ASIA PACIFIC REGIONAL INITIATIVE ON TRADE, ECONOMIC GOVERNANCE, AND HUMAN DEVELOPMENT

PROTECTION OF GEOGRAPHICAL INDICATIONS

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Preface

The UNDP Asia Pacific Regional Initiative on Trade, Economic Governance and Human Development (Asia Trade Initiative) was conceived in 2000 in the aftermath of the collapse of the WTO Seattle Conference which was unable to launch a new round of trade negotiations in the face of new initiatives by developing countries. The fundamental motivation is that multilateral rules should craft globalization, so that it provides real benefits for poor people, rather than exclude them. To this end, the Asia Trade Initiative is striving to advance human development in the region through promoting a greater understanding on its interface with trade issues. This involves conducting a comprehensive analysis of the far-reaching impacts of trade agreements on the ability of developing countries to shape national human development outcomes. By facilitating debate among governments and civil society, and introducing human development considerations into the national and regional debates on trade issues, it is hoped to strengthen the capacities of the weaker and more vulnerable "stakeholders" to defend and articulate their interests. The main objective is thus that human development considerations be more fully taken into account in negotiating positions and hopefully in the ensuing trade agreements.

The Asia Trade Initiative became operational in the second semester of 2002. Its first step was to provide more substance to the link between trade and human development by conducting empirical studies at the country level and drawing these together in synthesis documents, "Technical Support Documents" (TSDs). The subjects selected for study are those items on the Doha Development Agenda, where any new international commitments or intensification of multilateral disciplines could affect the human development, for better or for worse, of many poorer and more vulnerable people in Asia. Another criterion has been the existence of parallel efforts in UN bodies aimed at human development goals. The TSDs have been prepared in a consultative manner with reliance on specific grassroots evidence. A conscientious effort is made to examine the impact of possible outcomes of trade negotiations on the broad human development objectives of empowerment, equity, productivity, sustainability to ultimately expand people's choices, and their capabilities to lead the kind of life they have reason to choose and value.

The issue of Geographical Indications, as elaborated in Articles 22, 23 and 24 of the WTO Agreement on Trade-related Aspects of Intellectual Property (TRIPS) is one of our priority topics in the first phase. This Issue Paper is an abridged and modified version of a longer TSD on the subject. This is an emerging area of interest in global trade and development, and we hope the Issue Paper will contribute to enhancing the level of understanding as well as the quality of the debate on Geographical Indications in Asia. Some key points are summarized below:

Geographical Indication is an unconventional intellectual property that can potentially serve distinct human development objectives. The WTO Agreement on Trade Related Intellectual Property Rights (TRIPS) defines Geographical Indications (GI) as indications -- words, phrases, symbols, images -- which identify a good as originating in the territory of a member, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin. It is a form of intellectual property, like copyrights and patents, which bears intangible properties related to pieces of information that can be incorporated in tangible products. GIs can *potentially* aid human development objectives by allowing communities to exploit premiums through “right of exclusion” (empowerment). The logical next step extends empowerment to being a means of translating exclusive rights into economic rents (productivity). Most GIs are related to agriculture, craft, and artisanal products -- any trade advantage that draws on these can thus potentially be pro-poor, for unlike other IPRs, GIs have a low-tech bias in ownership (equity). And GIs have also been considered relevant to protect local knowhow if the reputation or other characteristic of a good is based on traditional knowledge that is essentially attributable to a geographic area (sustainability).

The TRIPS Agreement appears unbalanced in its provisions for protection of GIs. Article 22 of the TRIPS Agreement applies to all GIs and provides certain minimum standards of protection to prevent misleading claims. This contrasts with provisions in Article 23 that constitute additional protection for wines and spirits only, overwhelmingly favoring Europe. Article 23 also provides legal means to prevent use of expressions such as “kind”, “type”, “style” to products not originating in certain geographic locations, even if the public is not misled. For example, “Beaujolais type wine produced in Beijing” would violate Article 23, but not Article 22. Article 23 also permits refusal or invalidation of registration of certain trademarks for wines or spirits, if legitimately contested. The Doha Ministerial Declaration of 2001 also mandates negotiations for setting up a multi-lateral register for wines and spirits.

Support for proposals to extend added protection for all GIs at the WTO is not unanimous. In 2001, the "Friends of GIs" – a group of countries led by Bulgaria, India and Switzerland, as well as the EU repeated their proposal to extend additional protection for GIs to products other than wines and spirits by referring to Article 24 as providing a negotiating mandate, and broadly asserting that, i) the level of protection under Article 22 is not sufficient and, ii) providing two different levels of protection is unjustified. Opponents of added protection (including Australia, US, Philippines) maintain that a delicate balance struck in the TRIPS Agreement ought not be disturbed. They also argue that the costs of extending additional protection would be prohibitive. Proponents retort that this is exaggerated. On legislative and administrative costs, for instance, Article 23 of the TRIPS Agreement, as it stands, requires all WTO Members (except LDCs) to provide protection for all GIs. Developing countries, thus, either need to widen the scope in existing laws, or incorporate additional protection in new laws. On costs to consumers, while short-term confusion is likely, *demandeurs* of extension claim it is in the interest of a higher principle to prevent illegitimate free-riding and usurpation. After all, the rationale for protecting intellectual property rights (IPR) relates to the public good properties of knowledge.

The issue of GIs involves tactical merits at the WTO. Negotiations in the WTO are often a political-economic process involving bargains and exchanges. Some nations, therefore, prefer for tactical reasons to include GIs in the basket of issues for negotiations in the 5th Ministerial Conference in Mexico and beyond, so that a trade-off is possible. It would also seem to be in the interest of developing countries to retain the support of countries such as Switzerland, Czech Republic, and Hungary since this can help to spread the "cost of negotiations" more evenly. The EC and Switzerland already seem willing to pay for the cost of negotiations in GIs through concessions they may make on agriculture. Some observers, however, express dissatisfaction at the prospect of such a likely trade-off.

But ultimately, charity on GIs begins at home. Unless products are appropriately protected at home, the case for protection abroad becomes difficult. At the national level, thus, there is a need to put in place a legislative framework for providing GI protection, if the opportunity costs of economic investments in setting up such systems of IP protection are not prohibitively high under the national circumstances. Countries could also initiate action at the bilateral level. This is important because a multilateral agreement (whether at WTO or at the WIPO) is desirable, but is likely to be time-consuming in light of opposition to extension. In the interim, action at the bilateral level (such as agreements that Australia and others have signed with EC on wine) is worth replicating. Before the launch of mandated negotiations in the WTO, if it occurs, it might also be useful to secure a multilateral understanding to prevent genuine GIs from being generic.

Asia Trade Initiative.

EXECUTIVE SUMMARY

"Geographical Indications" as defined in the WTO TRIPS Agreement incorporate aspects of both "indication of source" and "appellation of origin", but is clearly more akin to the latter. As with some other intellectual property rights, GIs too are rights that need to be protected based on "excluding others" from using the indication. It is this "right to exclude others" from using the indication that confers tangible economic and commercial benefits upon legitimate rights holders of GIs.

The WTO TRIPS Agreement had a tortuous negotiation on the issue of GIs. In the end, it led to an outcome which was fundamentally unbalanced. Thus, for no other reason than politics and deal-making, wines and spirits alone are entitled to additional protection, while no other product is. Developing countries in particular, did not meaningfully participate in the negotiations on GIs with the result that the question of additional protection was essentially decided upon between the two major players in the WTO, namely the US and the EC.

It became apparent to several developed and developing countries that their products were either facing "usurpation or imitation" or other products were "free-riding" on the reputation of their products. Either way, it was obvious to these countries that only additional protection for GIs such as the one granted for wines and spirits will prevent "usurpation, imitation and free-riding". Thus, a group of "Friends of GIs" comprising both developing and developed countries came into being, their common denominator being that they sought extension of additional protection for GIs to products other than wines and spirits. From Asia, India, Sri Lanka and Pakistan were part of this group from the beginning. Thailand joined subsequently. This was opposed to by countries such as Australia, Canada, New Zealand, US, Mexico etc. which maintained that there was a "delicate balance" in the TRIPS Agreement which could not be disturbed. They also argued that there was no mandate for negotiations in this area and even if extension were to be agreed, the costs for developing countries in particular would far exceed the benefits that would accrue.

The countries advocating extension of additional protection for GIs to products other than wines and spirits have argued through their proposals why negotiations in this area needs to be launched without further delay. At the Doha Ministerial Conference in November 2001, the Ministers decided that the issue of extension shall be addressed in the TRIPS Council and a recommendation made to the TRIPS Council by end of 2002.

This document argues that the time for discussions is long gone and that it would be unfair to deprive the proponents of extension of their legitimate demand to negotiate this issue in the WTO. One way or the other, the issue is bound to figure in the basket of issues for negotiations at Mexico.

Actual and potential products in selected Asian countries that could benefit from GI protection are detailed in the form of caselets. The number of products from developing countries in Asia may not run into hundreds, but their trade and commercial value is undeniable.

As for costs, there are different kinds. A "negotiation" cost is involved, but it would seem that in the context of WTO Conference in Mexico where there is bound to be a basket of issues for negotiations, a trade-off is feasible, even desirable. Evidence regarding costs related to implementing and enforcing any outcome in the negotiations take the form of costs of passing and implementing legislation; costs to consumers; and costs to trade and manufacturers. On the basis of available information, it would appear that the costs to Governments are not significant and that costs related to consumer confusion appear exaggerated. However, it does seem as if that producers in some countries manufacturing selected products (such as cheese, for example) could be adversely affected, at least in the short-run. But, this needs to be seen in perspective and weighed against the market currently "lost" by manufacturers of "genuine" products.

On the link between GIs and traditional knowledge, the document makes the case for GIs being a more appropriate form of protection, than say patents or trademarks. Nevertheless, protection of traditional knowledge through GIs will not necessarily prevent misappropriation, for which separate action needs to be initiated at national and international level. GIs protection for traditional knowledge possessed by indigenous communities can also help change the current image of the WTO and the TRIPS Agreement as being exclusively for the benefit of the TNCs / MNCs.

Finally, the document makes the case for countries that seek extension of additional protection for GIs to take immediate action at three levels: national, bilateral and multilateral. All three actions could run in parallel without being mutually exclusive.

I INTRODUCTION AND BACKGROUND

The term “Geographical Indications” (hereinafter referred to as GIs) is defined in the WTO Agreement on Trade – Related Aspects of Intellectual Property Rights (hereinafter referred to as the TRIPS Agreement) 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.[1] For purposes of this document, this definition will be relied upon. The question of whether a better definition could have been agreed upon by negotiators of the TRIPs Agreement is both an academic issue and is in any case outside the scope of this document.

In any survey of literature on the subject, the reader is bound to encounter two concepts, one, “indication of source” and two, “appellation of origin”. It is important to understand the distinction between these two terms. While indication of source is a general concept referring to any expression or sign used to indicate that a product originates in a country, a region or a specific place, appellation of origin is a more refined and special concept used to refer to the geographical name of a country, a region or a specific place which serves to designate a product originating therein but the characteristic qualities of which product are due exclusively or essentially to the geographical environment, including natural, human factors or both natural and human factors. It will, therefore, be apparent to the reader that while all appellations of origin are clearly indications of source, the converse is not necessarily true.

As for the definition in the WTO TRIPS Agreement, GIs have incorporated aspects of both the above concepts. But, by using the words “essentially attributable to its geographical origin” with regard to quality, reputation or other characteristic of the good concerned, the TRIPS Agreement seeks to make the definition of GIs more akin to the appellation of origin and certainly narrower than a mere indication of source. This may have implications for the current debate over extension of additional protection for GIs for products other than wines or spirits.

