

# **THE TRIPS AGREEMENT, THE BILATERAL AGREEMENTS CONCERNING GEOGRAPHICAL INDICATIONS AND THE PHILOSOPHY OF THE WTO\***

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## **Summary**

The philosophy of the World Trade Organization (WTO) agreements is to implement a liberal world regime on trade. This aim goes beyond the national frontiers and has several effects on the legal system established by the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), especially concerning the Intellectual Property Rights territorial principle. In the TRIPS agreement, geographical indications have the legal regime possible according to the WTO trade-off mechanism. However, several bilateral agreements on trade in wine have tried to enhance the level of protection of geographical indications, specially phasing-out generic or semi-generic geographical names, and regarding the relationship with trademarks. However, we must take into account that, if geographical indications are intellectual property rights (that is, private rights), they have a very unique public sphere that implies a particular legal regime different from the other market distinctive signs. This uniqueness must be recognized in the bilateral agreements and in the TRIPS agreement, in order to guarantee free trade, trade loyalty and consumer protection in a world free trade economy (that is turning into an intangible economy).

## **Keywords**

WTO; TRIPS; geographical indications; bilateral agreements; intangible economy.

## **1 – Introduction.**

The World Trade Organization (WTO) and its several agreements wish to establish a liberal trade world system. This economic philosophy, however, has legal effects, namely on the Agreement on Trade Related Aspects of Intellectual Property (TRIPS). Nevertheless, these economic beliefs – that want to be the only possible model – are far from being equal and fair and even after the Doha Development Agenda it does not want to talk about fraternity.

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With this view of thinking the world economy (that is turning into an intangible economy), the TRIPS agreement and its trade-off policy could only reach a level of protection that is in accordance with the economic interests that are at stake. We could never have the same level of protection for all intellectual property rights. Geographical indications are a very good example of this, as we will see. Several bilateral agreements on trade in wine have tried to enhance the level of protection of geographical indications, but they are far removed from the level that is conceded to other intellectual property rights.

Finally, geographical indications are intellectual property rights, but its contents are not entirely private, rather are of a very unique public sphere. This must not be forgotten as we cannot forget the high level of protection – without exceptions – that is conceded worldwide to other intellectual property rights.

## **2 - The World Trade Organization and the TRIPS agreement philosophy.**

The aim of the WTO agreements is to implement a liberal world regime on trade. This intent goes beyond the national frontiers and has several effects on the legal system established by the TRIPS agreement.

After the II World War it was necessary to find mechanisms of international cooperation and international trade discipline. According to the Havana Charter an International Trade Organization was foreseen, but it never came into force. Instead the General Agreement on Tariffs and Trade (GATT) was implemented. In the course of several Rounds the member states felt that the GATT was not enough, it was crucial to control other areas besides international trade policy. New technologies, services, agriculture, environment, investment and intellectual property, were discussed during the Uruguay Round and became part of the WTO.

International trade of products and services that include trademarks, patents (including the protection of new varieties of plants), copyrights and related rights, geographical indications, layout-designs of integrated circuits or other intellectual property rights had considerably increased – we are in the presence of an intangible economy. So it was important to get international rules on these matters in order to avoid barriers to trade. These barriers to trade could result from a missing national discipline on intellectual property or from a non-effective international regulation. Of course the developed countries were the most interested in this field, trying to get new mechanisms to fight piracy or the counterfeiting of products (specially after the Tokyo Round and relating particularly to the new industrialized countries) as well as to put into practice a new intellectual property attitude or approach.

This new approach to intellectual property signified the establishment of minimum standards of protection to be provided by each member in an attempt to get an international harmonization. Each of the main elements of protection is defined, for example the subject-

matter to be protected, the rights to be conferred, the minimum duration of protection, etc. In order to assure that this substantive protection is not disrespected the TRIPS agreement has additional rules concerning the acquisition and maintenance of intellectual property rights. In second place there are several measures concerning enforcement: member states must adopt domestic measures and remedies for the enforcement of intellectual property rights. The TRIPS agreement even contains civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which identify, in great details, the procedures and remedies that must be offered so that the rightful holders can successfully enforce their rights. Finally, the WTO's dispute settlement procedure applies to the disputes between member states about the respect of the TRIPS obligations.

The aim of the WTO is to put into operation a liberal world regime on trade, so what is important in the TRIPS agreement is that intellectual property will not become a trade barrier to free international trade. But free international trade that will favour the interests of those that control the international trade mainly using the intellectual property system, that is, an intellectual property model that underlines some intellectual property rights in detriment of other intellectual property rights. An intellectual property model that is exported to other countries, imposing standards of protection and specially mechanisms for enforcement.

