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GLOBAL STRUGGLE OVER GEOGRAPHIC INDICATIONS

by

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THE GLOBAL STRUGGLE OVER GEOGRAPHIC INDICATIONS

16 February 2006

Kal Raustiala & Stephen R. Munzer*

I. Introduction

The inclusion of intellectual property rights within the World Trade Organization in 1994 heralded a landmark change in international law. It significantly increased the power of international intellectual property law and simultaneously engendered debate over the status and scope of intellectual property rights. Many developing countries considered the WTO's Trade-Related Intellectual Property Rights (TRIPs) Agreement¹ to be an attempt by the United States and, to a lesser extent, Europe to force inappropriate, Western-style law on the rest of the world. The rationale for including intellectual property in a global free trade agreement was and remains unclear, because the relationship between trade liberalization and intellectual property protection is hazy and contested. Some eminent free trade advocates consider TRIPs a straightforward case of rent-seeking by wealthy states against the rest of the world.²

The major substantive rights protected by TRIPs are copyright, patent, and trademark. These rights are familiar and generally well-supported as a matter of intellectual property theory, even if their connection to trade liberalization is contested. Some of the property rights protected by TRIPs, however, lack even this foundation, which makes their inclusion in the WTO even more problematic. Perhaps the most theoretically-contested such intellectual

* Professor of Law and Global Studies, UCLA, and Professor of Law, UCLA, respectively. We thank Christina Davis, Mark Greenberg, Andrew Guzman, Petros Mavroidis, Seana Shiffrin, Richard Steinberg, Joel Trachtman and participants at presentations at Case Western Reserve Law School, the Law and Philosophy Discussion Group in Los Angeles, and the UCLA School of Law, for their helpful comments. We also thank Betsy Bennion and William Wood for their able research assistance.

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, signed in Marrakesh, Morocco on 15 April 1994. Text at www.wto.org/english/docs_e/legal_e/legal_e.htm.

² E.g. Jagdish Bhagwati, 'From Seattle to Hong Kong', 84 *Foreign Affairs* 2 (December 2005, WTO Special Edition).

property right relates to ‘geographic indications’ (GIs).³ Akin to a trademark, a GI identifies a good as originating in a particular region, where a given quality of the good is attributable to its place of origin. The fundamental concept behind GIs is that specific geographic locations yield unique qualities in products, qualities that cannot be replicated in other locations. Because the *place* is said to be essential to the *product*, proponents argue that those outside a specified region cannot be permitted to use its place-name in marketing and on product labels. Well-known GIs include Champagne, Prosciutto de Parma, Roquefort, and Rioja. As this list suggests, many valuable GIs relate to traditional agricultural products--and many are European in origin. The question of GI protection, consequently, is linked to a larger and politically sensitive debate about economic competition in agriculture and the proper level of protection for agricultural producers and rural communities--as well as the degree to which international law ought to trench upon questions of culture and tradition.⁴ The GI debate, moreover, exhibits not the North-South division so familiar to international lawyers, but rather a less common and more interesting split: that between the New World and the Old World.

This Article examines and critiques the rise of GIs in international law. We begin by defining GIs and explaining the origin of the contemporary struggle over them. Although GIs have a long history, we argue that they gained markedly greater political salience in the postwar period due to major changes in the global economy.⁵ These changes led to the increasing consolidation of formerly discrete local and regional markets, which in turn meant increased competition--and opportunities--for many traditional producers. This enhanced global competition has raised the value of putative GI rights. But it also has led to extensive charges of misappropriation, in particular by the member states of the European Union. The inclusion of GIs in the 1994 TRIPs Agreement is thus part of a larger strategy by European states, in particular those of the European Union, to shield their agricultural producers from increasing New World price-based competition while simultaneously reforming farm subsidies.⁶ Indeed, the European Commission has expressly linked the protection of GIs with reform of the Common Agriculture

³ Strictly speaking, the terms ‘geographic indication’ and ‘GI’ are ambiguous among a linguistic expression, the legal protection of that expression, and the product associated with that expression and/or its legal protection. Because the context generally makes clear which is meant, and because it would be tiresome to spell out which is meant on each occasion throughout the paper, we will not fuss over the ambiguity.

⁴ Tomer Broude, Taking ‘Trade and Culture’ Seriously: Geographical Indications and Cultural Protections in WTO Law, 26(4) *U. Penn. J. Int’l Econ. L.* 1 (2005). Broude notes that some 40% of WTO disputes have involved edible products.

⁵ The first mention in international law is in the 1883 Paris Convention on Industrial Property; see below. In national and regional practice they date much further back, perhaps to the ancient Greeks and Romans. Bernard O’Connor, *The Law of Geographic Indications* (2004) [hereinafter *O’Connor*].

⁶ For stylistic purposes we use EU and EC interchangeably in this article. Formally, it is the EC (and its member states) that is a party to the WTO.

Policy.⁷ The latest salvo in this struggle is the inclusion, within the ongoing Doha Round of world trade talks, of two GI-related agenda items: extension of the current heightened wines and spirits standard to other products, and the creation of a multilateral system for registration of GIs for wines and spirits.⁸ While economic concerns plainly loom large, the effort to entrench GI protection in international law also draws strength from more diffuse concerns about authenticity, diversity, culture, and locality in a rapidly integrating world. To assert the importance of a GI is, in part, to assert the importance of local culture and tradition in the face of ever-encroaching globalization.

