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In Territorio Veritas: Bringing Geographical Coherence in the Definition of Geographical Indications of Origin under TRIPs

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☞ Geographical indications; Treaty interpretation; TRIPs

Introduction

In this article, I touch upon a topic that remains highly controversial in international intellectual property law—the legal protection of geographical indications of origin (GIs): Chianti wine, Champagne sparkling wine, Gorgonzola cheese, Parma ham, Darjeeling tea, Colombian coffee, and other terms that indicate (or are supposed to indicate, as I will develop in this article) the geographical origin of the products they identify. In line with the theme of this special issue of the *WIPO Journal*, I focus on the requirement of “geographical origin” upon which the protection of GIs has been historically built and is generally justified.¹ In particular, I question the ambiguity that characterises the current definition of GIs under art.22(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which does not require that products originate entirely from their GI-denominated regions to enjoy GI protection as long as the quality, characteristic or reputation of the products at issue can be “essentially” attributed to those regions.

More specifically, as I elaborate in this article, under the current language of art.22(1), the makers of Chianti wine in Tuscany can legitimately use grapes from outside the Chianti region and label their wines with the Chianti GI as long as the products’ quality, characteristics or reputation remain essentially attributable to the Chianti region.² Similarly, producers of GI-denominated cheeses, coffees, teas, and so forth can lawfully use the relevant GIs regardless of whether the product ingredients or steps of production entirely originate in the GI-denominated regions, again as long as the overall quality, characteristics, or reputation of the products can be essentially attributed to those regions. Perhaps not surprisingly—and likely the reason behind the TRIPs provision—turning to outside regions as partial sources of product

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¹ The literature on this topic is extensive. e.g. Michael Blakeney, *The Protection of Geographical Indications: Law and Practice* (Cheltenham: Edward Elgar Publishing, 2014), p.1; Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge: Cambridge University Press, 2012), p.1; Rosemary J. Coombe and Nicole Aylwin, “Bordering Diversity and Desire: Using Intellectual Property to a Mark Place-Based Products” (2011) 43 *Environment and Planning* 2027, 2027–2029; Christophe Geiger, Daniel J. Gervais, Nibert Olzak and Vincent Ruzek, “Towards a Flexible International Framework for the Protection of Geographical Indications” (2010) 1 *WIPO J.* 147, 157–158; Daniele Giovannucci, Tim Josling, William Kerr, Bernard O’Connor and May T. Young, *Guide to Geographical Indications: Linking Products and Their Origins* (Geneva: International Trade Center 2009). For more critical discussions, see Justin Hughes, “Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications” (2006) 58 *Hastings L.J.* 299, 305; Kal Raustiala and Stephen R. Munzer, “The Global Struggle Over Geographic Indications” (2007) 18 *Eur. J. Int’l L.* 337, 359–360.

² For a detailed description of the production requirements for Chianti, see Tomer Broude, “Taking ‘Trade and Culture’ Seriously: Geographical Indications and Cultural Protection in the WTO” (2005) 26 *U. Pa. J. Int’l Econ. L.* 623, 666–667. See also Tim Josling, “The War on Terroir: Geographical Indications as a Transatlantic Trade Conflict” (2006) 57 *J. Agric. Econ.* 337.

ingredients and manufacturing steps has become increasingly common among GI producers during the past decades. On the one hand, this permits the production of more GI-denominated goods (at times for a lesser cost than using local ingredients and labour) in order to meet greater demands. On the other hand, it allows for meeting production quantities and requirements even in the face of challenges (e.g. drought, extreme winter, earthquake or other environment-related accidents) that could reduce the availability of local ingredients or labour. Consumers, however, are rarely explicitly informed that GI-denominated products may not originate entirely from the respective GI-denominated regions, and nothing in TRIPs requires the public disclosure of the actual geographical origin of products' ingredients or manufacturing steps. In general, GI-producers may be required to disclose the actual origin of the products' ingredients or manufacturing steps only when such disclosure is legally mandated as a matter of consumer protection or as a safety or technical standard under their respective national laws.

Criticisms of this non-rigorous application of the requirement of "geographical origin" under art.22(1) of TRIPs are not new³ and have been repeatedly voiced to oppose an expansion of GI protection into other products that would be modelled after the current regime for GIs identifying wines and spirits.⁴ In particular, critics have stressed that, despite the argument that GIs aim to protect local products and rural development, this trend of permitting GI producers to partially outsource the production of GI-denominated goods—in terms of both ingredients and labour—indicates that GI protection has become primarily a tool to secure exclusive rights over the attractive power of geographical terms. In this respect, it is well-known that GIs grant a presumption of tradition and high quality, and this frequently translates into a competitive advantage for GI producers, particularly in high-end sectors of the market. In turn, this can create barriers to entry for competitors.

