

COMPETING CONCEPTIONS OF GEOGRAPHICAL INDICATIONS: CONTINUING CONFLICTS**Abstract**

A few hundred years ago, virtually everything was made with local components. Certain areas gained clout for their unique products: wine, cheese, rugs – even watches and violins. Today, many artisan goods still depend on specific ingredients and require considerable skill. Modern transportation systems have made the world's unique products widely available, and others have made imitations, free-riding on the goodwill created by years of consistent quality.

To combat this free-riding, Geographical Indications (GIs) were created to provide some control over who could use the name of a place that is famous for what it produces. There is, however, no consensus as to how strong these protections should be or whether they should be uniform across GI for all types of goods. The U.S. argues that GIs are a form of trademark, and so may be used by competitors so long as there is no consumer confusion. In contrast, the EU seeks to prevent nominative uses such as “Roquefort-like” for all GIs.

The TRIPS Agreement was signed in 1994 and provides some international standardization of GI protections. TRIPS strikes a compromise between the U.S. and EU views, giving broader protections to GIs on wines and spirits and narrower protections to all other GIs. However, the EU is actively seeking broad protections for all GIs. The U.S. vigorously opposes the expansion of protections.

This paper examines GIs from their origin to the present day, examining the rise of GIs. It moves on to compare the two primary conceptions of GIs through a dispute between the U.S. and EU. It concludes with an examination of whether or not the U.S. system is capable of providing the uniform strong protections that the EU seeks.

I. Introduction

Centuries ago, villagers in France ate pungent cheese, the Scots drank Scotch, and the Persians adorned their floors with beautiful rugs. Over the years these regions developed reputations for their unique products. Fast forward to today. We live in a world where information is exchanged instantaneously and one can travel to the other side of the world in

well under a day. In today's fast-paced world, how do we protect the quality and integrity of products with a reputation linked to their place of origin against free-riders?

A Geographic Indication ("GI") is any word or phrase that "identify[ies] a good as originating in the territory . . . where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."¹ Classic examples of such products include Roquefort cheese, Scotch whisky, and Vidalia onions.² These products, however, all clearly derive some of their qualities from their place of origin. Other GIs, such as Swiss Watches,³ have no land-attributes connection and are based solely on reputation.

Now that we know what GIs are, what do we do with them? What protections should we provide? Further, are existing legal systems capable of providing the protections we deem appropriate? It is often helpful to start at the beginning, so now we turn to a brief history of GIs.

II. A Brief History of Geographic Indications

a. Terroir and the Origin of Appellations d'Origine Controlees

The clearest historical precursor to GIs can be found in the French appellations d'origine controlees ("AOCs"), based on the concept of *terroir*. While "*terroir*" does not translate cleanly into English, it is based on the idea that the essential characteristics of a product come from the land in which it is produced. In other words, "the local producers are entitled to exclusive use of a product name because no one outside the locale can truly make the same product."⁴ AOCs only protect products whose properties have a nexus with their place of production.

Accordingly, AOCs necessarily have a narrower scope than GIs.⁵ While AOCs may have a

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations art. 22(1) (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1125, *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm [hereinafter TRIPS].

² U.S. Trademark Registrations 571,798 (filed Feb. 13, 1952) (ROQUEFORT certification mark owned by community of Roquefort) and 1,709,019 (filed Feb. 2, 1990) (VIDALIA certification mark owned by the Georgia Dept. of Agric.); 27 C.F.R. § 5.22 ("Scotch whisky' is whisky which is a distinctive product of Scotland").

³ U.S. Trademark Registration No. 3,047,277 (filed Aug. 16, 2002).

⁴ Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications*, 58 HASTINGS L.J. 299, 301 (2006). Note that while *terroir* is the primary theoretical underpinning of EU arguments for stronger protection of GIs, it is in and of itself a contested concept. *See Id.* at 357-68.

⁵ *E.g.*, Ruth L. Okediji, *The International Intellectual Property Roots of Geographical Indications*, 82 CHI.-KENT L. REV. 1329, 1341 (2007) (internal citations omitted). Another important difference between AOCs and GIs warrants mentioning despite being largely outside the scope of this paper. AOCs are tied to a specific geographical region, and do not have an owner as such. Because of this, the right to use an AOC cannot be sold, and thus AOCs arguably cannot be described as property, intellectual or otherwise. Accordingly, an AOC must be protected under a *sui generis* doctrine. *See* Louis

narrower scope than GIs as a whole, the protection afforded to the holder of an AOC is considerably broader, allowing them to restrict comparative or descriptive uses such as “Champagne-like.”⁶ Given the tensions of scope and strength of protections, it will be helpful to examine previous efforts to internationally codify and harmonize protection of both AOCs and GIs.

