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## **A Critical Appraisal of WTO Negotiations to Establish a Multilateral Register for Geographical Indications**

### ***Evaluación crítica de las negociaciones de la OMC para establecer un registro multilateral de indicaciones geográficas***

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Palabras clave: Acuerdo ADPIC, Derechos de propiedad intelectual, Indicaciones geográficas, Sistema de registro multilateral.

Clasificación JEL: K33, O19, O24, O34.

#### ABSTRACT

To what degree should geographical indications (GIs) be protected by international law? What is the best way to protect at international level the names of well-known products, such as Rioja wine, which have a great reputation around the world? Do current international rules provide sufficient safeguards, or should governments implement another system of more effective protection? These are the questions that need to be solved by WTO Members within the scope of the Built-In Agenda of the TRIPS Agreement. It is true that TRIPS provisions undoubtedly represent a considerable improvement in the international protection of GIs with respect to that which existed under WIPO. However, this Agreement did not create a complete international protection system. Quite the contrary, these provisions continue generating considerable legal uncertainty. For these reasons, negotiations between the new and the old world must continue in order to solve outstanding issues with respect to GIs. In particular, the twin negotiating issues of the multilateral register and the additional protection for products other than wines and spirits. However, WTO Members remain divided over the nature, reach, effects and scope of this registration system. In the present author's view, the minimalist approach defended by some of WTO Members presents the great disadvantage of limiting itself to creating a simple database without consistent legal effects. This approach is not of a multilateral character and hardly will help to facilitate GIs protection. By contrast, the consensualist approach defended by the European Union as part of a coalition of 108 WTO Members, which includes a huge number of developing countries, could truly contribute to facilitate multilateral protection as Article 23.4 TRIPS Agreement prescribes. Interestingly enough, it is apparent from recent debates that developing countries are becoming aware of the importance of GIs as instruments that contribute to the development of their economies. Therefore, the pressure exerted by these countries could bring an end to the deadlock that had continued for so many years. Otherwise, resistance to this negotiation may communicate an unfortunate message to these countries about the reality of WTO international intellectual property rights regime.

## RESUMEN

¿Qué grado de protección debe ofrecer el Derecho internacional a las indicaciones geográficas? ¿Cuál es el mejor sistema para proteger a nivel internacional las referencias geográficas de productos como vino de Rioja que poseen una reputación conocida por los consumidores de todo el mundo? ¿Ofrecen las normas vigentes suficientes garantías o el sistema internacional debe implementar un sistema de protección más eficaz? Estas son las cuestiones que deben resolver los Miembros de la OMC en el marco de la agenda incorporada en el Acuerdo ADPIC. Es cierto que las disposiciones de este Acuerdo representan una considerable mejora en la protección internacional de las indicaciones geográficas con respecto a la que existía en el marco de la OMPI. Sin embargo, no logran crear una completa protección internacional, además de continuar generando cierta inseguridad jurídica. Por ello, el debate entre los países del nuevo y del viejo mundo debe continuar a fin de solucionar las cuestiones pendientes, en particular, el registro multilateral y la protección adicional para productos distintos de los vinos y bebidas espirituosas. Sin embargo, los Miembros de la OMC continúan divididos en cuanto a la naturaleza, el alcance, los efectos y la cobertura de este registro multilateral. De un lado, el enfoque minimalista defendido por algunos países se limita a crear un sistema carente de efectos jurídicos a nivel multilateral, por lo que no creemos que sea apto para facilitar la protección de las indicaciones geográficas. De otro, el enfoque consensual defendido por la Unión Europea como líder de una coalición de 108 miembros de la OMC, incluyendo un nutrido grupo de países en vías de desarrollo. Desde nuestro punto de vista, ésta es la única propuesta que podría contribuir a facilitar la protección internacional de las indicaciones geográficas como prescribe el artículo 23.4 ADPIC. En los debates recientes resulta curioso observar cómo los países en desarrollo están tomando conciencia de la importancia de una adecuada protección de las indicaciones geográficas como instrumento que puede contribuir al desarrollo de sus economías. Y no cabe duda de que la presión ejercida por estos países puede poner fin definitivamente a la parálisis que ha existido durante tantos años en estas negociaciones. En caso contrario, la resistencia por parte de algunos miembros haría llegar a esos países un lamentable mensaje acerca de la realidad del sistema de la OMC en materia de protección internacional de los derechos de propiedad intelectual.

## 1. INTRODUCTION

The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) was the first multilateral international treaty (although not the first international treaty) to define and protect geographical indications (GIs) as a specific intellectual property type. According to this Agreement, Geographical indications (GIs) are indications that identify a good as originating in the territory of a particular country, or a region or a locality in that country, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin<sup>1</sup>.

1 This definition is set out in article 22 of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *ILM*, vol. 33-1994, p. 81.

Historically, GIs have received little international protection. Before the TRIPS Agreement, protection in international fora was limited to three international instruments under the auspices of the World Intellectual Property Organization (WIPO): the Paris Convention<sup>2</sup>; the Madrid Agreement;<sup>3</sup> and the Lisbon Agreement<sup>4</sup>. The Paris Convention is a widely-recognized international agreement, compelling members to seize or prohibit imports with false indications of source, producer, manufacturer, or merchant<sup>5</sup>. However, in its original form, countries prohibited such uses only in cases of serious fraud<sup>6</sup>. Due to this insufficient protection, in 1891 came into force the Madrid Agreement for the Repression of False or Deceptive Indications of Source. This Agreement provided more precise protection for indications of source<sup>7</sup>. Not only are members to seize imports bearing a false or deceptive indication, they also must prohibit those uses of indications that are capable of deceiving the public<sup>8</sup>. However, it suffers from limited membership and has had a minimal impact<sup>9</sup>. This same happened with the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, which provides for an international registration system limited to appellations of origin. The Lisbon Agreement has failed to attract support from more than only a few nations. The main problem was that accession is confined to those nations which protect appellations of origin “as such”. Thus, States which protect this form of intellectual property under unfair competition or consumer protection laws are locked out<sup>10</sup>.

Due to these insufficiencies, international community did not provide extensive protection for GIs prior to the TRIPS Agreement. However, during the Uruguay Round of GATT trade in intangibles was included, for the first time, in multilateral trade negotiations, resulting in, among others, the TRIPS Agreement. It covers a broad

2 Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *U.N.T.S.* vol. 828, p. 305, available at [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html) (last visited March. 16, 2011).

3 Madrid Agreement for the Repression of False and Deceptive Indications of Source, Apr. 14, 1891, *U.N.T.S.* vol. 828, p. 168. [hereinafter Madrid Agreement], available at [http://www.wipo.int/treaties/en/ip/madrid/trtdocs\\_wo032.html](http://www.wipo.int/treaties/en/ip/madrid/trtdocs_wo032.html), (last visited March. 16, 2011).

4 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, *U.N.T.S.* vol. 923, p. 205, as last revised Jan. 1, 1994 at art. 2(1); available at <http://www.wipo.int/lisbon/en/> (last visited March. 16, 2011).

5 Paris Convention, at arts. 9, 10.

6 See Lenzen (1968), 184; Cortés Martín (2003), 118.

7 See Simon (1983), 134.

8 See Madrid Agreement, art. 1, 3 bis.

9 See Cortés Martín (2003), 125.

10 Lastly, some authors are proposing the use of the Lisbon Agreement for the Protection of Appellations of Origin as way of eliminate the stumbling block in the TRIPS Negotiations and resolving the main differences in these negotiations, see Gervais (2010); Geuze (2009).

range of intellectual property rights and regulates the availability, scope, and use of these intangible assets. One of the features of the TRIPS Agreement is that not all different categories of intellectual property rights (IPR) regulated therein had either the same degree of legal or doctrinal development or the same degree of acceptance among countries. This is the case of GIs where legal treatment and level of protection are still debated between the old and the new world<sup>11</sup> as a source of international controversy<sup>12</sup>. On the one hand, there are European Union (EU) countries, which have a long tradition of the protection of this kind of intellectual property right<sup>13</sup>. The first European framework for the registration of geographical indications and designations of origin was created in 1992<sup>14</sup>. This system was enacted with the twofold objective of increasing the quality of products and promoting the diversification of production, so as to better balance supply and demand, improve the incomes of farmers and benefit rural areas<sup>15</sup>. From a more general point of view, the creation of this EU system was especially due to the increasing pressure to reduce subsidies to farmers by reforming the Common Agricultural Policy<sup>16</sup>. Be that as it may, today this

11 See Cortés Martín (2004), 120.

12 Goebel (2003), at, 982: "Although GIs are recognized as a type of intellectual property pursuant to Article I(2) of the TRIPS Agreement, it is sometimes argued that GIs cannot be considered as another form of intellectual property right since protection to the individual using a GI is effectuated only as a reflex of protecting a certain regional collective goodwill." In my opinion, however, such an interpretation is incompatible with the TRIPS Agreement which clearly defines GIs as intellectual property rights and as private rights. It is true though that the inclusion of GIs in the TRIPS Agreement as a type of intellectual property was very controversial.

