



AgEcon SEARCH
RESEARCH IN AGRICULTURAL & APPLIED ECONOMICS

The World's Largest Open Access Agricultural & Applied Economics Digital Library

This document is discoverable and free to researchers across the globe due to the work of AgEcon Search.

Help ensure our sustainability.

Give to AgEcon Search

AgEcon Search
<http://ageconsearch.umn.edu>
aesearch@umn.edu

*Papers downloaded from **AgEcon Search** may be used for non-commercial purposes and personal study only. No other use, including posting to another Internet site, is permitted without permission from the copyright owner (not AgEcon Search), or as allowed under the provisions of Fair Use, U.S. Copyright Act, Title 17 U.S.C.*

**An analysis of the dispute European Communities –
Protection of Trademarks and Geographical
Indications for Agricultural Products and Foodstuffs**

Christophe Charlier* and Mai-Anh Ngo**

*University of Nice Sophia Antipolis and GRÉDEG/CNRS, France

**GRÉDEG/CNRS, 250, rue A. Einstein

06560 Valbonne

France

charlier@idefi.cnrs.fr

ngo@idefi.cnrs.fr



**Paper prepared for presentation at the 98th EAAE Seminar ‘Marketing
Dynamics within the Global Trading System: New Perspectives’, Chania,
Crete, Greece as in: 29 June – 2 July, 2006**

Copyright 2006 by [Christopher Charlier and Mai-Anh Ngo]. All rights reserved. Readers may make verbatim copies of this document for non-commercial purposes by any means, provided that this copyright notice appears on all such copies.

An analysis of the dispute European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs

Christophe Charlier* and Mai-Anh Ngo**

*University of Nice Sophia Antipolis and GRÉDEG/CNRS, France. Corresponding author

**GRÉDEG/CNRS, France

GRÉDEG – CNRS
250, rue A. Einstein
06560 Valbonne
France

charlier@idefi.cnrs.fr
ngo@idefi.cnrs.fr

Abstract: The dispute “European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs” that opposes the European- Union to the United States and Australia, has been raised by the European regulation concerning the protection of geographical indications. This dispute has two important issues. First, the Panel demonstrated that the European regulation did not comply with national treatment promulgated by the TRIPS and the GATT 1994 Agreements. Second, the Panel affirmed the possibility of coexistence between GIs and identical prior trademarks. This article considers these two issues and depicts the position of the parties at the end of the dispute regarding GIs’ protection. The first part of this article presents the conclusion of the Panel concerning national treatment and the coexistence between GIs and prior trademark. An analysis of the relations between national treatment and the international harmonization of the rules on the protection of geographical indications is presented in the second part. This analysis permits to establish that if the Panel findings do not annihilate the European system of protection of the geographical indications, the United States will find advantageous to free ride in geographical indications, refusing to move toward the European system of protection.

Key words: Geographical indications, Intellectual property, National treatment, TRIPS, Dispute settlement.

JEL codes : F13, Q17, Q18

1. Introduction

The measures implied in the international trade dispute *European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs*, (“GIs” and “dispute on GIs” afterward) arbitrated by the Dispute Settlement Body of the World Trade Organisation (WTO afterward), have been raised by the European Regulation 2081/92 of the 14th July 1992 (European regulation afterward). This regulation aims at protecting geographical indications and designations of origin for agricultural products and foodstuffs. On June 1999 the United States¹ (and Australia² on April 2003) requested consultations with the European Communities (EC afterwards) in respect of certain aspects of the European regulation. The United States estimated that those aspects went against dispositions of the GATT 1994 and TRIPS Agreements. The United States indeed contended that the EC Regulation does not provide national treatment with respect to GIs and does not present enough protection to pre-existing trademarks that are similar or identical to European GIs. The consultations didn’t allow to the parties to settle their differences by themselves. As a consequence, on August 2003 the United States and Australia requested the Dispute Settlement Body to establish a Panel³. On March 2005 the Panel report circulated to Members. Neither party appealed. The Dispute Settlement Body adopted the Panel report on 20 April 2005.