b. International Standardization of AOC Protection

There have been many international treaties and agreements involving GIs over the years.⁷ Of particular note to this paper are the Paris Convention on Industrial Property of 1883 and the Lisbon Agreement on the Protection of Appellations of Origin and their International Registration of 1958.⁸

i. The Paris Convention

“[T]he Paris Convention was the first multilateral agreement to prohibit the use of false GIs.”⁹ However, while the Paris Convention nominally protects “indications of source or appellations of origin,” its focus is on preventing false advertising and consumer confusion rather than setting out *sui generis* protections.¹⁰ Indeed, the Paris Convention did not “establish a rationale for GIs as such; instead, consistent with the primary purpose of preventing deception, [it] devised strong protection for cross-border treatment for GIs.”¹¹ While not attempting to address the entire breadth of GIs, the Lisbon Agreement sought to define protections for AOCs and served as a foundation for TRIPS.¹²

ii. The Lisbon Agreement

The Lisbon agreement defines “appellation of origin,” the English translation of the French appellations d'origine controlees, as “the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics

Lorvellec, *You've Got to Fight for Your Right to Party: A Response to Professor Jim Chen*, 5 MINN. J. GLOBAL TRADE 65, 68-69 (1996).

⁶ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, as last revised Jan. 1, 1994, 923 U.N.T.S. 205, available at http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.htm [hereinafter Lisbon Agreement].

⁷ E.g., Hughes *supra* note 4 at 311 (citing CAROLINE BUHL, LE DROIT DES NOMS GEOGRAPHIQUES 323 (1997)).

⁸ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305, available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html [hereinafter Paris Convention]; Lisbon Agreement, *supra* note 6.

⁹ Stefania Fusco, *Geographical Indications: A Discussion on the Trips Regulation After the Ministerial Conference of Hong Kong*, 12 MARQ. INTEL. PROP. L. REV. 197, 204 (2008) (internal citation omitted).

¹⁰ Paris Convention, *supra* note 8 at art. 1(2); Dev Gangjee, *Quibbling Siblings: Conflicts Between Trademarks and Geographical Indications*, 82 CHI.-KENT L. REV. 1253, 1261 n.41 (2007).

¹¹ Okediji, *supra* note 5, at 1342.

¹² *Id.* at 1341-42.

of which are due exclusively or essentially to the geographical environment, including natural and human factors.”¹³ Inside its signatories, the Lisbon Agreement prevents of an AOC against “usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind,’ ‘type,’ ‘make,’ ‘imitation,’ or the like.”¹⁴

The Lisbon agreement allows a signatory to register protected AOCs with the World Intellectual Property Organization, after which each signatory must protect the AOC and its translations within the signatory’s borders unless the signatory “declare[s] that it cannot ensure the protection of an appellation of origin whose registration has been notified to it.”¹⁵ While the Lisbon Agreement defines “AOC” as a narrow subspecies of GI,¹⁶ its protections are very broad. “[T]he holder of an appellation as such . . . has the right to stop any use in a descriptive phrasing such as “Port-like fortified wine,” “imitation Chianti,” or “Roquefort-style cheese.”¹⁷ This broad protection is in stark contrast with some countries’ trademark-like system of protection.¹⁸

One key problem with both the Paris Convention and the Lisbon Agreement was they simply did not have many signatories. Indeed, the Lisbon Agreement – with its protection of AOCs – currently has only 26 signatories,¹⁹ and none of the countries with the four highest GDPs are a signatory.²⁰ Nevertheless, the Lisbon agreement is particularly important because it serves as one basis for TRIPS’s protections of GIs, which reflect the global tension between AOC and Trademark-like conceptions of GIs.²¹

¹³ Lisbon Agreement, *supra* note 6 art. 2(1).

¹⁴ *Id.* at art. 3.

¹⁵ *Id.* at art. 5(3).

¹⁶ AOCs under the Lisbon Agreement must be recognized as such in their country of origin. *Id.* at art. 1(2). Accordingly, GIs protected as certification marks and the like in their countries of origin do not qualify for protection. Hughes, *supra* note 4 at 312-13 n.79 and accompanying text.

¹⁷ Hughes, *supra* note 4, at 312-13.

¹⁸ *See id.* at 382. In the context of trademarks, while comparative advertising is acceptable and even encouraged in the U.S., the EU heavily restricts such comparisons. *See* Case C-487/07, L’Oréal SA v. Bellure NV (Judgment of the ECJ, June 18, 2009) (“[A]n advertiser who states explicitly or implicitly in comparative advertising that the product marketed by him is an imitation of a product bearing a well-known trade mark” has engaged in “unlawful comparative advertising.”). Accordingly it could be argued that the EU affords a level of protection to famous marks approaching that of AOCs.

¹⁹ World Intellectual Prop. Org., Contracting Parties, Lisbon Agreement, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=10 (last visited Dec. 13, 2009).

²⁰ *See* The World Bank, Gross domestic product 2008, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (last visited Dec. 13, 2009).

²¹ *E.g.*, Hughes, *supra* note 4, at 312 (“Article 10bis(3) [of the Lisbon Agreement] is nonetheless important because it became a launching point for the current TRIPS provisions on GIs.”).

c. GIs: AOCs or Trademarks?

