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# Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications

JUSTIN HUGHES\*

It should be borne in mind that, as is the case with trademarks, an unduly high level of protection of geographical indications and designations of origin would impede the integration of national markets by imposing unjustified restrictions on the free flow of goods.

—European Union Advocate General Francis Jacobs<sup>1</sup>

Tell me what you eat and I will tell you what you are.

—Anthelme Brillat-Savarin<sup>2</sup>

## INTRODUCTION

Not so long ago, exotic goods came from exotic places if they came at all. People grew, cured, and cooked local foods; they built with local materials. The people in the village of Roquefort-sur-Salzon ate their cheese because that was what they produced, not because they insisted

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1. Constanze Schulte, Presentation at Lovell Madrid, Similarities and Differences in the Enforcement of Trademarks and Designations of Origin, *available at* <http://www.mie.org.hu/conference05/eloadasok/Schulte.ppt> (last visited Nov. 5, 2006) (quoting the Opinion of Advocate General Jacobs).

2. THE ANCHOR BOOK OF FRENCH QUOTATIONS 242 (Norbert Guterman ed., 1963) (quoting JEAN ANTHELME BRILLAT-SAVARIN, *PHYSIOLOGIE DU GOUT*, at IV (1825) (“Dis-moi ce que tu manges, je te dirai ce que tu es.”)).

on Roquefort cheese. Over time, trade de-localized consumption and, in the process, established reputations for goods produced in distant places.<sup>3</sup> The trade of Phoenician sailors made purple-hued Phoenician cloth widely known and coveted in the ancient world. In the fifteenth century, swords from Bizen became known among the samurai class in Japan for their impressive strength and suppleness,<sup>4</sup> just as the violins from Cremona became celebrated in Europe for the “warmth” of their sound. In each case, a geographic name became associated, far beyond the borders of that geographic location, with a product known for highly desirable and seemingly unique characteristics.<sup>5</sup>

This accretion of meaning occurred in a similar fashion with trademarks. Trademarks represent the commercially, organizationally, and legally circumscribed group (the “house”) that became identified with a specific desirable product. Frequently the two processes happen in tandem. The town of Cremona became famous for violins, as did Stradivarius, Amati, and Guarneri, each name designating a single Cremona violinmaker, and later, a production house.<sup>6</sup> In fact, some assume that geographic designations were an historic precursor of trademarks.<sup>7</sup>

In both cases, geographic designation and organizational source, people may try to free-ride on the meaning of a particular word. The law offers radically different responses to this free-riding, dependent on the effects of the third party usage up to that moment. If the third party use of the word(s) is so extensive that it has already eliminated the geographical or organizational source from the meaning of the word, the use will typically be allowed to stand. This is “genericization” and it works the same way with geographical designations and trademarks: escalator, cellophane, English muffins, camembert, thermos, and Swiss cheese are several uncontroverted examples.

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3. For a discussion of the development of the global spice trade, see CHRISTIAN BOUDAN, *GÉOPOLITIQUE DU GOUT* 39–42, 46–51 (2004).

4. See NUBUO OGASAWARA, *JAPANESE SWORDS* 9–10 (1970); JOHN M. YUMOTO, *THE SAMURAI SWORD, A HANDBOOK* 29–30 (1958).

5. See generally CAROLINE BUHL, *LE DROIT DES NOMS GÉOGRAPHIQUES* 323 (1997).

6. Stradivari Antonio (1644–1737); Stradivari Francesco (1671–1743); and Stradivari Omobono (1679–1742). Amati Antonio (1555–1640); Amati Francesco (1640–?); Amati Hieronymus (1556–1630); Amati Hieronymus (1649–1740); Amati Nicolo (1596–1684); and Amati Antonio Hieronymus (1555–1630). *ENCYCLOPÆDIA BRITANNICA* (2006).

7. For example:

In antiquity, geographic indications were the prevailing type of designation for products. With the development of the productive forces and production relationships, the use of other types of designation, intended to distinguish the goods of one manufacturer from the similar goods of other manufacturers, tended to spread. Thus, certain manufacturers' names have progressively become trade names.

M.C. Coerper, *The Protection of Geographical Indications in the United States of America*, 29 *INDUS. PROP.* 232, 232 (1990) (Dr. Grigoriev speaking at the Symposium on the International Protection of Geographical Indications, Santenay, France, November 9–10, 1989).

If the law intervenes earlier, while the word still means a specific geographic or organizational source, the third party use is likely to be judged harshly against two concerns: protecting consumers from misinformation and protecting producers from activities we judge “unfair.” These two concerns provide, in varying degrees, the justifications for unfair competition and trademark laws on both sides of the Atlantic. These concerns also gave rise in Europe to separate law limiting the use of certain geographic words to designated producers in designated producing regions. Historically, the most important of such laws has been France’s system of *appellations d’origine contrôlées*.

Appellation laws are traditionally justified by the idea of terroir: that a particular land is a key input for a particular product. There is no direct English translation of “terroir,” but the idea is that the product’s qualities “come with the territory.” Terroir is the idea of an “essential land/qualities nexus”: the local producers are entitled to exclusive use of a product name because no one outside the locale can *truly* make the same product. Of course, when the geographic name has great cachet (e.g., Bordeaux, Napa, or Swiss chocolate) exclusive control produces economic benefits for local producers, regardless of whether there is really anything unique about the local products.

Continental European countries, especially Mediterranean countries, have traditionally followed France’s lead in seeking (or accepting) strong protection for geographical indications (GIs).<sup>8</sup> However, it was not until the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement<sup>9</sup> that geographical indication protection joined the ranks of copyright, patents, and trademarks as the subject of a broad-based multilateral agreement with detailed obligations. For geographical indications, the TRIPS Agreement forged a complex substantive compromise between European and “New World” interests. Unsurprisingly, the compromise included an agreement to put off the full battle for another day. This agreement took the form of precise commitments to continue discussions about further, increased protection for geographical indications.

So, in recent years, New World agricultural producers (Australia, Canada, Chile, the United States, and others)<sup>10</sup> have squared off against

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8. See, e.g., Bruce Lehman, *Intellectual Property under the Clinton Administration*, 27 G.W. J. INT’L L. & ECON. 395, 409 (1993–94) (attributing the TRIPS provisions to “strong French interest in appellations such as Champagne, Burgundy, and Chablis”).

9. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197 [hereinafter TRIPS].

10. The New World producers are largely an informal group of industrialized nations that typically include Japan, the U.S., Canada, Australia, and New Zealand (“JUSCANZ”) with a few wine producers from the developing world. JUSCANZ sometimes works in tandem and sometimes in

the European Union about how to fulfill these commitments. The European Union advocates an international registration system that provides mandatory, very strong protection of Old World agricultural production names.<sup>11</sup> It also insists that certain words like “Parmesan” (as in cheese), “Parma” (as in ham), and “Chablis” be “returned” to Europe. The European Commission says this is a matter of fairness.<sup>12</sup> The New World producers advocate a less centralized, more market-driven approach and show no enthusiasm to return words that have become generic product names in many countries. Australia and the United States have also successfully argued before the World Trade Organization (WTO) that the European Union has failed to abide by its *existing* obligations to protect the geographical indications of non-EU countries.

The debates about geographical indications are more than just intellectual property arcana; they take place in the context of long-standing, high-stakes negotiations over trade in agricultural goods.<sup>13</sup> Indeed, until the Doha Round negotiations collapsed in the summer of 2006,<sup>14</sup> one EU ambassador identified the geographical indications issue as “one of the few offensive interests” of the European Union in those talks.<sup>15</sup> In a possible world of reduced agricultural subsidies, control of

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opposition to EU proposals over a wide range of issues from intellectual property to climate change. See George Archibald, *'Sexual Rights' Battle Looms: Women's Session to Be Contentious*, WASH. TIMES, June 5, 2000, at A1 (describing EU and JUSCANZ working together to oppose the “G-77” developing countries voting bloc at the UN); Terry Hall, *EU Move Leaves a Sour Taste: New Labeling Rules Raise Concerns for New Zealand Wine Producers*, FIN. TIMES, July 19, 2002, at 18 (describing how 2002 EU Wine Regulations, which touch upon all aspects of wine production for wines imported into the European Union, raised protests from New Zealand, Brazil, the U.S., Australia, and Canada); Tonya Barnes et al., EARTH NEGOTIATIONS BULL., (Int'l Inst. for Sustainable Dev., Winnipeg, Canada), Mar. 10, 2000, at 1, <http://www.iisd.ca/linkages/vol14/enb1429e.html> (describing comparative EU and JUSCANZ proposals on micro-financing for developing countries).

11. Tobias Buck & Guy de Jonquieres, *Name-Calling over Europe's Delicacies*, FIN. TIMES, May 5, 2003, at 10.

12. James Cox, *What's in a Name*, USA TODAY, Sept. 9, 2003, at 1B.

13. See, e.g., William Drozdiak, *French Winemakers See Themselves as 'Hostages' to Politics*, WASH. POST, Nov. 10, 1992, at A19 (describing pre-WTO U.S.-EU disagreement over oil seed subsidies and possible retaliatory U.S. tariffs against French winemakers); Editorial, *Fair Spirit*, FIN. TIMES, Nov. 8, 1999, at 12 (describing the European Union's strong stand against South Africa on wine geographical indications as “another example of the conflict between the European Union rhetoric of free trade and the continuing protectionism in agriculture”).

14. Blame for the collapse flew like mud at a rainy rodeo. See Alan Beattie, *Several Suspects in Frame for Doha Murder*, FIN. TIMES, July 26, 2006, at 5; Alan Beattie, *US Hits Back at EU Countries Over Collapse of Doha Round*, FIN. TIMES, July 26, 2006, at 1; Scott Kilman & Roger Thurow, *U.S Farm-Subsidy Cuts a Long Shot as Doha Falts*, WALL ST. J., July 26, 2006, at 19 (discussing how the collapse of free-trade talks is likely to eliminate any chance of overhauling America's farm-subsidy program); *Les aides agricoles provoquent l'échec de la libéralisation du commerce*, LE MONDE, July 26, 2006, at 9 (describing how European Commission officials blamed the U.S. and the U.S. countered).

15. *Hearing on Geographic Indications Before the H. Comm. on Agriculture*, 108th Cong. 4 (2003) (testimony of Michael Pellegrino, Vice President of Marketing & Strategy, Kraft Cheese Division, Kraft Foods North America) [hereinafter Testimony of Michael Pellegrino].

valuable geographical indications would at least allow European farmers to compete better in high-end food categories and secure at least some monopoly rents from well-known food names. Although geographical indications laws technically apply to all kinds of products from Botswanan baskets to Selangor pewter, for all practical purposes, the law of geographical indications is about foodstuffs.<sup>16</sup> Within foodstuffs, geographical indications predominantly concern wine and spirits.<sup>17</sup> This is a debate about the law of the names of what we eat and drink.

There has been relatively little systematic, scholarly analysis of geographical indications in Europe and almost none, or none, on the New World side of the Atlantic.<sup>18</sup> Yet potentially at stake is commercial control of a dizzying array of words and symbols: champagne, port, bourbon, camembert, Idaho potatoes, Swiss cheese, sherry, sake, pictures of the Eiffel Tower or Golden Gate Bridge, Dutch chocolate, shapes of bottles, Budweiser, jasmine rice, Coney Island hot dogs, Neapolitan pizza, perhaps even images of Mozart and Benjamin Franklin.<sup>19</sup> Based on ideas advocated in some quarters, the list is disturbingly long.

This Article proposes that geographical words in product names (that is, labeling and advertising) have three basic purposes. These are (1) to communicate geographic source, (2) to communicate (non-geographic) product qualities, and (3) to create evocative value. The first of these is simple. "Industria Argentina" or "Made in England" communicate a product's geographic origins. Second, geographic words are often used to communicate product characteristics other than geographic origin. This second use often leads to the geographic words

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16. See, e.g., DOMINIQUE DENIS, APPELLATION D'ORIGINE ET INDICATION DE PROVENANCE 1 (1995) ("Les appellations d'origine hors de ce secteur [agroalimentaire] sont négligeables sur le plan pratique.") [The appellations of origin outside of this sector (agro-alimentary) are negligible on the practical level.]

17. According to another report, "[t]here are some 4200 registered [geographical indications] for wines and spirits and 600 [geographical indications] for other food products." Bernard O'Connor, *The Legal Protection of Geographical Indications*, 2004 INTELL. PROP. Q. 1, 35. But O'Connor's numbers look suspect because this country break-down produces only 1136 GIs for France, Italy, and Spain together. *Id.* at 35-36.

18. Worthwhile exceptions exist. See Jim Chen, *A Sober Second Look at Appellations of Origin: How the United States Will Crash France's Wine and Cheese Party*, 5 MINN. J. GLOBAL TRADE 29 (1996); Albrecht Conrad, *The Protection of Geographic Indications in the TRIPS Agreement*, 86 TRADEMARK REP. 11 (1996); see also Robert Brauneis & Roger E. Schechter, *Geographic Trademarks and the Protection of Competitor Communication*, 96 TRADEMARK REP. 782 (2006) (discussing the recent direction geographic trademark law has taken in the U.S.).

19. NORBERT OLSZAK, LES APPELLATIONS D'ORIGINE ET INDICATIONS DE PROVENANCE 34 (2001) (giving the image of William Tell and the Cathedral at Strasbourg as examples of indirect GIs, the latter the subject of a litigation in France in 1968); see also L. Wichers Hoeth, *Protection of Geographic Denominations in the Netherlands*, in PROTECTION OF GEOGRAPHIC DENOMINATIONS OF GOODS AND SERVICES 75 (Herman Cohen Jehoram ed., 1980) (giving the Eiffel Tower (France), Cologne Cathedral (Germany), and Tower Bridge (England) as examples).

becoming “generic.”<sup>20</sup> The word loses its geographic meaning and acquires another meaning based on non-geographic qualities of the product, as when people go into a *restaurant chinois* off the Champs-Elysées or, nine time zones away, Californians order *French fries* with their *hamburger*.

A third, more overlooked, category for use of geographical words in product names is their use for evocative and aesthetic purposes. These are typically uses of words which, in American trademark doctrine, would be “fanciful” or “arbitrary.”<sup>21</sup> The evocative value of geographic words is most evident with geographic names of fictional or no-longer existent places: ATLANTIS waterproofing services,<sup>22</sup> POMPEII game machines,<sup>23</sup> and SHANGRI-LA hotels.<sup>24</sup>

Armed with this framework, we will see that the classical justification for geographical indications is that they serve a special combination of (1) and (2): to communicate a product’s geographical source *and* non-geographic qualities of the product that are related to its geographic origin. This is the idea of *terroir*: that the *particular geography* produces *particular* product characteristics that cannot be imitated by other regions. The idea of *terroir* undergirds the European Union claim for stronger protection of geographical indications. This

20. See *Black Hills Jewelry Mfg. v. Gold Rush, Inc.*, 633 F.2d 746, 751 (8th Cir. 1980) (“For ‘Black Hills Gold Jewelry’ to be generic, it must be applied to three-color gold grape and leaf design wherever produced.”). See generally *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976); *King-Seeley Thermos Co. v. Aladdin Indus.*, 321 F.2d 577, 579 (2d Cir. 1963); ANDRÉ BERTRAND, *LE DROIT DES MARQUES, DES SIGNES DISTINCTIFS ET DES NOMS DE DOMAINE* 146 (CEDAT, 2002) (“Comme en matière de marques ou des indications de provenance, il est admis qu’une appellation d’origine peut perdre ce caractère par usage généralisé.”) [As with trademarks and indications of provenance, some appellations of origin admittedly lose their character by falling into general use.]; OLSZAK, *supra* note 19, at 16 (“Certains termes géographiques sont parfois perdu dans l’usage cette signification précise pour deviner un nom commun désignant un type de produit. L’utilisation de ce nom est alors nécessaire pour identifier un produit et ne peut donc pas être restreinte aux seuls produits originaires de lieu géographique que correspondant au nom propre initial, mais il n’est pas impossible de songer à rétablir la situation en régénérant la valeur géographique du signe.”) [Some geographic terms lose their first signification and become a common word used by people to designate a type of product. The use of this term then becomes necessary to identify a product and therefore cannot be restricted to products that originally come from the geographical place that the initial proper name designates.].

21. A classic example from trademark law might be “Alaska brand bananas” because almost no adult would think that bananas can be or would be grown in Alaska. See *In re Nantucket, Inc.*, 677 F.2d 95, 97 n.5 (C.C.P.A. 1982). But use of geographic words for evocative purposes could include geographic words which are considered “suggestive” in U.S. trademark doctrine.

22. U.S. Trademark Registration No. 1,212,225 (filed Jan. 26, 1981) (ATLANTIS in stylized form certification mark owned by Rockhopper Group LLC).

23. U.S. Trademark Registration No. 2,539,104 (filed Jan. 6, 2006) (POMPEII certification mark owned by Aristocrat Tech. Austl. Pty. Ltd.).

24. U.S. Trademark Serial No. 7,4148,286 (filed Mar. 18, 1991) (SHANGRI-LA HOTEL & RESORT certification mark abandoned by applicant Nakash Bros. Realty P’ship N.Y. on Jan. 18, 1992).

concept helps justify the European Union's demand, since 2004, for the "return" of over forty words that have become generic names for foodstuffs in other countries (e.g., Parmesan cheese, Champagne, Chablis, Gorgonzola cheese, Parma ham, etc.). Although terroir and a claim for a unique communications function for geographical indications is the European Union's public rhetoric, this Article concludes that the European Commission has a simpler goal: control of geographic words for their *evocative value in the marketplace*. The monopoly rents available from exclusive control of this evocative value drive the EU position in the debates over geographical indications.

Part I provides the reader with the two basic approaches in national law protecting GIs, either a free-standing appellations law or the use of certification marks within trademark law. Part II describes international obligations to protect GIs as they now exist in the TRIPS Agreement, the TRIPS mechanisms mandating further negotiations, the major proposals that have been made, and the 2005 WTO decision concluding that the European Union discriminated against other countries in its own GI law. Part III explores the "popular" parameters of the debate and how the European Union reasonably sees strong GI protection as a way to gain monopoly rents. Part IV turns to the weakness of terroir as a justification for the EU appellation theory behind GIs, and Part V describes the slow process by which geographical words that have become generic can be repropriated. Finally, Part V explores the dangers to evocative and descriptive uses of geographical words from any strengthened protection of GIs against "usurpation."

## I. GEOGRAPHICAL INDICATIONS IN NATIONAL LAW

A "geographic identifier" could be any word, phrase, or symbol that designates the place where a product was produced regardless of reputation.<sup>25</sup> So, "made in Patagonia" on ROM chips would be a *geographical identifier* even though Patagonia has no particular reputation for semiconductors. In contrast, a geographical indication designates the place where a product was produced *and* that the place is known to produce that item with particular desirable qualities. In the case of GIs there is a known *land/qualities* nexus. It follows that every geographical indication is a geographical identifier, but not vice versa.

Geographical indications are often geographic words coupled with the generic term for the product (e.g., Irish whiskey). Sometimes the geographic word stands alone (e.g., Scotch). Typically, the places are

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25. These are sometimes called "indications of source," but I am not using that phrase because "indication of source" is often used in distinction to "geographical indication." See, e.g., Leigh Ann Lindquist, *Champagne or Champagne: An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT'L & COMP. L. 309, 312 (1998).



either towns (Roquefort, Chablis), or sub-national regions such as states (Idaho potatoes), departments (Cognac), or counties (Bourbon). The larger the region, the less likely it is that production factors will be both (a) consistent across the region and (b) unique to that region. Nonetheless, and despite resistance to the idea historically,<sup>26</sup> names of countries can be protected as geographical indications one way or another in most legal systems, for example, Canadian whiskey, Colombian coffee, or Swiss chocolate.

Finally, geographical indications are occasionally *not* names of places.<sup>27</sup> For example, in Britain, “claret” has come to refer to red Bordeaux wines. Similarly, the European Union has spent years arguing over whether “feta” is a geographical indication belonging to Greece.<sup>28</sup> A bottle style that has been historically used for, and identified with, a wine or spirit from one particular region might also be claimed as a geographical indication. Some commentators believe that such indirect geographical indications might even include “depictions of landmarks, familiar landscapes, heraldic signs, [and] well-known persons,”<sup>29</sup> a disturbing extension of the concept for anyone concerned about either evocative use of symbols in advertising or free expression in general.

With these basics in mind, it is useful to sketch out the two most divergent approaches to protecting geographical indications.

#### A. THE FRENCH SYSTEM OF *APPELLATIONS D’ORIGINE CONTRÔLÉES*

Although there were some laws in France, Portugal, and Tuscany controlling wine labeling as early as the fourteenth and fifteenth centuries,<sup>30</sup> appellations law is a modern phenomenon. In 1855, the Médoc vineyards of Bordeaux were classified.<sup>31</sup> This move coincided, not incidentally, with the opening of the railroad between Bordeaux and

26. For example in 1975, the European Communities argued against Germany’s claim that “Sekt” was an indirect geographical indication, partly on the grounds that “the Federal Government gave no example demonstrating that the territory of a whole country may also be the subject of indirect indications of origin.” Case 12/74, *Comm’n v. Germany*, 1975 E.C.R. 181 ¶ 3. French law does not permit country names to be protected *appellations d’origine* and, according to the California Wine Export Program, country names like “American” do not qualify as geographical indications under EU wine doctrine. See CAL. WINE EXP. PROGRAM, EUROPEAN UNION WINE LABELING REGULATIONS 2–3 (Oct. 20, 2000) (on file with author).

27. Case 12/74, *Comm’n v. Germany*, 1975 E.C.R. 181 ¶ 12.

28. See Joined Cases C-465/02 & C-466/02, *F.R.G. v. Comm’n*, 2005 E.C.R. I-09115.

29. Conrad, *supra* note 18, at 11–12 (giving examples of the Eiffel Tower (France), the Matterhorn (Switzerland), and Mozart (Austria)).

30. BUHL, *supra* note 5, at 331; OLSZAK, *supra* note 19, at 51. Many claim that there existed in ancient Palestine a “hierarchy of crus [wines]” recognized by local connoisseurs. JEAN-ROBERT PITTE, *LE VIN ET LE DIVIN* 45 (2004). And, of course, Falernian wines were renowned in the Roman era. See ANDREW DALBY, *FOOD IN THE ANCIENT WORLD FROM A TO Z* 138 (2003).

31. A.J. LIEBLING, *BETWEEN MEALS: AN APPETITE FOR PARIS* 158 (1995); OLSZAK, *supra* note 19, at 6.

Paris. The first modern French law to combat fraudulently labeled wines was passed in 1905, but France's first government committee on appellations of origin for wines and *eaux de vie* was not established until 1935. In 1947, that committee became the *Institut National des Appellations d'Origine* (INAO),<sup>32</sup> now part of the Ministry of Agriculture.

The French system of *appellations d'origine contrôlées* (AOC) is founded on the idea of terroir.<sup>33</sup> Terroir has no direct English translation, but the notion behind the Latinate word is simple: the product's qualities *come with the territory*. As one Australian wine critic describes it: "terroir . . . translates roughly as 'the vine's environment[,] but has connotations that extend right into the glass: in other words, if a wine tastes of somewhere, if the flavours distinctly make you think of a particular place on the surface of this globe, then that wine is expressing its terroir."<sup>34</sup>

To put it less poetically, terroir is the idea of an "essential land/qualities nexus": French law defines an AOC as a region or locality name "that serves to designate a product of that origin whose qualities or characteristics are due to the geographic milieu, which includes natural and human elements."<sup>35</sup>

Beliefs about terroir run deep in France, but not too deep, for if they did there might not be a justification for the elaborate regulatory structure governing production of AOC foodstuffs. The INAO regulates not just the geographic boundaries for each AOC, but all "conditions of production," including, for wine, the grape varieties, hectare production quotas, natural alcohol content during vinification, permitted irrigation, etc.<sup>36</sup> The INAO regulations for AOC cheese place varying legal

32. See CODE DE LA CONSOMMATION [C. CON.] art. L. 115-19 (establishing INAO); see also OLSZAK, *supra* note 19, at 10. A national committee on *appellations d'origine* for cheese was not established until 1955. *Id.* at 11.

33. See INAO, History and Genesis of the AOC, [http://www.inao.gouv.fr/public/textesPages/History\\_and\\_concepts350.php?mnu=350](http://www.inao.gouv.fr/public/textesPages/History_and_concepts350.php?mnu=350) (last visited Nov. 5, 2006).

34. MAX ALLEN, SNIFF SWIRL & SLURP: HOW TO GET MORE PLEASURE OUT OF EVERY GLASS OF WINE 24, 29 (2002) (explaining that between Alsatian Pinot Gris and Italian Pinot Grigio white wines "[t]he difference, of course, comes almost solely from the terroir"). For a cyberspace version of the terroir story, see Chateau de Beaucastel, Terroir, <http://www.beaucastel.com/ang/terroir/> (last visited Nov. 5, 2006).

35. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. L. 721-1 (citing C. CON. art. L. 115-1 (defining AOC as "la dénomination d'un pays, d'une région, ou d'une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique, comprenant des facteurs naturels et des facteurs humains") [the denomination of a country, a region, or a locality serving to indicate a product which originates from it and to which the quality or characteristics are due to the geographical environment, including natural factors and personal elements]). With implementation of the "Origins Regulation" France also protects "indications of source," which do not require this nexus. See discussion *infra* note 99.

36. JAMES E. WILSON, TERROIR 60 (Blue Island Publishing 2005) (1999).

requirements on rennet used in coagulation, curd drainage, milk temperature at different points in curing, salting, and the use of lactic proteins.<sup>37</sup> The INAO works with “interprofessional” committees organized around specific products.<sup>38</sup> Based on committee recommendations, the INAO also establishes new *appellations contrôlées*.<sup>39</sup>

French statutory law protects an AOC not just against unauthorized uses on products in the same category, but also against any commercial use of the indication “likely to divert or weaken the renown of the appellation d’origine.”<sup>40</sup> This standard seems roughly similar to the protection accorded famous trademarks under U.S. federal dilution law. In perhaps the best known application of this broad protection, the producers of sparkling wine from the Champagne region were able to stop Yves St. Laurent from marketing a perfume called “Champagne.”<sup>41</sup>

## B. THE AMERICAN SYSTEM OF CERTIFICATION AND COLLECTIVE MARKS

In contrast to a separate system for protecting *appellations*, some countries, like the United States, subsume protection of geographical indications under trademark law. This is achieved through the categories of “certification marks” and “collective marks.” Under U.S. law, a collective mark is a trademark “used by the members of a cooperative, an association, or other collective group or organization,”<sup>42</sup> a definition that could easily include a foodstuff producers’ cooperative or trade association which imposes its own standards.<sup>43</sup> Certification marks are

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37. KAZUKO MASUI & TOMOKO YAMADA, FRENCH CHEESES 50, 92, 108 (1996); see also *L’adjonction d’eau ou de colorants est interdite*, LE MONDE, Aug. 20, 2002, at 8 (noting requirements for the “calvados domfrontais” AOC issued on December 21, 1997).

38. E.g., “Le Comité Interprofessionnel du Vin de Champagne” was organized in 1941. See Decree No. 86-242 of Feb. 21, 1986, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 25, 1986. The “Interprofession des appellations cidricoles” organizes producers of cider, calvados, and other apple-based spirits. See Jean-Jacques Lerosier, *En Normandie, des pommes, des poires et des appellations contrôlées*, LE MONDE, Aug. 20, 2002, at 8. There are committees organized for various types of wines, cheeses, “fragrant plants,” beets, flax, cider, tartar, semolina, etc. See *Le Comité Interprofessionnel du Vin de Champagne* (paper on file with the author).

39. Lerosier, *supra* note 38 (noting that the town of Domfrontais was given AOC for calvados on December 31, 1997 and AOC for poiré (apple and pear-based spirit) on December 12, 2001).

40. C. CON. art. L. 115-5. (“[L]e nom qui constitue l’appellation d’origine . . . ne peuvent être employés pour aucun produit similaire. . . . Ils ne peuvent être employés pour aucun établissement et aucun autre produit ou service, lorsque cette utilisation est susceptible de détourner ou d’affaiblir la notoriété d’appellation d’origine.”) [The name that constitutes the *appellation d’origine* cannot be used for any similar product. They cannot be used for establishment or any other product or service, when this use is likely to divert from or weaken the reputation of the *appellation d’origine*.]

41. Yves St. Laurent Parfums S.A. v. Institut National des Appellations d’Origin, Cour d’appel, [CA] [regional court of appeal], Paris, Dec. 15, 1993, 1994 E.C.C. 385 (holding that the use of Champagne as a title for a scent “usurped the prestige” of the appellation).

42. 15 U.S.C. § 1127 (2006).

43. See MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:99 (4th ed. 2006). In fact, McCarthy gives as one example of a likely collective mark holder “an agricultural cooperative of

used to “certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of . . . [the] goods or services.”<sup>44</sup> Examples include the “Good Housekeeping” seal of approval, the “UL” mark (Underwriters Laboratory),<sup>45</sup> and various trademarks used to designate kosher foods.

A certification mark protects a geographical indication when it is used to “certify regional . . . origin.”<sup>46</sup> For example, the state government of Idaho has three registered certification marks at the United States Patent and Trademark Office (USPTO) protecting different versions of “IDAHO POTATOES.”<sup>47</sup> Other examples of registered certification marks in the United States include PARMIGIANO-REGGIANO,<sup>48</sup> ROQUEFORT,<sup>49</sup> STILTON,<sup>50</sup> REAL CALIFORNIA<sup>51</sup> for cheese, PARMA for ham,<sup>52</sup> DARJEELING for tea,<sup>53</sup> WASHINGTON for apples,<sup>54</sup> and the FLORIDA SUNSHINE TREE for citrus.<sup>55</sup>

To maintain USPTO registration of a certification mark, the mark holder must meet several standards. The holder must control use of the mark.<sup>56</sup> The holder *cannot* be a producer of the certified products.<sup>57</sup> The holder must *not* allow it to be used for anything but certification of the relevant products; and must not discriminately “refuse[] to certify . . .

sellers of farm produce.” *Id.*

44. 15 U.S.C. § 1127.

45. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 11 reporters’ note (1995).

46. 15 U.S.C. § 1127.

47. U.S. Trademark Registration No. 2,403,069 (filed Mar. 17, 1997) (FAMOUS IDAHO POTATOES FAMOUS POTATOES GROWN IN IDAHO certification mark owned by Idaho Potato Commission); U.S. Trademark Registration No. 1,735,559 (filed July 21, 1991) (GROWN IN IDAHO IDAHO POTATOES certification mark owned by State of Idaho Potato Commission); U.S. Trademark Registration No. 943,815 (filed June 7, 1971) (PREMIUM PACKED IDAHO POTATOES certification mark owned by State of Idaho).

48. U.S. Trademark Registration No. 1,896,683 (filed June 7, 1993) (PARMIGIANO-REGGIANO certification mark owned by Consorzio del Formaggio Parmigiano-Reggiano).

49. U.S. Trademark Registration No. 571,798 (filed Feb. 13, 1952) (ROQUEFORT certification mark owned by community of Roquefort).

50. U.S. Trademark Registration No. 1,959,589 (filed Jan. 18, 1994) (STILTON certification mark owned by Stilton Cheese Makers’ Association).

51. U.S. Trademark Registration No. 1,285,675 (filed Apr. 11, 1993) (REAL CALIFORNIA CHEESE certification mark owned by California Milk Producers Advisory Board).

52. U.S. Trademark Registration No. 2,014,628 (filed Aug. 7, 1984) (PARMA certification mark owned by Consorzio del Prosciutto di Parma).