GIs form a particular category of intellectual property. They are defined within the TRIPS Agreement as following: “Geographical indications are (...) 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

¹ WT/DS174.

² WT/DS290.

³ Colombia, Guatemala, India, Mexico, New Zealand, Norway, Chinese Taipei, Turkey, China, Argentina, Canada and Brazil reserved their third-party rights.

geographical origin”⁴. Article 22:2 of the TRIPS Agreement asks the Members to provide legal means in order to protect GIs. The EC Regulation that gives rise to this dispute is in keeping with this process. Finally article 22:3 of the TRIPS Agreement provides additional protection for GIs for wines and spirits.

An original feature of this dispute is that no GI located in a third country outside the EC gives rise to it. The EC Regulation is therefore challenged by the United States and Australia “as such”. The economic stakes should not be under-estimated however⁵. As an example, the United States are an important producer of “American” cheeses as well as “non American” ones. Together with this statement it is interesting to note on the one hand that the American definitions given to “non American” cheeses can be very different with the European definitions for the same cheeses and, on the other hand, that the American production of “non American” cheeses is systematically bigger than the American production of “American” cheeses since 1988 with a growing gap through time. Furthermore, this dispute was concomitant to the ongoing international negotiation on GIs held in the Doha mandate⁶. If these negotiations concerns different issues (the creation of a multilateral register for wines and spirits and the extension of the higher level of protection beyond wines and spirits) they form the arena for strong oppositions between the United States and the European Union that have different conception of the legal means to protect GIs⁷ as well as of the adequate degree of protection⁸. It is interesting to note from this

⁴ Article 22:1 of the TRIPS Agreement.

⁵ For the economic perspectives of GIs see Barjolle and Sylvander (2002) for example.

⁶ See Addor and Grazioli (2002).

⁷ This does not mean the American agriculture has no interest in developing GIs. See Babcock (2003) on this point.

⁸ The international debates on intellectual property generally oppose developing countries and developed countries (see Reichman 1997 for example). For an economic analysis of the international protection of intellectual property when trade between the North and the South is considered see Grossman and Laie (2004).

point of view that both parties were satisfied with the outcome of the dispute on GIs.

An important part of the Panel report deals with national treatment. National treatment in the context of this dispute means that within the EC a foreign GI producer should be accorded by the EC Regulation a treatment no less favourable than the one accorded to EC nationals. From a positive point of view, the national treatment compliance allows a Member to develop internal regulations that are not protectionist⁹. National treatment in particular ensures that the access to a particular domestic market for a foreign producer is not made conditional to a particular internal regulation choice of his government. Another important part of the Panel report deals with GIs coexistence with similar pre-existing trademarks. The compatibility of two broad models for protecting intellectual property rights for agricultural products is therefore questioned.

The aim of this paper is twofold. First, it shows that the international harmonisation of rules for GIs protection is at stake on both aspects of this dispute (national treatment and GIs and prior identical trademarks compatibility). The paper then tries to characterise the future of GIs as a model of intellectual property rights for agricultural products. The paper is structured as follows. In the second section the main conclusions of the Panel report are analysed. With the help of this analysis a study of the international harmonisation of rules on GIs protection is presented in the third section. This study permits to characterise the position of the parties after the dispute on GIs.

⁹ See Roessler (1999) on that point.

2. The report of the Panel

The two main issues of the Panel report considering national treatment and prior trademark and GIs coexistence are successively considered.

2.1. The national treatment

The claims of the United States regarding national treatment in the dispute on GIs concern five different issues: availability of protection, application procedures, objection procedures, inspection structures and labelling requirement. In each case, the United States argue that national treatment obligations under article 3:1 of TRIPS agreement and under article III:4 of GATT 1994 are violated by dispositions of the European regulation.

The national treatment principle is defined as following in article 3:1 of TRIPS agreement: "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property". This article applies to nationals rather than to products. Under article III:4 of GATT 1994, national treatment applies to products. However, the Panel will reach the same conclusions concerning the respect of the national treatment by the European regulation when considering the definition of the TRIPS agreement and when considering the definition of the GATT 1994 agreement. The present article focuses rather on the debates raised by article 3:1 of TRIPS agreement.