In Seattle (1999) in the intellectual property field, the industrialized countries wanted that the developing and least-developed countries law system be in compliance with the TRIPS agreement. They also wished to get a higher level of protection concerning patents of pharmaceutical and biotechnological products and the prohibition of parallel imports. However this ministerial conference was a disaster. At the IV ministerial conference (in Doha, 2001) the TRIPS agreement was one of the main worries. The main idea was to adjust the TRIPS agreement to the interests of the developing countries. In this sense, the Doha Development Agenda emphasizes the need to implement the TRIPS agreement in a manner supportive of public health (promoting both access to existing medicines and research and development into new medicines), the necessity to establish a multilateral system of notification and registration of geographical indications for wines and spirits as well as the obligation to extend the higher level of protection (concerning geographical indications related to wines and spirits) to other products, and finally the Doha Development Agenda says that work must be done relating to the connection between the TRIPS agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore.

The Doha Development Agenda is very far from being accomplished (in Cancun there was no consensus but the developing countries showed some light of their power). The TRIPS agreement corresponds to the will of the developed countries that had the opportunity to impose their model to the new industrialized and developing countries in a great trade-off fair, that is a "trade forum where everything can be exchanged for everything" and where the

technology transfer was a lollipop. Intellectual property was conceived simply as a trade measure, an instrument of the economic power and the dominant economic interests.

Taking this in mind we can understand the TRIPS discipline concerning geographical indications.

### **3 - Geographical indications in the TRIPS agreements.**

In the TRIPS agreement, geographical indications have the possible legal regime according to the WTO trade-off mechanism. It is interesting to note that the issue geographical indications was not a quarrel “North–South“ but a “North–North“ dispute. However, after the Doha Development Agenda that issue is turning also to be a “North-South” disagreement.

We may identify three main differences between the proposals of the European Union (including other countries like Switzerland) and the proposals from, for example, Australia and the US.

Firstly the definition of geographical indication does not expressly refer to appellations of origin or designations of origin, but it adopts a new concept that covers a broader scope than appellations of origin. This is a very good example of approach between different groups of industrialized countries and how this definition of geographical indication became so useful to developing countries.

Secondly, and looking at the whole rules concerning geographical indications, we can conclude that geographical indications are only conceived as an exclusive right in the case of wines and spirits and without taking into account the several exceptions or limitations to this intellectual property right. The geographical indications relating to the other products are regarded as a “negative right” or a right to prevent, rather than a positive right, such as a right to authorise use. In fact, not bearing in mind the additional protection for geographical indications for wines and spirits, it is difficult to “see” the geographical indications as an exclusive right. But even taking into consideration this additional protection concerning geographical indications for wines and spirits, we must read all the restrictions and “safeguards” that the TRIPS agreement allows and we may conclude that this exclusive right is not so exclusive. Indeed, if negotiators accepted the proposals of some wine-producing countries, particularly in the European Union, that wished a higher level of protection for wines and spirits than the model applied to geographical indications in general, the TRIPS agreement sets up quite a lot of exceptions or restrictions that allow the maintenance of past “sins”.

Thirdly, there were (and still are) different opinions concerning the establishment of a system of notification and registration. The European Union in 1990 had proposed a system of registration that was not accepted by other countries. It was only possible, in order to save the agreement as a whole, to stipulate further work.

In this sense, considering the “safeguards” or restrictions that the TRIPS agreement adopts and that there was no agreement in the establishment of a system of notification and registration, it is difficult to put on the same “level” geographical indications and the other intellectual property rights covered by the TRIPS agreement. Geographical indications don’t have the same standards of protection and enforcement as copyright, trademarks, patents or layout-designs of integrated circuits. Some of these intellectual property rights correspond to the industrialized countries model and was imposed to the world, that is, to the developing countries. It is not necessary to delve to the bottom of some details concerning pharmaceutical or biotechnological patents to understand that several developing countries had to change their laws against their economic interests or even the public health values. But this is another issue that is very far removed from wine.

Coming back to the Doha Development Agenda and the Ministerial Conference in Cancun and restricting our analysis to geographical indications, we may wonder why there was no agreement in the establishment a multilateral system of notification and registration of geographical indications for wines and spirits as well as the extension of the protection of geographical indications related to wines and spirits (the higher level) to other products? And why there is no agreement in the protection of traditional knowledge and folklore? Is that because this is not simply a dispute between “North and South” but particularly “North-North” disagreement? In fact, when it was necessary to “export” a model (the industrialized countries model) to protect and enforce patents or copyrights in order to put an end to piracy and counterfeiting products (in the name of a free and loyal trade), there was no problem; the trade-off policy solved any difficulty.

But, perhaps it is better to think that this is not true and that perhaps the bilateral agreements’ mechanism is a good way of increasing the protection and enforcement of geographical indications.

#### **4 - Bilateral agreements.**

Not forgetting the Most-Favoured-Nation Treatment, bilateral agreements may be a good instrument to develop the international system of intellectual property. In the past some of the achievements in the intellectual property domain were conquered using this tool. The US has made use of this mechanism – especially after the famous Section 301 or the Special 301 of the US Trade Act – in order to impose to the negotiating country modifications in its juridical and judicial system in a way that it gives higher protection to intellectual property rights; of course to the intellectual property rights that are the most important to the US economy. Geographical indications are not part of this US intellectual property package.