Protection of GIs refers to protection against the use of GI for products <u>not</u> originating from the geographical area to which the indication refers. It is natural to ask why there should be such protection in the first place. First, consumers deserve to be protected against misleading practices. If a GI is used in connection with products which do not originate from the geographical area to which the indication refers, consumers are misled. There is also the question whether the consumers really understand the GI as a reference to the geographical origin of the products in question. This need not necessarily be the case, since it may have become customary to use the GI as the generic designation for the product concerned. Indeed, this is one of the principal obstacles faced by the advocates of the extension of additional protection for GIs to products other than wines and spirits. The second reason for the protection of GIs is the recognition that a GI may be considered as a distinctive sign, the use of which is reserved to the enterprises located in the geographical area to which the indication refers. Thus, the idea is to provide protection for GIs as a protected subject matter, a kind of intellectual property right, which entitles the enterprises that are located in the designated area to <u>exclude</u> others from using the indication. The third reason for the protection of GIs is that it obviously places a premium on the product concerned by pushing up its competitiveness and prices. In other words, it is to seek trade and commercial advantage on legitimate grounds.

Having classified the issues of definition and the purpose of protection of GIs, it may be useful to now briefly survey the multilateral agreements that were in existence before the entry into force of the WTO TRIPS Agreement on 1st of January, 1995.

The Paris Convention for the Protection of Industrial Property (hereinafter referred to as Paris Convention, the relevant provisions of which are reproduced in the Annexure) had specific provisions relating to both “indications of source” and “appellations of origin”. Thus Article 1 of the Paris Convention mentions both as falling within the scope of Industrial Property. Articles 9 and 10 of the Paris Convention are also relevant in this regard.[2]

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[1] Article 22, paragraph 1 in Section 3: Geographical Indications of the WTO TRIPS Agreement.
[2]See the text of Articles 1,9 and 10 of the Paris convention for the protection of Industrial Property

The Paris Convention nevertheless is characterized by the fact that while there is a clear obligation to protect indications of source as provided in Article 10, there is no corresponding provision in the Paris Convention for protection of appellations of origin. It may, however, be argued that Articles 9 and 10 are applicable to appellations of origin since every appellation of origin by definition constitutes an indication of source as well. Be that as it may, the main drawback of the Paris Convention is that it applies mainly, only to false indication of the source. It does not deal with cases where an indication, without being false, may nevertheless mislead the public. This could happen where certain geographical areas in different countries have the same name but only one of those areas is internationally known for particular products. So, while the Paris Convention is widely subscribed to by as many as over 100 countries, it does not tackle the question of indications which, in countries other than the country of origin, are generic names of a product.

The Madrid Agreement[3] is a special agreement within the framework of the Paris Convention. The Agreement aims at the repression not only of false but also of deceptive indications of source. But in the end, the Madrid Agreement not only did not enjoy the wide acceptance of countries (only 30 countries subscribed to it) but it also had the crucial drawbacks that the Paris Convention suffered from. For example, indications of source are not protected against the risk of becoming generic names. Most importantly, the repression of false or deceptive indications which are qualified by terms such as "kind" or "type" are not tackled by the Madrid Agreement. It needs to be recognized however that the Madrid Agreement went further than the Paris convention inasmuch as the repression of deceptive indications of source even if they are not false was provided for.

Because the Paris Convention and the Madrid Agreement did not substantively deal with the protection of appellations of origin, it is easy to see the "raison d'etre" for the Lisbon Agreement[4] (relevant portions of which are reproduced in the Annexure) which dealt exclusively with appellations of origin. Apart from the fact that the Lisbon Agreement excludes indications of source, it also stipulates two conditions for parties that have acceded to the Agreement. The first condition stipulated in Article 1(2) provides that parties to the Agreement undertake to protect on their territories the appellation of origin of products of the other countries party to the Lisbon Agreement. The second condition also laid down in Article 1(2) is that the appellation of origin must be registered with the International Bureau of the World Intellectual Property Organization (hereinafter referred to as WIPO).

The Lisbon Agreement made an attempt to address the shortcomings of both the Paris and the Madrid Agreements. Thus, Article 3 of the Lisbon Agreement tries and ensures that the use of qualifying terms such as "kind" or "type" in relation to an internationally registered application of origin does not render its use legitimate. Also, Article 6 prevents an internationally registered appellation of origin from becoming a generic name as long as it has not become a generic name in the country of origin. These are precisely the safeguards that are needed if GIs are to be an effective and equitable tool for developing countries.

What then explains the fact that the Lisbon Agreement has only 16 countries as its Members. Obviously, the conditions stipulated in Article 1(2) have been considered as onerous by some countries. Other commentators have opined that the definition of the appellation of origin in the Lisbon Agreement might have been too narrow. Whatever the reasons, it is true that the Lisbon Agreement failed to attract the support of a large number of countries.

Among the multilateral agreements that pre-dated the WTO TRIPS Agreement, any account would be incomplete without the work carried out in WIPO on a multilateral treaty on the protection of Geographical Indications. The International Bureau of WIPO prepared a draft treaty in 1975.[5] The WIPO Draft Treaty defined GIs as covering both indications of source and appellations of origin. The definition, however, was broader than the definition of appellation of origin under the Lisbon Agreement. Substantive provisions of the WIPO Draft Treaty were contained in two chapters. The first chapter prohibited the use of

[3] See Articles 1,2,3,3 bis and 4 of The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods
[4] See text of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.
[5] See WIPO documents TAO/II/2 and 6 for the WIPO Draft Treaty on the Protection of Geographical Indications.

denominations, expressions or signs which constitute directly or indirectly false or deceptive GIs as to the source of products. The second chapter provided for a system of international registration in respect of any GI that fulfilled certain conditions. In most other respects, the draft treaty was similar to the Lisbon Agreement. It is obvious that the WIPO Draft Treaty tried to tackle the criticism against the Lisbon Agreement that the definition of appellation of origin in the latter was too "narrow". In the circumstances, it was a pity that further work on the WIPO Draft Treaty was discontinued, inter alia, because of preparations for the revision of the Paris Convention which started around the same time.

The revision of the Paris Convention tried to address criticism against the original treaty as well as incorporate recent developments. Thus the basic proposal for the revision of the Paris Convention adopted the term "geographical indication" as used in the WIPO Draft Treaty. A new article was proposed which was aimed at ensuring more extensive protection of appellations of origin and indications of source against their use as trademarks and to incorporate a special provision in favour of developing countries which would allow the latter to reserve a certain number of potential GIs for the future so that, even if they were not yet used as GIs they could not be used as trademarks. In fact, the draft provided that each developing country can notify to the WIPO up to 200 geographical names denominating the country itself or a region / locality in its territory. The WIPO would in turn notify all member States of the Paris Convention and they would be obliged to prohibit the registration or use of trademarks containing or consisting of the notified names. The effect of the notification would last for 20 years. However, the developed countries after some initial disagreements came up with a revised draft which substantially diluted the proposal with regard to the provisions relating to developing countries. The amended version allowed the developing countries to reserve up to 10 (as against the original 200) GIs and only if the goods for which the name was or was going to be used had already been indicated. But in the end, the Diplomatic Conference for the revision of the Paris Convention was never concluded and the drafts remained drafts.

In 1990, the WIPO Committee of Experts on the International Protection of GIs considered the establishment of a new treaty for protection of GIs. It was borne out of a recognition that the Paris convention had limited scope and that the Madrid and Lisbon Agreements did not enjoy wide acceptance. In order for a new treaty to be acceptable the Committee felt that the following ideas would have to be incorporated:

a) The concept of "GI" to replace "appellation of origin" and "indication of source";
b) A new international registration system, more acceptable than the one in the Lisbon Agreement, based on the freedom of the Parties to choose the manner of protection of a GI in its country of origin, rather than requiring a specific form of protection; and
c) The new Treaty to provide for effective protection of GIs against degeneration into generic terms.

As with other some previous attempts, the Committee did not reach a common position on the various issues involved. The work was thus discontinued.

It was against the above background that the Uruguay Round of Trade Negotiations and the conclusion of the WTO TRIPS Agreement occurred in 1994. The TRIPS Agreement itself was one of the more controversial Agreements in the Uruguay Round pitting some developed countries against the rest, including a vast majority of developing countries. While the issue of patents generated most of the controversy, there were other issues of contention as well, one of them being the issue of geographical indications.

GIs were a delicate issue and as we have seen before, no multilateral agreement really succeeded in tackling all issues involved and those that tried to (arguably the Lisbon Agreement) did not attract wide membership for one reason or other. Against this background, it would have been naïve to expect the negotiations on GIs within the framework of the TRIPS Agreement to be smooth. Negotiations on GIs within the TRIPS Agreement, as will be seen below, were not only contentious but were also carried out primarily between the US and the EC, to the near exclusion of all other countries. Developing countries did not have much say in the matter and were presented with a "fait accompli". The issue of GIs, difficult as it was, was rendered more complicated because of the linkage to the controversial issue of Agriculture. In the end, EC won “additional protection for GIs for wines and spirits” in return for concessions it granted in Agriculture. The net effect was that an issue of great complexity and of definite importance to (potential or actual) developing countries was decided by two major players, namely, US and EC.

Among the proposals on GIs submitted to the negotiating group on TRIPS, the EC proposal[6] was understandably the one which was most comprehensive. The EC proposal was devoted to GIs, including appellations of origin. The central element in the EC proposal (which came to be subsequently referred to as additional protection for GIs) was the prevention of the use of a GI for a product not originating in the place indicated by the GI, even where the true origin of goods is indicated or the indication is used in translation or accompanied by expressions such as “kind”, “style”, “imitation” or the like. Most significantly, the EC proposal in this regard was applied to GIs relating to all products and not just to wines and spirits. The original EC proposal also referred to the establishment of a multilateral system of notification and registration of GIs for wines, something that was later incorporated in Article 23.4 of the TRIPS Agreement.

In contrast to the EC proposal, the US proposal[7] aimed at protecting GIs by providing for their registration as certification or collective marks. The US proposal also sought protection for non-generic appellations of origin by prohibiting their use when such use would mislead the public as to true geographic origin of the wine. It is clear from the US proposal that it was unwilling to entertain the notion of “additional protection” contained in the EC proposal.

The developing countries submitted a proposal[8] which sought to provide protection for GIs, including appellations of origin, against any use which is likely to confuse or mislead the public as to the true origin of the product. The proposal was obviously not as detailed as the one by EC, but contained the notion of additional protection and was certainly more advanced than the one put forward by the US.

Following proposals by different countries, the Chairman of the Negotiating Group on TRIPS came up with a text of his own in July 1990.[9] This Chairman’s text contained a proposal to protect GIs from any usurpation, imitation or evocation, even where the true origin of the product is indicated or the appellation or designation is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like. There was also an obligation to cooperate with a view to establishing an international register for protected GIs.

It was, however, the text submitted to the Brussels Ministerial Conference[10] that for the first time singled out special treatment for wines (To be fair, the US proposal referred to above also referred to wine but in the context of non-generic products). Thus, additional protection for wines took the form of prevention of the use of a GI identifying wines for wines not originating in the place indicated by the GI in question even where the true origin of the goods is indicated or the GI is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like and an obligation to refuse the registration of a trademark for wines which contains or consists of a GI identifying wines not having that origin. Why only wines? The answer lay in a deal between the US and the EC, linked to concessions granted by EC to US in Agriculture.

Following the failure of the Brussels Ministerial Conference (ironically due to differences, inter alia, in Agriculture) a stocktaking meeting of the TRIPS negotiating group identified 20 key issues that still remained outstanding.[11] One such outstanding issue was GIs. The key question was whether additional protection should be available for wine and spirits and the scope of and conditions on exemptions to that protection. By now, i.e., late 1991, it became clear that additional protection, if at all, would be provided

[6] Uruguay Round document MTN/GNG/NG 11/W/68 of 29 March, 1990
[7] Uruguay Round document MTN/GNG/NG 11/W/70 of 11 May, 1990
[8] Uruguay Round document MTN/GNG/NG 11/W/71 of 14 May, 1990 presented by Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay.
[9] Uruguay Round document MTN/GNG/NG 11/W/76 of 23 July, 1990.
[10] Uruguay Round Document MTN. TNC/35/Rev. 1 of 3 December, 1990
[11] Uruguay Round document MTN.TNC/W/89/Add.1 of 7 November, 1991

only for wines and spirits. It was, therefore, no big surprise when the Dunkel Text[12] which was presented in December 1991 had provisions relating to GIs which now figure in the WTO TRIPS Agreement.