A few hundred years ago, virtually everything was made with local components, and “exotic goods came from exotic places if they came at all.”²² Times have changed dramatically, however, since terroir and AOCs came into being. Many contemporary artisan goods remain highly dependent on the nature of their components and the skill of their maker. However, we now live in an age where a brand of beer brewed in over ten countries can have “the same refreshingly drinkable taste, wherever it is sold [throughout the world].”²³ Given modern transportation systems, there is no reason a rugmaker in Brooklyn with the proper skills could not import the raw materials to make what is essentially a Persian rug.

Accordingly, many countries have strongly resisted international *sui generis* recognition of AOCs, arguing that GIs can be sufficiently protected using existing trademark (specifically, certification mark) systems.²⁴ This tension between AOC and trademark-like²⁵ protections resulted in two different protective systems being codified in TRIPS.²⁶ Article 22 protects GIs under a trademark-like framework, while Article 23 prevents third parties from using GIs on wines or spirits “even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.”²⁷

III. Present Day: The Agreement on Trade-Related Aspects of Intellectual Property Rights

The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), developed and now overseen by the World Trade Organization (“WTO”), came into effect on January 1, 1994 and is binding on the WTO’s 153 member states.²⁸ TRIPS addresses a broad

²² *Id.* at 299.

²³ ANHEUSER-BUSCH, INC., BUDWEISER: ONE WORLD ... ONE BEER 2, <http://www.anheuser-busch.com/mediakits/08/08%20Budweiser%20Quality.pdf> (last accessed Dec. 12, 2009).

²⁴ See, e.g., Lynne Beresford, *Geographical Indications: The Current Landscape*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 979 (2007) (arguing that the U.S. protection of GIs as service marks satisfies TRIPS art. 22).

²⁵ I am glad “AOC” is not an AOC, as then I could not say “AOC-like.”

²⁶ E.g. Hughes, *supra* note 4, at 301 (“For geographical indications, the TRIPS Agreement forged a complex substantive compromise between European and ‘New World’ interests. Unsurprisingly, the compromise included an agreement to put off the full battle for another day.”); Beresford, *supra* note 24, at 985-96.

²⁷ See TRIPS, *supra* note 1. arts. 22-23. Note the similarity to the protections under art. 3 of the Lisbon Agreement.

²⁸ World Trade Organization, Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (WTO has 153 members as of Jul. 23, 2008) (last accessed Dec. 13, 2009); World Trade Organization, Intellectual property: protection and enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last accessed Dec. 13, 2009). Note that there is considerable tension between WIPO, which administers the majority of international agreements relating to intellectual property including the Paris Convention and the Lisbon Agreement, and the WTO,

array of intellectual property including patent, copyright, GIs, and industrial design, and “establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members.”²⁹ One key principle of TRIPS is the prevention of discrimination against foreigners,³⁰ which is accomplished in large part by requiring “national treatment,” which means that each Member must “accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.”³¹ This principle of national treatment is discussed further in Part IV of this paper, which examines the tension between AOC and Trademark-like conceptions of GIs through a dispute between the United States (“U.S.”) and the European Union (“EU”).³²

a. Treatment of GIs under TRIPS

It may be helpful to think of TRIPS as having four key functions regarding GIs: (1) defining GIs more broadly than previous definitions of AOCs; (2) setting minimum standards of protection; (3) creating stricter protections for wines and spirits; and (4) binding members to work towards a uniform system of protections for wines and spirits.³³

Article 22(1) of TRIPS defines a GI as any indication that “identify[ies] 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.”³⁴ Two key differences from the Lisbon Agreement’s definition of an AOC are immediately apparent. First, Lisbon protects only “geographical name[s],”³⁵ while TRIPS is not limited to just words.³⁶ Second, while both Lisbon and TRIPS require a connection between the qualities of a good and the place of origin,³⁷ TRIPS adds “reputation” to the list of

which administers TRIPS. *See generally* Ruth L. Okediji, *WIPO-WTO Relations and the Future of Global Intellectual Property Norms*, 39 NETHERLANDS YEARBOOK INT’L L. 69 (2008).

²⁹ WTO, Intellectual property: protection and enforcement, *supra* note 28.

³⁰ *Id.*

³¹ TRIPS, *supra* note 1 art. 3(1).

³² “Since 1 December 2009 ‘**European Union**’ has been the official name in the WTO as well as in the outside world. Before that, ‘**European Communities**’ was the official name in WTO business for legal reasons, and that name continues to appear in older material.” World Trade Organization, European Union or Communities?, http://www.wto.org/english/thewto_e/countries_e/european_union_or_communities_popup.htm (emphasis in original) (last accessed Dec. 23, 2009).

³³ *See Hughes, supra* note 4, at 313 (internal citations omitted). Hughes also identifies the complex system of exceptions to the GI provisions as a key component; however, such exceptions are beyond the scope of this paper.

³⁴ TRIPS, *supra* note 1 art. 22(1).

³⁵ Lisbon Agreement, *supra* note 6 art. 2(1).

