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# Trips Agreement and Extended Protection of Geographical Indications

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## ABSTRACT

*This research paper addresses the issues relating to the augmentation of the protection of Geographical Indications under the Trade related aspects of intellectual Property rights (TRIPs). Geographical indications are an apparatus of Intellectual Property which includes the goods and services that are distinguished by the place of their origin. This place of originality can be based on their environmental, historical, social or cultural explicitness. It is because of the signing of the TRIPs agreement, that the Geographical Indication has been provided an international place as one of the Intellectual properties. And now, it has become one of the most salient areas within the World Trade Organization (WTO). But still, As far as this is considered, the protection of Geographical Indications at the international level is away from being satisfactory, as, except for wines and spirits, it is easy to abuse and exploit the other products or services. The special protection provided to wines and spirits under Article 23 of the TRIPs agreement is quite contentious in nature. As a result of which a weaker mechanism of protection is provided to the other products. This research paper aims to explain the relationship between the TRIPs and the geographical Indication of various products based on the place of their origin. Also, the research paper seeks to describe how far the TRIPs agreement helps in the protection of the Geographical Indications of other products, beyond wines and spirits as mentioned under article 23 of the TRIPs agreement.*

**Keywords:** *TRIPs, Geographical Indications, Intellectual property rights, Wines and Spirits, Extended protection*

## I. INTRODUCTION: TRIPS AGREEMENT

The trips agreement, also known as Trade Related aspects of Intellectual property Rights, came into existence on 1 January, 1995. It is an international agreement between all the nations who are the members of the World Trade Organization. The World Trade Organization is an intergovernmental organization that regulates and facilitates international trade between nations. The Trade related aspects of intellectual property rights is a product of such

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organization. The TRIPs agreement is a minimum standard agreement which sanctions the member nations to provide more substantial protection of Intellectual Property, if they so wish. The scope and objective of TRIPs agreement is found in the preamble and Article 1.

According to Article 1 of the TRIPs agreement,

“Members shall give effect to this agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by the agreement, provided that such protection does not contravene the provisions of this agreement. Members shall be free to determine the appropriate method of implementing the provisions of this agreement within their own legal system and practice”

This provision provides a defense against demands for higher levels of protection or for ignoring the transitional terms provided for by the agreement.<sup>2</sup> This means that the agreement cannot be considered to be fully independent in its applicability but instead to be used as an interdisciplinary instrument which provides additional protections for Intellectual property rights (IPRs). Members can flexibly execute the provisions of the agreement accordingly to their country’s legal approach, which implies that the member cannot be compelled to provide ‘more extensive’ protection but also on the other hand, the member countries cannot confer a lower level of protection provided under the agreement. This determination of scope and purpose of an agreement is vitally important as it harmonizes the structure in which a treaty is supposed to set out and function. And that the signing member countries can also comply with the provisions. The compliance of the signatory parties implies that the countries are ready to observe the treaty in good faith<sup>3</sup> and shall give effect to the same. The comprehensiveness of the execution of the agreement is determined by the scope of such agreement.

Article 1.2 of the TRIPs agreement states that “For the purpose of this agreement, the term ‘Intellectual Property’ refers to all categories of Intellectual property that are the subject of Sections 1 through 7 of Part II.” So, the ambit of TRIPs Agreement is contemplated to include Copyright and related rights, Trademarks, Patent rights, Industrial designs Geographical Indications, the layout-designs of integrated circuits, undisclosed information, the anti-competitive practice in contractual licenses and other rights as stated in Part II of the TRIPs agreement. These grouping of Intellectual Properties establish the extent of the general subject matter of the TRIPs agreement. The contents of Part II of the TRIPs agreement also reflect that the negotiating parties commenced their negotiations by seeking to regulate the Trade-Related

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<sup>2</sup> Carlos M. Correa, *Intellectual Property Rights, the WTO and developing countries: The TRIPs agreement and policy options*, Pg.no 8, Zed Books Ltd. (2000).

<sup>3</sup> *Pacta Sunt Servanda*, Vienna convention, article 26.

aspects of intellectual property rights and not intellectual property rights as such.<sup>4</sup> The scope of the TRIPs agreement further requires Member states to incorporate complex substantive legal standards into domestic laws.<sup>5</sup> Standards, floatation and the dispute settlement, are the three dominant attribute of the TRIPs agreement.