53. U.S. Trademark Registration No. 1,632,726 (filed July 1, 1998) (DARJEELING certification mark owned by the Tea Board of India).

54. U.S. Trademark Registration No. 1,528,514 (filed Dec. 30, 1985) (WASHINGTON certification mark owned by Washington State Apple Advertising Commission).

55. U.S. Trademark Registration No. 932,033 (filed Oct. 14, 1970) (THE FLORIDA SUNSHINE TREE certification mark owned by Florida Department of Citrus); U.S. Trademark Registration No. 1,559,414 (filed May 11, 1987) (FRESH FROM THE FLORIDA SUNSHINE TREE certification mark owned by Florida Department of Citrus).

56. 15 U.S.C. § 1064(5)(A) (2006).

57. *Id.* § 1064(5)(B).

goods or services . . . [that] maintain[] the standards or conditions which such mark certifies.”<sup>58</sup> But, unlike the INAO,<sup>59</sup> as long as the certification standards are applied in a non-discriminatory fashion, the USPTO does not care *what* the certification standards are. Even less government oversight is involved in a “collective mark” which is owned by an association to which all the relevant producers belong.<sup>60</sup> Collective marks are treated like regular trademarks, subject only to traditional trademark doctrines against abandonment, naked licensing, attachment to goodwill, and the like. In short, government involvement with this kind of geographical indication is no different than it is with the trademarks HILTON HOTELS or PEPSI.

Like other trademarks, certification marks can develop as a matter of common law without USPTO registration.<sup>61</sup> Presumably, the same is true for collective marks. In a seminal case concerning COGNAC as an unregistered certification mark, the Trademark Trial and Appeal Board concluded that the critical issue is whether *control* is being exercised over the use of the word.<sup>62</sup> The certification mark exists at common law “if the use of a geographic designation is controlled and limited in such a manner that it reliably indicates to purchasers that the goods bearing the designation come exclusively from a particular region.”<sup>63</sup> Thus, if an appellation or *denominazione* is controlled locally in France or Italy, the producers market in the United States, and *no one else in the United States is using the GI for the same product*, there are probably common law trademark rights under U.S. trademark doctrine. This means that a European producer can gain common law protection of its geographical indication in the United States without regard to whether the GI is protected under an EU member state’s trademark law, geographical indications law, or both.<sup>64</sup> The ability of certification mark rights to arise

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58. *Id.* § 1064(5)(C)–(D).

59. See *supra* text accompanying note 36.

60. MCCARTHY, *supra* note 43. And in many circumstances, “the only possible distinction” between the two kinds of marks “is one of form”:

That is, as to a collective trade or service mark, the sellers are members of an organization with standards of admission, while as to a certification mark, sellers are not members of an organization, but their products are certified according to set standards. This means that creating an “association” and calling a mark a “collective” mark may be a way to avoid the strict duties which Lanham Act § 14(e) applies to certification marks.

*Id.* § 19:99.

61. See *Florida v. Real Juices, Inc.*, 330 F. Supp. 428, 430 (M.D. Fla. 1971) (unregistered SUNSHINE TREE valid certification mark for citrus from Florida); *Institut National des Appellations d’Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d (BNA) 1875, 1883 (T.T.A.B. 1998) (COGNAC valid unregistered certification mark for purposes of opposing trademark registration using “Cognac”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 18 (1995).

62. See *Brown-Forman*, 47 U.S.P.Q.2d at 1885.

63. *Id.*

64. It is unclear whether GI registration at the EU level “preempts” registration as a certification mark at the national level. For a thorough discussion of the uncertainties on this issue, see Lionel

without any *ex ante* government role further distinguishes the American approach from a real AOC system.

## II. THE TRIPS PROVISIONS ON GEOGRAPHICAL INDICATIONS

From the late nineteenth century forward, concern for geographical identifiers made its way into many bilateral agreements. In 1910, the United States entered into a bilateral agreement with Portugal on the use of *Porto*; by 1930, there was a complex web of such treaties among European states.<sup>65</sup> Indications of source and geographical indications also made their way into a few multilateral agreements. Two of these multilateral agreements concern us<sup>66</sup>: the Paris Convention on Industrial Property (1883)<sup>67</sup> and the Lisbon Agreement on the Protection of Appellations of Origin and their International Registration (1958).<sup>68</sup>

Established in 1883, the Paris Convention was revised several times in the twentieth century<sup>69</sup> and it is better known for its provisions on patents and trademarks than for anything it says about geographical indications. Although Article 1 provides that the Convention includes “indications of source or appellations of origin”<sup>70</sup> those terms are undefined and the actual treaty obligations are cast at a very general level. Article 10(1) of the Convention requires countries to seize “on importation” or “inside the country” any goods bearing a “direct or indirect use of a false indication of the source of the goods.”<sup>71</sup> Article 10bis(3), added in 1958, also prohibits “indications or allegations the use of which in the course of trade is liable to mislead the public as to the

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Bentley & Brad Sherman, *The Impact of European Geographical Indications on National Rights in Member States*, 96 TRADEMARK REP. 850 (2006).

65. BUHL, *supra* note 5, at 340–41 (listing some of France’s bilateral treaties prior to EU competence in this area).

66. Another multilateral agreement on geographical indications—as unsuccessful as it is amusing named—is the Stresa Convention. Convention internationale sur l’emploi des appellations d’origine et dénominations de fromages [The International Convention for the Use of Appellations of Origin and Denominations of Cheeses], June 1, 1951, <http://www.admin.ch/ch/t/rs/18/0.817.142.1.fr.pdf>.

67. Paris Convention for the Protection of Industrial Property, *opened for signature* Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention] (revised at Brussels on Dec. 14, 1900, at Washington on June 2, 1911, at The Hague on Nov. 6, 1925, at London on June 2, 1934, at Lisbon on Oct. 31, 1958, and at Stockholm on July 14, 1967, and as amended on Sept. 28, 1979).

68. Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, 923 U.N.T.S. 189 (English text of Stockholm revision begins at 215), available at [http://www.wipo.int/lisbon/en/legal\\_texts/lisbon\\_agreement.htm](http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.htm) [hereinafter Lisbon Agreement] (revised at Stockholm on July 14, 1967, and as amended on September 28, 1979).

69. For an account of the origins of the Paris Convention, see I STEPHEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 59–94 (1975).

70. Paris Convention, *supra* note 67, art. 1(2).

71. *Id.* art. 10(1). Article 10(1) extends Article 9’s seizure obligations for false trademark to false indications of “source.” The “source” phrase apparently means geographic origin because it is the first half of a disjunctive in which the other phrase is “the identity of the producer, manufacturer, or merchant.” *Id.*

nature, the manufacturing process, [or] the characteristics” of the goods.<sup>72</sup> The drafting history of this provision indicates that it was *not* intended to apply to geographic identifiers,<sup>73</sup> but Article 10bis(3) is nonetheless important because it became a launching point for the current TRIPS provisions on GIs.

The second relevant pre-TRIPS effort is the Lisbon Agreement of 1958. The Lisbon Agreement established an international registration system for *appellations of origin*.<sup>74</sup> Article 2(1) of the agreement provides: “[A]ppellation of origin’ means 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>75</sup>

The Lisbon system is both simple and rigorous. Each country decides how its domestic law will determine that an appellation is protected (i.e., judicial or administrative processes).<sup>76</sup> Once an appellation is protected in its country of origin and registered with the World Intellectual Property Organization (WIPO), each member country of the Lisbon Agreement is required to protect that appellation within its own borders—subject to a one year window in which the country “may declare that it cannot ensure the protection of an appellation of origin whose registration has been notified to it.”<sup>77</sup> The scope of protection under the Lisbon Agreement is broad. Article 3 expressly provides: “Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind’, ‘type’, ‘make’, ‘imitation’, or the like.”<sup>78</sup>

Thus, the holder of an appellation as such (a certification trademark will not do)<sup>79</sup> has the right to stop *any* use in a descriptive phrasing such

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72. *Id.* art. 10bis(3)(3).

73. Article 10bis generally binds treaty members “to assure to nationals of [other treaty countries] effective protection against unfair competition.” The specific language of Article 10bis(3) then prohibits “indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.” The original proposal for this provision included “the origin” between “nature” and “the manufacturing process,” but this reference to source was dropped at the insistence of the United States during the 1958 revision of the Convention. See J. Thomas McCarthy & Veronica Colby Devitt, *Protection of Geographic Denominations: Domestic and International*, 69 TRADEMARK REP. 199, 202–03 (1979).

74. Lisbon Agreement, *supra* note 68, art. 1.

75. *Id.* art 2(1).

76. *Id.* art. 8.

77. *Id.* art. 5(3).

78. *Id.* art. 3.

79. The Lisbon Agreement leaves no room for anything short of an “appellation” system. Article 1(2) makes it clear that the treaty obligation extends only to “appellations of origin of products . . .

as “Port-like fortified wine,” “imitation Chianti,” or “Roquefort-style cheese.”

As of August 1, 2006, only twenty-five states were parties to the Lisbon Agreement.<sup>80</sup> Five countries have joined the Lisbon Agreement since 2001, but the new signatory list hardly suggests that the treaty is enjoying a second wind of mainstream acceptance (Georgia (2004), North Korea (2005), Peru (2005), Iran (2006), Nicaragua (2006)).<sup>81</sup> Among EU member states, only France, Hungary, Italy, and Portugal belong to the Lisbon system.

Lack of participation in the Lisbon system probably gave GI advocates added incentive to seek inclusion of GI provisions in TRIPS.<sup>82</sup> The negotiation history of these provisions will not be reviewed here,<sup>83</sup> except to say that (a) the contours of the debate crystallized with the

recognized and protected *as such* in the country of origin.” *Id.* art. 1(2) (emphasis added). The official French text is arguably more demanding, requiring that the protected appellations of origin be “reconnues et protégées à ce titre dans le pays d’origine,” arguably meaning that the phrase “appellations d’origine” or a close linguistic translation must be used in the country’s domestic legal regime. See Arrangement de Lisbonne concernant la protection des appellations d’origine et leur enregistrement international, [http://www.wipo.int/lisbon/fr/legal\\_texts/lisbon\\_agreement.htm](http://www.wipo.int/lisbon/fr/legal_texts/lisbon_agreement.htm) (last visited Nov. 5, 2006). The Spanish text seems to more closely follow the “as such” construction in English (“[D]enominaciones de origen de los productos de los otros países de la Unión particular, reconocidas y protegidas como tales en el país de origen.”). See Arreglo de Lisboa relativo a la Protección de las Denominaciones de Origen y su Registro Internacional Lisbon Agreement, [http://www.wipo.int/treaties/es/registration/lisbon/pdf/trtdocs\\_wo012.pdf](http://www.wipo.int/treaties/es/registration/lisbon/pdf/trtdocs_wo012.pdf) (last visited Nov. 5, 2006).

80. See THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, LISBON AGREEMENT STATUS ON OCT. 13, 2006 (2006), <http://www.wipo.int/treaties/en/documents/pdf/lisbon.pdf> (for a current signatory list).

81. *Id.*

82. The European Union sought inclusion of GI provisions early in the Uruguay Round negotiations. See Communication, *European Community—Guidelines Proposed for the Negotiation of Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/16 (Nov. 20, 1987); Submissions, *European Communities, Japan & United States—Trade Problems Encountered in Connection with Intellectual Property Rights 2–3*, MTN.GNG/NG11/W/7 (May 29, 1987) (European Union submitted that “[t]he protection of appellations of origin and of other geographical indications is of fundamental importance” and that “the wine and spirit sector is one which is particularly vulnerable to imitation, counterfeit and usurpation [which causes] damage not only to producers . . . but also to consumers”).

83. The TRIPS Agreement has been described and dissected in detail by several writers and commentators, although the GI provisions have not been scrutinized fully. See generally CARLOS M. CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES* 3 (noting that “[i]ndustrialized countries forced developing countries to initiate negotiation of an agreement on TRIPS with the clear objective of universalizing the standards of IPRs protection that the former had incorporated in their legislation . . .”); MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* (1998); SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* (1998); 2 THE GATT URUGUAY ROUND, *A NEGOTIATING HISTORY 1986–1992*, at 2245–2313 (Terence P. Stewart ed., 1993) (chapter on TRIPs); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 9–47* (2001) (detailing the North-South negotiation process); Conrad, *supra* note 18, at 29–46; Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613 (1996); Roland Knaack, *The Protection of Geographical Indications According to the TRIPS Agreement*, in FROM GATT TO TRIPS—THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 117, 127–40 (Freidrich-Karl Beier & Gerhard Schricker eds., 1996).



introduction of divergent U.S. and EU draft treaty texts in 1990<sup>84</sup>; and (b) the final merger/compromise of these conflicting approaches was presented by GATT Director Arthur Dunkel on December 20, 1991.<sup>85</sup> The Dunkel Draft provisions on geographical indications became Article 22–24 of the final TRIPS text.

It may be easiest to think of the TRIPS GI provisions as having four components: (1) a “floor” of unfair competition norms for all geographical indications<sup>86</sup>; (2) special, additional protection for wine and spirit GIs<sup>87</sup>; (3) complex exceptions to GI protection<sup>88</sup>; and (4) obligations to conduct further negotiations to increase protection of wine and spirit GIs.<sup>89</sup> Throughout these provisions, TRIPS is silent as to the mechanism of protection and it is understood that each country may fulfill these obligations through its own particular domestic law tools.

#### A. ARTICLE 22(1)

Article 22 provides the “floor” protection for all GIs. Article 22(1) gives a definition of geographical indications and has three elements that warrant our attention. First, Article 22(1) provides the definition of a geographical indication: “Geographical indications are for 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.”

This definition is not limited to *words*, so images and packaging are potentially included. Nor is the definition limited to foodstuffs,<sup>90</sup> although

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84. The critical texts were the Communication, *European Community—Draft Agreement on Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/68 (Mar. 29, 1990), reprinted in 10 *WORLD INTELL. PROP. REV.* 128 (1990) [hereinafter EU Draft] and Communication, *United States—Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/70 (May 11, 1990), reprinted in 10 *WORLD INTELL. PROP. REV.* 128 (1990) [hereinafter U.S. Draft].

85. *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel Draft]. There was also a draft treaty text submitted to the GATT Brussels Ministerial meeting in December 1990 which had some bearing on the GI issue. See *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods in Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* 193–237, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990) [hereinafter Brussels Draft]. In 1990, there were three other draft treaty texts introduced by Switzerland, Japan, and a coalition of developing countries (including Argentina, Brazil, Nigeria, Egypt, China, Chile, and Tanzania), but those three additional drafts were not central to the geographical indications issues.

86. See TRIPS, *supra* note 9, art. 22.

87. See *id.* art. 23(1)–(3).

88. See *id.* art. 24(4)–(9).

89. See *id.* arts. 23(4), 24 (1).

90. See Communication, *New Zealand—Geographical Indications and the Article 24.2 Review*, 2, IP/C/W/205 (Sept. 18, 2000) [hereinafter *New Zealand TRIPS Council Submission*] (wording of TRIPS Agreement “cover[s] geographical indications for all goods, including industrial goods”).

it apparently excludes services.<sup>91</sup> But there are other aspects of the definition that warrant our attention.

First, the definition is ambiguous on whether human production factors may be part of the tally of “quality, reputation, or other characteristic of the good.”<sup>92</sup> In contrast, the Lisbon Agreement specifies “natural *and* human factors”<sup>93</sup> and the EU Draft in 1991 had proposed this same construction.<sup>94</sup> The lack of this language has led some commentators to conclude that Article 22(1) *excludes* human factors in the consideration of GIs,<sup>95</sup> but that interpretation is not warranted since neither the 1990 U.S. Draft nor any of the other TRIPS proposals expressly attempted to exclude “human factors” of production.

Second, we should note the standard Article 22(1) adopts for the relationship between the product’s qualities and the geographic source. The Lisbon Agreement states that the product’s “characteristics” must be “due exclusively *or* essentially to the geographical environment.”<sup>96</sup> TRIPS Article 22(1) requires that the “given quality, reputation, or other characteristic of the good is *essentially* attributable to its geographical origin.”<sup>97</sup> No one knows whether there is any difference between qualities being “essentially” or “exclusively” due to the land. Since we should not multiply legal distinctions needlessly, I think it is reasonable to see the same standard being generated by both terms: an *essential land/qualities connection*.

Third, there is the word “reputation” in the Article 22(1) definition—something absent from the Lisbon Agreement. TRIPS

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91. See Conrad, *supra* note 18, at 33–34. *But see* Carolina Hungria de San Juan Paschoal, *Geography, Source, and Origin: The Legal Framework*, 152 TRADEMARK WORLD 38, 38 (Nov. 2002) (U.K.) (“[I]t is possible to have services protected by a geographical indication, such as ‘Swiss Banking Services.’”).

92. TRIPS, *supra* note 9, art. 22.

93. Lisbon Agreement, *supra* note 68, art. 2 (emphasis added).

94. See EU Draft, *supra* note 84, art. 19 (“Geographic indications are, for the purposes of this agreement, those which designate a product as originating from a country, region or locality where a given quality, reputation or other characteristic of the product is attributable to its geographic origin, including natural and human factors.”). WIPO’s model law in the 1990s on geographical indications also expressly referred to “the geographical environment, including natural factors, human factors, or both natural and human factors.”

95. See Lee Bendekgy & Caroline H. Mead, *International Protection of Appellations of Origin and Other Geographical Indications*, 82 TRADEMARK REP. 765, 785 (1992); Conrad, *supra* note 18, at 33. Arguably, this limitation was acceptable to the European Union because French law had already developed in this direction and the United States simply would not have cared.

96. Lisbon Agreement, *supra* note 68, art. 2 (emphasis added).

97. TRIPS, *supra* note 9, art. 22(1) (emphasis added). The “essentially attributable” standard appears in at least one treaty before TRIPS: Article 2(2)(b) of the Australia-European Community Agreement, which entered into force on March 1, 1994. Agreement Between the European Community and Australia on Trade in Wine, Eur.-Austl., *opened for signature* Jan. 26, 1994, 1994 O.J. (L 86) 3, 3. But this bilateral treaty itself was negotiated while TRIPS was being negotiated and, in fact, was largely completed.

Article 22(1) arguably leads to protection of geographic products names “where a given . . . reputation . . . of the good is essentially attributable to its geographic origin.” Broadly read, this could obviate any land/qualities connection of the sort that has been fundamental to the notion of appellations.<sup>98</sup> The addition of “reputation” probably reflects the two-tier system of protecting geographical indications in the European Union, something discussed further below.<sup>99</sup>

#### B. ARTICLE 22(2)

Article 22(2) then provides the two basic treaty obligations applicable to *all* geographical indications:

Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).<sup>100</sup>

Broad enough to include all communications concerning a product, Article 22(2)(a) has three requirements: (1) that a word, phrase, or symbol “indicates or suggests” that a product comes from a geographic region; (2) that the product does *not* come from that producing region, and (3) that the public is misled by (1) and (2). This does not address situations where a word or symbol could fail (3) or even (1). A geographic name’s failure to indicate or suggest a particular geographic origin could be because the word, phrase, or symbol is being used for evocative purposes (DARJEELING bras in France<sup>101</sup>) or has become generically descriptive of the product (French fries in Washington, D.C.).

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98. See O’Connor, *supra* note 17, at 52 (“This definition expands the concept of appellation of origin contained in Art. 2 of the Lisbon Agreement to protect goods which merely derive a reputation from their place of origin without possessing a given quality or other characteristics which are due to that place.”).

99. The EEC Origins Regulation does allow that its second tier protection can extend to products “which possess[] a specific . . . reputation . . . attributable to that geographical origin” without an exclusivity or essentiality requirement. See Council Regulation 2081/92, art. 2(b), Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, July 14, 1992, 1992 O.J. (L 208) 1, 2 (EC) [hereinafter Origins Regulation]. Nonetheless, the Regulation Preamble says “the scope of this Regulation is limited to certain agricultural products and foodstuffs for which a link between product or foodstuff characteristics and geographical origin exists.” *Id.* pmb1.; see also Joerg W. Rieke, Attorney-at-Law, German Dairy Association, Presentation at the IDFA 2004 Dairy Forum in Boca Raton, Florida, at 15–21, (January 18–21, 2004) [http://www.idfa.org/meetings/presentations/reike\\_df2004.ppt](http://www.idfa.org/meetings/presentations/reike_df2004.ppt).

100. TRIPS, *supra* note 9, art. 22(2)(a)–(b).

101. U.S. Trademark Registration No. 2,043,112 (filed Dec. 21, 1995) (DARJEELING typed drawing certification owned by Delta Lingerie, a French Corporation).

As for subsection (b), Article 10bis of the Paris Convention provides that member countries of that treaty are generally “bound to assure to nationals of such countries effective protection against unfair competition.”<sup>102</sup> Most definitively, TRIPS Article 22(2)(b) “extends” Paris 10bis(3)—which was described above—so that WTO members must prohibit the use of any geographical indication which “in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.”<sup>103</sup> Obviously, there will be substantial overlap in the coverage of Articles 22(2)(a) and 22(2)(b).

While TRIPS Article 22(2) addresses use in commerce, Article 22(3) bars registration of any trademark that includes a geographical indication “if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.” This provision is compatible with American law barring geographic terms in trademarks where the term would be “primarily geographically deceptively misdescriptive,”<sup>104</sup> but not barring registration where the public is not misled as to the product’s place of origin. For example, Pepperidge Farms has a “distinctive” line of U.S.-made cookies named BORDEAUX, GENEVA, MILANO, ST. TROPEZ, VERONA, etc.<sup>105</sup> Such evocative marks can be registered on the grounds that American consumers do not expect the cookies to come from these places.

### C. ARTICLE 23’S ADDITIONAL PROTECTION OF WINES AND SPIRITS

If Article 22’s deception-based provisions stood alone, GI protection in TRIPS would be unremarkable. But Article 23 adds another layer of obligations in relation to wines and spirits and these are, at present, the bulk of the world’s “appellations.”<sup>106</sup> Whereas Article 22 patrols use of

102. Paris Convention, *supra* note 67, art. 10bis(1). Article 10bis(2) then provides that “[a]ny act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.” *Id.*

103. *Id.* art. 10bis(3)(3). Article 10bis(3) appears generally aimed at false or misleading advertising vis-à-vis competitors, i.e., “allegations” in 10bis(3)(2) and (3) and “acts [that] . . . create confusion . . . with the establishment, the goods, or the . . . activities, of a competitor,” *id.* art. 10bis(3)(1), but the 10bis(3)(3) inclusion of “indications” seems to return to issues of product labeling.

104. 15 U.S.C. § 1052(e)(3) (2006).

105. See Pepperidge Farms, Cookies, [http://www.pepperidgefarm.com/indulgent\\_treats\\_cookies.asp](http://www.pepperidgefarm.com/indulgent_treats_cookies.asp) (last visited Nov. 5, 2006).

106. According to the European Commission in 2003, the “European Communities have registered some 4800 geographical indications (4200 for wines and spirits; 600 for other products).” See European Commission, *Intellectual Property—Why Do Geographical Indications Matter to Us?*, July 30, 2003, [http://europa.eu.int/comm/trade/issues/sectoral/intell\\_property/argu\\_en.htm](http://europa.eu.int/comm/trade/issues/sectoral/intell_property/argu_en.htm) [hereinafter *Why Do Geographical Indications Matter to Us?*]. But something seems wrong about these numbers because the same document lists France as having “593 GIs (466 for wines and spirits and 127 for other products)”; Italy as having “420 GIs (300 for wines and spirits and 120 on other products)”; and 123 GIs for Spain. *Id.* Since these three countries have the strongest GI traditions, it is hard to believe that they are, together, only 24% of the EU GI total. See *id.*

GIs that would mislead or deceive the consumer, Article 23 eliminates *any* confusion requirement for wines and spirits.<sup>107</sup> Regardless of consumer confusion, a trademark embodying an inaccurate geographical indication for wines or spirits must be denied registration under Article 23(2)<sup>108</sup> and must be eliminated from commerce generally under Article 23(1).<sup>109</sup> In the words of one TRIPS delegate, this “effectively constitutes a departure from the general rule laid down in Article 22” requiring deception or unfair competition.<sup>110</sup>

Article 23(1) also explicitly expands the scope of protection for the wine and spirit geographical indication to bar a whole range of commercial practices:

Each member shall provide the legal means for interested parties to prevent use of a 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 goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind,” “type,” “style,” “imitation,” or the like.<sup>111</sup>

As will be discussed further below, this standard eliminates many labeling and advertising possibilities that would actually increase consumer information. At the same time, this is neither as expansive as the protection for GIs in the Lisbon Agreement nor is it what was originally sought by the European Union in the TRIPS negotiations. Recall the language of Article 3 of the Lisbon Agreement: “Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind,’ ‘type,’ ‘make,’ ‘imitation,’ or the like.”<sup>112</sup>

107. The United States implemented this TRIPS obligation by making changes to § 2(a) of the Lanham Act in Uruguay Round Agreements Act, Pub. L. No. 103-465, § 522, 108 Stat. 4809, 4982 (1994).

108. The agreement provides:

The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, *ex officio* if domestic legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

TRIPS, *supra* note 9; accord *New Zealand TRIPS Council Submission, supra* note 90, at 3 (stating that under Article 23(1), “[t]here is no requirement that the public be misled or that the use constitutes an act of unfair competition”).

109. Conrad, *supra* note 18, at 39.

110. *New Zealand TRIPS Council Submission, supra* note 90, at 3. A departure that is acknowledged as “essentially the result of the demands of a number of wine-producing countries during the Uruguay Round, notably in the European Union.” *Id.*

111. TRIPS, *supra* note 9, art. 23(1).

112. Lisbon Agreement, *supra* note 68, art. 3.

The European Union's original TRIPS proposal similarly provided that all GIs would be protected from "usurpation" by *any* product or commercial use—a standard drawn from French law and most easily understood by American lawyers as a dilution or "dilution plus" standard of protection for all GIs. In contrast, TRIPS Article 23(1) limits its confusion-less protection to uses *within* the wine or spirit product category (that is, it bars "a geographical indication identifying wines for wines not originating in the place indicated").

#### D. ARTICLE 24: LIMITATIONS AND EXCEPTIONS

Article 24 houses an array of limitations<sup>113</sup> to the geographical indication obligations in Articles 22 and 23, but the two limitations that are the most important are the provisions on grandfathering for established trademarks and the provision on genericity. The grandfathering provisions are complex, but, essentially, a country does not have to invalidate any trademark containing a GI if rights in that trademark (including under the common law) developed prior to (a) the date of TRIPS coming into force in that country, or (b) the protection of the GI in its country of origin, whichever comes later.<sup>114</sup> Subsection (6) of Article 24 then provides the general exception for geographic words that have become generic in a WTO country. The obligations of Articles 22 and 23 do not apply if "the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member."<sup>115</sup>

Obviously, these provisions on grandfathering and genericity are disliked by some European foodstuff producers. The grandfathering of pre-existing trademarks allows a Canadian producer to continue to use its PARMA ham trademark in Canada. It also allows BUDWEISER to continue to be marketed in countries where it was already trademarked even if the Czech Republic succeeds in its argument, always a bit of a stretch, that the beer-producing town of Budvar is entitled to the German adjectival version of its name. The limitation on generic words allows Argentine vintners to continue to make "Champagne" sparkling wine and South African farmers to continue to sell "Camembert" cheese.

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113. See TRIPS, *supra* note 9, art. 24(4)–(9). Article 24(3) establishes a prohibition on back-tracking, stating that the TRIPS obligations are not a justification to "diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement." *Id.*; see *infra* Part II.E (discussing Article 24(1)–(2)).

114. TRIPS, *supra* note 9, art. 24(5)(a)–(b). And Article 65(1) provides that no WTO member is bound by the TRIPS obligations "before the expiry of a general period of one year following the date of entry into force of the WTO Agreement." The date of entry into force for original signatories of TRIPS was January 1, 1995. Article 24(4) also provides a grandfathering clause specific to a geographical indication for wine or spirits.

115. *Id.* art. 24(6).

#### E. ARTICLES 23 AND 24: COMMITMENTS FOR FURTHER NEGOTIATIONS

The TRIPS Agreement calls for continued discussion of geographical indications in three separate TRIPS provisions: Article 23(4), Article 24(1), and Article 24(2). This contrasts sharply with the TRIPS provisions on copyrights and patents, which were written as complete and final.<sup>116</sup>

One of these, Article 23(4), mandates further negotiations for “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.” The goal is limited to wines and is expressed as a system in which participation is completely optional, i.e., a registration “system” establishing “protection in those Members participating in the system.”<sup>117</sup> Yet even if this optional system is limited to wine (which is now unlikely) it would essentially reinvigorate the Lisbon Agreement system and move it into the WTO framework. A more open-ended obligation is created by Article 24(1), stating that “[m]embers agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23.” As a result of the reference to Article 23, this obligation extends to spirits as well as wines.<sup>118</sup>

The remainder of Article 24(1) shows the level of distrust over these negotiation commitments. The French hope to reclaim key viticultural words is embodied in the second sentence of 24(1), which says that the limitations built into the existing TRIPS system cannot be used by a Member to refuse to engage in negotiations toward increased protection that might eliminate those exceptions. The next sentence then splashes New World cold water on that hope: “Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such

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116. For that reason, discussion of further development of international legal norms in the copyright and patent fields has returned principally to the World Intellectual Property Organization. See, e.g., WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

117. Eleanor K. Meltzer, *TRIPs and Trademarks, or—GATT Got Your Tongue?*, 83 TRADEMARK REP. 18, 33 (1994) (“Article 23(4) indicates that participation would be discretionary.”).

118. At least one commentator believes that the EU intent (or France’s intent, in particular) with the Article 24(1) negotiations is the re-propertyization of “Burgundy,” “Chablis,” and “Champagne” instead of countries being able to treat these terms as generic under Article 24(4). See Roland Knaak, *The Protection of Geographical Indications According to the TRIPS Agreement*, in FROM GATT TO TRIPS—THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, *supra* note 83, at 135–39. Countries advocating a widening of the negotiations to include all foodstuffs usually, if not always, have a specific issue in mind, as with the Czech Republic’s *Budweis* beer or India’s *basmati* rice. The third and most benign commitment for further discussions, not discussed here, is in Article 24(2), which establishes a special mechanism for dialog and review of both the substantive GI commitments and the procedural commitments for further negotiations.

negotiations.”<sup>119</sup> The point-counterpoint reminds one of Francis Walder’s observation about diplomacy: no position “can be considered irrevocable or the word ‘discussion’ would make no sense.”<sup>120</sup>

#### F. THE NEGOTIATIONS BEGIN

The TRIPS-mandated discussions began in earnest in June 1998 when the European Union made its first proposal for a notification and registration system under Article 23(4).<sup>121</sup> The 1998 EU proposal called for a binding system on all WTO members in which country *A* would designate a geographical indication and any country that did not object to the GI within one year would be obligated to protect the GI, regardless of the Article 24 exceptions.<sup>122</sup> The method for resolving objections was not elaborated. It appears that WTO members who failed to object would be obligated to protect the geographical indication.<sup>123</sup> In other words, if France sought to register “Chablis” and only Australia objected, all WTO members besides Australia would *lose* all Article 24 exceptions vis-à-vis “Chablis” regardless of the outcome of the France-Australia dispute. The European Union modified and elaborated this proposal in June 2000, but it maintained its object-or-be-bound basis and its application to all WTO members.<sup>124</sup>

At the WTO Ministerial meeting in Doha, Qatar in November 2001, the European Union pressed for expedited negotiations on geographical indications and WTO members agreed to expand discussion of the Article 23(4) notification and registration system to include spirits.<sup>125</sup> In response to this renewed pressure, the JUSCANZ+ group with

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119. TRIPS, *supra* note 9, art. 24(1).