Since individual rather than products are concerned with this article, the Panel has to evaluate if "effective equality of opportunities" between the nationals of other Members and the European Communities' own nationals with respect to the protection of GIs is granted by the disposition of the European regulation. If the protection of GIs for the nationals of other Members is lesser than the protection of GI's of the European Communities' nationals, national treatment will be scorned and the European regulation judged as inconsistent with the WTO's rules. The different claims of the United States and their consideration by the Panel are considered in what follows.

2.1.1 Availability of protection

The procedures for applications for registration of GIs are strictly controlled by the European regulation. These procedures are essential since GIs' protection needs GIs' registration as a preliminary. Nationals from other Members wishing to have the benefit of the GIs' protection should therefore be able to register their GIs. In the European regulation, the procedures for application for registration of GIs located on the European territory (articles 5 to 7) are distinct from the procedures for application for registration of GIs located outside the European territory (articles 12*bis* and 12*ter*). This formal difference in treatment is not sufficient to show a violation of the "effective equality of opportunities" principle. Such a violation will be found however by the Panel in the dispositions of article 12:1 that form preliminary requirements to article 12*bis* and 12*ter* for registration of GI's located outside the European territory¹⁰.

Article 12:1 indeed makes the registration of non European GIs conditional to the presence in the foreign country of a regulation on GIs protection similar to the European one. This harmonisation attempt is constraining since, on the one hand, many countries (the United States in particular) do not have such a regulation and, on the other hand, a particular Member cannot make GIs protection conditional to such a condition of equivalence. This preliminary condition goes against "effective equality of opportunities" between the nationals of other Members and the European Communities' own nationals.

The EC defend their position arguing that the expression "without prejudice to international agreements" in article 12:1 subjects the conditions of article 12:1 to the terms of the GATT 1994 and of the TRIPS agreements. In other words, WTO Members should not be concerned with the restrictions of article 12:1 when applying for their GIs registration in the EC. The Panel points

¹⁰ Article 12(1) provides as follows: Without prejudice to international agreements, this Regulation may apply to an agricultural product or foodstuff from a third country provided that:

- the third country is able to give guarantees identical or equivalent to those referred to in Article 4,
- the third country concerned has inspection arrangements and a right to objection equivalent to those laid down in this Regulation,
 - the third country concerned is prepared to provide protection equivalent to that available in the Community to corresponding agricultural products or foodstuffs coming from the Community."

out however that no registration procedure for GIs' protection exists in the GATT 1994 and the TRIPS agreements. As a consequence, the expression "without prejudice to international agreements" does not protect a Member from the exigencies of article 12:1. Therefore, the requirement of a regulation on GIs protection similar to the European one is incompatible with national treatment for the Panel.

2.1.2 Application procedures and objection procedures

The application procedure for GIs located in the EC is described in article 5 of the European regulation. The application is scheduled to be sent to the Member State in which the geographical area is located. Then, the Member State verifies that the application is justified and forwards it to the European Commission. The procedures for application for registration of GIs located outside the European territory is described in article 12*bis*. This article states that the application for registration shall be sent to the authorities in the country in which the geographical area is located. If these authorities consider that the application satisfies the requirements of the European regulation, they can transmit it to the European Commission accompanied by, among others, a description of the domestic regulation on GIs' protection. For the EC this cooperation of the foreign country is seen as essential for ensuring that the concerned GI is produced in accordance to product specifications and inspection.

In front of these specifications the Panel concludes that the European regulation gives other WTO Member nationals less favourable treatment than it gives to the European Communities' own nationals. Indeed, the Panel considers that EC Member States are obliged, with regard to EC law, to forward any admissible GI application for registration to the European Commission, whereas a third country only complies voluntarily. Furthermore a third country should not be required to know the European regulation and to be able to judge if its own legislation responds to the dispositions of the European regulation.

