

Culture, Trade and Additional Protection for Geographical Indications

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Cultural diversity is sometimes evoked to justify the legal protection of geographical indications, but these arguments may be misguided. Nevertheless, 'additional protection' under the TRIPS Agreement should be extended to all such indications in order to remove discrimination between products from developed and developing countries.

According to Article 22.1 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), geographical indications (GIs) 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." The GIs that qualify for international legal protection under WTO law are place-related names most often associated with food and beverage products, such as Parma ham, Darjeeling tea or Budvar beer.

There is a distinct cultural backdrop to GIs: the assumption that – beyond their private-interest and public-welfare effects – they are required for the preservation of local traditions and cultural diversity. This approach is necessary to justify the inclusion of GIs in intellectual property disciplines, which are usually aimed at encouraging innovation and individual creativity through the grant of a temporary monopoly. GIs are different: based on commonly used place-names, they establish communal rights and are maintained to protect 'traditional' knowledge.

Under TRIPS Article 22, GI protection may not apply if it can be shown that circumstances or proactive measures prevent confusion regarding the product's true geographical source. Article 23 – which relates only to wines and spirits – goes a step further, conferring to the GI a nearly absolute degree of exclusivity that prevents others from using it even when measures have been taken to prevent confusion (for instance, a wine cannot be called a 'Beaujolais' or described as 'Beaujolais-style' unless it actually comes from the Beaujolais region in France even if the label clearly indicates that the product originates in another location). In this enhanced category, consumer protection – the original rationale for integrating GIs in the WTO's intellectual property rules – no longer serves as the basis for the

GI and so must be replaced by another one, such as cultural protection. In the Doha Round, a number of WTO Members seek to extend this degree of absolute protection to all GIs.

The main proponent of the cultural argument is the EU, which is interested in extending TRIPS Article 23 'additional protection' to its Member States' non-wine and spirit products. The EU has gained support from certain developing countries keen on enhancing the protection of their own current and future non-wine GIs, which are now inherently disadvantaged because most wines and spirits are produced in developed countries. The EU argues that GIs are "key to EU and developing countries' cultural heritage, traditional methods of production and natural resources".¹ This widely-held idea² is usually taken for granted, based on general perceptions of the trade/culture relationship.

How Are GIs Expected to Protect Culture?

A popular image of the effects of trade on culture is the apocalypse of a 'McWorld', where the global proliferation of standardised products of mass culture through international free trade threatens to stifle national and local cultures and traditions embodied in cultural goods and services ('widgets').

A 'widget' may become cultural in three ways, all of which may apply also to food and wine products, currently the main beneficiaries of GI status:

- *The culture of production:* The process and/or method of the widget's creation and production endow it with cultural merit worth protecting, irrespective of the widget's commercial value or end-use (e.g., hand-crafted boots). This corresponds to elements of Article 4 of the preliminary draft of UNESCO's Convention on Cultural Diversity³, which requires 'cultural activities, goods or services' to embody or convey cultural expressions that result from the creativity of individuals, groups and societies. Food and wine products are cultural in this sense, especially if produced through traditional viticultural, oenological or agricultural practices. Most relevant for the geographical indications debate is the so-called 'old world' concept of *terroir*, which sees such products as non-industrial expressions of their specific natural and human environment, so that the place of production itself becomes a cultural value.
- *The culture of consumption:* The widget may also become 'cultural' by virtue of the context in which it is consumed. For example, the demand for music once spawned a tradition of musical performances, expressed through the culture of concert- and opera-going, but also that of the dance-hall or the folk musician. When the same performances became available, with enhanced audio quality, through mass-produced long-playing records, the social context of consumption changed from the communal to the private. In this respect, food and wine products covered by GI rules are closely linked with local cultures of consumption, as evidenced by a rich sociological literature on relevant ceremonies, social norms, lifestyles and local tastes. This aspect appears to have been neglected in the UNESCO Draft Convention, although it may be included in the broad concept of 'cultural activities'.
- *The culture of identity:* Acknowledged in the UNESCO Draft Convention as 'symbolic meaning', this is the least tangible manner in which local culture may attach to a widget. Culture is embedded in the widget by its very existence – and through its content – in a

way that somehow makes it representative of a cultural value that is associated with the relevant individual or group identity, such as a flag or ceremonial dress. This dimension appears in food and wine products that are national ‘champions’ closely associated with national or regional perceptions of identity (e.g., Champagne in France).

