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GEOGRAPHICAL INDICATIONS AND TRADEMARKS:
SYNERGIES AND CONFLICTS

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“One does not judge the quality of wine by its container’s appearance; one determines it by taste, and it is a vague illusion to think that the mark on the outside of a cask will make the quality of the wine contained any better than it actually is.”

André Richard, *De la Protection des appellations d'origine en matière vinicole. Les vins de Bordeaux*, [Bordeaux], Imprimeries de Gounouilhou, 1918 p. 222¹

¹ French to English translation - Cited in William van Caenegem, *Registered Geographical Indications Between Intellectual Property and Rural Policy - Part II* (2003), *Journal of World Intellectual Property*, Vol. 6, no. 6, p. 861.

GEOGRAPHICAL INDICATIONS AND TRADEMARKS:
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ABSTRACT

Historically, the relationship between Trademarks and Geographical Indications (GIs) has been tempestuous and marred by controversy. Like their trademark counterparts, GIs are source-indicators intended to signify a particular quality of the product, and in the case of GIs, this quality is inextricably linked to the geographic location it derives from. There are numerous similarities between the two forms of intellectual property rights (IPRs), leading some commentators to view GIs as a subset of trademark rights. However, these similarities have also given rise to conflicts between the two regimes, conflicts which form the basis of various international discussions on sustainable agricultural policies. At the heart of the current World Trade Organisation (WTO) Ministerial Conference negotiations (The Doha Development Round), are issues relating to the extension of higher-level GI protection to all foodstuff, and the creation of a mandatory international register for GIs.

ABBREVIATIONS

AO	Appellation of Origin
AOC	Controlled Appellation of Origin
EC	European Community
ECJ	European Court of Justice
EU	European Union
GATT	General Agreement on Tariff and Trade
GI	Geographical Indications
IP	Intellectual Property
IPR	Intellectual Property Rights
OJ	Official Journal
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
TM	Trademarks
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UKHL	United Kingdom House of Lords
US	United States of America
USPTO	United States Patent and Trademark Office
USC	United States Congress
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

INTRODUCTION

This essay seeks to explore some of the ways in which GIs and Trademarks work well together (or at least coexist), as well as the conflicting issues that may arise between these two regimes. For the purpose of this article and in order to avoid confusion regarding the range of terminologies often used by different jurisdictions, the term '**geographical indications**' (GIs) is used in its widest sense, as an umbrella term encompassing indications of source, geographical indications (as defined by Article 22.1 of the TRIPS Agreement) and appellations of origin, (unless the need for differentiating between them is necessary).

Part I of this essay will briefly examine the historical development of GIs and discuss a range of systems available for the protection of GIs. **Part II** will provide a useful comparison with trademark and *sui generis* systems, as well as discussing the ways in which trademark systems can protect or supplement the protection of GIs (historically, *de juro condito* and *de jure condendo*). **Part III** will then explore some of the ways in which trademarks can negatively affect or destroy a GI and how generalisation can also affect GIs and trademarks, respectively. **Part IV** will examine the current international rules governing the protection of GIs and consider their effectiveness, as well as discussing the current issues within the Doha Development Round. Finally, **Part V** will conclude by summarising the main findings of the essay, as well as providing some suggestions for moving forward in this highly contentious area of intellectual property law.

Throughout the course of this essay, practical examples (often from case law) will be given to demonstrate the real synergies and conflicts that can occur when these two regimes collide. Although the focus of this essay will largely be based on European approaches and principles, wherever possible, cross references will be made to other jurisdictions to illustrate the divergence of approaches taken around the world.

PART I

THE HISTORICAL DEVELOPMENT OF GEOGRAPHICAL INDICATIONS

What Are Geographical Indications?

Consider, for a moment, the following products: “Champagne”, “Darjeeling tea”, “Parma ham”, “Camembert cheese” and “Jersey Royal potatoes”. What do you think of when you first see these words on products?

For most people, two things are instantly recognisable. Firstly, the products come from the country or place indicated by the name of the product, and secondly, the names indicate some sort of additional quality or characteristic of the product that is essentially linked to its geographical origin.

The above products are all examples of **GIs**. GIs are defined by Article 22 (1) of the TRIPS Agreement², but can be summed up as distinctive signs used on products from a specific geographical region to show “a link between the origin of the products to which it is applied and a given quality, reputation or other characteristic that the product derives from that origin”³.

Historically, marks indicating the geographical origin of goods were the earliest forms of trademarks. Functionally, both GIs and trademarks are similar because they serve as source-indicators⁴. However, GIs are distinct and separate legal concepts in their own right and unlike trademarks, which are typically owned by a single registered owner, GIs are collectively owned by producers adhering to a defined set of regulated standards and within a defined geographical area. No single owner can claim exclusive rights to the GI sign.

