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#11: The Future of Geographical Indications and Traceability post-COVID

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Encounter 11: The Future of Geographical Indications and Traceability post-COVID

Report Encounter 11

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Speakers:

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Moderator and Speaker:

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INTRODUCTION

Prof. MANDERIEUX: Geographical indications (“GIs”) is the intellectual property (“IP”) right that has been created further to the pandemics of phylloxera. Therefore, this topic connects us to what we are currently experiencing during COVID-19. GIs is one of the businesses which suffers a lot during the current crisis and is also a point of tensions in international negotiations (mostly between the US and European Union). GIs is an area where developing countries are making fascinating advancements and where the IP world is being restructured and transformed. For all these reasons, the global digital encounter should be at the edge of it.

GENERAL OVERVIEW

Dr. MARIE-VIVIEN: GIs are origin-linked products, which existed since antiquity in many different countries and industries (wine, cheese, wood, marble, stones, textiles etc.). GIs were first legally recognized in the south of Europe, especially in France in 1905. Then they were recognized among the members of the Lisbon System and harmonized at the European Union (“EU”) level in 1992. Since the TRIPS Agreement (“TRIPS”) in 1995, they have broadly expanded to all World Trade Organization (“WTO”) members. GIs identify a good where a given quality, reputation, or the characteristics of the good are essentially achieved through its geographical origin. Only producers located in the area and complying with GI specifications can use the name protected as a GI. GIs grant an exclusive right of use to the producers. GIs are only for those local products that

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#11: The Future of Geographical Indications and Traceability post-COVID

have a qualitative link with the place of origin. GIs are the reflection of cultural heritage, the special relationship between the local community of people, place, and products. To ensure quality and reputation, method and geographical area of production should be clearly defined in the so-called specifications, codes of practices or rules of use. Control of such rules is needed to ensure that products are authentic. Now, 25 years after TRIPS, GIs are less harmonized compared to other IP rights, and this area is a point of hard debates and negotiations between the new and old world.

1) WHAT ARE THE IMPACTS OF GIs?

Dr. MARIE-VIVIEN: During the last decade, the total economic value of EU GIs has increased sharply. Outside the EU there are also some success stories. The Kampot pepper from Cambodia, for example, is sold at a price, which is 5 times higher than the price of non-GI pepper. However, there are some drawbacks. To be successful, it is necessary not only to have a product with a specific quality and reputation, but also a good balance between motivation and involvement of local communities of producers, and support from the public authorities.

Prof. HUGHES: GIs are interesting and important, but they are a relatively tiny area of the IP world. In Japan, there are around 100 GIs but there are over 1000 trademark applications every day. GIs are crucial for helping farmers, especially in developing countries, and they can do this through the decommodification of products. For example, they can help raise the price in decommodifying agricultural products as is done through fair trade, shade-grown or dolphin-friendly certification marks. The problem is that the EU oversells and asks developing countries for protection, which imposes more burdens on those countries than it gives them benefits. The EU also asks third countries for claw-back lists, to give exclusive protection to words used generically in those countries (like "Parmesan"). Finally, the big problem is not the idea of protecting GIs but giving them enormous protection in case of "evocation". This is why the US and other countries have pushed back so hard on the EU on some of these issues.

Prof. COVARRUBIA: GIs can be used to preserve and safeguard our culture and identity. Indeed, GIs identify a product but also identify a region and the people of that region. The problem of Latin America is that we have borrowed legislation, so it does not always fit perfectly well with our society. In general, in Latin America GIs are divided into two categories: "appellation of origin" known in Europe as "denomination of origin", and "indication of source". The difference between the two is enormous because the indication of source has a weaker link with the region. Geographical indication is about "terroir", the connection with the land. Other elements, such as people and cultural aspects are also very important. This allows conceiving GIs not only as protection, and a business toolkit, but also something more. The positive impact of GIs is how local communities are coming together and feel proud of what they make.

Prof. SCARIA: There is a need for a critical analysis of what impact GIs made in a developing country like India during the last couple of years. The first issue is that in India the majority of the applications for GIs are filed by the state, not by farmers or any association of producers. In such cases, we need to ask whether the benefits are really going to the people whom GI law wanted to protect. Secondly, what are we protecting as GIs in India? Around 220 of the registered GIs in India appear to be handicrafts. As compared to agricultural products, the geographical linkages are weaker in many of them. In some cases, the GI Registry has also granted protection for religious

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#11: The Future of Geographical Indications and Traceability post-COVID

offerings. GI protection granted for Tirupati laddu is an example in this regard. Does the grant of GI protection to such products justify the rationale for GI protection? Similarly, we should also analyze the issue of quality guarantee for consumers. If I look at how this issue is addressed in India, I have a very disappointing picture to portrait. Regarding most of the GIs in India, there are no quality management or strong quality control measures. So, it is not clear what exactly are we guaranteeing to consumers through a GI. With all these facts in place, I cannot say that GIs are making a huge impact in India. Maybe we need to analyze what is going wrong, and take corrective measures to address these deficiencies of GI protection to make a strong positive impact.