³⁶ Hughes, *supra* note 4, at 314 (“This definition is not limited to words, so images and packaging are potentially included.”).

³⁷ *See Id.* at 315.

characteristics that make a GI eligible for protection.³⁸ As such, TRIPS could be read as removing AOCs' land-characteristics connection.³⁹ This allows GIs such as "Swiss Watch," whose "quality and characteristics . . . are [not] due exclusively or essentially to the geographical environment" in which they were produced.⁴⁰

TRIPS Article 22(2) concisely describes signatories' obligations to protect GIs generally:

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

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

(b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention

As is clear, the TRIPS obligations focus on consumer confusion and unfair competition.

Accordingly, the minimum protections specified for GIs under TRIPS can be easily satisfied by a trademark-like system as in the U.S.⁴¹

Article 23 of TRIPS provides for stronger protections for wines and spirits. Specifically, it requires each Member to prevent the use of GIs on wines or spirits "not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like."⁴² This language bears a striking resemblance to the protections afforded AOCs under the Lisbon Agreement.⁴³

Finally, Article 23(4) calls for negotiations "concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection."⁴⁴ As discussed below in Part V, the negotiations required by Article 23 have proven to be highly politicized, with the strength and nature of the proposed systems tracking the AOC/Trademark divide.

TRIPS attempts to harmonize the WTO Members' highly divergent interests into a single and enforceable international agreement. Of course, given the international tensions relating to Geographic Indications, it was inevitable that disputes would arise.

³⁸ TRIPS, *supra* note 1 art. 22.

³⁹ Hughes, *supra* note 4, at 315-16.

⁴⁰ See Lisbon Agreement, *supra* note 6 art. 2(1); Hughes, *supra* note 4, at 315-16.

⁴¹ See generally Beresford, *supra* note 24.

⁴² TRIPS, *supra* note 1 art. 23(1).

⁴³ Lisbon Agreement, *supra* note 6 art. 2(1).

⁴⁴ TRIPS, *supra* note 1 art. 23(4).

IV. EU post-TRIPS GI protections: The U.S./EU Dispute

Ironically, after the EU successfully obtained protections for GIs under TRIPS, it found itself dragged in front of the WTO's Dispute Settlement Body⁴⁵ ("DSB") for allegedly failing to meet its TRIPS obligations.⁴⁶ Understanding the dispute requires a brief summary of the then-current EU treatment of GIs.

a. The EU's Pre-Dispute Protections

The dispute centered on the 1992 EU Council Regulation No 2081/92 (the "1992 Origin Regulation"),⁴⁷ which provided different protections to GIs and Designations of Origin ("Designations").⁴⁸ Following the DSB's ruling, the 1992 Origin Regulation was replaced by the 2006 Origins Regulation.⁴⁹

The 1992 Origin Regulation defines both Designations and GIs as "the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff," and can only be applied to products "originating in that region, specific place or country."⁵⁰ Designations, however, only apply to products "the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined geographical area."⁵¹ Designations must have the land-product connection at the heart of the French concept of *terroir*. GIs, on the other hand, apply to products whose "specific quality, reputation or other characteristics [are] attributable to that geographical origin."⁵²

⁴⁵ TRIPS falls under the auspices of the WTO, and is thus unique among international IP agreements as it gives member countries access to the WTO's enforcement mechanism, the DSB. See World Trade Organization, UNDERSTANDING THE WTO: SETTLING DISPUTES, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last accessed Dec. 15, 2009).

⁴⁶ See generally Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005), available at <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/174R.doc> [hereinafter DSB Report].

⁴⁷ *Id.* at ¶ 2.

⁴⁸ See generally Council Regulation 2081/91, *On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs*, 1992 O.J. (L 208) 1 (EC) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992R2081:EN:HTML> [hereinafter 1992 Origins Regulation].

⁴⁹ Council Regulation 510/2006, *On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs*, 2006 O.J. (L 93) 12 (EC) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R0510:EN:NOT> [hereinafter 2006 Origins Regulation].

⁵⁰ 1992 Origins Regulation, *supra* note 48 art. 2(2).

⁵¹ *Id.*

⁵² *Id.*

A Designation is narrower than a GI under TRIPS due to TRIPS's recognition of reputation. Conversely, a GI under the 1992 Origins Regulation covers a broader array of products than a GI under TRIPS, which requires the product's characteristics to be "essentially attributable" to the product's place of origin.⁵³

Under the 1992 Origins Resolution, a registered Designation or GI is protected from:

- (a) any direct or indirect commercial use of a name registered in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or insofar as using the name exploits the reputation of the protected name;
- (b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar;
- (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;
- (d) any other practice liable to mislead the public as to the true origin of the product.⁵⁴

While not identical, the protections afforded by the 1992 Origins Resolution are analogous to and stronger than those provided by TRIPS. Accordingly, countries outside of the EU were dismayed to find that the Origins Resolution failed to offer national treatment to non-EU GIs.

b. The Dispute

Under the 1992 Origins Resolution, GIs and Designations from countries outside of the EU were protected only if that country had adopted a system of protections equivalent to that of the EU.⁵⁵ In June of 1999, the U.S. initiated dispute settlement consultations with the WTO DSB, arguing that the 1992 Origins Resolution denied national treatment for American GIs in violation of TRIPS.⁵⁶

After the U.S. entered consultations with the DSB, in 2003 it was joined by fifteen other members of the WTO.⁵⁷ Later in 2003, Australia filed for parallel consultations, and was also

⁵³ Compare *id.* with TRIPS, *supra* note 1 art. 22 (emphasis added). See also Hughes, *supra* note 4 at 325.