The distinctiveness of GIs has helped differentiate products of superior quality from their inferior counterparts, ultimately protecting the consumer and the product’s goodwill. As such, GIs are valuable commercial tools that have become important global commodities⁵. It is for this reason

² Article 22 (1) of the Trade-Related Aspects of Intellectual Property Rights (hereinafter, referred to as “the TRIPS Agreement”), defines geographical indications as: “... **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.**” The full text of the Agreement is available at: http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

³ World Intellectual Property Organisation (WIPO) website, available at: http://www.wipo.int/geo_indications/en/about.html.

⁴ Trademarks and GIs both indicate the origin of the goods and serve as guarantees of quality. Whilst trademarks indicate *commercial origin*, GIs serve to indicate the *geographical origins* instead.

⁵ GIs are being used as a tool for sustainable development, particularly within the agricultural sector of developing countries. Their potential is increasingly being considered, for example, see WTO document [IP/C/W/204, Para. 2](#), where the TRIPS Council acknowledged that “Geographical indications have considerable potential for commercial use; something which has been neglected for a long time”- available at: <http://docsonline.wto.org/>.

that various legal systems have developed or have been adapted to provide protection for GI marks.

Legal Frameworks for the Protection of Geographical Indications

Historically, GIs have not been uniformly protected across the different jurisdictions. Article 1(1) of the TRIPS Agreement gives Member States the freedom to implement any means of protection most relevant to their jurisdiction. Particularly within the European Union (EU), GIs have been regulated on a product-specific basis and by a number of different regulations, giving rise to a fragmented approach. Consequently, it is often difficult to provide a definitive answer to the question of what system constitutes the most efficient method of protection.

There are essentially two main levels of legal protection: **National** and **International**, and although this essay separates the two levels, it is important to bear in mind that, in reality, both systems often work alongside each other to offer maximum protection for GIs. They are not necessarily exclusive and the distinction is simply made here for clarity.

National Principles for the Protection of Geographical Indications

The protection of GIs has traditionally been the preserve of national legislation. In Europe, France is generally credited for enacting the first comprehensive system for the protection of GIs⁶.

The main concepts of national protection are generally categorised as:

- Unfair competition and consumer protection⁷;
- Passing off⁸;
- Protected appellations of origin⁹;
- Registered geographical indications;
- Collective and Certification trademark regimes; and
- *Sui Generis* protection.

Despite the diversity of national mechanisms, observers such as Bernard O'Connor (2004, p. 5), identify two basic principles shared by all forms of national protection systems:

1 The protection of consumers from false and misleading information; and

⁶ In France, GIs are specifically known as *appellation d'origine contrôlée* (AOC). The origin of AOCs can be traced as far back as the 15th century when *Roquefort* cheese was granted royal protection. In May 1919, the Law for the Protection of the Place of Origin was passed, enacting the first modern law on the protection of GIs.

⁷ Unfair Competition is a common law tort, essentially based on the principles of honesty and fairness and with the overriding aim of consumer protection.

⁸ The tort of passing off is aimed at protecting the goodwill of the product, by enforcing against unauthorised use/misrepresentation of a mark (traditionally used for infringements of trademarks).

⁹ Protected appellations of origins are specific forms of GIs, defined by Article 2 of the Lisbon Agreement (1958).

2 The protection of GI producers from unfair competition.

Notwithstanding these measures, national States were powerless to protect their goods when exported. Once products left the confines of their national boundaries, they were often copied and counterfeited and it soon became apparent that national measures, alone, were inadequate mechanisms for protecting GIs. Individual States had to seek protection for GIs through international trade agreements, which began as bilateral agreements, gradually moving towards multilateral agreements¹⁰.

International Principles for the Protection of Geographical Indications

The international protection of GIs is anchored in several multilateral treaties. In principle, there are two different types of international agreements, namely, **bilateral** (as between two States) or **multilateral** (as between a number of Member States). Although many more countries are now utilising bilateral agreements, in most cases, the scope of protection remains *de minimis* and often limited to specific products such as wines and/or spirits. Yet once again, the protection of GIs at the international level is far less harmonized than other fields of IP law¹¹. **Part IV** of this essay will look at the effectiveness of four key international agreements generally considered to have as their object, or which deal, *inter alia*, with the protection of GIs.

However, for the sake of completeness, it is perhaps a fair assessment to view international principles as the most efficient forms of GI protection. By their very nature, their scope is far more reaching than national measures. Of course this statement, in itself, is highly dependent on the number of signatory countries signed up to the agreement. The globalisation of trade and commerce has made international systems of protection more relevant for the protection of locally produced products once cross-border trade is in issue.