Dr. MARIE-VIVIEN: There are fewer GIs than trademarks but there are so many producers behind one GI benefiting from it. Most important are the benefits that may be brought to producers and artisans, rather than the number of GIs itself. We need to look at success stories to understand how other GIs could be successful as well. We need to control the method of production so it is compliant with the GI specification and the characteristic of the product, and the product meets consumers' expectations. In the majority of countries, there is higher protection for GIs compared to trademarks, as GIs are protecting the heritage of the communities. So, there are many requirements to fulfill which result in higher protection.

2) IS IT JUSTIFIED TO EXTEND GIs TO NON-FOOD PRODUCTS, IN PARTICULAR, HANDICRAFT (TEXTILE, WOOD ETC.)?

Dr. MARIE-VIVIEN: The EU GI regulations cover only food products. When third countries like India want to get their GIs protected in the EU, they do not have any legal framework for protecting such non-food goods. The issue is that the link to the territory and culture is not as strong for non-food products as it is for food products. For many handicraft products, the raw material is not necessarily local.

Prof. HUGHES: I am greatly in favor of this extension. As we extend the protection of GIs to handicraft, it becomes very clear that GIs are what the US has always said them to be - they are just certification marks. I am in favor of using these marks to try to protect indigenous traditions, local communities, raise standards or ensure the quality of the product, and protect them from rip-offs and counterfeits. It is a problem for those who push for GI as a theoretical construct, as it does not seem to have the same kind of connection that is at the root of the traditional theory of appellations of origin. When you follow the historical flow of GIs, there is a slow-moving away from the "terroir" idea which has been so powerful in 1980-1990s.

Prof. COVARRUBIA: I fully support the extension of GIs to handicraft. Handicraft provides a means of living for 8% of Latin Americans who are indigenous people. The artisan sector is huge and informal and we need to start establishing rules, certifications, and protections. Handicraft will also apply terroir, because terroir is about the environment, and also about people who work on the land. When we are talking about traditional handicraft which is connected to indigenous people, in Latin America there is sometimes the risk that such communities can be displaced (relocated). In this case, terroir will not exist anymore. But interestingly, GI also connects to traditional knowledge. So, it is not just about the terroir - it is also about traditional knowledge. Latin American countries do grant GIs to handicraft, while Europe does not, which is not really a fair play when

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#11: The Future of Geographical Indications and Traceability post-COVID

negotiating Free Trade Agreements (“FTAs”) as in Latin America, e.g., in Colombia around 40% of the GIs are handicraft.

Prof. SCARIA: When we speak about the protection of handicraft in India, the positive side is that it is often connected to traditional knowledge. Apart from the economic value that GI may provide, many communities might see GI also as a non-monetary recognition for the community. To that extent, I agree that this extension is needed. However, I have not seen good data which show that the benefits are going to the communities. As indicated earlier, the state still plays a predominant role in the registration process and GI ownership. Until this situation changes and we ensure that the economic benefits flow to the concerned community, we would not be able to give much economic justifications for granting GIs to handicraft. But on the non-monetary aspect, I see a benefit, and this might contribute to the preservation of traditional knowledge.

3) DO TRADE AGREEMENTS SIGNED BY COUNTRIES FACILITATE PROTECTION OF GIs ON INTERNATIONAL LEVEL?

Prof. COVARRUBIA: There are various bilateral agreements signed between Europe and countries from South and Central America. The problem is that there are many things and terms that perhaps are mixed: appellation of origin, denomination of origin, GIs. For example, in the FTA between the EU, Colombia and Peru (later signed by Ecuador), Colombia recognized multiple types of GIs which were denominations of origin, geographical indications and traditional specialties guaranteed (“TSGs”). TSGs are not recognized as such in Colombia, and they still were given recognition. This is a negative aspect, but the positive side of that agreement is that products from Latin America that obtain GI in Europe, receive higher protection.

Prof. SCARIA: I am skeptical about the trade agreement that was partially negotiated between India and the EU (negotiations stopped a couple of years ago) because it is still not clear what benefits India would receive from higher standards of protection. In the absence of clear benefits from higher protection, a country like India should not be entering into any FTAs that demand higher level of protection.