13 GIs have a long and proud tradition. Since antiquity, their existence has served to distinguish products and to indicate source, serving a similar function to that of present-day trademarks. See, Cortés Martín (2003), Fernández Novoa (1970), Maroño Gargallo (2002).

14 Council Regulation (EEC) No 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs: OJ L 208, 24.7.1992, entered into force on 25 July 1993. After, Regulation 2081/92 had been repealed in 2006 and replaced by Regulation 510/2006, /2006, OJ L 93/12, 31.03.2006; which still applied only to GI products other than wines and spirits. There are also a series of regulations dealing with designations for wines and spirits (e.g. Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999, OJ L 148, 06.06.2008.

15 Recital 2, Regulation 2081/92 of 14 July 1992 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, recognizes that the promotion of high quality foods can be of considerable benefit to the rural economy by improving the incomes of farmers and by retaining the rural population in more remote areas.

16 See Raustiala, K. and Munzer, S. R. (2007), 350: "Faced with an onslaught of inexpensive wine and other agricultural products from the New World, often bearing European place names, EU countries have sought to use the international intellectual property system to assert quality, segment markets, and protect their national producers from what they deem unfair competition". According to these authors, Pascal Lamy, a former high EU trade official and currently Director-General of the WTO, stated: "[T]he future of European agriculture lies not in quantity of exports but quality (...) That is why we are fighting to stop appropriation of the image of our products and improve protection."

system is a feature of EU policy on agriculture and product quality and has enhanced the attractiveness of using GIs to gain market share internationally. This is based on the assumptions of empirical studies, which suggest that the protection of GIs for specialty agricultural products can potentially benefit the rural economy<sup>17</sup>.

By contrast, the US and other New World producers (Canada, Australia, New Zealand and others) tend to oppose strong GI protection, especially at the WTO level. Historically, these countries have not had separate laws to protect GIs, apart from their systems of trademarks. Although it may be true that GIs are similar to trademarks in that they function as source indicators<sup>18</sup>, these two different types of IPR are governed by very divergent systems of laws and bodies of beliefs. While European countries believe that the names of many products should be protected based on their status as GIs, the United States and other countries disregard the validity of such protection because such names do not deserve protection under trademark law and many product names are considered to be generic terms rather than references to geographic locations that produce property rights.

This introduction will give an idea of how controversial it was to include GIs in the TRIPS Agreement as a type of intellectual property<sup>19</sup>. Perhaps, the most theoretically contested intellectual property right included in the TRIPS Agreement relates to GIs. And these problems remain due possibly to the peculiar type of intellectual property asset that represent GIs. Among other characteristics, GIs do not confer individual rights (such as in the case of patents and trademarks) but rather "collective rights". In such a case, the right over a geographical name does not belong to a single company, but to all producers in a given geographic area that respect a specific code of conduct. The monopoly over a geographical name is not an exclusive right over a certain category of products, like in the case of patents. The producers of Sherry wine are not entitled, neither wish, to prevent others from producing wine. The right conferred by the GI is limited to banning competitors outside the defined geographic area (or inside the geographic area for those not respecting the code of conduct) from using the name 'Sherry' in connection with their products. It is surely due to GIs peculiarities that its inclusion in the TRIPS Agreement caused heated debates during the Uruguay Round and continues to generate discussions.

17 See, among others, Rangnekar (2003), 34-35; Réquillart (2007), 17-18; Folkesson (2005), 87.

18 See, Hangard (1995), 66.

19 See, Lindquist (1999), at 311-312, who wrote: "The inclusion of these [protection of GIs] caused heated debates during the Uruguay GATT Rounds and continues to generate discussion. The Article that causes most debate is Article 23 which deals with the protection of Geographical Indications for wines and spirits (...) The current debate surrounding Article 23 is over how much protection should be given to Geographical Indications that have long been used beyond their boundaries and what obligations TRIPS imposes on its Members."

Like many aspects of the Uruguay Round negotiations, the disagreement among countries impeded the creation of a complete system for the international protection of GIs and regrettably protection remains inadequate, particularly if compared to other IPR. In addition to legal uncertainty that TRIPS provisions still generate, many countries feel that current protection fails to prevent free-riding on the reputation of genuine GIs. Uruguay Round Negotiators were conscious of these deficiencies and, thus, mandated ongoing negotiations<sup>20</sup>. As a result, there remain a series of outstanding issues with respect to GIs. In particular, the twin negotiating issues of the multilateral register and the additional protection for products other than wines and spirits.

Concerning multilateral register, negotiations began in 1997, under Art. 23.4 TRIPS, and were included in the Doha Round when it was launched in 2001. Unfortunately, they have yet to produce any real results. This same happened with extension issue, which was discussed in the regular session of the TRIPS Council up to the end of 2002. Thereafter, it has become the subject of consultations chaired by the Director General of the WTO. While some countries are in favour of granting further GI protection, others wish to maintain the status quo. The purpose of this paper is, first, to describe how the WTO strives to secure effective protection for GIs, and, second, to explore the prospects for further development based upon these ongoing negotiations. In order to accomplish these objectives, we must first review the international protection of GIs under the TRIPS Agreement, followed by reviews and critiques of the various proposals for a multilateral register set forth during negotiations. Lastly, we will address the appropriateness of expanding the system to establish additional protection for products other than wines and spirits. The paper then concludes by arguing in favour of further GI protection and for WTO Members to shoulder their responsibility by providing greater protection for GIs. Doing so, they will ensure that TRIPS remains an effective multinational treaty and sets an example for compliance. This compliance would be particularly helpful for developing countries which are becoming aware that products identified with their country, or a given region within their country, can contribute mightily to their economic development.

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## 2. CURRENT PROTECTION UNDER THE TRIPS AGREEMENT

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At the time of the TRIPS Agreement adoption, not all categories of IPR regulated therein had the same degree of legal or doctrinal development; neither had they the

20 See articles 23.4, 24.1 and 24.2 TRIPS Agreement. See also Abbott (2000), 166; citing negotiation for GI protections as a "Built-In Agenda" item that remains before the TRIPS Council.

same degree of acceptance among countries. In the case of GIs, the appropriate legal treatment and level of protection continued to be fiercely debated between WTO Members. Interestingly enough, the debate over GI protection did not follow the usual North-South divide<sup>21</sup>. Instead, the dispute created a dichotomy of states, with “emigrant” nations on one side and “immigrant” nations on the other<sup>22</sup>. The “emigrant nations” – the European Union, Switzerland and former Eastern bloc countries – support extensive GI protection, while countries like Australia, New Zealand and the United States ally with Latin American nations and other “immigrant” countries oppose this protection<sup>23</sup>.

During TRIPS negotiations, GIs was a very sensitive issue. Only at the very end of the Uruguay Round was an agreement reached. And this was largely due to the parties’ ability to link GIs with the agricultural negotiations taking place at the time<sup>24</sup>. According to TRIPS Agreement, GIs are subject to the same general principles applicable to all categories of IPR included in the Agreement, primarily the “minimum

21 Traditionally, developed and developing countries have tended to be in opposite groups in the GATT-WTO system. With some limited exceptions, this trend of opposition in North-South politics continues today. Developing countries have organized themselves into alliances such as the African Group and the Least-Developed Countries Group. But, in other issues, the developing countries do not share common interests and may find themselves on opposite sides of a negotiation. A number of different coalitions among different groups of developing countries have emerged for this reason. The differences can be found in subjects of immense importance to developing countries, such as agriculture. See WTO, “Understanding the WTO: Developing Countries. Some Issues Raised”, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/dev4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm) (last visited March. 16, 2011).

22 “Emigrant” countries include those in Europe, Africa and parts of Asia, whereas “immigrant” countries include the United States, Australia, and Latin American countries. Past waves of immigration, particularly around the turn of the 19th century, brought millions of farmers and artisans from Europe to the Americas and elsewhere. These immigrants brought with them their food products and, more importantly, their traditional production methods and recipes. And they often recreated the products they had known at home using the same geographical name. Sometimes, this is the main reason why some names become generics. By contrast, in European countries GIs have a long and proud tradition. Since antiquity, their existence has served to distinguish products and to indicate source, serving a similar function to that of present day trademarks.

23 See Addor and Grazioli (2002), 883; affirming that the suitable protection of GIs has never been a conflict of interests between developed and developing countries, but between the countries of the old world and the new world.