Nevertheless, this assessment should not be seen as the downgrading of national legislations. On the contrary, national measures of protection play a vital role, particularly when used to prop up the inadequacies of international legislations. They invariably provide country-specific mechanisms which are best suited to address the particular needs of each nation State.

¹⁰ According to commentators such as Evans and Blakeney (2006), the current development of the law of GIs has, in part, been spurred on by both the “greater need and additional opportunities offered by the global marketplace for the diversification of agricultural products and foodstuffs.” (p. 578).

¹¹ Author Christopher Heath (2003), contends that the disparity is due, in part, to the lack of clarity in what products can and are afforded GI protection.

PART II

TRADEMARK SYSTEMS AND SUI GENERIS SYSTEMS

Advantages and Disadvantages: Trademark Systems¹²

The decision to protect GIs via the trademark system or within a *sui generis* system is often a difficult one. Both methods have their advantages and disadvantages, yet, the final decision to implement one over the other is often made with reference to economics (i.e. cost implications), and, to a greater extent, the level of priority GIs are given in that particular country.

Protecting GIs under trademark regimes has an immediate advantage because they are well established and familiar tools within the commercial world. In most cases, governments can simply modify existing trademark legislations instead of introducing new, and possibly, cumbersome *sui generis* systems¹³. This becomes a valuable cost-cutting mechanism as governments do not have to commit additional resources to protect GIs. Furthermore, protecting GIs via the trademark system opens up the possibility of utilising the international registration system, overseen by WIPO¹⁴.

Despite the apparent advantages, trademark regimes can also be costly, complicated and at times, ineffective. As a monopoly right granted to individual owners, trademark protection is limited to the confines of the countries in which registration is sought and granted. Relying on trademark systems can be a very expensive mechanism of protection. However, the knock-on effect of not adequately protecting a registered GI is the threat of generalisation (as will be discussed further in Part IV). Additionally, GI producers must be aware of the scope of the protection given, as trademarks do not generally cover translations, nor expressions such as “like”, “style” etc, or terms used to de-localise the product (e.g. “New Zealand champagne”).

Advantages and Disadvantages: *Sui Generis* Systems

A number of countries have developed specific *sui generis* systems of protection¹⁵. According to Ester Cáceres of OriGIn (Spain), there is a growing trend towards *sui generis* systems around

¹² References in this essay to trademark systems will be taken to include the terms trademarks (as defined by Article 15 of the TRIPS Agreement), collective marks and certification marks, unless the need to distinguish between them arises.

¹³ Dev Gangjee (2006), *Protecting Geographical Indications as Collective Trademarks: The Prospects and Pitfalls* (p.31).

¹⁴ The **Madrid Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989)** offers an international system of registration to protect GIs via certification trademark regimes. The System means that trademark owners have the opportunity to protect their mark in several countries, by virtue of a single registration through the System. The System is available at: http://www.wipo.int/madrid/en/legal_texts/trtdocs_wo015.html.

¹⁵ For example, India and Thailand have adopted *sui generis* legislations to protect their GIs. India has enacted the Geographical Indications Act (1999), whilst Thailand has enacted the Geographical Indications Protection Act (2003) (“GIPA”).

the world, “demonstrating that countries recognize the need for a specific GI protection system that co-exists with trademark regimes”¹⁶.

One significant advantage of *sui generis* systems is the ability to draft country-specific legislations addressing the particular needs of that country. Although the drafting of such legislations can be complicated and time-consuming, they ultimately provide relatively stronger levels of producer protection, in comparison to their trademark counterparts¹⁷. As the scope of trademark protection tends to be broader than *sui generis* systems, *sui generis* mechanisms can offer a more comprehensive level of protection by combining the best elements of existing protection mechanisms.

European Model of *Sui Generis* Protection

Within the EU, there are a variety of Regulations aimed at harmonising the plethora of protection mechanisms. Many countries are unwilling to set up individual *sui generis* systems, but still want to ensure that protection can be obtained by some form of registration, rather than relying on the court or unregistered systems.

Regulation 2081/92 (as amended by Regulation 510/2006¹⁸), gives protection for designations of origin (PDO), protection for GIs (PGI), agricultural products and foodstuff. A clear advantage of having a European-wide system of registration is the harmonization it brings to the piecemeal nature of national legislations.

In addition, once registered, a PDO or PGI is afforded protection by virtue of Article 13(1) of the Regulation, against:

- Any direct/indirect commercial use of a registered name, in so far as using the name exploits the reputation of the protected GI; and
- Any misuse, imitation, or **evocation**¹⁹, 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.

This is a significant advantage over trademarks because there are no constraints imposed by pre-existing legislations. However, a major disadvantage to the *sui generis* system is the length of

¹⁶ Ester Olivas Cáceres, Secretary General of OriGIIn, Alicante, Spain, *International Symposium on Geographical Indications* (June 26-28, 2007), WIPO document WIPO/GEO/BEI/07/13.