After explaining the origins of the effort to protect GIs by law, we assess the justification for these new rights. Despite a wide range of scholarship on the WTO and intellectual property, GI rights have not had their conceptual underpinnings rigorously examined.⁹ We argue that GI protection in international law is justifiable for many of the reasons that trademark rights are justifiable: primarily, to protect consumers against confusion and to lower their search costs. We contend, however, that the current level of protection afforded by the TRIPs Agreement for wine and spirits--which disallows any mention of a protected GI by a producer outside the region, even if the place where the product is produced is clearly indicated--is unwarranted in that it goes well beyond what trademark-based justifications support.¹⁰ A fortiori, further expansion of the wines and spirits standard to new products, as currently sought by European and other states in the Doha Round, is unjustified as well. We defend this position through careful consideration of the major theoretical bases for property rights.

⁷ 'The EU has entered, in good faith, in negotiations with its partners in the WTO with a view to further liberalising world trade in agricultural commodities. This will mean, in practice, less export subsidies to our farmers. This policy is embodied in the Commission's proposed review of the Common Agricultural Policy: compete internationally on quality rather than quantity. Yet, efforts to compete on quality would be futile if the main vehicle of our quality products, GIs, are not adequately protected in international markets.' European Commission, Why Do Geographical Indications Matter to Us? (30 July 2003)

http://europa.eu.int/comm/trade/issues/sectoral/intell_property/argu_en.htm

⁸ The Doha Declaration of 2001, WTO Ministerial Declaration, WTO Doc. WT/MIN (01)/DEC/W/1 (November 14 2001). Recent WTO litigation over GIs is discussed *infra*.

⁹ The most thorough treatments of the law of GIs are O'Connor, *supra*, Broude, *supra*, and Justin Hughes, 'The Spirited Debate Over Geographic Indications' (manuscript on file with authors). None of these, however, tackles the fundamental property rights claims that undergird GI protection.

¹⁰ An earlier brief version of this argument was made in Kal Raustiala and Chris Sprigman, 'Eat, Drink and be Wary: Why the US Should Oppose the WTO's Extending Stringent Intellectual Property Protection of Wine and Spirit Names to Other Products', at www.findlaw.com, Dec. 12, 2002.

II. The International Law of Geographic Indications

In the last two decades intellectual property has become a central part of international affairs. Intellectual property law is traditionally territorial, but the various major multilateral agreements on copyright, patent, and the like have created a measure of convergence in substantive law across states. Until a decade ago, serious differences remained, especially between industrialized and developing countries and especially related to enforcement. In the 1980s, the rise of knowledge-based economies raised the salience and economic importance of intellectual property.¹¹ Technological change, notably the digital revolution, also made copying of many intellectual property-related protected products far easier. These changes spurred many producers in the US and elsewhere to demand greater legal protection globally. Facing what they considered to be rampant piracy of their intellectual property, major firms in the software, film, music, pharmaceutical, and other industries pressured the US, Europe, and other industrialized states to fight more aggressively for stronger intellectual property protection worldwide. The result was the landmark 1994 TRIPs Agreement.

The inclusion of TRIPs in the newly-created WTO substantially augmented the traditional approach of relying on discrete multilateral intellectual property treaties. For the first time the WTO's powerful new dispute settlement process was put behind the enforcement of intellectual property rights.¹² However, many states and stakeholders vigorously but largely unsuccessfully opposed this global extension of western-style property rights. These critics argued that strong property rights either harm the developing world, as when they raise the costs of essential medicines, or disproportionately benefit advanced industrial democracies, whose citizens and firms hold most patents, trademarks, and copyrights.¹³ Critics also noted that many of the proponents of strong intellectual property rights--in particular the US--had themselves favored weak rights when they were developing.

The far-reaching rules enshrined in the TRIPs agreement are substantive as well as procedural.

¹¹ Peter Drahos, 'Intellectual Property Rights in the Knowledge Economy', in David Rooney, Greg Hearn, and Abraham Ninan (eds), *Handbook on the Knowledge Economy* (2005); Laurence Helfer, 'Regime-Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', 29 *Yale J Int'l L* (2004) 1; Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003); Michael Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (1998).

¹² Rochelle Dreyfuss and Andreas Lowenfeld, 'Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together', 37 *Va. J Int'l L* (1997) 275.

¹³ E.g. UK Commission on Intellectual Property Rights, 'Final Report: Integrating Intellectual Property Rights and Development Policy' (2002), at http://www.iprcommission.org/graphic/documents/final_report.htm.

These rules establish a set of ‘minimum standards’ that every WTO member must follow. They closely track the structure of legal rights found in the US and Europe. In the Western tradition, intellectual property law balances private rights guaranteed by the state against the general interest in a vibrant public domain. Hence with the exception of trademark, the core rights of copyright and patent are time-limited: at a certain point, creations move into the public domain and can be used and copied freely by all. The importance of the public domain rests on innovation concerns, because most creations derive from earlier creations, as well as liberty concerns, because private monopolies on inventions and expressions restrain free economic competition and may inhibit free expression. Maintaining a vibrant public domain is therefore an important, if often underappreciated, goal of the international intellectual property regime. Politically, however, the TRIPs Agreement was seen as a triumph of private rights and interests-of property over the public domain. As noted earlier, the trade-enhancing effects of the inclusion of TRIPs within the WTO are highly debatable.¹⁴ But the effects on producers, who now stand to receive greater rents, are undeniable.