⁵⁴ 1992 Origins Regulation, *supra* note 48 art. 13.

⁵⁵ *Id.* art. 12.

⁵⁶ Request for Consultations by the United States, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/1/IP/D/19 (June 7, 1999) available at <http://docsonline.wto.org/DDFDocuments/t/IP/d/19.DOC>. The U.S. Request included other claims that are not examined in this paper.

⁵⁷ MARSHA A. ECHOLS, GEOGRAPHICAL INDICATIONS FOR FOOD PRODUCTS: INTERNATIONAL LEGAL AND REGULATORY PERSPECTIVES 205 (2008).

joined by a host of WTO members.⁵⁸ The U.S. and Australian requests were consolidated in late 2003, and the panel issued a report in early 2005.⁵⁹

In a 178 page report,⁶⁰ the DSB agreed with the United States that “[t]he [1992 Origins] Regulation does not accord equal treatment because third country governments only comply voluntarily whereas EU member States have a legal obligation to do so.”⁶¹ Accordingly, the DSB held that the 1992 Origins Regulation did not satisfy the national treatment requirements of TRIPS.⁶² Approximately one year after the DSB Report, the EU replaced the 1992 Origins Regulation with the 2006 Origins Regulation, which sought to remedy the issue of national treatment.⁶³

c. Changes to EU Protections

Following the 2005 DSB Report, the EU replaced the 1992 Origins Regulation with the 2006 Origins Regulation.⁶⁴ The changes in the 2006 Origins Regulation are largely superficial except for the inclusion of national treatment. Indeed, the definitions of Designations and GIs survived virtually unchanged, as did the protections afforded to each.⁶⁵ The 2006 Regulation replaced Article 12, which previously limited EU protection to terms originating from countries providing GIs with the same level of protection as the EU. Further, the 2006 Regulation amended Article 5 to allow for registration of geographical names from outside of the EU so long as “the name in question is protected in its country of origin.”⁶⁶

V. TRIPS Article 23: The Current Debate

Article 23 binds the WTO members to participate in “negotiations . . . concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.”⁶⁷ This wording arguably provides for an optional system, limited to “those Members *participating*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ This page length refers to the English version of the opinion. Note also that the opinion addresses issues beyond that of the EU’s obligations to afford national treatment for GIs under TRIPS.

⁶¹ DSB Report, *supra* note 46 ¶ 7.244.

⁶² *Id.* ¶ 7.284.

⁶³ *See Id.*; 2006 Origins Regulation, *supra* note 49.

⁶⁴ *See* 2006 Origins Regulation, *supra* note 49.

⁶⁵ *Compare* 1992 Origins Regulation, *supra* note 48 arts. 2, 13 *with* 2006 Origins Regulation, *supra* note 49 arts. 2, 13.

⁶⁶ *Compare* 1992 Origins Regulation, *supra* note 48 arts. 5, 12 *with* 2006 Origins Regulation, *supra* note 49 arts. 5, 12.

⁶⁷ TRIPS, *supra* note 1 art. 23(4).

in the system."⁶⁸ The future of Article 23, however, is not so certain, with some countries arguing for both a mandatory system and to extend Article 23 protections beyond wines and spirits.⁶⁹

a. Proposed Systems

The two primary proposed implementations of TRIPS Article 23, rather predictably, reflect the AOC/Trademark divide: a mandatory system supported by the EU and an optional system supported by the U.S focused on an advisory GI database maintained by the WTO.⁷⁰

i. The EU Proposal

The EU system proposes a "multilateral system of notification and registration of geographical indications," overseen by the WTO.⁷¹ Each member seeking protection of its GIs would have to notify the WTO of those GIs. Other member countries then have eighteen months to lodge a reservation to that registration. If a country fails to lodge a registration in time, it is then bound to provide Article 23-level protections for the GI.⁷²

This system is particularly troubling from the U.S. perspective because, as discussed below, it pairs the mandatory protections with an extension of Article 23 protections to *all* GIs – not just GIs for wine and spirits.⁷³

ii. The U.S. Proposal

The United States supports a system encompassing only wines and spirits that "is strictly voluntary, and [in which] no Member shall be required to participate."⁷⁴ Participating members may – but are not required to – submit their GIs to the WTO to be entered into a database. In stark contrast to the EU proposal, the U.S. proposal's only substantive requirement is that "[e]ach Participating Member commits to ensure that its procedures include the

⁶⁸ *Id.* (emphasis added); Hughes, *supra* note 4, at 320 (citing Eleanor K. Meltzer, *TRIPs and Trademarks, or – GATT Got Your Tongue?*, 83 Trademark Rep. 18, 33 (1994)).

