

(Published in the Economic Times on October 3, 2003)

Forgotten Agenda from Doha?

By Latha R. Nair

There is a new kind of conflict brewing between the new world and the old world before the Council for the Trade Related Aspects of Intellectual Property Rights (TRIPS Council) on the issue of geographical indications (GIs).

GIs are a form of intellectual property right, the protection of which is provided for in Section 3 of the TRIPS Agreement (Articles 22 to 24). GIs are defined under TRIPS as indications which identify a product to be originating in a region or territory where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin. GIs can be geographical names (*Champagne* for a sparkling white wine from Champagne district of France and *Darjeeling* for a fine tea from Darjeeling) or non-geographical names (*Alphonso* for a mango from Maharashtra or *Basmati* for a rice from northern part of the Indian sub-continent).

TRIPS mandates two levels of protection for GIs - one relating to all products in general (Art. 22) and the other relating to wines and spirits (Art.23). At the general level, member countries are obliged to protect GIs against deceptive or misleading use and other acts of unfair competition. At the other level, there is an additional protection for wines and spirits which requires member countries to prevent the use of GIs even if they do not imply that the wines or spirits originate in a place other than the true place of origin or even if used in translation or accompanied by de-localising terms/ qualifiers such as "type", "kind", "style" or the like. In other words, for wines and spirits, even in the absence of public deception as to origin, unauthorized use of a particular GI would be prohibited. For instance, even if someone makes a sparkling white wine with identical taste and texture of the Champagne wines in Maharashtra, they cannot describe it as "Champagne from Maharashtra, India" or "Champagne type wine from Maharashtra" etc. This level of protection is not afforded to GIs for products other than wines and spirits.

However, the additional level of protection under Art. 23 is subject to certain exceptions which recognize rights in trademarks or generic terms existing prior to TRIPS. These exceptions are, however, open to bilateral negotiations, leaving members free to conclude agreements to phase out such prior rights. In other words, as regards the use of GIs *relating to wines and spirits*, TRIPS permits negotiations to phase out prior rights, or retrieve names which have become generic terms for a type of product in a particular country etc. For instance Australia and the EU have entered into an agreement through negotiations wherein Australia has agreed to phase out the generic use of the names such as "Champagne" in Australia. No such negotiations are feasible vis-à-vis GIs relating to products other than wines and spirits.

It is but ironical to have such a provision which stipulates differential treatment to two types of products in the same category in a WTO agreement which is supposed to bring in a level playing field and reduce the inequalities of trade. Such treatment appears all the more glaring when the economies of very few developing countries depend on wines and spirits. It eventually raises the question why only wines and spirits?

This issue was indeed raised during the Fourth Ministerial Conference of the WTO in Doha and there were discussions on extension of protection under Art. 23 TRIPS to geographical indications (GIs) relating to products other than wines and spirits. In particular, paragraph 18 of the Doha Declaration discussed two issues related to GIs. First, it stated that it was agreed to negotiate the establishment of a multilateral system of notification and registration of GIs

for wines and spirits (as provided in Art. 23.4) by the Fifth Ministerial Conference. Secondly, it stated that issues related to the protection of GIs provided for in Art. 23 to products other than wines and spirits will be addressed in the TRIPS Council pursuant to paragraph 12 of the Doha Declaration. Para 12 states that those issues where there is a specific mandate to negotiate shall be addressed under that mandate and other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO Bodies which shall report to the Trade Negotiations Committee (TNC) by the end of 2002 for appropriate action.

There have been two conflicting interpretations for para 12 - one advocated by many developing and European countries argue that the so-called outstanding issues are already part of the negotiation; the second group argue that these issues can only become negotiating subjects if the TNC decides to include them in the talks. And TNC has not done this so far.

While para 18 of the Doha Declaration specifically mandates negotiation on establishment of a multilateral system of notification and registration of GIs there appears no such specific mandate under that para to negotiate on extension of Art. 23. The main task of the Fifth Ministerial Conference of the WTO which just took place at Cancun was to take stock of the negotiations and other work done in pursuance of the Doha Declaration. However, as expected, the issue of extension was not even part of the Draft Cancun Ministerial text.

The WTO members remain deeply divided on the discussion over the mandates and the discussions even include the issue whether the Doha Declaration provides a mandate for negotiations. Some countries have even tried to link it to agriculture negotiations and said that any progress in discussions on extension of Art. 23 would make it easier for them to agree to a significant deal in agriculture. Others oppose this by saying that Doha Declaration makes this issue part of the remainder of the negotiations.

Those countries advocating the extension are the EU, Hungary, China, India, Pakistan, Switzerland etc. They question the basis of such a differential treatment to products other than wines and spirits and accuse the other countries of “usurping” their terms. This is basically a reference to the adoption by emigrants of place names from Europe to other countries during 17th, 18th and 19th century. Such emigrants were encouraged to implant their culture in the New World. Naturally, product names and descriptions were used by them from their home country. The concept of intellectual property did not exist in those days.

The countries opposing the extension, i.e., US, Canada, Australia, New Zealand etc., argue that the existing level of protection (Art.22) is adequate to products other than wines and spirits and that enhanced protection would be expensive in so far setting up systems for such extension. Further, they reject the allegation of “usurpation” because it was the migrants who took the methods of making the products and the names with them to their new homes!

Considering the pressure on the TRIPS Council on the issue and the conflicting stand points taken by the two sides, it would be interesting to see the outcome of the debate. However, it remains undecided whether the issue of extension will ever be taken up at the WTO negotiations. Going by the flow of events at the just concluded Cancun Ministerial, even if the issue makes it to the discussions, the proponents of the extension have little hope for their cause.

© 2003, Latha R. Nair, New Delhi

The author is an IP Lawyer with the law firm K&S Partners (formerly Kumaran & Sagar), New Delhi