Though the primary foci of attention in the negotiation of TRIPs were copyright, trademark, and patent, the agreement also addresses some less well-known issues: rights over plant genetic resources, semi-conductor ‘maskworks,’ and of course geographic indications. While similar to trademarks, GIs differ in that they attach to goods from a particular region rather than from a particular producer.¹⁵ GIs were a particular focus of the European Community in the TRIPs negotiations. Indeed, as we noted in the Introduction, enhanced GI protection has been widely understood as an effort by the Old World to secure legal protection against the New.¹⁶ GIs include not only verbal designations, such as Murano glass, but packaging as well. Even the shape of wine bottles may be part of a protected GI. Most GIs relate to agricultural products, yet there is no necessary connection to agriculture. Some GIs, such as Champagne and Parmigiana-Reggiano, quite well-known. Others, such as Kanchipuram silks from India or Zhostovo metal painted trays from Russia, are more obscure.

A GI applies to a specific region within a given state.¹⁷ The regions that a GI indicates can be very large, in some cases encompassing entire states. Indeed, last year the European Court of

¹⁴ Bhagwati, *supra* note 2.

¹⁵ GIs, unlike trademarks, are not owned by individuals and cannot be licensed. See O’Connor, at 112-114.

¹⁶ Felix Addor and Alexandra Grazioli, ‘Geographical Indications Beyond Wines and Spirits’, 5 *J. World Intellectual Prop.* (2002) 6.

¹⁷ Indeed, we know of no example of a transnational geographic indication, though conceptual one could plainly--and indeed ought to--exist, given that natural features do not correspond to political borders.

Justice held that Greece had the exclusive right to call its famous salty white cheese ‘feta.’¹⁸ The indication ‘Swiss Made’ is also a protected GI for watches.¹⁹ Hence within a GI-protected region there may be numerous distinct--and competitive--producers. Typically, national rules limit the use of a given GI to producers who, in addition to residing in the designated region, follow specified manufacturing practices and use particular ingredients. These rules aim to ensure that the authentic and special quality claimed for the protected good is present in all products that carry the GI. The connection between place of origin and quality of the product is usually understood to be based on climate, geography and the like: on natural features of the locale. The TRIPs Agreement defines a GI as an expression that identifies a product as originating in a particular region, ‘where a given quality, reputation, or other characteristic of the good is essentially attributable to its place of origin.’²⁰ Thus they are *geographic* indications. Still, some believe human skills may also play a role. The World Intellectual Property Organization, for instance, maintains that GIs can also ‘highlight specific qualities of a product which are due to human factors that can be found in the place of origin of the products, such as specific manufacturing skills and traditions.’²¹ As we discuss below, this ambiguity—do GIs refer only to fixed natural features or also to (moveable) human skills?—has implications for the normative justification of GIs as well as the question of who can legitimately use the GI and who cannot.

TRIPs requires that WTO member states (nearly 150 today) must provide the means for interested parties to register GIs and to prevent any use of a GI that amounts to unfair competition or misleads the public as to the geographical origin of the good.²² The precise structure of the national systems to register and enforce GIs is left to the parties to decide. All the same, in 2005 the US successfully challenged the EU’s system before the WTO Dispute Settlement Body by arguing that that system impermissibly discriminated against foreign products and persons.²³ WTO member states also have a duty to refuse or invalidate the

¹⁸ Joined Cases C-465/02 and C-466/02, *Federal Republic of Germany and Kingdom of Denmark v Commission of the European Communities*, [2005] ECR 00. This ruling bars other EU producers from using the word ‘feta’ despite the fact that feta is not a place in Greece, or anywhere else for that matter. ‘Feta’ is a Greek word roughly translatable as ‘slice.’ We thank the scholar of trade law and cheese Petros Mavroidis for this translation.

¹⁹ O’Connor, at 77.

²⁰ TRIPs, Art. 22, para. 1.

²¹ www.wipo.int/about-ip/en/about_geographical_ind.html. O’Connor argues that a GI ‘is linked...to something more than mere human creativity including topography, climate, or other factors independent from human creativity.’ O’Connor at 113.

²² TRIPs, Art. 22, para. 2.

²³ Dispute DS/174/R, *EC-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (2005).

registration of a mark that misleads the public as to the geographical origin of a good. Under TRIPs GIs for wines and spirits receive enhanced protection. WTO member states must provide holders of such GIs with the legal means to prevent labeling that, even if it indicates the true origins of a good, includes a GI with the qualification 'kind,' 'style,' or the like. (There is an important grandfather clause exempting those who have used an alcohol-related GI, such as Champagne, for at least ten years prior to the entry into force of TRIPs.) The standard for wine and spirits, in other words, goes well beyond that for other products. The EU has recently compiled a list of 41 cheeses, meats, and other products that it believes should enjoy the same heightened protection currently awarded to alcohol products.²⁴ Whether, and if so how, to extend the wine and spirits standard to new products is a major point of contention in the current negotiations within the WTO. Rhetorically, the EU has taken to referring to the unfair "discrimination" faced by other, non-wines or spirits products.²⁵