Prof. HUGHES: Only articles 22, 23 and 24 of TRIPS say that everyone should keep negotiating. This was done because the EU was dissatisfied with what it got out of the TRIPS. So, it is natural and understandable that the EU seeks these “TRIPS-Plus” standards with other countries. The problem is that there is a mismatch of domestic legal concepts from different jurisdictions because the EU, like the US, goes into these negotiations saying, “*we are not going to change our concepts*”. Also, when it comes to GIs in the US FTAs, the US is defensive to preserve the words that American society considers generic.

Dr. MARIE-VIVIEN: FTAs can support the producers because they can have their GIs easily protected abroad. For foreign GIs, this is a great chance to be protected in the EU, but this brings about enforcement issues as consumers should get authentic products. So, we need to have the ability to protect consumers and fight the fake products on the market. That said, this can make things easier for producers, but FTAs can be more complicated for enforcement agencies, and for consumers to know the authenticity of the product.

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#11: The Future of Geographical Indications and Traceability post-COVID

4) SHOULD THE US TRY TO ADOPT A DIFFERENT APPROACH TO GIs AT THE INTERNATIONAL LEVEL TO SUPPORT ITS PRODUCERS?

Prof. HUGHES: US fulfils TRIPS undertakings to protect GIs through certification mark law and collective mark law. That said, we do have a full protection system. The difference between the systems is less government regulation. With certification marks, standards are filed with the trademark office and as long as producers apply those standards, they have a certification mark. There is less interaction with the government about the standard, which might be good or bad. Government involvement in any local decision-making is not automatically good or bad.

5) IS IT CORRECT THAT REGARDLESS OF DIFFERENT REQUIREMENTS FOR RECOGNITION AND REGISTRATION OF APPELLATIONS (DESIGNATIONS) OF ORIGIN AND GIs IN THE EU, THE ACTUAL PROTECTION (ENFORCEMENT) IS THE SAME FOR BOTH?

Dr. MARIE-VIVIEN: Yes, in the EU there is the same level of protection.

Prof. COVARRUBIA: In Latin America, the protection is the same if you have a registration. If the GI is not registered, protection can be achieved through unfair competition law, but there is a big burden to prove infringement in this case.

6) ISN'T THE REAL ISSUE ABOUT THE BENEFITS OF GIs HOW THE VALUE CHAIN IS ORGANISED?

Prof. COVARRUBIA: The most difficult part in Latin America is the pre-recognition phase rather than the recognition phase. The former is not very expensive, as the cost at the IP office is very low, but the technicality of the papers is expensive. It is difficult to quantify the project's unique characteristics, the negotiations participants, or what should be agreed upon or defined. This is a problem even in the EU. In Latin America, there are many non-governmental organizations doing workshops with local producers which is a good starting point.

Dr. MARIE-VIVIEN: There was a case in India about Darjeeling tea, where they put into a specification that the GI applies only to 100% pure Darjeeling tea. This increased the prices and there has been some benefit-sharing through the value chain up to tea plantations owners. However, it is not easy to say if these benefits are received by the workers of the tea plantations. We need to have stakeholders of the value chain at the core of GIs in terms of defining the contents of GI specifications and benefiting from the added value.

Prof. SCARIA: As for Darjeeling tea, my main question is why should the state be owning the GI registration in Darjeeling Tea (through the Tea Board, which is a state entity)? Can't this GI be collectively managed by the tea producers of the Darjeeling region themselves? That might also contribute to better benefits for workers of those tea plantations. In the current approach, I'm not sure how much of the benefits are really going back to the people whom the GI legislation wanted to protect. The state should slowly step back from GI ownership and ensure better participation and empowerment of local communities. Maybe this can be achieved through capacity building measures with the help of different non-governmental organizations.

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#11: The Future of Geographical Indications and Traceability post-COVID

7) WHAT IS THE MAIN PROBLEM IN LATIN AMERICA WITH PRODUCTS OF ORIGIN?

Prof. COVARRUBIA: The main problems are the organization of communities and trust, i.e., who is benefiting from GIs? In the majority of Latin America, the government is the owner of the GI and the community does not trust the government to have that entitlement. This problem also exists in Europe, but in a discrete scale, as societies are different.

CONCLUSION

Prof. DESANTES: We are now 25 years after TRIPS, but GIs are far from being harmonized. GIs is a very young field of law. However, it is growing, and each GI benefits thousands of producers. GIs are not only a type of IP protection but also a tool to preserve cultural heritage. We have discussed the extension of GIs to non-food products (like handicrafts), and we are all in favor of it. Handicrafts are essential for indigenous communities, also from an environmental perspective. We have discussed who is benefiting from GIs, and how indigenous communities are coming together through GIs. A separate essential topic concerns the relationship between certification marks and GIs. Whether GIs are something more than just a certification mark (particularly, if extended to non-food products). That said, GIs is an extraordinary and alive field, and many of the topics discussed today are so broad that they deserve a separate encounter.

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