What had happened, therefore, was that developing countries, apart from making a pro-forma proposal did not participate meaningfully in the actual negotiations (including the crucial pre-negotiations that typically happens in the WTO) on the issue of GIs. One reason was that there may have been a lack of adequate appreciation of the potential trade value of the additional protection of GIs. Also, developing country negotiators, preoccupied as they were with patents (which was an explosive issue for many countries) did not want to fight on many fronts, nor did they have human or technical resources to do so.

II PROVISIONS OF THE TRIPS AGREEMENT ON GIs

While the Lisbon Agreement provides that the quality and characteristics of the product in question are due, exclusively or essentially, to the geographical environment, including natural and human factors, the TRIPS Agreement gives three independent criteria, viz., quality or reputation or other characteristic of the good should be essentially attributable to its geographical origin. Unlike the Lisbon Agreement, the TRIPS Agreement offers less stringent criteria for something to qualify as GIs. The wording in the TRIPS Agreement was not surprising, given the positions of the US and the EC and the fact that a compromise had to be found.

Article 22 of the TRIPS Agreement applies to all GIs and provides certain minimum standards of protection. The basic obligation in Article 22 is for WTO Members to provide the legal means for interested parties to prevent both 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 which misleads the public as to the geographical origin of the good and any use which constitutes an act of unfair competition within the meaning of Article 10 bis of the Paris Convention. It will be observed that the legal means to protect GIs is not specified and is left to countries to decide. Article 22 also provides that Members shall refuse or invalidate the registration of a trademark which contains or consists of a GI with respect to goods not originating in the territory indicated but only if use of the indication in the trademark for such good in that Member is of such a nature as to mislead the public as to the true place of origin. The relationship between GI and trademark needs some explanation. Whereas a trademark identifies the enterprise which offers certain products on the market, a GI identifies a geographical area in which one or several enterprises are located which produce the kind of product for which the GI is used. Thus, crucially, there is no ownership of a GI in the sense that one person or enterprise can exclude other persons or enterprises from the use of a GI; on the contrary, each and every enterprise which is located in the area to which the GI refers has the right to use the said indication for the products originating in the said area. It is obvious that there is a degree of conflict between a GI and a trademark and the latter has the potential to "usurp" the former by rendering it meaningless. It is for this reason that provisions on GIs almost always outline circumstances where registration of a trademark will be refused or considered invalid.

The central element of Article 22 is that the public should not be misled as to the geographical origin of the good. If the public is not misled, then, it does not constitute an infringement of Article 22 of the TRIPS Agreement. This then is the main drawback of Article 22 of the TRIPS Agreement. Because, not only can there be circumstances where producers can free-ride on the reputation of a product without necessarily misleading the public, but also there can be uncertainty in deciding whether or not the public is mislead or not.

Two key elements constitute additional protection for wines and spirits under Article 23, something not available for any other product. One, Article 23 provides legal means to prevent the use of a GI identifying wines and spirits not originating in the place indicated by the GI, even where the true origin of the goods is indicated (and, therefore, arguably not misleading the public) or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like. Second, in simply refusing or invalidating the registration of a trademark for wines or spirits which contains or consists of a GI

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[12] Uruguay Round Draft Final Act MTN.TNC/W/FA of 20 December, 1991

identifying wines or spirits, respectively at the request of an interested party (even where the use of the indication in the trademark does not mislead the public as to the place of origin).

In addition to the above, wines have two other provisions specific to them in Articles 22 and 23 of the TRIPS Agreement. One, the obligation to protect homonymous GIs is only provided for wines, in Article 23.3 and in Article 22.4. Two, Article 23.4 of the TRIPS Agreement mandates negotiations in the TRIPS Council concerning the establishment of a multilateral system of notification and registration of GIs for wines.

Finally, Article 24 of the TRIPS Agreement deals with exceptions. One important exception in para 4 of Article 24 provides that nothing prevents a Member to continue the use of a particular GI of another Member identifying wines or spirits in connection with goods or services by any of its nationals who have used that GI in a continuous manner with regard to the same goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April, 1994 or (b) in good faith preceding that date. Another exception in para 5 of Article 24 states that when a trademark has been acquired or registered in good faith before the date of application of the TRIPS Agreement or before the GI was protected in its country of origin, measures to implement GIs in the TRIPS Agreement shall not prejudice eligibility for or the validity of registration or the right to use a trademark, on grounds that such trademark is identical to the GI. These two may be called "Grandfather Clauses". Yet another important exception, known as the "generic exception", is contained in para 6 of Article 24 which provides that nothing shall require a Member to apply its provisions in respect to a GI of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name of such goods or services in the territory of that Member. The "Grandfather Clauses" and the "Generic Exception" is obviously meant to take into account the concerns of Members who fear trade disruption because of additional protection for GIs. One of the most critical issues for the advocates of extension will be how to deal with these in any new regime of GIs.

III IMBALANCE IN THE TRIPS AGREEMENT

There is a certain minimum standard of protection for all products (including wines and spirits) that is contained in Article 22. This standard centres around an obligation not to mislead the public and not to indulge in unfair competition (as per Article 10 bis of the Paris Convention). For wines and spirits, it is not just the above conditions that have to be met, but there is additional protection preventing the use of a GI identifying the product if it does not originate in the place indicated by the GI even where the true origin of the product is indicated or expressions such as "kind", "type", "style" etc. accompany the GI. For example, it would be impossible to describe a product as, say, "Beaujolais type wine produced in Outer Mongolia". The above would not fall foul of Article 22 since it is clearly mentioned that the product is from Outer Mongolia; it will, however, fall foul of Article 23 for reasons mentioned above.

This imbalance in the TRIPS Agreement would have mattered less if the Agreement itself was not viewed by several developing countries as suffering from a "development deficit". Several developing countries also came to realize (admittedly after the TRIPS Agreement was negotiated) that products of interest to them were either being "usurped" by the developed countries through trademarks or patents or were making openly free-riding on the reputation of the products. Leading examples are "Basmati Rice" for India and "Ceylon Tea" for Sri Lanka. Both products belonged to a particular geographical area and the quality, reputation or other characteristics were essentially (if not exclusively) attributable to their geographical origin. The fact that other countries started growing "Basmati type" rice and blending "Ceylon Tea" resulted in loss of market for these two countries. This drove them to seek additional protection and remedy the imbalance in the TRIPS Agreement. The fundamental motivation was therefore economic.

However, it is not just developing countries such as India and Sri Lanka which were adversely affected by lack of additional protection for GIs for products of interest to them. It was also a whole range of developed and transition economy countries. Thus, Switzerland was foremost in demanding that additional protection for GIs must be made available to products other than just wines and spirits; they certainly had cheese, inter alia, in mind. Czech Republic had Budweiser beer in mind and Bulgaria had their Yoghurt.

Thus, emerged a coalition of developing and developed countries all pursuing the same cause, namely, how to redress the imbalance in the TRIPS Agreement by extending additional protection for GIs to products other than wines and spirits.

IV OVERVIEW OF PROPOSALS BY COUNTRIES INCLUDING DEVELOPING ASIAN COUNTRIES FOR EXTENSION OF ADDITIONAL PROJECTION FOR GIs TO PRODUCTS OTHER THAN WINES AND SPIRITS

The issue of extension of additional protection for GIs to products other than wines and spirits goes to the heart of the scope of the TRIPS Agreement with regard to GIs. The issue of scope came to the fore as early as 1996 when the Annual Report of the TRIPS Council was being prepared. After intense consultations carried out by the then Chairman of the TRIPS Council, the Annual Report[13] agreed on an amended paragraph 34 of the Report, the relevant portion of which reads as follows: "….. In regard to geographical indications, the Council has agreed that a review of the application of the provisions of the section on GIs as provided for in Article 24.2 would take the form outlined in paragraph 27 above, which permits inputs from delegations on the issue of scope, and …..". This brought the issue of scope squarely within the framework of negotiations and the so-called built-in agenda of the TRIPS Council. Moreover, this paragraph of the Annual report catalogued a list of issues to be brought to the attention of Ministers at the WTO Singapore Ministerial Conference. Thus, paragraph 34 of the 1996 Annual Report read in conjunction with paragraph 27 meant that the countries seeking extension of additional protection for GIs succeeded in placing their demand for consideration in the TRIPS Council, something endorsed by the Singapore Ministerial Conference. Some countries however maintain that there is no mandate in the TRIPS Council to consider the issue of extension of additional protection for GIs to products other than wines and spirits.

In the summer of 1997, three countries, viz., Czech Republic, India and Switzerland floated informal papers[14], all arguing that additional protection for GIs only to wines and spirits had created a fundamental imbalance in the TRIPS Agreement and was unjustified. They called for discussions among all WTO Members to extend the additional protection for GIs available in Article 23 to products other than wines and spirits.

But it was in September 2000 that a group of countries led by Bulgaria, Czech Republic, India and Switzerland (among others) that formally put on the table of the TRIPS Council a proposal[15] to extend additional protection for GIs to products other than wines and spirits. The proposal set out the rationale for their demand, drawing on the built-in agenda set out by the 1996 Report of the TRIPS Council. Explaining that the imbalance in the TRIPS Agreement (as between Article 23 additional protection for GIs to wines and spirits and ordinary Article 22 protection for all other products) was a result of deals done between major players at the Brussels Ministerial Conference (1990) involving Agriculture, the proposal argued strongly and convincingly that there needs to be further negotiations for extending additional protection for GIs to products other than wines and spirits. The mandate for such built-in agenda negotiations was justified by the proponents by relying upon the first sentence of paragraph one of Article 24 of the TRIPS Agreement: "Members agree to enter into negotiations aimed at increasing the protection of individual GIs under Article 23". The proponents of extension cite this as mandate for the negotiations; opponents (which include Australia, Argentina, Chile, Mexico, Canada, US and New Zealand) say that this refers only to wines and spirits because of the reference to Article 23. Opponents say that a delicate balance had been struck in the TRIPS Agreement and that this cannot be disturbed, in addition to the lack of mandate argument. The opponents of extension also argued that the costs for Members to extend additional protection would be prohibitive, that it would lead to consumer confusion and that there would be imbalance in trade.

It is useful to note some unique aspects of this issue in the WTO. First, it is not a North-South issue. There are developing countries which support extension like India, Sri Lanka, Pakistan, Kenya, etc. but

[13] WTO document 1P/C/8 of 6 November, 1996, entitled "REPORT (1996) OF THE COUNCIL FOR TRIPS.

[14] WTO Job No. 4152, 31 July, 1997 (Switzerland)
Job No. 4486, 4 August, 1997 (Czech Republic)
Job No. 5023, 16 September, 1997 (India)

[15] WTO document IP/C/W/204/Rev.1 of 2 October 2000, communication by Bulgaria, Czech, Egypt, Iceland, India, Kenya, Leichtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey.

equally, there are developing countries such as Argentina, Chile, Mexico and Guatemala which oppose extension of additional protection to products other than wines and spirits. Second, the TRIPS Agreement was widely considered by developing countries as “development–unfriendly”; here was an opportunity to prove that at least for some developing countries, the TRIPS Agreement would confer a “benefit” rather than impose a “burden”. Indeed, for developing countries it was quite a decision to make, whether to ask for “strengthening of TRIPS” in an area such as GIs, since in other areas like patents, the debate was often in the opposite direction. Third, the issue of extension of additional protection of GIs to products other than wines and spirits, was also raised by developing countries under the rubric of the positive agenda of “Implementation”. Finally, European Communities found itself in an interesting position. It will be observed that EC was not part of the formal proposal made in October 2000. This was obviously because of the membership of the EC. Countries such as France were wholeheartedly in favour of extension; but countries like Germany, Denmark etc. were against the idea. It was only much later that EC came on board the wagon of those who advocated extension. But it still remains to be seen how committed the EC is towards extension. EC’s more immediate priority is to first get the multilateral register for wines going in accordance with paragraph 4 of Article 23, a legitimate trade interest for EC. One important lesson from language in Article 23, paragraph 4, is that despite a negotiating mandate for a multilateral register for wines, EC has not been able to achieve an outcome due to opposition by other WTO Members who have effectively thwarted attempts by EC.