This means that bilateral agreements in the field of intellectual property, including geographical indications, can only be conceived if it provides a level of protection that is

higher than the one that is established in the TRIPS agreement. Otherwise the bilateral agreement would be good-for-nothing.

In this sense bilateral agreements maybe a good tool to supersede the territoriality principle. In the intellectual property domain the accomplishment of a free international trade and the achievement of a multinational enforcement would suppose that the territoriality principle could be set aside. However, it is the national law system that creates and recognises the exclusive intellectual property right and it is the national law system that determines the boundaries of the exclusive right. Taking into account that the TRIPS agreement has not created truly international intellectual property rights that could renounce its national or territorial connection, the international trade development demands from the intellectual property rights holders the use of the national law system of each country in order to protect their exclusive rights. In a globalized economy, the intellectual property rights' territorial nature, the national law systems independency and the courts territorial power, does not allow multinational decisions or decisions that have effects in several countries and demands, instead, a great effort from the right holder and it may generate contradictory decisions that can have negative effects on international trade.

This means that bilateral agreements are very important. They are an essential tool to fight piracy and the counterfeiting of products. In the geographical indications field we can still find several examples of piracy, specially concerning prestigious geographical indications. This piracy must stop. It is not only the consumer flag that must be waved, but also the trade loyalty (particularly in a multilateral trade that we live today), the respect for traditional knowledge and the investment that each demarcated region makes in the production of quality products and their international promotion. All of this demands the international protection and enforcement of geographical indications, mainly through bilateral agreements. All of this demands the end of piracy in the geographical indications field.

Bilateral agreements concerning geographical indications must concede a level of protection higher than the TRIPS agreement, and it must have stricter rules regarding the relation between geographical indications and trademarks. Finally, those bilateral agreements must take into account that geographical indications are exclusive rights with their own content and characteristics. Geographical indications are market distinctive signs, but are different from trademarks, for example. Particularly we must stress that geographical indications benefit from an important public sphere.

## **5 - Geographical indications' public sphere.**

Geographical indications are an extraordinary competition tool (as long as a lawful competition is assured) at the service of the producers and traders from a specific region but

they also contribute in a decisive way to the safeguard of consumers' interests (assuring them quality products).

In fact, geographical indications are means of consumer protection, of quality assurance, of conservation of the environment and support of fair competition. Geographical indications, and specially appellations of origin, assure the consumer that the product holds a certain number of qualities and characteristics, this is to say, that the product is in accordance with a specific regulation and complies to a certain number of specifications whose fulfilment is ensured by a body responsible for its control (which must be impartial and objective). This function of quality guarantee is assured as long as cases of imitation and usurpation are properly attacked. In this sense, the consumer will be protected and will not see his preference for quality products with a specific geographical origin defrauded. In the presence of a certain product bearing an appellation of origin, the consumer not only sees a product originating from a certain place and therefore having a certain number of characteristics, but above all he sees a product with a superior degree of quality, with strictly controlled production stages.

Geographical indications, and appellations of origin in particular, not only guarantees the product's quality and origin, but also contribute to the defence, added value and respect for the rural world as well as the promotion and conservation of the environment and its specific productive characteristics. Finally, both appellations of origin and geographical indications have been recognised as a means of protecting the traditional knowledge and folklore, which is to say, a People's culture.

As previously stated, appellation of origin and geographical indication besides satisfying consumers' interest are also tools at the service of producers and traders. They are competition tools. While trademarks are usually owned by a single entrepreneur and consequently used only in the satisfaction of his exclusive interest, appellations of origin and geographical indications are common property (being an example of collective property) of the producers and traders of that specific and determined region. Indeed appellations of origin and geographical indications are, in their juridical nature, very special. They are distinctive signs, they are industrial property rights, but they are not property of one single person or association or public institution. Appellations of origin and geographical indications, in our opinion, do not constitute a type of co-ownership or roman common property, but the German type of common property (the *Gemeinnschaft zur gesamten Hand*), that is, a communal property. This means that the appellation of origin or the geographical indication belongs to several persons, to a collectivity of persons who are the owners of the appellation. The use and fruition of the appellation belongs to the whole collectivity, that is, to all producers and traders of the demarcated region whose products comply with the established rules.

This means that geographical indications and particularly appellations of origin perform a function or several functions, profit from a juridical content and a juridical nature that qualifies these intellectual property rights as promoting a public dimension that is not present

in the same way in other intellectual property rights. And this must be taken into account when we are negotiating bilateral agreements or we are playing at the WTO business round-table.

## **6 – Conclusion.**

In order to obtain fair trade, to put a stop to imitations, usurpations or counterfeiting products, to protect the consumer in a world of a free trade and communication we must achieve a level of protection and enforcement to geographical indications similar to what is established for the other intellectual property rights. The fundamental reasons are the same, the economic interests are equal, and the public dimension is, in some cases, even stronger, only the negotiating countries involved are different. But this is not a justified reason.

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