24 The proposals were presented by the European Union, the United States, Switzerland, Japan, and a group of developing countries consisting of Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, and Uruguay. See, e.g., WTO Negotiating Group on TRIPS, *Draft Agreement on Trade-Related Aspects of Intellectual Property Rights*, presented by the European Union, doc. MTN.GNG/NG11/W/68, Mar. 29, 1990. All WTO official documents are available at: [http://docsonline.wto.org/gen\\_search.asp?searchmode=simple](http://docsonline.wto.org/gen_search.asp?searchmode=simple).



standards<sup>25</sup>, the “national treatment”<sup>26</sup> and the “most-favoured-nation clause”<sup>27</sup>. As a result, one big difference from the pre-WTO situation is that GIs are now embedded in the WTO system, as they comprise one of the categories of intellectual property that are the subject of the TRIPS Agreement, which itself is an integral part of the WTO Agreement. Consequently, non-compliance with TRIPS obligations on GIs can be challenged under the WTO dispute settlement mechanism, and if a country fails to implement a ruling, if it is indeed not in compliance<sup>28</sup>, it could eventually be faced with sanctions in areas of international trade governed by other parts of the WTO Agreement and lose benefits that accrue to it under that agreement for as long as it does not remedy the situation<sup>29</sup>.

Apart from these, Section 3 of the TRIPS Agreement regulates the availability, scope, and use of these intangible assets<sup>30</sup>. The structure of this Section is quite

25 Art. 1 TRIPS Agreement: “Members shall give effect to the provisions of this Agreement. Members may, but shall not be obligated to implement in their domestic law more extensive protection than is required by this Agreement.”

26 See *id.* Art. 3: “Each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection”.

27 See *id.* Art. 4: “With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members (...)”.

28 For instance, in the Case *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Australia and United States successfully challenged in 2005 the US the EU’s GIs protection system before the WTO Dispute Settlement Body. They argued that it impermissibly discriminated against foreign products and persons. Even if the WTO Panel dismissed some of the claims, yet held that EU Regulation 2081/92 failed to provide national treatment to foreign products, see doc. WT/DS290/R, Add.1, Add.2 y Add.3. On 20 April 2005, the Dispute Settlement Body adopted the Panel Reports. As a result, the new Regulation nº 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs was adopted and published in the Official Journal of the European Union on 31 March 2006. Thus, the EU complied with the DSB rulings and recommendations in this dispute within the reasonable period of time agreed upon between the parties.

29 See Geuze (2009), 51.

30 Both the Paris Convention and the Lisbon Agreement had a clear influence on the provisions of the TRIPS Agreement in general, but particularly in the case of GIs. Substantive provisions contained in Articles 1 to 12 and 19 of the Paris Convention (1967) were “incorporated” in the TRIPS Agreement with respect to the minimum standards concerning: the availability, scope, and use of intellectual property; the enforcement of the intellectual property rights; and, the acquisition and maintenance of intellectual property rights and related *inter partes* procedures. This has had at least three important consequences: (i) WTO Members are to comply with the substantive provisions of the Paris Convention, mainly Articles 1 through 12 and Article 19, even if they were not signatories of that Convention; (ii) all WTO Members are bound by the same Act of the Paris Convention (Stockholm Act of 1967); and (iii) the provisions of the Paris Convention incorporated in the TRIPS Agreement became subject to the WTO dispute settlement mechanism.

simple and clear. First, Article 22 provides general protection for all GIs<sup>31</sup>. All GIs must be protected against use, which would mislead the public or constitute an act of unfair competition. In this respect, WTO Members should provide legal tools so that interested parties can prevent the designation or presentation of a good that indicates that the good originates in a geographical area other than the true place of origin. They can also prevent any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention<sup>32</sup>. Another important element of Article 22 is that inconsistent use of a GI which does not mislead the public as to its true origin should not be considered an infringement of TRIPS<sup>33</sup>. Additionally, Article 22 mandates that Members should refuse or invalidate the registration of a trademark which contains or consists of a GI, but only if such use of the trademark would be misleading<sup>34</sup>. However, there is no obligation to protect GIs which are unprotected in their country of origin or have fallen into disuse in that country.<sup>35</sup> Thus, protection abroad is dependent on continuing domestic protection.

WTO Members agreed to provide a higher level of protection for GIs for wines and spirits (often referred to as additional or absolute protection), waiving general protection conditions (misleading of the public, unfair competition) in their regard. As a result, in addition to the general protection contained in Article 22, Article 23 accords additional protection for wines and spirits<sup>36</sup>. This additional protection encompasses three main elements. First, it provides the legal means for interested parties to prevent the use of GIs which erroneously identify wine and spirits not originating in the place indicated by the GI<sup>37</sup>. Second, it mandates the refusal or invalidation of the registration of a trademark for wines or spirits which contains or consists of a GI at the request

31 Article 22.2 requires Members to provide the legal means for interested parties to prevent 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.

32 Article 10 *bis* of the Paris Convention was amended to prohibit indications that were "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." Paris Convention, *supra* note 2, art. 10 *bis*.

33 Misleading the public consists of any "act or practice, in the course of industrial or commercial activities, that misleads, or is likely to mislead, the public with respect to an enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition." See WIPO, *Model Provisions on Protection Against Unfair Competition*, art. 4, Geneva, 1996. Also, according to Article 22(b), whether the use of a GI constitutes an act of unfair competition is governed exclusively by Article 10 *bis* of the Paris Convention

34 Art. 22 TRIPS Agreement.

35 *Id.* Art. 24.9.

36 *Id.* Art. 23.

37 This is so 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.

of an interested party<sup>38</sup>. Third, it calls on WTO Members to negotiate for increased protections<sup>39</sup>. These provisions give GIs for wines and spirits stronger protection than those provided in Article 22 for other products, under which protection is limited to cases where the public is misled as to the true geographical origin of a product or where use of the GI constitutes an act of unfair competition. The “misleading test” is a burdensome requirement tailored to suit laws for the protection against unfair competition or the protection of consumers, but not for the protection of intellectual property. In particular, the condition that existing protection only applies to the extent needed to prevent “misleading the public” results in wide legal uncertainty because judges may reach different decisions on whether the public is misled or not. On the other hand, unlike Article 23 TRIPS Article 22 does not prevent the use of GIs in translation or accompanied by expressions such as “style”, “type”, “kind”, “imitation”, or the like. It therefore enables free-riding on renowned GIs by products not possessing the qualities which original products displayed due to their origin. Neither does it prevent free-riding on the efforts and hard work which had been employed to make a GI renowned<sup>40</sup>.

Last but not least, the Agreement contains three exceptions to the obligation of providing general and additional protection. In other words, Section 3 of TRIPS establishes a series of exemptions to GI protection in an endeavour to accommodate past registration and use<sup>41</sup>. The first of these exemptions provides that nothing in Section 3 prevents a WTO Member from continuing to use another Member's GI if it has used it continuously in the past with regard to the same goods or services<sup>42</sup>. Article 24.5 provides the second exemption allowing for continued use of previously acquired trademarks<sup>43</sup>. The third exception refers to generic terms and allows a country not to protect a GI if the relevant indication is identical to common names of such goods or services<sup>44</sup>.

38 Art. 23.2 TRIPS Agreement.

39 *Id.* Art. 24.1. Some countries are of the opinion that this obligation applies to all GIs, and not only to those concerning wine and spirits.

40 See Cortés Martín (2004), 165.

41 See *id.* art. 24.

42 *Id.* art. 24.4 (either, (a) for at least 10 years preceding April 15, 1994 or, (b) in good faith preceding that date).

43 *Id.* art. 24.5.

44 *Id.* art. 24.6. Also, the right to use a personal name is not to be prejudiced under Section 3 of the Agreement.

### 3. NEGOTIATIONS FOR A MULTILATERAL REGISTER FOR GIS

At the Uruguay Round, proposals by the EU, the United States, and Switzerland were indispensable to framing eventual obligations concerning GIs. For example, key elements like Article 23's "additional protection" for wines and spirits and for a multilateral register for indications of wines and spirits were present in the EU Proposal. The eventual framework reflects "a very sensitive compromise in an area that was one of the most difficult to negotiate"<sup>45</sup>. However, WTO negotiators did not resolve all issues on the table. Instead WTO Members agreed a "Built-In Agenda" for future negotiations designed to facilitate international protection of this legal category.

This means that under the TRIPS system, WTO Members must negotiate, *inter alia*, the establishment of a multilateral notification and registration system for GIs<sup>46</sup>. The precise terms of this obligation are in Article 23.4, which states that "[i]n 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 geographical system of notification and registration of geographical indications for wines<sup>47</sup> eligible for protection in those Members participating in the system"<sup>48</sup>. In 2001, part of this work became part of the work programme of the Doha Development Agenda, as adopted by the WTO's Ministerial Conference<sup>49</sup>. In the Hong Kong Ministerial Declaration, adopted on 18 December 2005, Ministers took note of a

<sup>45</sup> Geuze (1997), 199.

<sup>46</sup> Art. 68 TRIPS Agreement.

<sup>47</sup> Art. 23.4 TRIPS Agreement addresses exclusively GIs for wine. However, the WTO Singapore Ministerial Conference in 1996 also included spirits: "In regard to GIs (...) the Council will initiate (...) preliminary work on issues relevant to the negotiations specified in Article 23.4 of the TRIPS Agreement (...) Issues relevant to the notification and registration system for spirits will be part of this preliminary work. All of the above work would be conducted without prejudice to the rights and obligations of Members under the TRIPS Agreement (...) WTO Council for TRIPS", doc. IP/C/8, Nov. 6, 1996, para. 34.