In the beginning of 2001, the proponents of extension sought to infuse momentum to the issue especially in the light of the Doha Ministerial Conference scheduled for November 2001. Indeed, this is the time when a group known as “Friends of GIs” became active. The group was open to all countries favouring extension of additional protection for GIs to products other than wines and spirits and included: Bulgaria, Cuba, Czech Republic, Egypt, Iceland, India, Jamaica, Kenya, Leichtenstein, Mauritius, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland, Turkey and Venezuela. European Communities (EC) almost always participated in the meetings of the “Friends of GIs” but did not always co-sponsor the proposals. They nevertheless extended conditional support to the proposal.

Accordingly in May 2001, the above “Friends of GIs” put forward their proposal[16], the purpose of which was to demonstrate:

- why the level of protection provided by Article 22 of the TRIPS Agreement for GIs for products other than wines and spirits is not sufficient;
- why providing two different levels of protection for GIs in the TRIPS Agreement is unjustified; and
- why the extension of the protection of GIs for wines and spirits to one uniform level of protection for GIs is necessary in order to conform to Section 3 of Part II (dealing with GIs) to the goals contained in the TRIPS Agreement and to general WTO principles.

Arguing why Article 22 protection is not enough, these countries provided stated that Article 22 enables free-riding on the renown of a GI; it leads to legal uncertainty since it is up to national courts and administration to decide whether or not the public is misled; Article 22 also puts the burden of proof on the producer entitled to use a GI; Article 22 does nothing to prevent GIs from becoming generic; and Article 22 also does not prevent “usurpation” of a GI by trademarks.

The proponents further said that there is no substantive justification for discriminatory treatment between GIs for wines and spirits and those of other products. Thus, they ask why and how wines and spirits are any different from say, rice, cheese or tea.

Finally, the proponents argue that extending additional protection for GIs to products other than wines and spirits will lead to enhanced predictability, transparency and legal security for the protection of GIs while minimizing the risk of trade distortions.

Discussions in the area of TRIPS at the WTO Doha Ministerial Conference in November 2001 were dominated by the issue of public health. So, GIs took a back seat. In the end, the Doha Ministerial

[16] WTO document IP/C/W/247/Rev.1 of 17 May, 2001

Declaration[17] in paragraphs 12 and 18 covered it under the rubric of "Implementation" and following the decision[18] of the Trade Negotiation Committee in February 2002, it was provided that the issue of "extension" of additional protection for GIs to products other than wines and spirits shall be addressed in the regular meetings of the TRIPS Council on a priority basis, leading to a recommendation to the TNC by the TRIPS Council by the end of 2002. The outcome at Doha on the issue of GIs for developing countries seeking extension was, therefore, that the issue was to be addressed in the TRIPS Council.

In June 2002, the proponents of extension made a more far-reaching proposal. In a communication[19] to the TRIPS Council about 21 WTO Members put forward their case for extension. The proposal argued that Article 22 protection does not prevent products whose names are ineligible for GI from free-riding on the reputation of genuine GIs. Apart from citing legal uncertainty as a reason (for example, judges may reach different decisions on whether the public misled or not) for insufficient protection under Article 22, the proposal explains how consumer choice can be enhanced because of extension and how extension can open up new market opportunities by preventing trade distortions. The proposal also argues that administrative costs of extension are negligible. The issue of costs is taken up in the next section of the document.

The proposal explains the practical effect of Article 23 (additional protection) and why this is desirable, not just for wines and spirits, but for all other products as well. The proposal suggests that to establish uniform protection for all products and extend additional protection of Article 23.1 to other products, the reference in Article 23.1 of the TRIPS Agreement to wines and spirits be removed. The result of this would be that the TRIPS Agreement will ensure the same protection for all GIs, irrespective of the product. It would also result in legitimate producers of a product identified by a GI being better protected against illegal use of the GI. Competitors not producing the product from the particular geographical area will be prevented from illegitimately using the GI of such products. The most important outcome would be that the illegitimate use of a GI with expression such as "kind", "type", "style", "imitation" or the like will be prevented for all GIs alike and will thus help prevent more GIs from becoming generic, thereby losing economic value.

We have already seen that there is a degree of conflict between GIs and trademarks and that the latter usurps the former, especially under Article 22 kind of protection when it is considered not to mislead the public. Article 23 kind of additional protection, on the other hand, ensures the prohibition of registration and validity of trademarks containing or consisting specific GIs. Extension of additional protection, if made applicable to all products, will facilitate the objective examination of trademarks by authorities concerned. In deciding whether or not to refuse the registration of a trademark, the only question is, do the products identified by a trademark containing the GI, really have the geographical origin referred by the GI? This way, the proposal argues that the legitimate producers and other interested parties will obtain a more effective and less costly protection of their GIs against trademarks.

Article 24 contains certain exceptions to protection of GIs. Except for exceptions in Article 24.4. and 24.6, the other exceptions in Article 24 apply to all products anyway. The proposal suggests that certain adjustments may have to be made to article 24.4 and 24.6. But, the proposal says that these adjustments should not be fundamentally detrimental to the principle of extension and that they should be restrictive in scope while at the same time be flexible and not diminish the level of protection previously available to GIs.

The "Friends of GIs" (now formally joined - in by the EC) proposed that the TRIPS Council recommend to the TNC that the latter adopt the following guidelines for the negotiations on "extension":

(a) the protection of Article 23 of the TRIPS Agreement shall apply to GIs for <u>all</u> products;

(b) the exceptions in Article 24 of the TRIPS Agreement shall apply mutatis mutandis; and

[17] WTO document WT/MIN(01)/DEC/W/1 of 14 November 2001

[18] WTO document TN/C/1 of 4 February 2002

(c) the multilateral register to be established shall be open for GIs for all products.

Opponents to the extension came up with a paper[20] which argued that the extension of additional protection for GIs to products other than wines and spirits is not a panacea. The opponents argue that the fact that some WTO Members have GIs for many products and other Members have only a few, if any, GIs for additional protection creates an imbalance in numbers. These countries also consider the definition of GI to be a barrier. They also argue that Article 22 is enough, but seldom used. They finally argue that Article 24 exceptions will take away the benefits of additional protection. The opponents also cite costs as a reason against extension.

Some of the arguments put forward by the opponents are valid. But proponents of extension also pose back certain questions. For example, the imbalance in numbers makes a difference only if countries are producing the product in question. Thus, country "x" which does not make cheese at all, but is looking for additional protection in rice, can conceivably benefit from protection for rice in overseas markets and may not mind granting protection in several varieties of cheese, because the latter will neither impose costs nor adversely affect producers because there are none making that kind of cheese. For several Asian countries, this might be the case. As for the definition of GIs being a barrier, it is difficult to see how this can be any more a barrier than it is for wines and spirits. As for Article 22 being enough, this is not true because it does nothing to prevent either free-riding or usurpation and imitation. As for Article 24 exceptions, it is something that would have to be negotiated and it is not something that can be prejudged at this stage. What is applicable for wines, may not necessarily apply to other products.

Be that as it may, the stalemate in the TRIPS Council continues and the Council was unable to meet the deadline of end 2002 for a recommendation to the TNC. The Chairman of the TRIPS Council has resorted to the time-honoured WTO tradition of drawing up a checklist of issues for discussion (see WTO JOB (02)/117 dated 17 September, 2002). The three categories of issues are: legal issues relating to differences between the general protection for GIs provided in the TRIPS Agreement and additional protection for GIs for wines and spirits; broader policy issues such as impact on producers and consumers of any extended protection; and the administrative costs and burdens of the procedures associated with extended protection any other impact on governments. Besides, there is also the costs and risks of postponing additional protection for products other than wines and spirits indefinitely. This is particularly true for developing countries since not only are markets lost due to usurpation, imitation and free-riding but also the risk of GIs becoming generic becomes greater by the day.

V PRODUCTS IN SELECTED ASIAN COUNTRIES THAT ARE ACTUALLY OR POTENTIALLY CONVERED BY GI PROTECTION

It will be seen from the list of "Friends of GIs" that India and Sri Lanka were among the earliest Asian countries that are proponents of extension. Pakistan joined later. The latest entrant is Thailand.

Any number of studies have focused on the two most important products in Asia that would could be potentially covered by GIs protection. These are: Rice and Tea. In the case of rice, the specific variety known as Basmati rice, grown in India and Pakistan has assumed fame and notoriety for a variety of reasons. In the case of tea, Ceylon Tea (Ceylon being the original name of Sri Lanka) and Darjeeling Tea (Darjeeling being a hill district in India) are products for which there could be potential for protection through GIs. For reasons of space, the account that is given below pertains only to Basmati Rice. But, the lesson applies equally to other products such as tea.

VI THE SAGA OF BASMATI RICE (also see box)

Basmati rice assumed notoriety in 1997 when a patent was awarded for a Texas- based company Rice Tec for basmati rice produced by it. That it was a case of "wrong or bad" patenting was evident when

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[19] WTO document IP/C/W/353 of 24 June, 2002 by Bulgaria, Cuba, Cyprus, Czech Republic, The EUROPEAN COMMUNITIES, Georgia, Hungary, Iceland, India, Kenya, Leichtenstein, Malta, Mauritius, Pakistan Romania, Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey.

following the Indian challenge, 17 of the 20 claims of Rice Tec were rejected by the US Patent Office. But the basic problem for basmati rice was not confined just to wrong or bad patenting. Indeed, it can be argued that even if additional protection for GIs was available for basmati rice, wrong or bad patenting could not be prevented. The problems faced by basmati rice can be summarized as follows:

(a) Basmati is a unique, long–grain aromatic rice cultivated traditionally only in the Indo-Gangetic plains of India and Pakistan. That Basmati is a special kind of rice is something that goes without saying. But because it is special and found favour among consumers world-wide, the first problem faced by Basmati was that other countries produced rice (sometimes similar and sometimes not so similar) and called it Basmati. In fact countries like the US believe basmati is a generic term and that it can be grown anywhere in the world, a position contested strongly by India with facts and figures. It totally ignores the fact that Basmati has been grown for centuries in the same areas of India and Pakistan. It is also obvious that the only reason countries like the US call the rice they produce Basmati is to free-ride on the excellent reputation that the latter has. In 2001, the Research Foundation for Science, Technology &Ecology based in New Delhi, the Centre for Food Safety in Washington and the International Center for Technology Assessment in Pennsylvania asked the US Federal Trade Commission to commence a proceeding for a trade regulation rule to prevent US grown rice from being advertised or otherwise represented using the words "Basmati". It may be noted that the Federal Trade Commission is directed to act in the interest of all consumers to prevent unfair and deceptive advertising. The Commission's efforts are focused on those areas which may affect the greatest number of consumers, may pose a risk to consumers' health or safety or may cause significant economic harm to consumers. Because of these considerations, the Federal Trade Commission said in a ruling dated May 2001, that they do not have reason to believe that significant consumer injury is likely to arise from current rice marketing. They noted that under US Department of Agriculture regulations, Basmati is included as example of "aromatic rough rice" and is not limited to rice grown in any particular country. The commission also did not have evidence to suggest that US grown rice was misrepresented as rice from other parts of the world. So, based on the above considerations, the Federal Trade Commission declined to take any action in the matter. The ruling was of course a blow to Basmati rice growers in India. But, the Commission chose not to go into the issue of why US growers did not market the rice as "aromatic rice grown in the US" and called it Amercian "Basmati" instead! This is the heart of the dispute and the Commission ducked it completely.

(b) The other problem faced by Basmati was that there were a large number of applications for the registration of trademarks that were confusingly similar to Basmati. Some of these were Kasmati and Texmati and these affected the market of Basmati adversely through Usurpation.

(c) Then there was the marketing of the so-called "Basmati-type" rice. This again had the effect of depriving the market of genuine Basmati rice producers.

(d) In 1997 the US Patent Office granted Rice Tec permission to market its product allowing them to claim that their rice is similar or superior to Basmati. It was reported that they crossed a traditional Basmati with a non-Basmati and called the resulting product a Basmati. At the root of this problem is whether or not you can define Basmati purely in terms of its genetic make-up. India took the view that Basmati cannot be defined in terms of its genetic make-up and that it is the presence of a gene along with the way it is expressed after its interaction with the local environment that matters. In India, there were also NGOs which argued that what US had done by cracking the genetic code and coming up with a crossed variety is no different from what India does by way of reverse engineering of drugs which has been banned as piracy under the TRIPS Agreement. So, if India has been prevented from reverse engineering in drugs, what gives the right to countries such as the US to do something similar by "stealing" Basmati from countries that own it.