With the same line of reasoning the Panel shows that the nationals of other Members are accorded "less favourable" treatment than nationals of the

EC with regard to objection procedures. A national from third country wishing to object under the European regulation to registration of GIs have to send a statement to the country in which it resides, which shall transmit it to the European Commission. Nationals of other Members face an "extra hurdle" in ensuring that the authorities in those countries carry out the functions reserved to them under the European regulation, which nationals of the EC do not face¹¹.

2.1.3 Inspection structures

Article 4 of the European regulation makes the compliance with a product specification a prerequisite to GIs. This product specification has to identify, among others, the product characteristics and the inspection structures¹². These inspection structures are seen as mean to ensure that the different elements of the product specification are met. In the European regulation spirit this is considered as a way to ensure that the information delivered to consumers by GIs is true. In order to register GIs of national of other Members, the European regulation (article 12 *bis*) asks the authorities of those Members to ensure that equivalent inspection structures exist in their territory.

The United States consider that this inspection structure requirement violates national treatment obligations. Nationals from the EC automatically have the required inspection structures which other WTO Member nationals do not. The United States argue that if a product meets basic standards for what constitutes a GI for the EC, the non- EC national should be able to register it under the European regulation, regardless of whether its home government has established the same inspection structures as the EC member States¹³. The requirement of inspection structures identical to the European ones as a precondition for granting intellectual property rights to nationals of other Members would entail less favourable treatment.

¹¹ Report of the Panel, paragraph 7.341.

¹² The inspection structures are described in article 10 of the European Regulation.

¹³ Report of the Panel, paragraph 7.392.

The Panel considers that the United States did not succeed in demonstrating that the inspection structures requirement is burdensome and likely to raise an obstacle to "effective equality of opportunities" between EC and non-EC nationals. The European requirement is on the contrary considered as flexible: authorities as well as approved private bodies can be considered, a private bodies can have other kind of activities together with the control and, finally, the applicable standards for private bodies can be a standard equivalent to the European one¹⁴ (ISO standard for example)¹⁵. The intended participation of third countries' authorities in inspection structures (articles 10 and 12*bis* of the European regulation) is considered however by the Panel as incompatible with article 3:1 of the TRIPS agreement. The reasoning used by the Panel to reach that conclusion is the same as the one used to evaluate authorities' participation in application and objection procedures.

2.1.4. Labelling requirement

The complaint by the United States concerns here the case of homonymous GIs. In their argumentation a formal treatment difference between nationals from the EC and non-EC nationals is pointed out: the registration conditions of homonymous GIs from the EC is considered in article 6.6 of the European Regulation whereas the registration conditions of a non-EC GI with a homonymous prior registered GI from the EC is considered in article 12:2. The United States consider that a cost supported by non EC nationals results in this formal difference. Indeed for the United States article 12:2 requires that the country of origin of the product is clearly and visibly indicated on the label of the foreign product in case of homonymous GIs whereas article 6.6 does not impose such a requirement for GIs from the EC. This mention would generate a reduction of the value of the concerned GI insofar as it would induce the idea that this GI is different from the "true GI". This result of course would be incompatible with national treatment.

For the EC, the difference between the two articles 6:6 and 12:2 has to be seen in their respective field of application. Article 6 applies to a broader range of homonymous GIs: homonymous GIs located in different Member

¹⁴ Standard EN 45011

¹⁵ Report of the Panel, paragraph 7.387.

States of the EC as well as a GI from the EC which is a homonym of a third country GI. The EC consider that the messages of the two articles are identical. In practice, in order to make a clear distinction of the homonymous GIs, the GI which is registered later, whatever its origin, is required to indicate the country of origin. The national treatment claim on that point should therefore be dismissed. Doing an analysis of the syntax of the two articles the Panel retains the interpretation of the EC.

2.2 The relationship between GIs and prior trademarks

The United States claim that the possibility of coexistence between GIs and prior identical trademarks scheduled by the European regulation infringes exclusive rights of the trademark owners under article 16:1 of the TRIPS agreement. Before analysing the argumentation of the parties on that point it is important to remind the general context of the dispute on the relationship between GIs and prior trademark.