<sup>48</sup> This article was introduced in TRIPS at the request of the European Union, although its Proposal contemplated coverage applicable to all GIs and not only to those of the wine sector, see WTO Negotiating Group on TRIPS, *Draft Agreement on Trade-Related Aspects of Intellectual Property Rights*, presented by the European Union, doc. MTN.GNG/NG11/W/68, art. 21(3), Mar. 29, 1990. The Proposal was included in the text that the President of the Negotiations Group presented in July 1990, doc. MTN.GNG/NG11/W/76, July 23, 1990. During the autumn of that year, some countries were in favor of the creation of this register in the Uruguay Round. They even presented, in an informal way, some proposals which contemplated, in a detailed and systematic way, the creation of this register. These Proposals were debated by the Negotiations Group. However, other countries were committed solely to examining this question in the future. This disagreement was reflected in the project presented by the President of the Negotiations Group to the Ministerial Meeting of Brussels in December, 1990, doc. MTN.TNC/W/35-1/Rev.1, Dec. 3, 1990.

<sup>49</sup> The mandate of the Special Session is set out in the first sentence of paragraph 18 of the Doha Ministerial Declaration, doc. WT/MIN(01)/DEC/1, Nov. 20, 2001.

progress report on the negotiations in the Special Session and agreed to intensify them in order to complete them within the overall time-frame for the conclusion of the negotiations that were foreseen in the Doha Ministerial Declaration<sup>50</sup>. Lastly, the Seoul Summit Document, agreed at the G20 Seoul Summit, November 11-12, 2010, asks for a broader and more substantive engagement in order to bring the Doha Development Round to a successful, ambitious, comprehensive, and balanced conclusion consistent with the mandate and built on the progress achieved<sup>51</sup>.

The submissions presented at the TRIPS Council for the establishment of this register can be divided into two camps. On the one hand, the minimalist approach defended by the United States together with a coalition of 19 countries like Canada, Australia, New Zealand, along with many Latin American nations (Joint Proposal Group)<sup>52</sup>. The second proposal advocating a minimalist approach was presented by Hong Kong, China, in which the inscription of a GI would lack a process of substantive examination or opposition at the multilateral level<sup>53</sup>.

By contrast, the consensualist approach defended by the European Union as part of a coalition of 108 WTO Members<sup>54</sup> (the so-called W52 sponsors), which includes Switzerland, former Eastern bloc countries, and a huge number of developing countries<sup>55</sup>. It includes a modified and stripped-down version of the EU's original

50 Doc. WT/MIN(05)/DEC, par. 29.

51 Once such an outcome is reached, G20 commit to seek ratification, where necessary, in their respective systems, TN/C/W/57, 26 November 2010, par. 43.

52 Submission by Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Rep. Korea, Mexico, New Zealand, Nicaragua, Paraguay, Chinese Taipei, South Africa, the US ("Joint Proposal Group") in doc. TN/IP/W/10 and Addenda 1, 2 and 3. In March, 2011, the Joint-Proposal Group circulated a revision of its proposal, adding a section on special treatment for developing countries, aligning the formatting with the structure of the draft and using its preferred wording from the composite draft, doc. TN/IP/W/10/Rev.3.

53 Hong Kong, China's proposal is contained in Annex A of doc. TN/IP/W/8.

54 The first European Union Proposal is contained in doc. IP/C/W/107, Jul. 28, 1998; and after in doc. TN/IP/W/11, Jun. 14, 2005. The last EU position is contained in doc. TN/C/W/52, Jul. 19, 2008, "Draft Modalities for TRIPS Related Issues".

55 This proposal is sponsored Albania, Brazil, China, Colombia, Croatia, Ecuador, the European Union and its 27 Member States, Georgia, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, Moldova, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the Africa, Caribbean and Pacific Group (The ACP Group) and the African Group. Both groups consists of 61 WTO Members: Angola, Antigua & Barbuda, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Rep., Chad, Congo, Côte d'Ivoire, Cuba, Congo (Democratic Rep.), Djibouti, Dominica, Dominican Rep., Egypt, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea Bissau, Guyana, Haiti, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Mali, Morocco, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Papua New Guinea, Rwanda, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Senegal, Sierra Leone, Solomon Islands, South Africa, Suriname, Swaziland, Tanzania, Togo, Tonga, Trinidad & Tobago, Tunisia, Uganda, Zambia, Zimbabwe, doc. TN/IP/W/52, Jul. 19, 2008 and Addenda 1, 2 and 3.

proposal for the multilateral register. Previously the EU had proposed that if a term is registered the assumption — the legal phrase was “irrebuttable presumption” — would be that it should be protected in all WTO members except those that have successfully challenged the term<sup>56</sup>. Nowadays, the negotiated compromise among the sponsors envisages a system applying to all WTO Members where they have to take a term’s registration “into account” and treat it as “prima facie” evidence (first sight, or preliminary, before further investigation) that the term meets TRIPS definition. As a result, this new proposal reflects a meaning movement from the EU to review its previous position so that it could bring an end to the deadlock that had continued for so many years.

Throughout, an attempt will be made to deepen the interpretation by exhibiting the different negotiating proposals submitted about the notification and registration system of GIs<sup>57</sup>.

### 3.1. *The Joint Proposal*

The register urged in this approach, which can be qualified as the least common denominator for the negotiation, is characterized solely by its informative nature. As a result, a GI inscription would not create legal rights and consequently it would not require protection by other WTO Members. As well, this system is strictly voluntary, which means that no WTO Member shall be required to participate<sup>58</sup>.

The joint proposal is succinct and has not been modified in substance since it was tabled in 2002. Subsequent revisions had been made to add co-sponsors but no substantive modifications had taken place. It is based on the assumption that GIs are territorial rights and, therefore, the conditions for granting and exercising them must be established in national fora. This means that under this system, any GI established in accordance with national legislation would be entitled for protection, regardless of whether it is registered in the WTO database. Moreover, the proposal states that, in accordance with Article 23.3, identical or similar GIs may be submitted by several WTO Members provided it had been recognized by each of them in accordance with national systems.

With regard to legal effects under national legislation, participants would be legally bound to consult the database, along with other sources of information, while

56 TN/IP/W/3, 24 June 2002.

57 At first, debates developed in the TRIPS Council. More recently, they have been the subject of informal consultations chaired by the WTO Director-General or by one of his deputies.

58 *Supra* footnote 52.

Non-participants would be encouraged to refer to the database<sup>59</sup>. Registering itself would not create protection, but simply it would create a source of information. As a result, multilateral registration would not give rise to any presumption regarding national protection. Thus, Members' participation would be limited to receiving these lists, among other sources of information, when they must make decisions on the protection in their territories of GIs of other Members. With regard to appeals or objections, the proposal sets out that decisions concerning protection for GIs, regardless of whether the WTO is notified, should occur at the national level at the request of interested parties.

### 3.2. *The Hong Kong, China Proposal.*

The second proposal was presented by Hong Kong<sup>60</sup> and it attempted to reconcile the minimalist approach of the U.S.-led Group with the initial EU maximalist approach. Nowadays, it is not truly a middle-ground proposal. Instead, it is much closer to the European-led Group except for participation in the system.

Concerning legal effects, the inscription would be put into effect only after a cursory, formal examination of the GI subject to questions relating to its conformity with the general definition of Article 22.1. If a term is registered, this would be preliminary evidence ("*prima facie*") - which could be rebutted - about who owns the term and that it is protected in the country of origin. But the applicability of TRIPS exceptions would remain in the local jurisdiction in accordance with domestic law.

As regards participation, protection only embraces those WTO countries choosing to participate in the system. In other words, participation would be entirely voluntary. However, those participating in the WTO system would be compelled to give legal effects to inscriptions. The proposed multilateral system would involve a formality examination of the notified GIs. A GI would be entered on the register by the administering authority upon submission of some basic information, such as details of the GI, ownership and the basis on which it was claimed to be protected in the country of origin, and payment of the requisite fee. The formality examination would

59 The proposal asserts that information obtained from WTO Multilateral Systems for Wines and Spirits would be taken into account in making those decisions in accordance with that national legislation (...) WTO Members not participating in the system will be encouraged to refer to the WTO Multilateral System for Wines and Spirits, along with other sources of information, in making decisions under their national legislation (...) in order to ensure that such decisions are based on the most complete information available, doc. TN/IP/W/10.