India reacted to the challenge in not just the US markets, but also in countries such as Spain, UAE etc. In all, India is reported to be fighting as many as 40 cases to protect the name Basmati in 25 court jurisdictions across the world. The first thing India had to do was to make sure that Basmati was protected at home. First, there was the question of Basmati being produced in other parts of India, such as Rajasthan, outside of the

[20] WTO document IP/C/W/360 of 26 July 2002, communication from Australia, Canada, Guatemala, New Zealand, Paraguay, Philippines and the US

Indo-Gangetic plains. The general rule of GIs is that you could not ask of other countries what you yourself are not in a position to do. So, India has made sure that the only rice that can be marketed as Basmati in India is that which is grown in Punjab, Haryana and Western UP (Indo-Gangetic plains). These were difficult decisions for India, but it took it in the larger interests of protecting the Basmati. The second thing that India did was back this up with the Geographical Indications of Goods (Registration and Protection) Act 1999. The third thing that India did was to take preventive measures in lucrative markets; for example, in the UK enough evidence was presented by agencies of the Government of India to the Government of UK, that Rice Tec failed in its attempts to market Texmati and had to withdraw its trademark applications.

VII DISCUSSION OF COSTS RELATED TO ACTUALISING EXTENDED GI PROTECTION

What are there significant costs to extension? If so, who will bear them? And will the anticipated benefits outweigh the costs?

It needs pointing out that assuming the proposal put forward by the proponents is accepted, it still remains that negotiations will have to be carried out in the WTO TRIPS Council. As is well known, negotiations in the WTO are a matter of give and take. So, it is clear that proponents of extension would have to give something in return for it. It is, therefore, important that the issue of GIs be included in the basket of issues for negotiations in Mexico and beyond, so that a trade-off is made possible. As mentioned before, there is no justification for preventing the inclusion of an issue such as this in the basket of issues for future negotiations. From the viewpoint of developing countries (most of which are from Asia) who are proponents of extension, it is important to retain the support of other like-minded countries such as Switzerland, Czech Republic, Bulgaria and Hungary since this will help in the “cost of negotiations” being more evenly spread, not to mention the better chances of a more favourable outcome. Also, WTO Members such as EC and Switzerland have already established strong linkages between the issue of GIs and the market access opening exercise currently on as part of negotiations in Agriculture. Thus, there is already an attempt by EC and Switzerland to pay for the cost of negotiations in GIs by concessions they may be making in Agriculture. Developing countries from Asia who are advocating extension may also like to consider other areas of negotiations either within TRIPS or outside (Implementation, Tariffs etc.) where trade-offs are possible.

Apart from the costs associated with negotiations in the WTO, it also seems obvious that there will be costs associated with implementing and enforcing any outcome that is reached in the WTO. The issue of costs has been put forward as one of the central arguments by the opponents of extension to support their case. In proposals[21] put forward by the opponents to extension, which include Australia, Canada, New Zealand and the US, (the only Asian country opposing extension would be the Philippines), it is argued that developing countries in particular will find it difficult to bear the costs of extension as opposed to the more advanced countries. This argument needs to be taken seriously and must be examined.

The following are the costs which are mentioned:

(a) Costs to Governments of passing, implementing and administering new laws;
(b) Costs to consumers; and
(c) Costs to trade and manufacturers.

Because it has been argued that costs are more likely to affect developing countries more than others, the following assessment is made from the view point of developing countries.

As far as Governments are concerned, the advocates of extension say in their rebuttal[22] to the arguments related to costs put forward by the opponents, that Article 23 of the TRIPS Agreement, as it stands, requires all WTO Members (with the exception of least developed countries) regardless of whether they produce wine and spirits or not, to provide additional protection for GIs to wines and spirits. So, for developing countries, either the law is already in place or is being put in place. If the law is already in place,

[21] WTO document IP/C/W/289 of 29 June, 2001.
22 WTO document IP/C/W/308/Rev.1 of 2 October, 2001.
23 WTO document IP/N/1/IND/G/1 dated 25 October 2001

then, the question is one of extending the scope by inclusion of other products and this would not seem to be an insurmountable obstacle. If the law is not yet in place, then, it is an opportunity to put in place a law that includes additional protection for GIs to products other than wines or spirits.

The Indian law is a case in point. India passed an act in Parliament which was published on December 30, 1999[23]; this act was entitled "Geographical Indications of Goods (Registration and Protection) Act,1999. The Indian Act starts by defining GIs (chapter I, paragraph 2e) and does so, a little differently from the TRIPS Agreement. Thus, it not only covers natural goods, but also specifically mentions manufactured goods and in that respect lays down that one of the activities of either production or of processing or preparation of the goods concerned should take place in the territory, region or locality. Having defined what is a GI, the Act in paragraph 9 in chapter II, lays down what cannot be registered as a GI. In particular, it specifies that "which are determined to be generic names or indications of goods and are therefore not or cease to be protected in their country of origin or which have fallen into disuse in that country", cannot be registered as a GI. The yardstick used would appear to be the protection in the country of origin. The other aspect of the Indian Act is that there is provision of additional protection to certain goods or classes of goods which power is vested in the Central Government. These would have to be notified in the Official Gazette. It is therefore clear that in the Indian Act, additional protection is not just for wines and spirits but potentially for other products as well. At the same time, it would appear that the list of products which qualify for additional protection is not an infinite list and that the Central Government has chosen to keep some discretionary powers in this regard. As for the regulations governing the prohibition of registration of a GI as a trade mark, the Indian Act tracks closely the TRIPS Agreement itself. The Act is yet to come into force because the Appellate Board for Intellectual Property provided for in the Act has not yet been constituted.

Much has been said about the costs of implementing and administering the law for developing countries in particular. It is worth recalling the flexibility provided in Article 1 of the TRIPS Agreement that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice". Thus, there is no need for a radical overhaul of the legal and administrative system in vogue within the country. In fact, the most important obligation under Article 23 is that "Each Member shall provide the legal means for interested parties to prevent use of a GI ……" The principal cost, therefore, is one of providing the legal means. And if that is already provided for wines and spirits, then it is a question of providing the same to other products as well. In fact, the courts at present have a duty under Article 22 of the TRIPS Agreement to make a judgement of what misleads the public and what does not. If extension of additional protection for GIs is made available to all products, it may well be argued that there would be clearer criteria for courts to follow. Moreover, the proponents of extension argue, quite correctly, that there are costs now incurred by countries in time-consuming and lengthy legal procedures to prove that the use of a GI is actually misleading the public. This is certainly true of Basmati Rice in India's case.

At least in the case of India, it would seem that the obligation of the Government is to pass the law and then come up with rules. The Government then announces that the law will come into effect on a particular date. The law then becomes "self-executing". So, there is no need to create departments or add on to the existing department that oversees Intellectual Property rights. The only thing the Government of India is in the process of setting up is an Appellate Board for Intellectual Property matters and this is not just for GIs but for all the different areas of Intellectual Property covered by the TRIPS Agreement.

Even in the case of advanced countries such as Switzerland, available information shows that the GI could be automatically protected without any registration and does not necessarily involve additional human resources. Such control, as is exercised, could also be done by the association of producers without the Government getting involved. Enforcement is obviously a matter for courts.

All in all, the costs to Government need not be significant unless a separate model of multilateral registration is made obligatory, which as we have seen is not the case in the TRIPS Agreement.

It has been argued by the opponents of extension that if additional protection for GIs is made available to products other than wines or spirits, then, there will be consumer confusion as well as costs resulting from an alleged need to re-name and re-label products.

GIs serve a fundamental consumer need to identify a good as originating in a geographical area, where a given quality, reputation or other characteristic is essentially attributable to its GI. What is sought to be done by extending additional protection is precisely this so that consumers are no longer influenced by the use of GI in combination with a de-localizing indication for products which try to free-ride upon the reputation of a GI and the efforts and achievements of those to whom the GI owes its reputation. As for the need to re-label or rename products, this may be required in cases where there is free-riding, usurpation or imitation. But, the exceptions provided for in Article 24 mean that indications which have been used in good faith and in a customary manner over time will not need to be abandoned. The fears of the opponents to extension on this count, therefore, appear exaggerated.

The opponents of extension argue that certain industries of theirs, especially in areas such as dairy and food processing, may be adversely affected because of closed access to markets of other countries. Those particularly concerned about losing markets are producers of some varieties of cheese, olives, vinegar and pilsner.[24]

If extension of additional protection for GIs to all products is granted, the producers in some countries adversely affected would appear to be mostly in the category of one product, i.e., cheese. Besides, what about the market currently lost by producers of "genuine cheese products" in their true countries of origin. This argument is a particularly emotive one in countries where the TRIPS Agreement has generated much controversy.

The potential losses that some producers or manufacturers may incur from loss of market access will be more than compensated by gains for producers of the true GIs as well as new and challenging market opportunities for a range of products from developing countries. Significantly, the TRIPS Agreement will have also become more equitable and there will be benefits for traditional, ethnic and indigenous people, as will be seen in the next section.

In conclusion, the potential benefits of extension of additional protection for GIs would appear to outweigh the costs associated with it. But it is true that a limited number of countries specializing in a small number of products (example cheese) may be more affected than others.

VIII GEOGRAPHICAL INDICATIONS, TRADITIONAL KNOWLEDGE AND HUMAN DEVELOPMENT

One of the controversies surrounding the TRIPS Agreement in developing countries concerns traditional knowledge involving plant genetic (biological) resources normally in the possession of indigenous communities. The concerns are generally two-fold: one, misappropriation of traditional knowledge involving plant genetic resources; and two, how the TRIPS Agreement can be used to protect traditional knowledge involving plant genetic resources and to allow their equitable and sustainable use.

On the first concern, it is generally believed that efforts should be undertaken to ensure that the TRIPS Agreement does not allow misappropriation of traditional knowledge involving plant genetic resources which is usually to the detriment of the indigenous communities. The furore caused by "wrong or bad" patenting of Basmati rice. Yet another classic example is the patenting of the Indian turmeric. The turmeric is a plant that has been used in India for centuries not just as a spice in curry preparations but more importantly as an anti-septic agent for its wound-healing properties. When the US Patent and Trademark Office granted a patent in 1995 on turmeric, this caused a furore in India and elsewhere. The Council of Scientific and Industrial Research from India then asked the US Patent Office for reexamination and revocation of the patent, a procedure not only involving time but also money and effort. For instance, the Indian Council showed ancient scriptures to prove to the US patent office that the wound-healing properties

[24] WTO document IP/C/W/360 of 26 July, 2002; see paragraph 25

of turmeric were known for centuries in India and hence was in public domain and thus, there was no novelty involved, an important criterion for patentability. In the end, the US Patent Office revoked the patent, but only because there was written evidence provided by the Indian Council. But, this throws up the problem that modern patent laws requiring written evidence are completely inadequate to handle traditional knowledge which may be passed on form one generation to the next by word of mouth! By insisting on written evidence, modern patent laws may actually be aiding and abetting misappropriation of traditional knowledge. It is precisely to tackle this that a number of developing countries in the TRIPS Council have insisted on two conditions being fulfilled in the case of patents involving plant genetic resources. These two conditions are: one, that the patent application should reveal the country or place of origin of the plant genetic resources; and two, that there should be prior informed consent of the authorities representing indigenous communities. The developed countries of course have resisted these suggestions so far.

The "wrong or bad" patenting of plant-genetic resources involving traditional knowledge is widely described as bio-piracy. To prevent this, a number of steps have been suggested. At the national level, countries like India are documenting traditional knowledge in written form and even on CD-RoMs (Traditional Knowledge Digital Library) so that these can be given to Patent Offices around the world, thus giving them valuable evidence that these are already in public domain and thus not patentable subject matter.

But, preventing misappropriation (through "wrong" or "bad" patenting) of traditional knowledge belonging to indigenous communities is one thing. The other equally important thing is how the TRIPS Agreement can be used to protect traditional knowledge enabling indigenous communities to benefit in tangible commercial and economic terms. A number of commentators have pointed out, in this respect, that GIs have the potential to provide protection and confer benefits to indigenous communities possessing traditional knowledge.