120. FRANCIS WALDER, SAINT-GERMAIN OU LA NÉGOCIATION 60 (1958) (“Elle ne peut être considérée comme irrévocable, ou le mot discussion n’aurait plus de sens.”).

121. WTO Proposal, *Multilateral Register of Geographical Indications for Wines and Spirits Based On Article 23.4 of the TRIPS Agreement*, IP/C/W/107 (July 28, 1998) [hereinafter *1998 EU Proposal*].

122. *Id.* at 2–3.

123. *Id.* at 3. While the proposal stated that an international registration could potentially be “refused,” it described no mechanism for such refusal and no ramifications for such refusal in non-objecting countries. *Id.* But the clear goal of the 1998 proposal was a system binding on all WTO countries: “One year after notification by the WTO Secretariat, geographical indications will become fully and indefinitely protected in all WTO Members.” *Id.*

124. WTO Proposal, *Implementation of Article 23.4 of the TRIPS Agreement Relating to the Establishment of a Multilateral System of Notification and Registration of Geographical Indications*, IP/C/W/107/Rev.1 (June 22, 2000) [hereinafter *2000 EU Proposal*]. Under the modified EU proposal, when country *A* submits a GI for international registration, country *B* would have eighteen months (instead of twelve) to ask questions and/or challenge country *A*’s registration. *Id.* at 4–5.

125. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, at 4, 41 I.L.M. 746 (2002) (“With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference.”).



additional countries from Asia and the Americas formally proposed a simple, streamlined registration system: a notification system with a searchable, online database that creates no new rights or obligations.<sup>126</sup> The proposal implicitly contrasted itself with the EU proposal, noting that it more closely hones to the Article 23 mandate to provide a voluntary “notification and registration” system that “facilitate[s]” the protection of GIs.<sup>127</sup> Although simple and non-binding, even this proposal has been criticized in some corners as (unintentionally) doing too much.<sup>128</sup> The core group of New World wine producers (Argentina, Australia, Canada, Chile, New Zealand, and the United States) followed up the proposal with a “communication,” implicitly criticizing the EU proposal in diplomatically pointed language.<sup>129</sup>

In the spring of 2003, additional proposals were put forward by Hong Kong, China,<sup>130</sup> and the International Trademark Association (INTA).<sup>131</sup> Hong Kong’s proposal would also establish a registration database, an entry on which would be prima facie evidence of GI protection in the country of origin,<sup>132</sup> with challenges to the registered GI occurring in national courts.<sup>133</sup> INTA’s proposal goes further. Consciously modeled on the Patent Co-operation Treaty and the Madrid System for Marks, the INTA proposal would require the applicant to designate the jurisdictions in which it is seeking GI protection with examination in each such country. Private parties would be able to challenge the application before the national offices or courts in any country where GI protection is sought<sup>134</sup>; in other words, a trademark owner—faced with a

126. WTO Proposal, *Proposal for a Multilateral System for Notification and Registration of Geographical Indications for Wines and Spirits based on Article 23.4 of the TRIPS Agreement*, TN/IP/W/5 (Oct. 23, 2002) (Communication from Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, Philippines, Chinese Taipei, and the United States).

127. *Id.* at 3–4. The proponents emphasize that it fulfills this goal “without undue cost or complexity.” *Id.* at 4.

128. Burkhart Goebel, *Geographical Indications and Trademarks—the Road from Doha*, 93 TRADEMARK REP. 964, 978 (2003) (criticizing the American proposal on the grounds that “it is quite likely that the courts of the Member States will presume that designations contained in the WTO data base indeed constitute GIs which will—in many cases—shift the burden of proof to the trademark owner . . .”).

129. WTO Proposal, *Multilateral System of Notification and Registration of Geographical Indications for Wines (and Spirits)*, TN/IP/W/6 (Oct. 29, 2002) (Communication from Argentina, Australia, Canada, Chile, New Zealand, and the United States).

130. WTO Proposal, *Multilateral System of Notification and Registration of Geographical Indications Under Article 23.4 of the TRIPS Agreement*, TN/IP/W/8 (Apr. 23, 2003) [hereinafter 2003 WTO Proposal] (Communication from Hong Kong, China).

131. Int’l Trademark Ass’n [INTA], *Establishment of a Multilateral System of Notification and the Registration of Geographical Indications for Wines and Spirits pursuant to TRIPS Article 23 (4)*, (Apr. 2003), available at [http://www.wto.org/english/forums\\_e/ngo\\_e/posp31\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/posp31_e.htm).

132. 2003 WTO Proposal, *supra* note 130, at 2.

133. Goebel, *supra* note 128, at 981.

134. *Id.* at 983. If the proposal has one overarching principle, it is that “[c]onflicts between . . .

potentially conflicting GI—could defend itself without having to convince one or more WTO member governments to object to the GI.<sup>135</sup> The INTA proposal would allow countries to charge application fees, reducing the burden for governments, but increasing it for GI owners. In contrast, under the EU proposal the GI owner would get free, (fairly) global protection.

In 2003, Brussels upped the stakes. In anticipation of the WTO's September 2003 Cancun meeting, the European Union released a list of forty-one geographical indications that it wanted all WTO members to accept as non-generic, protected terms. According to the EU press release, the forty-one names are all "well established European quality products whose names are being abused today."<sup>136</sup> The Commission characterized its efforts as "recuperation" of the names, although the forty-one names quickly became more colloquially dubbed the "claw back" list.

The claw back list includes familiar cheese terms (Gorgonzola, Mozzarella [di Bufala Campana], Roquefort, etc.) and a few well-known meats (various kinds of Prosciutto), but the list is dominated by twenty-two names for wines and spirits, including all the usual suspects—Bordeaux, Chablis, Champagne, Chianti, Cognac, Porto, etc. Then-EU Farm Commissioner Franz Fischler reiterated that the Commission considers that "[t]his is not about protectionism. It is about fairness."<sup>137</sup> At the time the 2003 claw back list was published, the Commission made it clear that its demands included all translations, so that the list's inclusion of "Porto" would include "Port," "Champagne" would cover "Champaña," and "Prosciutto di Parma" would cover "Parma ham."<sup>138</sup>

#### G. THE ANGLOS OPEN A SECOND FRONT

While the European Union was pressing for increased protection of

rights should be resolved pursuant to the well-established intellectual property principles of territoriality, exclusivity, and priority." *Id.*

135. As Goebel notes, under the EU proposal, "[t]he owner of a medium-sized company who owns a trademark registration conflicting with a geographical indication in 50 countries would have to persuade the governments of 50 countries to raise an objection with the WTO in order to defend the exclusivity of his prior mark." *Id.* And all this would have to be done in eighteen months. *Id.* at 984.

136. Press Release, European Comm'n, WTO Talks: EU Steps up Bid for Better Protection for Regional Quality Products (Aug. 28, 2003), available at <http://www.fas.usda.gov/gainfiles/200308/145985850.doc>.

137. *Id.*

138. *Id.* The entire list of wines and spirits includes: Beaujolais, Bordeaux, Bourgogne, Chablis, Champagne, Chianti, Cognac, Grappa [seven variations], Graves, Liebfrau(en)milch, Malaga, Marsala, Madeira, Médoc, Moselle, Ouzo, Porto, Rhin, Rioja, Saint-Emilion, Sauternes, and Xerez [Sherry]; other products: Asiago, Azafán de la Mancha, Comté, Feta, Fontina, Gorgonzola, Grana Padano, Jijona y Turrón de Alicante, Manchego, Mortadella Bologna, Mozzarella di Bufala Campana, Parmigiano Reggiano, Pecorino Romano, Prosciutto (di Parma, di San Daniele, and Toscano), Queijo São Jorge, Reblochon, and Roquefort. *Id.*

geographical indications, the WTO dispute settlement system was being used by Australia and the United States to establish that the European Union was not abiding by its existing Article 22 and 23 obligations. To understand this high profile irony, we must first sketch the then-EU system for protecting GIs, the parties' arguments, and, finally, the WTO Panel's conclusions.<sup>139</sup>

The EU rules for wine and spirit GIs are embedded in a web of broader industry regulations. The most important piece of that regulatory framework for our purposes is Council Regulation No. 1493/1999 of May 17, 1999 (1999 Wine Regulation),<sup>140</sup> recently supplemented by 2002 Wine Regulations.<sup>141</sup> Protection of all other GIs is based on European Community Council Regulation (EEC) No. 2081/92—commonly called the “1992 Origins Regulation”<sup>142</sup>—and its recent successor, the 2006 Origins Regulation.<sup>143</sup>

Article 2(2) of the Origins Regulation uses two concepts: the “designations of origin” and the “geographical indication.” Both are defined as “the name of a region, a specific place, or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff.”<sup>144</sup> A designation of origin applies only to products where “the quality or characteristics of *which are essentially or exclusively due* to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which takes

139. Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005) [hereinafter WTO Panel Report on Origins Regulations].

140. Council Regulation 1493/1999, On the Common Organisation of the Market in Wine of 17 May 1999, 1999 O.J. (L 179) 1 (EC) [hereinafter 1999 Wine Regulation], available at [http://europa.eu.int/eur-lex/en/lif/reg/en\\_register\\_036055.html](http://europa.eu.int/eur-lex/en/lif/reg/en_register_036055.html).

141. Commission Regulation 753/2002, Laying Down Certain Rules for Applying Council Regulation (EC) No 1493/1999 as Regards the Description, Designation, Presentation and Protection of Certain Wine Sector Products, 2002 O.J. (L 118) 1.

142. Council Regulation 2081/91, On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 1992 O.J. (L 208) 1 (EC) [hereinafter 1992 Origins Regulation].

143. Council Regulation 510/2006, On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 2006 O.J. (L 93) 12 (EC) [hereinafter 2006 Origins Regulation]. The 2006 Origins Regulation replaces the 1992 Origins Regulation, 2006 O.J. (L 93) at 13, and almost completely duplicates the 1992 regulation language except for revisions made to meet the WTO decision discussed in this part. Citations in text and footnotes of this Article are to the 2006 Origins Regulation unless otherwise noted. The 1992 and 2006 Origins Regulations harmonize EU law for: beer, natural mineral waters and spring waters, beverages made from plant extracts, bread, pastry, cakes, confectionery, biscuits and other baker's wares, natural gums and resins, hay, and “essential oils.” See 1992 Origins Regulation, *supra* at 8; 2006 Origins Regulation, *supra* at 22–23. The 2006 Origins Regulation does not “apply to wine-sector products, except wine vinegars, or to spirit drinks.” 2006 Origins Regulation, *supra* at 13, art. 1(1). The actual list of EU-protected GIs is found in Commission Regulation 2400/96, On the Register of Some Geographical Indications and Appellations of Origin, 1996 O.J. (L 327) 11.

144. 2006 Origins Regulation, *supra* note 143, art. 2(1).

place in the defined geographical area.”<sup>145</sup> Thus, designations of origin require an essential connection between the land and the product’s qualities, i.e., the French notion of *terroir*.<sup>146</sup>

In contrast, a “geographical indication” under the Origins Regulation does *not* have the “essentiality” requirement and requires only that “the production and/or processing and/or preparation of [the foodstuff] takes place in the defined geographical area.”<sup>147</sup> The result is that under EU GI law the first category, a “designation of origin,” is close to, but arguably tighter than, the TRIPS definition of a GI.<sup>148</sup> The second definition, a “geographical indication,” is much looser than the TRIPS definition of a GI, albeit no looser than a geography-based certification mark in the United States.

Article 5 of the Origins Regulation provides that registrations are to be given to groups or associations of “producers and/or processors working with the same agricultural product or foodstuff,” although in exceptional circumstances a natural or legal person can apply. Successful registration results in a “protected designation of origin” (or “PDO”) or a “protected geographical indication” (or “PGI”), both of which enjoy the same protection against:

(a) any direct or indirect commercial use in respect of products not covered by the registration insofar as those products are comparable to the products registered under that name or insofar as using the name exploits the reputation of the protected name;

(b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as “style,” “type,” “method,” “as produced in,” “imitation” or similar.<sup>149</sup>

So while there are two defined types of GIs, they receive the same protection. According to the Regulation’s recitals, this two-tier system

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145. *Id.* art. 2(1)(a) (emphasis added).

146. Professor André Bertrand reasons that the more restrictive definition of a “protected designation of origin” modified French law vis-à-vis the definition of an *appellation d’origine*, transferring the *essentiality* requirement into French law. BERTRAND, *supra* note 20, § 3.44, at 145.

147. 2006 Origins Regulation, *supra* note 143, art. 2(1)(b). Article 2(3) also allows for some geographical indications to be protected even “where the raw materials for the products concerned come from a geographical area larger than, or different from, the processing area.” This is a grandfathering provision and such designations “must have been recognized as designations of origin in the country of origin before 1 May 2004.” *Id.* In the 1992 version of the Origins Regulation, this grandfathering provision was Article 2(4). 1992 Origins Regulation, *supra* note 142, at 2. Article 2(7) limited the exception to applications lodged “within two years of the entry into force of this Regulation.” *Id.*

148. The EU definition of a “designation of origin” is arguably narrower than the TRIPS definition of a geographical indication because it does not include the ambiguous “reputation” language in TRIPS Article 22(1). See discussion *supra* Part II.B.

149. 2006 Origins Regulation, *supra* note 143, art. 13(1). The Origins Regulation also prohibits origin-misleading packaging, containers, and advertising as well as having some catch-all language against misleading origin identifications. *Id.* art. 13(1)(c)–(d).

was appropriate because of “existing practices” in EU member states,<sup>150</sup> i.e., neither the French<sup>151</sup> nor the Germans would give up their own definitional approach.

In contrast, EU regulations concerning wine GIs exist in a very different environment, in which, by Commission admission, “the rules governing the common organisation of the market in wine are extremely complex.”<sup>152</sup> Article 50 of the 1999 Wine Regulation gives EU member states more general directions to “take all necessary measures” to protect geographical indications for wine from “third countries” in accordance with Articles 23 and 24 of TRIPS. Articles 51 through 53, in combination with Annexes VII and VIII, then create a system that leaves most control in the hands of the member states to use “the name of a specified region” to designate wines from that region.<sup>153</sup> This allows the French, Italian, and other appellation systems to apply to wines along the same lines as the framework provided by the Origins Regulation.

As originally promulgated, the Origins Regulation required any application for GI protection to be made via an EU member state’s government to the Commission.<sup>154</sup> Producers from geographic regions outside the European Union have no EU member national government to make an application on their behalf to the Commission. As a result, they were locked out of the system. This exclusion was either intentional or the product of a belief held by European officials that no one outside the European Union had GIs worthy of protection. It is hard to say which explanation would be worse.

The Origins Regulation was then amended to add Article 12, which provided the sole means for the registration of non-EC GIs. Article 12(1) offered protection on the condition that the non-EC country “adopt[ed] a system for GI protection that is equivalent to that in the European

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150. 2006 Origins Regulation, *supra* note 143, at 12.

151. As originally formulated, the Origins Regulation would only have covered the stricter protected designation of origin (PDO) definition, rooted in French law. See Marina Kolia, *Monopolizing Names of Foodstuffs: The New Legislation*, 4 EUR. INTELL. PROP. REV. 333 (1992) (discussing potential effects of the 1992 Origins Regulation); Opinion on the Proposal for a Council Regulation on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 1991 O.J. (C 269) 62, para. 1.2 (EC). But German officials lobbied for an inclusion of their own approach. For a discussion of the compromise between the French appellations system and the more informal German system for protecting geographical indications, see Dav Gangjee, *Melton Mowbray and the GI Pie in the Sky: Exploring Cartographies of Protection*, 3 INTELL. PROP. Q. 291 (2006).

152. 1999 Wine Regulation, *supra* note 140, at 2.

153. *Id.* at 27.

154. 1992 Origins Regulation, *supra* note 143, art. 5. For example, in the United Kingdom, applications go to the Department for the Environment, Food and Rural Affairs (DEFRA). See Gangjee, *supra* note 151, at 294. After an application is received, the Commission will then entertain an objection from any Member States or “any ‘legitimately concerned natural or legal person.’” Joined Cases C-321/94 & C-324/94, *In re Pistre*, 1997 E.C.R. I-2343, 1997 C.M.L.R. 565, 573.

Communities and provide[s] reciprocal protection to products from the European Communities.”<sup>155</sup> Thus, without their own “equivalent” appellation laws, Ethiopians were left with no means to register Yergacheffe as a coffee GI<sup>156</sup>; Ecuadorians had no means to register cocoa/chocolate GIs; and Americans had no means to register Idaho potatoes.

In June 1999, the United States initiated dispute-settlement consultations with the European Union, noting that “[t]he European Communities’ Regulation 2081/92, as amended, does not provide national treatment with respect to geographical indications, and does not provide sufficient protection to preexisting trademarks that are similar or identical to a geographical indication.”<sup>157</sup> Shortly thereafter, at a 2000 meeting of the TRIPS Council, New Zealand submitted a paper demanding a full analysis of national implementation of existing GI provisions under the Article 24(2) process. This served as a not too subtle warning to the European Union over the same issue.<sup>158</sup> Over time, Canada,<sup>159</sup> Australia,<sup>160</sup> Argentina,<sup>161</sup> and Sri Lanka<sup>162</sup> also joined the consultations on the U.S. side.<sup>163</sup> In 2003 the WTO consolidated the U.S. complaint with a parallel Australian complaint against the European Union and established a three member dispute panel on February 23, 2004.<sup>164</sup> Twelve countries reserved the right to participate in the dispute settlement proceedings on the U.S./Australia side.<sup>165</sup> After submissions

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155. WTO Panel Report on Origins Regulations, *supra* note 139, ¶ 7.38.

156. Yergacheffe (or Yirgacheffe) is a small town in the Sidamo district of Ethiopia. Joan Reis Nielson, *World Class Cafes*, *TEA & COFFEE TRADE J.*, Feb. 20, 2004, at 64.

157. Request for Consultations by the United States, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/1/TP/D/19 (June 7, 1999).

158. See *New Zealand TRIPS Council Submission*, *supra* note 90, *passim*.

159. Request to Join Consultations from Canada, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/3 (June 22, 1999).

160. Request to Join Consultations from Australia, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/4 (Apr. 23, 2003).

161. Request to Join Consultations from Argentina, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/9 (Apr. 24, 2004).

162. Request to Join Consultations from Sri Lanka, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/7 (Apr. 24, 2003).

163. Others also joined the consultations, i.e., India, Mexico, Hungary, the Czech Republic, Bulgaria, Slovenia, and Turkey. But the wording of the documents cited *supra* notes 159–62 expresses objection or concern with the EU regulations.

164. Constitution of the Panel Established at the Requests of the United States and Australia, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/19, ¶¶ 1, 3 (Feb. 24, 2004).

165. *Id.* ¶ 5 (“Argentina, Australia (in respect of the United States’ complaint), Brazil, Canada,

and hearing, the Panel issued its interim report to the parties on November 16, 2004 and its final report on March 15, 2005.<sup>166</sup>

The U.S. case made two basic types of claims. First, that the Origins Regulation violates national treatment obligations under TRIPS and the General Agreement on Tariffs and Trade (GATT); second, that the Origins Regulation violates TRIPS trademark protection obligations by giving GI holders rights that effectively limit the rights of owners of pre-existing trademarks.

The national treatment claim was founded on the fact that Article 12(1) of the Origins Regulation permits a national from a WTO country to register a GI in the European Union only if the WTO country adopts an “equivalent” system and offers “reciprocal protection.” The Panel agreed with the United States that these equivalence and reciprocity provisions denied “national treatment” to citizens of other WTO members.<sup>167</sup> The Panel cited a wide range of evidence that the Origins Regulation excludes WTO countries from GI protection absent these equivalence and reciprocity conditions, including a letter from EC Commissioner Pascal Lamy saying “it is true that U.S. GIs cannot be registered in the EU.”<sup>168</sup> On these grounds, the Panel concluded that the 1992 Origins Regulation violated TRIPS and Article III:4 of the GATT.<sup>169</sup> The March 2006 revision of the Origins Regulation addressed this finding, eliminating this reciprocity requirement.<sup>170</sup>

The Panel also embraced the U.S. claim that the Origins Regulation denies national treatment procedurally because non-EU nationals filing applications for EU GI protection must petition their own national government to apply to Brussels, a more uncertain mechanism than the procedure used by EU nationals.<sup>171</sup> In contrast, the Panel declined to find

China, Colombia, Guatemala, India, Mexico, New Zealand, Norway, Chinese Taipei, Turkey, and the United States (in respect of Australia’s complaint) have reserved their rights to participate in the Panel proceedings as a third party.”)

166. WTO Panel Report on Origins Regulations, *supra* note 139, ¶ 6.1.

167. *Id.* ¶¶ 7.72, .74, .102.

168. *Id.* ¶ 7.83.

169. *Id.* ¶¶ 7.213, .238. Related to this, the Panel concluded that the 1992 Origins Regulation’s requirement that a foreign government participate in the “inspection structures” for that foreign country’s GI was also an effective *equivalence* requirement in violation of GATT. *Id.* ¶¶ 7.441(b), .463.

170. Under the 2006 regulation, “[w]here the registration application relates to a geographical area in a given Member State,” the application goes through the member state’s national government in a procedure sketched out in Article 5(4) and (5), whereas Article 5(9) provides that

[w]here the registration application concerns a geographical area situated in a third country, [the application] shall comprise the elements provided for in paragraph 3 and also proof that the name in question is protected in its country of origin. The application shall be sent to the Commission, either directly or via the authorities of the third country concerned.

2006 Origins Regulation, *supra* note 143, at 16. Although the geographical name must be “protected in its country of origin,” it can be protected under a certification mark system and a separate geographical indications law is presumably no longer required.

171. WTO Panel Report on Origins Regulations, *supra* note 139, ¶¶ 7.244–307. “The [Origins]

that the Origins Regulation procedure for filing objections to GI applications was prejudicial to non-EU nationals.<sup>172</sup>

On the trademark side, the Panel sided with the European Union in concluding that a prior trademark holder's inability to stop the use of a subsequently registered GI was not a violation of TRIPS.<sup>173</sup> The Panel concluded that while a few trademarks involve geographical terms that might one day have GI protection,<sup>174</sup> some limitation on trademark rights arising from such overlap<sup>175</sup> constitutes an acceptable "exception" to trademark protection under TRIPS Article 17.<sup>176</sup> This was an important point for the European Union because it legitimates, to some (as yet unknown) degree, a legal system in which new GIs can adversely impact established trademarks.

The United States also achieved something important in the trademark area: a Commission acknowledgment and Panel finding that GI registration in the European Union extends only to the words registered and *not* to translations.<sup>177</sup> This issue of translations of GIs became quite contentious in the final stages with the United States accusing the European Union of trying to "back away from factual findings that the European Communities itself repeatedly encouraged the Panel to make."<sup>178</sup> This issue has both broad implications and an extremely sharp focal point. The political focal point has been the Czech town Budvar's claim to the German adjectival word *Budweiser*, a dispute with the American Anheuser-Busch Brewing Company that has littered the globe with inconclusive litigations. On the other hand, the broad implications of the translation issue go to the very nature of genericity. In the United States, "Parmesan" is a generic term while PARMIGIANO-REGGIANO is a protected certification mark. In contrast, the European Union's 2003 "claw back" list demands the "return" of forty-one geographic terms and all their translations, i.e., both "Parmigiano" and

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Regulation does not accord equal treatment because third country governments only comply voluntarily whereas EC member States have a legal obligation to do so." *Id.* ¶ 7.244. The Panel accepted that this procedural difference violated TRIPS, *id.* at ¶ 7.281, and the GATT, *id.* at ¶¶ 7.306-7.307.

172. *Id.* ¶ 7.384. The Panel also declined to find that EU practices regarding labeling of non-EU GIs were prejudicial. *Id.* ¶¶ 7.499, .509.

173. *Id.* ¶ 7.533. The United States' argument was that EU law was asymmetrical in the sense that a registered GI prevails over a later trademark, but a registered trademark only *may* prevail over a later GI. The United States reasoned that "[t]rademarks can incorporate certain geographical elements. If the geographical name subsequently qualifies for GI protection under the Regulation, it will inhibit the ability of the trademark owner from preventing confusing uses." *Id.*

174. *Id.* ¶ 7.565.

175. *Id.* ¶¶ 7.567, .573, .575.

176. *Id.* ¶ 7.661.

177. *Id.* ¶ 7.548 ("The right conferred by registration does not extend to other names or signs not in the registration. Registration does not cover translations.").

178. WTO Panel Report on Origins Regulations, *supra* note 139, ¶ 6.37.



its translations, i.e., “Parmesan,” “Parmesano,” etc.

To placate both sides, the Panel carefully honed its factual conclusions to EU statements on the issue of translations, then made a Panel finding favorable to the United States<sup>179</sup>:

[T]he European Communities has emphasized that . . . the positive right to use the GI extends only to the linguistic versions that have been entered in the register and not to other names or signs which have not been registered. Accordingly, on the basis of the terms of the GI Regulation and of the Community Trademark Regulation, and the explanation of them provided by the European Communities, the Panel finds that not only may the trademark continue to be used, but that the trademark owner’s right to prevent confusing uses, is unaffected except with respect to the use of a GI as entered in the GI register in according with the registration.<sup>180</sup>

The most reasonable interpretation of this finding is that until the Budvar brewery successfully registers the German adjective “Budweiser” as a GI for Budvar, BUDWEISER beer from the United States should be able to prevent confusing uses of the word by the Budvar brewery (and anyone else).

It will be interesting to watch how the 2005 WTO decision does or does not modify the EU position in TRIPS talks. In light of having repeatedly told the WTO Panel that EU GI registration does not extend to translations, and having the Panel make a finding to this effect—can the Commission comfortably insist that its claw back list include all translations? Thus demanding “recuperation” of “Parmesan” in English and “Champaña” in Spanish?

Until the WTO decision, the European Union was promoting GIs as a tool for developing countries to exploit markets. In their August 2003 press release, the Commission repeatedly mentioned developing world GIs—“India’s Darjeeling tea, Sri Lanka’s Ceylon tea, Guatemala’s Antigua coffee, [and] Morocco’s argan oil,”<sup>181</sup> but the WTO decision raises serious questions as to whether Brussels has ever had any genuine interest in giving developing countries the GI tool *within* the European Union. Indeed, the Commission press release was a little clueless: “Darjeeling” has been used as the trademark for a French brand of lingerie sold in the European Union since 1995,<sup>182</sup> an arguably tarnishing use of the geographic word that the Champagne producers would never have to endure.

Will the adverse WTO decision curb the European Union’s agenda?

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179. *Id.* ¶ 6.38.

180. *Id.* ¶ 7.659 (emphasis added).

181. Press Release, European Comm’n, WTO Talks: EU Steps Up Bid for better Protection of Regional Quality Products (Aug. 28, 2003), available at <http://europe.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1178>.

182. See Darjeeling Lingerie, <http://www.darjeeling.fr/home.php> (last visited Nov. 5, 2006).

Perhaps not. If and when there are renewed international negotiations to open global agricultural markets, strong geographical indications protection is likely to remain on the agenda.

### III. POPULAR PARAMETERS OF THE DEBATE AND THE AMBITIOUS EU AGENDA

North Americans have thought little about geographical indications and, when they do, their thoughts orbit around a few basic motifs: that European-style geographical indications law is unduly bureaucratic and imposes unneeded transaction costs; that geographical indications are a static kind of entitlement, in contrast to the incentive-based structure of most intellectual property law; and that almost all advantages from strengthened geographical indications would accrue to European countries. This Part explores the validity of these points, adding some nuances and concluding that European negotiators may irrationally overvalue GIs.

Part IV then turns to the deeper question of whether there is any truth to the notion of “terroir” and, if not, what justifications for GI laws remain available. Exploring what we do and do not understand about terroir helps us see the similarity between GIs and high-end trademarks. Like these trademarks, GIs are partly about “myth maintenance” and the extraction of monopoly rents from such myths.

#### A. HOW MANY REGULATORS? HOW MUCH CONTROL?

Any system for registration of intellectual property claims requires bureaucracy, but an appellations system as used in France involves more bureaucratic intervention in the economy than the certification/collective mark system used in the United States or the geographical indications committee approach used in Australia. In this sense, the geographical indications debate is an instantiation of the larger debate about government versus markets and about how much decision-making is given to government officials and what is left to market signals.

European bureaucracies are criticized and lampooned with both regularity and vigor,<sup>183</sup> perhaps even more so than their American counterparts. Although the law at issue was not a GI law per se, it might be hard to find a more unintentionally damning description of bureaucratic control of words than the European Court of Justice’s 1997 description of a French law governing commercial use of the word “mountain”:

Section 4 provided in essence that the products had to comply with manufacturing methods determined by joint ministerial orders of the

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183. See, e.g., Alphonse Allais, *L'Excessive Bureaucratie*, in ALPHONSE ALLAIS, *LECTURE SUBSTANTIELLE* 132–36 (1992).

Minister for Agriculture and the Minister for Consumer Affairs. Those orders were to be adopted following advice from the National Labeling Commission and the Regional Commissions for Quality Food Products. In relation to cooked meats, those orders were to specify the choice of raw materials; the method of cutting up, boning, mincing and trimming; the method of salting, drying, or smoking; the mixture of ingredients and the cooking method.<sup>184</sup>

With actual *appellations d'origine contrôlées*, the French government has similarly elaborate rules. Regulations for most AOC wine regions strictly control what grape varieties can be used; for example, only Pinot Noir grapes can be used in red wines from Burgundy. When multiple varietals are permitted (five varietals are permitted for red wines from Bordeaux, fourteen for the Châteauneuf-du-Pape AOC),<sup>185</sup> the maximum percentages for each varietal are designated. As mentioned above, AOC designations for cheese place varying legal requirements on rennet used in coagulation, curd drainage, milk temperature at different points, salting, use of lactic proteins,<sup>186</sup> and the exact size of cheese rounds down to a few millimeters.<sup>187</sup>

Early in the twentieth century, French wine producers themselves had “*réactions d’horreur*” over the amount of bureaucracy involved in the first proposals to protect wine quality in France.<sup>188</sup> The reaction of New World winemakers today is much the same. Discussing the degree of government involvement in an *appellations* system, Australian wine critic Max Allen says “[i]n newer wine-producing countries . . . such laws are seen as affronts to the very basic human rights of every winemaker.”<sup>189</sup> On the other hand, the more bureaucratic approach theoretically has the upside of stabilizing *meaning* to the geographical indications, a point discussed below.

In contrast, subsuming geographical indications in a regular trademark system<sup>190</sup> means that the *obligatory* bureaucratic role is reduced to a single trademark examiner. The certification mark issues after an application process in which the application must be accompanied by certification standards, but “[t]here is no government control over what are the standards that the certifier uses.”<sup>191</sup> Subsequent

184. Cases C-321-324/94, *In re Pistre*, 2 C.M.L.R. 565, 570-71 (1997).

185. Richard Nalley, *The Feudal System*, EXPEDIA TRAVELS, Mar./Apr. 2001, at 71, 74.

186. MASUI & YAMADA, *supra* note 37, at 28, 56, 66, 80-81.

187. DENIS, *supra* note 16, at 8 (describing exact size and weights required for AOC *grand pont-l'évêque*, AOC *pont-l'évêque*, AOC *poulligny-saint-pierre*, and AOC *petit poulligny saint-pierre*).