In my previous scholarship, I have recognised that GIs add value to the products that they identify and this may offer a competitive advantage to their producers, but I have nonetheless concluded that a system of GI protection is more beneficial for economic development than a system in which competitors can freely use geographical terms without a direct connection to the GI-denominated region. In particular, I have highlighted that GIs can benefit local economies, the environment, and the conservation of local culture.⁵ Moreover, I have underlined that GIs do not grant an exclusive right over a type of product. Cheese makers in Wisconsin, for example, would remain free to produce and market "mozzarella" and "mozzarella di bufala" even if the United States concedes to the long-held pressure of the European Union (EU) to "claw-back" several geographical names of cheese (currently held to be generic in the United States).⁶ Equally as relevant, TRIPs permits competitors to use GIs in descriptive contexts (e.g. comparative advertising) and to name their products as a "style", "like" or "type" of GI-related product in several

³ For a detailed overview of the debates that led to the adoption of art.22(1) of TRIPs, see Gangjee, *Relocating the Law of Geographical Indications* (2012), pp.185–237.

⁴ TRIPs Agreement art.24(1). See also Felix Addor and Alexandra Grazioli, "Geographical Indications beyond Wines and Spirits—A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPs Agreement" (2002) 5 J. World Intell. Prop. 865, 867; Emily C. Credit, "Terroir vs. Trademarks: The Debate over Geographical Indication and Expansions to the TRIPs Agreement" (2009) 11 Vand. J. Ent. & Tech. L. 425, 427.

⁵ Dev Gangjee, "Geographical Indications and Cultural Heritage" (2012) 4 WIPO J. 92; Anselm Kamperman Sanders, "Incentives for Protection of Cultural Expression: Art, Trade and Geographical Indications" (2010) 13 J. World Intell. Prop. 81; Toshiyuki Kono, "Geographical Indication and Intangible Cultural Heritage" in Benedetta Ubertazzi and Esther Muñoz Espada (eds), *Le Indicazioni di Qualità degli Alimenti* (Milan: Giuffrè Editore, 2009), p.289.

⁶ In March 2014, the European Union requested that the United States cease using names of cheeses that are protected by GIs in Europe but are considered generic in the US as part of the negotiations for the Trans-Atlantic Trade and Investment Partnership. The controversies on this topic were widely reported by the press. "Say Bye Bye to Parmesan, Muenster and Feta: Europe Wants Its Cheese Back" *The Guardian*, March 11, 2014. On March 14, 2014, a bipartisan group of US senators wrote to the US Secretary of Agriculture and the United States Trade Representative urging them to resist the European Union's request due to its negative impact on the local industry. Letter from Senators Charles E. Schumer and Pat Toomey to Tom Vilsack, Secretary of Agriculture, and Michael Froman, United States Trade Representative, March 11, 2014, available at http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=79c9296b-a7a7-482e-8c3f-60fd9bd77fa9 [Accessed October 22, 2014]. The European Union recently succeeded on a similar claim as part of the negotiation for the EU-Canada Trade Agreement (CETA). The (leaked) version of the agreement is available at <http://www.tagesschau.de/wirtschaft/ceta-dokument-101.pdf> [Accessed October 22, 2014]. See also Jason Langrish, "Say 'cheese' on Canada-EU Trade Deal" *Financial Post*, August 19, 2014, available at <http://business.financialpost.com/2014/08/18/say-cheese-on-canada-eu-trade-deal/> [Accessed October 22, 2014].

circumstances—the only exception to this general rule are GIs identifying wines and spirits.⁷ Still, in my writing I have expressed scepticism over GI protection when the products at issue are not grown or manufactured entirely or nearly entirely in the GI-denominated territory. In these cases, I have argued that GI protection indeed may transform into an unjustified anticompetitive subsidy as well as a tool for potential consumer confusion, or even deception.⁸

In this article, I further bring my scepticism to what I call “ambiguous geographical origin” of GIs and advocated against the misuse, or misinterpretation, of the terms “geographical origin” in art.22(1) of TRIPs. More specifically, I expose the partial inconsistency between the legal definition under TRIPs and the dictionary definition of the terms “geographical” and “origin”. In this respect, I point out that, from a strictly linguistic standpoint, the term “geographical”, in its variation as “geographic”, is defined as “of or relating to geography” and as “belonging to or characteristic of a particular region”.⁹ Likewise, the word “origin” is defined as “the point at which something begins or rises or from which it derives”.¹⁰ Based on these definitions, I note that art.22(1) of TRIPs essentially misuses, or at least misinterprets, the notion of the terms “geographical” and “origin” and expands the scope of GI protection beyond the meaning of these terms. This departure from a literal interpretation contributes to granting exclusive rights to GIs beyond the original rationale for protection, which remains protecting GIs for the information they convey to the public about products’ geographical origin and as incentives for investment in local economies.

In this article, I argue that this should not be permitted and that the definition and protection of GIs should return to coherently identifying products’ “geographical origin”. My argument in favour of this narrower approach is threefold. First, as noted by GI critics, GIs become an unjustified barrier to entry in the market, and a disguised subsidy, when they do not fully reflect the geographical origin of the products that they identify. Secondly, the use of GIs on products not fully locally grown or made becomes a source of misinformation for the consumers that rely on the GI as a source of geographical information, and a potential source of negative reputation for producers that operate within the GI-denominated region when the former products are of lesser or different quality, or pose a safety or health-related issue. Finally, adopting a stricter territorial approach could be the much-needed solution for bringing back legitimacy to the international debate over GIs. As I note in this article, GIs are and remain an important tool for economic and cultural development—finding a compromise like the one advocated in this article could perhaps move forward the gridlocked international agenda on GI protection.