The TRIPs Agreement is not the first invocation of GIs in international law, though it is by far the most important. GI protection was part of the Paris Convention for the Protection of Industrial Property (1883), but under a different label ('false indications'). The 1891 Madrid Agreement for the Repression of False or Deceptive Indications also addresses GIs, though it has relatively few parties. In the 20th century the Lisbon Agreement on Appellations of Origin (1958) set the standard until the onset of the TRIPs Agreement in 1994. National law on GIs is even older. French law first addressed GIs in 1824,²⁶ and plainly GIs existed as common signifiers for centuries if not millennia before that. Nor is GI protection limited to the Old World. In the US the Federal Alcohol Administration Act of 1935 bars misleading labels on wine. More recently California, the center of American wine-making, passed a statute requiring that any wine produced or marketed in California and bearing the name 'Napa' must contain at least 75% Napa Valley-grown grapes.²⁷

As noted, central to the GI concept is the idea that particular regions bestow unique qualities on foods and wines. This is often referred to, especially in the wine trade, by the French word *terroir*. In its increasingly active media campaigns to promote European GI-denominated foods, the European Commission defined *le goût du terroir* as 'a distinct, identifiable taste reminiscent of a place, region or locality ... Foods and beverages that evoke the term *terroir*

²⁴ 'WTO talks: EU steps up bid for better protection of regional quality products', IP/03/1178, 28/08/2003, at <http://europe.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1178>.

²⁵ *Why Geographical Indications Matter to Us*, supra.

²⁶ See generally O'Connor; Molly Torsen, 'Apples and Oranges (and Wine): Why the International Conversation Regarding Geographic Indications is at a Standstill', 87 *J. of Patent and Trademark Office Society* (2005) 31, at 34-35.

²⁷ See *Bronco Wine Co. v Jolly*, 33 Cal. 4th 943 (2004).

have signature qualities that link their taste to a specific soil with particular climate conditions. Only the land, climate and expertise of the local people can produce the product that lives up to its name.²⁸ Consequently, a GI-denominated product is not simply *from* a place; it is said to have special, even unique qualities that the place alone can provide. In the recent *Feta* case, for instance, the ECJ argued accordingly that there was a close and important interplay between natural geographic factors and human innovation in the making of feta cheese. In the case of feta this interplay is said to include

the development of small native breeds of sheep and goats which are extremely tough and resilient, fitted for survival in an environment that offers little food in quantitative terms but, in terms of quality, is endowed with an extremely diversified flora, thus giving the finished product its own specific aroma and flavour. The interplay between the natural factors and the specific human factors, in particular the traditional production method, which requires straining without pressure, has thus given Feta cheese its remarkable international reputation.²⁹

The result of GI protection is that producers outside a designated region cannot use recognized GIs, no matter how similar their product is to the GI protected product.³⁰ Even the phrase ‘*méthode champenoise*’—which denotes a product or process method, rather than any regional quality per se—has been held to be improper for German producers of sparkling wine to employ on their labels.³¹ Although this restriction is an example of what might be called creeping patentization, it is important to underscore that GIs differ dramatically from patents in that the products from outside a GI region may be identical to those from the GI region.³² These products, however, may not use the GI. Hence producers of Sekt in Germany may employ the *méthode champenoise*, but cannot say so on the label. Likewise, producers of feta in Greece can now stop producers in Denmark from using the name feta. But a virtually identical Danish cheese may still be marketed under a different name, such as ‘Danish White Salty Slice

²⁸ www.eu-authentic-tastes.com/system/overview.html (visited on Dec 16, 2005).

²⁹ ECJ press release on the Feta judgment: *Press release No 92/05*, 25 Oct 2005.

³⁰ However, TRIPs Article 24 has grandfathered in the (mis)use of certain GIs.

³¹ Advocate General Gulmann in Case C-306/93, *SMW Winzersekt GmbH v. Land Rheinland-Pfalz*, [1995] ECR I-5555.

³² The theory of *terroir* suggests that this result is impossible. For more on *terroir* in the GI context see Hughes, *supra*. A recent econometric study claims that the contribution of *terroir* to valuable wine is vastly overstated; see Oliver Styles, *Terroir Plays No Role, "Parker effect" adds 15% to Bordeaux, Study Finds*, (March 22, 2005) at www.decanter.com/news/62518.html.

Cheese.’ And not just any cheese made in Greece can be called feta. Only white, crumbly, goat and sheep's milk cheeses made in Greece in a specific way qualify for the GI.

In short, at the conceptual core of GIs is a claim about authenticity. In an age of rapid economic integration and consumer abundance, GIs purport to help individuals or groups identify, protect, and at times profit from authentic production. GIs are economically valuable labels, but they also reflect the importance of place, culture, and tradition. They announce and protect terrior. And they provide a bulwark against homogenization and industrial production of foodstuffs. A GI such as Champagne distinguishes ‘true’ Champagne from other sparkling wines. GI proponents believe that a similar product from a different region of the world necessarily lacks the geographically-determined qualities of Champagne. It is therefore a kind of fake or impostor. Given the focus of GIs on tradition, locality and ‘place-ness,’ it is unsurprising that these rights are popular with those who oppose aspects of contemporary globalization, especially its despatializing and homogenizing characteristics.³³ Yet, as we argue below, the very transnational integration that globalization fosters has led to increased demand for GI protection. The protection of GIs can be seen as a way to commodify and market place-ness and tradition in an increasingly global economy.