60 Hong Kong, China has no interest in GIs, but it has a systemic interest in fulfilling the negotiating mandate under Article 23.4 of the TRIPS Agreement. With this objective in mind Hong Kong, China tabled the alternative proposal TN/IP/W/8 at the TRIPS Special Session on 29 April 2003, see doc. TN/IP/W/8.

only involve checking of the documents submitted by a WTO Member to ensure they met the minimum formal requirements. The register would contain the information of the registered GIs and would be made available to participating Members, e.g. through the Internet website. Concerning legal effects, the Hong Kong proposal states that the registration would be accepted by any domestic courts, tribunals or administrative bodies of the participating WTO Members as *prima facie* evidence for proving three issues: ownership; conformity with the TRIPS definition; and protection in the country of origin. These three issues would be deemed to have been proved unless evidence to the contrary was produced by other WTO Members. Therefore, registration would give rise to a rebuttable presumption on these three issues. As a result, legal effects would only affect the legal burden of proof to the proceedings in order to assist GIs owners, discharging them about the burden of proof on these three relevant issues in domestic proceedings<sup>61</sup>.

### 3.3. *The EU-led Proposal.*

Initially, the European Union proposed a full registration system, combining elements from the Lisbon Agreement<sup>62</sup> and EU Regulation<sup>63</sup>. This ambitious proposal tried to favour legal certainty on GIs protection by advocating for the creation of a system which would be opened to GIs on all products that would benefit from unconditional protection in all WTO markets upon its inscription in the register<sup>64</sup>. However, in order to put an end to the deadlock, the EU-led Group has subsequently made a huge effort to reduce the consequences of the register. Accordingly, in 2008 the EU relaxed its position concerning legal effects of the register, although maintaining that registering should imply protection in all WTO markets.

According to this new proposal, the issue of legal effects is the key area where the EU has made major concessions to address the concerns expressed in the past.

61 "Consequently, according to the Hong Kong Proposal, this would facilitate GI protection through Members' domestic legal systems", WTO Council for TRIPS, Special Session, *Minutes of Meeting*, TN/IP/M/22, Jun. 10, 2009, para. 45.

62 See Downes (2000), at p. 273.

63 Under the EU Regulation n. 510/2006, the protected designation of origin (PDO) allows agricultural producers in EU Member States an exclusive right to the name of a particular foodstuff that is determined to be unique because the production, processing, or preparation takes place in a specific area using local expertise and resources. The protected geographical indication (PGI) also gives an exclusive right to a name for foodstuffs, but unlike the PDO, it does not require unique characteristics associated with a specific geographical environment, see Regulation (EEC) n° 2081/92, July 14, 1992. Instead, the PGI grants protection for products due to their reputation. See Cortés Martín (2003), 325-451.

64 *Supra*, footnote 54.



In particular, because the proposed register would not be an automatic protection system. Instead, GI right holders would still have to go through the procedures provided by each country, meaning that all exceptions would remain available and that it would be the national authorities who would decide to grant protection. Consequently, the first concession is related to the consultation of the register by domestic authorities when making decisions on registration and protection of trademarks and GIs. The entry of a name on the register would trigger two legal effects:

It would be considered *prima facie* evidence that, in that WTO Member, the notified GI met the definition of “GI” laid down in TRIPS Article 22.1. This means that the notifying WTO Member would have checked that there was a product, a place of origin, and, for example, a characteristic of that product linked to that origin. This consequence is very reasonable, the more so as it would apply “in the absence of proof to the contrary”. In other words, domestic authorities might decide that they would consider that a notified GI did not meet a GI definition in their country.

The second consequence of a registration seems even more reasonable: as genericness is a TRIPS exception, it would be normal that those who claim it had to substantiate the alleged genericness<sup>65</sup>. Thus, domestic authorities would consider assertions on the genericness exception laid down in TRIPS Article 24 only if these were substantiated. Beyond that, domestic authorities would have all latitude to decide for or against protection of a term on the basis of contrary evidence provided by themselves or brought by any third party.

This means that this proposal gives careful consideration to domestic systems: it would be up to the domestic authorities to act within the framework of their domestic system in accordance with their own law. On the other hand, checks and balances of the exceptions provided in Article 24 TRIPS would remain unchanged.

### 3.4. Critical Appraisal

As an overall assessment, although fundamental positions have not changed, in the present author's view it seems exist a genuine and sincere desire on the part of delegations to move forward and resolve the remaining differences in these negotiations, so as to be ready to contribute to any movements in the wider context of the Doha Round negotiations. Then, we will try to expose a reflection of the state-of-play and of remaining challenges, in particular in the two key areas of legal effects and participation.

With respect to the question regarding the consequences that should flow from an entry on the international register, two general approaches are on the table,

<sup>65</sup> See, doc. TN/IP/W/52, Jul. 19, 2008.

namely that (a) an entry should result in better information being available to and used by decision makers and national systems, and (b) that an entry should result in a legal presumption in national systems.

According to minimalist approach group, a legal presumption is not acceptable for a number of reasons: firstly, a legal presumption would increase the legal protection for GIs, and this would be outside the scope of this negotiation, which is only about facilitating protection; secondly, a legal presumption would violate the principle of territoriality; and, thirdly, a legal presumption would alter the balance of rights and obligations in the TRIPS Agreement. By contrast, these countries prefer a limited information system in which national GIs would be notified and incorporated automatically. However, WTO Members sponsoring this system have not yet explained how they would implement the obligation to “consult and take into account” the information on the register. As legal uncertainties for market operators, whether they were GI or non-GI operators, have to be avoided, there is need for further explanations on this issue.

The Joint Proposal calls for the establishment of a simple database as a source of information that Members’ authorities might or might not consult, and, even if they consult, it is unclear which consequences they would attach to it. In this author’s view, it should not be up to WTO Members to decide whether or not to take into account information on the register, essentially for the following reasons: firstly, leaving countries to decide would create legal uncertainty and discrepancies, and would of course not be in the interest of the right holders or of business in general; and secondly, it did not fulfil the mandate which called for a registration system, not a database system, which would amount in practice to a duplication of the information already provided by the applicants and therefore would not add any value.

As regard legal effects, it would seem that an IPR multilateral register clearly must imply multilateral protection and this should be the key element in establishing such a register. However, the U.S.-led Proposal is limited to creating a record rather than a true registration. The system does not provide for a mechanism to filter out names that should not be protected and, therefore, risks creating more confusion than clarity. The proposal is silent on the need for elements of proof, for the assessment of eligibility, or for an opposition procedure — elements which seem indispensable in the framework of an IPR register. Under this approach, it is impossible to ensure that terms that do not meet the provisions of Articles 22.1 or 24.9, or which fall under one of the exceptions provided for in Article 24, are denied eligibility. The U.S.-led Proposal also does not establish procedures to resolve possible litigation, an indispensable procedure for any future multilateral register. The great uncertainty regarding legal effects may thus increase litigation and, consequently, administrative costs. It also does not provide for any monitoring mechanism which requires national authorities to “refer” to the lists of GIs on the database. As a result, these national authorities will not know whether to rely on the information included in the system

when making a determination on the protection of a GI. For all these reasons, it is difficult to understand how the mandate to facilitate the protection of GIs established in Article 23.4 would be fulfilled through this system.

As to the participation in the system, the minimalist approach group also does not provide for a system with a truly multilateral character. In reality, it is unclear whether non-participating Members would be bound to give protection according to Article 23. If non-participating Members were not bound, the mandate to facilitate GIs protection – as mandated in Article 23.4 – would be undermined. The literal meaning of the U.S.-led Proposal seems based on a political commitment without legal force: authorities would be bound to refer to the register, yet the register gives rise to no national legal commitment.

Assuredly, Article 23.4 calls for more ambitious action than this proposal offers. The proposal concentrates on the first part of the job, namely the establishment of a notification system, while the register would simply compile participating Members' information. As of this writing it is unclear whether this would satisfy the requirement of producing legal effects that registration inherently should entail in the context of IPR<sup>66</sup>. If transparency alone is the only advantage offered by the proposed U.S.-led system, it might not be sufficient to justify its costs. To "facilitate" GIs legal protection under Article 23.4, a multilateral system should help administering bodies implement, and producers and consumers avail themselves of, legal protection. To respond to this mandate, it seems essential after so many years of negotiations to foresee at least that, beyond the simple obligation to consult a source of information, WTO Members should provide some clear assurances that the national authorities responsible for GIs – judges, trademark examiners or other authorities – would have the obligation not only to consult the information in the register but also to take due account of this information when making decisions by giving it all the necessary weight.

By contrast, the proposal sponsored by the EU could in this author's view help to facilitate GIs protection, as Article 23.4 TRIPS Agreement prescribes. This could occur even though it has significantly reduced their initial claims in order to achieve the desired consensus. This proposal struck a balance between different interests and would be the appropriate tool towards a register which would truly facilitate GI protection, and not duplicate what would already be available on the Internet system. The proposal would not entail any automatic protection, would not oblige WTO Members to change their protection system and would not generate excessive administrative costs and burdens. Possibly, these are the reasons which make this proposal to enjoy nowadays the support of two thirds of the WTO Members.

<sup>66</sup> This can be deduced from other sections of TRIPS which employ the word "registration," most notably in Part II, Section 2, on trademarks. See arts. 15, 18 and 19 TRIPS Agreement.