Adding “reputation” to (already) ambiguous geography: Exposing the incoherence of the definition of geographical indications of origin under TRIPs

A contribution on GIs seems to fit well in a special issue of the *WIPO Journal* dedicated to the topic of intellectual property and geography. As reflected directly from their name, GIs are one of the most noticeable expressions of the notion of geography in intellectual property law—at least in its definition as “geographical origin”.¹¹ In particular, even though they remain a controversial type of intellectual property right, GIs are protected under TRIPs precisely because they identify the geographical areas from which certain products originate and from which these products derive their quality, characteristics and

⁷ Irene Calboli, “Of Markets, Culture, and Terroir: The Unique Economic and Culture-Related Benefits of Geographical Indications of Origin” in Daniel Gervais (ed.), *Research Handbook in International Intellectual Property* (Cheltenham: Edward Elgar Publishing) (forthcoming).

⁸ Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming).

⁹ *Merriam Webster’s Collegiate Dictionary*, 11th edn (Springfield: Merriam-Webster Inc, 2009), p.523. “Geography” is defined as “a science that deals with the description, distribution, and interaction of diverse physical, biological, and cultural features of the earth’s surface” and “the geographic features of an area”. *The Oxford Dictionary of English* defines “geographical” as “related to geography” and “geography” as “the nature and relative arrangement of places and physical features”. *Oxford Dictionary of English*, 2nd edn (Oxford: Oxford University Press 2003), p.723.

¹⁰ *Merriam Webster’s Collegiate Dictionary* (2009), p.875. A very similar definition is offered by the *Oxford Dictionary*, which defines “origin” as “the point or place where something begins, arises, or is derived”. *Oxford Dictionary of English* (2003), p.1242.

¹¹ *Merriam Webster’s Collegiate Dictionary* (2009), p.523. In this article I do refer to “geography” in a literal sense. I remain aware, however, that the interpretation of the notion of “geography” as scientific discipline remain more nuanced than its literal dictionary definition.

reputation.¹² More specifically, GI protection extends to those producers who utilise the geographical names in order to signal a certain geographical origin, based on the assumption that only products originating from those areas should be identified by those names, lest consumers be confused. Beyond the names of geographical localities and regions, the same principles apply to those products whose names have become associated with a specific locality even though those names are not geographical names—Feta cheese is perhaps the most famous (and contested) example of this type of GI. With respect to GIs identifying wines and spirits, the protection granted under TRIPs is greater and encompasses protection from the usurpation of GIs by third parties, even in the absence of consumer confusion.

As I have analysed before, protection for GIs originates, historically, from the French concept of *terroir*, which indicates a deep connection with the land from which the products derive not only in terms of the actual geological, meteorological, and other similar factors, but also in terms of the unique qualities derived from the local human factor.¹³ Following this tradition, GI protection has been primarily discussed in the context of agricultural and food-related products, including wine and spirits.¹⁴ But over time, GI protection has also become increasingly important for non-agricultural goods, such as artisanal artefacts and traditional design products, both in developed and developing countries.¹⁵ In an increasingly globalised and interconnected world, GIs play an important role in promoting local economies as well as local culture and traditions among different consumers in different countries. In particular, by identifying a product's geographical origin, GIs educate consumers about the commercial and traditional strengths of a locality while both capitalising on and enhancing the locality's goodwill. For these reasons, attention to GIs has grown considerably in recent years in developing countries as well.¹⁶

From a theoretical standpoint, however, the protection of GIs remains fundamentally linked to the notion of geographical origin. The importance of the geographical link between GI-denominated areas and GI-denominated products is also directly reflected in TRIPs and in the international treaty anticipating TRIPs, the Lisbon Agreement for the Protection of the Appellations of Origin and Their International Registrations (Lisbon Agreement).¹⁷ Hence, a closer look into the controversies surrounding the GI debate reveals a partially different application of the notion of “geographical origin” to GI protection—namely, that GI protection seems to increasingly lean towards a growing trend aimed at exploiting the commercial value (i.e. the reputation) of GIs, at the expense of geographical accuracy, that is, regardless of whether GIs still provide accurate information about the geographical origin of the products.

Despite the possible arguments favouring an expansive interpretation of the notion of GIs, this trend is nonetheless problematic. As I noted in the introduction, the literal definition of the terms “geographical” and “origin” encapsulates a much stricter notion of “geographical origin” than the one that has ultimately become widely accepted with TRIPs. In particular, the word “geographical” is defined as something

¹² For a summary of the arguments in favour of GI protection, see Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming).

¹³ Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming).

¹⁴ e.g. Matt Kramer “The Notion of Terroir” in Friz Allhoff (ed.), *Wine & Philosophy: A Symposium on Thinking and Drinking* (Oxford: Blackwell Publishing, 2007), p.225; Cornelis van Leeuwen and Gerard Seguin, “The Concept of Terroir in Viticulture” (2006) 17 J. Wine Res. 1; James E. Wilson, *Terroir: The Role of Geology, Climate, and Culture in the Making of French Wines* (Berkeley: University of California Press, 2004), p.4. See also Gangjee, *Relocating the Law of Geographical Indications* (2012), pp.80–93.