III. The Rise of Geographical Indications in Economic Cooperation

Though cultural factors cannot be ignored,³⁴ the ongoing effort to entrench and expand GIs in international law has important economic underpinnings. In particular, the expansion of globalization and world trade has led to increased demands for international rules on GIs as a means to protect market share. To be sure, the broader international trend toward greater intellectual property protection has also aided this process. But it is primarily globalization that has raised the value of property rights in GIs, and, we argue, increased the incentives for various actors to seek to create or strengthen intellectual property rights. Hence, though we do not dismiss noneconomic factors, and we believe that many traditional producers feel passionately about the issue, our causal argument is chiefly economic. Specifically, we claim that

- Falling transport costs and trade barriers in the postwar era have lowered the prices of GI-protected goods and created global markets out of previously

³³ Some claim that globalization reflects the idea that activities, which were once carried out within nation states, are now often carried out regionally or globally -- and are even, in that respect, ‘deterritorialized.’ See, for example, Ngaire Woods, ‘The Political Economy of Globalization’, in Ngaire Woods (ed.), *The Political Economy of Globalization* (2000) 5.

³⁴ E.g., Broude, *supra*.

discrete local markets;

- Goods similar to GI-protected goods exist in many states due to prior waves of immigration, which brought skills and tastes to new locations; these goods compete with their 'original' forbears; and
- Rising wealth and falling food prices have increased the share of household income available for niche food products, which are often marketed through GIs. The increasing preference for artisanal or traditional products in many societies accentuates this trend.

High levels of international trade are not new. It is often forgotten that world trade levels were quite high in the decades leading up to World War I, and it took well into the 1970s to reach equivalent levels. Postwar globalization differed from late 19th century globalization in many ways, however.³⁵ Most germane here is the nature of international trade, which was, in the postwar era, marked by a far larger percentage of *intra*-industry trade. Pre-World War I integration was characterized by *inter*-industry trade: that is, trade of one kind of good (steam engines) for something completely different (rubber). Contemporary globalization is distinctive in that we see firms and products from many states now compete directly in integrated markets. Japanese cars vie with German, American, Swedish, and Korean cars for dominance in the global market. Similarly, agricultural products, especially high-end artisanal products such as wine and cheese, now increasingly compete globally with their foreign imitators and rivals.

Increasing global trade in GI-related products in the postwar era resulted mainly from three interrelated factors, one technological, one economic, and one political. The first is a precipitous drop in costs of transportation. Containerization, ship improvements, and transcontinental aircraft permit transport over long distances at strikingly low cost. Products that once could not be successfully traded over long distances now can be shipped around the globe cheaply. The second factor is the establishment of international trade agreements, such as the WTO itself, which have markedly lowered tariffs and, more recently, reined in non-tariff barriers as well. The third is increased economic demand on the part of consumers in wealthy countries for GI-marked food, drink and other products. These three factors have dramatically increased the flow of many foods across frontiers and created global markets out of local or regional markets. The result is that traditional artisanal products, such as Champagne, Roquefort, and Russian caviar, now compete much more directly with their newer variants,

³⁵ Richard Baldwin and Phillippe Martin, 'Two Waves of Globalization, Superficial Similarities, Fundamental Differences', *NBER* Working Paper no 6904 (1999); Geoffrey Garrett, 'The Causes of Globalization,' 33 *Comp. Pol. Stud.* 941 (2000).

such as Australian sparkling wines, Iowa blue cheese, and California paddlefish roe.

A powerful example, and one clearly central to the current debate over GIs, is the world wine industry. For centuries Europe dominated the world's wine market, though the vast majority of production was for local consumption. Even into the 1960s less than 10 percent of global wine production was traded internationally. Today, the proportion of wine traded internationally is 25 percent and rising rapidly.³⁶ For the US and the EU, the two major powers in world trade, wine is a highly traded product and is overlaid with cultural conflict: New World technique versus Old World *terroir*. Yet despite differences in approach and style the majority of US wine exports go to the EU. In 2004, global U.S. wine exports exceeded \$736 million, with exports to the European Community over \$487 million.³⁷ For European producers wine imports are now a major threat. Soon Europe may, for the first time in recorded history, import more wine than it exports.³⁸

World wine competition, though segmented by price, is thus increasingly fierce. Many of the wines sold on the world market employ varietal grape names, such as Pinot Noir, but many also use famous place-names such as Champagne or Chablis to signal their style and type. In this competitive environment well-protected GIs rights are compelling. The ability legally to restrict the use of the words 'Chianti,' 'Champagne' or 'Rioja' to certain products confers a decided economic advantage. And all else equal, the larger the market is, the higher is the economic value of the GI. GIs permit, as the European Commission has made plain, a strategy based on quality rather than price: "Geographical indications constitute the main pillar of the EU's quality policy on agricultural products...[they] create a genuine niche for development of agri-food industries for relatively low development agricultural economies."³⁹

The causal impact of global markets on the creation of legal rights in GIs has been enhanced by two additional factors. First, the prior diffusion of traditional techniques of production created fertile soil for the later assertion of GIs in international law. Past waves of immigration, particularly around the turn of the 19th century, brought millions of farmers and artisans from Europe to the Americas and elsewhere. These immigrants brought with them their food products and, more importantly, traditional production methods and recipes. Once settled, they often recreated the products they had known at home. The onset of wine production is

³⁶ Kym Anderson, 'Wine's New World', 136 *Foreign Policy* (2003) 46, at 49.

