/W/68 [Mar. 29, 1990]
this provision extended to all GIs no matter the kind of product to which they are associated, whereas in the TRIPs Agreement, a very similar rule is established in Article 23, but only for wines and spirits\textsuperscript{182}.

Ultimately, it looks clear that the EU, in the last moments of the negotiations, had to give up some of its goals regarding the international protection of GIs in order to obtain the significant coverage enjoyed today by those GIs on products that probably are among the most important for the community’s economy and for which the connection with the particular place of origin and their qualities is more evident: wines and spirits.

Thus the ‘Geographical Indication’ has been around for many decades, but it is really since the World Trade Organisation (WTO) Agreement on TRIPS entered into force in the mid-1990, that it has come into common use.

The concept of GI comes from the concept of ‘country of origin’ or a regional or sub-regional geographical origin. Over time, some locations, regions, or countries become synonymous with producing high-quality products. Producers from those locations can benefit from the ‘geographic origin’ image, which is a set of

\textsuperscript{182} Agreement Trade Related Intellectual Property Rights, April.15 1994, Marrakesh Agreement Establishing the orld Trade Organization Annex. IC, Legal instrument- Result of the Uruguay round 33. I.L.M 1125,1197
generalized beliefs about specific products from that geographic origin on a set of attributes\textsuperscript{183}.

International protection of origin-labeled products has a long history\textsuperscript{184}. Today, international IP and related laws offer two main options for GI protection. These include [a] defense against unfair competition; and [b] positive protection through registration mainly under sui generis system or through trademark\textsuperscript{185}.

The Uruguay Round of the GATT negotiations began in 1986, precisely when India’s development policy making process was at a watershed. By the time India launched its massive economic reforms package in 1991, marking a paradigm shift in its policy, the Uruguay Round negotiations were well under way, paving the path towards Marrakesh in 1994 and the establishment of the WTO. India remained a cautious and somewhat passive player during the initial years of the Uruguay Round negotiations, given its long legacy of inward looking development strategy and protectionist trade policy regime\textsuperscript{186}.

\textsuperscript{184} Petra van de Kop, Denis Sautier, and Astrid Gerz, ‘Origin-Based Products- Lessons for pro-poor market development’, Bulletins No:372 of the Royal Tropical Institute [KIT], Netherland.  
\textsuperscript{186} Dr.Sudhir Ravindran & Ms. Arya Mathew, ‘The Protection of Geographical Indication in India – Case Study on ‘ Darjeeling Tea’.
However, at Doha India wanted to extend protection under GI beyond wine and spirit, to other products. A number of countries wanted to negotiate extending this higher level of protection to other products as they see a higher level of protection as a way to improve marketing their products by differentiating them more effectively from their competitors and they object to other countries ‘usurping’ their terms. Some others opposed the move, and the debate has included the question of whether the Doha Declaration provides a mandate for negotiations\(^\text{187}\).

The development of international rules on GIs has been a result of distinct periods before and after TRIPS\(^\text{188}\). These distinct periods may be summarized as:

[a] Before the negotiation and passage of the TRIPS Agreement;

[b] After the adoption of TRIPS obligations by member countries;

[c] The post-TRIPS period marked by the;

• Doha negotiations


Developments in bilateral and regional trade arrangements as well as development at World Intellectual Property Organization [WIPO].

TRIPs Agreement and Contemporary application of GIs

Article 1.1 of TRIPs provides the minimum standards of Intellectual Property Rights protection that WTO Members are obliged to comply with. Members however, are free to implement more extensive protection, provided such protection does not contravene the provisions of the Agreement. TRIPs also leave it up to the Member countries to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

Overview of the TRIPS

The TRIPs Agreement, which provides a comprehensive definition of a GI, is the first truly multilateral agreement for the international protection of GIs. In order to understand the development of the legal frame work adopted nationally with respect to GIs, it is essential to understand some of the main features of the TRIPS Agreement.
The salient features of the TRIPS Agreement are\textsuperscript{189}; Standards:

In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.