¹⁵ Rosemary J. Coombe and Nicole Aylwin, “Marks Indicating Conditions of Origin in Rights-Based Sustainable Development” (2014) 47 U.C. Davis L. Rev. 753; Madhavi Sunder, “IP3” (2006) 59 Stan. L. Rev. 257, 298. See also “Study for Geographical Indication Protection for Non-Agricultural Products in the Internal Market” (2013), available at http://ec.europa.eu/internal_market/indprop/docs/geo-indications/130322_geo-indications-non-agri-study_en.pdf [Accessed October 22, 2014]. In July 2014, the European Commission started a public consultation to evaluate the opportunity to extend GI protection to non-agricultural products.

¹⁶ Rosemary J. Coombe, Sarah Ives and Daniel Huizenga, “Geographical Indications: The Promise, Perils and Politics of Protecting Place-Based Products” in Matthew David and Deborah Halbert (eds), *Sage Handbook on Intellectual Property* (London: Sage Publications, 2014); Dwijen Rangnekar, *The International Protection of Geographical Indications: The Asian Experience*, p.19, available at http://www.iprsonline.org/unctadicts/dialogue/docs/Rangnekar_2004-11-08.pdf [Accessed October 22, 2014].

¹⁷ Other relevant international instruments are the Madrid Agreement for the Repression of False and Deceptive Indications of Source and art.10bis of the Paris Convention for the Protection of Industrial Property (Paris Convention). Irene Calboli, “Expanding the Protection of Geographical Indications of Origin under TRIPs: “Old” Debate or “New” Opportunity?” (2006) 10 Marq. Intell. Prop. L. Rev. 181, 184.

“belonging to or characteristic of a particular region”¹⁸ while the word “origin” is defined as the “the point at which something begins or rises or from which it derives”.¹⁹ To a large extent, this stricter definition of geographical origin was well reflected in the traditional concept of *terroir*—a concept to which GI supporters continue to refer to support the idea that the natural and human conditions of the GI-denominated regions are inimitable anywhere else, and thus only GIs producers are permitted to use the GI in their product name. Yet, as Justin Hughes provocatively but correctly stated, these beliefs “about terroir run deep”, but not “too deep”,²⁰ and the story of GIs has increasingly shown that the same GI producers who invoke the uniqueness of *terroir* do not seem to hesitate to adopt a looser approach with respect to their own products. In particular, while loudly condemning third parties for using geographical names on products originating from outside the GI-denominated regions, GI producers have increasingly turned to outside sources to purchase raw materials or other product ingredients, and have even lobbied national and international legislators in order to legalise this trend.

As expected, this non-rigorous geographical approach has been labelled as hypocritical and the tension between a stricter and more flexible definition of “geographical origin” has adversely affected the international GI debate. To a certain extent, this controversy over a stricter and more flexible approach to the notion of geographical origin was not new to the negotiations leading to the adoption of TRIPs. Several decades earlier, in 1958, art.2(1) of the Lisbon Agreement²¹ had already introduced the idea that “appellations of origin” could be the

“geographical name[s] of a country, region, or locality, which serve 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”.

Under special interest pressures (primarily from developed countries) and in context of greater trade negotiation (in which countries and corporations were also promoting fewer barriers to trade and fewer subsidies), the final version of art.22(1) of TRIPs confirmed that products do not need to entirely originate from their GI-denominated regions to enjoy protection. As Dev Gangjee has explained, TRIPs went even further and blended the concept of “essential” (no longer “exclusive”) *terroir* with the increasingly relevant (and lucrative) concept of “GI reputation”—that is, the attractive power that geographical names can exert when applied to products for sale in the marketplace.²² Ultimately, art.22(1) of TRIPs settled on a compromising (as much as incoherent) definition of GIs 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”.²³

As a result, GI producers were given full licence to partially deviate from producing their products entirely in GI-denominated regions,²⁴ while still retaining exclusive rights on the GIs and, in turn, the possibility to enforce these rights against third parties.²⁵ Moreover, with the elimination of the word

¹⁸ Merriam Webster’s Collegiate Dictionary (2009), p.523.

¹⁹ Merriam Webster’s Collegiate Dictionary (2009), p.875.

²⁰ Hughes, “Champagne, Feta, and Bourbon” (2006) 58 Hastings L.J. 299, 307.

²¹ Before the adoption of the Lisbon Agreement, the Madrid Agreement offered protection against misleading and confusing uses of indications of source in art.1(1). In particular, art.1(1) refers to “goods bearing a false or deceptive indications by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin”. For a detailed overview, see Gangjee, *Relocating the Law of Geographical Indications* (2012), pp.65–74.

²² See Gangjee, *Relocating the Law of Geographical Indications* (2012), p.214 (citing World Intellectual Property Organization (WIPO), “The Definition of Geographical Indications”, October 1, 2002, SCT/9/4, para.4).

²³ The definition in TRIPs was certainly influenced by the definition adopted by WIPO, which defines GIs as “sign[s] used on goods that have a specific geographical origin and possess qualities, reputation or characteristics that are essentially attributable to that origin”. WIPO, “Overview of Geographical Indications”, available at http://www.wipo.int/geo_indications/en/ [Accessed October 22, 2014].

²⁴ Gangjee, *Relocating the Law of Geographical Indications* (2012), p.214.