³⁷ Press release, USTR, Sept 15, 2005 at www.useu.be/Categories/Trade/Sept1505_Wine_Accord.html.

³⁸ Barbara Supp, 'In Vino Vilitas: European Wine Fighting for Survival', 44 *Der Spiegel* (2005) (translated at <http://service.spiegel.de/cache/international/spiegel/0,1518,druck-383331,00.html>).

³⁹ European Commission, Why GIs Matter to Us, *supra*.

again instructive. Wine grapes were widely planted in California in the nineteenth century, with the result that today Napa Valley, Sonoma, Mendocino, and the Santa Ynez Valley are highly-regarded wine-growing regions. Likewise, wine grapes were first planted in Australia in 1788 and in New Zealand three decades later.⁴⁰ For a small range of high-value, nonperishable products--primarily spirits--this process of diffusion through immigration created some minimal level of economic competition centuries ago. For most other products, however, international trade in agricultural goods was quite low until the 1960s but has accelerated rapidly since. The non-European share of global wine exports, for example, increased over 600 percent since the early 1990s.⁴¹ Much of this wine is inexpensive, but not all--and in any event, cheap New World wines compete favorably with cheap Old World wines, which are increasingly exported outside their country of origin.

Second, over the last fifty years household incomes rose across much of the globe while food costs dropped.⁴² In the process the place of high-value food products in daily diets has grown. Luxury goods, once limited to a tiny coterie of the wealthy, have become widely accessible. This trend dovetails with a heightened awareness of and affinity for regional cuisines and wines on the part of many consumers. Producers of Indiana corn or Australian wheat do not claim GIs (though Finland apparently claims a potato).⁴³ Rather, GIs are asserted for cheeses, wines, spirits, watches, and other highly-specialized artisanal products.⁴⁴ For some products, like fine wines, silk, and tea, long-distance trade has long existed. But the volume of such trade is higher today--as the wine trade makes abundantly clear. Enhanced global competition for luxury goods sales has raised the incentives for producers to claim and assert GIs in the world's marketplaces as a way of appealing to consumers fascinated by local traditions. The apotheosis of these varied trends is perhaps the 'Artisanal Cheese Club,' which air-ships to its members a set of regional, usually GI-protected cheeses from around the world each month, along with tasting notes and wine suggestions.⁴⁵

Europe is at the forefront of the effort to expand GI protection, not only for its well-known

⁴⁰ Kym Anderson, David Norman, and Glyn Wittwer, 'Globalisation of the World's Wine Markets', 26 *The World Economy* (2003) 659, at 660-61.

⁴¹ *Ibid.* at 665.

⁴² 'Make it cheaper, and cheaper', 369 *The Economist* (2003) 6, at 6-7.

⁴³ James Lee and Bryan Rund, EU-Protected Geographic Indications: An Analysis of 603 Cases, (draft manuscript, American University, Dec 2003), at 3.

⁴⁴ These products often share qualities -- hand-crafted, traditional, artisanal -- that the pop-sociologist and New York Times columnist David Brooks argues are highly sought after by upper-income consumers in post-industrial societies. David Brooks, *Bobos in Paradise: The New Upper Class and How They Got There* (2000) ch. 2.

⁴⁵ www.artisanalcheese.com.

products but also its less well known, such as Turrón de Alicante, a nougat candy from Spain, and Grappa del Friuli, a grape-derived spirit from Italy. The EU in 1992 created a system to protect GI-denominated food products, and the European Commission actively promotes European GI-denominated foods abroad. For example, the EU's current 'EAT' campaign--for European Authentic Tastes--has run ads in major newspapers and magazines abroad extolling the authenticity of true Champagne and denigrating other champagne-style wines as impostors.⁴⁶ The EU favors expanded GI rights in part because its member states are the home of many famous food products. Nevertheless, Europe also has a relatively high proportion of its population employed in agriculture — some four percent compared to one percent in the U.S.⁴⁷ This is especially true for the southern states of Europe; the vast bulk of GI activity and litigation in Europe stems from the five states of France, Spain, Italy, Greece, and Portugal.⁴⁸ The increasing pressure on the EU to reduce subsidies to farmers by reforming the Common Agricultural Policy only enhances the attractiveness of using GIs to gain market share internationally. As a high EU trade official stated, 'the future of European agriculture lies not in quantity of exports but in quality ... That is why we are fighting to stop the appropriation of the image of our products and improve protection.'⁴⁹ Faced with an onslaught of inexpensive wine and other agricultural products from the New World, often bearing European place-names, EU countries have sought to use the international intellectual property system to assert quality, segment markets, and protect their national producers from what they deem unfair competition.

By contrast, the U.S. and other New World producers unsurprisingly tend to oppose strong GI protection, especially at the WTO level. In response to EU initiatives to expand protection in TRIPs, the Australian Ambassador to the WTO pointedly stated that 'Europe is seeking to rewrite' the TRIPs Accord.⁵⁰ EU demands to expand GI protection, moreover, would 'introduce a new form of subsidy for selected European food producers' while also extending a 'new form of neo-colonialism on its former territories by preventing them from using terms which are now

⁴⁶ www.eu-authentic-tastes.com.