Intuitively, trade restrictions protecting cultural ‘widgets’ may be able to prevent cultural degradation. Culture may be highly valued collectively, but if aggregate individual consumer demand cannot independently sustain the cultural widget in the face of ‘non-cultural’ but otherwise functionally substitutable products, the widget’s economic survival requires regulatory protection for its preservation. Conflicts between international trade liberalisation and domestic policies shielding cultural goods and services may arise in any conceivable trade measure, from tariffs to tax preferences.

GIs are somewhat different. They do not have the obvious trade restrictive effects of other measures. The primary goal of GIs is not cultural diversity but consumer protection – preventing the ‘passing off’ of a good as the ‘genuine article’ even when it has been sourced from another locale, thus diluting a geographical production area’s reputation. In this sense, GIs do not appear to have an inherent value beyond their role in the perfection of market information. A cultural widget is simply shielded from ‘non-cultural’ competition unfairly using its GI, permitting consumers to exercise their preferences. A similar effect could be achieved by a prohibition on misleading labelling, instead of the institution of a quasi-intellectual property right. In itself, this seems a weak contribution to cultural protection, as market failure is still imminent.

Moreover, it is acknowledged that GIs actually may add value to goods. It is the monopolisation of the GI ‘brand’ that achieves this, and under TRIPS Article 23 the GI concept has been detached from consumer protection, significantly increasing the strength of GIs for wine and spirits. Thus, culture is protected in theory not only by distinguishing cultural widgets from the non-cultural, but by valorising the cultural expression embodied in the widget and converting it into a commercial premium.

The European Experience: Cultural Change Despite GIs

Europe, where GIs and similar rights have been legally regulated and enforced since at least the early decades of the last century, provides an observatory for assessing the effectiveness of GIs as protectors of local traditions. Despite the theoretical considerations above, evidence shows that GIs cannot in themselves provide cultural protection, and in fact may serve as agents of change.

Markets change production practices despite GIs, even when regulated: Wine styles and winemaking practices have changed significantly over the last thirty years in many European wine appellations, shifting from ‘traditional’ to ‘international’, accommodating evolving tastes in domestic and foreign markets – displaying clear influences of Australian and Californian styles. This may have improved the overall quality and marketability of many wines. Sometimes little cultural loss has ensued (i.e., in bulk wine industries), but in other cases local traditions of production and most of all regional product characteristics have deteriorated despite GI protection.

In the Chianti Classico region of Tuscany, for example, starting in the 1970s many quality-conscious and innovative winemakers simply abandoned the prestigious appellation, using the formally inferior *Vino da Tavola* label so that they would be able to stray from the traditional production requirements regulated by law, introducing non-indigenous grape varieties, new trellising, oak aging and other methods, which significantly changed local practices and the character of products. Following this ‘Super-Tuscan’ revolution, the Chianti Classico law itself underwent far-reaching changes, to the point that the current GI-eligible varietal composition prohibits the use of the indigenous white varieties Malvasia and Trebbiano, where in the traditional Chianti ‘recipe’ consolidated by Barone Ricasoli in the 1850s, the use of white varieties in the red wine was mandatory.

Other wine regions have experienced similar changes, in which the cultural content of GI requirements has shifted significantly. This is perhaps testament to the dynamics of cultural evolution, as well as the strength of market forces, but in any case shows that GI protection does not prevent cultural change.

Markets change cultures of consumption despite GIs: For example, Britain has long had established traditions of taste in wines and spirits, closely linked to France and with high degrees of discernment between different appellations. Yet despite France’s advantage in GIs and its general philosophy of *terroir*, in 2000 Australian wine exports to Britain surpassed those of France. A 2002 French government-commissioned report acknowledged that one reason for loss of market share was the proliferation of geographical appellations, which has led to customer confusion – reflecting the fact that the culture of consumption had moved away from geographical sensitivity to simpler varietal preferences and homogenous tastes, despite (or even because) of GIs.

The GI market invents traditions, dilutes culture and distorts identity: Led by the assumption that GIs add value to products, a market has evolved for GIs, in which regional groups of producers lobby government regulators for GI status. In order to satisfy reputational, legal and political requirements for GI recognition, communities have had to crystallise where none really existed before, and traditions have had to be ‘invented’, sometimes drawing upon defunct reputations from the distant past. More importantly, like tourism, GIs may cause distortions in the representation and evolution of local culture if, in order to benefit from the indication, communities emphasise the more commercially marketable aspects of their culture.

Implications for the WTO GI Debate and Cultural Policy

GIs, as legal mechanisms and quasi-intellectual property rights, evidently do not have the independent capacity to protect local cultures of production, consumption or identity, or to prevent the erosion of cultural diversity.