The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property [Paris Convention] and Berne Convention for the protection of Literary and Artistic Works [Berne Convention] in their most recent version must be complied with.

With the exception of the provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries.

The relevant provisions are found in Article 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional

\textsuperscript{189} http://www.wipo.int/meetings/en/doc.details.jsp?doc.id=5074
obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris plus Agreement.

**Enforcement:**

The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

**Dispute settlement:**

The Agreement facilitates dispute resolution amongst WTO Member about the respect of the TRIPs obligations subjects to the WTO’s dispute settlement procedure.

In addition the Agreement provides for certain basic principles, such as national and most-favored-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the
substantive benefits that should flow from the Agreement. The obligations under the Agreement will apply equally to all Member countries, but developing countries will have a longer period to phase them in.

Part II section 3 of TRIPs Agreement provides for GIs,

Part II section 3 does not discriminate between either agricultural or industrial goods, nor do the provisions discriminate between manufactured and handicraft goods. The only distinction with respect to application of section 3 exists in the form of additional protection for wines and spirits through Article 23 and is an accepted interpretation of the TRIPs Agreement\(^\text{190}\) Article 22[1] provides a definition of GIs, which has two principle elements that are considered to be international standards developed beyond what existed before TRIPS. It provides inter alia:-

‘Geographical indications are for purposes of this Agreement, indication 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’.

From the definitions, indications which may be given protection includes those which are not verbal by its nature, rather even images, symbols, packaging etc

\(^{190}\) WIPO Symposiums 1999,2000
are also included. However, services are excluded from protection, but protection extends to even non agricultural food products. Still, for all practical purposes, the law of geographical indications is about foodstuffs.

Moreover, the definition does not mention expressly whether ‘human factor’ is among other criterion that falls within the ambit of ‘…quality, reputation or other characteristics…’ some commentators do argue that, such silence means ‘human factor’ is not included, because, other multilateral agreements expressly incorporated it. However, others consider ‘human factor’ to have been included, they argue that the history of the negotiation which resulted to the definition does not show any proposed draft which opposed the need of including ‘human factor’ as proposed by the EU. Hence, Dunkel’s draft should be interpreted to have incorporated ‘human factor’.

The definition further commands the need of connectivity between the qualities in question vis-à-vis a producing geographic region. The article needs the quality of a good be “essentially attributable” to the geographical region where it is produced. Majority think this is a lax standard when compared to that imposed

---

191 Examples of indirect GIs are such as the Eiffel Tower for Paris, that Matterhorn for Switzerland or the Tower Bridge for London. See WIPO intellectual property Handbook: Policy, Law and Use p.121
192 Human factor entails special professional traditions of the producers established in the geographical area concerned. Also see WIPO, GI Evans & Blakeney'The Protection of geographical indications after Doha: Quo Vadis?'[2006]9 Journal of International Economic Law 575-614
by the Lisbon Agreement, which requires the good to have a quality which is ‘due exclusively’ or ‘essentially’ or to the land where it is produced.

However, Hughes\(^{193}\) finds both standards the same because ‘exclusively’ and ‘essentially’ has the same coverage. If particular geographical region A is essential for producing product qualities Z, surely that means no other geographical region will do as a product input. But that is the same thing as saying that region A has exclusivity for qualities Z. If geographic region B can also produce qualities Z, then ‘A’ is not ‘exclusive’, but neither is it ‘essential’. However, there is no legal pronouncement to uphold any of the conflicting view up to now.

For ensuring common standards of the agreement, article 22[2] set down two basic operative requirements applicable for all GIs:

\[\text{In respect of geographical indications, members shall provide the legal means for interested parties to prevent;}\]

\[a] the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner that misleads the public as to the geographical origin of the good;\]

b) Any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention [1967].