⁶⁹ See generally Stefania Fusco, *supra* note 9; Beresford, *supra* note 24, at 991 ("In the WTO TRIPs Council, the EC and certain other countries are calling to extend the protection given to GIs for wines and spirits in Article 23 to GIs used on any goods.") (internal citations omitted).

⁷⁰ Fusco, *supra* note 9, at 211-14 (internal citations omitted). While the two primary positions are typified by the EC and the U.S., those two actors are by no means the only WTO Members involved in the debate, which is considerably more nuanced than can be discussed here. See, e.g., *Id.* at 211-15.

⁷¹ Geographical Indications, Communication from the European Communities, TN/IP/W/11 (June 14, 2005) [hereinafter EC Proposal] available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/tn/ip/W11.doc>.

⁷² *Id.*; Fusco, *supra* note 9, at 211-13.

⁷³ EC Proposal, *supra* note 71; Beresford, *supra* note 24, at 990-94.

⁷⁴ Council for Trade-Related Aspects of Intellectual Property Rights, Submission by Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Korea, Mexico, New Zealand, Nicaragua, Paraguay, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, South Africa and the United States: Proposed Draft TRIPs Council Decision on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wine and Spirits, TN/IP/W/10/Rev2 (Jul. 24, 2008) [hereinafter U.S. Proposal] available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/tn/ip/W10R2.doc>.

provision to consult the Database when making decisions regarding registration and protection of trademarks and geographical indications for wines and spirits in accordance with its domestic law.”⁷⁵

b. Scope: Wines and Spirits or any GI?

As it currently reads, the stronger protections of Article 23 only apply to wines and spirits.⁷⁶ However, the European Union is actively seeking to extend the scope of GIs covered by Article 23:

[The EU seeks to extend Article 23’s] scope to geographical indications for all products. In a nutshell, the obligation to provide the legal means to interested parties to prevent certain types of imitations (Article 23.1), as well as the obligation to refuse or invalidate trademarks including geographical indications (Article 23.2) are extended to any situation in which the trademark or the imitation concerns a product of the same kind as the one protected by the geographical indication.⁷⁷

One key, and extremely contentious, component of this is the claw-back feature, where a WTO Member would be required to invalidate trademarks on GIs protected in their home country. This would require countries to protect as GIs terms that have become generic in that country and thus are not even eligible for trademark protection, such as “Parmesan” in the United States.⁷⁸

As one might imagine, the U.S. takes a dim view of this perceived power grab, characterizing the EU conception of GIs as being rooted in agricultural trade interests rather than intellectual property.⁷⁹ Indeed, Lynne Beresford, the Commissioner for Trademarks at the U.S. Patent and Trademark Office wrote that “the EU proposes to export the cost of domestic subsidies to the rest of the world in the form of a mandatory licensing fee – the value-added rent associated with world-wide monopoly rights in a given term.”⁸⁰ The EU and the U.S. champion starkly contrasting conceptions GIs – why we have them, what they should protect, and what protections should be offered – and neither side should be expected to lay down without a fight. Next, we turn to the question of whether the U.S. system is even capable of accommodating the protections that the EU seeks.

⁷⁵ *Id.*

⁷⁶ TRIPS, *supra* note 1 art. 23.

⁷⁷ EC Proposal, *supra* note 71.

⁷⁸ See Beresford, *supra* note 24, at 989-90.

⁷⁹ *Id.* at 985-86.

⁸⁰ *Id.* at 987.

VI. U.S. Law and TRIPS Article 23

One question that remains to be answered is how a strong TRIPS Article 23 regime will impact U.S. treatment of GIs. An examination of this question requires first that we explore the U.S. system for protecting GIs, and then turn to the fit between that system and the stronger of the proposed Article 23 implementations.

a. U.S. Treatment of GIs: The Trademark System

The United States feels that GIs, as defined by Article 22 of TRIPS, have the same functions as trademarks – namely, they serve to identify a source, assure a level of quality (high or low), and to protect the business interests of whomever commercialized the term in question.⁸¹ Accordingly, the U.S. uses its existing trademark system to satisfy its obligation to protect GIs under TRIPS.⁸²

In the U.S., a GI can be registered as a certification mark, a collective mark, or a trademark.⁸³ A trademark is a word, name, or phrase used to distinguish a party's good from goods manufactured or sold by others.⁸⁴ Trademark protection has also been extended to graphical marks and even product packaging.⁸⁵ "A collective mark is a trademark or service mark used, or intended to be used, in commerce, by the members of a cooperative, an association, or other collective group or organization."⁸⁶ Finally, a certification is a mark "used, or intended to be used, in commerce with the owner's permission by someone other than its owner, to certify regional or other geographic origin . . . or other characteristics of someone's goods or services."⁸⁷ Accordingly, ownership of a mark vests with a single entity, which is responsible for ensuring that the quality, source, and other characteristics associated with the mark are maintained, and who can sue for misuses of the mark.⁸⁸ Additionally, a certification mark, like a GI, must be available to anyone "who maintains the standards or conditions which such mark certifies."⁸⁹

⁸¹ *Id.* at 980-81; *Compare* TRIPS, *supra* note 1 art. 22, with 15 U.S.C. § 1052.