188. OLSZAK, *supra* note 19, at 8.

189. ALLEN, *supra* note 34, at 30.

190. See, e.g., Meltzer, *supra* note 117, at 31 n.61 (“Marks of geographical indication are given their own section, not because they could not be addressed by trademark law, but because the specific concerns of European Community wine growers demanded that unique attention be given to certain regional indicators for wines and spirits.”).

191. MCCARTHY, *supra* note 43, § 19:91.

issues (like non-discriminatory application of the private standards) can be hammered out before administrative and judicial tribunals.

Nonetheless, both the United States and Australia have additional bureaucracies dedicated to geographical indications for wine. In the United States, beginning in 1978, the Bureau of Alcohol, Tobacco and Firearms (ATF) began establishing “American Viticultural Areas” (AVAs). Petitions (with extensive informational requirements) to designate geographic areas as AVAs were filed with the ATF—and now its post-9/11 successor agency, the Alcohol and Tobacco Tax and Trade Bureau (ATTTB). The U.S. government understands these AVAs to be “approved . . . appellations of origin” for American wines.<sup>192</sup> There are presently over 150 of these AVAs, ranging from “San Francisco Bay” to “Northern Neck George Washington Birthplace” to “Mississippi Delta,” giving the impression of a process less concerned with terroir and more concerned with political constituencies. Most importantly, ATTTB makes no attempt to limit acceptable varietals or regulate *production methods* per AVA, activities which might make it a genuine counterpart to INAO.<sup>193</sup> In other words, the AVA system is primarily a marketing tool, and accomplishes little else.

Australia similarly has a national “geographical indications committee” (GIC), whose mandate is principally to determine “the boundaries of the various regions and localities in Australia in which wines are produced” and “the varieties of grapes that may be used in the manufacture of wine in Australia.”<sup>194</sup> But, again, the GIC does not dictate mandatory (or forbidden) varietals per region and does not control production conditions.<sup>195</sup> For both countries, imposing GI “quality

192. 27 C.F.R. § 9.21 (2006) (“The viticultural areas listed in this subpart are approved for use as appellations of origin in accordance with part 4 of this chapter.”); *see also id.* § 4.25(a)(1) (“(i) The United States; (ii) a State; (iii) two or no more than three States which are all contiguous; (iv) a county (which must be identified with the word ‘county,’ in the same size of type, and in letters as conspicuous as the name of the county); (v) two or no more than three counties in the same States; or (vi) a viticultural area (as defined in paragraph (e) of this section).”).

193. The AVAs are also distinguished by the fact that only 85% of the grapes in the wine have to come from the AVA designated on the label, *id.* § 4.25(e)(3)(ii), a questionable practice from a consumer information point of view and a practice criticized by Europeans. Although practical for vintners, this permissiveness means, in effect, that a “Napa” label means “mainly Napa.”

194. Australian Wine and Brandy Corp. Act 1980, § 3(1)(f)(iii), <http://scaletext.law.gov.au/html/pasteact/0/155/0/PA000070.htm> (last visited Nov. 5, 2006).

195. According to the Australian Wine and Brandy Corporation, the government authority that regulates wine,

[a] Geographic Indication can be likened to the Appellation naming system used in Europe (eg [sic] Bordeaux, Burgundy) but is much less restrictive in terms of viticultural and winemaking practices. In fact the only restriction is that wine which carries the regional name must consist of a minimum of 85% of fruit from that region. This protects the integrity of the label and safeguards the consumer.

Australian Wine and Brandy Corporation, Wine Region Overview, <http://www.awbc.com.au/Content.aspx?p=16> (last visited Nov. 5, 2006). The Australian GIC follows the American 85% rule. *Id.*

controls” is principally a job for market forces.<sup>196</sup>

In contrast, European wine AOCs exist in a rigorous bureaucratic framework that controls almost *all* labeling vocabulary—and in ways that look suspiciously like non-tariff barriers to trade. In addition to geographical indications, there are controls on words such as “reserve,” “private cellars,” “private,” and “select.”<sup>197</sup> Wine labels cannot mention any competitions in which the wine has garnered prizes unless the competition is officially recognized by the European Union, and competitions in the United States, New Zealand, Australia, and Argentina are not recognized.<sup>198</sup> The European Union also reserves to its own producers the term “table wine” (“vin de table”),<sup>199</sup> which is a broad category of lesser, but still quality wine. There cannot be Australian or Argentine “table wine” sold in the European Union. Table wines are, in turn, prohibited not just from using protected appellations and confusing similar *names*, they are also prohibited from using many general terms. For example, in France, a table wine cannot use “clos,” “tour,” “mont,” or “moulin” in its name because these are considered evocative of appellation or high-end wines.<sup>200</sup>

The European Union’s 2002 Wine Regulations went further, effectively obliging non-EU countries to establish government registries of grape varieties authorized to be used in wine production in those countries even though the European Union would not police or try to control other countries’ lists. As the chief executive of the New Zealand Winegrowers said, “the EU wants us to have a register of grape varieties. Where do we keep it?”<sup>201</sup> Retaliatory legislation passed the U.S. House of Representatives in 2002.<sup>202</sup>

## B. STATIC OR DYNAMIC?

Americans view intellectual property principally as an *ex ante*

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196. *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 102 (1990) (“Much like a trademark, the strength of a certification mark is measured by the quality of the organization for which it stands.”).

197. See CAL. WINE EXP. PROGRAM, *supra* note 26, at 2, 12.

198. *Id.* at 11.

199. The European Union reserves the term for its own winemakers in an apparent attempt to keep the lower-end market for domestic producers. *Id.* at 2.

200. OLSZAK, *supra* note 19, at 45.

201. Hall, *supra* note 10, at 20.

202. The legislation would have required wine importers to provide official certifications and laboratory analyses to prove that wines being brought into the U.S. meet U.S. regulatory standards. These provisions were included in the Miscellaneous Trade and Technical Corrections Act of 2004, H.R. Res. 1047, 108th Cong. (2004) (amending subsection (a) of section 5382 of the IRS code); see also Daniel Sogg, *Trade Bill Could Limit Rare-Wine Imports*, WINE SPECTATOR, Jan. 31–Feb. 28, 2003, at 17. On the Senate side, the bill did not get out of the Senate Finance Committee, but because of other, non-wine provisions in the proposed act. *Id.*

incentive structure for wealth-creation.<sup>203</sup> Continental jurists more comfortably embrace intellectual property as an entitlement arising from pre-existing status of the individual, particularly the *auteur*.<sup>204</sup> This difference may connect to broader social differences, the American leaning toward meritocracy and living in a future-oriented society while Europeans hold more to tradition, history, and established hierarchy.<sup>205</sup>

Most intellectual property rewards “doing,” but emphasis on “status” arguably manifests itself in moral rights as well as protection of folklore and traditional knowledge. At first blush, geographical indications seem akin to “status” rights. Like rights to folklore or traditional knowledge, geographical indications crystallize protection around traditional purveyors/creators<sup>206</sup> without regard to recent originality or creativity, the hallmarks of copyright and patent law.

At the same time, geographical indications have much of the same incentive function of trademarks<sup>207</sup> because geographical indications can provide the same information feedback loops that trademarks provide.

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203. See generally William W. Fisher, III, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (S. Munzer ed., 2001); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (describing, among other theories, incentive-based, instrumental theory as the vision of intellectual property informing U.S. Constitution); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325 (1989).

204. Continental intellectual property law is very much oriented toward “incentives,” but they are more likely to turn to status, natural rights, or personality based views of IP law. And those views are not completely unfamiliar to Americans. See William W. Fisher III, *Geistiges Eigentum-ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten*, in EIGENTUM IM INTERNATIONALEN VERGLEICH 265 (Vandenhoeck & Ruprecht 1999), translated in *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States* 22, available at <http://cyber.law.harvard.edu/people/ffisher/iphistory.pdf> (last visited Nov. 5, 2006); Justin Hughes, *Copyright and incomplete historiographies: of Piracy, Propertization, and Thomas Jefferson*, 79 SO. CAL. L. REV. 993, 1058 (2006) (discussing presence of natural rights perspectives in American copyright law); see also Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 37, 44 (2002) (noting that in state copyright acts preceding the 1790 federal law “author’s natural rights are mentioned as frequently as society’s benefits as the justification for protection”).

205. One is reminded of the Benjamin Franklin pamphlet, *To Those Who Would Remove to America*, which advised would-be European immigrants that in America “[p]eople do not enquire concerning a Stranger, What is he? But What can he DO?” Edmund S. Morgan, *Poor Richard's New Year*, N.Y. TIMES, Dec. 31, 2002 (quoting BENJAMIN FRANKLIN, *TO THOSE WHO WOULD REMOVE TO AMERICA* (1784)). Two centuries later, observers like Luigi Barzini were still drawing the same difference between Americans and Europeans. See, e.g., LUIGI BARZINI, *THE EUROPEANS* 219–53 (Michael Curtis ed., Penguin Books 1984) (1983).

206. See generally Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769 (1999); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793 (2001).

207. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

Some consumers come to recognize Margaux as having desirable characteristics among red wines; they seek out Margaux wines, expecting them to continue to have those characteristics. If enough consumers do this, the Margaux producers are motivated to maintain and enhance the consumer-desired characteristics. In this way, the GI rewards both product quality control and product differentiation. This is no different than the way the SNICKERS and BABY RUTH trademarks give their respective owners incentives to maintain different recipes for similar peanut/caramel/chocolate candies.<sup>208</sup> Additionally, where production is predominantly spread among small and medium sized enterprises, the appellation or certification mark allows marketing on a scale that individual enterprises cannot attempt,<sup>209</sup> providing economies of scale for information transfer from producers to consumers.

If a country's appellations regime recertifies individual producers on a regular basis, this too is an incentive system for quality control arising from the GI. In theory, a certification mark system polices itself on these quality controls. In each case, the principal incentive is to maintain quality. Again, this is not categorically different than regular trademarks. All three, privately-held regular trademarks, certification marks, and appellations, create a pressure for quality maintenance in order to retain consumer loyalty. All three will be subject to market pressures to improve their quality, whether (a) in response to other competitors' improvements or (b) to gain new market share. The preferred way to gain new market share is to gain new customers while retaining old customers, hence the frequent labels on established, trademarked brands: "NEW" and "IMPROVED." In terms of flexibility in efforts to gain new market share, there is a descending order here. Privately-held trademarks offer more flexibility than certification marks; certification marks offer more flexibility than appellations—if only because the appellation criteria is only changed after the government agency is convinced to make the change.

Conversely, by being the least flexible, appellations are arguably the most prone to stability in meaning. Greater meaning-stability in the

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208. *Id.* at 270 (explaining the incentive "to invest in developing and maintaining . . . a strong mark depends on [the] ability to maintain consistent product quality"); see also Friedrich-Karl Beier, *The Need for Protection of Indications of Source and Appellations of Origin in the Common Market: The Seku/Weinbrand Decision of the European Court of Justice of 20 February 1975*, in PROTECTION OF GEOGRAPHIC DENOMINATIONS OF GOODS AND SERVICES 183, 195 (Herman Cohen Jehoram ed., 1980) (explaining the product differentiation function of geographical indications).

209. Beier, *supra* note 208, at 195; see also YVES ROUSSET-ROUARD & THIERRY DESSEAUVE, *LA FRANCE FACE AUX VINS DU NOUVEAU MONDE* 54 (2002) ("[C]ette notion d'appellation contrôlée est une notion de marque en commun. Je prends un exemple facile. Il y a quatre cents producteurs de chablis, qui se partagent la marque de chablis.") [Jacques Berthomeau, author of a report on French viticulture, remarked that the notion of an *appellation contrôlée* is the idea of a mark held in common, and provided a simple example of four hundred producers of Chablis who share the mark Chablis.].

appellation could be of benefit to consumers.<sup>210</sup> Because information seeps into the consumer base slowly, greater meaning-stability theoretically allows *more* meaning for *more* consumers which furthers the information function that Professor Landes and Judge Posner identified. More rigid controls in wine labeling may increase the payoff of “*savoir lire l’étiquette*” (how to read the label).<sup>211</sup> The rigid controls on wine labeling arguably create an environment where it is more logical for a consumer to invest time learning what certain terms used on wine labels mean. Bordeaux’s *classement* (classification) system was, from its inception, a system to stabilize meaning not that different from trademark law. As Laurence Osborne notes, the *classement* system was “a commercial ploy intended to make Bordeaux wines more rationally intelligible to brokers and buyers” during the nineteenth century and “a kind of brand-creation system.”<sup>212</sup>

But this is theoretical—or past tense. According to Thierry Desseauve, editor of *La Revue du vin de France*, one of the loudest complaints currently about the appellation system is that it is (at least now) “incomprehensible” for French consumers and even worse for consumers in global markets.<sup>213</sup> A 2005 survey found that Americans find French wines “intimidating,”<sup>214</sup> a feeling that may be connected to wine labeling. There seems to be a wide consensus that New World wine producers have tapped into a simpler, more efficient system of communicating wine characteristics through varietal names, such that any stability advantages for the appellation system have not made up for its daunting complexity.<sup>215</sup>

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210. See Justin Hughes, *Recoding Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999) (discussing even passive audiences’ interest in stability in protection of cultural objects by copyright and trademark laws).

211. JACQUELINE GARDAN, *LIVRE DE CAVE: PRÉCIS A L’USAGE DE L’AMATEUR ÉCLAIRÉ* 13–14 (Porphyre ed., 1991).

212. LAWRENCE OSBORNE, *THE ACCIDENTAL CONNOISSEUR: AN IRREVERENT JOURNEY THROUGH THE WINE WORLD* 74 (2004).

213. ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 45 (“Nous entendons souvent dire que ces appellations sont incompréhensibles pour le consommateur français déjà, à plus forte raison dans le monde entier.”).

214. Pascal Galinier, *Le vin français “intimide” les consommateurs américains*, LE MONDE, June 21, 2005, at 17.

215. ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 42 (“L’un des axes principaux de ce développement des vis du Nouveau Monde a été le développement de vins dits de cépage, reconnaissables par le consommateur au nom du cépage principal qui le compose.”) [One of the principal successes of development for New World wines was to develop varietal wines, recognized by the consumer by the name of the principal varietal of which it is composed.]. In the same panel discussion, Michel LaRoche, a Chablis region winemaker noted that the approach of the New World wines has an enormous advantage in simplifying wine labeling. *Id.* at 44–45. Also among those who acknowledge that the labeling of French wines is too complex is René Renou, president of the Wine Committee of INAO, and Christian Berger, Agricultural Counselor of the French Embassy to the United States, who bluntly states: “Our labels are difficult to read.” Corie Brown, *Who’s Killing the*



That is the information stability side. On the production side, there is widespread agreement among wine industry experts (but not extensive, hard-nosed empirical work) that the appellations system stifles innovation.<sup>216</sup> Reliable empirical data on this issue may now be impossible because the common wisdom on this point has been so widely repeated that any survey of winemakers would likely be contaminated. There are plenty of reports of innovation in French, Spanish, and Italian vineyards,<sup>217</sup> but there is anecdotal evidence that this is happening more *outside* the appellation-controlled production environments. For example, there are a number of European winemakers who have stayed outside the appellation system as a way of protecting their freedom to innovate.<sup>218</sup>

The adverse impact on innovation and quality improvement appears to be grave enough that, René Renou, the head of INAO's wine committee, was prompted to propose a series of reforms that would permit all but the very top end AOC wine producers to recommend extensive changes in "grape-growing and winemaking protocols."<sup>219</sup> But even this proposal shows the difference between French and New World vineyards. The New World winemaker is free to try all kinds of new techniques, but Renou's proposal is only that the centralized French

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*Great Wines of France?*, L.A. TIMES, Mar. 2, 2005, at F5. Charlotte Selles-Simmons, a Beaujolais vintner, agrees with that and recommends putting grape varieties on wine labels so consumers "don't have to get out their reading glasses" and "don't have to ask for help." *Id.*; see also Sarah Nassauer & Christopher Lawton, *French Whine*, WALL ST. J., Mar. 2, 2005, at B1 (attributing decline in sales of French wine partly to "France's complicated labeling system, which obscures what casual drinkers want to know most about a wine—its grape variety").

216. See, e.g., ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 41 (Jérôme Quiot explaining Ricard's opposition to making an appellation of their Jacob's Creek region in Australia); *id.* at 89 ("Le seul problème de l'AOC est que cela a peut-être bridé les structures des entreprises françaises.") [Thierry Desseuve remarking that the AOC's only problem is that it has potentially constrained the structures of French companies.]; *id.* at 109–10 ("Le vrai débat pour l'AOC est de savoir pourquoi les gens les plus novateurs dans la viticulture française se sentent bridés par ce système. S'ils essaient de changer ou d'améliorer, ils sont bloqués.") [William Echikson, wine reporter for the *Wall Street Journal*, noted that the true debate for the AOC system is to understand why the most innovative people in French viticulture feel constrained by the system, and that if they want to change or improve, they are blocked.].

217. See, e.g., Jancis Robinson, *The Grapes of War*, FIN. TIMES, Sept. 16, 1995, at I (reporting on Australian techniques being used in French vineyards); *Les crus du Médoc, d'hier et d'aujourd'hui*, VINS MAG., Winter 2002, at 85 (describing new clonal varieties of grapes being used and research on plant vines); *Les vins de pays d'Occ: diversification, exportation, et communication*, VINS MAG., Winter 2002, at 78 (describing new varietal mixes in Languedoc region).

218. ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 29–30 ("Il y avait déjà un choix délibéré dans cette région de rester autour du concept du vin de pays, parce que l'appellation d'origine contrôlée semblait beaucoup trop contraignante, en particulier en n'autorisant pas l'utilisation de cépages que je juge qualitatifs.") [Speaking about Languedoc, Michel Larouche noted that a deliberate choice in this region to stay with the concept of the "vin de pays" because the *appellation d'origine contrôlée* appears much too constraining, particularly in not authorizing the use of varieties that he judged appropriate.].

219. Brown, *supra* note 215.

system *consider* recommendations for particular new techniques that could be included under the AOC system: “[w]inemakers would propose their ideas to the National Committee on Wines, and we would decide if those ideas would be permitted.”<sup>220</sup>

### C. STATIC ENTITLEMENTS, IP MONOPOLY RENTS, AND AGRICULTURAL SUBSIDIES

To the degree that European-style appellations law is less prone to innovation and more prone to safeguarding the status quo, we need to recognize this is not a flaw in appellations law; it is a characteristic, if not the goal. Indeed, Brussels may have made a strategic error in the early 1990s when it pressed for GIs to be enfolded into the TRIPS intellectual property framework when, in fact, GIs are really part of EU agricultural policy.<sup>221</sup>

The European Union’s strong position on GIs is an understandable strategy to use monopoly rents from GIs to subsidize European agricultural production at a time when direct subsidies are becoming less tenable and direct competition with New World agriculture is becoming more likely, even with the 2006 collapse of the Doha round. With that logic in mind, it becomes clear why the European Union seeks strong GI laws far beyond protection against consumer confusion.

#### I. A Partially Traditional Status Quo

One of the leitmotifs of European advocacy of strong GIs is that European agriculture is “traditional” while agricultural production in North America, Australia, and other New World countries is “industrial.” Typical of this kind of thinking is Professor Norbert Olszak, one of the few French legal academics to write at length about geographical indications. He characterizes New World agriculture with the following: “The vast spaces and the recourse to technology permitted the development of very large enterprises producing standard wines for the consumption of the masses.”<sup>222</sup> This is after Olszak baldly claims, without a stitch of evidence, that “terroirs” in the “New World” “are less identifiably distinct because the geological and climatological particularities are less diverse.”<sup>223</sup> In the same vein, a few years ago, a

220. *Id.* Substantively, and to his credit, Renou foresees permitting a wider range of blending of grape varieties in more AOCs, allowing some cross-regional blending for AOC wines and “relax[ing] AOC labeling rules to allow varietal names and other New World conventions.” *Id.*

221. O’Connor, *supra* note 17, at 35 (“The protection of GIs, both domestically and internationally, has been at the heart of the EC’s agricultural policy for some time.”).

222. OLSZAK, *supra* note 19, at 4 (“Les vastes espaces et le recours à la technologie permettent le développement d’entreprises de très grande taille produisant des vins standards pour une consommation de masse.”).

223. *Id.* Olszak’s comments may be linked to a French tendency to believe the French territory is uniquely rich and varied compared to other countries. See, e.g., FERNAND BRAUDEL, THE IDENTITY OF FRANCE 63–65 (Siân Reynolds trans., 1988) (comparing the rich “micro-climates” and “micro-

French government official notoriously told an assembled convention of French winemakers, “here, you have the products of terroir; elsewhere they have industrial products.”<sup>224</sup> In this kind of narrative, as Professor Tomer Broude has observed, terroir is “the epitomic opposite of globalization: a exemplary reflection of place and people.”<sup>225</sup>

For many regions in Europe, this idea of family-based, traditional farming is, in the words of Professor Dominique Denis, a “near caricature . . . that no longer corresponds to reality.”<sup>226</sup> In many European regions both the scale and the methods of production are increasingly industrial. For example, in 2001, the Champagne district vintner Veuve Cliquot produced and sold one million cases of sparkling wine; Piper-Heidsieck sold 455,000 cases.<sup>227</sup> The largest champagne company, LVMH, ships over four million cases of its mainline sparkling wines annually.<sup>228</sup> Production of sparkling wines in “industrial quantities”<sup>229</sup> by the big Champagne firms has been true for decades.<sup>230</sup>

environments” of France with the “monotony” of northern Europe, Brazil, Madagascar, and the Argentine Pampas). Of course, Americans are no stranger to their own self-absorbed “exceptionalism” narratives. See generally SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1997).

224. ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 34 (“[Au] congrès national de la CNAOC . . . un représentant du ministre . . . a dit tout simplement : ‘Ici, vous êtes des produits de terroir; ailleurs, ce sont des produits industriels.’”). We should add to this Christian Boudan who wrote in 2004 that the general usage of freezing (food) at the end of the 1950s, permitted productivity gains for factory-made meals to be served (directly) to the table, announcing the beginning of the end for common, by-hand food preparation in the United States. BOUDAN, *supra* note 3, at 424. But the “end” has not come, and a more careful observer of culinary arts in the United States might have noted just the opposite sort of trends over the past twenty years.

225. Tomer Broude, *Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 U. PA. J. INT’L ECON. L. 623, 651–52 (2005). Broude insightfully elaborates on the argument: “As such [terroir] arguably deserves protection, even enhanced protection, from commercial forces that threaten to compel homogenization and obliterate local terroir-ist cultures of production. GIs are ostensibly a targeted way of achieving this, since they grant each terroir, as officially defined and delimited, a separate legal source of protection.” *Id.* at 652.

226. DENIS, *supra* note 16, at 3 (describing the idea of *exploitation familiale* as almost a caricature which no longer corresponds with the varied number of regions). See generally Broude, *supra* note 225 (questioning a variety of assumptions that strengthening GI law would help preserve traditional or local culture).

227. *Uncorking Success*, THE ECONOMIST, Dec. 21, 2002, at 46 (note that these are figures for brands, not companies).

228. *Id.* (4,350,000 cases worldwide for 2001 not including smaller selling LVMH brands like Dom Perignon); see also Michael Franz, *Boutique Champagnes*, WASH. POST, Dec. 29, 2004, at F7 (“Moët & Chandon reportedly produces 24 million bottles each year”—which would be four million cases).

229. *Uncorking Success*, *supra* note 227, at 47.

230. ALEXIS LICHINE ET AL., ALEXIS LICHINE’S ENCYCLOPEDIA OF WINES & SPIRITS 173, 185, 187 (Alfred A. Knopf, Inc., 1968) (1967) (“Almost all Champagne is made sparkling in the cellars of the big shipping firms . . . Only in a few isolated cases does the grower in Champagne vinify his own grapes—they are nearly always sold to one of the shipping firms . . .”). Similar market concentration is true of the Cognac AOC, where, even a handful of companies has controlled production of Cognac exported to the United States. See Terry Robards, *The Mystique of Brandies*, N.Y. TIMES MAG., Dec. 26, 1982, at 34 (noting that at that time four companies produced 85% of Cognac exports to the U.S.).

As Thierry Desseauve notes, “[a] generic Bordeaux at 2 euros is an industrial product like any other. Sold on a large scale, it is no more and no less than another varietal wine at 2 euros, except that it is an AOC.”<sup>231</sup>

As for production methods, as Professor Denis recognizes, in some viticultural regions farmers control the production process while in others there is a “near total separation, legal and physical, between the raising of grapes and the making of wine.”<sup>232</sup> In the Châteauneuf-du-Pape AOC, the production methods range from “ancient oak cooperage with little or no stainless steel” to one vintner that “sends its grapes through stainless-steel pipes, where the skins are flash-heated by steam entering the outer jacket of the pipes.”<sup>233</sup>

European cheese production presents the same complicated picture. In Italy, many of the production facilities for *Parmigiano-Reggiano* are “gleaming laborator[ies] in every sense of the word, with white tiles, chrome fixtures and work tables, and great copper cauldrons.”<sup>234</sup> One commentator characterized production of the region’s famed cheese as “ha[ving] the feel of big business, with more cooperatives and fewer small farms.”<sup>235</sup> In France, AOC cheeses are actually classified into four production types: *fermier*, *artisanal*, *cooperative*, and *industriel*.<sup>236</sup> Many AOC cheeses are available in several of these four types.<sup>237</sup> For example, of the more than 3700 tons of *Pont l’Eveque* cheese produced in 1991, only 2% were classified as *fermier* (by the farmer.) The rest was *artisanal*, *cooperative*, or *industriel*. Of the more than three million cheeses cured in the caves of Roquefort-sur-Soulzon (and thus qualifying for the AOC *Roquefort*), 60% are made by one company.<sup>238</sup> Total production of AOC cheeses in France went from 152,411 tons in 1991 to over 172,561 tons in 1997.<sup>239</sup> Given agricultural population trends—flat and falling—it seems very likely that such an increase resulted principally from increasingly larger scale production, not new small farmers.

This is not to deny that there are many small-farm producers in the hills of Burgundy and Reggio Emilia. There are almost certainly more

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231. ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 133.

232. DENIS, *supra* note 16, at 5 (“Dans d’autres pays viticoles, il existe au contraire une séparation presque totale, physique et juridique, entre la production du raisin, et l’élaboration du vin.”).

233. Nalley, *supra* note 185, at 71, 73.

234. PAMELA SHELDON JOHNS, *PARMIGIANO!* 16 (1997).

235. *Id.* at 13.

236. See MASUI & YAMADA, *supra* note 37, at 28.

237. *Id.* at 20–21, 48, 51, 187, 188, 196–97, 208 (Abundance AOC from Rhône-Alpes; Beaufort AOC from Rhône-Alps; Bleu d’Auvergne AOC from Auvergne; Livarot AOC from Basse-Normandie; Maroilles AOC from Picardie; Neuchâtel AOC from Haute-Normandie; and Pont-l’Evêque from Basse-Normandie).

238. See MASUI & YAMADA, *supra* note 37, at 217 (the Société des Caves et des Producteurs Réunis); see also Roquefort Société, <http://www.roquefort-societe.com> (last visited Nov. 5, 2006).

239. See MASUI & YAMADA, *supra* note 37, at 77.

per capita than in California, New South Wales, or Mendoza province. Although France has western Europe's largest farms, French farms are still considerably smaller than their American counterparts.<sup>240</sup> The Bordeaux region is full of vintners like Francois Mitjavile, who produces only a couple thousand cases of his TERTRE ROTEOEUF Saint-Emilion each year,<sup>241</sup> a yield in the same ballpark with the annual Napa production of Sean Thackrey's legendary wines.<sup>242</sup>

The point of all this is not to say that European farming is as or more "industrial" than Australian and North American farming. On average, it almost certainly is not. But the point is that a "homogenized" average is largely non-sensical. The truth, as French cheese regulations recognize, is that all sorts of food production are happening in both Europe and New World countries, including very much that is industrial.<sup>243</sup> Even the writer Christian Boudan, intent on showing France's unique resistance to the industrialization of food production,<sup>244</sup> recognizes that artisanal food products have generally been pushed to the margins in developed countries (European countries included) and that France has been following these production and consumption trends.<sup>245</sup>

## 2. *Political Reality and the Pressure to Curtail Agricultural Subsidies*

Although we are familiar with concerns about the "family farm" in American politics, agricultural interests remain more politically potent in the European Union than in the United States. Both western Europe and the United States have experienced a steep decline in their agricultural workforces since World War II, but the population statistics remain different. In France, "about 4% of the total working population" is

240. Comparing average farm size, American farming does appear much more "large scale." The average U.S. farm is 199 hectares (491 acres) versus the average French farm of 42 hectares and an average EU farm of 21 hectares. Embassy of France in the United States, <http://www.info-france-usa.org/atoz/agriculture.asp> (last visited Nov. 5, 2006). But these are difficult numbers to compare. The large American farms are dedicated to grain and beef production, not the core of geographical indications issues. In France, 43% of the agricultural land is in farms larger than 100 hectares—presumably, these are also used for grain and livestock. *Id.*

241. JAY MCINERNEY, *BACCHUS & ME: ADVENTURES IN THE CELLAR* 124 (2002).

242. *Id.* at 189 (describing production of Thackrey's Orion wine—just 500 cases—and his non-vintage Pleiades Syrah-based blend—around 1500 cases).

243. See, e.g., *L'industrie du sans saveur*, GAULT-MILAU MAG., June/July 2006, at 78 (describing and reviewing nine "industrial" *jambon supérieur au torchon*—"superior" classification ham aged in a sackcloth).

244. BOUDAN, *supra* note 3, at 231 ("Mais en France ce régime avait bien résisté grâce à la suivie tardive du monde rural et aux produits d'une agriculture diversifiée.") [But in France this system had resisted, thanks to the late following of the rural world and to the products of a diversified agriculture.].

245. *Id.* ("[I] semble qu'on assiste en France même à un effritement sérieux du régime alimentaire et culinaire traditionnel, régime encore suivie par les personnes âgées, mais rejeté par les jeunes générations.") [It seems that one is witnessing in France a serious crumbling of the traditional diet and cuisine still followed by the older people that is rejected by the younger generations.].

occupied in agricultural production and another 2.7% in “food processing.”<sup>246</sup> This group produces approximately 4.6% of France's GDP.<sup>247</sup> In contrast, “farming employs only about 1 percent of the U.S. workforce and accounts for less than 1 percent of gross domestic product.”<sup>248</sup> By these measures, agricultural or *agroalimentaire* interests should have significantly more political influence in France than in North America.

As in other developed countries, French agriculture continues to decline as a percentage of the country's total GDP. This trend is “mainly attributable to the steady deterioration in agricultural prices relative to prices in general with the saturation of the European single market.”<sup>249</sup> Two decades ago, Luigi Barzini pinpointed this problem in his own analysis of French motivations within the European community. He concluded that French political leaders were motivated by a belief that they must “sell their agricultural products at a price high enough to keep the *paysans* happy.”<sup>250</sup> Barzini pointed to a systematic French effort to support “its costly patriarchal agriculture, . . . the very expensive and excellent wines, the wonderful cheeses . . . .”<sup>251</sup>

Barzini wrote these words in the 1980s, but since then agricultural subsidies in the European Union have grown. Beginning at the inception of the European Community in the late 1950s, the “Common Agricultural Policy” (CAP) was intended as an income support structure for farmers and a means to ensure self-sufficiency in food products.<sup>252</sup> Rapid increases in production converted western Europe to a net exporter of foodstuffs during the 1960s<sup>253</sup> and, because agricultural subsidies were tied to production, as farm efficiencies improved, subsidies rose dramatically. The cost of EU agricultural subsidies trebled between 1981 and 1991.<sup>254</sup> Efforts in the late 1990s to reform the CAP actually triggered a substantial increase in projected costs: by one estimate from 40.92 billion euros in 2000 to a projected 45.8 billion euros

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246. BERNARD VIAL, *FRENCH AGRICULTURE IN THE CONTEXT OF EUROPE* (2001), <http://www.info-france-usa.org/atoz/agriculture.asp>. Historically the differences were even greater. According to Christian Boudan, in 1900, less than 10% of the English population were engaged in agriculture, 25% in Germany, 35% in the United States, and 45% in France. See BOUDAN, *supra* note 3, at 221–22.