For the EC, organising the coexistence between GIs and trademarks is an imperative. The collective right delivered to GIs holders to prevent the use of the registered name can however contradict the private right of trademarks owners to do the same. In practical terms, the European regulation has therefore to balance these two distinct interests. On the one hand, trademarks owners invest a lot to make known their products, to create and to ensure consumers' confidence. On the other hand, GIs owners are obliged to comply with precise product specifications ensuring product differentiation. In both cases, the economic stakes involved are important.

The United States attach little importance to GIs and don't have specific protection rules for GIs as a consequence. The legislation of the United States, in opposition, gives ascendancy to trademarks. According to this, some of the American practitioners consider that the trademarks rights are not well represented compared to GIs rights in the TRIPS agreement ¹⁶.

These divergences of valorisation policies for agricultural products are one of the reasons of this dispute and explain the respective position of the

¹⁶ C.W. LACKERT, « Indications géographiques : quelles obligations en vertu de l'accord ADPIC ? », *PIBD* n° 665,II, p 201.

parties. The United States alleged that the article 14:2 of the European Regulation organising the coexistence between GIs and similar prior trademarks undermines intellectual property rights of trademarks owners. The article 16 of the TRIPS Agreement enounces indeed that “the owner of a registered trademark shall have the executive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion”. In front of this position, the EC put forward several arguments to defend the European Regulation. The Panel only agreed with one of them ¹⁷.

The Panel considers that the coexistence between a prior trademark and a GI form a limited exception to the exclusive rights of trademarks owners, as expressed in the article 17 of the TRIPS Agreement ¹⁸. The article 14:2 of the European Regulation takes into account the legitimate interests of the owner of the trademark and of third parties (consumers and any persons using a GI in accordance with its registration). In practical terms, this means that trademark owners suffer a limitation of their rights in particular cases only. Consumers can use GIs to verify that the concerned products effectively come from precise geographical areas and possess qualities linked to their territorial origins. The GIs producers see their qualitative efforts settled with product specifications rewarded by a differentiation of their products.

Such a solution is not surprising and can be considered to get the two parties satisfied. On the one hand, the European Regulation is not modified in substance about trademarks and, on the other hand, the coexistence between

¹⁷ For the EC several arguments can be put forward to justify the coexistence between prior trademarks and GI’s. First, the article 14:3 of the European Regulation avoids confusions since it prohibits the registration of any GI identical to a “well-known” trademark. Second, the coexistence of GIs with trademarks is organised by the article 24:5 of the TRIPS Agreement. Third, diminishing protection for GIs pre-existing to the TRIPS Agreement is prohibited by the article 24:3 of this agreement. The EC consider therefore that they are obliged to maintain coexistence between prior trademarks and GIs. Fourth, in the article 17 of the TRIPS Agreement, the possibility to depart from the principles of the article 16 is anticipated. This derogation allows the EC to justify the coexistence between trademarks and GIs. The Panel agreed with this latter argument only.

¹⁸ Report of the Panel, para. 7.688.

prior trademarks and GIs is strictly delimited and does not question the American model of trademarks protection.

3. The analysis of the dispute

This commercial dispute on GIs is interesting from many points of view. First of all the fact that the EC were satisfied with the Panel's decision whereas the European regulation has to be changed on many aspects has to be explained (2.1). Furthermore, this dispute reveals the originality formed by GIs as intellectual property elements (2.2). Finally, the dispute puts light on the debate on international harmonisation of the rules on intellectual property protection (2.3).

3.1 Product specifications and inspection structures as key points

For the EC, seeing the European regulation spoiled was the main risk of this dispute. This risk directly comes from the fact that the TRIPS agreement tells few things on the protection of GIs. From this point of view, the allegation of the US against inspection structures was obviously the most sensible. Indeed, to demand for GIs' registration that products specifications verify the existence of inspection structure forms the cornerstone of the European system of GI protection. This requirement ensures the credibility of the product specifications. This element is of uppermost importance since it is through its product specifications that a GI is defined in the European regulation¹⁹. Withdrawing the exigency of inspection structure would imply the total collapse of the European system.