## II. GEOGRAPHICAL INDICATIONS

Geographical Indication (GI) indicates that particular goods originate from a country, region or locality and has some special characteristics, qualities or reputation, which is attributable to its place of origin.<sup>6</sup> The nexus between the product and the region becomes so eminent that when a person talks about a place, the product instinctively comes in the mind and vice versa. It is the place of origin of every product that helps in distinguishing the product from each other. Geographical Indication takes into account the quality of each and every product based on the area from where a product is produced or originated. After, it is established that a particular product or goods is emerged from that place, then such product is qualified to be registered as geographical indication and accordingly gets the Geographical Indication Tags. For a product to get itself registered as a Geographical Indication, it is important that the product derives its qualities and reputation from that place.

For example, the mention of the city of Tequila, Mexico spontaneously takes the mind of the people to the spirit Tequila that is produced there. A few more examples of Geographical Indication are Parmesan cheese, Swiss watches, Champagne, Cuban cigars, Cognac, Basmati for rice, Darjeeling Tea etc.

The Quality and characteristics of the product are exclusively and essentially derived from the geographical environment, including natural and human factors.<sup>7</sup> Geographical indication identifies a product as coming from a place where a given quality, reputation, or other element of goodness is due to its geographical origin. They do not give the right to control the use of certain information, but only limit the number of people who can use a particular brand. They are not freely transmitted from one owner to another and can be seen as long as shared culture is maintained. That is why Geographical Indication can be seen as a tool for the protection of Traditional knowledge. The Traditional knowledge can be defined as the knowledge,

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<sup>4</sup> Andrew Law, Patents and Public Health: Legalizing the policy thoughts in the Doha TRIPs declaration of 14 November 2001, Pg. no. 43, Nomos Verlagsgesellschaft mbH.(2008)

<sup>5</sup> *Ibid*

<sup>6</sup> Ahuja,V. Protection of Geographical Indications: National and International Perspective, journal of the Indian Law Institute, (2004), 46(2), 269-287. Retrieved March 31, 2021, from <http://www.jstor.org/stable/43951907>

<sup>7</sup> Suh, J., & MacPherson, A., The Impact of Geographical Indication on the Revitalization of a Regional Economy: A Case Study of 'Boseong' Green Tea.(2007) *Area*, 39(4), 518-527. Retrieved March 31, 2021, from <http://www.jstor.org/stable/40346073>

innovations and practices of indigenous peoples and local communities. Traditional knowledge includes knowledge of plants and animals and their protection, minerals and soil and their protection, combinations of organic and inorganic matters, process and technologies, means of enhancing individual health, means of maintaining social cohesion and social health, culture.<sup>8</sup> The concept of Geographical Indication and Traditional knowledge goes hand in hand.

### **III. TRIPS AGREEMENT AND GEOGRAPHICAL INDICATION**

The full fledged protection to geographical Indication was granted in four stages. Before the TRIPs agreement there were three other agreements that led to the need for the preservation of geographical Indication. For the very first time, the Paris Convention of 1883, in its Article 1, mentioned about the protection of source or appellation and prevention of unfair competition. Also, article 10 of the Paris convention provided for preventing direct or indirect use of a false indication of the source of goods or the identity of the manufacturer, producer or merchant.<sup>9</sup> Later, the Madrid agreement of 1891 additionally validated the provisions of the Paris Convention and further added upon that when a product is highly known and popular, reason being its place of origin, then the place can be used to describe the product together with its assurance of the quality. Though like Paris convention, the Madrid agreement limits itself basically to border measures, yet the scope of Madrid agreement is wider than that of the Paris convention.<sup>10</sup> In 1958, the Lisbon agreement finally defined an appellation of origin as the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.<sup>11</sup> Hence, it was for the first time through Lisbon agreement that in order to make certain the standard of a good, both natural and human factors were recognized. Following this was the TRIPs agreement in 1995, which made it mandatory for the governments of the countries ratifying the agreement, to provide legal opportunities in their own laws for the owner of the geographical indications, registered in their countries to prevent the use of the geographical name which falsely represents that the product comes from elsewhere.<sup>12</sup>

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<sup>8</sup> Sombir singh, Geographical Indication and protection of Traditional Knowledge, Retrieved April 15, 2021, [https://www.academia.edu/37160979/Topic\\_Geographical\\_Indications\\_and\\_Protection\\_of\\_Traditional\\_Knowledge](https://www.academia.edu/37160979/Topic_Geographical_Indications_and_Protection_of_Traditional_Knowledge)