There is considerable debate over how to define traditional knowledge. The World Intellectual Property Organization (WIPO) uses the term to refer to tradition-based literary, artistic or scientific works as well as all tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. Thus, the definition is broad. But, it is felt that an operational concept may be required and this can be based on the source of the knowledge (traditional and indigenous communities) and on its cultural specificity, rather than on the specific content of its components.[25]

If, as we have seen above, patents are scarcely suitable for protection of traditional knowledge possessed by indigenous communities, then, could there be other categories of Intellectual Property that could serve the purpose. It has been suggested that GIs can play a useful role in protection of traditional knowledge. In contrast to patents, copyright and industrial designs, which are primarily intended to reward and encourage investment in innovation, GIs are designed to ensure and protect the commercial reputations of producers of a product from a particular geographical area. If the quality, reputation or other characteristic of the good is based on traditional knowledge and essentially attributable to a geographic area, then, it would seem that GIs are indeed a valuable tool for protection and for ensuring tangible economic and commercial benefits to the indigenous communities that possess the traditional knowledge. The idea is to use the GIs to enhance the economic and commercial value of natural, traditional and craft products of all kinds if their particular characteristics may be attributed to their geographical origin. This is especially so when products that come from a geographical area are the result of traditional processes and knowledge implemented by one or more communities in a given region. On the face of it, if GI protection is given then it might lead to lesser likelihood for "wrong or bad" patenting (though it cannot be completely ruled out) of traditional knowledge involving plant genetic resources, conservation of environment and best environmental practices and above all help the indigenous communities derive tangible economic benefits.

Before we proceed to understand why GIs are more suitable than other categories for protection and exploitation of traditional knowledge belonging to indigenous communities, it needs pointing out that goods based on such traditional knowledge fall, in the majority of the cases, in the categories of agriculture, crafts and artisanal products. At least in developing countries, traditional groups or indigenous communities

[25] See "A discussion paper: Traditional Knowledge and Intellectual Property" by Carlos M. Correa for the Quaker United Nations Office, Geneva.

producing such goods happen to be located in relatively backward rural areas, with low per capita incomes, low levels of literacy and skills, where the whole family participates in the economic activity and where the production and processing methods are relatively low-tech but highly traditional. This then is the broad profile of the traditional or indigenous communities that we are talking about. This needs bearing in mind because the TRIPS Agreement as a whole is seen as largely benefiting the Transnational / Multinational Corporations which can afford to spend large amounts on research and development and can use innovative practices to derive benefits from patents, copyrights, industrial designs. If GIs can somehow benefit the vulnerable and relatively unskilled and backward groups mentioned above, it would be no mean achievement not just for the TRIPS Agreement but also for the WTO and the way the latter is perceived by its critics.

Because traditional knowledge has collective ownership but confined to a particular geographical area, GIs may be much more suited for protection and beneficial exploitation than say patents. For the same reason GIs may be more suitable than trademarks because traditional knowledge is often collectively owned and cannot be "assigned" to an enterprise. GIs is compatible with collective ownership and knowledge being in the public domain. Finally, GIs do not have a time limit, unlike patents and copyrights. So, rights are held in perpetuity as long as the production link to geographical area is maintained and the indication is prevented from becoming generic.

Be that as it may, the criticism against GIs protection for traditional knowledge is that it does not guarantee misappropriation through bio-piracy, "wrong" patenting etc. This is something that would have to be ensured independently, as pointed out in the beginning of this section.

IX SUGGESTED MEASURES AT NATIONAL, BILATERAL AND MULTILATERAL LEVEL

At the national level, there is an imperative need to put in place a legislative framework for providing additional protection for GIs to products other than wines and spirits. We have seen the Indian case earlier. There was a real possibility of the term Basmati becoming generic because it was produced and was allowed to be marketed as Basmati outside the geographical area (Indo-Gangetic plains). But the Indian Government appears to have taken action to put an end to this. The point is that unless the product is appropriately protected at "home", the case for protection abroad becomes difficult. In this regard, developing countries may need technical and financial assistance. Regarding the products that need to be protected, countries would do well to bear in mind not only those which may be doing well in commercial terms but also those which have potential.

Countries could also initiate action at the bilateral level. This is important because a multilateral agreement based on action at the international level (whether at WTO or at the WIPO) while being highly desirable, is likely to be time-consuming in the light of opposition to extension. Action at the bilateral level in the interim is likely to be beneficial for many reasons. One, the country aiming to extend additional protection for GIs can not only choose products but also choose the most attractive markets, to being with. Two, action at the bilateral level might help in preventing a GI from becoming generic in a specific market. Three, usurpation of the GI either through patents or trademarks can be challenged and hopefully deferred, if not prevented altogether through petitions and bilateral discussions. Last, it may also be worthwhile exploring the possibility of a bilateral agreement with countries concerned, as Australia, Hungary and others have done with EC in the case of wine.

At the multilateral level, pending the launch of negotiations, it might be useful to get a multilateral understanding that GIs from developing countries in particular will not be declared "generic" by developed countries, that trademarks and patents will not be granted in the case of GIs unless there is overwhelming evidence to the contrary that the quality, reputation or other characteristic of the good is <u>not</u> essentially attributable to its geographical origin. Indeed, at the time when the revision of the Paris Convention was being considered, developing countries had been given a certain number (200 at first and then reduced to 10) of GIs that they could "reserve" so to speak, which would not be allowed to become generic in the developed country markets nor be usurped by trademarks and patents. This is necessary as a confidence building measure for the developing countries.

That there is a case for launching negotiations on the issue of extension of additional protection for GIs to products other than wines and spirits, is clear. What is less clear is, however, the outcome. Should it cover all products other than wines and spirits? Or should a list of products be negotiated using a combination of bilateral and multilateral means, such as the one adopted in the Services (GATS) Agreement? What about the exceptions in Article 24? What about terms on which there is no agreement as to whether they are generic or not? And could some terms be generic in one market but not in another? These are some of the issues that will have to be tackled in a negotiation.

But the basic case for developing countries to take measures at the national, bilateral and multilateral level for extending additional protection for GIs to products other than wines and spirits is strong, and the credibility of WTO may stand enhanced if negotiations are launched without prejudice to the outcome.

ANNEXURE I

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS AGREEMENT, 1994)

Article 22
Protection of Geographical Indications

1. Geographical indications are, for the purposes of this Agreement, 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.

2. 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 which 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).

3. A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

Article 23
Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits 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 like.[*]

2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, *ex officio* if a Member’s legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification

[*] [TRIPS Agreement note] Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action.

and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Article 24
International Negotiations; Exceptions

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Members as defined in Part VI; or
(b) before the geographical indication is protected in its country of origin; measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

ANNEXURE II
PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY
as last revised at Stockholm on July 14, 1967 and as amended on September 28, 1979

Articles 1, 9, 10, 10 bis and 10ter

Article 1

[Establishment of the union; Scope of Industrial Property][*]

(1) The countries to which the Convention applies constitute a Union for the protection of industrial property.

(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.

(3) Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.

(4) Patents shall include the various kinds of industrial patents recognized by the laws of the countries of the Union, such as patents of importation, patents of improvement, patents and certificates of addition, etc.

Article 9
[*Marks, Trade Names*: Seizure, on Importation, etc., of Goods Unlawfully Bearing a Mark or Trade Name]

(1) All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection.

(2) Seizure shall likewise be effected in the country where the unlawful affixation occurred or in the country into which the goods were imported.

(3) Seizure shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country.

(4) The authorities shall not be bound to effect seizure of goods in transit.

(5) If the legislation of a country does not permit seizure on importation, seizure shall be replaced by prohibition of importation or by seizure inside the country.

(6) If the legislation of a country permits neither seizure on importation nor prohibition of importation nor seizure inside the country, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.

Article 10
[*False Indications*: Seizure on Importation, etc., of Goods Bearing False Indications as to their Source or the Identity of the Producer]

(1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant.

(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party.

Article 10bis

[*] Articles have been given titles to facilitate their identification. There are no titles in the signed (French) text.

[*Unfair Competition*]

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

Article 10ter

[*Marks, Trade names, false Indications,*
Unfair Competition: Remedies, Right to Sue]

(1) The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10*bis*.

(2) They undertake, further, to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, with a view to the repression of the acts referred to in Articles 9, 10, and 10 *bis,* in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.

ANNEXURE III
MADRID AGREEMENT FOR THE REPRESSION OF FALSE OR DECEPTIVE INDICATIONS OF SOURCE ON GOODS
as last revised at Lisbon on October 31, 1958

Articles 1 to 4

Article 1

(1) All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.

(2) Seizure shall also be effected in the country where the false or deceptive indication of source has been applied, or into which the goods bearing the false or deceptive indication have been imported.

(3) If the laws of a country do not permit seizure upon importation, such seizure shall be replaced by prohibition of importation.

(4) If the laws of a country permit neither seizure upon importation not prohibition of importation nor seizure within the country, then, until such time as the laws are modified accordingly, those measures shall be replaced by the actions and remedies available in such cases to nationals under the laws of such country.

(5) In the absence of any special sanctions ensuring the repression of false or deceptive indications of source, the sanctions provided by the corresponding provisions of the laws relating to marks or trade names shall be applicable.

Article 2

(1) Seizure shall take place at the instance of the customs authorities, who shall immediately inform the interested party, whether an individual person or a legal entity, in order that such party may, if he so desires, take appropriate steps in connection with the seizure effected as a conservatory measure. However, the public prosecutor or any other competent authority may demand seizure either at the request of the injured party or ex officio; the procedure shall then follow its normal course.

(2) The authorities shall not be bound to effect seizure in the case of transit.

Article 3

These provisions shall not prevent the vendor from indicating his name or address upon goods coming from a country other than that in which the sale takes place; but in such case the address or the name must be accompanied by an exact indication in clear characters of the country or place of manufacture or production, or by some other indication sufficient to avoid any error as to the true source of the wares.

Article 3bis

The countries to which this Agreement applies also undertake to prohibit the use, in connection with the sale or display or offering for sale of any goods, of all indications in the nature of publicity capable of deceiving the public as to the source of the goods, and appearing on signs, advertisements, invoices, wine lists, business letters or papers, or any other commercial communication.

Article 4

The courts of each country shall decide what appellations, on account of their generic character, do not fall within the provisions of this Agreement, regional appellations concerning the source of products of the vine being, however, excluded from the reservation specified by this Article.

ANNEXURE IV

LISBON AGREEMENT FOR THE PROTECTION OF APPELLATIONS OF ORIGIN AND THEIR INTERNATIONAL REGISTRATION

As revised at Stockholm on July 14, 1967, and as amended on September 28, 1979

Articles 1 to 8

Article 1

[Establishment of a Special Union; Protection of Appellations of Origin Registered at the International Bureau]*

(1) The countries to which this Agreement applies constitute a Special Union within the framework of the Union for the Protection of Industrial Property.

(2) They undertake to protect on their territories, in accordance with the terms of this Agreement, the appellations of origin of products of the other countries of the Special Union, recognized and protected as such in the country of origin and registered at the International Bureau of Intellectual Property (hereinafter designated as “the International Bureau” or “the Bureau”) referred to in the Convention establishing the World Intellectual Property Organization (hereinafter designated as “the Organization”).

Article 2

[Definition of Notions of Appellation of Origin and Country of Origin]

(1) In this Agreement, “appellation of origin” means 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.

(2) The country of origin is the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation.

Article 3

[Content of Protection]

Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as “kind,” “type.” “make,” “imitation,” or the like .

Article 4

[Protection by virtue of Other Texts]

The provisions of this Agreement shall in no way exclude the protection already granted to appellations of origin in each of the countries of the Special Union by virtue of other international instruments, such as the Paris Convention of March 20, 1883, for the Protection of Industrial Property and its subsequent revisions, and the Madrid Agreement of April 14, 1981, for the Repression of False or Deceptive Indications of Source on Goods and its subsequent revisions, or by virtue of national legislation or court decisions.