¹⁷ See Dev Gangjee, *Quibbling Siblings: Conflicts Between Trademarks and Geographical Indications* (p. 1267).

¹⁸ Regulation 2081/92 was introduced in 1992 to harmonise the different types of protection mechanisms within Europe. However, following the WTO dispute resolution board’s findings (see WT/DS174/20 and WT/DS290/18) as between the *US and Australia v. EC*, Regulation 2081/92 was amended and repealed by Regulation 510/2006, which came into force on 20 March, 2006.

¹⁹ In *Gorgonzola/Cambozola* (Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola v. Kserei Champignon Hofmeister GmbH and amp*), the ECJ considered the meaning of “evocation” in Article 13(1) (b). The ECJ ruled that it is possible for a protected designation to be evoked where there is no likelihood of confusion between the products concerned and even where no Community protection extends to the parts of that designation which are mirrored in the term(s) at issue.

time it takes to draft adequate legislations. In addition, countries such as the US and Australia argue that the European system is not sufficiently open to non-EU countries, effectively blocking third country registrations. Once again, a major concern is the scope of protection. GI producers need to know if ex officio procedures (procedures by which governments take responsibility on the enforcement of the GI law) is available. If not, producers will have to monitor the foreign market to detect possible abusers and take necessary legal action.

SYNERGIES: Supplementing Geographical Indications

The relationship between GIs and trademarks cannot be understated²⁰. Accordingly, trademarks can be used to supplement the protection of GIs in a number of ways. In countries where GIs can only be protected via the trademark system (e.g. Germany, UK and the US), producers are forced to seek protection via trademarks, collective or certification marks.

Generally speaking, GIs cannot be registered as trademarks because of the fundamental principal of distinctiveness²¹, unless the mark has acquired distinctive character through use (examples include “Bermuda” shorts, “Mont Blanc” pens and “Antarctica” bananas).

Collective marks are usually defined as signs which distinguish the geographic origin of different enterprises using the collective mark²². They function to inform the public of a particular quality inherent in the product and are typically used to promote products which are characteristic of a given region. A collective mark can be used together with the individual trademark of the producer, allowing them the opportunity to differentiate their own products from those of competitors, whilst benefiting from consumer confidence offered under the collective mark. For example, the “Idaho” and “Grown In Idaho” certification marks are used by the Idaho Potato Commission to indicate the potatoes are grown in the State of Idaho, US. They are therefore very valuable tools, particularly for associations of small-medium sized enterprises (SMEs)²³.

Certification marks are used to certify the nature or origin of the product to which they are applied and are generally owned by a public entity²⁴. Certification marks are usually given for compliance with defined standards, but are not confined to any membership. They may be used

²⁰ In a 2002 ruling by the House of Lords for England and Wales (*Consorzio del Prosciutto di Parma v. Asda Stores Ltd* [2001] UKHL 7 (Para. 100), Lord Scott commented that there was an “obvious similarity of purpose” shared by trademarks and geographical indications.

²¹ Article 15(1) of the TRIPS Agreement states that: “**Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of another undertaking, shall be capable of constituting a trademark**”.

²² WIPO definition, available at: http://www.wipo.int/sme/en/ip_business/collective_marks/certification_marks.htm.

²³ For a practical illustration of how collective marks work in practice, see WIPO’s case studies, available here: “[Chirimoya Cumbe](#)” and “[APDL Cajamarca](#)”.

²⁴ WIPO definition, available at: http://www.wipo.int/sme/en/ip_business/collective_marks/collective_marks.htm. The United States has a certification mark system of protection and strongly believes that it is an adequate system of protection for GIs. See USPTO website for further information, available at: <http://www.uspto.gov>.

by anyone who can certify that the products involved meet certain established standards. Famous certification marks include WOOLMARK which certifies that the goods on which it is used are made of 100% wool.



In many countries, the main difference between collective marks and certification marks is that the former may only be used by a specific group of enterprises, e.g., members of an association, while certification marks may be used by anybody who complies with the standards defined by the owner of the certification mark. An important requirement for certification marks is that the entity which applies for registration is considered "competent to certify" the products concerned²⁵.

Certification marks may also be used alongside the individual trademark of the producer. The label used as a certification mark will be evidence that the company's products meet the specific standards required for the use of the mark.

Once a GI is protected as a collective or certification mark, it can be enforced in accordance with the applicable rules of trademark law. Unfortunately, under trademark principles, if there is a conflict between trademarks, the principle of 'First In Time, First In Right' ('FITFIR') applies. This is not always an adequate dispute resolution mechanism for GIs and typically gives rise to conflicts, as will be discussed.