²⁵ TRIPs Agreement art.22(2).

“exclusively”—though present in the Lisbon Agreement—TRIPs seemed to have validated the idea that GI-denominated products would merely “essentially”—but no longer “exclusively”—originate from their typical localities.

In a world in which agricultural subsidies are increasingly denounced as anticompetitive, the protection of well-known geographical names offers GI producers an important alternative to these subsidies while continuing to secure “some monopoly rent” against similar products grown or produced by competitors that are located outside these areas (usually in other countries).²⁶ Not surprisingly, corporate forces and national interests have been solidly behind the designing of the more flexible approach to the protection and regulation of GIs ultimately adopted by TRIPs. The same constituencies have heavily lobbied for the expansion of GI protection in advocating the adoption of the anti-usurpation protection now granted to wines and spirits for all types of GIs—both as part of the Development Agenda of the World Trade Organization (WTO),²⁷ as well as part of bilateral and plurilateral free trade agreements.²⁸

Hence, when producers turn to outside resources to take advantage of a partly delocalised production model (that may help to increase production quantities and lower costs), this delocalisation unequivocally breaches what I call the “GI-protection bargain”—the fact that GIs are protected because they inform consumers about the link between the natural and human factors of the GI-denominated areas and the products coming from those areas, and therefore provide economic incentives to invest and maintain economic capital in those same areas. To borrow Dev Gangjee’s words, GIs are protected because they “must *actually* provide useful information to consumers in an established market” and for their “*potential*”, that is, the possibility to “generate improved incomes and tangible benefits for groups of rural or marginalized groups”.²⁹

In contrast, when GIs do not accurately reflect the geographical origin of the products, they essentially become marketing tools for local producers and act as unjustified barriers to entry for competitors breaching the quid pro quo that justifies their legal protection.³⁰ More problematically, as opposed to offering accurate information to consumers, GIs may become vehicles for consumer confusion and deception through the offering of inaccurate information about the products’ geographical origin, further leading to misunderstandings of other characteristics, including product safety and health and environmental aspects related to product manufacturing and distribution.³¹ In addition, the blame and shame that may incur from any problems with products not fully originating from GI-denominated regions could be erroneously passed along to other products that are entirely produced in their GI-denominated areas.³² Attempts to distinguish these “problematic” products as not fully originating from GI-denominated regions could further confuse consumers. Thus, product demand for producers in GI-denominated areas could still drop despite the clarification.

As I conclude below, this type of expansion in scope of GI protection should not be accepted because it constitutes a misuse of the rationale behind GI protection, which could lead to the creation of potentially perpetual rights on GIs (whose protection, like trademarks, is not limited in time) without an adequate bargain for the public interests and market competition. Certainly, narrowing the definition of GIs seems like a fight between David and Goliath. Far from being merely the emblem of rural development, GIs are

²⁶ e.g. Hughes, “Champagne, Feta, and Bourbon” (2006) 58 Hastings L.J. 299, 345.

²⁷ WTO, Declaration on the TRIPS Agreement and Public Health, November 14, 2001, WT/MIN(01)/DEC/2. See also Gail E. Evans and Michael Blakeney, “The Protection of Geographical Indications after Doha: Quo Vadis?” (2006) 9 J. Int’l Econ. L. 575.

²⁸ Recent examples in this respect are the concluded negotiations for a free trade agreement between the European Union and Singapore, and the ongoing negotiations for similar agreements between the European Union and Canada, India, Malaysia, Vietnam, and the United States, respectively. An updated list of the current trade negotiations undertaken by the European Union is available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf [Accessed October 22, 2014].

²⁹ Gangjee, *Relocating the Law of Geographical Indications* (2012), p.183.

³⁰ Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming) (noting that “[i]his may also provide a contractarian normative basis to protect GIs because consumers are more likely to benefit when those conditions are present, an argument that has been made also with respect to trademarks”).

³¹ TRIPs Agreement art.22(2).

³² Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming).

also fundamental trade instruments in the global marketplace and promote very large economic interests, as the recent wave of international trade negotiations between the European Union and several other countries to secure exclusive rights on GIs directly exemplifies. Still, it remains crucial to highlight the geographical incoherence currently characterising the definition in art.22(1) of TRIPs and to address this incoherence in order to restore legitimacy to the debate over GI protection. To instead insist on a broader and potentially misleading interpretation of geographical names may undermine local development in the long term as well as dilute the value of GIs generally.

In territorio veritas: The case for geographical coherence and a literal interpretation of “geographical origin” in art. 22(1) of TRIPs

As I highlighted above, the criticisms of the broad and incoherent definition of GIs under art.22(1) of TRIPs are certainly on point. The expansion of GI protection beyond the recognised function of GIs as indicators of accurate geographical origin—and, in turn, incentives for local development—is an unwelcome development for the intellectual property system. More generally, however, these criticisms should not undermine the relevance of GIs as legitimate intellectual property rights when limited to products that are grown and produced locally in their GI-denominated region. As stated before, GIs represent an important tool for consumer protection and economic development and play a constructive role within the intellectual property system.³³

Yet, to effectively fulfil this role, GIs cannot be untied from the geographical areas to which they belong—the geographical link remains both the essence of GIs and the only reason why GIs should be protected when applied to commercial products. In contrast to this principle, the primary objective of the corporate lobbyists who have pushed for the more flexible definition in art.22(1) and the introduction of the notion of “reputation” in this definition, is to secure exclusive rights over GIs’ “evocative power”³⁴ in order to gain a competitive market advantage—and to possibly turn to non-local ingredients and labour should the need arise.