⁸² *Beresford*, *supra* note 24, at 981 (internal citations omitted); *see also* United States Patent and Trademark Office, Office of the Administrator for External Affairs – Geographical Indications (GI) Protection, <http://www.uspto.gov/ip/global/geographical/protection/index.jsp> (describing U.S. treatment of GIs) (last visited Dec. 14 2009).

⁸³ *Beresford*, *supra* note 24, at 982-83 (citing 15 U.S.C. §§ 1052, 1054).

⁸⁴ 15 U.S.C. § 1127.

⁸⁵ *Id.* § 1125.

⁸⁶ United States Patent and Trademark Office, Trademark FAQs, <http://www.uspto.gov/faq/trademarks.jsp> (last visited Dec. 14, 2009); § 1127.

⁸⁷ Trademark FAQs, *supra* note 84; § 1127.

⁸⁸ *Beresford*, *supra* note 24, at 981-85

⁸⁹ 15 U.S.C. § 1064(5)(D).

Analogous to TRIPS Article 22, U.S. law prohibits the use of any mark that is likely to confuse consumers as to the origin of a product.⁹⁰ Because the U.S. trademark system provides the prescribed level of protection to GIs, the protection of GIs under a trademark system satisfies the requirements of TRIPS Article 22. However, the U.S. trademark system has a well-established system of fair use defenses, with one commentator noting that “‘imitation Stilton’ and ‘Roquefort-like’ are phrases that resonate with [U.S.] doctrines of comparative advertising and nominative fair use of trademarks.”⁹¹ How well, then, will the current U.S. legal framework handle TRIPS Article 23-level protections?

b. U.S. Treatment of Food and Drink

Before we turn to U.S. law and Article 23 of TRIPS, we should briefly examine the separate U.S. system of regulations surrounding food and drink. The U.S. Department of Agriculture (“DOA”) regulates the labeling of foods, and provides that “[t]erms having geographical significance with reference to a locality other than that in which the product is prepared may appear on the label only when qualified by the word ‘style,’ ‘type,’ or ‘brand.’”⁹² The U.S. Food and Drug Administration (“FDA”) prohibits “any representation that expresses or implies a geographical origin of the food or any ingredient of the food.”⁹³ It then goes on to a number of exceptions including GIs and any “name whose market significance is generally understood by the consumer to connote a particular class, kind, type, or style of food rather than to indicate geographical origin.”⁹⁴ Both the DOA and FDA regulations allow for use of GIs in a descriptive manner (e.g., “Roquefort-like”). Next, we turn to the regulation of wines and spirits.

Alcoholic beverages are regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) and the DOJ.⁹⁵ While the regulations are fairly complex, it suffices to say that some GIs are strictly protected (such as “Scotch”) and some are not (such as “Chablis”).⁹⁶

⁹⁰ Compare § 1125(a) and TRIPS, *supra* note 1 art. 22(2). Note, however, that U.S. law incorporates a number of fair use defenses that may preclude infringement despite some likelihood of confusion. *E.g.*, *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117-18 (2004).

⁹¹ Hughes, *supra* note 4, at 382.

⁹² 9 C.F.R. § 317.8.

⁹³ 21 C.F.R. § 101.18(c).

⁹⁴ *Id.*

⁹⁵ See Bureau of Alcohol, Tobacco, Firearms and Explosives, ATF’s History, <http://www.atf.gov/about/history/> (last visited Dec. 14, 2009).

⁹⁶ See 27 C.F.R. §§ 4.24, 5.22.

c. Can Current U.S. Law and Policy Accommodate a Strong TRIPS Article 23 Regime?

Finally, we turn to if and how U.S. law can accommodate strong GI protections within its current framework. This is particularly important because if the EU has its way, the U.S. may find itself required⁹⁷ to enforce protections that are dramatically stronger than provided for in its existing system.

As discussed above, the labeling of wines and spirits is strictly regulated by the ATF and the DOJ. Because the regulations are extremely granular, while it may fly in the face of U.S. GI policy, it should be relatively straightforward⁹⁸ for the U.S. to afford extremely strong GI protections to wines and spirits. Indeed, some wine and spirits GIs, such as “Scotch” and “Rhone” already receive strong protections in the U.S.⁹⁹ Similarly, the labeling of U.S. food products is regulated by the FDA, and so however unpalatable, implementing Article 23-level protections for food-related GIs should be fairly simple.