²⁵ *Ibid*, footnote no. 24 (WIPO reference).

PART III

HOW TRADEMARKS CAN NEGATIVELY AFFECT GEOGRAPHICAL INDICATIONS AND ISSUES OF GENERALISATION

Conflicts can arise between GIs and trademarks for a number of reasons. As previously stated, once GIs are protected under the trademark system, they are governed by the 'FITFIR' principle²⁶. When a prior trademark has been registered in good faith, this may trump the latter registration of a validly held GI, primarily because of the FITFIR principle. Unfortunately 'FITFIR' is not always an equitable remedy for GIs because it is based mainly on the concept of a trademark's exclusivity within a given territory. In a global economy with merging markets, the principle of exclusive territoriality is somewhat simplistic.

More conflicts can be seen with registered trademarks bearing the name of a geographic area. In some countries, a prior registered trademark bearing the name of a geographic region may trump the registration of GI producers. Nowhere is this issue more evident than the 'Parma ham' cases²⁷. The *Conorzio* representing the Parma ham producers in Italy sought registration in the US and Canada but were initially denied registration of their GI products because both the US and Canada already had validly registered trademarks for Parma ham producers.

The ECJ's judgment in *Windsurfing Chiemsee v Boots and Attenberger* (1999), discusses the registrability of geographical indications as trademarks²⁸. Moreover, the longstanding dispute between Anheuser-Busch (Budweiser) and Budejovicky Budvar, is yet another example of the real life conflicts between registered trademarks which have geographic indications (Case C-216/01)²⁹.

Some commentators also point to the conflicts inherent between the exclusivity of registered trademarks (Article 15 TRIPS Agreement) and Article 22(3) TRIPS, which requires the refusal or invalidation of a trademark registration, ex officio, or at the request of an interested party for trademarks containing a GI, if it does not originate from that territory.

²⁶ FITFIR is a fundamental principle in trademark law. In case of conflict between two similar trademarks, the first in time will triumph as the first to the right.

²⁷ *Conorzio del Prosciutto di Parma v Sausage Products Inc.* 23 U.S.P.Q.2d (BNA) 1894, 1992 (US Parma case), and *Conorzio del Prosciutto di Parma v Maple Leaf Meats Inc (Maple Leaf)*, [2001] F.C. 536 (Fed. Ct). (Canadian Parma case).

²⁸ ECJ Case C-109/97 (May 4, 1999), *Windsurfing Chiemsee Produktions-und Vetriebs GmbH v. Boo- und Segelzubehör Walter Huber und Franz Attengerger*. The ECJ ruled that just because a sign consists of a geographical designation, it does not necessarily follow that it cannot be a trademark; if the designation is suitable to serve as an indication of origin, the applicant, however, has to be able to prove that the sign has become a distinctive mark through use.

²⁹ Anheuser-Busch (US company) is the legal owner of the registered trademark Budweiser™ and Bud™ beer. However, Budejovicky Budvar (Czech Republic) contend that the name Budweiser is a GI, indicating that the a beer originates in the Budweis region of the Czech Republic. Conflict was inevitable as soon as both breweries expanded they exports internationally.

Article 24 of the TRIPS Agreement contains a number of exceptions to the obligations under Article 23 and 24 TRIPS, namely:

- Continued and similar use of GIs for wines and spirits (Article 24(4));
- Prior good faith trademarks (Article 24(5)); and
- Generic designations (Article 24(6)).

The TRIPS Agreement aimed to resolve the conflicts between GIs and TMs by creating a co-existence between the two mechanisms. Following the WTO dispute panel's findings in WT/DS174/20 and WT/DS290/18 (US and Australia v. EC), the EC successfully argued that GIs and trademarks are two distinct forms of IPRs which are equal in their own right. Therefore, one does not take priority over another and Article 24(5) allows for a level of coexistence. This is evidenced in the Parma ham case, where the registered GI exists alongside the registered trademarks for the same product. The issue was also interpreted by the ECJ in the Gorgonzola/Cambozola case (Case C-87/97).

How Generalisation Affects Trademarks and Geographical Indications

One of the most controversial areas in the international protection of GIs is that of “generic use”. Generalisation can occur when a trademark or GI term is no longer considered to relate to the place or product in which it originated from. Once a name ceases to indicate the specific origin of the product and becomes known as the common name for the kind or category of the product, it is said to be generic (e.g. Danish pastries and French fries). At the European level, Article 3(1) Regulation 510/2006 defines and prohibits the registration of generic names³⁰, whilst Article 24(6) of the TRIPS Agreement covers the same principle on a wider, global level. The failure to adequately prevent others using a geographical term or trademark on other goods may lead to generic use.

