

**European Communities – Protection of Trademarks and Geographical Indications
for Agricultural Products and Foodstuffs**

(WT/DS174 and WT/DS290)

**Closing Statement of the United States
at the Second Substantive Meeting of the Panel**

August 12, 2004

1. Thank you, Mr. Chairman and members of the Panel. We appreciate your hard work over the past two days.

2. As the EC suggested in its closing statement, it is true that this case has become fairly complicated, although it started off fairly simple and straightforward. Our legal claims were based on a simple problem: An EC GI Regulation that benefits EC persons and products to the detriment of non-EC persons and products and to the detriment of trademark rights. The EC GI Regulation purports to provide significant economic and competitive benefits for persons and products receiving GI status, but then effectively reserves those benefits to EC persons and products, erecting prohibitive barriers to access to those benefits for non-EC persons and products, and protecting EC persons and products from competition from non-EC persons and products.

3. This relatively simple case became complicated because the EC, in order to defend itself against rather straight-forward WTO inconsistencies, threw one complicating factor after another into the mix. It is difficult to try to explain that the Regulation does not mean what it says, and that is where the complications come in. For instance, for the EC to defend against our claims, the meaning of the Regulation had to be seriously contorted so that, for instance, a relatively straightforward and WTO-inconsistent requirements of equivalence and reciprocity has to, somehow, be read out of the Regulation. Where it is clear that the EC GI Regulation prevents trademark owners from exercising rights guaranteed by Article 16.1 of the TRIPS Agreement, the EC has to explain somehow why trademark owners have no need of those rights – when, of course, they do – and has to devote long, complicated arguments to explaining how the Regulation blocks the registration of any and all confusing GIs, when in fact, by its own terms, it does not and cannot. The EC also has to try to explain how numerous and vague unfair trade statutes, labeling requirements, deceptive advertising rules and the like somehow make up for the lack of Article 16.1 rights. They, of course, do not, but attempting to explain that they do is complicated. That is why this relatively straightforward case has become complicated.

4. I will divide my closing remarks into two general categories – national treatment/MFN, and trademark rights.

National Treatment/MFN

5. On the issue of reciprocity and equivalence in Article 12(1) of the GI Regulation, there is obviously a disagreement between the complainants and the respondent on the facts, that is, on the meaning of the GI Regulation. The EC claims that it is entitled to “considerable deference”, a standard that is not in any WTO agreement or any dispute settlement report. The EC’s apparent hope is that the Panel will not make factual findings based on the evidence, but will simply adopt wholesale the EC’s interpretation of the Regulation. But it is the task of this Panel to make an objective assessment of the facts concerning this measure and what it means. The Panel must determine if there is a solid evidentiary basis for a factual finding that reciprocity and equivalence conditions do not apply to non-EC WTO Members, and that, in fact, there is a mechanism in the GI Regulation for registering and protecting GIs of other WTO Members without those conditions. As the United States has said before, and I will repeat again today, the United States would welcome a finding based on authoritative domestic legal instruments that the GIs of other WTO Members can be registered without the WTO Members satisfying those conditions. But, on the basis of the evidence that we have seen, we have no confidence that this

is the case, or that the European Court of Justice would agree with the EC's interpretation in this dispute.

6. With respect to whether the GI Regulation discriminates against nationals, the EC has effectively argued that, somehow – because of the special nature of the TRIPS national treatment requirement, and because there is also a GATT Article III national treatment requirement with respect to goods – unless a measure literally and specifically states the word “national” in connection with less favorable treatment, there can be no TRIPS national treatment violation. Although the Regulation itself does not use the word “national”, it does everything but. And, indeed, the preamble to last year's amendments *does* use that word in admitting that the distinctions made in the Regulation are based on nationality. Without repeating all of the details we have argued elsewhere, the distinctions made in the Regulation between the EC track and the non-EC track for GI Registrations (and objections) correspond extremely closely, if not exactly, to nationality. Simply stated, non-EC nationals are on a different track than EC nationals, and that non-EC different track provides much less favorable treatment than the EC track.

7. Does the differential treatment also correspond to the origin of the product? Yes, it does. There is an overlap. And this overlap may well be more pronounced in the case of geographical indications than in the case of other forms of intellectual property rights. But the fact that the GI Regulation discriminates against non-EC products, should not and does not detract from the fact that it also provides less favorable treatment of non-EC nationals as well. There is absolutely no basis in any principle of treaty interpretation that would justify a narrow, technical reading of the TRIPS Agreement national treatment obligation, simply because the measure is also covered by the GATT 1994 Article III national treatment obligations. GATT Article III is simply not an excuse for whittling down the TRIPS Agreement national treatment obligation to virtually nothing.

8. The EC argument that the less favorable treatment is based on where a person is established and producing GI products and not on that person's nationality simply does not hold up. Nor does the EC's claim, which we just heard in the EC's closing statement, that the “foreign” and “domestic” registration tracks are simply a matter of “drafting” differences. The simply truth is that, because of the two “tracks”, EC nationals have direct means to avail themselves of GI protections in the EC, and non-EC nationals do not.

