Geographical Indications:
Implications for Africa

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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 as well as some of the historical background to the issue. 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 Organisation. 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, p. 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 give 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 the protection of them 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 essentially create a barrier to entry into the market for that product and exploit monopoly rents by charging higher prices to consumers (Botha, 2004, pp.1-2). Such protection will be particularly controversial when the names that are protected in one region are

commonly used by producers from another (www.geographicindications.com, 2005). A number of international intellectual property rights agreements offer some protection of GIs, including the Paris Convention of 1883, the Madrid Agreement of 1891, the Stressa Convention of 1951 and the Lisbon Agreement of 1958. WIPO also has a standing committee considering the protection of GIs. It has developed a model national law and a draft international treaty on GIs. The WTO Trips Agreement also provides a level of protection for GIs in article 22. Article 23 extends this specifically for GIs used for wines and spirits.

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 second 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 from Hong Kong China.

The proposal by the EC and others 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 GI them the onus is upon them to lodge a reservation within eighteen 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" suggests a voluntary system for wines only. GIs would be registered in a database upon notification. Members could choose whether to participate. If they did so then 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 at the heart of the debate on the multilateral register, include what would be the legal effect within member countries, what extent should the

effect apply to countries not participating in the system, and what would be the administrative and financial costs for governments (WTO, 2005, p.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 in 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. In the end, this issue was included under paragraph 12 of the Declaration which deals with implementation issues. It was decided that the TRIPS Council would discuss the matter. 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". 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 forty-one 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 forty-one 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 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 has adopted an equivalent system of GI protection to the EC's. It was also put forward by the complainants that the regulations diminished the legal protection for trade marks, 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).

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 plus 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 trade mark rules, provide adequate protection for GIs.

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 Doha Development Agenda (DDA) set a deadline for completion of negotiations on the multilateral registration system for GIs for wines and spirits of the Fifth Ministerial Conference in 2003. This was not achieved and debate has continued. There is some hope that it might be possible to make some progress on the multilateral register at the Hong Kong Ministerial Meeting but many believe that at this stage the key players are still too far apart in their positions. 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 seems 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 forty-one agricultural products. 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 forty-one products identified. This would then set a precedent that it 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 is 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 are however known to be supporters of the extension of GI protection to agricultural products.

Second, on the multilateral register for wines and spirits, the majority of African countries are not producers or exporters of wine and spirits, with the exception of South Africa. The interests in this area are therefore largely defensive in terms of the African Group being required to provide additional protection for these products. It would therefore be assumed that of major concern would be to ensure that any system that is put in place 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, p.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 amount. 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), government would become responsible for enforcing GI rights rather than it being the responsibility of industry as with 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 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 regards 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 great protection for GIs argue that this is a fundamental issue that needs to be resolved in order to make progress in the liberalisation of agriculture trade.

Like the 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, p.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. 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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