Article 5

[International Registration; Refusal and Opposition to Refusal; Notifications; Use Tolerated for a Fixed Period]

(1) the registration of appellations of origin shall be effected at the International Bureau, at the request of the Offices of the countries of the Special Union, in the name of any natural persons or legal entities, public or private, having, according to their national legislation, a right to use such appellations.

(2) The International Bureau shall, without delay, notify the Offices of the various countries of the Special Union of such registrations, and shall publish them in a periodical.

* Articles have been given titles to facilitate their identification. There are no titles in the signed French text.

(3) The Office of any country may declare that it cannot ensure the protection of an appellation of origin whose registration has been notified to it, but only in so far as its declaration is notified to the International Bureau, together with an indication of the grounds therefor, within a period of one year from the receipt of the notification of registration, and provided that such declaration is not detrimental, in the country concerned, to the other forms of protection of the appellation which the owner thereof may be entitled to claim under Article 4, above.

(4) Such declaration may not be opposed by the Offices of the countries of the Union after the expiration of the period of one year provided for in the foregoing paragraph.

(5) The International Bureau shall, as soon as possible, notify the Office of the country of origin of any declaration made under the terms of paragraph (3) by the Office of another country. The interested party, when informed by his national Office of the declaration made by another country, may resort, in that other country, to all the judicial and administrative remedies open to the nationals of that country.

(6) If an appellation which has been granted protection in a given country pursuant to notification of its international registration has already been used by third parties in that country from a date prior to such notification, the competent Office of the said country shall have the right to grant to such third parties a period not exceeding two years to terminate such use, on condition that it advise the International Bureau accordingly during the three months following the expiration of the period of one year provided for in paragraph (3), above.

Article 6

[Generic Appellations]

An appellation which has been granted protection in one of the countries of the Special Union pursuant to the procedure under Article 5 cannot, in that country, be deemed to have become generic, as long as it is an appellation of origin in the country of origin.

Article 7

[Period of Validity of Registration; Fee]

(1) Registration effected at the International Bureau in conformity with Article 5 shall ensure, without renewal, protection for the whole of the period referred to in the foregoing Article.

(2) A single fee shall be paid for the registration of each appellation of origin.

Article 8

[Legal Proceedings]

Legal action required for ensuring the protection of appellations of origin may be taken in each of the countries of the Special Union under the provisions of the national legislation:

1. at the instance of the competent Office or at the request of the public prosecutor;
2. by any interested party, whether a natural person or a legal entity, whether public or private.

SELECT CASES

Geographical Indications: Case 1
Basmati: The Tale of the Rice Queen

Basmati, which means "the fragrant one" in Sanskrit, is a long, slender rice described to have a perfumed, nutty flavor, and a delicate texture. It has been grown in the northern parts of the Indian Sub-continent for at least the past several thousand years. The distinctive qualities of this rice have been appreciated through history, hailed by poets and emperors; and today, it is recognized to be one of the world's most expensive rice. Among the 100 varieties of aromatic rice in the world, Basmati is the costliest. Like good wine, the best Basmati is aged for several years to decrease moisture content. Although India produces 80 million tons of rice annually, and only half a million of that is Basmati exported overseas, Indians earn over US$ 250 million from this premium export alone.

In September 1997, the Texas-based RiceTec Inc. was awarded Patent number 5663484 on Basmati rice lines and grains by the United States Patent Office (USPTO). This caused a furore in the subcontinent, and provoked the government to lodge an immediate protest. RiceTec made 20 patent claims essentially covering, i) rice plants with characteristics identical to Basmati, ii) grain produced by such plant, and iii) method of selecting rice plant based on starch index test devised by itself. Following the Indian challenge, RiceTec withdrew in September 2000 four of its 20 claims dealing with starch content, length of grain, chalkiness, and burstness. In March 2001, the USPTO told RiceTec that of its 20 claims only three were approved, issuing it a "varietal patent" to market only three types of Basmati developed by itself, and not cultivated and bred traditionally by farmers in India.

The Basmati case, like the earlier contest over a similarly patented Turmeric, whose healing properties have been common knowledge in India for centuries, was a clarion call to developing countries to initiate legal protection of their special products. Beyond the legal-economic motives, there also are broader human development implications. While rice is a staple food of around 70% of the world's population, in Asia it is more than a grain -- it is deeply attached to patterns of livelihoods and culture. The Chinese word for rice is synonymous with food; cooked rice is understood as "meal" in Thailand and Japan; a common greeting in Nepal is, "did you have your rice today?"; and in India, rice is often the first food offered to the newly-born as well as the newly wed. In societies where rice is so important, the best brands among them like the Basmati or Jasmine obviously hold immense socio-economic-cultural merits.

Like Basmati, the Nepali and Bhutanese Red rice, grown high in the Himalayas using glacial waters rich in trace minerals, also holds tremendous promise in as yet untapped premium export markets. This is where IPRs such as Geographical Indications of the WTO's TRIPs Agreement can be leveraged to not only benefit poor countries of their own native resources, but also to prevent bio-piracy, and misrepresentation of their products by richer interests to mislead global consumers. Articles 22-24, in Part II, Section 3 of TRIPs specifies the standards of protection that WTO members must provide for GIs that are defined as goods originating in a specific location where a given quality, reputation or other characteristic of the good is attributable to its geographic origin. This means that Basmati that is grown only in Punjab, Haryana and western parts of Uttar Pradesh can be recognized as such. While in the past, names like Basmati have been misused with impunity, India has now enacted the Geographical Indication of Goods Act 1999; and more recently created a new category of Indian long, slender grain to class all rice not grown in the three regions mentioned. This effectively bars all millers, exporters and traders from using the Basmati label for rice not grown in the three specified regions in India and Pakistan. Once GI protection is secured under TRIPs, conflicts outside national borders could also be taken up at the WTO's Dispute Settlement Mechanism.

Source: This write-up draws in part on a range of newspaper articles, and other resources available on the web.

Geographical Indications: Case 2
Phu Quoc Sauce: A fishy delight in Vietnam

Fermented fish sauces have long been a fond portion of East Asian diet. From Myanmar to the mountains of Laos to the coasts of Vietnam, sauce made out of salted fish, fermented in wooden barrels, has been used by local communities as a native delicacy for generations. Although known under different names in different countries, the most famous among these is *nuoc mam* from Vietnam's largest island called Phu Quoc in the Gulf of Thailand. Its waters are rich in *ca com,* described as silvery, translucent, long-jawed anchovies, which along with salt and water are the main ingredients of this culinary delight. The Phu Quoc islanders guard their traditional recipe with secrecy, but the process essentially involves catching, layering, and salting anchovies, followed by decomposing them in special wooden casks that are said to flavor the sauce. The process takes almost one year, and details on color, flavor and protein content are closely monitored.

Some 90 fish sauce enterprises exist in the island of Phu Quoc that collectively produce around 10 million liters of sauce each year, of which only around half a million liters reach overseas markets, EU in particular. This quantity is not only way below what is demanded, but real *nuoc mam* has been sidelined by counterfeit products that have abused the Phu Quoc name. 80% of fish sauce labeled Phu Quoc in EU and Japanese markets is said to be fake. The twin issues of under-supply and illegitimate displacement of the precious Phu Quoc fish sauce has been a cause of concern for the locals and Vietnamese authorities. This has prompted the registration of the sauce for an appellation of origin, and recently an agreement has also been reached with France where the latter has vowed to protect the authentic Vietnamese brand from counterfeit imitations in EU.

In a remarkable new development, one of the world's largest consumer product companies, Unilever, has teamed up with local fish sauce producers in Phu Quoc to expand their reach in global markets. Unilever's Best Food has signed a ten year contract with a local consortium of 17 producers, Quoc Duong, and invested almost one million dollars to upgrade processing and bottling of *nuoc mam.* Role of the multi-national and the local group has been demarcated -- the former will advertise, market, distribute, and design labels while the latter will reprocess and bottle it in its upgraded facilities. Also drawing a clear distinction between an appellation of origin and a trademark, Unilever's Knorr trademark will not appear prominently alongside the geography indicating letters of Phu Quoc.

Two kinds of fear have been raised over this carefully negotiated deal by a foreign company getting involved so directly in selling what is clearly a national culinary asset, i) potential monopoly, and ii) distortion of original flavor to suit Western tastes. Unilever has allayed these fears and in addition offered to contribute to secondary ventures, such as building a museum on fish sauce in the island, and involving foreign scientists to research anchovies to suggest patters of sustainable harvest of these tiny fish. How this partnership evolves will set a notable precedence in developing countries whose under-marketed and little known traditional products or GIs can be exploited to bring in pro-poor benefits by engaging in innovative partnerships with governmental and non-governmental entities with clout within and outside national borders in an ever-globalizing world.

Source: This write-up draws in part on a range of articles, and resources available on the web. Special acknowledgement is made of Cohen, M. "Pungent Pride", in FEER, September, 2002; and Vietnam News, 21 September 2002.

Geographical Indications: Case 3
The Champagne of Teas: Darjeeling and Ceylon

Ceylon is an ancient name of the present State of Sri Lanka, and Darjeeling is a mountain province, in the Indian state of West Bengal. These two geographical names, along with the lesser known Assam, Nilgiri, and Illam (Nepal), are almost synonymous with their most famous products of black tea. 94% of tea consumed today is of the black variety, and most of it comes from these two locations. Tea is of Chinese origin, created some 5000 years ago, and a first book written on it by Lu Yu circa 800 AD. But it was the British colonialists who adapted the Chinese variety of *Camelia Sinensis* to the subcontinent and popularized it globally in the nineteenth century. The *Assamica* was also developed from wild native bushes in Assam, India, but commercial tea cultivation emerged only after seedlings were smuggled south from China.

After early experimentation proved successful, owing to Darjeeling's suitable soil, slopes, sunshine and rainfall, the British had planted over 400 hectares of tea by 1866. Today there are over 80 estates spread over nearly 20,000 hectares, producing over 10 million kilos of tea annually. This industry is labor intensive, employing over 50,000 people -- many more added during the plucking season. Most workers are women, and the salary comprises of cash and perks designed to serve as social safety net. Tea is plucked by hand -- usually two leaves and a bud -- and sorted, graded and stored in air-tight wooden chests before further processing.

Tea industry in Ceylon followed precedents in Darjeeling, but was given a well-timed boost by the fall of the coffee plantations there circa 1870. Today, it is the world's third largest producer of black tea, sending around 300 million kilos of tea to locations as diverse as Syria, Iraq, and the UK. Main exports continue to be "bulk" tea while efforts are being made to produce more value-added tea products. Ceylon teas grow at varying altitudes, but like Darjeeling, it's the flavor and a bright golden appearance of the high grown, at around 7,000 feet of altitude, that's best appreciated.

While ownership of these plantations have typically switched hands among the British colonizers, newly-independent states, and now mostly back to private hands, they remain national prides of the entire nation for identity, employment, and revenue purposes. India and Sri Lanka are both members of the WTO, and have long advocated for a higher standard of protection in TRIPs for an expanded range of products like these tea, and not just wines and spirits as is the case now. Countries differ, however, on what form a multilateral register of GIs should be formed at the WTO -- some call for obligatory protection of all qualifying GIs by all WTO members, while others arguing that such additional protection would entail costs that outweigh trade benefits call for a voluntary system of registration.

Source: This write-up draws in part on a range of articles, papers, and other resources available on the web.

Geographical Indications: Case 4
Mongolian cashmere: facing de-industrialization.

Cashmere as a fiber has been known in the Western world since Roman times, but only came to prominence in the last two centuries as trade between the East and the West developed. Known as the "Fiber of Kings", it was Empress Eugenie, wife of Napoleon the Third who brought prominence and growing popularity to the fiber in Europe. Cashmere itself derives its name from the Kashmir goats of Tibetan origin which are found in the mountainous regions around the Himalayas and Central Asia, most notably the regions around the Gobi desert. Some variants are found in Asia minor and Persia otherwise known today as Iran, Afghanistan and to a lesser extent Turkey. These goats are less sought after due to the often dark color of the fiber and a definite coarseness that does not allow the end products to compare favorably from those of their Mongolian and Chinese cousins.

Furthermore, the conditions created in particular on the high desert plateau of the Gobi region are ideal to ensure the fine growth of down. This protects the animals from the extremes of temperature between the day and night and the nutrition, being sparse, enhances the fine nature of the fiber. As a consequence, of the approximately 15,000 tons of raw cashmere produced globally, China accounts for 67% of total production, followed by Mongolia with 21% of the total production.