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#### 4. THE ROAD AHEAD

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It seems that early 2011, a drafting group of negotiators produced a complete text on the proposed multilateral register for GIs for wines and spirits, which was presented to a formal TRIPS Council negotiation meeting on 3 March 2011<sup>67</sup>. This text comes entirely from the WTO members and covers six main areas: Notification - eg, how a term would be notified and which WTO Member would do it (also related to "participation"); registration - eg, how the system would be run and the WTO Secretariat's role; legal effects/consequences of registration, in particular any commitments or obligations on WTO Members arising from a term's registration (also related to "participation"); fees and costs - including who would bear these burdens; special treatment for developing countries (officially, "special and differential treatment") and participation - whether the system will be entirely voluntary, or whether a term's registration would have some implications for all WTO members. This text represents apparently a swift result as it can be a basis for moving ahead after 13 years of talks that have seen a lot of views exchanged but little movement in positions.

According to the heart of the Doha Development Agenda, which seeks to place developing countries' needs and interests at the heart of the Work Programmes, this text addresses for the first time special and differential treatment. Indeed, there are details in this new text of proposed special treatment for developing and least-developed countries. This would include delays in implementing the system and technical assistance from developed countries. A key difference is over the delays: the "transition periods". Some developing countries in the EU-led proposal propose developing countries be given 10 years after the system comes into being before they have to consult terms in the register, and 20 years for least-developed countries. By contrast, the Joint-Proposal group bases its suggested transition periods on the totally voluntary form it is proposing for the system - the delays, at this stage unspecified numbers of years, would start from when a developing or least-developed country volunteers to participate in the system. It is also new in this text a section on costs and fees, with views differing on whether the cost should be borne by the WTO's budget - meaning all members would fund the system - or whether "user fees" should be charged to countries registering terms.

However, all the present divergent positions are included in this new text. As a result, the document contains around 208 pieces of rival text, marked by square

67 Statements will appear in minutes because this was a formal meeting. Until then, the sole source is the excerpt from Chairperson's TRIPS Council Report, Ambassador Mr. Darlington Mwape (Zambia), on March 3, 2011, available at [http://www.wto.org/english/news\\_e/news11\\_e/trip\\_ss\\_03mar11\\_e.htm#minutes](http://www.wto.org/english/news_e/news11_e/trip_ss_03mar11_e.htm#minutes) (last visited March. 16, 2011).

brackets. This means that the real challenge still lies ahead and WTO Members must continue negotiating to narrow down differences and remove the square brackets. Thus, the ongoing drafting seems fragile and delicate and the process is still a work in progress.

This is specially the case about fundamental questions, where positions remain more or less unchanged. This occurs with respect to consequences/legal effects of registration. All WTO Members seem to accept an obligation to consult the information on the Register. They also seem to be willing to take the information on the Register into account “when making decisions regarding registration and protection of trademarks and geographical indications”<sup>68</sup> under their national procedures. However, views differ significantly as to how such information should be taken into account, what weight and significance should be given to it, and whether there should be a specific legal obligation to take the information into account. While some WTO Members are of the view that the mere obligation to consult the Register is not enough to ensure meaningful facilitation of protection of wine and spirit GIs, others are concerned about extra-territorial effects of GI protection.

As a result, the Joint Proposal Group continue rejecting that if a WTO Member registers a term, this would be “prima facie evidence” that the term meets the definition of a GI under the TRIPS Agreement in other countries, in the absence of proof to the contrary. The main critic in recent debates is over the weight of this “prima facie”. This term raises doubts about its real meaning, which could be: “on first sight”; “preliminary”, “before further investigation”, “evidence”... The Joint Proposal Group objects that the EU system would create obligations in other countries’ legal systems, something qualified as “extraterritorial”. These countries critics that the EU-led Proposal would shift the burden of proof away from the owner on whether a term qualifies as a GI. By contrast, EU-led Group denies that its proposal would be extraterritorial because countries could still use their own legal systems to decide whether to protect the term. As a result, the rights enshrined in the TRIPS Agreement would be respected, as the final decision on whether or not to protect a GI will be left to national authorities.

Given these criticisms, we might consider the following question: Is a system which creates *prima facie* legal effects at international level really necessary to facilitate GIs protection? There are several reasons why we think it is necessary. The most important is that international legal effects would make GI protection easier by providing registered GIs a presumption of eligibility for protection<sup>69</sup>. However, it

<sup>68</sup> This text appears both in TN/IP/W/10/Rev.2, paragraph 5 and in TN/C/W/52, paragraph 2.

<sup>69</sup> But see, GOEBEL (2003), p. 986; arguing that most of the existing multilateral systems of notification and registration, such as under Art. 6 *ter* of the Paris Convention, the Hague Agreement in the field of industrial designs and the Madrid Protocol in the field of trademarks, all rely ultimately on determinations under domestic law to determine eligibility and protection.

is doubtful if the last EU proposed system would enable producers to reduce costs as they would have to continue to enforce protection in each WTO market. It is true, however, that at least occasional free-riding would be discouraged because they would have to bear the burden of proof and incur litigation costs. This means that in case of litigation, the last EU proposed register would be a tool for these producers to “facilitate” GIs protection by a reversal of the burden of proof. But it is doubtful if this could be particularly valuable for producers in developing countries who might not have the means to assert their rights in all markets. The notification, examination, and opposition phases should therefore be considered an investment in the system’s viability; the costs involved would be offset by the benefits that would be derived from effective protection. Without a presumption of eligibility, it would be difficult in most cases, if not impossible, for the average GI right-holder to enforce his rights, because he would have to build a case from scratch before local courts. In certain cases, litigants would be thousands of kilometres from home and under completely different legal systems. This inconvenience would threaten the WTO Members’ clear intention to facilitate GIs protection. On the other hand, it is doubtful if under the last EU Proposal, producers with a policy of international expansion would be able to save costs when defending their names around the world. At least, under EU-led Proposal public administrations would have timely information that would allow them, for instance, not to register trademarks containing such GIs, as prescribed by Article 23.2 TRIPS. As a result, usurpation should diminish and, in turn, litigation and administration costs would decrease. In any case, the last EU-led Proposal is the only one that would make GI protection easier to implement because registered GIs would benefit from a presumption of eligibility for protection; moreover, piracy would be discouraged. These two features seem benefit all parties: producers, consumers, and administrations.

The same dialectic is being still in connection with the issue of whether participation in the system should be voluntary or mandatory; and whether allowing countries to opt out of the system entirely conforms to the “multilateral” description in the mandate. Some WTO Members interpret the reference in the mandate to “a multilateral system” to mean that the system should apply to all. By contrast, other WTO Members interpret the words “those Members participating in the system” to mean that not all Members are expected to participate. This raises the issue of whether a system based on voluntary participation could bind WTO Members once a GI has been registered. The logical answer seems to be that a voluntary system could only bind participating WTO Members.

From my point of view, the use of the words “those Members participating in the system” does not necessarily mean that participation must be voluntary. Due mainly to efficiency reasons, an ideal system would require all WTO Members to participate, even if a literal reading of Article 23.4 only establishes a voluntary parti-

ciatory system.<sup>70</sup> Otherwise, a system whereby GIs are recognized and protected in some WTO Member markets, but not in others, would surely create legal and economic uncertainty, thus undermining the objective of the TRIPS protection. We must not forget that Article 23.4 TRIPS calls for the establishment of a multilateral system of notification and registration of GIs. And a multilateral system can only be understood as requiring all parties to be bound to protect registered GIs. Unlike plurilateral trade agreements, which bind only signatories, a multilateral system should be understood as including all WTO Members.<sup>71</sup> Therefore, in the lexicon of the WTO, “plurilateral” must be understood as referring to a system in which participation is entirely voluntary, whereas “multilateral” should be understood to bind all Members<sup>72</sup>. Certainly, the phrase “Members participating in the system” at the end of Article 23.4 TRIPS Agreement seems to refer to voluntary participation. But, in my opinion, this reference can be interpreted as meaning no more than those WTO Members who chose to participate by registering their GIs in the system. Under this interpretation, a participating WTO Member would still be obligated to afford protection to GIs registered by other countries, even though it chooses not to register its own GIs. Nonetheless, the protection of registered GIs must be obligatory for all by virtue not only of the mandate of Article 23.4, but also via the other provisions of Part II, Section 3, particularly Article 24.1 TRIPS Agreement<sup>73</sup>. According to this interpretation, this provisional intersection results in a system of obligatory GI protection for all because Article 24.1 TRIPS Agreement prohibits any

70 See art. 23.4 TRIPS Agreement. Indeed, this position is supported by its wording: “...eligible for protection in those Members participating in the system”, *Id.*

71 The Agreement establishing the WTO expressly affirms that although the four Plurilateral Trade Agreements (Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement and the International Bovine Meat Agreement) are part of the WTO Agreement, they create neither obligations nor rights for Members that have not accepted them.