GIs can struggle against becoming generic, particularly in countries such as Singapore, where GI producers are automatically protected under the Geographical Indications Act 1998, somewhat similar to copyrights. Establishing whether a name has become generic can be a difficult task and often varies from country to country. The main case on generic terms is the “Feta” cheese ECJ Joined cases³¹, where the ECJ initially held that “Feta” had become generic in many countries and was denied registration as a GI for Greece. The decision was subsequently overturned and Feta is now registered as a PDO in Europe. However, other countries such as the US, still consider the term to be generic and do not recognise it as a GI.

³⁰ A name that has become ‘generic’ means “the name of an agricultural product or a foodstuff which, although it relates to the place or the origin where this product or foodstuff was originally produced or marketed, has become the common name of an agricultural product or a foodstuff in the Community.”

³¹ ECJ joined Cases C-289/96, C-293/96 and C-299/96. The ECJ’s decision was the first to clarify the test for generic status under the pan-European registered GI regime. It annulled the Commission’s initial decision to treat “Feta” cheese as a PDO, because it had failed to take into account the fact that “Feta” had been used for a considerable period of time in certain Member States other than Greece.

PART IV

EFFECTIVENESS OF CURRENT INTERNATIONAL SYSTEMS OF PROTECTION and THE DOHA DEVELOPMENT ROUNDS

It would be futile to think that a single agreement could fully protect and enforce GIs. International agreements are often the result of intricate compromises between Member States and as such provide only minimum standards for all member countries to adhere to.

The length of this essay only permits a very brief outline of some of the key international agreements. For the purpose of this section, I will briefly look at:

- The Paris Convention (1883);
- The Madrid Agreement (1891);
- The Lisbon Agreement (1958); and
- The TRIPS Agreement (1994).

Effectiveness of Current International Protection Systems

The **Paris Convention (1883)**³² was the first and most general attempt to protect GIs at the international level. Earmarked as a landmark international treaty for the protection of GIs, (albeit by reference to a different terminology), it guarantees the protection of indications of source and appellations of origin (Article 1(2))³³. Although it prohibits the use of false indications of source, it does not provide for situations where the use of an indication of source may still mislead the public or be deceptive, despite it not being false. This type of situation often arises where a geographical name exists in two different countries and the goods are subsequently exported internationally into the same market. Such conflicts are referred to as **homonymous GI conflicts**. Despite the various amendments to the Paris Convention³⁴, the provisions remain inadequate to fully protect GIs.

The **Madrid Agreement (1891)**³⁵ marginally extended the scope of protection of the Paris Convention. It was the first multilateral agreement to provide specific rules for the repression of false and deceptive indications of source (Article 1(1)), and protects against imprecise wording

³² The Paris Convention for the Protection of Industrial Property, 20 March 1883, as revised at Stockholm on 14 July 1967 (hereinafter, referred to as “the Paris Convention”) - full text of the Convention is available at: http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

³³ An indication of source is a direct or indirect reference of a product’s geographic source. For example, the term “Made in Switzerland” would be an indication of source because it indicates the country of origin, whilst the phrase “U.S.A” would be an appellation of origin (i.e. the actual geographical name of the country of origin).

³⁴ Article 10*bis* of the Paris Convention now covers non-misleading use of GIs to the extent that such use is considered to constitute an act of unfair competition

³⁵ Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, 14 April 1891 (hereinafter, referred to as “the Madrid Agreement”) - full text of the Agreement is available at: www.wipo.int/treaties/en/ip/madrid/trtdocs_wo032.html.

and misleading references. Deceptive indications of source can include GIs that designate the true name from which the goods originate from, but nevertheless confuse the consumer in relation to the true origin and quality of the good. Besides extending the protection of GIs to include deceptive indicators of source, the Madrid Agreement did not add much substantive changes to the Paris Convention and remains limited in the level of protection it affords GIs.

In 1958, the **Lisbon Agreement**³⁶ fostered an even stronger level of protection for GIs, but only in relation to appellations of origin (Article 2(1)). Signatory Member States undertake to protect appellations of origin, provided they are protected in the same way in the country of origin and registered in the international register (administered by WIPO). Countries are free to adopt their own systems of protection and once registered, are protected in other Member States. Traditional examples include; Tequila (spirits), Bordeaux (wines) and Toscano (olive oil).

However, the scope of protection afforded by the Lisbon Agreement is, again, limited for two main reasons. Firstly, there are currently less than 30 countries signed up to the Agreement and secondly, only countries that protect appellations of origin in their own national system can join the system, ultimately limiting its scope of protection. It does not make exceptions for GIs which have already become generic in some countries and it does not provide for a dispute resolution system to resolve conflicts between signatories to the Agreement.