The fiber of the Cashmere goat consists of a predominantly coarse outer hair and then a smaller percentage of fine down. Traditionally the two were separated by hand and as such the production of the fiber was very intense. In India in the 16th century approximately 50,000 people were engaged in Cashmere production. Towards the end of the 19th century a mechanised way of separating the two types of fiber was developed in Great Britain. Reliance on relations with the Chinese suppliers was essential as the goat exhibits such properties that the fiber diameter, which is very fine, is controlled by both genetic and environmental constraints. This makes it impossible to breed the cashmere goats in the West.

Mongolian cashmere has several unique features, such as its longer length, ease in dyeing, etc. Although Chinese cashmere is very fine, its relatively short length produces a weaker yarn when unblended. After the fall of communism in Mongolia, 90% of the herds were privatized, which provoked a dramatic increase in economic activity in the pastures, prompting thousands of Mongolians to return to the land. In 1994, the Mongolian Government, hoping to encourage the development of a cashmere processing industry, banned the export of raw cashmere to keep its price low. Forced to remove the ban, the industry has been in crisis since then, as the price of raw cashmere has increased dramatically, from 9 US$ to 40 US$, and raw cashmere is mostly exported to China for processing there. This has affected the domestic processing sector. The distinctiveness of Mongolian Cashmere could be preserved, its quality enhanced, and the livelihoods of the nomad communities be helped if GI protection is procured for this special product from an exotic geographical location.

Source: This write-up draws in part on a range of articles, papers, and other resources available on the web

Geographical Indications: Case 5
Tempe & Food Security in Indonesia.

Tempe (or tempeh) the soul food of the Javanese people, a unique feature of Indonesia's culinary heritage, is widely popular in some countries in the West, especially as health food. The processing of tempe is based on fermentation of soybeans and is considered one of the oldest food technologies in the history of Java, documented as early as the 16th century. Rich in Vitamin B12, which is normally found in animal products and milk, it is an excellent high protein substitute to meat or fish. Tempe represents a food rich in protein but, unlike beef, contains no cholesterol or saturated fats.

Tempe is an Indonesian delicacy, made by boiling soya beans for three hours, stamping on them, leaving them overnight, boiling for another three hours, mixing them with yeast and packing them in banana leaves. After exactly three days, the tempe is ready. Often used as a meat substitute, it is widely consumed among the majority of low income groups. It forms an important part of the diet. During the Asian crisis that hit Indonesia badly, most of the population affected by sharp drops in their income returned to tempe, which is far cheaper and more accessible than animal products, thus, ensuring basic intakes of proteins.

Like other fermented foods in South-East Asia, Tempe plays an important role in rural development, as creator of employment and generating income for investment in the rural economy. The production process is labor intensive, an advantage in a country with serious overpopulation and urban employment problems. Furthermore, tempe manufacturing is environmentally friendly, and uses all local available ingredients, as well as domestic skills without depending on the purchase of tools or skills from abroad.

Without any kind of protection, tempe has been patented and produced in some countries in a manner that amounts to non-recognition or even a disregard of a process and product that belongs to a traditional Asian culture.

Source: "Food security and social safety net in Indonesia", Sulastri Surono, 1999. Other articles, papers, and other resources available on the web were also consulted.

Geographical Indications: Case 6
Agar: A wooden treasure from Laos and beyond.

From the northeastern parts of India, especially the State of Nagaland, to the jungles of Laos, there grows a large, heavy, dark, evergreen tree that Botanists call *Aquillaria Roxb.* From the resins extracted from its barks is made probably the world's most expensive essential oil. The product has been mentioned in the Bible, and by classical Indian authors from 2000 years ago like Kautilya and Kalidasa, and also in the travel narratives of the famous Chinese pilgrim, Hiuen Tsang. Today, the commercial exploitation of Agar is being done in a limited manner in the jungles of South East Asia, often in poverty-stricken regions. An arrangement where a sustainable processing of this rare geographical treasure by Asia's poorest people is linked to world-class packaging and marketing in premium export markets such as the Middle East (where it is known as Oud in Arabic and is in great demand) can potentially bring tremendous benefits to Asia's poorest hinterlands.

The natural process of extraction takes place as follows: a rare fungus attaches itself to the exterior of the Agar tree. In response to the fungal infection, the tree produces a resinous oil that carries with it a deep, rich aroma, forming dark patches of oleoresin. This is most frequently found in trees that are older than 50 years, and a typical tree may produce over six kilograms of Agar wood content. The value of the content rises with the intensity of fungal infection -- the darker the bark, the higher the value, and without the fungal infection, the Agar tree itself is of little use to the fragrance industry. After the wood pieces are extracted, they are put in large water drums for softening. These are then ground and put in vessels for heating which permits the release of oil as well as water vapor through a steel pipe that then cools the combination to find oil floating on water in a separate container. Oil is then extracted carefully with syringes and stored in glass bottles and sun-dried for sale.

It is the pure smell of the final product that commands such a premium price in world markets. While the wild harvested wood is becoming rarer, there have been attempts to cultivate plantations of Agar wood where fungus is injected artificially; but resins extracted this way do not match the quality of the natural extractions. In a slowly opening Laos too, foreign investors are pouring in to invest in this lucrative indigenous resource. Carefully designed agreements between investors and local communities, possibly followed by GI protection, may hold promise of tremendous mutual benefit.

Source: Various publications on the web, as well as The Vientiane Times, January 28-30, 2003.

Geographical Indications: Case 7
Himalayan Natural Mineral Water: Pure Drinking

The Lisbon Agreement for the Protection of Appellation of Origin 1958, introduced to redress the deficiencies of the earlier Paris Convention and the Madrid Agreements, has stricter articles on Appellation of Origin (AO), which some suggest offer the kind of safeguards that Geographical Indications (GI) need in order to be an effective IPR tool. Perversely, because of this onerous and specific definition of AO, this Agreement, administered by WIPO, only has 19 members. No Asian country is a signatory. Of the 766 AOs registered under this agreement, France alone owns two thirds, followed by the Czech Republic (10%). European countries together account for 95% of the registrations. Every 7 in 10 such registration is related to wines and spirits, followed by agricultural products and cheese.

Among the 766 registrations, 17 are related to mineral water. Now that GI is regaining interest under a formally binding TRIPS Agreement of the WTO, this gives some idea to the potential market value of special Himalayan waters from some of the poorest but exotic regions of Asia -- Kashmir and the Indian North West, Nepal, Sikkim and Bhutan -- that can potentially be marketed in lucrative export markets. According to the World Wildlife Fund (WWF), bottled water is the fastest-growing beverage sector in the world, worth over US $20 billion.

Producers of bottled drinking water make a sharp distinction between "normal" mineral water and "natural" mineral water. Most bottled waters are claimed to be ordinary water tapped from any kind of source (well, river, sea, spring, glacier, municipal water) treated, purified and sanitized chemically to render them potable. The process often involves the use of chemicals like Silver Nitrate and Ultra Violet rays for silver ionization and reverse osmosis. This, it is argued, alters the composition of natural minerals, which not only dulls and sanitizes the taste, but could also have adverse effects on human health.

"Natural" mineral waters, however, have to come from approved underground sources, and not from a public water supply system. Considered biologically pure, these waters are required to undergo no treatment other than physical filtration and iron removal. This natural advantage, specific to a special region such as the Himalayas, can be protected as a geographical indication. Waters trapped in deep underground clay layers that are geologically preserved and untouched by human settlements, especially in high mountains are known to pass through several aquifiers. Some producers claim that this process may even take up to 20 years gathering useful chemicals like calcium, magnesium and other minerals from nearby rocks. Such rare underground sources have been found in parts of Europe and the US.

In the Himalayan region, however, there is only one major company, Dadi, that has discovered and is exploiting an underground source in the Himalayan province of Himachal Pradesh. This company claims to be the only internationally accepted natural mineral water exporter from India to the US. Apart from possibly a lack of knowledge about indigenous potentials and world markets, there is no reason why identical or better Himalayan terrain from Bhutan and Nepal do not offer similar opportunities for marketing natural mineral water. And the geography of the Himalayas -- the tallest and the youngest mountain ranges in the world -- is bound to lend a favorable edge to these distinctive products.

On a related note, the Dadi company that is until now the only major exporter of natural mineral water sells its "Himalayan" brand under a company called Mount Everest Mineral Water Limited, based in New Delhi, India. This highlights one difference between AOs and GIs. While AOs must necessarily be geographical names of countries, regions or localities, GIs could be indications pointing to the 'geographic origin' of products in the form of words, symbols, phrases, such as iconic symbols like the Great Wall to designate Chinese goods, Taj Mahal for Indian, or the Pyramids to designate Egyptian goods. Since Mount Everest is based in Nepal, and is often used as an emblem to identify that country, Nepali authorities might choose to contest in the future the use of brand names such as Mount Everest by entities not based in Nepal. There is however no obligation for GIs to be "national" in character, and several countries can share an indication like the Punjab province in both Pakistan and India jointly claiming the aromatic Basmati rice. The point is that GIs remain a new area, not only in international trade, but also as an issue deserving better academic enquiry on the precise interpretation of legal provisions.

Defining Human Development

The premise that people are the real wealth of nations, and the real end of development, led UNDP to define human development as a "process of enlarging people's choices". The three essential choices: to lead a long and healthy life, to acquire knowledge, and have access to resources needed for a decent standard of living. Additional choices range from socio-economic and political freedoms to opportunities for being creative and productive, and enjoying personal self-respect and guaranteed human rights. The paradigm of human development views poverty as a deprivation not only of incomes, but of choices and opportunities to lead the kind of life that people have reason to choose and value. The notion of human capabilities thus focuses on what people are actually able to do and what people are able to be. Higher income is seen as necessary for its 'instrumental' role in expanding opportunities for achieving many of these broader goals. The following four components are seen as being essential to human development:

Empowerment -- This is an all-encompassing notion that addresses the people's capability to shape the processes and events that affect their lives, not just on the economic front, but also the socio-political-cultural. Going beyond the notions of 'basic needs' for the poor, often with an accent just on commodity possession, the human development paradigm downplays this as being paternalistic. The paradigm attaches importance to issues of dignity and self-respect, which has a serious bearing on how people engage in processes that lead to higher incomes and capabilities, and political voice.

Productivity -- Investments in enhancing human potentials so that greater productivity that lends itself to higher growth is an important subset of the paradigm. Human development is a means to higher productivity -- a well nourished, educated, and alerts labour force is an important productive asset. But rather than viewing humans as mere inputs into the production process, this paradigm views them broadly as ends of development itself. This thus implies that there is a crucial distinction between human resource development and human development, with the former just being one aspect of the latter.

Equity -- Enlargement of people's choices requires that they can access opportunities equitably. This often implies that the prevailing power structures have to improve, such as better distribution of assets like land and credit, transfer of public incomes through fiscal measures, and socio-political reforms that enhance opportunities for participation of certain groups, ethnicity and gender.

Sustainability -- Not to be confused with renewal of natural resources only, sustainability in human development terms means that the physical, human, financial and environmental resources are governed by the current generation in a way that does not prevent the next generation from improving its own welfare. It also implies that international commitments made by governments do not impede the economic and social development and cultural integrity of future generations.

The challenge facing the Asia Trade Initiative is, thus, to relate these concepts to trade issues and policies.

Take the Initiative

The Asia Trade Initiative aims at promoting debate on trade and human development issues. We would therefore welcome your comments on our studies.

Our web page, www.asiatradeinitiative.org provides further information about the program and its activities. In case you want to participate in them, please contact us. You will also find a complete downloadable copy of all the Technical Support Documents.

Furthermore, we would like to receive your opinion on our studies. Once you have read them, we would appreciate your feedback to the following questions:

How useful was this paper to you?

Are you aware of the existence of similar studies in your country or region?

How do you think the ideas and issues contained herein can be disseminated more widely in your country or region in order to advance the debate from a human development perspective?

Are you interested in joining our effort, as well as network of scholars, practitioners, and officials to promote the debate and understanding on this subject in Asia?

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