<sup>9</sup> Jay shah, History of protection of geographical indication, retrieved April 15, 2021 at 2:46pm, from [https://www.academia.edu/9619472/History\\_of\\_Protection\\_of\\_Geographical\\_Indications](https://www.academia.edu/9619472/History_of_Protection_of_Geographical_Indications)

<sup>10</sup> Ahuja, V. (2004). Protection of geographical indication: national and international perspectives. *Journal of the Indian Law Institute*, 46(2), 269-287. Retrieved April 21, 2021, from <http://www.jstor.org/stable/43951907>

<sup>11</sup> Article 2(1), Lisbon agreement

<sup>12</sup> Supra note 10.

**(A) Provisions relating to geographical indication in TRIPs agreement**

Article 22 and 23 of the TRIPs agreement provides reference to the protection of geographical indication. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.<sup>13</sup> The TRIPs agreement takes into its consideration any acts of unfair competition which was also described under article 10 of the Paris convention. As there is always an ongoing debate as to the difference and similarities between the trademarks and geographical indication, so as to avoid any kind of mislead in the minds of the public with regard to any product or good, the member country shall, by virtue of its discretion, or at the request of the owner of the geographical indication can refuse or disapprove of the registration of a trademark containing a local reference in respect of goods that do not appear in the specified area.<sup>14</sup> Article 22 limits the protection of geographical indications to situations which mislead the public as to the true geographical origin of the product with the geographical indication or where the use of geographical indication results in an unfair competition.<sup>15</sup> On the other hand, Article 23 of the trips agreement provides for additional protection of geographical indication for wines and spirits.<sup>16</sup> This is because the abuse of geographical indication is peculiarly ordinary as well as important in the case of wines and spirits. That is why Article 23 has been embedded in the trips agreement. The provision exceeds the level of protection provided in under article 22. Since there is no condition that the public must be confused about the origin of the product, Article 23 provides for the absolute protection against false use.<sup>17</sup> Each member shall provide the legal means for interested parties to prevent use of geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the good is indicated or the geographical indication is used in translation or accompanied by expressions such as kind, type, style, imitation or the like.<sup>18</sup>

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<sup>13</sup> Article 22(1), TRIPs

<sup>14</sup> Article 22(3), TRIPs

<sup>15</sup> Dharmendra chatur, Enhancement of protection of geographical indication,(2010), Retrieved April 15, 2021 at 4:01 pm , from [https://www.academia.edu/613652/Enhancement\\_of\\_Protection\\_of\\_Geographical\\_Indications](https://www.academia.edu/613652/Enhancement_of_Protection_of_Geographical_Indications)

<sup>16</sup> TRIPs agreement

<sup>17</sup> Peter-Tobias Stoll, Jan Busche & Katrin Arend (eds), WTO—Trade-Related Aspects of Intellectual Property Rights(2009) pp. 407–417, Retrieved April 21, 2021 at 12:12 pm from [https://brill.com/previewpdf/book/edcoll/9789004180659/Bej.9789004145672.i-910\\_033.xml](https://brill.com/previewpdf/book/edcoll/9789004180659/Bej.9789004145672.i-910_033.xml)

<sup>18</sup> Article 23(1), TRIPs agreement

**(B) Contentions regarding higher level of protection to wines and spirits**

The augmentation of protection of geographical indication to wines and spirits only and not to the other products or goods has become a debatable issue now. This atypical, significant feature of the TRIPs agreement has attracted a lot of consciousness. Unlike other classes of intellectual property, the TRIPs agreement provides a pecking order in the levels of protection for a single definition of subject matter.<sup>19</sup> But the majority of the members who has ratified the TRIPs agreement do not favor this as they believe that this decision is neither rational nor legal in its application. That is why this debate continues to remain exceedingly severe and vigorous. The TRIPs agreement through the way of its Article 23 itself puts in a position where a question will automatically arise that why an extended protection is given only to wines and spirits? This can be understood if the merits and demerits arising out of Article 23 of the agreement are taken into consideration. The very first thing is that Article 23 in itself is a complete provision which can be easily distinguished from Article 22 of the same agreement. Article 22 primarily gives rise to the problem of ‘free riding’ which ultimately leads to the likelihood of geographical indications becoming generic name. Article 23 bestows an unadulterated and outright protection to wines and spirits. It even prohibits the translation of geographical indications or attachment if the expressions such as kind, type, imitation.<sup>20</sup> Talking about the issue of extended protection it is relevant to first go through the negotiation process that was involved for the protection of geographical indications.<sup>21</sup> The additional protection of geographical indication for wines and spirits provided under the TRIPs agreement addresses long standing European concerns about the use of labels to describe imitation products with no direct connection to the geographical area denoted by the label.<sup>22</sup> It is said, believed and agreed upon that article 23 of the TRIPs agreement is an outcome of final barter so that the negotiations could take place. And this is the reason why this compromise happened. This led to a clear division between the two proponents of the TRIPs agreement- the US and EU.<sup>23</sup> As a result of which, the consequence is the ongoing and topical arguments relating to the TRIPs agreement. A basic standard of protection is provided to the other products and goods along with a higher degree of protection are provided to wines and spirits. It does not conclude that wines and