The above Agreements have not become effective international instruments of protection as they only contained general provisions or have very limited membership. In 1994, specific protection for GIs was finally established by the **TRIPS Agreement**. TRIPS is widely recognised for setting new standards at the international level of GI protection. As Evans and Blakeney (2006) point out, TRIPS succeeded in recognising GIs as a major category of intellectual property, alongside patents, copyright and trademarks (p. 14). Prior to TRIPS, there was very little added to the international protection of GIs. As TRIPS is currently the primary means for protecting GIs at the international level it is of paramount importance and will be discussed further.

The TRIPS Agreement

The TRIPS Agreement provides a two-tier level of protection for GIs. Article 22 provides a general level of protection for all products, whilst Article 23 provides a higher level of protection for wines and spirits, regardless of whether or not the public are misled or an act of unfair competition is involved and even if the true origin of the product is indicated on the product³⁷. Although TRIPS is regularly praised for signaling a major shift in the protection of GIs, it merely sets a minimum standard of protection. Regrettably, with the exception of wines and spirits, it still permits misuse of GIs on all other products. For example, a producer could legitimately

³⁶ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 31 October 1958 (hereinafter, referred to as “the Lisbon Agreement”) - full text of the Convention is available at: www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.htm.

³⁷ Article 23 (3) provides for a third level of protection in relation to homonymous GIs but in relation to wines only. The different levels of GI protection represents the trade-offs and compromises that had to be reached at the Uruguay Round of negotiations (1986-1994). They reflect the balance of concessions eventually reached in order to progress the multilateral trade negotiations.

label his products “Roquefort-type cheese made in New Zealand” or “American Basmati rice”³⁸, allowing others to enjoy a free-ride at the expense of the established good’s reputation and goodwill.

The Doha Development Round of Negotiations

In 2001 during the Doha Round of TRIPS negotiations, WTO Member States committed to reach an agreement on the creation of a multilateral register, as well as address the issues relating to the extension of the protection provided by Article 23 TRIPS, to products other than wines and spirits³⁹.

The issue of GI extension has generated strong debate among WTO members, but to date, very little progress has been made, resulting in the current standstill of Ministers. In 2005, three different proposals were submitted by the EU, the US, and Hong Kong to the WTO⁴⁰. In July 2008, a group of over 130 WTO Members called for a “procedural decision” to negotiate the issues, commonly referred to as the “draft modalities⁴¹”. In addition to this, the EU have also submitted a list of 41 products which they wish to claw back (to avoid problems of genericness). This strategy has, thus far, not been successful at the WTO.

On one side of the debate are countries (led by the EU) who believe that GI extension would significantly improve market access for GI products. The existing level of protection is seen to be inadequate, therefore, by extending the protection of Article 23 to all GIs, the “modalities” would remove what is clearly an unjustifiable discrimination among products⁴². The weakness of TRIPS, arguably, is due to the two levels of protection afforded to GIs. The imbalance caused by this arbitrary and unjustified division could be corrected by extending GI protection to all foodstuff, thereby ensuring producers an equal footing. With over 700 registered GIs within the EC, European producers are exceptionally well placed to leverage the benefits of an expanded multilateral system⁴³.

³⁸ *Basmati* is a protected GI in India and Pakistan. However, the term has been declared generic in the US as the authorities do not consider a label such as “American Basmati rice” to be misleading or unfair competition (Maskus, 2003, p.6).

³⁹ Paragraph 18 of the Doha Ministerial Declaration, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#TRIPS.

⁴⁰ The EU’s proposals (TN/IP/W/11), the US joint proposal (TN/IP/W/10/Rev.2) and Hong Kong’s compromise proposal (TN/IP/W/12) are all available at <http://www.docsonline.wto.org>.

⁴¹ The Draft Modalities for TRIPS-Related Issues, WTO document TN/C/W/52 of 19 July 2008, available at <http://www.docsonline.wto.org>.

⁴² “There is no logical, legal, economic or trade-related reason to protect only GIs of wines and spirits effectively and to leave the rest of the world’s products with a second class protection,” Alexandra Grazioli (2007, p.25).

⁴³ Evans and Blakeney (2006), p.579.

In the case of the multilateral Register, a mandatory system would have to be implemented and apply to all Member countries in order to be effective (this is the very nature of any WTO multilateral agreement). It would make it possible for all WTO Members to recognise protected GIs and facilitate opposition proceedings. As to its legal effects, it respects the national sovereignty of each WTO Member (the final decision concerning the protection of a given GI within its jurisdiction remains in the hands of national authorities, fully respecting the principle of territoriality)⁴⁴. As a result, national authorities will have the final say on whether or not a GI should be protected in their territory.