Firstly, the article requires WTO members to provide legal mechanisms for protecting GIs from which, any person who uses any designation or presentation which signifies that the good in question comes from certain geographical region. While, in fact does not come from such named geographical region. And due to such signification if the ‘public is mislead,’ then such use of deceptive indication should be prevented.

However, commentators have argued that to what extend should public be considered to have been mislead? The agreement is silent over the matter and does not provide even the meaning of the term ‘public’, thus leaving members with discretion to fill the lacuna. Secondly, the article impliedly extend the coverage of article 10bis of the Paris Convention in the definition provided under art 22[1] of the TRIPs, on the prevention of unfair competition194.

The standards set under article 22 are qualified by article 23 which provide additional protection for GIs relating to wines and spirits. The extension is two

---

194 J.Hughes contends that in the negotiation of Article 10bis in 1958, the United States delegation objected to the words ‘the origin’ in the original Austrian proposal. The provision had to be reworded so as not to extend to geographical indications. Thus, the definition of GI in TRIPS Article 22[1] and the ‘incorporation’ of 10bis in TRIPs Article 22[2][b] implicitly expands Article 10bis coverage without formally saying so 107 and amounts to a U.S concession on what it would not concede in 1958.
fold: firstly, it relates to cancellation of existing registered trademarks and secondly, use of trademarks bearing false indication denoting wines and spirits even if the public is not mislead, it does not matter whether the use of such a label or trademark is in translated form such as ‘type’ ‘kind’ ‘style’ or the like so that the public is not mislead. However the provision of this article is subject to exceptions provided under article 24. Generally it provides that:

   Each Member shall provide the legal means for interested parties to prevent use of geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirit not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’, or the like195.

Article 24[1] and [2] concern the WTO obligations on continuing negotiations, also article 24[3] is simply a prohibition on back-tracking. TRIPS obligations are a floor, not a justification to ‘diminish the protection of GIs existed prior to the entry into force of the agreement. Article 24[4] through [9] provides an array of limitations and exceptions to the GIs obligations in articles 22 and 23.

195 The footnote to the text is written as ‘Notwithstanding the first sentence of Article 42, Members may with respect to these obligation, instead provide for enforcement by administrative action’. 
Article 24[4] specially relates to GIs for wines or spirits protected in country X, whilst producers in country Y were already using that geographic word in connection with goods or service. Article 24[6] excludes obligation of protecting GIs which have accidentally through historical usage became generic.

The Doha Development Round – The Key Issue
The protection of GIs has, over the years, emerged as one of the most contentious IPR issues in the realm of the TRIPS agreement of the WTO.

At the Fourth Ministerial Conference in Doha, Qatar, in November 2001 WTO member governments agreed to launch new negotiations. They also agreed to work on other issues, in particular the implementation of the present agreements. The entire package is called the Doha Development Agenda [DDA][196]. The negotiations take place in the Trade Negotiations Committee and its subsidiaries, which are usually, either regular councils and committees meeting in “special sessions”, or specially-created negotiating groups. Other work under the work programme takes place in other WTO councils and committees.

[196] For a general reading on the Doha Agenda see http://www.wto.org/english/thewto.e/whatis.e/tis.e/doha1.e.htm
The DDA was the Forth Ministerial Conference undertaken by the World Trade Organization [WTO], taking place in Doha, Qatar, in 2001. The DDA’s aim was twofold. On the one hand it was to strengthen the global multilateral trading system. On the other it aimed to establish conditions in order to increase global welfare with a special focus on the needs of developing countries.

Thereby the DDA intends to support developing countries to reach the standard they are aiming at and integrating further them in the global market. Though the initial negotiations failed all of the unsettled items from the DDA still remain at the center of all follow up Ministerial Rounds, which failed all together.