Inspection Structures

9. With respect to the unilateral imposition of inspection structures on other WTO Members, the EC would like the issue to be “what is wrong with the EC's inspection structure system?” So, the EC jumped gleefully on my statement yesterday that their inspection system is “fine”. What I meant was that it was fine for the EC. What we object to, and what is contrary to the WTO agreements, is imposing that particular structure on us as a precondition to our products and persons receiving GI status in the EC. What if we, too, established a inspection system for protection of GIs in the United States, and then imposed that inspection system on the EC as a condition to protecting EC GIs? What if the inspection system that we imposed were incompatible with the EC's system? What if all of the WTO Members did the same thing:

developing particular inspection systems for themselves and requiring other WTO Members to adopt the same systems? How many competing and incompatible inspection structures can one WTO Member establish in its territory before its entire system becomes unworkable? That is one reason that the issue is not “what is wrong with the EC inspection system”, but “why is the EC justified in imposing that system on other WTO Members.”

10. Further, the EC says that its inspection structure is product-specific. This statement is misleading and inaccurately dismisses the broad scope of the requirement in Article 10 of the GI Regulation, which requires that an inspection structure be established by the WTO Member, and that, under that structure, particular inspection bodies may be authorized to conduct inspections. Further, these inspection structure requirements have nothing to do with whether the products satisfy the substantive criteria of the Regulation; we are not in this dispute challenging the requirements that a product must meet in order to claim GI status.

Government Involvement

11. We have already explained why it is WTO-inconsistent for the EC to require other WTO Members to assess whether GI applicants comply with the requirements of the EC GI Regulation and to do the EC’s work for it. During this meeting, and for the first time to this degree, the EC focuses on TRIPS Article 24.9, which provides that Members need not protect GIs not protected in the country of origin. The EC uses this provision to support its proposition that the TRIPS Agreement itself permits the EC to require that other WTO Members assess the GI applications of its nationals and transmit those applications to the EC. According to the EC, only the WTO Member government, and not the individual rightholder, is in a position to show that the GI is protected in the country of origin.

12. But we ask the Panel to consider this argument carefully. The EC’s assertion is perhaps true if a WTO Member has an EC-style GI protection system, with a central list of protected GIs maintained by the government. But, as indicated by several WIPO publications we have cited in this proceeding, WTO Members protect GIs in a number of ways, including through certification or collective marks, unfair trade statutes, and the like. Further, some WTO Members have common law certification and collective mark systems, in which the marks are not maintained on any central register. For all of these Members, perhaps unlike the EC, the government is not in a better position than the rightholder to provide information that the GI is protected in its country of origin. Therefore, implicit in the EC’s argument – and in the requirement that the WTO Member government and not the rightholder show that the GI is protected in the country of origin – is the assumption that, in order to have their GIs protected in the EC, other WTO Members must have a system of GI protection that is similar to the EC system. This requirement is a “back-door” way of imposing an EC-style system of GI protection on other WTO Members.

13. Further, the EC characterizes its requirement that other WTO Members process GI applications as “cooperation”. I know why they call it “cooperation”: who can be against cooperation? But this is not cooperation. The EC is forcing other sovereign WTO Members to subject themselves to the EC’s requirements and forcing other WTO Members to do the EC’s job for it, as a condition of receiving GI status for its persons and products. That is not cooperation.

Article XX(d) of the GATT 1994

14. The EC's second submission contains the EC's only substantive argument on Article XX(d) of the GATT 1994. It went on for several pages; clearly some work went into it. Yet, the EC's argument was that the WTO-inconsistent requirements alleged by the United States are necessary for the "attainment of the objectives" of the Regulation or "indispensable for the implementation" of the Regulation. But we have to be much more rigorous than this when considering whether a Member has satisfied the strict conditions for an exception to basic WTO obligations. An examination of previous disputes discussing these exceptions – such as *Korea – Beef* – shows the level of rigor and analysis that is appropriate for this analysis. In brief, the requirement under the GATT 1994 Article XX(d) is that a WTO-inconsistent measure must be "necessary to secure compliance" with a WTO-consistent law or regulation. This requirement cannot be glossed over or swept under the carpet. It is simply irrelevant under GATT 1994 Article XX that a measure is necessary for the objectives of a regulation, or indispensable to the implementation of a regulation. It must be necessary to secure compliance with a WTO-consistent regulation.

15. I heard a brief conclusion in the EC's closing statement that these requirements are necessary to ensure that a product meets the specifications. But it is not clear that the specifications are a regulation, or in what sense the specifications – if they are the regulation the EC has in mind – are WTO-consistent. In short, the EC has not even made a credible attempt to support its case for entitlement to an Article XX(d) exception, because it has not even shown that the WTO-inconsistent requirements secure compliance with a WTO-consistent regulation. And, of course, we have already described in our oral and written submissions why these requirements are not in any sense "necessary".

Trademarks

16. While our claims with respect to trademarks are separate from our national treatment and MFN claims, the theme is the same: through GI registration, the EC gives its nationals protection against the trademark rights of all trademark owners under the TRIPS Agreement, including non-EC nationals.