⁴⁷ U.S. Department of Agriculture, 'The United States and the European Union: Statistical Overview', at <http://www.ers.usda.gov/publications/WRS0404/WRS0404b.pdf>. The European Commission has argued that 'GIs are the lifeline for 138000 farms in France and 300000 Italian employees'. European Commission, 'Why Do Geographical Indications Matter to Us?' (30 July 2003) http://europa.eu.int/comm/trade/issues/sectoral/intell_property/argu_en.htm

⁴⁸ Lee and Rund, *supra*

⁴⁹ Pascal Lamy, quoted in Bruce Babcock, 'Geographic Indications, Property Rights, and Value-Added Agriculture', 9 *Iowa Ag Review Online* (2003) 4, http://www.card.iastate.edu/iowa_ag_review/fall_03/article1.aspx.

⁵⁰ David Spencer, 'A Way Forward for Geographic Indications', document prepared for the World Symposium on Geographic Indications, WIPO, July 2003, WIPO/Geo/SFO/03/25, at 1.

generic in their territories.⁵¹ These views are shared elsewhere in the New World. As a US Commerce Department official recently declared:

Make no mistake, what the EU is asking for is not fair treatment; it's preferential treatment, it's nothing less than a subsidy of European agriculture interests through claw back of generic terms. If adopted, the EU's demands could undermine the world's systematic approach to intellectual property protections, and not just for GIs.⁵²

Of course, neither the US nor Australia rejects the concept of GIs altogether. In fact, the US protects 150 of its own viticultural GIs, including such seemingly unremarkable designations as the 'Mississippi Delta' wine-growing region. Australia has its own famous wine regions, including the McLaren Vale and Hunter Valley. In the recent US-Australia Free Trade Agreement, the respective trade ministers signed a side letter confirming that both Bourbon whiskey and Tennessee whiskey would be protected GIs in Australia.⁵³ What New World critics largely oppose is the extension of the wine and spirits standard of GI protection to new food products, as well as various proposed procedural extensions that would have the effect of further entrenching the wine and spirits standard in international law.

Developing countries take mixed positions on GI protection. Many favor GIs for their famous products: Mexico, for example, for Tequila and Mezcal, and India for Basmati rice and Darjeeling tea.⁵⁴ Some also have pushed in the ongoing Doha Round for an extension of the TRIPs wine and spirits standard to other goods, arguing that non-alcohol products ought not be barred from receiving the same level of protection.⁵⁵ At the same time, some developing nations recognize that GI-protection is intertwined with other policies of industrialized nations that they oppose, and which are currently on the WTO negotiating agenda, such as substantial farm subsidies that harm farmers in developing countries. GI conflicts at the WTO may in some cases simply be prefatory moves aimed at creating bargaining chips for later use in larger negotiating battles.

⁵¹ Id. at 3.

⁵² John Dudas, Deputy Undersecretary of Commerce for Intellectual Property, quoted in Torsen, *supra* note 21, at 52.

⁵³ Letter from Australian Minister for Trade Mark Vaile to USTR Robert Zoellick, May 18, 2004, at http://ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file778_3889.pdf.

⁵⁴ Indeed, Mexico sought and received explicit protection for Tequila and Mescal in NAFTA. See NAFTA Annex 313 (Distinctive Products), North American Free Trade Agreement, 32 *ILM* (1993) 605.

⁵⁵ O'Connor, at 392.

In sum, the intensifying shift from local to global markets that marks the contemporary world economy both permits information and innovations--in the form of GIs--to flow out, and new competition, often employing these innovations, to flow in. Globalization raises the returns from assertions of property rights in GIs. It is no coincidence that GIs have become part of the international debate just as world trade is reaching record levels and economies are integrated ever more deeply. By no means does economics drive all property claims. Many GI proponents fear the leveling and homogenizing encroachment of global competition, even as they seek to capitalize on it through intellectual property law. Yet as the vast literature on the evolution of property rights illustrates, actors tend to demand new property rights when underlying costs and benefits shift in fundamental ways.⁵⁶ The rise of GIs in international law exemplifies this process.

IV. Does International Legal Protection of Geographical Indications Make Sense?

So far we have explained the conceptual basis of GIs and the causal forces that have thrust them in the last decade onto the global trade and intellectual property agenda. In this Part we evaluate the case for GI protection as a normative matter: Why, and to what degree, should GI rights be protected by international law? We consider the major philosophical justifications for property rights: labor-desert theory, incentives to innovate, moral rights theory, and others. GIs most resemble trademarks, and trademarks are usually justified under a consumer search costs rationale: they are protected in order to reduce consumer confusion in purchasing. Yet, to be thorough, we assess the force of a wide range of possible justifications, not just those deployed in favor of trademarks. Probably no robust property rights--whether in real or intellectual property--can be defended on the basis of any single justification, unless one's *idée maitresse* is utility. GIs are no exception. Neither of us is a utilitarian or an economist wedded to a particular understanding of efficiency. Consequently, we bring in arguments that appeal to utility or efficiency only in some targeted form, such as an incentive to innovate or protecting against confusion among consumers, rather than a broad appeal to whatever maximizes, say, preference-satisfaction across all individuals.