The final and perhaps largest question, then, is how U.S. law would handle GIs on non-edible products. TRIPS protects GIs on non-edible products,¹⁰⁰ and may extend so far as to cover services such as “Swiss Banking.”¹⁰¹ Because TRIPS protects such a broad scope of GIs, it is not possible to simply tailor increased protections into industry-specific regulations, as many potential GIs are in largely unregulated industries. Accordingly, protection of GIs for non-edible goods (and, perhaps, services) must be achieved through the system that governs all marketing terms in the U.S. – the trademark system. Providing Article 23-level protections through the U.S. Trademark system, however, faces strong political and doctrinal obstacles.

The U.S. characterizes the EU’s push for strong GI protections as an attempt “to export the cost of domestic subsidies to the rest of the world.”¹⁰² Given the extreme disparity in rationales behind GI protections in the U.S. and EU, adopting Article 23-level protections for all

⁹⁷ I note that the United States has a long and colorful history of simply ignoring WTO Rulings that are not in its favor, going so far as to largely ignore one of its own trade agreements. *E.g.*, Haley Hintze, *U.S. Disavows Own Trade Agreements, Plans to Ignore WTO Judgment*, POKERNEWS, May 7, 2007, <http://www.pokernews.com/news/2007/05/us-disavows-trade-agreements-ignore-wto.htm>.

⁹⁸ The process for updating administrative regulations in the United States is relatively onerous. As such, I mean that the requisite changes could be implemented without a full-scale overhaul of the attendant legal framework.

⁹⁹ See 27 C.F.R. §§ 4.24, 5.22.

¹⁰⁰ Hughes, *supra* note 4, at 314-15 (citing Communication, New Zealand – Geographical Indications and the Article 24.2 Review, 2, IP/C/W/205 (Sept. 18, 2000)).

¹⁰¹ *Id.* at 314-15 n.91 and accompanying text.

¹⁰² Beresford, *supra* note 24, at 987.

GIs in the U.S. would face immense political opposition.¹⁰³ Further, there is one additional hurdle to providing Article 23-level protections to all GIs in the U.S. system: the structure of the U.S. trademark system.

First, the U.S. trademark system is focused primarily on consumer protection, so the key question in trademark infringement cases is whether the defendant's use is likely to cause consumer confusion.¹⁰⁴ The U.S. system, however, considers the use of phrases like "imitation Stilton" to be non-confusing, and thus non-infringing.¹⁰⁵ Indeed, any instance where the trademark is used to name the trademark-holder or its product and is used as little as necessary to accomplish that goal – a nominal fair use – is presumed to be non-confusing.¹⁰⁶ Accordingly, the fundamental test of U.S. trademark law, likelihood of confusion, precludes that system's application to cases invoking TRIPS Article 23 protections – situations "where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like."¹⁰⁷ As such the U.S. trademark system is currently incapable of providing TRIPS Article 23-level protections to all GIs.

VII. Conclusion

The debate over Geographical Indications has two strong factions, led by the U.S. and the EU. They have wildly divergent views on why we protect GIs,¹⁰⁸ which lead to contrasting proposals as to what protections we should afford.¹⁰⁹ The U.S. argues that GIs are essentially trademarks, and so may be used by competitors as long as there is no consumer confusion.¹¹⁰ The EU argues that GIs reflect the link between a place and the products it produces¹¹¹ and so that place should have broad power to control the use its GIs.¹¹²

The TRIPS Agreement currently strikes a compromise, giving broader protections to GIs on wines and spirits and narrower protections to all other GIs.¹¹³ The EU faction, however, is

¹⁰³ See generally *id.*

¹⁰⁴ See 15 U.S.C. § 1125(a).

¹⁰⁵ See Hughes, *supra* note 4 at 382.

¹⁰⁶ J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:11 (4th ed.) ("‘nominative fair use’ is merely a label to denote one situation in which a mark is used in a manner that does not cause confusion and is therefore non-infringing”).

¹⁰⁷ See TRIPS, *supra* note 1 art. 23; § 1125(a).

¹⁰⁸ See generally Beresford, *supra* note 24.

¹⁰⁹ Compare EC Proposal, *supra* note 71 and U.S. Proposal, *supra* note 74.

¹¹⁰ See generally Beresford, *supra* note 24.

¹¹¹ See discussion *supra* Part II.a.

¹¹² EC Proposal, *supra* note 71.

¹¹³ TRIPS, *supra* note 1 arts. 22-23.

currently pushing for broad protections for all GIs.¹¹⁴ This flies in the face of the U.S., which vigorously opposes the expansion of protections.¹¹⁵ Furthermore, an examination of the U.S. treatment of GIs reveals that while the industry regulations surrounding wines, spirits and even food could be tailored to include stronger protections for GIs, such protections are fundamentally impossible under the current U.S. trademark framework.¹¹⁶ Given this tension, the debate is unlikely to end in the foreseeable future, with both camps fiercely championing their competing points of view.

¹¹⁴ EC Proposal, *supra* note 70.

¹¹⁵ *See generally* Beresford, *supra* note 24.

¹¹⁶ *See* discussion *supra* Part V.c.

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