This, however, does not have to be the ending chapter of the GI story. On the contrary, the international community should seriously consider a categorical shift away from this misuse of the rationale behind GI protection, by instead adopting a more rigorous and narrower interpretation of the terminology “geographical origin”. To this end, in this Part, I highlight that the international community could consider limiting the scope of GI protection to a literal interpretation of these terms to avoid the degeneration of GIs into absolute rights in geographical names in the absence of accurate geographical contexts, with negative effects on consumers, competition, and the local economies that GIs are supposed to help support.

In this respect, even though difficult to achieve in practice, the international community could amend the text of art.22(1) and adopt a narrower and more geographically coherent definition of GIs, which would be limited to those names that accurately identify the geographical origin of the products to which they are affixed. In particular, the definition in art.22(1) could be realigned with a stricter *terroir* approach by removing product “reputation” from the qualifying elements for GI protection in addition to the quality and characteristics of the products. To emphasise the necessity of a strict link between the geographical area and the GI-denominated product, the word “essentially” could also be removed from the provision. Thus, GIs could be defined 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 or other characteristic of the good is attributable to its geographical origin”.

³³ Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming).

³⁴ Hughes, “Champagne, Feta, and Bourbon” (2006) 58 *Hastings L.J.* 299, 305.

Alternatively, the word “essentially” in the current text of art.22(1) could be substituted with “exclusively” or, although less preferred, with the wording “exclusive or essentially” as is currently stated in the Lisbon Agreement. Here again, this language would better reflect that GI protection depends on a very high level of geographical connection between the products and the GI-denominated areas, and generally on an “exclusive” link between these two—“essentially” remaining merely an exception and not the general rule, should the international community prefer the language that is currently used in the Lisbon Agreement.

Still, I am fully aware of the difficulties—technical and political—surrounding the possibility of an amendment to TRIPs.³⁵ However, a change in this direction remains necessary in order to realign the rationale for GI protection with its application in practice. Moreover, if an amendment to TRIPs is too difficult to pursue at the international level, national legislators could instead consider a stricter interpretation of GIs at the local level.³⁶ To this end, TRIPs additionally prohibits any misleading use of GIs in art.22(2) and permits “interested parties” to oppose:

- “(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 goods*”.

The application of GIs to partially de-localised products or to products using ingredients from outside the GI-denominated area could be seen as a violation of this provision—which must be implemented into national laws and not only allows GI producers to oppose the use of geographical names by competitors located outside the region, but also allows consumers and competitors that may be “interested” in opposing any misleading use of GIs by anyone, including GI producers.

In contrast, without renewed attention to this matter, national laws could further broaden the definition and regulation of GIs. In this respect, one of most intricate examples of the regional regulation of GIs is in the European Union. Notably, Council Regulation 1151/2012 on quality schemes for agricultural products and foodstuff defines “protected geographical indications” (PGI) as a name identifying a product:

- “(a) originating in a specific place, region or country; (b) whose given quality, reputation or other characteristics is essentially attributable to that geographical origin; and (c) at least one of the production steps of which takes place in the defined geographical area.”³⁷

The same Regulation offers a more stringent definition for “designation of origin” (PDO) as identifying only products entirely produced in the relevant area,³⁸ even though the same Regulation allows raw materials—specifically animals, meat and milk—that are used for PDO-designated products recognised in the country of origin before May 1, 2004, to nonetheless originate from outside the relevant geographical area.³⁹ A similar approach is adopted under Council Regulation 479/2008 (Wine Regulation),⁴⁰ which defines and regulates PDOs and PGIs for wines, while Council Regulation 119/2008 (Spirits Regulation)⁴¹ only refers to PGIs for spirits.

Hence, the story of GI protection at the international level does not need to mirror the modern European system.⁴² Instead, the international debate should strive for a more coherent position and converge on the

³⁵ Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming).

³⁶ For a detailed analysis of the French system of appellation of origin, see Gangjee, *Relocating the Law of Geographical Indications* (2012), p.21.

³⁷ Regulation 1151/2012 of November 21, 2012 on quality schemes for agricultural products and foodstuff [2012] OJ L343/1, art.5(2) (Quality Schemes Regulation).

³⁸ Quality Schemes Regulation art.5(1).

³⁹ Quality Schemes Regulation art.5(3).

⁴⁰ Council Regulation 479/2008 on the common organization of the market in wine, amending Regulations 1493/1999, 1782/2003, 1290/2005, 3/2008 and repealing Regulations 2392/86 and 1493/1999 [2008] OJ L148/1, arts 34(1)(a)–(b) (Wine Regulation).

⁴¹ Regulation 110/2008 of January 15, 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirits drinks and repealing Council Regulation 1576/89 [2008] OJ L39/16, art 15 (Spirits Regulation).