In the debates of this dispute, the US asked why, rather than inspection structures, unfair competition rules could not constitute the adequate mean to ensure the GIs protection. The EC replied that such a scheme would guarantee lesser protection. They more specifically argued that "a producer would have to have recourse to legal action and could not rely on controls carried out by an inspection body" and that a consumer "would only have the assurance that a competitor might take legal action against non-conforming products" to be sure of superior product quality²⁰. Obviously, the EC desire to avoid a scenario à la Shapiro (1983) in which the goods' quality is ensured only with the

¹⁹ The Parmigiano Reggiano example given in annex 2 is a good illustration of this point.

²⁰ Report of the Panel, para. 7.396.

producer's reputation (that has to be constructed without any certification scheme). This debate on inspection structures, therefore, interestingly focuses on legal governance for GIs protection. This orientation was inevitable in a situation, on the one hand, characterised by an international diversity of GIs protection systems and, on the other hand, where the TRIPS agreement is not very constraining in terms of harmonisation, simply requiring that Members provide legal means for GIs protection.

Considering the inspections structures as non-constraining, as the Panel did, has an important consequence. Indeed, the GI of a non- EC Member that would satisfy all the European requirements defining a GI, excepted for the requirement on inspection structure, cannot be registered under the European Regulation. It can be argued therefore that both geographical origin and legal means of protection contribute to the definition of a GI in the European perspective. In front of this result, it remains however that claiming for non- EC Members' government to control the existence of inspection structure is seen by the Panel as incompatible with the national treatment principle. The European Commission should therefore be responsible for this control.

3.2 The originality of the GIs as elements of intellectual property

Intellectual property protection is usually justified on the ground of society's well-being maximisation. The protection of R&D's outcomes creates incentives to innovate. Innovation in that perspective is considered to be beneficial to consumers. A decrease in the market size appears however due to the possibility to charge a price higher than the marginal cost as a consequence of protection. A loss of earnings in term of well being appears therefore. Society's well-being should however increase if this loss of earnings is smaller than the increase in well-being created. This kind of discourse has penetrated national legislations on the intellectual property protection.

When GIs are considered as intellectual property elements, this discourse is no more appropriate. Since no innovation is at stake with GIs, it is necessary to put forward an other justification for protection. This latter underlines that increasing in goods' variety raises consumers' well-being. In situation of asymmetrical information on goods' quality or on production

processes' specifications, goods variety tends to decrease. A protection of GIs that would attest to products' specifications can be considered as a way to fill the informational gap. The desired products variety would therefore be restored as a consequence. This protection however confers a market power to producers and creates, as a result, a well-being transfer from the consumers to producers. This transfer appears as the necessary "price to pay" to re-establish products variety.

One has to admit that this latter discourse has not penetrated national legislations as the former on the protection of R&D did. The countries the more receptive to it should be those for which history is determinant for regional alimentary specificity. In this context GIs have a strong significance since good quality and product specificity are linked with traditional knowledge. In response to the great differences among countries on that field, a great diversity in the legal means implemented to protect GIs can be observed. It is also important to note that issues of an agreement on intellectual property protection are different when innovation protection is considered rather than GIs protection. When innovation protection is at stake the issue of an agreement on intellectual property protection is primarily to bring closer different national protection systems. When GIs protection is considered what's primarily at stake is rather the recognition of GIs as element of intellectual property²¹. This dispute is really representative of this situation. In this context and from a general point of view the TRIPS agreement aims at creating conditions for international harmonisation on intellectual property protection. This harmonisation is not however operated with the help of a unique system that would be binding at the international level. As an example, the section 3 of this agreement that concerns GIs specifically comprises only three elements: a definition of a GI (article 22:1), the request addressed to Members for the implementation of "legal means" to protect GIs (article 22:2) and a clause of "additional protection" for GIs for wines and spirits (article 23). It is interesting to note that with "legal means" the article 22:2 does not imply specific regulations on GIs and gives Members full scope in their choice of rules. The TRIPS Council of the WTO noted as a result that "countries employ a

²¹ See Mahé (1997) for example.

wide variety of legal means to protect GIs: ranging from specific GIs laws to trademark law, consumer protection law and common law”²². This declaration reveals well the difference in “concernment” towards GIs that coexists among Members.