72 WTO Council for TRIPS, Special Session, *Minutes of Meeting*, doc. TN/IP/M/4, Feb. 6, 2003, para. 21.

73 From a general perspective, it must be recalled that the WTO Agreement has eliminated the imbalances caused by the collateral agreements, also referred to as “Codes,” concluded after the Tokyo Round (1973–1979), which, in most cases, differentiated the norms and procedures for decision-making and dispute resolution and whose acceptance among the Contracting Parties was limited. However, some free-rider countries, i.e. countries which have assumed only the minimum level of obligations have tried to benefit from the Most Favored Nation (MFN) clause of Article I of GATT, demanding the advantages resulting from these Codes, which they themselves have ignored. To avoid these imbalances, Article II.3 of the WTO Agreement states specifically that the MFN Clause is not applied to the four Plurilateral Agreements. It must be observed, however, that nothing equal has been established in the section of the TRIPS Agreement in relation to GIs protection. Therefore, if we admitted that the multilateral register of GIs only must bind participant countries, nothing in it would prevent the other WTO Members from demanding the application of the MFN Clause established specifically in TRIPS, Article 4.

country from refusing to negotiate to improve the protection of individual GIs<sup>74</sup>. Thus, it would seem that the notification of a GI to the future register could be equivalent to a request to open negotiations.

Last but not least, it remains the question of the register scope: If the register must cover only wines and spirits or more. The Joint-Proposal group and some others say there is no mandate to extend the system to other products and to link these talks to this topic in order to extend to other products the higher level of protection now given to wines and spirits ("GI extension"). However, other WTO Members, among them, the EU-led group and China, are insisting that the multilateral register must not discriminate in favour of wines and spirits. Nowadays, it seems that interventions on this aspect are keeping relatively low-key on both sides due mainly to the mandate in this forum, which is limited to negotiations on the establishment of a multilateral system of notification and registration of GIs for wines and spirits. However, the drafting group spent considerable time in talking about whether or not the composite text should be neutral with respect to possible GI extension or not, without any definitive result.

Independently of the register negotiations, the expansion of Article 23 TRIPS-type protection of GIs for products other than wines and spirits is the second battleground in the WTO<sup>75</sup>. Indeed, a large group of countries ("GI-Friends Group") continue requiring the elimination of the existing imbalances in the GIs protection, applying the level of protection enjoyed at the present time by wines and spirits (Article 23 TRIPS) to all other products<sup>76</sup>. Proponents for extension claim that the higher protection of GIs for wines and spirits is a discrimination, which could be corrected by extending that protection to GIs for other products. Accordingly, they propose that Article 23 should apply to GIs for all products and Article 24 exceptions should apply *mutatis mutandis*. Moreover, the multilateral register to be negotiated for GIs for wines and

74 Art. 24.1. TRIPS Agreement.

75 The issue of extension was discussed in the regular session of the TRIPS Council up to the end of 2002. Thereafter, it has become the subject of consultations chaired by the Director General of the WTO. The Doha Declaration notes in its paragraph 18 that the TRIPS Council will handle work on extension under the declaration's paragraph 12 (which deals with implementation issues). Paragraph 12 says "negotiations on outstanding implementation issues shall be an integral part" of the Doha work programme, and that 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." Delegations interpret Paragraph 12 differently. Many developing and European countries argue that the so-called outstanding implementation issues are already part of the negotiation and its package of results (the "single undertaking"). By contrast, other countries argue that these issues can only become negotiating subjects if the Trade Negotiations Committee decides to include them in the talks — and so far it has not explicitly done so.

76 See Joint Statement by the GI-Friends Group, doc. TN/C/4, 13 July 2004.



spirits should apply to all GIs<sup>77</sup>. By contrast, the Minimalist Group hold the view that this discrimination could as well be corrected through suppressing Article 23 and limiting the protection of GIs in all sectors to that provided by Article 22.

The merits of extension have been extensively debated<sup>78</sup>. The divide in the talks is the same as in the negotiations on the multilateral register, namely, the EU, other European countries and a huge number of developing countries on one side. They defend that GIs Register and GIs Extension should be pushed forward in parallel and GIs Register should cover all products to avoid further discrimination against GIs for products other than wines and spirits. On the other side, the same countries that sponsor - or expressed sympathy - for the Joint Proposal, together with some other developing countries. The debate revolves around issues such as the possible benefits of GI extension to GI right holders; the cost for non-GI holders; the costs for consumers; and the impact of extension in third markets.

It can be useful to try to investigate the reasons of this differential treatment. About this, it can only be explained in the light of negotiations of the Uruguay Round. The relevant TRIPS provisions are the result of trade-off which was specific to the circumstances prevailing at the time of the Uruguay Round negotiations, in particular during the Brussels Ministerial Conference in 1990. This was, to some extent, due to the link at that time between the negotiations on GIs and the negotiations on agriculture<sup>79</sup>. Today, however, there are no economic or systemic reasons for protecting

77 See WTO documents TN/C/W/14/Add.2, JOB(05)61/Add.2 and TN/C/W/26.

78 A compilation of issues raised and views expressed is contained in WTO doc. TN/C/W/25-WT/GC7W/546.

79 See, Blakeney (1996), 6.08; Stewart (1999), 1993: these authors state that the additional protection for wine and spirit GIs is due to an attempt to reconcile during the Uruguay Round, on the one hand, the European position, favourable to establishing an ample protection of GIs and, on the other, the US position, confining protection exclusively to wine sector. Even, some commentator argues that the absolute protection standard was 'granted solely for the political reason of persuading the EC to join consensus on the Uruguay Round', Das (2006), 459-495. As of this writing it is unclear whether this was to persuade the EU or rather the European Proposal itself lacked ambition, lacking to propose extension GIs protection for all products. This view is based in the EU first proposal (1988), which presented the enhanced protection only for wine, see, GATT doc. MTN.GNG/NG11/W/26, 7 July 1988, "Guidelines and Objectives proposed by the European Community for the Negotiations on Trade-Related Aspects - Substantive Standards of Intellectual Property Rights". The same prevalence for wine GI protection was proposed by the European Proposal presented in 1990, see, GATT doc. MTN.GNG/NG11/W/68, 29 March 1990, Draft Agreement on Trade-Related Aspects of Intellectual Property Rights. Article 20 of this Proposal established: "... Where appropriate, protection should be accorded to appellations of origin, in particular for products of the vine, to the extent that it is accorded in the country of origin" (emphasis added), while Article 21 established: "... Appropriate measures shall be taken under national law for interested parties to prevent a geographical indication from developing into a designation of generic character as a result of the use in trade for products from a different origin, it being understood that appellations of origin for products of the vine shall not be susceptible to develop into generic designations" (emphasis added).

GIs for certain products differently from others. As the EU-led Group has stated, the risk of confusion between products originating in a specific region is important and damaging for any GIs, not just for wines and spirits<sup>80</sup>. The economic and political significance of GIs is growing as increasing quality awareness and higher quality requirements promote the demand for products of a specific geographical origin. The added-value of exported goods increases the chances for such legitimate goods to reach the market, which is part of the global vision for a multilateral trading system. That is why, since the end of the Uruguay Round, the awareness of the need for an extension of additional protection to products other than wines and spirits has continuously increased and spread among WTO Members<sup>81</sup>. The EU-led Group thinks that protection currently provided for GIs for products other than wines and spirits is inadequate; it does not prevent products whose names are ineligible for the GI from free-riding on the reputation of genuine GIs, which harms legitimate producers. In this author's view, extension would provide an adequate level of protection to GIs for all products. Extended GI protection could facilitate product identification by the consumer, and consumer choice could be enhanced. Extension would open new market opportunities by preventing trade distortions<sup>82</sup>. The benefits resulting from extension would foster the development of local rural communities and encourage a quality agricultural and industrial policy. As is the case for products protected via trademarks, those benefiting from adequate GI protection would be in a better position to benefit from an enhanced access to third-country markets. As such, a strong GI regime would bring economic benefits to producers worldwide, and not only to producers in countries where the local protection of GIs is already stronger than in the WTO.

Against this background, it is necessary to emphasize that GI extension does not aim at requiring that terms and indications which are considered generic today be re-appropriated. The exceptions provisions of Article 24.6 would continue to apply to such indications. The goal of the extension would be to prevent GIs, which are not generic, from becoming generic. This extension would also seek to solve once and for all other disadvantages resulting from the insufficient protection provided by Article 22 TRIPS, such as the burden of proof required under that provision to defend

80 WTO Doc. IP/C/W/353, 24 June 2002.

81 The call for extension of additional protection for GIs to products other than wines and spirits has been required from time to time, see e.g. WTO Doc. IP/C/W/247/Rev.I. Nowadays, it is one of the main elements of the EU-led Proposal, where this question is asked as an integral part of the Single Undertaking. These countries require amending the TRIPS Agreement in order to extend the protection of Article 23 of the TRIPS Agreement to GIs for all products as well as to apply to these the exceptions provided in Article 24 of the TRIPS Agreement *mutatis mutandis*.