247. See VIAL, *supra* note 246.

248. KATHRYN L. LIPTON, WILLIAM EDMONDSON & ALDEN MANCHESTER, *THE FOOD AND FIBER SYSTEM: CONTRIBUTING TO THE U.S. AND WORLD ECONOMIES I* (1998), available at <http://www.ers.usda.gov/publications/aib742/AIB742.pdf>.

249. VIAL, *supra* note 246.

250. BARZINI, *supra* note 205.

251. *Id.* at 124; see also DENIS, *supra* note 16, at 5.

252. See SCOTTISH EXECUTIVE, *HISTORY OF THE COMMON AGRICULTURAL POLICY* (2004), <http://www.scotland.gov.uk/Resource/Doc/1037/0003475.pdf>.

253. *Id.* at 3, ¶ 10.

254. *Id.*

in 2006.<sup>255</sup> The present system “decouples” subsidies and production levels, so that farmers get fixed payments and are “able to choose what they want to produce according to what will be the most profitable for them whilst still having the necessary income stability.”<sup>256</sup> Unfortunately the market distortion is still enormous. According to one EU Minister, the level of subsidization remains at two euros *per cow, per day*.<sup>257</sup>

There is enormous pressure to curb this system of subsidization. Americans tend to think of the pressure as occurring internationally, but the fiscal pressures *within* the European Union are as, or more, important. The unequal distribution of these subsidies is a bone of contention. In fiscal 2003, France received 10.4 billion euros of subsidies, approximately one quarter of the total.<sup>258</sup> France’s share was twice as much as Germany and more than what was received by the UK, Ireland, and all the Nordic EU countries combined.<sup>259</sup> The European Commission admits that by the early 1990s the CAP “did not always serve the best interests of farmers and became unpopular with consumers and taxpayers.”<sup>260</sup> In 2004 Lawrence Osborne more colorfully noted, “[t]he French farmer, who is largely subsidized by the urban taxpayers of all the other countries in the European Union, can smell the end of his golden age. The Germans and the British, for one thing, are tired of paying for him.”<sup>261</sup> Such predictions became reality in 2005 as the British sought “fundamental” changes in the CAP<sup>262</sup> and Prime Minister Tony Blair pointedly attacked the subsidies as supporting old forms of production

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255. Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on Budgetary Discipline and Improvement of the Budgetary Procedure, 1999 O.J. (C 172) 1. There were such efforts again in 2003, but to mixed reviews. *EU Agrees “Radical” Farm Reform*, BBC News, June 26, 2003, <http://news.bbc.co.uk/1/hi/business/3021728.stm>. According to the Scottish Executive the figure for 2003 was 44.3 billion euros. See Scottish Executive, *supra* note 252, ¶ 2.

256. EUROPEAN COMMISSION, AGRICULTURE AND RURAL DEVELOPMENT, *THE COMMON AGRICULTURAL POLICY—A POLICY EVOLVING WITH THE TIMES* 3 (2004), [http://europa.eu.int/comm/agriculture/publi/capleaflet/cap\\_en.pdf](http://europa.eu.int/comm/agriculture/publi/capleaflet/cap_en.pdf).

257. Daniel Wortmann, *Zwei Euro pro Tag für jede Kuh, Zwei Euro pro Tag für jede Kuh*, DEUTSCHE WELLE, June 18, 2005, available at <http://www.dw-world.de/dw/article/0,1564,1619380,00.html>.

258. Commission of the European Communities, *33rd Financial Report on the European Agricultural Guidance and Guarantee Fund, Guarantee Section, 2003 Financial Year*, COM (2004) 715 final (Oct. 27, 2004).

259. *Id.*

260. EUROPEAN COMMISSION, *supra* note 256, at 2.

261. OSBORNE, *supra* note 212, at 156. France has increasingly found itself isolated on these issues. See *Réforme de la PAC, grogne des agriculteurs*, LE FIGARO, June 27, 2003, at 1 (describing France as the principal opponent of efforts to reform the CAP). The farmers’ political clout within France may also be weakening. See Robert Graham, *The French Love Affair With Farming Life Starts to Wither*, FIN. TIMES, Mar. 6–7, 2004, at 4 (describing how French “politicians seem more interested in the votes of urban middle class” than those of French farmers).

262. David Rennie & Toby Helm, *Now Blair Gives Up Pounds 7bn for Nothing in Return*, DAILY TELEGRAPH (London), Dec. 17, 2005, at 1.

while Europe is not investing enough in new technologies and education.<sup>263</sup> German Chancellor Angela Merkel has supported Prime Minister Blair's efforts to scale down the CAP.<sup>264</sup>

### 3. *GI Monopoly Rents as the New Agricultural Subsidies*

If you were a European policymaker and realized that reduction of agricultural subsidies is probable over the long-haul, you would look for means to gain added revenue for European farmers. If you realized that increased opening of your agricultural markets was also, for independent reasons, increasingly likely, you would look for ways to preserve as much of your agricultural employment as possible. One answer would be to migrate your production to *high-end products*, to cultivate and maintain consumer demand for these high-end products, and to control the names of these high-end products as widely as possible in an effort to prevent product substitution and/or consumer defection.<sup>265</sup>

This has been the European Union's consistent strategy, although Brussels has been more circumspect in stating it. The preamble of the 1992 Origins Regulation talks of improving the income of farmers and supporting rural economies through GI protection,<sup>266</sup> while a July 2003 communication from the Commission argues:

GIs provide added value to our producers. French GI cheeses are sold at a premium of 2 euro. Italian "Toscano" oil is sold at a premium of 20% since it has been registered as a GI in 1998. Many of these products whose names are protected, are exported. 85% of French wine exports use GIs. 80% of EU exported spirits use GIs. GIs are a lifeline for 138[,000] farms in France and 300[,000] Italian employees.<sup>267</sup>

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263. See Anthony Browne, *A Wind of Change Starts to Blow Across Europe*, TIMES (London), June 25, 2005, at 30 (describing Blair's address before the European Parliament calling for CAP funds to be moved to "industries of the future"). Blair is correct that the farm subsidies dwarf EU support for education and science. See Wortmann, *supra* note 257 (noting EU support for education and science is only 10% of the amount of EU subsidies for agriculture). During this period, the inequitable distribution of the CAP has fed into traditional Anglo-French antipathy. One British writer humorously predicted of his summer vacation in the south of France: "and they will say: 'Non, mais, enfin, dites-nous la vérité, qu'est-ce qu'il mijote la, ce Tony Blair?' ['Oh, come on, don't be chicken, tell us the truth, what does Tony Blair think he is up to?']", and then I will explain to them very gently and carefully why the Common Agricultural Policy may be good for France but it is very bad for the rest of Europe, and they will beat me up in a friendly but meaningful way." Miles Kingston, *A Traveller's Guide to Anglo-French Dialogue*, INDEP. (London), July 7, 2005, at 40.

264. Heather Stewart, *For George Bush, a Fair Deal Means What American Farmers Demand*, GUARDIAN, July 30, 2006, at 5 ("Tony Blair and German Chancellor Angela Merkel have formed a liberalizing alliance, helping to isolate French President Jacques Chirac and drag the European Union toward an agreement that would pare back the CAP to make it palatable to developing countries.").

265. Testimony of Michael Pellegrino, *supra* note 15, at 5 ("The EU sees new rules on GIs as a way of softening the impact on European farmers of further cuts in agricultural protection and support.").

266. 1992 Origins Regulation, *supra* note 142, pmbl. ("[W]hereas the promotion of products having certain characteristics could be of considerable benefit to the rural economy, in particular to less-favoured or remote areas, by improving the incomes of farmers . . .").

267. *Why Do Geographical Indications Matter to Us?*, *supra* note 106, at 1.



This communiqué is evidence of the European Commission's strategy but belies the wisdom of that strategy. For example, while 85% of French wine exports use GIs, French wines have been *losing market share* in North America and Britain during the past few years to wine producing countries that do not have strict GI systems.<sup>268</sup> The communiqué implies that a GI system by itself increases a product's value (Italian "Toscano" oil is sold at a premium of 20% since it has been registered as a GI in 1998). This assumption is not supported. The mechanism for creating value is not the "GI" or "AOC" label. The AOC wines growing fastest in international markets are Champagnes, but the bottles marketed in North America and Japan are not labeled as *appellations d'origine contrôlées* (the Champagne companies are market savvy and the AOC labeling adds little or no information for an American, Canadian, or Japanese consumer). The same is true for Scotch and Irish whiskey—*none* of the brands marketed in the United States even bother to say they are protected geographical indications.

This communiqué may be for domestic political consumption as much as international persuasion; part of the effort to convince EU farmers that reduced subsidies from liberalization of agricultural trade will be (more) tolerable if European farmers can migrate to high-end foodstuffs. The next step in the reasoning is that exclusive use of their geographical indication names will secure (monopolize) those high-end markets:

[A]n essential part of the value of many agricultural products is the geographical indication which, if not protected, seriously erodes this value. . . . The EC's objective is to negotiate fair market access opportunities to those wines, spirits, and other agricultural and foodstuff products whose quality, reputation, or other characteristics are essentially attributable to their geographic origin and traditional know-how.<sup>269</sup>

The Commission then tells EU farmers that "GIs are a unique asset for our producers in an increasingly liberalized world."<sup>270</sup>

As anyone who shops in high-end grocery, wine, and liquor stores can attest, the issue is not really "fair market access" for European

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268. See Brown, *supra* note 215 (excluding Champagne, French wine exports fell 9.2% in value between 2003 and 2004, after a 2003 year in which sales had been "dismal"); Nassauer & Lawton, *supra* note 215 ("Exports of French wine to the U.S., excluding champagne, dropped 17% by volume in 2003 and a further 4.1% in 2004.").

269. Commission Proposal 625/02 of Dec. 16, 2002, Modalities in the WTO Agriculture Negotiations 4, available at [http://trade.ec.europa.eu/doclib/docs/2005/september/tradoc\\_111447.pdf](http://trade.ec.europa.eu/doclib/docs/2005/september/tradoc_111447.pdf); accord *Why Do Geographical Indications Matter to Us?*, *supra* note 106, at 3.

270. *Why Do Geographical Indications Matter to Us?*, *supra* note 106, at 4; see also Antonio Fernandez-Martos, European Commission Directorate-General Trade, Powerpoint Presentation, Nov. 21, 2003, slide 5 (on file with author) (showing the Commission publicly acknowledging that strengthened GI protection is perceived as means of offsetting reductions in CAP subsidies under slide entitled "The EC's objectives on GIs" heading "GIs in a wider context" lists "CAP reform").

foodstuffs. A geographical indication is an “essential part of the value” of a foodstuff for the same reasons and in the same ways that a trademark is valuable: it causes people to pay a premium for the labeled product. In this respect, Brussels’ drive to capitalize on the value of its geographical names is no different than two California beach towns dueling over who is “Surf City, U.S.A.”<sup>271</sup>; New York City trying to “acquire the rights to everything that says ‘New York’”<sup>272</sup>; and Hollywood and West Hollywood battling over who has the real “Sunset Strip.”<sup>273</sup>

Maximizing monopoly rents from the “unique asset” of geographical indications is a completely rational EU goal, a goal which manifests itself in (a) the European Union wanting to strengthen global protection for all GIs to a product specific usurpation standard (as is already the case with wines and spirits), (b) the European Union seeing GIs as having primacy over trademarks (where North Americans tend to enjoy more monopoly rents globally in the *agroalimentaire* sector), and (c) the European Union wanting to reclaim a substantial set of geographic words that have become generic in many countries. Each of these points is addressed below.

a. *To Maximize Monopoly Rents, GIs Should Have a Broad Penumbra of Protection, Including Against Trademarks*

If you believed that you had a unique advantage in geographical indications over your trading partners, who have relied on trademarks for marketing, you would want GIs to have some kind of primacy over trademarks. Not surprisingly, as one commentator reports, “the European Communities traditionally pursue a concept of geographical indication protection which assumes a certain element of superiority of geographical indications over trademarks.”<sup>274</sup> First, the law in at least some EU jurisdictions gives GIs protection at least equal to, and arguably beyond, the dilution protection for famous marks in the United States. This protection appears to preclude non-confusing commercial uses of the geographic word.

For example, French law forbids use of the appellation not just on similar products, but on “any other product or service where the use is susceptible of diverting or weakening the notoriety of the appellation d’origine.”<sup>275</sup> Thus, Yves St. Laurent could not use Champagne as the

271. Kimi Yoshino, *Two Surf Cities Claim the Same Wave of PR*, L.A. TIMES, Jan. 31, 2005, at A1 (Huntington Beach and Santa Cruz, California, competing for trademark rights to “Surf City, USA” and “Original Surf City, USA”). Although in this dispute, the two municipalities are, to some degree, free-riding off the Beach Boys as much as they are trying to capitalize on a geographic designation.

272. Thomas S. Mulligan, *The Big Apple Wants Its Slice*, L.A. TIMES, Feb. 22, 2005, at A9.

273. Bob Pool, *W. Hollywood Stakes Claim to Sunset Strip*, L.A. TIMES, Aug. 16, 2004, at B1.

274. Goebel, *supra* note 128, at 973.

275. C. CON. art. L. 115-5; BERTRAND, *supra* note 20, at 147. In contrast, at least one Belgian court has permitted a beer called “Bourgogne des Flandres” [Burgundy of Flanders] on the grounds that,

name for a high-end perfume,<sup>276</sup> although the haut couture company had believed that with a “luxury product commercialized by a company with a global reputation, there was no diminishment or weakening” of the Champagne name.<sup>277</sup> Under Belgian law, once an appellation is recognized, the use of the word on any “products not covered” by the appellation is forbidden—again, without regard to consumer confusion.<sup>278</sup>

If the same breadth of dilution-like or “dilution-plus” protection were implemented in other countries, Champagne district wine producers could theoretically shut down the CHAMPAGNE café chain in California, TEXAS CHAMPAGNE hot sauce,<sup>279</sup> the CHAMPAGNE POWDER ski resort in Steamboat Springs,<sup>280</sup> BUBBLES-THE CHAMPAGNE OF CAR WASHES in Canada,<sup>281</sup> CHAMPAGNE ROSE as a Yardley of London trademark for bath soaps,<sup>282</sup> and SCHAUMPAGNER bubble bath in Switzerland. (The Champagne

although the beer trademark incorporated a protected *appellation d'origine*, consumers know that Belgium does not produce wine and would not be confused. BERTRAND, *supra* note 20, at 147.

276. Cour d'appel [CA] [regional court of appeal] Paris, 1<sup>e</sup> ch., Dec. 15, 1993, D. 1994, 145, note le Tourneau (finding that YSL's use of the word had “diverted the notoriety which only the producers and marketers in Champagne could exploit in commercializing wine . . .”).

277. OLSZAK, *supra* note 19, at 46.

278. Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur [Law of July 14, 1991 on Trade Practices and Consumer Information and Protection], Chapitre III, art. 20(3), available at [http://www.wipo.int/clea/docs\\_new/fr/be/be054fr.html](http://www.wipo.int/clea/docs_new/fr/be/be054fr.html) (“Il est interdit . . . (3) de fabriquer, d'offrir en vente et de vendre sous une appellation d'origine des produits non couverts par une attestation d'origine lorsqu'une telle attestation est requise.”). Belgian law also explicitly forbids all translations of the protected appellation, *id.* art. 21(3) (“L'emploi abusif d'une appellation d'origine reste interdit nonobstant . . . l'utilisation de mots étranger lorsque ces mots ne sont que la traduction d'une appellation d'origine ou sont susceptibles de créer une confusion avec une appellation d'origine.”), as well as the use of “style” or “type” terms with the appellation, i.e., the TRIPS Article 23 standard expanded to apply to all products. *Id.* art. 21(1) (“L'emploi abusif d'une appellation d'origine reste interdit nonobstant . . . l'adjonction de termes quelconques à ladite appellation d'origine notamment de termes rectificatifs, tels que 'genre,' 'type,' 'façon,' 'similaire.’”). Article 13(1)(a) of the Origins Regulation itself requires the PDOs and PGIs be protected in national law both against “any direct or indirect commercial use of a name registered in respect of products not covered by the registration in so far as those products are comparable to the products registered . . . or insofar as using the exploits the reputation of the protected name.” Article 13(1)(b) of the Origins Regulation requires that all PDOs and PGIs be protected broadly against “any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as ‘style’, ‘type’, ‘method’, ‘as produced in’, ‘imitation’ or ‘similar.’”

279. U.S. Trademark Registration No. 1,526,014 (filed Feb. 21, 1989) (TEXAS CHAMPAGNE certification mark owned by Texxstar Resources (USA), Inc.).

280. U.S. Trademark Registration No. 2,456,466 (filed May 29, 2001) (CHAMPAGNE POWDER certification mark owned by Steamboat Ski & Resort Corp.).

281. Canadian Trademark Registration No. TMA375924 (filed Nov. 16, 1990) (BUBBLES THE CHAMPAGNE OF CAR WASHES AND DESIGN certification mark owned by Bubbles International Car Wash Corp.).

282. Canadian Trademark Registration No. TMA430664 (filed July 22, 1994) (CHAMPAGNE ROSE certification mark owned by Muelhens GMBH & Co.).

district producers lost this last claim in a Geneva court action in 1990.<sup>283</sup>) Potentially they could prevent the use of the word “Champagne” to name a rich yellow wall paint color, or a Vegas showgirl, without consumer confusion in any of these cases. In the strong, French, version of GI law the geographical indication is protected from all *similar* commercial uses. This increases the number of friction points between GI law and trademark law, points of engagement where the GI is likely to prevail. As Professor Olszak notes, “this absolutism of the appellation contrasts with a greater flexibility in the law of trademarks.”<sup>284</sup>

Such strong protection of a geographical indication, giving it a very wide penumbra to prevent “usurpation” or dilution, borders on the view that a protected appellation should never be used in a trademark.<sup>285</sup> In contrast, barring dilution protection, a geographic word protected as a certification mark could be used commercially by third parties as long as there is no risk of consumer confusion, i.e., the trademark IDAHO SCIENTIFIC is not confusingly similar to Idaho when used as a certification mark for potatoes. COGNAC can be a common law certification mark and not interfere with a house paint company naming one of its golden colors “cognac.” Even where the certification mark achieves sufficient famousness for dilution protection, pre-existing trademarks and trade uses are protected; there is no “priority” for the now-famous certification mark.

To be clear, the European Union has *not* proposed that TRIPS Article 23(1) be strengthened to the wide usurpation standard provided in French law and Article 3 of the Lisbon Agreement. The European Union’s present position seeks to increase all GI protection to what I have called the “product specific usurpation standard,” i.e., primacy within its product classification only.<sup>286</sup> But the view from Brussels also

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283. OLSZAK, *supra* note 19, at 37–38. The Swiss product’s counterpart in the United States might be something like ROYAL BAIN DE CHAMPAGNE. U.S. Trademark Registration No. 0856169 (filed Apr. 4, 1967) (ROYAL BAIN DE CHAMPAGNE certification mark owned by Parfums Caron Joint Stock Co.).

284. OLSZAK, *supra* note 19, at 46.

285. BERTRAND, *supra* note 20, at 147 (“L’antinomie des notions de marque et d’appellation d’origine conduit à la prohibition du dépôt de l’appellation d’origine à titre de marque.”).

286. Although Article 23(1) does not say “usurpation,” that is clearly how the European Union understands it. See General Council Trade Negotiations Committee, *Doha Work Programme—The Extension of the Additional Protection for Geographic Indications to Products Other than Wines and Spirits*, WT/GC/W/540/Rev.1, TN/C/W/21/Rev.1, at 3 (Dec. 14 2004) (Communication from Bulgaria, the European Communities, Guinea, India, Kenya, Liechtenstein, Madagascar, Moldova, Romania, Switzerland, Thailand, and Turkey) (“GI-extension will save litigation costs to legitimate producers of GI products through an easier burden of proof in enforcement procedures to end usurpation and illegitimate use of a geographical indication.”); Trade Negotiations Committee, *Statement by Switzerland-Joint Statement by the GI-Friends Group*, TN/C/4 (July 13, 2004) (urging extension of Article 23(1) to all products because GIs “of products other than wines and spirits can be usurped and free-riden upon by products not having the respective origin or quality”).

seems to be that a new GI recognized by a government should displace a pre-existing trademark, at least within that GI's product classification.

This makes the disruptive cost of the EU proposal difficult to calculate because we do not know the full range of future GIs. In fact, GIs are a fairly recent tool of agricultural policy in the European Union. Even as venerable a wine as Chianti did not become a protected *denominazione* in Italy until 1967.<sup>287</sup> In France, there seems to be a slow, but steady stream of new GIs. Of the more than thirty-five protected appellations for cheese in France, only eleven are more than thirty years old.<sup>288</sup> Camembert did not become part of a protected AOC (*Camembert de Normandie*) until 1983.<sup>289</sup> Similarly, although Cantal cheese has been produced in the Auvergne region of France for over a thousand years, it was not granted *appellation* status until 1980.<sup>290</sup> New French AOCs are created fairly regularly for wine<sup>291</sup> and spirits.<sup>292</sup> Uncertainty about how GIs would develop as a policy tool in different countries heightens concern about any proposals in which GIs trump trademarks.

A system that gives geographical indications primacy over trademarks is especially unacceptable if GI status is simply a decision by one national government that is then imposed on all other WTO members, without independent review within each member's national legal system available to trademark holders. This is the essence of the European Union's proposal in TRIPS negotiations.

*b. To Maximize Monopoly Rents, the EU Must "Claw Back" Geographic Terms that Have Become Generic*

The desire to generate GI monopoly rents for the agricultural sector also explains the European Union's "claw back" list of forty-one geographic terms. There is some irony in this list in that it includes at

287. OSBORNE, *supra* note 212, at 219.

288. MASUI & YAMADA, *supra* note 37, at 28. In addition to *Camembert*, cheese appellations that have been granted in the past twenty-five years include *Bleu de Haut Jura* from Rhône-Alps, France (1977); *Bleu des Causses* from Midi-Pyrénées, France (1979); *Cantal* from Auvergne, France (1980); *Brie de Melun* from Ile-de-France, France (1990); and *Rocamadour* from Midi-Pyrénées, France (1996). *Id.*

289. *Id.* at 92. Actually, "camembert" by itself was declared generic in 1926 by the Court of Orleans and the AOC only governs *Camembert de Normandie*, leaving "camembert" generic. See OLSZAK, *supra* note 19, at 20 n.23.

290. MASUI & YAMADA, *supra* note 37, at 94-96.

291. Just in 1990-1991, France added at least five new appellations for wine. GARDAN, *supra* note 211, at 135 (*Vacqueyras* (Languedoc, 1990), *Cremant de Limoux* (Sud-Ouest, 1990), *Floc de Gascogne* (Sud-Ouest, 1990), *Marcillac* (Sud-Ouest, 1990), and *Pommeau de Normandie* (Normandie, 1991)). In 2002, at least one new wine AOC was created. See *Une A.O.C. pour les rouges de Limoux*, VINS MAG., Winter 2002, at 10; see also MCINERNEY, *supra* note 241, at 37. Discussing the Mâcon area of Burgundy, he notes "[t]he appellation of Viré-Clessé was finally approved and appeared on wines from these special villages for the first time in 1999." *Id.*

292. Lerosier, *supra* note 38 (town of Domfrontais given AOC for calvados on December 31, 1997 and AOC for *poiré* [apple and pear-based spirit] on December 12, 2001).

least two terms, “Feta” and “Parmesan,” that have substantial generic use *within* the European Union. In the case of “feta,” the Greek government’s 2002 registration of the term as a PDO under the Origins Regulation was contested by the German, Danish, French, and British governments. Greece finally prevailed at the European Court of Justice in 2005.<sup>293</sup>

The generic use of “Parmesan” is also widespread in Europe. In April 2004, the European Commission issued an “opinion” (avis motive) to Germany that its continued failure to protect the word, and its use by German cheese manufacturers, would result in the Commission launching a case against the German government at the European Court of Justice.<sup>294</sup> The court decided that “feta” had not become generic, while recognizing that the production of feta cheese in “other countries has been large and of substantial duration (since 1931 in France, since the 1930s in Denmark and since 1972 in Germany).”<sup>295</sup>

What would happen if the cheese-makers of Parmigiano-Reggiano were given global control of commercial use of “Parmesan”? Makers of cheese and cheese products presently labeled “Parmesan” would not stop selling their products; they would re-label and re-brand. This process would impose quantifiable costs on these producers and, during the process, engender a great deal of consumer confusion that is of a less quantifiable cost. The confusion would be augmented if Article 23 protection (the product-specific usurpation standard for wines and spirits) extended to cheese GIs because these producers would not be able to label their products “parmesan-like,” “parmesan-style,” or anything that would similarly offer efficient communication of product characteristics to the consumer. Similarly, a wide range of dishes, whether in restaurants or commercially-available, prepared food, might be barred from using “parmesan” in their names (“eggplant parmesan,” “chicken parmesan,” etc.). This might be true even where the prepared food used authentic Parmigiano-Reggiano cheese.<sup>296</sup>

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293. Press Release No. 92/05, Eur. Court of Justice, Judgment of the Court of Justice in Joined Cases C-465/02 and C-466/02, *The Court of Justice Upholds the Name ‘Feta’ as a Protected Designation of Origin For Greece* (Oct. 25, 2005), available at <http://curia.europa.eu/en/actu/communiqués/cp05/aff/cp050092en.pdf>.

294. Consortium du fromage Parmigiano-reggiano, *Le Parmesan: plus qu’un patrimoine national*, VINS & GASTRONOMIE (Dec. 2004), at 88.

295. Press Release No. 92/05, *supra*, note 293, at 2.

296. The scope of this problem would depend on whether a jurisdiction adopted GI protection as strong as that recognized by the European Court of Justice. Case C-469/00, *Ravil S.A.R.L. v. Bellon Imp. S.A.R.L.*, 2003 E.C.R. I-5053; Case C-108/01, *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v. Asda Stores Ltd.*, 2003 E.C.R. I-5121. In *Ravil*, the Court ruled that Grana Padano cheese and Parma ham could impose grating, slicing, and packaging conditions on use of the PDO. As a result, Ravil, a French company which bought the Grana Padano cheese and grated the cheese itself, could be prevented from using the “Grana Padano” name. Similarly, a British supermarket chain that bought boned Parma ham and sliced and packaged the ham itself could be prevented from labeling the

#### IV. A DEBATE ABOUT COMMERCIAL LINGUISTICS, MYTH-MAINTENANCE, AND COMPARATIVE ADVANTAGE

While the politics of GIs are intriguing, at heart the debate about geographical indications is a struggle about commercial linguistics, myth maintenance, and who will extract the monopoly rents from those myths. This is what makes the geographical indications debate both so interesting and so parallel to conventional trademark law.

The introduction described three basic functions for geographic words in labeling products: (a) to tell us a product's geographic provenance; (b) to tell us about non-geographic characteristics of a product; or (c) for evocative purposes. The European Union's *public* argument for strong GI protection is that GIs serve a *fourth* purpose which is a hybrid combination of (a) and (b): the European Union contention is that GIs are supposed to tell us *non-geographic characteristics of the product linked to the product's geographic provenance*. This is the "terroir" theory, i.e., there is an essential land/qualities nexus. The terroir theory allows the European Union to argue that although words like Parmesan and Chablis have become generic descriptors of products from many locales, such genericity should not have happened because the non-EU products lack the true product's qualities and, therefore, are mis-described, mislabeled, and, thereby, competing unfairly.

This Part will first examine how the essential land/qualities nexus is needed to justify the strong GI protection advocated by the European Union. Then we will turn to the question of whether there is an essential land/qualities nexus across a broad spectrum of products at a sufficient level for strong GI protection to make sense. While winemakers and artisanal farmers are completely justified in their concern for terroir, what we know—and are learning—about terroir does not fit our appellations laws very well and does not justify GI protection beyond protection from consumer confusion. On the other hand, preserving descriptive and evocative uses of geographic words is an important goal counseling us to *limit* such protection.

##### A. THE MIGRATION OF GEOGRAPHIC WORDS TOWARD NON-GEOGRAPHIC MEANING

Of the three basic uses I have proposed for geographic words in labeling products, the first two are in some opposition to each other: to communicate a product's *geographic origins* as opposed to

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ham "Parma." *Ravil*, 2003 E.C.R. at I-5119. The Court required that the PDO expressly impose such limitations and that the limitations be relevant to maintaining the quality and, therefore, reputation of the PDO. *Id.* at I-5106. Grating, slicing, and packaging were found to be relevant to the maintenance of the quality and the authenticity of the PDOs at issue. *Id.* at I-5104.

communicating a product's *non-geographic characteristics*. Yet many geographic words naturally drift from geographic source identification toward non-geographic product identification. This genericity drift is all around us, whether one encounters *sauce mexicaine* in a Paris *supermarché* or locally-baked French bread in Beijing.

In the 1992 *Exportur SA v. LOR SA* case before the European Court of Justice, French candy makers contended that two Spanish candy names, "turrón de Alicante" and "turrón de Jijona," had become generic.<sup>297</sup> The British Government intervened on the side of the French producers, agreeing that the two candy names had come to represent only "certain recipes for confections, whose principal distinctive ingredients, namely honey and almonds, originate in different regions or even different countries."<sup>298</sup> The British Government elegantly summarized the issue:

[I]t is not unusual for successful foodstuffs produced in one Member state to be imitated in other Member states. If appropriate labeling ensures that 'imitations' are clearly distinguishable from the originals on whose recipes they are based, there is no risk of fraud or deception and so the original name becomes generic.<sup>299</sup>

Although the French candy makers lost this case, their side's arguments nicely capture the problem. Broad-based progress requires both innovation *and* imitation. Imitation of technology (in the broadest sense) is often accompanied by imitation of the relevant terminology. So we get *computador* (Spanish), *televisi* (Malaysian), and *croissant* (English).<sup>300</sup> As the French candy makers argued in the *Exportur* case, "in so far as [the words] indicate certain types of tourons and constitute generic terms, they are necessary in order to identify the products in question for the benefit of consumer[s], so that to reserve them solely for Spanish producers is unlawful."<sup>301</sup>

As recipes (the "technology") migrate, they often retain their original names; generally speaking, it is efficient for them to do so. The original name comes to stand for the results of the technology. This is a

297. Case C-3/91, *Exportur SA v. LOR SA*, 1992 E.C.R. I-5529, I-5535, ¶ 23; see also BRAUDEL, *supra* note 223, at 208 (describing how the Roannais wine-producing region 240 miles from Paris lost out to more distant Midi vineyards as railways expanded).

298. *Exportur*, 1992 E.C.R. at I-5539, ¶ 47.