In order to avoid non tariff barriers to international trade due to differences in regulations, safeguards have to be found. National treatment is understood in this context. This principle ensure that if a country, noted A, develops a specific regulation in order to protect intellectual property more stringent than the one developed by an other country, noted B, the intellectual property of B’s nationals is protected on A’s territory as well as the intellectual property of A’s own nationals. National treatment should therefore impede a country to use its regulation to the sole purpose of protecting its nationals. A more positive interpretation can be developed. In this interpretation, national treatment allows the country A to develop stringent regulation on intellectual property protection without being suspected of delivering more protection to intellectual property of its own nationals at the expense of foreign nationals.

The implications of national treatment are different however when considering GIs protection, where strong gaps between national legislations exist, rather than innovation protection where the gaps are lesser. As an illustration of this point, imagine that in the country B of the preceding example GIs are simply recognized as elements of intellectual property without being placed under a developed protective regulation because few GIs exist on its territory (for example, the products’ specifications and inspection structure are not required, primacy is given to trademark rather than to GIs etc.). In the country A, on the contrary, a developed protective regulation is developed for GIs. For this country therefore, fulfilling national treatment means ensuring high protection to GIs from foreign countries whereas the same treatment from foreign countries to its nationals doesn’t exist. This result appears even if national treatment is applied by the country B. It is only the consequence of the gap between the legislations on GIs protection of the two countries.

3.3 The international harmonisation of regulations and national treatment

²² www.wto.org

To put into practice national treatment with respect to intellectual property of other countries' nationals, a country will ask reciprocity for its nationals to the foreign country. A unilateral implementation of national treatment in a country could be seen indeed as a sort of altruism²³ since it allows foreign nationals to have the advantage of the GIs protection in its territory whereas this advantage is not accorded to its nationals abroad. A mutual respect of national treatment will be therefore sought after. This shows that a kind of international harmonization of rules (the respect of national treatment) is necessary for protecting intellectual property²⁴. This harmonisation should prevent situations where the regulation chosen by a country implies a positive, but not reciprocal, externality on the other countries.

In the dispute on GIs, the European regulation is criticized by the US because certain procedures for non- EC nationals are made conditional to the existence of regulation similar to the European one in their country of origin, or to the knowledge by the foreign countries of the European Regulation on GIs. This European position can be interpreted as an attempt to force international harmonisation of regulations on GIs on the European model, with the aim of guaranteeing to the GIs from EC a high degree of protection at an international level. The Panel's decision shows however that this unilateral will of harmonisation, as expressed in the European regulation, is opposed to national treatment.

The relation existing between national treatment and harmonisation is therefore ambiguous. The implementation of national treatment requires reciprocity. This reciprocity can be reached with the help of an international agreement on intellectual property protection like the TRIPS agreement, and implies a degree of harmonisation as a consequence. However a mutual acceptance of national treatment does not imply harmonisation of the national regulations. The dispute on GIs shows that it is quite the reverse that occurs since national treatment has the effect of restraining unilateral intentions to push upward harmonisation of national regulations.

²³ See Scotchmer (2004).

²⁴ For a general analysis of the reasons and forms of the international harmonisation of national regulations see Bhagwati (1997).