82 WTO Doc. IP/C/W/353, 24 June 2002.

a GI against misuse, unlike under Article 23, with regard to wines and spirits. The administrative costs of this extension are negligible, because governments already apply this type of protection to wines and spirits, as required by Article 23. Extension affects how the laws should protect GIs, so it is essentially a norm-setting issue that does not determine the form of implementation which, according to Article 1.1 of the TRIPS Agreement is left to each WTO Member.

In summary, the rationale of the extension is that GIs for all products deserve the same level of protection as that which applies currently only to wines and spirits. In order to establish such uniform protection for all products and extend the additional protection of Article 23.1 of the TRIPS Agreement to other products, some WTO Members have proposed to remove the reference in Article 23.1 of the TRIPS Agreement to wines and spirits, and to prevent the use of a GI “identifying products of the same category” not originating in the place referred to by it. With extension, existing imbalance in Part II, Section 3, will disappear, providing the same level of effective protection to GIs for all products.

However, the Joint Proposal Group have strongly opposed extension, partly because no evidence has been provided in their opinion showing that protection currently available with respect to GIs for products other than wines and spirits is inadequate. The other reason for objection is that the cost of extension would be considerable and no benefits were offered in the Uruguay Round to assume the obligations that the extension would entail.

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## 5. CONCLUSIONS

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To what degree should GIs be protected by international law? What is the best way to protect at international level the names of well-known products, such as Rioja wine or Idaho Potatoes, which have a reputation known by consumers around the world? Do current international rules provide sufficient safeguards, or should governments implement another system of more effective protection? These are the questions that need to be solved by WTO Members in the framework of TRIPS Agreement Built-In Agenda. The peculiarity of GIs debate being that chiefly exhibits not so much the North–South division, but rather a less common and more interesting split: that between the New World and the Old World. And the difficulty is perhaps that GIs stand at the intersection of three increasingly central debated issues in international law: trade, intellectual property and agricultural policy<sup>83</sup>. To

83 In fact, the EU submitted in 2004 a proposal in the context of WTO agriculture negotiations that is relevant to GIs debate. It concerns a list of names that, in the EU constitute GIs but that in other

enhance GIs protection seems to emphasize the importance of local culture and tradition in the face of globalization.

It is true that TRIPS provisions offers legal instruments for the protection of future GIs, while also protecting illegal uses before it went into effect<sup>84</sup>. Although these provisions undoubtedly represent a considerable improvement with respect to that which existed under WIPO, TRIPS did not create a complete protection system. Quite the contrary, these provisions continue generating considerable legal uncertainty. This is also true with regard to the existing imbalance between protection levels, leading to an additional protection for wines and spirits, as compared to other products.

For these reasons, the work on TRIPS is far from finished and the debate between new and old world continues to be divisive in the furtherance of TRIPS' goal of protecting IPR and global economic interests. By virtue of the program incorporated into the text of the Agreement, provisions relative to GIs protection of GIs must evolve towards a more effective model of protection. However, in spite of the major concessions and the huge efforts made by some WTO Members and the positive movement to review their previous positions so that to put an end to the deadlock that has continued for so many years, the 2010 Report of the TRIPS Council President reveals that doubts persist and there remain fundamental differences about the key issues of participation and the consequences/legal effects of registrations, even if there has been some movement in the past months towards a single document for discussion, identifying elements of convergence emerging out of the ongoing discussions.

The Register should be an accurate, reliable and authentic source of information. However, WTO Members sponsoring the minimalist approach do not consider acceptable the legal presumption for a number of reasons: firstly, it would increase GIs legal protection, and this would be outside the scope of this negotiation, which

countries are used generically to indicate a type or kind of product. The proposal aimed to "claw back" such names by reserving their use for EU producers in the geographical locations. Some other WTO Members argued that the Doha text on Agriculture did not provide a mandate for such a proposal. The proposal intended to be complementary to the work on GIs in the context of TRIPS on the Doha Work Program. Now, it seems that the link between agriculture negotiations and GIs protection does not exist anymore according to revised draft modalities for agriculture, TN/AG/W/4/Rev.2, 19 May 2008.

84 It could be said that the "sins of the past," the expression so often used to talk about the first legislative developments relative to GI protection, still have not been purified. This expression has often been used to describe the incapacity of the first international legislative developments to prevent GIs become generics. This expression is mentioned often by scholars, see, e.g., Gervais (2003), 203; Krieger (1974), p. 406; Knaak (1996), 116. But see Dawson (2000), 599; who states: "this must be seen as a bargaining position, not a crime and still less a sin".

is only about facilitating protection; secondly, it would violate the principle of territoriality; and, thirdly, it would alter the balance of rights and obligations in the TRIPS Agreement<sup>85</sup>. In spite of this criticism, we think that only the EU-led Proposal could contribute to facilitate multilateral GI protection as Article 23.4 TRIPS Agreement prescribes because it struck a balance between different interests and would be the appropriate tool towards a register which would truly facilitate GI protection, and not duplicate what would already be available on the Internet system.

As an overall assessment, a lack of dynamism and an unwillingness of some WTO Members to advance questions established in the Built-In Agenda are the qualities that best describe the negotiations until recently. This paralysis is made more evident when these negotiations are compared with the Uruguay Round, where there was considerable pressure<sup>86</sup>. It is true, however, that although the fundamental positions have not changed, it seems that there is a genuine and sincere desire on the part of WTO delegations to move forward and resolve the remaining differences in these negotiations, so as to be ready to contribute to any movements in the wider context of the Doha Round negotiations. Against this background, the draft presented recently by a group of negotiators with a complete text on the proposed multilateral register for GIs looks certainly promising, representing apparently a swift result as it could be a basis for moving ahead after 13 years of talks.

While several issues are important to that negotiation, including inter alia the issues of participation and the important area of special and differential treatment, from our point of view the issue of legal effects or consequences of registration is the stumbling block. In order to get real progress, there is a need for that negotiating group to depart from rhetorical debates, concentrating to narrow down differences and real challenges, which still lie ahead. Thus, the ongoing drafting seems fragile and delicate and the process is still a work in progress. As of this writing it is unclear whether the current effort to expand GI protection in the Doha Round will succeed. Be that as it may, we argue that GI protection in international law is justifiable for many reasons: primarily, to protect consumers against confusion; and next, to protect producers against misappropriation. A fortiori, further expansion of the wines and spirits standard to new products, as currently sought by European and other states in the Doha Round, is justified as well.

85 See, WTO Council for TRIPS, Special Session, *Minutes of Meeting*, TN/IP/M/25, Mars 4, 2010.

86 The WTO Agreement is a reflection of the single undertaking embarked upon in the Uruguay Round of multilateral trade negotiations: a negotiating package consisting of subjects put forward by the various trading partners, which, when negotiated on their own, would not likely have led to a successful outcome among all trading partners. This negotiating package had to be adopted as a whole, i.e., "nothing was agreed until everything was agreed."

From a general perspective, it is apparent from recent debates that developing countries are becoming aware of the importance of GIs as instruments that contribute to the development of their economies. In addition, when approaching the negotiations of the Built-In Agenda, TRIPS Council is forced to take into consideration the repercussions from the perspective of commerce and development of developing countries. To approach these repercussions in the context of GI protection means that it cannot be denied that a certain number of developing countries attribute enormous importance to GIs enhanced protection.

Finally, another factor which could influence these negotiations is the pressure exerted by some developing countries to establish a mechanism for the protection of traditional knowledge within the framework of IPR, given the important contribution to the development objectives that the protection of this knowledge can make. The concession of patents or other IPR on this knowledge to people other than the population that originated - and who must exert the legitimate control over those rights - as well as use of the knowledge without the authorization of indigenous communities and, what is more serious, without their participation in the benefits derived from that use, generate increasing preoccupation in more and more developing countries. Consequently, they demand the establishment of international measures of protection. Considering that most of these products are made following traditional and historical methods which enjoy a quality, a reputation or other characteristic that can be essentially attributable to its geographical origin, the products could benefit from protection through GIs. At least, they could play a complementary task in their protection, being interesting to examine their role in the context of the Convention on Biological Diversity<sup>87</sup>. In fact, European-led Proposal contemplates the TRIPS amendment in order to require in patent applications the disclosure of the country providing/source of genetic resources, and/or associated traditional knowledge.

All this means that pressure exerted by these countries can certainly help to conclude negotiations. From this perspective, future seems to be not discouraging due mainly the movements in the locus of power in global trade negotiations. Focusing only on TRIPS, post-Uruguay Round negotiations are witness to a changing constellation of Global South members, which sees them able to stall negotiations (e.g. Cancun), achieve outcomes (e.g. Doha Declaration on Public Health) and also set agendas (e.g. GIs in the Doha Round). The growing interest of a coalition of Global South members in GIs opens up a different canvas of concerns. Otherwise, persistent resistance by the Joint Proposal Group may communicate an unfortunate message to those countries about TRIPS regime.

87 Adopted 5 June 1992, A/CONF.151/26,31 *ILM* 818 (1992). Available at <http://www.cbd.int> (last visited March. 16, 2011).

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