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Holy Spirits – Part II

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In my last column, I looked at one particular aspect of Article 23 of the TRIPS Agreement – the spat over special treatment to be accorded to geographical indications for wines and spirits compared to those for other agricultural products.

Now let's examine an interesting case of textual ambiguity in TRIPS Article 23.4, which purports to set forth the goal for negotiating the future of GI protection in TRIPS. We'll also look at the ongoing (http://www.origin-food.org/cadre/cadb.htm) "culture wars" between the U.S. (http://usinfo.state.gov/ei/Archive/2003/Dec/31-157125.html) and the E.U. (http://www.geographicindications.com/laws.html) over Article 23.4's interpretation.

The final text of the TRIPS Agreement was *not* the product of negotiations between the parties. During the final year of the Uruguay Round negotiations in 1991, intellectual property negotiations were still at a stalemate. Frustrated with the lack of progress and the likelihood that the entire Round would fail over the issue of IP protection, then GATT Secretary-General Arthur Dunkel directed the Secretariat to issue a "take-it-or-leave-it" text to the negotiating parties, (the so-called "Dunkel Text" of TRIPS), and set a deadline for completion of the WTO Agreements in 1993. The European communities were just then in the process of putting into place place a complicated regime for the absolute protection of GIs.

The U.S. was then and remains today adamantly opposed to an elaborate and expensive civil-law type regime for protecting geographical indications, in favor of a "trademark approach" which allows for the registration of geographical indications as collective or certification marks for the purpose of preventing consumer confusion but not for the purpose of allowing WTO members to "own" words like "champagne," "chablis," or "port". In the words of USPTO Director Jon Dudas, "Why shouldn't Americans be able to eat a bologna sandwich or have a glass of chablis? And why should US trademarks be jeopardized because some countries think they should have exclusive rights to use words like 'parmesan' and 'feta'?"

Article 23.4 of TRIPS, as drafted, did nothing more than acknowledge the stalemate and kick the question into the future. It reads:

"In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the *establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.*" [emphasis added]

Well, what does *that* mean?? The Europeans emphasize the first highlighted phrase ("establishment of a multilateral system of notification and registration"), while the U.S. and like-minded states like Canada emphasize the latter ("for protection in those Members participating in the system." In essence, the European position is that a registration system similar to the ones in Europe must be mandatory for all WTO Members. The American position is that the plain language of 23.4 means that "Members participating in the system" clearly does not mean "all Members of the WTO"), because if it meant "all

Members of the WTO", the words "participating in the system" become superfluous. In the report of the WTO Secretariat of the Negotiations of the TRIPS Council in early 2003, (Part IV of WTO Document TN/IP/W/7) the Europeans argued that a registration system will be useless if participation is not mandatory. They also suggested that if Article 23.4 means that only some member states will join, the language would have been "plurilateral system" instead of "multilaterial system", to reflect standard GATT/WTO parlance, and that "it would not have been logical for the negotiators of Article 23.4 to have envisaged a voluntary system, since a voluntary system in WIPO (The Lisbon Agreement)is already in place." The Americans said, in effect, "Wait a minute. The Lisbon Agreement only has 22 Member states (including France and seven of its former colonies.) The WTO now has 147. Are we to assume we all agreed to sign on to an agreement so few of us ever agreed to in the past?"

Djiwen Rangneckar of the School of Public Policy at University College – London, characterizes the trade-off as between a "minimum sufficient" regime under Article 22, which would allow for the continued use of the trademark approach by the US. That would have the benefit of recognizing the current state of global trade in GI-protected goods, but run the risk of eroding GI protection through genericide in the US and Canada in the future. Conversely, an "absolute" system as proposed by the Europeans provides the potential for greater use of GIs in the future. But imagine the GI bureaucracies required for all WTO member states, and the attendand costs, if the Eurocrats get their way...