299. *Id.* at I-5534 to 35, ¶ 23. The candy makers argued that "touron Jijona" had come to mean a honey nougat candy "containing ground almonds and being of a soft consistency" while "touron Alicante" was a "brittle specialty made with whole almonds." *Id.*

300. For example, "the Turkish words for parliament and senate are *parlamento* and *senato*, both obviously Italian . . . Similarly, the Arabic term for parliament is *barlaman*, clearly from the French *parlement*." BERNARD LEWIS, *WHAT WENT WRONG?* 144 (2002). And similar terminology makes reporting about techniques easier, as when Professeur Jean-Robert Pitte of the Sorbonne writes about Armenia having a specialty "cognac" that was a favorite of Stalin's. PITTE, *supra* note 30, at 37.

301. *Exportur*, 1992 E.C.R. at I-5535, ¶ 25.



general process—we only call it “genericization” when a geographic word (or trademark) is involved. That is the difference between Caesar salad and Swiss cheese, between honey mustard and Dijon mustard, between crepes Suzette and Chicago pizza. All are general recipes, however, the second in each pair became so through a process of genericization of a geographic word.

In fact, geographic words are sometimes *added* during the migration to describe the supposed source of the technique. We call those delicious cholesterol delivery systems “French fries,” although the French just call them “frites.” If you buy a waffle in Liege, it is called a “*gaufre*.” In the Brussels train station, the same product is called a “*gaufre*,” “*gaufre de Liege*,” or “*gaufre liegeoise*” even though it is baked in front of you. On the streets of Paris, the same product might be called any of these names, or, a “*gaufre Belge*,” although, again, it is prepared before your eyes. By this process, food technologies migrate and geographic words migrate toward non-geographic meaning.

#### B. TOKAY, BUT NOT TRAVERTINE OR TIRAMISU

A curious thing about the idea of terroir is that it did not develop to cover the kinds of products that most obviously qualify for an “essential” land/qualities nexus. An essential land/qualities nexus makes the most sense with the *least* processed products. Stone is a good example. In the fifteenth century, the Florentines imported lustrous *biachi marmi* from Carrara for Brunelleschi’s construction of the Duomo.<sup>302</sup> In the twentieth century, Angelenos imported glistening Travertine marble from outside Bagni di Tivoli for the walls of the J. Paul Getty Museum complex.<sup>303</sup> Stone from particular places has been coveted throughout history, whether for building or human ornamentation. If the key is *essentiality*, should not GI protection have arisen in relation to various kinds of marble or Afghan lapis lazuli or Jerusalem limestone products whose characteristics are not convincingly reproduced beyond a single geographic area? These are the most unimpeachable examples of desirable final product qualities being intrinsically linked to a single geographic production area.

Of course, marble and lapis lazuli are not foodstuffs. More importantly, it might be said that stone does not reflect terroir, it literally *is* the terroir. But there are plenty of minimally-processed foodstuffs produced in western European countries where geographical indications did not arise originally and where GIs remain practically or completely absent. Four such products historically produced in France are mineral

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302. ROSS KING, BRUNELLESCHI’S DOME 108–11 (2000) (*biachi marmi* refers to white marble).

303. See RICHARD MEIER, BUILDING THE GETTY 94 (1997). Travertine from the same quarry was used to face the Coliseum, the Trevi Fountain, and the colonnade of St. Peter’s Basilica in Rome.

waters, honey, oysters, and sea salt.<sup>304</sup> Generally speaking, these minimally-processed, minimally-transformed foodstuffs have not given rise to appellations laws.

At the other extreme, *more* processed, transformed foods also have not been fertile territory for appellations of origin. Many well-known dishes or preparations, for example, panettone, have distinct regional origins, but this “cuisine level” of foodstuffs has not lent itself to geographical indications claims.

Geographical indications arose to cover a range of *intermediately* processed foodstuffs. At one level, the rise of appellations for wine and cheese was the result of contingent events like the widespread wine labeling fraud that France experienced in the late nineteenth century. At another level, geographical indications seem to have arisen for processed products (a) with a single dominant ingredient; (b) where the processing was done in roughly the same location as the ingredient was produced before processing; (c) where the dominant ingredient had multiple producers (at the farming level) that are citizens of the polity creating the protection; and (d) where the processing made the product transportable to distant markets.

Thus, tea, coffee, and chocolate did not give rise to GI protection in Europe because all three lacked characteristics (b) and (c), the latter meaning there was no domestic producer constituency to be served with GI regulations. Mineral waters lacked (c) as most “sources” are controlled by individual landholders, so there is no need for tools to coordinate marketing. Characteristic (d) explains why GIs would not develop for a product like bread. Although made of wheat with some water and salt, its processing did not make it especially transportable until recently, with the development of flash-frozen dough and par baking.<sup>305</sup> Characteristic (d) also subsumes the experience the French had with fraudulent Bordeaux and Burgundy wines in the late nineteenth and early twentieth centuries: the fraud was possible because the product had eager buyers at a distant market, newly serviceable from the expanding railway system in France.<sup>306</sup>

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304. As for oysters, one WIPO official thought aquatic terroir was certainly a new idea, but French gastronomes speak in such terms concerning these two ocean products. See, e.g., H el ene Lacas, *Reines des coquillages, les hu tres*, CUISINES ET VINS DE FRANCE, Feb.–Mar. 2005, at 101 (describing oysters as “des terroirs et des go ts” [regions and tastes]); H el ene Lacas, *Le sel, toutes les saveurs de l’or blanc*, CUISINES ET VINS DE FRANCE, June–July–Aug. 2005, at 30 (describing land and sea salts as “des sels de terroir” [the salts of the region]).

305. See, e.g., La Brea Bakery, [http://www.labreabakery.com/store\\_baked.html](http://www.labreabakery.com/store_baked.html) (last visited Nov. 5, 2006).

306. By the end of the eighteenth century, France had an excellent system of national roads, perhaps the best in Europe, which had substantially cut down travel times from just twenty-five years earlier and, in that sense, started creating a national market for regional French agricultural products. See BOUDAN, *supra* note 3, at 285 (comparing substantially reduced Paris/regional city travel times

But perhaps we must add one other condition for the rise of robust, GI-like law: *that the local product can be imitated and consumers cannot by themselves, at least not enough of them, distinguish the imitations.* If the techniques and ingredients to make delicious foodstuffs get imitated well enough to make sufficiently convincing counterfeits, and the first producers of delicious foodstuffs now face stiff competition, what should the first producers do? This is just an instantiation of the broader problem of what a producer should do when he faces stiff competition from people who have (lawfully) imitated his production technology. One thing to do is continue to improve the technology, hence how often we are told our favorite toothpaste or detergent is “new” and “improved.” But that route is partially closed to high-end European farmers by the rigidity of the appellations system itself. Another thing to do is to give brand value to the name—and protect it fiercely, whether by trademark law or a separate GI law.

In the past few decades, three things have intensified this kind of competition between original producers and imitators for intermediate-processed foodstuffs. First, transportation has made international trade in foodstuffs much more viable, opening distant markets that a producer could serve in the past only precariously. Second, consumers in these distant markets have become significantly wealthier. This is true everywhere from the American Midwest to Hyderabad. Third, on top of the initial wave of food technology migration (which often was the result of immigration or colonization), food preparation and processing techniques are being carefully studied and widely shared.

This last trend has attracted much attention in wine. As a Canadian journalist notes, blind taste tests

[have] become more difficult in the last decade with the globalization of wine varieties, styles, and winemaking. They’re making Aussie ‘shiraz’ and Italian-style pinot grigios in California, Burgundian pinot noirs in Oregon and New Zealand, California-dreaming chardonnays in France and Lotusland zinfandels in Italy. . . . The Balkans are awash with North American big-flavoured wines, Bordeaux-style blends are sculpted everywhere, even in Austria, zippy Germanic rieslings are sprouting in Ontario and New York.<sup>307</sup>

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from 1765 to 1789). Nonetheless, it is generally agreed that the expansion of the railway system dramatically affected wine marketing in France. *See, e.g.,* BRAUDEL, *supra* note 223, at 208 (describing how the Roannais wine-producing region 240 miles from Paris lost out to more distant Midi vineyards as railways expanded).

307. Gordon Stimmell, *Seeing Red Over White Blindness*, TORONTO STAR, Jan. 22, 2003, at D04. Australian wine critic Max Allen describes the same process Stimmell noted, but optimistically as creating new variations: “for every bland, internationalized wine, there is an exciting alternative: a South Australian Shiraz, for example, that has been made using ancient techniques developed in Burgundy and has an extra level of texture and structure; or a Spanish Tempranillo made using Australian technology that has an extra layer of pure, varietal fruit flavor.” ALLEN, *supra* note 34, at 66.

Another writer puts it more colorfully: “blow me if the[se] new top-notch burgundies don’t often taste disarmingly like top-notch Pinot Noir from Oregon . . . or Martinborough (New Zealand).”<sup>308</sup> In this sense, the crisis for French winemakers has been caused, at least partially, by the French companies that export tens of thousands of French oak barrels to California, South Africa, and Australia each year.

How to respond to these new competitors? One answer is to promote the idea of terroir, of an *essential land/qualities connection* (and with it, the idea of appellations law). British writer Andrew Barr puts it fairly directly: “The response that French wine-makers have now offered to the results of tastings such as these has been to introduce an element of mysticism into the equation—to talk up their soil (terroir).”<sup>309</sup>

If the product’s non-geographic qualities arise *only* from the product’s geographic origins, then imitators of the technique still cannot truly reproduce the product. And if this essential land/qualities connection is real, it justifies extending the intellectual property control to include *all* quality descriptive uses of a protected geographic word. In other words, if the terroir is actually needed for the process, then “Chianti-style wine” and “méthode champenoise” (for sparkling wine) make no sense for products produced outside those respective regions. If the recipe really requires that particular land, you arguably protect consumers by forbidding such “style” or “method” terminology.

### C. DISENTANGLING TERROIR FROM APPELLATIONS

The idea of terroir is an input/output idea: some unique inputs (the terroir elements) produce unique outputs in the same way that individual artisans might produce stylistically unique outputs. The particular input is *necessary* for the particular output: no other input produces that output. Let us consider each side of this equation.

#### 1. *Difficulties with the Input Side*

As to the input side, terroir is a claim that the product’s qualities come uniquely from some combination of inputs specific to that

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308. ALLEN, *supra* note 34, at 73. Closer to home, a French culinary magazine jocularly characterized the perspective of French Jura cheesemakers to their Alpine neighbor: “Switzerland is a friendly country for sure, but guilty of making a cheese too similar to the local [Jura] glory, le vacherin.” Sophie Denis, *Vacherin mont-d’or, la crème du Jura*, CUISINES ET VINS DE FRANCE, Feb.–Mar. 2005, at 82.

309. ANDREW BARR, *DRINK: A SOCIAL HISTORY* 112 (Bantam Press, 1995) (1988). Barr continues:

[I]t is essential to their purposes that French wine-makers should continue to insist that all the unusual characteristics of their fine wines should be attributed, not to wine-making techniques, but to the soil of the vineyard. The French emphasis on *terroir* serves not only to combat competition from wine-makers in America and Australasia, but also to create an aura around the most famous French wines: to establish them as natural phenomena, beyond the control of man.

*Id.* at 116.

geographic place. The most vexing of these views are the terroir narratives that insist on the *incomprehensible* nature of terroir. In this vein, James E. Wilson, an American geologist, tells readers that terroir has a “spiritual aspect.”<sup>310</sup> But it does not get the conversation very far if, when pressed, “the French winemaker would simply say terroir, and shrug his or her shoulders in that life-is-too-mysterious, Gallic way.”<sup>311</sup> In a trade environment that demands a certain level of science, rationality, and transparency, if terroir remains “an article of faith” for some<sup>312</sup> but a dubious mystery to many,<sup>313</sup> it cannot be a useful concept for developing further international norms.

Moving baby-steps beyond simple mystery, the official website for the principal producers of *Roquefort* cheese riffs on a taxonomy we learn in childhood: “The secret of Roquefort is the meeting between the animal, the mineral, and the vegetable.”<sup>314</sup> French oenologist Alain Carbonneau similarly defines terroir “as the interaction of the climate, grape variety, and the soil.”<sup>315</sup> Of course, emphasis on the “vegetable” element does not support the uniqueness of terroir. The migration of grape varieties at least as far as Christianity stretched is the very foundation of the marketing problem for European winemakers.

Professor Norbert Olszak is more cautious, properly removing the vegetable element from the terroir-based justification for geographical indications protection. Professor Olszak points out that the industrial revolution made it easy for geographic names of more processed goods such as “oxford” and “eau d’Cologne,” to become generic. But as to foodstuffs, he writes:

In contrast, for agriculture products and particularly for viticultural products, it is not the same. One can transport the grape varieties, the winemakers, the presses, the casks or stills—and there effectively is a world market for all this, but one cannot replace the soil and the

310. WILSON, *supra* note 36, at 334.

311. ALLEN, *supra* note 34, at 31.

312. Robinson, *The Grapes of War*, *supra* note 217, at 10 (describing terroir as “an article of faith for every French vigneron”).

313. OSBORNE, *supra* note 212, at 116 (winemaker Randall Graham, “I think American babbling about their terroir is—as yet—utter bullshit. It’s marketing psychobabble, okay?”); Daniel Sogg, *Sean Thackrey: Winemaking on the Edge in a Marin Eucalyptus Grove*, WINE SPECTATOR, Jan. 31–Feb. 28, 2003, at 96 (“There’s one pattern he detests—the concept of *terroir*, the notion that the growing site determines the character of wines. ‘You hear so much dog shit about *terroir*. It’s used as such an excuse to attribute quality to real estate. You wouldn’t do that with a restaurant. Every chef wants the best produce, but someone still has to cook it,’ he insists.”).

314. “Le secret de Roquefort, c’est le rencontre entre l’animal, le minéral, et le végétale.” The website further tells us that it is a combination of “lait de brebis, cave naturelle, penicillium Roqueforti” [ewe’s milk, natural cellars, and penicillium Roqueforti]. *Penicillium Roqueforti* is considered a low risk microorganism. See U.S. Environmental Protection Agency, Final Decision Document, *Penicillium Roquefortie* TSCA Section 5(h)(4) Exemption, [http://www.epa.gov/biotech\\_rule/pubs/fra/fdoo8.htm](http://www.epa.gov/biotech_rule/pubs/fra/fdoo8.htm) (last visited Nov. 5, 2006).

315. OSBORNE, *supra* note 212, at 15.

climate. Certainly, there can sometimes be one region which resembles another, but there remain subtle differences, reinforced by cultural and historic particularities, that form precisely this unique combination of natural and human factors that is *le terroir*.<sup>316</sup>

Olszak's statement nicely captures the ambivalent, two part strategy that is the terroir-iste's response to the migration of plants, animals, and food technology: focus on geology and climate and, when that gets you in a bind, add culture, history, and human skill.

As to the first approach, explanation of terroir as geology with secondary emphasis on climate appears pretty consistently in wine narratives (and with good reason in terms of a winemaker's effort to make the best possible wine; the issue is whether these are good reasons for a robust GI law). The Chablis district is identified by thin topsoil, calcium-rich subsoil, and "inclemency of the climate."<sup>317</sup> Local experts in the Priorat region of Spain attribute the character of Priorat's red wines to Llicorella slate in the soil<sup>318</sup> as well as the combination of long hot days and cool nights claimed to present the winemaker with a different sort of raw material than vintners in other regions.<sup>319</sup> For Port, "[a] certain type of rock called schist is probably the factor which, in conjunction with the climate and with methods of treatment worked out over a long time, gives the wine its character."<sup>320</sup> A 1960s guide to wines gives a particularly memorable claim about a single crucial element of the Champagne district terroir:

The white pebbles [in the Champagne soil] absorb the heat of the sunshine, reflecting and radiating it evenly on to the ripening fruit and holding it well after the sun has disappeared below the horizon. Without this extra source of heat, the grapes, in some years, would never ripen at all.<sup>321</sup>

This "heat retaining pebbles narrative" may well have some

316. OLSZAK, *supra* note 19, at 4 (author's translation).

317. LICHINE, *supra* note 230, at 173 ("The soil is hard, and hard to work. . . . The topsoil is thin and in many spots the white, marly, calcium-rich subsoil (a formation known as Kimmeridge Clay) shows through. . . . A further hazard is the inclemency of the climate, for Chablis is more to the north than any other fine wine district of France except Champagne and Alsace.").

318. The report from Priorat typifies this kind of narrative:

'Here, it is very easy to make wine,' said Jose Riera i Agustina, the winemaker at Mas Igneus. 'And the reason it is easy is this,' he said, grabbing a fistful of soil. 'The llicorella. The secret of the Priorat is this.' Llicorella is slate, and in Priorat it is so prevalent that many vineyards appear to have been planted in a bed of rubble.

Amanda Hesser, *In Spain, Old Growths and New Beginnings*, N.Y. TIMES, May 1, 2002, at F1.

319. *Id.* ("Long hot days during the summer leave the vines dry, which leads to smaller yields and grapes that are both very sweet and very concentrated in flavor. But cool nights make it difficult for tannins to develop in those grapes before the sugar content gets too high.").

320. LICHINE, *supra* note 230, at 410. When the traditions of Port were established, "the wine was made from any number of grape varieties, almost at random. To a considerable extent, this is still the case." *Id.*

321. *Id.* at 186.

foundation in geology.<sup>322</sup> Yet this is also where the terroir story of unique inputs runs into trouble from different directions.

First, are there really little white pebbles everywhere wine is grown in the Champagne district? *Single appellations are rarely consistent in key geology, flora, and climate.* In fact, the larger the appellation, the more variation. Geological studies have shown between ten and sixty soil types for the AOC *Alsace grand cru*.<sup>323</sup> Discussing “Bordeaux” as an appellation, Thierry Desseauve has noted that it “represents all forms of terroir, all kinds of microclimates, all situations, and finally all kinds of wines and prices.”<sup>324</sup> Similarly, the larger American AVAs are probably just “too big . . . to have real viticultural meaning.”<sup>325</sup> But this is genuinely a problem for appellations of *all* sizes. One French wine guide notes that *within* the *Le Minervois* AOC (a small region) there are four regions that are differentiated from each other by their terroir and their climate.<sup>326</sup> Many northern California vintners have studied soil and slope characteristics to the point of dividing individual *vineyards* into “flavor blocks,” i.e., miniature terroirs that are viticultured differently.<sup>327</sup> This practice is undoubtedly good for superior winemaking and husbandry of the land, but undermines any consistent uniqueness to the AVA as a whole.

Just as a single appellation changes across its own geography, it also changes across time, forming another threat to the consistent uniqueness of the inputs. This happens annually with the changing grapes used in any appellation that permits at least some mixing of varieties. It also happens structurally, as when grape rootstocks and varieties are grafted. In Italy, the breed of nearly the entire cattle stock used to produce *Parmigiano-Reggiano* cheese changed from local stock to Swiss Bruna-Alpina stock to, finally, “descendants of North American Holsteins and

322. See, e.g., W.H. Terry Wright, *Soil and Wine Quality: The Terroir Connection*, <http://www.sonoma.edu/geology/wright/gsa.html> (last visited Nov. 5, 2006) (noting that in some Sonoma vineyards “[p]ebbly clay loams developed on Franciscan Complex ophiolitic rock produces excellent red wine fruit.”); see also OSBORNE, *supra* note 212, at 149. Mouton-Rothschild’s and Pierre Siri’s *Iris du Gayon* Bordeaux vineyards in France have “thin topsoil filled with white pebbles which reflect the sun and heat the grapes. At night, they give back calories to the vines.” *Id.*

323. B. Burtschy, *Dix terroirs, quatre cépages, cinquante grand crus. L’équation enfin résolue*, *REVUE DU VIN DE FRANCE*, Mar. 2000, at 54.

324. ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 120–21.

325. Rod Smith, *Savoring Sonoma/The Wines*, *L.A. TIMES*, June 1, 2005, at F5 (“The Sonoma Coast AVA was created primarily as a marketing tool for large wineries and is too big (nearly half of the county) to have real viticultural meaning.”).

326. GARDAN, *supra* note 211, at 77 (“Quatre régions se différencient par leur terroir et leur climat.”).

327. W.H. Terry Wright, *Diverse Geology/Soils Impact Wine Quality*, *PRACTICAL WINERY & VINEYARD*, Sept./Oct. 2001, at Vol. XXIII, No. 2, [http://www.sonomagrapevine.org/pages/growerstoobox/gtgeology\\_soils.html](http://www.sonomagrapevine.org/pages/growerstoobox/gtgeology_soils.html) (noting this about Benziger Family Winery and describing “a rich smorgasbord of rock types and a complicated geological history” producing a “high diversity of soil types, each a niche with its own conditions of texture, structure, and nutrients” in Sonoma County).

Dutch Fresians.<sup>328</sup> Until 1984, the milk for *Parmigiano-Reggiano* cheese only came from cows grazing on fresh grass from April 1 to November 11, but that rule was abandoned with year round lactation<sup>329</sup> and now the cows are not allowed to graze freely and “[t]heir food, often computer-monitored, is brought to them.”<sup>330</sup> We are told, however, that since the thirteenth century, “*le mode de fabrication n’a pas changé*.”<sup>331</sup> A claim which might be true of the cheese-making techniques, but is not true of what are traditionally identified as the terroir inputs.

A separate challenge to the consistent unique input claim of terroir is that practically any *one* natural aspect of the region can be found somewhere else. Wine literature is full of such comparisons, whether the regions are proximate to one another or distant. In discussing wines from Cote de Duras and nearby Duras, both proximate to Bordeaux, Sophie Evan writes:

Above all, geographical considerations explain that the wines produced in the canton enjoy the same characteristics as those of the commune of Duras. The determining element here results from the fact that they are harvested from on the same ground. Consequently the wine of Duras does not offer *stricto sensu* any unique characteristic.<sup>332</sup>

The lack of unique characteristics is easy to understand between two geographically proximate regions, but it *might* also be true when comparing regions at a greater distance. The number of wine-producing areas that make claims to having Champagne-like, hot white pebbles borders on funny.<sup>333</sup> An article in a 2002 British newspaper favorably compared a few sparkling wines from Sussex in southern England with Champagne sparkling wines on the grounds that the Sussex “subsoil is remarkably like the Champagne region’s.”<sup>334</sup> Winemakers in Long Island and in Connecticut credit their own region with a “maritime microclimate” not unlike Bordeaux,<sup>335</sup> while a French expert explained

328. Johns, *supra* note 234, at 23–24.

329. *Id.* at 25.

330. *Id.* at 24.

331. Consortium du fromage Parmigiano-reggiano, *supra* note 294, at 88.

332. Sophie Evan, *L’Appellation “Vins des Cotes De Duras” Definition Judiciaire Et Administrative Entre 1917 Et 1937*, in *LES TERRITOIRES DE LA VIGNE ET DU VIN* 143, 152 (Féret ed., 2002).

333. Nalley, *supra* note 185, at 75 (reporting of Chateaufort-du-Pape region, “A sizeable portion of the appellation is blanketed under smooth, glacier-deposited stones the size of softballs. . . . It may be, as is often asserted, that the rocks help boost these grapes to stratospheric ripeness by retaining the warmth of the sun.”); Chateau de Beaucastel, <http://www.beaucastel.com> (follow “Terroir” hyperlink) (asserting that Beaucastel was formed in this manner with the “galets” contributing significantly to the quality of the wines: “they retain the heat of the day and radiate it to the vines during the night.”). The cover of *LES TERRITOIRES DE LA VIGNE ET DU VIN* shows a close-up of soil from the Graves region of Bordeaux which is soil covered in white-ish pebbles. Evan, *supra* note 332.

334. Jancis Robinson, *Make Sure Your Fizz Is the Biz*, *FIN. TIMES*, Dec. 28–29, 2002, at 10 (“Champagne vintages vary enormously.”).

335. Connecticut Wine Trail, Chamard Vineyards, <http://www.ctwine.com/chamard.html> (last



that South Australia has “the same climate” as Languedoc “except that it never rains.”<sup>336</sup>

## 2. *Would Understanding Terroir Make Terroir Disappear?*

If the terroir narrative is limited to geology and climate, then in addition to the problems of consistency and uniqueness discussed above, science challenges the narrative in three ways. First, the lack of evidence about what the classical terroir inputs actually do. As British writer Andrew Barr noted in 1995, the superiority of French soil because of the presence of limestone “is not . . . demonstrated by science. No expert is able adequately to explain in what way the presence of limestone might affect the flavour of the wines that have been made from the vines that grow upon it.”<sup>337</sup> In the 1990s, one Australian winemaker opined that “[s]oil science is not well advanced. We do not yet understand the underlying principles.”<sup>338</sup>

Second, once we believe we understand the geology, we start attempting to reproduce it. Limestone, or the appropriate mineral mix thereof, will simply be added to local land as needed. Indeed, that practice is already underway in both New World and European vineyards.<sup>339</sup>

Third, increased scientific precision, and reductionism, may produce an understanding that no two terroirs are truly the same, but it seems more likely to confirm what we are already learning. As discussed above, (a) at a *refined* level, single appellations (including American AVAs) contain a variety of geological and climatic conditions; and (b) at a more *gross* level, there are regions in different parts of the world that are quite similar in geological and climatic conditions. In that sense, the “earthy” narrative for terroir is likely to run aground.

One way to deflect these challenges is to add “tradition” and “custom” into the equation about what makes a single terroir unique. While some experts cleanly separate skills/traditions from the “terroir,”<sup>340</sup>

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visited Nov. 5, 2006); accord NEW YORK WINE REFERENCE, VARIETY: CABERNET SAUVIGNON 76, available at [http://www.newyorkwines.org/informationstation/newstouse/wine\\_course.pdf](http://www.newyorkwines.org/informationstation/newstouse/wine_course.pdf) (“The North Fork of Long Island has a maritime climate similar to Bordeaux’s; it is reasonable to expect similar success.”); LongIsland.com, <http://www.longisland.com/vineyard.php> (last visited Nov. 5, 2006) (“Through research, soil testing and intuition, the Hargraves realized that the maritime microclimate was remarkably similar to that found in Bordeaux.” (describing the founding of Long Island Winery)).

336. ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 40 (“Le gros des vins d’Australie vient de l’Australie méridionale . . . c’est même climat que dans Languedoc sauf qu’il n’y pleut jamais.”).

337. BARR, *supra* note 309, at 112.

338. *Id.*

339. In the Languedoc region, Alain Roux is famous for having uprooted traditional vines, planted the varietals of Châteauneuf-du-Pape, and “resolved to plow phosphates into his soils to imitate the soil conditions at Hermitage, the great domain of the Northern Rhône.” OSBORNE, *supra* note 212, at 160.

340. For example, Jérôme Quiot, former director of INAO and a Châteauneuf-du-Pape

others hedge their view of terroir as Professor Olszak does: “subtle differences, reinforced by cultural and historic particularities.”<sup>341</sup> For example, one wine encyclopedia says of the Champagne district, “[i]t is partly soil, partly climate, partly vines, and partly labor and tradition which make Champagne what it is.”<sup>342</sup> René Renou, president of the Wine Committee of INAO, goes further, admitting that the larger, regional appellations “correspond more to a tradition, to a ‘savoir-faire,’ than to a true notion of connection to the terroir.”<sup>343</sup> Defining terroir by skill and savoir-faire has its own ironies: first, it is the very migration of savoir-faire that brought on the Old/New World competition in foodstuffs. Second, the “award” of a GI may provide “an incentive to invent tradition.”<sup>344</sup> But we should consider at least two more charitable ways to understand the role that savoir-faire and “cultural particularities” could play in the terroir equation.

First, perhaps the diffusion of technologies means only that the savoir-faire of any one terroir (hence, one appellation) might be found, in bits and pieces, in other countries. But the single appellation might retain a unique combination of geology, climate, and a cohesive body of savoir-faire developed in relation to that geology and climate. Terroir-as-tradition would be that special, cohesive, local knowledge set: the result of finding the right varietal/soil/climate combination, a process that historically has taken a very long time. One problem with this explication of terroir is that the learning process takes considerably less time with advances in geology and biology. In discussing the Sonoma Coast, one writer noted that finding the right soils for the right grapes is “a long, vintage-by-vintage process of exploration through taste,” but concludes that “while it took thousands of years for Pinot Noir to emerge as the primary red grape of Burgundy, an echo of that process in Sonoma County has taken less than half a century.”<sup>345</sup>

But let us consider a more intriguing possibility. Instead of the simple idea that human skill and activity produce a special, local knowledge set about the land, consider the more subtle (and possibly unverifiable) idea that over time the land actually acquires additional, ineffable characteristics as it is cultivated by humans. This provides a narrative in which human skill has a significant role, but the role is not transferable through human and technological migration. No matter how skillful the European descendents in Sonoma, Stellenbosch, and

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winemaker in ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 49.

341. OLSZAK, *supra* note 19, at 4.

342. LICHINE, *supra* note 230, at 181.

343. *Id.* at 122.

344. Broude, *supra* note 225, at 677. Broude gives the example of an Italian coastal region awarded DOC status in 1978 with little or no local tradition or quality wines. *Id.* at 676–77.

345. Smith, *supra* note 325.

Mendoza, it will be generations, perhaps centuries, before cultivation turns the New World lands into “terroir.”

This idea has adherents in the New World as well as Europe. Consider a discussion between journalist Laurence Osborne and Ellie Patterson, winemaker at the Mount Eden Vineyards in Santa Cruz:

“Is there an American terroir,” I asked.

*“Most Californians would be insulted even at the question. But actually it’s a good question, a painful question. There’s not as much American terroir as people here think. It’s rarer than we think. I think we have it here because Masson and Ray brought it into being.”*

*“So terroir expresses the legacy of fathers and sons—*

*“Naturally. Daughters too.”<sup>346</sup>*

We can interpret this discussion as being just terroir-as-tradition, but it is more interesting to think about terroir as “brought . . . into being” by humans working the land.<sup>347</sup> This is an idea we should take seriously, if only because it is a corollary of an idea we do take very seriously: that humans can make a small ecosystem *deteriorate*. If humans have the capacity to give the land new, undesirable characteristics through their presence and use, then perhaps their presence and use can also produce terroir. In fact, from a strict ecologist’s perspective, terroir may be a deterioration of the indigenous environment.

### 3. *The Mythology of Unique Product Qualities and the Discerning-Few Theory*

Assuming that there can be genuine individuality on the input side, let us turn to the output side of the *essential land/qualities connection* claim: do appellation products really have unique, discernible qualities or, as A.J. Liebling would have said, “decided individuality”?<sup>348</sup> The answer is perhaps yes, but for most of us most of the time, probably not.

There is widespread agreement that within designated wine appellations like Medoc, Mendoza, Champagne, Châteauneuf-du-Pape, or Napa, there are tremendous variations in output quality.<sup>349</sup> Not surprisingly, the larger the appellation, the wider the swings in product characteristics.<sup>350</sup> There are similarly recognized output differences

346. OSBORNE, *supra* note 212, at 107 (emphasis added).

347. While writing from a pure historian’s perspective, this seems to be how Fernand Braudel understood “terroir.” See BRAUDEL, *supra* note 223, at 139–41 (describing how each village had a “terroir” of worked land that belonged to and defined the village).

348. A.J. LIEBLING, *BETWEEN MEALS: AN APPETITE FOR PARIS* 71 (1995) (“The wines of the Rhone each have a decided individuality.”).

349. A proposition that seems true of most AOCs. See, e.g., Nalley, *supra* note 185, at 74 (Châteauneuf-du-Pape wines are “all across the spectrums . . . Some are superb, many are mediocre.”).