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<sup>19</sup> Rajnish kumar rai, The TRIPs article 23 Extension stalemate continues: A way ahead for the developing countries, journal of intellectual property rights, Vol 14, September 2009, pp405-422, Retrieved April 21, 2021 at 1:30pm from <http://nopr.niscair.res.in/bitstream/123456789/6059/1/JIPR%2014%285%29%20405-422.pdf>.

<sup>20</sup> Suresh C Srivastava, Geographical indications under trips agreement and legal framework in India: Part 1, journal of intellectual property rights, vol.9, January 2004, pp9-23, Retrieved April 21, 2021 at 2:00pm from <http://nopr.niscair.res.in/bitstream/123456789/4725/1/JIPR%209%281%29%209-23.pdf>.

<sup>21</sup> UK commission’s report on Intellectual Property Rights

<sup>22</sup> Ahuja, V. Protection of Geographical Indications: national and international perspectives. Journal of the Indian Law Institute, (2004) pp 269-287. Retrieved April 21, 2021, from <http://www.jstor.org/stable/43951907>

<sup>23</sup> Supra note 20.

spirits are distinct products; rather it is just an after-effect of the compromised negotiation.

#### **IV. CONCLUSIVE REMARKS**

It is argued that if at the extended protection is provided to other goods, then it is going to increase the economic worth of the geographical indication. While there is no doubt that geographical indications are economically valuable, a multitude of other factors helps to actualize the economic potential of such geographical indications. Hence an in depth economic study and statistical analysis is required at the country level as well as cross country level to aid in evaluating the case for or against geographical indication extension.<sup>24</sup> Concerning the negotiations that took place during the Uruguay round, there had been a gap between the developing countries and developed countries. If the protection of geographical indications is expanded, then it would have an optimistic influence over the developing countries in their development goals. Also, the threat of spurious goods would lessen. By extending higher protection to geographical indication for all the products, geographical indication will be protected from becoming generic names.<sup>25</sup> Article 24 of the TRIPS agreement takes a stand for future negotiations. However, it also contains the provisions concerning the negotiations aimed at increasing the protection of geographical indication and which WTO members are not allowed to refuse to enter into or conclude on the basis of the existing exceptions applied in accordance with Article 24.<sup>26</sup>

The members, favoring the extension of protection of geographical indication understand it very well that there is no point in continuing the additional protection as this embraces the two level protection of goods and products, which in their opinion is useless. Since the definition of the geographical indication does not define a definite kind of product, so the protection to certain kind of products is also unreasonable and groundless. On the flip side, the members who are opposing the expansion of such protection believe that the protection of geographical indication provided under Article 22 of the TRIPS agreement is full-fledged. For instance, US protect its geographical indications through certified marks. Extending the ambit of article 23 protections would help increasing the monetary worth of geographical indications, which would thus spike section of greater quality and specialty items in the worldwide markets. To sum up, there is no just cause for the protection of geographical indications.

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<sup>24</sup> Supra note 19.

<sup>25</sup> Supra note 22.

<sup>26</sup> Deepika tiwari, Trips agreement: impact on protection of geographical indication, international research journal commerce arts science, Vol 7 issue 1 (2016), Retrieved April 21, 2021 at 4:00pm from [https://www.academia.edu/27363100/TRIPS\\_AGREEMENT\\_IMPACT\\_ON\\_PROTECTION\\_OF\\_GEOGRAPHICAL\\_INDICATION](https://www.academia.edu/27363100/TRIPS_AGREEMENT_IMPACT_ON_PROTECTION_OF_GEOGRAPHICAL_INDICATION)