The Fifth Ministerial Conference in Cancun, Mexico, in September 2003, was intended as a stock-taking meeting where members would agree on how to complete the rest of the negotiations. But the meeting was soured by discord on agricultural issues, including cotton, and ended in deadlock on the ‘Singapore issues’. Real progress on the Singapore issues and agriculture was not evident until the early hours of 1st August 2004 with a set of decision in the General Council [sometimes called the July 2004 package].

In 2003, the Doha Development Agenda was dealt a severe blow after the Ministerial Conference in Cancun, Mexico, failed spectacularly to agree upon how to proceed with the round. Without the willingness of developed countries
to commit to decreased agricultural protection and subsidies and of developing countries to engage in the Singapore issue [which include investment, competition policy, government procurement, and trade facilitation], the meeting failed to deliver any consensus.

The deadlock was broken in Geneva when the General Council agreed on the ‘July package’ in the early hours of August 1st 2004. The main achievements of the meeting include a road map for the future elimination of agriculture export subsidies, new commitments to discipline trade-distorting farm subsidies, and commitment to reduce agriculture tariffs to achieve substantial improvements in market access while allowing for flexibility in the treatment of sensitive products.

There was also agreement to initiate negotiations on trade facilitation, with the objective to expedite the movement, release and clearance of goods to substantially reduce re-tape and improve customs procedures around the world. The other Singapore issues were dropped. The delay in reaching agreement meant that the original January 1st, 2005, deadline for finishing the talks could not be met. Unofficially, members aimed to complete the next phase of the negotiations at the Hong Kong Ministerial Conference in December 2005, including full ‘modalities’ in agriculture and market access for non-agriculture products, and to finish the talks by the end of the following year.
The original 1\textsuperscript{st} January 2005 deadline was missed. After that, members unofficially aimed to finish the negotiations by the end of 2006, again unsuccessfully. Further progress in narrowing members’ differences was made at the Hong Kong Ministerial Conference on December 2005, but some gaps remained unbridgeable and Director-General Pascal Lamy suspended the negotiations in July 2006. Efforts then focused on trying to achieve a breakthrough in early 2007\textsuperscript{197}.

By early 2008, substantial progress has been made in the Doha Round negotiations in narrowing or resolving differences in negotiating positions. As a result, a WTO Ministerial Conference was held in Geneva during July 21-29, 2008, in hopes of resolving the remaining differences.

However, the Ministerial Conference failed to narrow the gap on the most contentious issues. In order to revive the negotiations before momentum was lost, the chair of the WTO’s Committee on Agriculture released a new draft text in December 2008, referred to as a ‘modalities framework’ [i.e., specific formula and timetables for reducing trade-distorting farm support, tariffs, and export subsidies, and for opening import markets]. The ‘modalities framework’ summarized the current mutually agreed changes to existing disciplines, as well

\textsuperscript{197} See generally The Doha Declaration explained available at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm
as highlighting the areas of disagreement. As such, it was an attempt to lock in
the status of current concessions, while adding detail to outstanding issues and
providing a basis for further, more specific talks.

The WTO Ministerial Conference, the highest-level WTO governing body, met in
Geneva November 30th to December 2nd, 2009. The Conference was not a
negotiating session for the Doha Round, but one of its main agenda items was
the Doha Round work program for 2010. Director-General Lamy had said that
the 2009 Ministerial Conference would be ‘an important platform for ministers to
send a strong signal of commitment to concluding the Doha Development
Round’. At the Ministerial, the U.S Trade Representative, Ambassador Kirk,
stressed that to address gaps in the agriculture and other negotiations, the
multilateral negotiations in the Doha Round need to be supplemented with
sustained direct bilateral engagement, especially with advanced developing
countries. The WTO Director-General had called for a stock taking during the
last week of March 2010 to assess whether concluding the Doha Round in 2010 is
‘doable?’.