⁴² I express this critique as an Italian, born and raised in the City of Bologna, which has been repeatedly named the gastronomic capital of Italy. I personally treasure the gastronomic and culinary tradition of Italy, and Europe in general, and I fully believe that a system of GI protection grounded on “geographical origin” would benefit localities more than the current system, which seems targeted primarily towards medium and large agricultural

theory that GIs ought to be protected based on consumer protection and local incentive theories. In this respect, reframing GI protection within stricter geographical boundaries could also restore the legitimacy of the GI debate—currently plagued by the accusations that GIs are nothing more than disguised subsidies and protectionist instruments—and this in turn could facilitate better re-negotiations on the expansion of GI protection and the creation of an International Registry as provided by art.24(1) of TRIPs.

As noted above, despite the opposition to GIs and the excesses that everyday practice in this area has highlighted, GIs remain a relevant tool for consumer protection and the economic development of localities, in both developed and developing countries. Notably, GIs convey information to consumers as well as promote local production, incentivise local investment, and reward local producers for the high quality of their products, in terms of both social and environmental responsibility.⁴³ Without GI protection, producers outside of the GI-denominated areas (from large conglomerates to individual businesses) could unfairly exploit geographical names through non-local products even when these products have no connection to the original GI-denominated goods. Certainly, producers of these products would argue that these geographical names are generic in their countries, but these claims are increasingly less valid since globalisation facilitates travel and social media facilitate information in such a way, that today's consumers are much better educated about the geographical origin of many products, even when these products originate from remote regions in foreign countries.

In some instances, it remains true that geographical terms are used outside the original location by immigrant communities, whose members emigrated from GI-denominated regions taking with them the original *savoir faire* used by producers in those regions, and continued to produce the same products with the same *savoir faire* in their new countries of residence. To accurately identify these immigrant communities remains difficult, however, and in many instances the original *savoir faire* has been subjected to changes with the passing of time and the introduction of new ingredients and manufacturing techniques from the “new world”. Accordingly, granting immigrant communities special consideration based on a past connection with the GI-denominated region compared to other outside competitors without the same connection also defeats the basic purpose of GI protection—that of indicating the “geographical origin” of the GI-denominating products. Moreover, these geographical terms are very frequently used by non-immigrants (or by businesses that are only in part owned by immigrant communities), whose intention is primarily to facilitate the sale of their products by evoking the idea of foreign localities and a connection with those localities. Ultimately, regardless of who effectively uses geographical names outside GI-denominated regions—immigrant communities or unrelated third parties—the use of GIs beyond their geographical context represents a source of inaccurate information for consumers. Similarly, any out-of-context use of GIs—by immigrant communities or unrelated parties—can damage the name and reputation of the localities from which the GI-denominated products originated. For example, free-riding, non-authentic products of lower quality may also tarnish the reputation of GIs. This could result in decreased sales for GI producers and, in turn, damage for their localities in both revenues and future sales.⁴⁴

Last but not least, GIs promote another set of important interests—the culture-related interests of the localities that they represent. Namely GIs promote awareness of the traditional knowledge and traditional skills needed to produce GI-denominated products, and, in turn, promote the conservation of this knowledge and these skills. GIs' role in promoting local culture is not limited to traditions and encompasses the variations and adaptations of local culture through the local human factor—i.e. culture in its dynamic

or food-related industries rather than rural or local development. See also Annette Kur and Sam Cocks, “Nothing but a GI Thing: Geographical Indications under EU Law” (2007) 17 *Fordham Intell. Prop. Media & Ent. L.J.* 999; Annette Kur, “Quibbling Siblings—Comments” (2007) 82 *Chicago-Kent L. Rev.* 1316.

⁴³ Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming). See also Margaret Ritzert, “Champagne is from Champagne: An Economic Justification for Extending Trademark-Level Protection to Wine-Related Geographical Indicators” (2009) 37 *AIPLA Q.J.* 191, 212–220.

⁴⁴ e.g. Michelle Agdomar, “Removing the Greek from Feta and Adding Korbel to Champagne: The Paradox of Geographical Indications in International Law” (2008) 18 *Fordham Intell. Prop. Media & Ent. L.J.* 541, 586–587.

interpretation.⁴⁵ Therefore, GIs should not be (mis)appropriated, because this could not only have long-lasting economic consequences, but also negatively impact on local culture and traditions.

Ultimately, in as much as expansive GI protection favours a certain set of corporate interests—those with a long agricultural or cultural tradition like the European Union and other parts of the “old world”—the lack of more appropriate GI protection favours another set of corporate interests—those producing similar products in the “new world” selling under names that are similar to the traditional geographical names without sharing any geographical link with those locations. Disputes over terms like Budweiser, Champagne, or Parma between “new” and “old” worlds are some illustrious examples of these conflicting interests.⁴⁶ Yet, these terms *are* geographical terms, which identify specific products coming from specific areas in Europe, and it is unquestionable that the North American companies that use these or similar terms as trademarks or as a generic description of their products certainly do so in part to exploit the geographical associations generated by these terms. Here again, this use of GIs outside their geographical context should not be permitted, in as much as GI producers themselves should not be permitted to shortcut the necessary geographical link that qualifies their own products for GI protection.