17. Several points in our discussions today are worth highlighting. Notably, the EC continues to maintain that, presumably in satisfaction of his TRIPS Article 16.1 rights, the trademark owner has full rights to challenge and cancel a GI registration, by alleging inconsistency with Article 14(3) of the Regulation. We are not sure that this "right", if available, is responsive. But since we had a considerable amount of new discussion of this issue during this meeting, some comments are in order. First, Article 16.1 requires that the trademark owner be able to prevent confusing uses of a GI. Cancellation of an entire GI might or might not be necessary to do this. It seems wholly unrealistic, for instance, that the owner of a trademark in one EC member State would be able to convince the ECJ that an entire EC-wide GI should be cancelled, simply to avoid a particular confusing use in his local market. In this case, particularly, the supposed opportunity to "cancel" a registration is an inadequate substitute for the ability to prevent confusing uses.

18. Second, the EC had initially suggested to the Panel that a trademark holder could challenge the registration directly, presumably under Article 230 of the EC Treaty. In response, we pointed out that any such challenge would have to be made within two months from the registration, and that, after that point, the trademark owner would be powerless to challenge the registration, even through an “indirect” challenge in EC member State courts. The EC now responds, contrary to its earlier suggestions, that trademark owners might not be able to satisfy the “directly and individually concerned” standing requirement for challenging the registration under Article 230, raising the possibility that some trademark owners might be able to challenge the registration after the two-month deadline expires. At least in the case of identical signs for identical goods, it would seem that the trademark owner *would* be directly and individually concerned. But not even the EC is claiming that *no* trademark owners would be considered directly and individually concerned. Therefore, even under the EC’s approach, not all trademark owners would have the opportunity to challenge the registration after the two-month deadline (and, indeed, it may be that none would have that opportunity). Consequently, it cannot reasonably be asserted that no trademark owners will be barred from challenging GI registrations after two months. Third, those trademark owners, if any, not prevented from challenging the registration after the two-month deadline expires, would not be entitled to a referral to the ECJ, which is in the discretion of the courts. Finally, it appears that none of the GI registrations pursuant to accession protocols is subject to challenge at all.

19. And in any case, the substantive standard that would be applied by the court under Article 14(3) is more strict than that required under TRIPS Article 16.1. Article 14(3) provides for the rejection of a GI Registration where it is likely to mislead the consumer in light of the trademark’s reputation, renown and length of time used. That is not the standard under Article 16.1, which only requires confusion. The EC says that the confusion analysis always involves the consideration of renown, but that is not true. For example, where there are identical signs for identical goods, reputation, renown, and length of time will be irrelevant.

Article 24.5 of the TRIPS Agreement

20. The EC points to the supposed difference between the United States and Australia regarding Article 24.5 with respect to the Article 24.5 phrase “right to use a trademark”. Regardless of whether this is true, however, there is no difference with respect to the main issue: that Article 24.5 says that measures to implement the GI section shall not prejudice the eligibility for or the validity of the registration of a trademark, and that Article 16.1 requires that owners of such registered trademarks have certain rights. Further, even if the EC is right that Article 24.5 prevents Members from prejudicing the right to put “signs” on goods, this does not give license *to* prejudice rights guaranteed under Article 16.1 to prevent confusing uses of signs. We urge the Panel to be very careful not to read away important Article 16.1 rights through a negative implication, particularly one arising from a misreading of Article 24.5.

Article 24.3 of the TRIPS Agreement

21. We find it extraordinary that the EC complains that our reading of Article 24.3 would mean that trademark owners have more rights after the TRIPS Agreement comes into force than

they had before the TRIPS Agreement came into force. That is the whole point of Article 16.1 of the TRIPS Agreement. That's why we signed the TRIPS Agreement. In contrast, the EC says that whatever GI protections were in place when the TRIPS Agreement came into effect cannot be changed, regardless of whether they are consistent with other TRIPS Agreement or WTO obligations. This reading is not supported by the text and is not what the negotiators intended. Further, we do not understand the EC's point that our reading of Article 24.3 discriminates against those with registration systems in place on the date the TRIPS Agreement came into force. Article 24.3 does not identify any particular system for the protection of GIs. That provision merely says that whatever protection was provided to GIs – regardless of system – cannot be diminished in implementing the GI section of TRIPS.

Article 17 of the TRIPS Agreement

22. Under Article 17, there is a difference between using a place name to describe a product and using a GI in a trademark sense to differentiate and encourage consumers to buy the product. Use of a GI in a promotional sense by an unlimited number of people, over an unlimited amount of time and for nearly unlimited uses cannot be justified as a limited exception under Article 17. Further, this, by definition, allows consumers to be confused, which is not in the interest of either trademark owners or consumers.

Conclusion

23. We sincerely thank the Panel. We know this has been a long and complicated two days, and that we have generated a lot of paper over the course of this dispute. But I do agree with the EC that these past two days have elucidated many issues. While the EC and we still do not agree on many issues, we at least have a better sense of where we disagree. Thank you.