350. ROUSSET-ROUARD & DESSEAUVE, *supra* note 209, at 97–98 (discussion between René Renou, president of Wine Committee of INAO and Thierry Desseauve on the inconsistency of wines within

among Parmigiano-Reggiano producers, even which seasons a cheese is first made, then aged.<sup>351</sup> But even with such variation, it would be possible for all Port or all Parmigiano-Reggiano cheese to occupy one unique zone of characteristics in which one could find no other fortified wine or cheese. In other words, although the products of a particular GI might vary from one another, there would be some unifying characteristics that they distinctly and uniquely share. Unfortunately, the evidence seems to point in the opposite direction, especially with wine, the most closely studied of foodstuffs that claim terroir.

The general comparability of New World wines to Old World vintages is both an old story and an abiding controversy. The modern era of this debate began in 1976, when Steven Spurrier organized the famed “Judgment of Paris,” a blind taste test in which nine judges, all French and with unimpeachable wine-tasting credentials, judged California wines to be better than like Burgundy and Bordeaux wines.<sup>352</sup> For our purposes, who had the *better* wines is irrelevant. As Paul Lukacs notes, “[t]he real news was that, to a person, the experts had been unable to tell which wines came from which country.”<sup>353</sup>

The “Judgment of Paris” that New World wines are comparable and often indistinguishable from Old World wines seems to be stable fact. A 2004 tasting of sixteen chardonnays by seven French experts, sponsored by one of France’s respected wine journals, placed California chardonnays first and second, with a New Zealand wine in third place.<sup>354</sup>

an appellation).

351. JOHNS, *supra* note 234, at 32 (1997) (stating that “Mountain [*Parmesan*] cheeses from the fall season are often more robust due to the second growth of green grass available in the fall” and that “[c]heese from the same producer varies from season to season”); *see also* Robinson, *supra* note 334 (“Champagne vintages vary enormously.”); Sarah Woodward, *All in the Caves of Roquefort*, FIN. TIMES, Aug. 26, 2006, at 4 (discussing the “unexpected variety” in the taste of different Roquefort cheeses).

352. The blind taste test pitted California Chardonnays against Chardonnay-based white Burgundy wines and California Cabernets against Cabernet-based wines from Bordeaux. Spurrier, an Englishman who owned a wine shop near the *Place de la Concorde*, chose the nine judges. Twelve California wines; eight French wines; nine French judges. The winning red wine was Californian. So was the winning white wine. In fact, three of the top five white wines were Californian. PAUL LUKACS, *AMERICAN VINTAGE: FROM ISOLATION TO INTERNATIONAL RENOWN—THE RISE OF AMERICAN WINE* 3–5 (2000) (“When the judges, led by Pierre Breyoux, chief inspector of the *Institut National des Appellations d’Origine* took their seats, they knew only that some of the wines they would be tasting came from the United States and that the others were French.”); MCINERNEY, *supra* note 241, at 178–79. To some French, of course, Spurrier was just another confirmation that the British have a constitutional inclination to be the European stalking horse for American interests. *See, e.g.*, LUIGI BARZINI, *supra* note 205, at 118 (1983) (attributing French opposition to British participation in Europe to Britain’s “partly imaginary ‘special relation’” with Americans).

353. *Id.*

354. *Dégustation Universel Chardonnay*, INT’L VINTAGE, Dec. 2004, at 22–30 (the order for scoring of all sixteen chardonnays was U.S., U.S., New Zealand, France, France, Australia, South Africa, France, U.S., Italy, France, Australia, Italy, France, France, France); *see also* Roger Morris, *California Sparkle*, SAVEUR, Mar. 2003, at 27 (explaining that in blind taste tests of Napa Valley J. Schram

Even as to the Champagne district, there is increasing evidence that other regions of the world can produce “convincing copies”<sup>355</sup> and “true rival(s)”<sup>356</sup> of Champagne’s sparkling wines.<sup>357</sup>

One possibility remains: that there really is a difference in taste but that this difference can only be detected by the few: that the *Pont L’Eveque* cheese really does have characteristics that are not reproducible or, *at least*, have not yet been fully reproduced. While these characteristics may be discernible, they are discernible only by a very, very few people, the cognoscenti (with at least wine, these are the profound cognoscenti—because, as discussed above, the people we think are wine experts do not discern terroir differences consistently).<sup>358</sup> Let us call this the *discerning-few terroir narrative* and let us assume that it is absolutely true.

The discerning-few theory is, however, a thin reed on which to justify thick geographical indications law. The average American can

sparkling wines against “six tête-de-cuvées from Champagne,” J. Schram “always finished in the top three”); Frank J. Prial, *Wines of the Times: Dodging Oak Bullets in \$12 Chardonnays*, N.Y. TIMES, May 29, 2002, at F6 (describing taste test in which Californian wines and a Portuguese wine placed ahead of French candidates among inexpensive chardonnays); Stimmell, *supra* note 307 (describing fourth annual “Tony Aspler Blind Taste Testing Award” in which Canadian wine buyers regularly identify and misidentify regions and types). The principle French explanation for California’s victory in 1976 was that the California wines were ready to drink earlier and that, therefore, over time French wines aged better and would prevail. But the same blind taste test conducted by Spurrier ten years later produced similar results: the highest rated French red placed third behind two California wines. BARR, *supra* note 309, at 112.

355. Robinson, *supra* note 334.

356. Jonathan Ray, *American Dream: The Queen Loves it and so Do the French*, DAILY TELEGRAPH (London), Nov. 2, 2002, at 7 (reporting on Nyetimber sparkling wines from Sussex, England; made by transplanted Chicagoans, which “stunn[ed] the critics with their dazzling quality” and “came top of a blind tasting of sparkling wines in Paris—yes, Paris, France.”).

357. Review after review that pits sparkling wines from Champagne against sparkling wines from other regions has the Champagne vintages generally on top, but usually with a *few* non-Champagne sparkling wines trouncing many of the Champagne products. For example, a recent taste test involved forty-four California, ninety-two Champagne wines, and four wines from other regions. *Buyline*, WINE NEWS, Dec./Jan. 2002/2003, at 89–100. One California sparkling (score 92) was only outscored by thirteen of the ninety-two Champagne wines, while nine California wines received the same score as eleven Champagne wines (88) and three California wines received the same score as eight Champagne wines (89). If one looks at the adjectives used to describe the California and Champagne wines in such reviews, there is also no significant variation. *Id.* “Pale straw hue” describes a Gloria Ferrer Sonoma County sparkler as well as a Henriot, NV Brut Souverain sparkler from Reims. *Id.* “[P]ale gold hue” describes a Korbel California “Champagne” as well as a Billecart-Salmon from the Champagne district. *Id.* Compare this with the view a few years ago. *See, e.g.*, LICHINE, *supra* note 230, at 181 (“Sparkling wines produced in other parts of the world may be good, but none will ever be Champagne—although some of them masquerade under the name.”).

358. Italian winemaker Antonio Terni says that very few winemakers are actually making terroir wines and very few people have learned to taste the terroir, indicating that perhaps this is peculiar to wine. OSBORNE, *supra* note 212, at 16. One sees increasing discussion in the popular press of winemakers aiming for a “terroir wine.” *See, e.g.*, Smith, *supra* note 325 (discussing Russian River Valley Pinot Noir wines, saying “[f]rom the beginning, they were *terroir*-oriented . . .”).

“hardly pass for a connoisseur of wines.”<sup>359</sup> And she is not unlike the average Japanese, average Dutch, or average Brazilian in lack of connoisseurship across a wide range of foodstuffs. The person who can taste the *je ne sais quoi* that unifies all fortified wines from Oporto and distinguishes them from the world’s other fortified wines is presumably the person who can also identify subtle differences among the tastes of *Porto* wines. The commonsensical assumption embodied in American trademark law is that a consumer who is that sophisticated is not misled by superficial similarities or immediate appearances of sameness.<sup>360</sup> It would be a weird model of a consumer that assumed just the opposite: that (a) she tastes the mysterious and subtle thing that unifies all fortified *Porto* wines, so much that non-*Porto* fortified wines are a completely different product, but (b) she is not a person who pays attention to the labeling details.

To sum up, the terroir theory is needed to justify the product-specific usurpation standard of protection presently found in TRIPS for wine and spirits that many countries would like to extend to all GIs. It is needed because phrases like “*X* style,” “imitation *X*” and “*X* type” can efficiently increase consumer knowledge, *unless X has truly unique, consumer-desired qualities* in which case such phrases are arguably deceptive. Without the terroir theory, broad usurpation protection (as under French law) is a straightforward, additional monopoly rent penumbra attached to the otherwise legitimate purpose of a GI. Similarly, the terroir theory is needed to justify the European Union’s “claw back” list in terms of “market access”—otherwise, the claw back list is also a naked monopoly rent wish list.

There is no question that soil and climate have a great impact on the production of foodstuffs, particularly those with limited processing and one central ingredient. In this regard, the concern and attention winemakers and artisanal farmers give to terroir seems completely justified; nothing here is meant to detract from that. But the lack of meaningful correlation between terroir and the GI system—whether French appellations or American AVAs—exposes the lack of any reasonable justification for granting stronger legal protection of GIs.

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359. Taylor Wine Co. v. Bully Hill Vineyards, Inc., 569 F.2d 731, 734 (2d Cir. 1978).

360. Big Star Entm’t v. NextBigStar, Inc., 105 F. Supp. 2d 185, 215–16 (S.D.N.Y. 2000) (concluding that web purchasers are less likely to be confused because the “manner in which products may be purchased on the web and the requirements imposed upon prospective buyers cannot be overlooked”); Eng’g Dynamics, Inc. v. Structural Software, 785 F. Supp. 576, 583–84 (E.D. La. 1991) (finding no confusion as to computer user interface because of technical sophistication of computer users); Michelle Brownlee, Note, *Safeguarding Style: What Protection Is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 COLUM. L. REV. 1157, 1174 (1993) (reasoning that compared to average consumers, purchasers of fine art have considerably more expertise in discerning differences in the constituent works and would be less likely to be confused as to the origin of the works).

One potential criticism of this critique of GIs is that it overlooks that TRIPS Article 22 recognizes that protection of a GI may be justified on “reputation”<sup>361</sup> and that protection based only on a locality’s reputation has been the basis for GI protection in Germany and forms the basis of the looser “PGI” category in the Origins Regulation. With this looser category, as one English jurist explained, “the causal link between the place of origin and the quality of the product may be a matter of reputation rather than verifiable fact,”<sup>362</sup> hence this entire critique of terroir is inapplicable. Indeed, this kind of “protected geographical indication” may be just a “‘simple’ or ‘quality neutral’ indication of source.”<sup>363</sup> But this broader understanding of GIs only reinforces the overall point being made here: if the “link” between a place and a product is just a matter of reputation, then the GI functions no differently than a trademark—and there is justification neither for GI primacy over trademarks nor GI protection beyond the consumer confusion-based protection that most trademarks receive.<sup>364</sup>

#### D. OVERSELLING GIs TO EU CONSTITUENCIES AND TO DEVELOPING COUNTRIES

Those with economic interests in European geographical indications probably overstate the economic yield they would enjoy if they had complete commercial control of the word. For example, Bruno Paillard, a winemaker in the Champagne district asserts that “counterfeit” Champagne sales in the United States are “probably . . . three to four times those of ‘authentic’ Champagne.”<sup>365</sup> When one looks at how few non-Champagne district sparkling wines use the word Champagne in the United States, this assertion seems reminiscent of some industry claims of losses from copyright piracy.<sup>366</sup>

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361. How a “reputation . . . of the good” could be “essentially attributable to its geographical origin” without involving the good’s qualities is a bit of a mystery, but technically speaking the way the Article 22 definition is constructed “goods having a certain ‘reputation’ but no specific quality attributable to their place of origin . . . would fulfill the TRIPS definition.” DWIJEN RANGNEKAR, *GEOGRAPHICAL INDICATIONS—A REVIEW OF PROPOSALS AT THE TRIPS COUNCIL: EXTENDING ARTICLE 23 TO PRODUCTS OTHER THAN WINE AND SPIRITS* 16, 18 (2003), available at [http://www.ictsd.org/pubs/ictsd\\_series/ipsr/CS\\_rangnekar.pdf](http://www.ictsd.org/pubs/ictsd_series/ipsr/CS_rangnekar.pdf).

362. *Consorzio del Prosciutto di Parma v. Asda Stores Limited*, [2001] UKHL 7 at [8].

363. Gangjee, *supra* note 151, at 305; see also Friedrich-Karl Beier & Roland Knaak, *The Protection of Direct and Indirect Geographical Indications of Source in Germany and the European Community*, 25 *INT’L REV. INDUS. PROP. & COPYRIGHT*, 1, 2 (1994); G. Schricker, *Protection of Indications of Source, Appellations of Origin and other Geographic Designations in the Federal Republic of Germany*, 14 *INT’L REV. INDUS. PROP. & COPYRIGHT* 307, 308 (1998).

364. As Dev Gangjee notes, the Origins Regulation “graft[s] reputation products on to a registration system which drew its inspiration from the [*appellations d’origine*] model.” Gangjee, *supra* note 151, at 308.

365. Lyn Farmer, *Abusing the C-word*, *WINE NEWS*, Dec./Jan. 2002/2003, at 8.

366. David Legard, *U.S. Global Piracy Losses Estimated at \$9.2 Billion*, *INFOWORLD*, Feb. 14, 2002, available at [http://www.infoworld.com/article/03/02/14/Hnpiracy\\_1.html](http://www.infoworld.com/article/03/02/14/Hnpiracy_1.html) (trade association estimate).

We have only bits and pieces of empirical data. For example, we might ask what has happened since the Spanish relinquished use of Champagne and started labeling their own sparkling wines *Cava*. Have Champagne district sparkling wine sales displaced Spanish sparkling wine sales in Spain? Have *Cava* sales dropped in the rest of Europe? The answer to each question looks to be no.<sup>367</sup> Have sales of European wines in Australia increased substantially since Australian vintners phased out use of many of Europe's cherished wine words? Apparently not.<sup>368</sup> But in each case, the effects of the GI-related labeling change may have been swamped by other market forces, for example rising income of Spanish consumers, increased Spanish access to the rest of the European market on entry into the European Union, the (perceived) improving quality of Australian wines, etc. We can expect that it will be hard to find examples where GI usage changed, but other significant market forces did not.

In reporting on the push for AOC designation by some apple and pear farmers in Normandy, *Le Monde* noted "the products stamped AOC could be the locomotive for new development of products from the Normandy *terroir*."<sup>369</sup> This is possible. Another possibility is that as the *appellations contrôlée* "space" gets more and more crowded, particularly in product categories that are rich in AOC products and in markets where consumers believe the AOC designation is important, the AOC designation simply becomes a minimum to compete. "AOC" could become de facto another bureaucratic requirement to enter a market, not a competitive advantage.

Similarly in international fora, EU officials strive to create the impression that substantially stronger GI laws will benefit countries in Africa, Asia, and Latin America. The EU argument that developing countries would benefit from substantially stronger GI law is, at best, unproven. Today's valuable geographical names are heavily concentrated in Europe and North America.<sup>370</sup> There are few products from

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based, with some products, on assumption that every pirated copy is a lost sale).

367. Tom Carter, *Wrath of Grapes Produces Bitter French Whine*, WASH. TIMES, Nov. 29, 2002 ("Spain, which called its sparkling wine 'champagne' until joining the European Union, now sells more of its celebratory wine under the name of 'cava' than all the champagne from Champagne."). In fact, "Cava" seems to be having a surge in sales in northern France. See *L'Espagne effervescente en France*, VINS MAG. Winter 2002, at 16 ("[S]uccès croissant des 'cavas' (vins effervescent espagnols) dans le nord de la France.") [describing a growing success in northern France of Cava].

368. Imported sparkling wine imports have dropped recently in Australia, with only a 1% increase in red wine imports and an increase in white wine imports attributed to a shortage of domestic white wine. *Wine Sales Flat in Australia*, WINE CONTACT (Australian Wine and Brandy Corp.), Oct. 2002, at 2.

369. Lerosier, *supra* note 38.

370. This may be true of geographic words generally. Besides foodstuffs, consider how carmakers have used European and North American geographic names for evocative purposes in recent decades: CORDOBA, SEVILLE, BROADWAY (Renault in France), NEVADA (Renault in France), MALIBU, TAHOE, SANTE FE, YUKON, SEQUOIA, etc.



developing countries that currently have reputations with the strength of Cognac, Port, Parma ham, or Swiss chocolate.<sup>371</sup>

The argument that substantially stronger GI protection will benefit developing countries simply mistakes the piling up of laws for the piling up of capital investment. We want an *optimal* level of law to encourage capital formation, to promote developing world products with minimal drag from government regulation and administrative burdens. There is no evidence that stronger GI protection fills this bill. In contrast, there is at least anecdotal evidence that certification trademark law provides a legal environment in which geographical indications from developing countries can build reputational capital that can be exploited.

Some products from the developing world (tequila from Mexico, cigars from Cuba) already have reputational bases that could be further developed. However, for geographical indications to help most producers from developing countries, the same kind of initial reputational investment would be needed to build recognition of these GIs as would be needed with new trademarks. Coffee may be the best example: serious coffee drinkers in North America and, more recently, Europe, would like to think they have become increasingly knowledgeable about high-end coffee producing regions (e.g., Cerrado in Brazil, San Juanillo in Costa Rica, and Yergacheffe in Ethiopia).

The oldest post-World War II development of reputational capital for a developing world GI is surely the forty year campaign by the National Federation of Coffee Growers of Colombia to convince North American coffee drinkers of the superiority of their country's coffee. Their success is measured not just by 95% of American coffee drinkers being aware that Colombia grows coffee, but also by the fact that the trademark avatar of their efforts, JUAN VALDEZ. "Juan Valdez" is a household name for 80% of Americans.<sup>372</sup> The Colombian coffee producers have done this successfully under certification mark law in the United States<sup>373</sup> and general trademark law in the European Union<sup>374</sup>

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371. Admittedly, this focuses on North/South international trade and there may be significant reputational value for some geographic regions even within a developing country or a group of developing countries. For example, in Nigeria, fruits and vegetables from the region around Jos are known for their quality; in Brazil, wines from the Mendoza region of Argentina are regarded as superior to most of the local production.

372. Press Release, National Federation of Coffee Growers of Colombia, Juan Valdez Turns 40, (Sept. 14, 2000), [http://www.juanvaldez.com/menu/news/Releases/Juan\\_Valdez\\_turns\\_40.pdf](http://www.juanvaldez.com/menu/news/Releases/Juan_Valdez_turns_40.pdf). For an online history of the Juan Valdez campaign, see National Federation of Coffee Growers, Advertising Strategy, <http://www.juanvaldez.com/menu/advertising> (last visited Nov. 5, 2006).

373. U.S. Trademark Registration No. 73,199,563 (filed Jan. 10, 1979) (COLOMBIAN for coffee certification mark owned by Republic of Colombia).

374. European Community Trademark No. 1185990 (filed May 26, 1999) (CAFÉ DE COLOMBIA for staple foods, light beverages, and other categories, registered to the Federación Nacional de Cafeteros de Colombia). In April 2003, the Federation also filed ECTM applications 100% CAFÉ DE COLOMBIA and JUAN VALDEZ 100% CAFÉ DE COLOMBIA.

(largely because EU law has not allowed developing countries to register EU geographical indications).

At the other extreme, coffee also provides the most recent example of the rapid reputational climb of a developing world GI, in this case, Rwandan coffee. In 2001, Rwanda's coffee crop was 100% at the lowest international grade; in 2006, 7% was sold as specialty coffee, doubling the income of 40,000 of Rwanda's 500,000 coffee farmers.<sup>375</sup> The specialty grade coffee sells at a 50 to 250% premium to western coffee roasters, many of whom market it as "Rwanda" coffee.<sup>376</sup> Thus, in the case of Rwanda (and most other coffee GIs besides Colombia), the financial investment in the regional reputations is coming from high-end coffee companies: Starbucks, Coffee Bean & Tea Leaf, Peet's Coffee & Tea, Green Mountain Coffee, Intelligentsia, etc. These companies differentiate their product from lower-end coffee through extensive promotion of geographical indications.<sup>377</sup> All this is happening with only the protection provided by trademark and unfair competition law.

While wealthier North Americans were becoming conditioned to purchase coffees by geographical source identification, European markets seem to lead in conditioning consumers to purchase chocolates by geographical source identification, whether from high-end chocolatiers like MICHEL CLUZIEL<sup>378</sup> or K-Mart-style "Monoprix" stores.<sup>379</sup> Godiva, perhaps the most industrial of the high-end chocolate brands, is now marketing cocoa-producing regional dark chocolates.

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375. Laura Fraser, *Coffee, and Hope, Grow in Rwanda*, N.Y. TIMES, Aug. 6, 2006, § 3, at 1.

376. *Id.*; see also Laurie Goering, *A Success Story Brews in Rwanda*, CHI. TRIB., June 18, 2006, at 8; *Rwanda; USAID Funding Up By US \$27 Million*, AFRICA NEWS, July 29, 2006 (quoting foreign aid representative in Rwanda as saying, "In 2000, no Specialty Coffee was exported from Rwanda. By 2005, the country was able to export 1,100 metric tons and the coffee was featured by Starbucks and Green Mountain Coffee.").

377. For example, Los Angeles-based Coffee Bean & Tea Leaf—with stores in four states and fifteen Asian and middle eastern countries—sells twenty-three unflavored coffees, of which fifteen are developing world geographical indications, either national or local (Brazil Cerrado; 100% Jamaican Blue Mountain; Java Estate; Colombia *Nariño*; Colombia; Costa Rica *La Cascada Tarrazu*; Costa Rica *La Minita Tarrazu*; Ethiopia *Yirgacheffe*; Guatemala *Antigua*; Kenya AA; Panama *Colibri Estate*; Papua New Guinea *Sigri A*; Sumatra *Mandheling*; Colombia *Nariño* Dark; and Sumatra Dark). One is a U.S. geographical indication: "Kona." See Press Release, The Coffee Bean & Tea Leaf Announces Inland Empire Expansion (2006), <http://coffeebean.com/Inland-Empire-Expansion-W236C162.aspx>; The Coffee Bean & Tea Leaf, Coffee, <http://coffeebean.com/Coffees-C40.aspx> (last visited Nov. 5, 2006). Vermont-based Green Mountain Coffee, principally a wholesale and catalog sale coffee company, offers eight geographical indication-based coffees, seven from the developing world and "Kona Mountain Estate." See also Green Mountain Coffee, Our Coffees, <http://www.greenmountaincoffee.com/navDepartment.aspx?DeptName=OurCoffees> (last visited Nov. 5, 2006); Peet's Coffee and Tea, <http://www.peets.com/shop/coffee.asp> (last visited Nov. 5, 2006).

378. Michel Cluzel markets chocolate with cocoa specified as originating in a number of locales, including Madagascar, Venezuela, and Haiti. See Chocolaterie Cluzel, Products, <http://uk.cluzel.com/fr/The+Single+Plantation+Chocolates/5/16.html> (last visited Nov. 5, 2006).

379. Monoprix "Equateur" chocolate bar. Package on file with the author and image available at <http://www.justinhughes.net/libraries/GIs>.

Again, the investment in the regional reputations is being made by companies in OECD countries. The North Americans are now following Europe in this trend with geographically-specific cocoa in chocolates marketed in high-end shops.<sup>380</sup>

Through years of structural prejudice in the Origins Regulation, the European Commission has inadvertently shown developing countries that an appellations system is not needed for all this investment in GI promotion. Existing laws on deceptive labeling and unfair practices appear sufficient to trigger promotion and investment by the coffee and chocolate companies. There is evidence that producers in developing countries can increase incomes by establishing geography-based reputations for quality and gaining a larger percentage of the premium retail price for their products, but there is no evidence that either process is especially aided by EU-style GI protection. Ironically, had there been any sanctions phase of the WTO's spring 2005 decision the European Commission would have been faced with a dilemma: if the European Union had argued that that lack of formal GI protection in the European Union has not really hurt U.S. and Australian products (because they could still obtain certification marks in EU member states), this would have undercut the European Union's own position that strong GI law would help developing countries in developed markets.

A final, but small point: under the French appellation concept, the stronger "designation of source" in the Origins Regulation, many if not *most* of the developing world's best known agricultural products will *not* qualify for protection. Almost *all* region-labeled coffees and chocolates would not qualify as AOCs because they are processed in developing world locations.<sup>381</sup> Despite being favorably mentioned by the European Commission as a GI example, the "6 million pounds of 'Antigua Coffee' . . . produced around [that] region of Guatemala"<sup>382</sup> may not qualify for "indication of source" protection under the Origins Regulation as long as it is roasted in Seattle, Vienna, and London. Except for a few Latin American chocolatiers, high-end chocolates are also processed in developed countries. Foodstuffs grown and processed

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380. See, e.g., Dagoba Organic Chocolate Company, Home Page, <http://www.dagobachocolate.com> (last visited Nov. 5, 2006) (Ashland, Oregon company providing single source chocolates from Costa Rica, the Dominican Republic, Ecuador, and Peru); International Chocolate Company, About, <http://www.chocolate4u.com/about/> (last visited Nov. 5, 2006) (Salt Lake City, Utah company providing source chocolates from the Ivory Coast and Mexico); Chocolate Santander, Home Page, <http://www.chocolatesantander.com> (last visited Nov. 5, 2006) (marketing Colombian "single origin" chocolates in North America); El Rey Chocolates, Wholesale Stores, <http://www.chocolates-elrey.com/wholesale.html> (last visited Nov. 5, 2006) (marketing Venezuelan single source chocolates mainly to North America with a large U.S. distribution network).

381. See Origins Regulation, *supra* note 99, art. 2(2)(a)-(b); see also O'Connor, *supra* note 17, at 40.

382. *Why Do Geographical Indications Matter to Us?*, *supra* note 106, at 1.

in different regions within a single country, like some of China's most famous fermented bean curds,<sup>383</sup> also fall outside the stricter AOC "designation of source" definition.

This is, however, a minor point. While local processing is required for French AOC protection, it is not required for "protected geographical indication" (PGI) status under the Origins Regulation. Since a PGI enjoys the same protection as a PDO at the EU level, there is no handicap for lack of local processing. Making local processing a requirement for some monopoly-rent conferring status (as AOC labeling may be in the French market) might be justified not only on grounds of local tradition (as a needed input for the true terroir product), but simply as a means to preserve local jobs against economies of a scale that would tend to centralize processing.

#### V. RAMIFICATIONS AND POTENTIAL COMPROMISE IN THE DEVELOPMENT OF GEOGRAPHICAL INDICATIONS LAW

As described above, the proposals to increase international legal norms for the protection of geographical indications fall into three areas: controversies over an international registration system for GIs; the expansion of words covered by GI law through the EU demands to "re-properitize" over forty words that have become generic in much of the world; and, finally, the proposals to expand product specific "usurpation" protection that is, legal protection where there is no consumer confusion, from wine and spirit GIs to all GIs.

The European Union proposed an international GI registration system that produces binding effects in each WTO country unless that country "objects" promptly. That proposal is likely to go nowhere, if only because it is so radically different from international trademark and patent systems, in which one designates jurisdictions in which protection is sought and those jurisdictions do the actual granting of protection within their borders. This remaining Part focuses on the other two: the viability of the European Union's "re-properitization" drive and the effects of "usurpation" protection on commercial communications. As to the "claw back" list, I propose a scenario for the successful re-properitization of "champagne," a scenario that could apply to some of the other forty-one terms. This is not a scenario that the European Commission is likely to embrace because it is lengthy and depends on private action.

Although the "claw back" list is the most blatantly aggressive effort to expand GI protection, it is the expansion of usurpation protection—legal protection of the commercial use of geographic words beyond

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<sup>383</sup> See Winnie Li, *Chinese Cheese, Wangzhihe Fermented Bean Curd*, BEIJING THIS MONTH, Aug. 2006, at 28.

consumer confusion—that poses the greater risk to disrupt efficient communication to (and among) consumers and to dampen evocative use of words that produces consumer utility. As discussed below, the EU proposal to “extend” the Article 23(1) product class usurpation standard for wines and spirits to all products may work as a stealth proposal to expand TRIPS obligations in the direction of a general usurpation standard. In other words, under that proposal, protection of Bordeaux for wine potentially might bar Pepperidge Farm’s BORDEAUX cookies; once Champagne is protected for sparkling wine, some of the non-wine trademarks mentioned earlier might be at risk.

#### A. HOW TO CLAW BACK GEOGRAPHIC WORDS

Europeans understand quite well the idea of a GI becoming generic. Camembert and Dijon mustard were declared generic by French courts decades ago, and are produced widely through the European Union and the world. The French, German, and Danish governments recently argued that “Feta” is a generic word for cheese, not an indication of Greek origin as the Greeks convincingly insisted it is.<sup>384</sup>

The question then becomes: if once generic, always generic? Should we be willing to allow generic words to be (re)propriety? The answer should usually be ‘no,’ and not by legislative fiat. But what about a situation where the private producers have been struggling to de-genericize the word? This is arguably what is happening with Champagne.

There is no question that during the nineteenth and twentieth centuries, “champagne” and its transliterations in various languages became a generic term used to describe sparkling wines. As far back as 1887, the California legislature was using “champagne” as a generic name for sparkling wine in *state statutes*.<sup>385</sup> The evidence of widespread generic usage, both historically and currently, is unquestionable. For example, a 1969 American title, *The Wine Book*, offered the following observation to begin its section on the Champagne district:

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384. See O’Connor, *supra* note 17, at 43–44 (history of the intra-EU Feta dispute); Bernard O’Connor & Irina Kireeva, *What’s in a Name? The “Feta” Cheese Saga*, 9 INT’L TRADE & L. REG. 110 (2003) (same).

385. 1887 Cal. Stat. ch. 36, § 1, pt. 47 (defining “[p]ure champagne, or sparkling wine” by natural, bottle fermentation technique). In what surely must be an irritating legal definition, California’s 1934 wine regulations defined “‘Champagne’ [as] a light white sparkling wine identical with champagne as made in the Champagne district in France in respect to composition and basic manufacturing principle.” *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 440 n.38 (Cal. 2004) (quoting CAL. CODE REGS. tit. 17 (1936)).

The mere word “Champagne” suggests an iridescent bubble filled with luxury, with pleasure, and with sparkling elegance. . . . The writer’s pen itches with glorious epithets—but let it pause, for the word Champagne covers a vast number of wines, ranging from poor to excellent, that have nothing to do with that section of France that answers to the name Champagne.<sup>386</sup>

The 1973 *Webster’s New Collegiate Dictionary* offers a completely generic definition of “Port” (“a fortified sweet wine of rich taste and aroma”), while defining “burgundy” and “champagne” as wines coming from those French regions or “also: a similar wine made elsewhere.”<sup>387</sup> A 1971 upscale guide to California wines had no difficulty listing twenty-three California vineyards making Chablis, twenty-six making Burgundy, seven making Chianti, five making Sauternes, and a handful producing Champagne.<sup>388</sup> Today, Ukrainian winemakers still produce *champanskoe*<sup>389</sup> just as a few winemakers in California and upstate New York produce champagne,<sup>390</sup> Argentine winemakers produce *champaña*<sup>391</sup>; and at least one Brazilian winemaker offers *Champanhe Brut*.<sup>392</sup>

The situation of the word “champagne” is complicated by the commonly used process description, “champagne method” or “méthode champenoise”; a technical method that can be carried out in a winery, whether in Mendoza or Alsace.<sup>393</sup> Because control over this phrase in the European Union is now reserved to the wine producers in the Champagne region, other EU wine producers have turned to the phrase

386. ALEXANDER DOROZYNSKI & BIBIANE BELL, *THE WINE BOOK* 111 (1969).

387. WEBSTER’S NEW COLLEGIATE DICTIONARY 147, 185 (1973). The same American dictionary gives generic definitions of “camembert” (“a soft surface-ripened cheese with a thin grayish white rind and a yellow interior”), *id.* at 159, and “bourbon” (“a whiskey distilled from a mash made up of not less than 51 percent corn plus malt and rye”), *id.* at 131. By the early twentieth century, terms like “Burgundy” and “Claret” were sufficiently generic in California that the California legislature tried to mandate California labels to say “Calclaret” or “Calburgundy.” See 1907 Cal. Stat. 127–28.