Moreover, the Register would not hamper recourse to the exceptions under Article 24 TRIPS (they could apply *mutatis mutandis* to products other than wines and spirits). Generics, prior use and prior trademarks exceptions, will continue to be available as per Article 24 TRIPS. The Register would establish a rebuttable presumption of validity, which would help reduce GIs becoming generic in different jurisdictions. Such a Register would represent a reliable source of information for trademark offices, institutions in charge of GIs and national tribunals.

In contrast, opposing countries (led by the United States), believe that GI extension will only cause “significant losses for food processors forced to abandon the use of terms that are considered generic outside the EU”⁴⁵. It is held that the discrimination of TRIPS could just as easily be removed by suppressing Article 23 altogether and limiting protection of GIs in all sectors to the level of protection afforded by Article 22. According to these arguments, GI extension would impose significant cost burdens on producers and deny them the right to use generic names which have been validly registered as trademarks⁴⁶. These costs would invariably be passed onto the consumers as higher priced goods.

⁴⁴ WTO Members would have to provide that domestic authorities consult the Register and take its information into account when making decisions regarding registration and protection of trademarks and GIs, in accordance with their domestic procedures.

⁴⁵ Michel Vincent, *Extending Protection at the WTO to Products Other Than Wines and Spirits: Who Will Benefit?*, (2007), The Estey Centre journal of International Law and Trade Policy, Vol. 8, No. 1, pp 57-68 - available at <http://www.purl.umn.edu/9383>.

⁴⁶ For a compilation of the issues raised by opposers, see WTO document WT/GC/W/546-TN/C/W/25.

PART V

CONCLUSION - *Quo Vadis?*

The protection of GIs has been, and continues to be, a highly sensitive and controversial issue. The current stalemate within the Doha Development Round is a clear indication of how contentious this issue is.

Historically, the spread of trade and commerce beyond national boundaries, has given rise to multilateral international agreements that provide mutual reciprocity between the various Member States.

At the multilateral level, the TRIPS Agreement represents a major shift in the protection of GIs. However, it is not without its limitations and significant new developments at the international, regional and bilateral level will need to take place in order to strengthen the minimum TRIPS standards. More and more countries are now turning to *sui generis* mechanisms because of a recognised need for country-specific methods that can coexist with trademark regimes. At the same time, bilateral agreements have also become a greater commodity, providing an additional platform for countries to further negotiate sufficient terms to protect their GIs. Within Europe, the EC has made use of such structures, namely by reference to Regulation 510/2006 and various EC bilateral agreements. These have become invaluable tools, particularly for agricultural policies within the EC.

Proponents of the trademark system often suggest that the exclusivity of trademark rights is being eroded by the existence of GI rights. However, the TRIPS Agreement recognises GIs as IPRs on the same level as trademarks and does not confer any superiority to trademarks over GIs (Article 24 (5) TRIPS). Coexistence is not always an ideal solution to the conflicts between GIs and trademarks. Arguably, it goes some way in bridging the conflict gap between the two regimes but invariably, does not provide a definitive solution to the problems at hand, leaving room to ponder on whether or not it is the most effective or appropriate solution.

The Doha Ministerial Declaration lends support to developing countries seeking to exploit less technology-driven rights, (e.g. marketing locally produced agricultural products). There are a number of factors hindering the progress of the current Doha negotiations, including differences in interpretation, a lack of harmonization at the national and international level and the elusive question as to what products should or should not be afforded an enhanced level of GI protection?

At present, progress on the creation of a multilateral Register is being hampered by the vastly divergent positions taken by the EC and the US. WTO Member States must find a way to adopt an appropriate level of dialogue, to ensure progress of the issues set out in the 2001 Doha Declaration. Perhaps the current standstill in the WTO negotiations is an opportune moment for WTO members to take stock of the situation and re-evaluate their proposals.

The draft modalities currently under review by the WTO poses a very interesting question, which we should be mindful of. Supposing an agreement on GI extension was finally reached, it begs the question of how realistic it would be to protect certain names, particularly where these are regarded as generic? Perhaps some sort of incremental approach over a few years, would be best suited to deal with this issue?

In closing, one final point of concern remains. Taking account of all the articles reviewed for this essay, I cannot help but wonder if, in the midst of all the debate, the true essence and spirit of GI protection has not simply been lost? Far too often in protracted, drawn out negotiations, it is far too easy to become dogmatic on every minute detail. The reality of today's global economy often means that more reliance is placed on the technological advances of developed economies, at the expense of issues more pertinent to many developing economies. These tend to be overlooked by the mass media and it is no wonder little media attention has been given to the issues being negotiated by the Doha Ministerial Round.

GIs are a relatively inexpensive method for providing sustainable agricultural policies. Nevertheless, for as long as Ministers and governments cannot reach a successful level of compromise, the true losers in all of this will be the small, local producers around the world, simply trying to protect their produce. Paradoxically, these are the very same people that the Doha Round set out to protect.

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