As illustrated by the dispute on GIs, this characteristic will be more constraining for a country having a regulation on intellectual property protection well developed and confronted with countries that do not. What could expect the country A for its nationals from B's implementation of national treatment? Since the protection of GIs in the country B is underdeveloped the answer is straightforward. Furthermore this example can be used to show that the regulation developed by the country A creates a positive cross-border externality on the country B through three modes²⁵. First, consumers of the country B benefit from the variety of products allowed by the regulation implemented in the country A. Second, producers of GIs from the country B can be protected under the regulation of country A since national treatment is acknowledged by both countries²⁶. Finally, since GIs protection is less developed in country B, the nationals of the country B can more easily compete with nationals of the country A on country B's markets. This positive externality is not reciprocal of course, even if national treatment is implemented by the country B. Moreover one could note that a strict interpretation of national treatment will raise the positive externality *via* the second mode. In the same perspective it can be underlined that the more important is the gap between the two regulations at stake the more important will be the positive externality *via* the third canal.

This analysis makes clear the reasons of the EC when trying to impose with the initial form of the European regulation the harmonisation of the regulations on GIs protection of its trade partners on his own regulation. This one would make the positive cross-border externality reciprocal. On the contrary, from the point of view of the United States, or of other countries that do not have developed regulations on GIs protection, it is rational on the one hand to keep watch over a strict enforcement of national treatment, and on the other hand, to free ride on GIs protection refusing upward harmonisation.

²⁵ Cross-border externalities' internalisation is usually conceived as a way of defending the necessity of multilateral negotiations for regulations harmonisation. See for example Maskus (2002).

²⁶ A better protection of GIs offered in a country will not imply an international delocalisation of production activities contrary to the case of innovation protection (see Hall 2001 for example for the latter case).

Without penalizing their domestic consumers, they have two control levers allowing them to benefit from the European positive externality.

Bibliography

- Addor, F. et Grazioli, A. [2002], "Geographical Indications beyond wines and spirits. A roadmap for a better protection for Geographical Indications in the WTO TRIPS Agreement", *Journal of World Intellectual Property*, 5(6), pp. 865- 898.
- Babcock, B. A. [2003], "Geographical Indications, property rights and value-added agriculture", *Iowa Ag Review*, 9(4), pp. 1- 3.
- Barjolle, D. et Sylvander, B. [2002], "Some factors of success for "Origin labelled product" in agro- food supply chains in Europe: Market, internal resources and institutions", *Economie et Société*, 25(9- 10), pp. 1441- 1461.
- Bhagwati, J. [1997], "The demands to reduce domestic diversity among trading Nations", in J. N. Bhagwati et R. E. Hudec (eds), *Fair trade and Harmonization. Prerequisites for free trade? Vol. 1: economic analysis*, MIT Press, pp. 9- 40.
- Grossman, G. M. et Laie, E. L. [2004], "International protection of intellectual property", *American Economic Review*, 94(5), pp. 1635- 53.
- Hall, B. H. [2001], "The global nature of intellectual property: Discussion", *Discussion Paper, Toronto IP Conference*, May 2001.
- Mahé, L.-P. [1997], "Environment and quality standards in the WTO: New protectionism in agricultural trade? A European perspective", *European Review of Agricultural Economics*, 24, p. 480- 503.
- Maskus, K. E. [2002], "Regulatory standards in the WTO: Comparing intellectual property rights with competition policy, environmental protection, and core labor standards", *World Trade Review*, 1(2), pp. 135- 152.
- Reichman, J. H. [1997], "From free riders to fair followers: Global competition under the TRIPS agreement", *Journal of International Law and Politics*, 29(11), pp. 11- 93.
- Roessler, F. [1997], "Diverging domestic policies and multilateral trade integration", in J. N. Bhagwati et R. E. Hudec (eds), *Fair trade and*

- Harmonization. Prerequisites for free trade? Vol. 2: legal analysis*, MIT Press, pp. 21- 56.
- Scotchmer, S. [2004], "The political economy of intellectual property treaties", *Journal of Law, Economics, & Organization* , 20(2), pp. 415- 437.
- Shapiro, C. [1983], "Premiums for High quality products as rent to reputation", *Quarterly Journal of Economics* , 98, pp. 659- 680.
- Sylvander, B. (2004), *WP 7 Final Report: synthesis and recommendations*, Concerted Action DOLPHINS, <http://www.origin-food.org>.