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In the WTO, this finding might appear to weaken the position of those advocating 'additional protection' for all GIs – not just wines and spirits – under TRIPS Article 23, as it could be argued that if GIs are not culturally justified, they should remain as much as possible within the narrower TRIPS Article 22 consumer protection equation. However, insofar as the abolition of 'additional protection' for wines and spirits is not on the negotiation table, the only way to prevent the current discrimination against developing countries whose GIs cannot now enjoy 'additional protection' is to extend the latter to all GIs.

Moreover, with or without extension, developing countries that are considering adopting GIs as a suitable vehicle for the protection of rights regarding traditional knowledge – or that would like to see stronger specialised rules for cultural protection in the WTO and elsewhere – should be aware that although such modalities may increase the commercial value of existing cultural goods and services, their effect on cultural preservation and diversity is indeterminate at best, as GI-protected traditions might nevertheless in the future succumb to economic pressures and international consumer preferences. GIs and other trade-related measures must be complemented by more comprehensive flanking policies if cultural diversity is to be preserved.

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ENDNOTES

¹ See EU Background Note No. 01/04 *Why Do Geographical Indications Matter to Us?* (2004), available at http://jpn.cec.eu.int/home/news_en_newsobj553.php.

² See public opinion surveys presented by the EU, WTO Doc. IP/C/M/38 at 32-33.

³ UNESCO, 33 C/23, *Preliminary Draft of a Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (the 'UNESCO Draft Convention'), Paris, August, 2005, available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=28182&URL_DO=DO_TOPIC&URL_SECTION=201.html.

WIPO Development Agenda Status Unclear

The General Assembly of the World Intellectual Property Organisation agreed in early October to establish a 'provisional committee' to continue discussions on proposals to mainstream a 'development agenda' into all of WIPO's work.

A year ago, Argentina, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela (known as the 'Friends of Development') convinced WIPO members to hold a series of intersessional intergovernmental meetings to discuss their proposals for wide-ranging changes to the mandate and functioning of the organisation (Bridges Year 8 No.9, page 21). This year's General Assembly (GA) had to decide if, where, and how to continue talks on the development agenda.

In closed informal meetings, delegations disagreed on whether to continue the discussions in the high-level intergovernmental meetings that reported directly to the GA, or to confine them to the Permanent Committee on Co-operation for Development Related to Intellectual Property (PCIPD), a body of minor importance. For the first time, the 'Friends', led by Brazil, expressly linked the development agenda to the Substantive Patent Law Treaty under elaboration at WIPO, refusing to discuss the latter in the absence of progress on the former.

Negotiators eventually compromised by creating the 'provisional committee', which is to hold two one-week sessions on the development agenda. In the interim, the PCIPD will cease to exist. Delegates differ in their interpretations of the significance of the new committee, particularly as to whether it will enjoy the high status of the intergovernmental meeting process.

Substantive Patent Law Treaty

The General Assembly focused particular attention on how developing country concerns would be reflected in the discussions on the Substantive Patent Law Treaty (SPLT), especially with regard to public interest flexibilities, genetic resources, traditional knowledge and competition. In an effort to address these concerns, the GA agreed to hold, in early 2006, a three-day informal open forum in Geneva, followed by an informal session of the WIPO Standing Committee on the Law of Patents charged with agreeing on an agenda for a five-day formal meeting later in the year, which will in turn report to the 2006 GA.

Genetic Resources and Traditional Knowledge

The GA extended the mandate for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). A number of industrial countries, which continue to oppose raising these issues of particular importance to developing countries in the WTO's Council for TRIPS, contend that WIPO, and the IGC in particular, is the appropriate forum to address them. However, in its five-year existence, the body has not come up with any significant recommendations. The General Assembly admitted several new civil society observers to the IGC, including the International Centre for Trade and Sustainable Development, the Third World Network and Consumers International.

Protecting Broadcasters' Rights

Existing treaties, such as the WTO's TRIPS Agreement and the Berne Convention, allow states to limit the protection of broadcasts to the authors of copyrighted subject matter. This has motivated broadcasters to lobby for an additional layer of protection to be granted specifically to them, independent of existing copyrights. The issue before the GA was whether and when a diplomatic conference for the adoption of a broadcasting treaty should be scheduled. Countries finally agreed to hold two additional meetings of the Standing Committee on Copyright and Related Rights with the aim of finalising a "basic proposal for a treaty [...] in order to enable the 2006 WIPO General Assembly to recommend the convening of a Diplomatic Conference in December 2006 or at an appropriate date in 2007."

The next issue of Bridges will carry more detailed analysis on the General Assembly outcome.