In summary, the debate over GI protection should converge and recognise that geography—that is, “geographical origin”—is the only reason to grant GI protection and the right to prevent third parties’ use of geographical names to identify their products. In this respect, a system of protection based on a stricter *terroir* approach makes a much more compelling case in favour of GIs. Of course, opponents will continue to criticise GI protection arguing that many geographical names are generic in the “new world”—like Champagne or Parmesan—and that today’s modern technology can replicate the conditions of any *terroirs* almost anywhere.⁴⁷

Hence, as I argued before, GI opponents should recognise that GIs secure exclusive rights only on the names of the products and not on the products themselves, which in turn implies that competitors can produce identical goods for identical markets. For example, Wisconsin cheese makers are not prevented from making mozzarella-type cheese with buffalo milk or blue-veined-type cheese, they just cannot call these products Mozzarella di Bufala Campana or Roquefort (or Gorgonzola), respectively. Moreover, as noted above, GI protection under TRIPs does not extend to the use of GIs in descriptive and comparative advertising settings (i.e. to promote their goods as “style”, “like”, “type” etc.) with the exception of GIs for wines and spirits under art.23.⁴⁸ As long as outsiders use GIs for comparative purposes without creating confusion on the part of the public about the actual origin of the products, these uses are permitted. This again makes the case of GI protection more appealing to critics, as long as producers use GIs in their accurate geographical contexts.

Conclusion

Despite suggesting that the concept of “geographical origin” is fundamental to qualifying for GI protection, the analysis of the GI debate and the details surrounding the normative foundation of this protection demonstrate that this geographical link has progressively been broadened to accommodate corporate and national interests, primarily coming from businesses from the European Union and other countries with GI-intensive industries. As a result, under the current legal definition of GIs under TRIPs, GI-denominated products may not originate entirely from the GI-denominated areas, yet producers in these areas retain the exclusive rights to use and to exclude others from using the GIs, and therefore maintain the exclusivity

⁴⁵ Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming) (referring to the definition of intangible cultural heritage in art.2(1) of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003).

⁴⁶ Calboli, “Of Markets, Culture, and Terroir” in Gervais (ed.), *Research Handbook in International Intellectual Property* (forthcoming).

⁴⁷ Hughes, “Champagne, Feta, and Bourbon” (2006) 58 *Hastings L.J.* 299, 357; Raustiala and Munzer, “The Global Struggle over Geographic Indications” (2007) 18 *Eur. J. Int’l L.* 337, 359.

⁴⁸ In my scholarship, I have called for a change in art.23 permitting these comparison also for GIs for wines and spirits. Calboli, “Expanding the Protection of Geographical Indications of Origin under TRIPs” (2006) 10 *Marq. Intell. Prop. L. Rev.* 181, 202.

to evoke the positive values generally associated with those names. Against this status quo, it is difficult to argue that GI protection is only about informing consumers of the origin and the associated characteristics of GI-denominated products, and not also (or primarily) about securing a monopoly over the evocative value of GIs in the marketplace.

As I noted in this article, the definition of “appellations of origin” in the Lisbon Agreement opened the door to the partial de-localisation of products. Moreover, TRIPs’ inclusion of the word “reputation” in the definition of art.22(1) clearly validated not only the trend of products not entirely made in the GI-denominated regions, but also the possibility of securing a monopoly on the exploitation of the value of the reputation associated with GIs on a commercial scale. Not surprisingly, in an increasingly competitive (and less subsidised) marketplace for both agricultural and non-agricultural products, the value of GIs as signifiers of quality, tradition, and, in turn, reputation, can be paramount to securing a large market share against competing products. This status quo, however, runs directly against the rationale for GI protection—providing accurate information to consumers about the geographical origin of the products, while offering incentives to local communities to invest in local production.

In this article, I proposed that GI protection should be limited to those that accurately identify geographical origin. It is only by adopting a coherent approach to the geographical link encapsulated in GIs that the international debate can be reopened, and a more constructive approach can be found. This is important for the world economy. Even though GI protection was primarily pushed into the TRIPs negotiations by developed countries—namely, the European Union—developing countries can also benefit from GIs as tools for national development since GIs can protect and promote the local agricultural, culinary, and artisanal products, thereby promoting investment in these countries. Furthermore, the role of GIs transcends purely economic interests. In particular, GIs can incentivise the conservation of traditional knowledge while promoting local labour and acting as guarantors of safety and other important product characteristics.

Certainly, my proposal to restrict GI protection and permit the use (and the right to exclude others from the use) of GIs only on products entirely (or at most “entirely or essentially”) originating from the GI-denominated regions may not appeal to many—in particular businesses that have specific interests in securing (larger quantities or cheaper) raw materials and labour outside of those regions. Likewise, the obstacles to amending the definition of GIs in TRIPs may prove insurmountable, considering the current polarisation of the GI debate worldwide, and the increasing shift away from the WTO in favour of bilateral and plurilateral FTAs. Still, despite these unavoidable road blocks, it remains crucial to repeat that “geographical origin”, intended as genuine derivation from the land, should be the *only reason* for protecting GIs as intellectual property rights. Otherwise, the words of GI opponents would ring true, and GIs will be just another monopoly and a disguised subsidy, favouring corporate interests and not benefiting, but rather misinforming and deceiving, consumers and potentially damaging local economies. In conclusion, the solution to the GI debate lies in geography.