Since the launch of the Doha Round of Multilateral Trade Negotiations the WTO
Members have, among other subjects, been negotiating possible rules for
enhanced protection of GIs.
There are two main issues being addressed. The first related to the establishment of a multilateral register for wines as mandated in Article 23 of the TRIPS Agreement. The Second issue relates to Whether the level of protection provided for wines and spirits under Article 23 of TRIPs, including the requirement to establish a multilateral register for wines , should be extended to cover all products.

In these negotiations, WTO Members remain sharply divided on a range of procedural and technical points. The differences range from political issues such as mandates through to substantive questions regarding the costs and benefits of the various proposed solutions.

Those opposing extension argue that the existing [Article:22] level of protection is adequate. They caution that providing enhanced protection would be a burden and would disrupt existing legitimate marketing practices. India , along with a host of other likeminded countries pressed an ‘extension’ of the ambit of Article 23 to cover all categories of goods.

However, countries such as the United States, Australia, New Zealand, Canada, Argentina, Chile, Guatemala and Uruguay are strongly opposed to any ‘extension’. The ‘extension’ issue formed an integral part of the Doha Work Programme [2001]. However, as a result of the wide divergence of views among
WTO members, not much progress has been achieved in the negotiations and the same remains as an ‘outstanding implementation issue’\textsuperscript{198}.

The subject of GIs is rather contentious, involving a significant split in views on the WTO/TRIPs agreement protecting GI; protection is currently limited to GIs for wine and spirits. The European Union, India, Thailand, Kenya, Switzerland and Turkey as also some Eastern European Countries such as Poland and Hungary wish to extend Article 23 WTO/TRIPs to protect all GI products. These nations also wish this extension to involve the establishment of a legally binding multilateral register for GI products. Australia, Canada, Guatemala, New Zealand, Paraguay, Philippines and United States do not support this extension\textsuperscript{199}.

The Doha Development Agenda discussions about food GIs raise important questions of policy regarding GIs and rural development, private [personal] versus communal rights, traditional versus new creations, the expansion of the protections offered for foods other than wines and spirits and the trade effects of GIs, among others. Other issues area more technical and result from the current TRIPs text, e.g., TRIPS provides less extensive protections for GIs for foods than


for trademarks or for wines and spirits. For example, the Agreement permits on food labels the use of the word “style” or “type” in combination with a GI, so long as consumers are not misled and there is no unfair competition. In addition, the Agreement does not provide for an international registry, mandate the international recognition of food GIs, or require that they be enforced.

India, along with a number of other countries has sought extended protection for GIs especially in the light of Article 23 of the TRIPS agreement. The additional protection has been sought for products other than wine and spirits200.

On 21st April 2011, Darlington Maple of Zambia circulated a 5 – Page report to the Trade Negotiations Committee as did chairs of all the Doha Round negotiating groups. He concluded by saying that:

‘All delegations have made a genuine effort to find common language while defending their interest (...) I do believe that working on treaty language formulations regarding the structure, operation and implications of the Register has – for the first time- helped all delegations to have a clearer view of each other’s positions, proposals and wordings. While I am aware that there still is a long way to go, I do believe that the Draft Composite Text (...) provides a good basis on which to continue negotiations towards a multilateral system of notification and registration for geographical indications for wines and spirits.

200 Doha work Programme- The Extension of Additional Protection for GIs to Products other than Wines and Spirits at http://www.ige.ch/e/jurinfo/documents/j10409.pdf
Concluding Remarks:

Summing up, in the Doha Development Agenda –debate, the EU and the US – both acting in their own economic interest. For the EU it is essential that GIs are adequately protected throughout the world, because of the importance of these products to certain member states. GIs is a part of a broader policy objective with the Common Agricultural Policy, where focus recently has shifted from production of quantity to quality. However, in the US, where several multinationals are dependent on the brand names with ‘European heritage’, and where the legal system is very differently set-up than from the EU, enforcing EU’s requirements would be a heavy economic burden for certain industries, and therefore also a very unpopular political move.