388. ROBERT S. BLUMBERG & HURST HANNUM, *THE FINE WINES OF CALIFORNIA* 303–05, 309 (1971).

389. For a Kiev restaurant menu listing “champanskoe” (шампанское), see Kiev2000.com, <http://kiev2000.com/poster/menu.asp?IdPart=21&Id=624> (last visited Nov. 5, 2006).

390. Among American producers who still use “Champagne” to describe their sparkling wines are Korbel (Napa and Sonoma) and André (a “bulk” processor). Farmer, *supra* note 365. One of the most highly rated California sparkling wines, Gloria Ferrer from Sonoma County, does not label the wine itself “Champagne,” although the vintner still calls itself—and appears on the label as—“Gloria Ferrer Champagne Caves.” *Id.* For New York producers of champagne, see DrFrankWines.com, [http://www.drfrankwines.com/drfr2\\_order.taf](http://www.drfrankwines.com/drfr2_order.taf) (follow “Chateau Frank Brut Champagne (2000)” hyperlink) (last visited Nov. 5, 2006) (discussing Chateau Frank Champagne from upstate New York); New York Wine Store, New York Vineyards, <http://ny-wine.com/winerylist.htm> (last visited Nov. 5, 2006) (listing upstate New York wineries, including “The Regent Champagne Cellars”).

391. For an Argentine restaurant menu listing “champaña,” see San Babilar Ristorante, Carta de Vinos, <http://www.sanbabilistorante.com.ar/champagne.htm> (last visited Nov. 5, 2006).

392. See Cave de Pedra, <http://www.cavedepedra.com.br> (follow “Pedidos” hyperlink) (last visited Nov. 5, 2006).

393. LICHINE, *supra* note 230, at 188 (“The Champagne process is the name for the traditional method of making a wine sparkle by allowing it to ferment a second time in the bottle.”).

“méthode traditionnelle.” In a 2001 survey of sparkling wines, *Gault-Millau*, one of France’s leading gastronomic publications, described “méthode champenoise,” then turned to define “méthode traditionnelle”: “It conforms exactly to the méthode champenoise, step by step. Only the name was changed because of European legislation that limits the adjective ‘Champagne’ to that which is uniquely from Champagne.”<sup>394</sup>

At least as recently as 1991 a French wine book described sparkling wine from Languedoc and Alsace as being made with the “méthode champenoise.”<sup>395</sup> Many of the French-owned California wine houses continue to use the phrase “méthode champenoise”<sup>396</sup> to label California sparkling wine, even French vintners when unencumbered by regulation continue to identify “méthode champenoise” as a general technique.<sup>397</sup>

Yet the situation for “champagne” is (slowly) changing. New World winemakers are increasingly abandoning the word “champagne.” For example, California’s finest sparkling wines, from the Schramsberg Vineyards “are no longer labeled ‘champagne,’ as they were for decades.”<sup>398</sup> But the evidence is certainly equivocal: after telling us that, the same writer christens Jamie Davis, carrying on the Schramsberg sparkling wine tradition she and her late husband started, as “Napa Valley’s own ‘champagne widow.’”<sup>399</sup> For example, a December 2002 *New York Times* survey of sparkling wines from the Champagne district wrote, “[o]nce it was common to use Champagne on wines made anywhere from California to Crimea, but the European Union cracked

394. Anselme Selosse, *Ces vins qui bullent . . .*, GAULT-MILLAU, Dec.2001/Jan.2002, at 65, 67. Books printed for the EU market continue to define the process as *méthode champenoise*. See, e.g., ALLEN, *supra* note 34, at 101 (sparkling wines in Australia, the U.S., and New Zealand made “using the so-called *méthode champenoise*, or ‘Champagne method’”).

395. GARDAN, *supra* note 211, at 76, 101 (describing *La Blanquette de Limoux* from Languedoc as “[c]es raisins sont suffisamment acides pour subir les manipulations de la méthode champenoise” [these grapes are sufficiently acidic to submit to the manipulations of the champagne method]; and *Crémant d’Alsace* as “élaboré selon la méthode champenoise” [made according to the champagne method]).

396. Farmer, *supra* note 365.

397. The “Méthode Champenoise” or “Méthode Traditionelle” introduces carbonation to the champagne through a second fermentation in the bottle (after a first round of fermentation in a vat or tank), sugar and yeast are added to the bottle along with a small plastic device called a “bidule.” See *Domaine Chandon, Artisan Winemaking*, <http://www.chandon.com/vineyards/artisan.html> (last visited Nov. 5, 2006). The bottles are then subjected to “riddling,” a process whereby they are rotated several times a day while being slowly elevated. *Id.* Once the riddling is complete, the sediment is allowed to settle and it is removed from the bottle in a process known as disgorging. *Id.* The result is a sparkling wine. *Id.* This process can be contrasted with the non-traditional method whereby carbon dioxide is simply passed through the wine to create the sparkling effect. See Dave Zuchowski, *Make Your Holidays Sparkle: Tiny Bubbles Help Make Pennsylvania Champagne a Festive Holiday Beverage*, PA. WINE & WINERIES, Oct. 28, 2003, [http://pennsylvaniawine.com/news/news\\_article.asp?articleID=60](http://pennsylvaniawine.com/news/news_article.asp?articleID=60).

398. Morris, *supra* note 354, at 26.

399. *Id.* at 25.

down.”<sup>400</sup> A restaurant critic in the same month wrote, “in the American wine industry, Champagne is almost a generic term for sparkling wine, much like we call any photocopy a Xerox, or facial tissue a Kleenex.”<sup>401</sup> In fact, the term is even used to refer to beverages that are not sparkling wine at all: Miller Highlife refers to itself as the “Champagne of Beers”<sup>402</sup> and Brazilian soft drink ANTARTICA Guarana also calls itself champagne.<sup>403</sup>

It seems fair to say that we are in a gray period when the meaning of “champagne” appears to be shifting. Exemplary of this is some 2002 commentary by Jay McInerney, novelist and wine columnist for *House and Garden*.<sup>404</sup> McInerney has no question in his own mind about the meaning of “Champagne,” but he clearly does not expect his readers to be as discriminating.<sup>405</sup> After describing champagne as “one of the most potent and venerable of all luxury brands—a universal synecdoche for the good life,” he adds, “[b]y champagne, of course, we mean the sparkling wine produced in the Champagne region of north-central France.”<sup>406</sup>

Even in France there are frequent echoes of the word’s generic meaning. When a leading gastronomic publication ran a series of “Champagne” articles at the beginning of 2002, the second article was about sparkling wines from other regions and countries. Entitled *Ces vins qui bullent . . .* (“The wines that bubble . . .”), the editors printed “Champagne” in large letters at the top of each page, although the article was expressly about sparkling wines *not* from the Champagne district.<sup>407</sup>

At the same time, producers in the Champagne region have been working to re-propertize “Champagne.” A 2003 advertising campaign was launched in English language publications to convince high-end consumers that “Champagne” designates only sparkling wines from the Champagne district. In one version, the advertisement asks “Alaskan Salmon From Florida?,” then educates readers that if the sparkling wine

400. Frank J. Priol, *The Wine Panel Sips Champagnes for \$40 or Less*, N.Y. TIMES, Dec. 11, 2002, at F1. The article continues on to describe the EU crackdown on “champagne” and “*méthode champenoise*” as “an understandable but slightly holier-than-thou attitude.” *Id.*

401. Farmer, *supra* note 365, at 8 (“Yet its casual usage really riles the French, even more than labels such as Gallo’s Hearty Burgundy and Almaden’s Golden Sauterne.”).

402. Miller High Life, About High Life: The Beer, <http://www.millerhighlife.com/Millerhighlife/default.aspx> (verify age, then follow the “About High Life” hyperlink) (last visited Nov. 5, 2006).

403. See Soda Pop Stop, Antarctica Guarana Champagne, <http://www.sodapopstop.com/products/detail.cfm?link=340> (last visited Nov. 5, 2006).

404. McINERNEY, *supra* note 241, at 61 (emphasis in original).

405. *Id.*

406. *Id.*

407. Selosse, *supra* note 394, at 68. The writers and editorial staff demonstrated, in other subtle ways, their view of control of the word “Champagne” including praising an Alsatian wine as better than one from Champagne (“il étonne plus d’un champenois”). *Id.* at 67.



“[is] not from Champagne, it’s simply not true Champagne.”<sup>408</sup> But the ad campaign’s magazine placements speak to how much work the Champagne district producers have to do: they have placed the same ad campaign in *Vanity Fair*, *The New Yorker*, *Saveur*, and *Wine Spectator*.<sup>409</sup> In these publications, the articles almost never mistakenly use “champagne” or “Bordeaux” or “burgundy” for non-French wines; arguably the readers of such publications are the people who should *already* be informed.

If, over time, the generic meaning of “Champagne” is suppressed, should the Champagne regional producers regain global control of the word? Students of American trademark law may immediately answer that a word once generic remains generic. But there are at least a few cases of generic words being successfully repropertized, including SINGER for sewing machines and GOODYEAR for rubber products.

In 1896, the U.S. Supreme Court held that SINGER had become a generic term for sewing machines,<sup>410</sup> yet half a century later the Fifth Circuit concluded that the Singer company had successfully “recaptured” the word from the public domain.<sup>411</sup> McCarthy reports at least three district court decisions going back as early as 1939 that enforced trademark rights in SINGER and, therefore, were premised on the principle that the trademark had been reclaimed from its generic status.<sup>412</sup> In describing the “SINGER saga,” McCarthy writes, “[I]t must be recognized that SINGER has gone back to being a valid trademark only by ‘educating’ buyers into not using the term as the name of a class of sewing machines, but as a symbol indicating products coming only from one source.”<sup>413</sup>

A similar story surrounded the GOODYEAR trademark. In 1888, the U.S. Supreme Court ruled that GOODYEAR RUBBER could not be appropriated by one company because the phrase described a good produced by Charles Goodyear’s previously patented vulcanizing

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408. Advertisement, *ECONOMIST*, Jan. 18–24, 2003, at 39, 41.

409. Advertisement, *SAVEUR*, Mar. 2003 at 19–21 (“Gulf Shrimp From Nebraska?” reads the teaser on page 19; “Champagne Not From Champagne?” reads the full page on page 21); Advertisement, *WINE SPECTATOR*, Jan. 31–Feb. 28, 2003, at 137–39 (“Monterey Jack From Alaska?” reads the tag on page 137; “Champagne Not From Champagne?” reads the full page on page 139). See generally Press Release, Office of Champagne USA, European Winemakers Launch ‘Questionable Origins’ Ad Campaign Highlighting the Importance of Wine Appellations (Jan. 13, 2003) (on file with author).

410. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185 (1896).

411. *Singer Mfg. Co. v. Briley*, 207 F.2d 519, 522 & n.3 (5th Cir. 1953) (affirming district court conclusion that Singer “has by the constant and exclusive use of the name ‘Singer’ in designating sewing machines . . . and in advertising the same continuously and widely recaptured from the public domain the name ‘Singer’”).

412. *McCarthy*, *supra* note 43, § 12:31. The Fifth Circuit’s decision was followed, in 1970, by a ruling by the Court of Customs and Patent Appeals ruling that SINGER had valid trademark rights in relation to sewing machines. See *Singer Co. v. Unishops, Inc.*, 421 F.2d 1371, 1372 (C.C.P.A. 1970).

413. *McCarthy*, *supra* note 43, § 12:31.

process.<sup>414</sup> The Court used equivocal language, sometimes saying “Goodyear” is a descriptive term, sometimes a generic term,<sup>415</sup> but their doctrinal description seems to favor genericity.<sup>416</sup> Yet a few decades later, the Goodyear Tire & Rubber Company began an ultimately successful effort to recover GOODYEAR. In the 1965 *Goodyear Tire & Rubber v. Rosenthal* case, a Minnesota district court found that the company had (re)established secondary meaning in GOODYEAR via hundreds of millions of dollars in advertising,<sup>417</sup> explaining away the 1888 opinion as concerning descriptiveness only. A few years earlier, the Federal Trade Commission (at the behest of Goodyear Tire & Rubber) had forced a consent decree to make raincoat importers stop using the name GOODYEAR by itself,<sup>418</sup> a result premised on the word now referring, at least partially, to a particular source.<sup>419</sup>

The lesson of SINGER and GOODYEAR is not that *any* generic words may be propertized.<sup>420</sup> Each started as a proper trade name (indeed a surname), identifying a single source of goods. In each case, a trademark migrated into the generic realm and migrated back into trademark protection through consumer conditioning (advertising).<sup>421</sup> In

414. *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 604 (1888).

415. *Id.* at 603–04 (“Nor can a generic name, or a name merely descriptive of an article of trade . . . be employed as a trademark.”); *id.* at 602 (“[T]he name ‘Goodyear Rubber Company’ is not one capable of exclusive appropriation. ‘Goodyear Rubber’ are terms descriptive of well-known classes of goods produced by the process known as Goodyear’s invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one.”).

416. *Rettinger v. FTC*, 392 F.2d 454, 455 n.2 (2d Cir. 1968) (“[I]n 1888, the Supreme Court held ‘Goodyear Rubber’ to be generic and in the public domain.”).

417. *Goodyear Tire & Rubber Co. v. H. Rosenthal Co.*, 246 F. Supp 724, 727 (D. Minn. 1965) (finding that “[b]etween 1952 and 1961 the advertising expenditures of the plaintiff exceeded 230 million dollars” and was then spending more than \$30 million a year on advertising); *accord* MCCARTHY, *supra* note 43, § 12:30 (stating that GOODYEAR was reclaimed from the public domain).

418. *In re Rettinger Raincoat Mfg.*, 53 F.T.C. 132 (1956). Rettinger subsequently entered into a consent decree with Goodyear Tire & Rubber to stop using GOODYEAR completely if and when the company succeeded in getting a court order against one of Rettinger competitors. *Rettinger v. F.T.C.*, 392 F.2d 454, 455 (2d Cir. 1968). *But see* *Goodyear Tire & Rubber v. Topps of Hartford*, 247 F. Supp. 899 (D. Conn. 1965) (refusing to issue preliminary injunction against raincoat makers using GOODYEAR because secondary meaning was not established and company may have been equitably estopped from action).

419. While this is an important doctrinal difference for American trademark law, note that the standard in TRIPS Article 24(6) permit for a state to refuse trademark protection to certain words is triggered when those words are “the term[s] customary in common language as the common name for such good[s] or services” without specifying “generic,” “descriptive,” or any other precise doctrinal category from national trademark laws. Thus, Professor Olszak’s criticism of the BATF’s “semi-generic” category is misplaced. *See* OLSZAK, *supra* note 19, at 22–23. American trademark law has, for example, had a category of “highly descriptive” words that, while not being generic, have been treated as outside the potential range of trademarkable words, slogans, and symbols. *See* MCCARTHY, *supra* note 43, § 12:20.

420. *See also* *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806 (2d Cir. 1999) (finding “hog” was originally generic word for large motorcycle and could not become trademark of Harley-Davidson).

421. The same may have occurred with the word “opry” in relationship to Nashville country music

this sense, American law is compatible with one French commentator's observation that "it is not impossible to think of restoring the situation by 'regenerating' the geographical meaning of a [generic] word."<sup>422</sup> The Singer and Goodyear stories are not so different from what wine producers in Champagne are trying to do.

The main difference between the SINGER situation and the situation with Champagne is that the wine producers of the Champagne district are playing on the international stage, where the political and economic clout of the European Union is used to persuade countries to surrender previously generic words. This is similar to when Australia agreed in a 1993 Australian-EU accord to phase out twenty-three generic wine words and allow their re-properization by Europeans.<sup>423</sup>

At what point should we consider the migration of meaning adequately complete to permit re-properization? In the *Goodyear v. Rosenthal* case, the defendant pointed to four other parties in the rubber industry that were still using the word "Goodyear."<sup>424</sup> The court found that these other users were not relevant to plaintiff having established secondary meaning because of the scale of the plaintiff's operations: total employment of the four firms was less than 1200 people compared to the 103,000 employed by the plaintiff.<sup>425</sup> We might similarly require that the Champagne district producers become the "relatively exclusive" users of the word in relation to sparkling wines.

#### B. "USURPATION" PROTECTION, AMERICAN LAW, AND PRESERVING SPACE FOR EVOCATIVE USES

While the claw back list is politically unworkable because of some of its high profile entries, it is "usurpation" protection of GIs that poses the real danger for both efficient commercial communication as well as evocative and aesthetic speech in commercial communications. We will first consider how Article 23(1)'s product specific usurpation protection for wines and spirits already reduces efficient communications to consumers, and how it would further crimp commercial communications if extended in a straightforward manner to all products. Second, we will look at how the European Union's proposal for an apparently minor

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and/or the services of the Grand Old Opry in Nashville. In 1984, an Eighth Circuit panel ruled that "opry" was a generic term for country western shows, *WSM, Inc. v. Hilton*, 724 F.2d 1320, 1326 (8th Cir. 1984), but eight years later a panel of the Federal Circuit held for the plaintiffs before it could prove that the term had been reclaimed from the public domain, *see Oprolyand USA, Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 853 (Fed. Cir. 1992); *see also BellSouth Corp. v. White Directory Publishers, Inc.*, 42 F. Supp. 2d 598, 612 (M.D.N.C. 1999) (finding BellSouth failed to prove that it had reclaimed trademark status for the generic designation of the "walking fingers" logo).

422. OLSZAK, *supra* note 19, at 16.

423. *Id.* at 22.

424. *Goodyear Tire & Rubber Co. v. H. Rosenthal Co.*, 246 F. Supp. 724, 728 (D. Minn. 1965).

425. *Id.*

change in TRIPS language might broaden usurpation protection, with possible adverse effect on both efficient communication to consumers and evocative uses of geographic words in commercial speech.

*1. What Article 23(1) Does Already—and Would Do if Extended in a Straightforward Manner*

In the preceding parts, I claimed that the product class usurpation protection of Article 23(1) already curtails some forms of efficient communication to consumers. Article 23(1) expressly forbids use of a protected wine GI on wine (or spirit GI on spirits) when the respective wine or spirit does not come from that place. The bar expressly extends to use of the GI word when “accompanied by expressions such as ‘kind,’ ‘type,’ ‘style,’ ‘imitation’ or the like.” Presumably this also prohibits packaging that uses phrases like “fake *X*” or “*X*-like.” It is helpful to think about how this Article 23(1) prohibition on different expressions has different effects *in how much it extends the GI protection beyond consumer confusion*.

For example, labeling a product as “imitation *X*” strongly flags the *difference* between *X* and the product—at least in English. No one thinks “imitation vanilla” is real vanilla, just as no one thinks an “Elvis imitator” is the King. So a prohibition on “imitation Scotch” or “fake Cognac” needs to be justified in terms other than consumer confusion, particularly because the phrases do *inform* consumers as to general product characteristics. Knowing that something is imitation vanilla or imitation Scotch tells you a great deal about the product.

Saying that something is “*X*-like” or “*X*-style” still seems to highlight that the product is not *X*, but less dramatically than using the word “imitation.” There is no question that at least some of these phrases can convey substantial useful information to consumers. A label that says that a cheese made in Wisconsin is “Roquefort-style” efficiently tells the consumer a great deal. If Article 23(1) protection were extended to cheeses, the phrases “Stilton-style” and “Roquefort-like” cheese would be barred, however neither seems to carry much risk of consumer confusion and both could be highly informative. Similarly, “Parmeggiano-type cheese” would be prohibited. This differs from “style” because “type” might be a less familiar word thus triggering some confusion. Of course, how much confusion is engendered by each of these phrases is an empirical question that could be studied.

Measured against the TRIPS Article 22 and 23 requirements, American trademark law may turn out to be a strange creature. On the one hand, *all* famous foodstuff GIs already enjoy broader, more general dilution protection under U.S. law as long as they function as geographically-based certification marks. In other words, famous certification marks in the United States such as ROQUEFORT,

DARJEELING, and COLOMBIAN coffee, already extend well beyond consumer confusion *without* any Article 23 limitation to wines and spirits.

On the other hand, “imitation Stilton” and “Roquefort-like” are phrases that resonate with our doctrines of comparative advertising and nominative fair use of trademarks. The Ninth Circuit has described nominative fair use situations as those “where a defendant has used the plaintiff’s mark to describe the plaintiff’s product, *even if the defendant’s ultimate goal is to describe his own product.*”<sup>426</sup> In other words, the heart of nominative fair use is communicating a message not very different from “Roquefort-style” cheese or “Porto-like” fortified wine. In words that aptly apply to foodstuffs, one court has noted “[i]t has repeatedly been held that one may copy the un-patented formula of another’s product and may use that product’s trademark in its advertising to identify the product it has copied.”<sup>427</sup> American courts repeatedly state that comparative advertising is to be promoted and *only* curbed in the face of likelihood of confusion, such confusion usually being dissipated by phrases like “fake” or “imposter.”<sup>428</sup> By the lights of these comments, American courts might refuse to enjoin “imitation Cognac,” “fake Scotch,” or perhaps “Porto-like”.

The possibility that American law may be TRIPS incompatible in this respect should only heighten our concern of possible utility loss from prohibiting these “comparative” phrases. But there are at least three reasons to think the utility loss from such a prohibition might be relatively low.

First, the truth is that most GIs convey very little useful, non-geographical information. Earlier, I argued that most of the developing world’s GIs do not have significant reputational capital outside their national border. This may be true for most GIs in the developed world as well. “Pont L’Eveque-style cheese” and “Jos-quality vegetables” would give little information to most consumers.<sup>429</sup> If it is correct that most of the world’s consumers do not know most of the world’s GIs, then

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426. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002). As the court noted, “[t]his is in fact the standard case of nominative fair use: Only rarely, if ever, will a defendant choose to refer to the plaintiff’s product unless that reference ultimately helps to describe the defendant’s own product.” *Id.* at n.8; accord *McCarthy*, *supra* note 43, § 23:11.

427. *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 423 (S.D.N.Y. 2002).

428. *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 668 (8th Cir. 1987) (describing that district court considered “Parfums’ prominent uses of the phrase ‘Designer Imposters by Parfums de Coeur’ on the store display, which it found adequately cured any likely confusion as to source”).

429. Jos is a city in central Nigeria and the capital of “Plateau State,” one of Nigeria’s six states. The Jos Plateau is known for the quality of its produce. See Plateaustategov.org, Natural Resources, [http://www.plateaustategov.org/gov\\_bus/resources.html](http://www.plateaustategov.org/gov_bus/resources.html) (last visited Nov. 5, 2006).

prohibiting these “comparative” phrases may not eliminate much communicative utility, with the exception of a handful of very well-known product names. The second reason to think that utility loss would be low is the experience of European countries that do not permit a wide range of comparative advertising.

The third reason to think utility loss from prohibiting these comparative phrases would be low is that American law on comparative advertising may be less solid than we commonly believe. Comparative advertising cases in the United States usually focus on advertising, not packaging.<sup>430</sup> How would we feel about a soft drink whose label says “A Coca-Cola style beverage,” a cookie in a package that described it as an “Oreo-like snack,” or a line of clothes that noted, under its own trademark, that “These clothes are made according to the Evan Picone method”? While American courts have established extensive tests and standards for the truthfulness of comparative advertising,<sup>431</sup> the case law has a distinct focus on advertising with little or no case law exploring whether the same standards apply to *product labeling*. It is an open question whether “A Coca-Cola style beverage” could be put on the bottle of a competitor cola and an open question whether “Cognac-like” could be put on a competitor liquor with similar characteristics. One’s intuitions on these sorts of questions reflect the difficulty even trademark lawyers have in deciding what constitutes nominative fair use and what constitutes inappropriate free-riding.

## 2. *The Current Proposal for Full Usurpation Protection of All GIs*

In the discussion above, I have characterized Article 23(1) as providing product class usurpation protection for wines and spirits. The language is quite self-limiting in scope, as it applies the added protection for any “geographical indication identifying wines” against “wines not originating in the place indicated” and for any geographical indication “identifying spirits” against “spirits not originating in the place indicated.”<sup>432</sup> The European Union and other countries have proposed to

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430. See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d 562, 569 (9th Cir. 1968) (product, perfume, and packaging did not refer to plaintiff’s CHANEL trademarks); *Saxony Products, Inc. v. Guerlain, Inc.*, 513 F.2d 716, 723 (9th Cir. 1975) (finding “advertising banners and displays” as the source of comparative advertising). Where product packages are at issue, the main problem is usually a combination of an “X-like” claim and similarity of the trade dress. See, e.g., *Charles of Ritz Group, Ltd. v. Quality King Distributors, Inc.*, 636 F. Supp. 433, 438 (S.D.N.Y. 1986) (enjoining “the use of the phrase ‘IF YOU LIKE OPIUM YOU’LL LOVE OMNI,’ or its equivalent, both on their product packaging and on their promotional or advertising materials”).

431. See, e.g., *McCARTHY*, *supra* note 43, § 27:59.

432. In other words, it does not even apply the added protection *across* wines and spirits. If a Japanese company labeled a Japanese whiskey “Scotch-like,” that would violate 23(1), but if they labeled a soft drink or a *wine* as “Scotch-like,” there would be no 23(1) violation. It’s hard to imagine why a company would do this and, if confusion resulted, there could be an independent violation of the Article 22 violation.

“extend” this protection to all GIs with the following language:

Article 23: Additional Protection for Geographical Indications for ~~Wines and Spirits~~

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying goods ~~wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits~~ for such goods not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like.

The problem with this proposal is immediately apparent: “goods” and “such goods” may create a broader range of protection. Does GI protection of a wine render other alcoholic beverages as “such goods”? Does a GI for chocolate extend to chocolates? To cocoa-based desserts? To all sweets? Could “such goods” just be foodstuffs generally?<sup>433</sup>

Under a broad reading of this language, problems could arise, particularly if more and more countries took the EU message at face value and started declaring their own geographic terms to be protectable geographical indications. Many existing marketing practices and trademarks would be at risk, particularly those that produce consumer utility through evocative and aesthetic use of geographic words.

Consider some common uses of geographic words on products that are unquestionably evocative (because the only other alternative would be *deceptive*). In the Paris market, there are “artisanal” chocolates called *palets mexicains*, made in Nemours, about eighty kilometers from Paris. Then there is the Swiss chocolate maker Lindt, which offers boxes of chocolate selections called *Versailles*, *Pyrhennees*, and *Champs-Elysées*, all made in France, but at none of these locations. Brazil’s domestic confections industry produces a vast array of good chocolates under the KOPENHAGEN brand (as well as various nuts sold under “The Nutty Bavarian” mark).<sup>434</sup> In South Africa, there is a TEX brand chocolate bar marketed by Nestlé, presumably to evoke how big the candy bar is.

Because cocoa is produced in a dozen countries and chocolates are made in scores of countries, if GIs (defined by the looser of Origins Regulations standards) were protected against “such goods” usurpation, any of these product names would be at risk. The manufacture of biscuits

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433. Obviously this problem could be avoided by more careful language, i.e., it would be better to specify more expressly that this is product-class usurpation. In other words, the added protection extended should be only to geographical indication identifying a particular class of products against products in that same particular class of products.

434. For the “Kopenhagen” homepage, see Kopenhagen, <http://www.kopenhagen.com.br> (last visited Nov. 5, 2006). For “The Nutty Bavarian” homepage, see Nutty Bavarian, <http://www.nuttybavarian.com.br> (last visited Nov. 5, 2006).

and cookies is even more ubiquitous, that is, virtually all place names could become GIs for this category of goods, thereby putting dozens of existing products at risk—whether it is Swiss-made JAPONAIS and FLORENTINS cookies, Malaysian-made LAUSANNE cookies, Brazilian-made CHAMPAHNE biscuits, Belgian-made BRAZIL, BIARRITZ, and CIGARE RUSSE cookies, or American-made GENEVA, BRUSSELS, and MILANO cookies.<sup>435</sup> These lists are the tip of the marketing and trademark iceberg in which geographic names are used for evocative and aesthetic purposes. And yet there seems to be no awareness at all on the part of strong GI advocates of this problem.

### CONCLUSION

The battle over certain geographic words has been long and persistent. World War I was fought over Champagne, both literally—as in the bombardment of the cathedral at Rheims—and grammatically. Pursuant to the Treaty of Versailles, Germany surrendered to France the lands of Alsace-Lorraine and the words “Champagne” and “Cognac.”<sup>436</sup> A century ago, Perrier had no problem advertising itself in Germany and France as “the champagne of mineral waters,”<sup>437</sup> but that same practice now would land Source Perrier on the docket anywhere in the European Union.

It is easy to understand the economic and political motives behind EU proposals to “claw back” valuable words that have become generic like “Gorgonzola” and “Chablis.” As with the proposals to give protection against “usurpation” to all GIs, the goal is to secure wider, more extensive monopoly rents to the European Union’s *agroalimentaire* industries. The European Union promotes these proposals as something that would benefit developing countries, but that mistakes the piling up of intellectual property laws for the piling up of investments. Investment in the reputation of developing country GIs—coffees, teas, and chocolates—is already happening, as quickly, if not more quickly, under certification law regimes.

While GI advocates usually want to distinguish GIs from

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435. For American-made “Milano” cookies see Pepperidge Farm, *Indulgent Treats: Cookies*, [http://www.pepperidgefarm.com/indulgent\\_treats\\_cookies.asp](http://www.pepperidgefarm.com/indulgent_treats_cookies.asp) (for Geneva and Brussels cookies, on same page click menu bar titled “You’ll love them all . . .”) (last visited Nov. 5, 2006).

436. “The appellations ‘Sekt’ and ‘Weinbrand’ became part of German commercial practice toward the beginning of this century . . . . They were originally parallel appellations to those of ‘Champagner’ and ‘Kognak’ for which they were, moreover, substituted in 1923, as from that date these two names ceased to be generic appellations and became registered designations of origin limited to French products.” Case 12/74, *Comm’n v. Germany*, 1975 E.C.R. 181, 186. (explanation of German government). According to Olszak, the need in France to define some appellations was “urgent” because of the French desire to include these provisions in the Treaty of Versailles. See OLSZAK, *supra* note 19, at 8, 21.

437. OLSZAK, *supra* note 19, at 19 (describing marketing in Germany).



trademarks, the two legal tools share a common arc: each concept begins with efficient communication of information to consumers and, then, turns quickly into a system of myth maintenance and the extraction of monopoly rents from those myths. GI law does this through the notion of “terroir,” a claim that geographically unique conditions cause unique products. But we have no convincing evidence of how the terroir inputs work, no convincing evidence that consumers can detect the allegedly unique outputs, and plenty of evidence that the geological and climatic factors that are important to artisanal food production do not line up with the appellations that have been created.

There is no justification for strengthening and extending the GI system beyond its present confines. Such an extension would hurt descriptive uses of geographic words, that is, uses which increase consumer welfare by informing us about non-geographic product characteristics. Perhaps most importantly, such extension would also hurt evocative and aesthetic uses of geographic words—the uses which increase consumer welfare by entertaining, pleasing, and charming us.