This Article shows that some modest legal protection of GIs is defensible under a mix of various

⁵⁶ See Gary Libecap, *Contracting for Property Rights* (1989); Thomas Merrill, 'The Demsetz Thesis and the Evolution of Property Rights', 31 *Journal of Legal Studies* (2002) 331; William Riker and Itai Sened, 'A Political Theory of the Origin of Property Rights', 35 *American Journal of Political Science* (1991) 951; Carol Rose, 'Economic Claims and the Challenges of New Property', in Katherine Verdery and Caroline Humphrey (eds), *Property in Question: Value Transformation in the Global Economy* (2004) 227-95.

justifications. Specifically, we find that the TRIPs standard for most products—essentially, that misleading uses of protected GIs are banned—is well justified. Consequently, we agree that a Spanish or Californian producer of blue cheese ought to be permitted to label her product “Roquefort-style Blue from Catalonia” or “Sonoma County Roquefort Cheese: Product of California.” However, we argue that the existing TRIPs wine and spirits standard, which disallows any use of a GI even if the true location of origin is made clear, is unjustified by any compelling theory of property and has pernicious economic effects. Consequently, we conclude that the international legal standard for all GI-denominated products should track that which TRIPs currently embodies for non-alcohol-based products. The wines and spirits standard, as a result, should be altered.

A. Labor and Desert.

A principle of desert based on labor is favored by many theorists of property, and is often associated with John Locke.⁵⁷ As often expounded, a labor-desert principle is merit-based; it conceives of persons as agents who, by their actions, deserve or merit something as a result. If property rights are deserved, their scope and strength must somehow be commensurate with the labor that grounds them. This principle is often invoked, with limited and variable success, to support property rights in inventions and works of literature and art as well as land, moveable goods, and so forth. If the principle is pressed into service for GIs, its justificatory force is limited. Perhaps the *originators* of the product associated with a particular region deserve property rights in, say, Basmati rice or Bordeaux wine, but they are long dead. It is hard to see why their remote descendants or unrelated later inhabitants of the region should deserve an intellectual property right in products that they never originated.

An obvious objection is that property rights are often transferred from one person to another. Careful expositions of the labor-desert principle stress that that principle alone does not support an unrestricted power to transfer property.⁵⁸ Some analysts argue that inheritance should be restricted.⁵⁹ Others contend that a labor-desert principle, as applied to land and

⁵⁷ See, for example, Lawrence Becker, *Property Rights: Philosophic Foundations* (1977) 48-56; Lawrence Becker, ‘Deserving to Own Intellectual Property’, 68 *University of Chicago-Kent Law Review* (1993) 609. As Becker and others recognize, Locke’s famous discussion of property offers only thin support for a labor-desert principle. See generally John Locke, *Second Treatise of Government* (1690) §§ 25-51, in Peter Laslett (2d ed.), *Two Treatises of Government* (1967) 303-20. Such a principle is related, though, to Locke’s argument that because no one would labor without expecting some benefit, it would be unfair to let the idle take ‘the benefit of another’s Pains’ (§ 34).

⁵⁸ See, for example, Stephen R. Munzer, *A Theory of Property* (1990) 276-79, 395-96.

⁵⁹ See, for example, William Ashley (ed.), John Stuart Mill, *Principles of Political Economy* (1848),

moveable goods, justifies broad powers to transfer by sale, gift, or will only if whatever constraints apply to original acquisition continue to be satisfied, and that steep taxes on gratuitous transfers are in order.⁶⁰ Multi-principle (pluralist) theories of property that include targeted appeals to utility or efficiency as well as a labor-desert principle can help to justify a power to transfer full ownership.⁶¹ For instance, appealing to the advantages to and preferences of both buyers and sellers of land helps to show that what Anglo-American property lawyers call a fee simple absolute, or full ownership, conduces to a useful, smoothly-functioning system of land transfer. By itself, a labor-desert principle could support no such system. It is therefore no surprise that economists argue that economic efficiency undergirds a limited number of types of property rights, of which a fee simple absolute would be the most conspicuous.⁶² Thinkers have yet to consider whether such philosophical and economic arguments can show that remote descendants of originators or unrelated later inhabitants of a region should have an intellectual property right in products that they never invented. Later we take up such arguments under the headings of incentives to innovate or market products and the prevention of consumer confusion. For the moment it is highly doubtful that a labor-desert principle by itself justifies GI-type property rights for originators' descendants or later inhabitants of a region.

One might try to sidestep this argument by stressing *improvements* to Basmati rice and Bordeaux wine by later growers and winemakers. This move requires an inquiry into matters of empirical fact. Were improvements made? If so, who made them and when? Did the improvements involve small increments or great strides forward? Patents, for example, rest on a claim of an inventive, non-obvious step. Very small steps, or large obvious ones, do not justify patents because these steps improve insufficiently on prior art. Only when answers to these empirical questions emerge will it be possible to assess Lockean arguments for improvers of GIs. But three points are immediately clear. First, the application of such a labor-desert principle to GIs will almost certainly be fact-specific. A single package of GI rights for all regional producers, which can number in the hundreds, is highly unlikely. Second, these rights are apt to be modest, because the desert of improvers will often be narrowly incremental and cannot partake of the desert of originators or earlier improvers. For example, we might ask whether the quality of Bordeaux wines is primarily the result of recent innovations in wine-making technique. To some degree the answer is yes; the science of oenology has made great

(1976) 226-27, who wanted to limit inheritance.

⁶⁰ See Munzer, *supra* note 58, at 276-78, 380-418.

⁶¹ *Ibid.* at 217-18, 286-87, 397-402.

⁶² See, for example, Thomas Merrill and Henry Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle', 110 *Yale Law Journal* (2000) 1.

strides in recent decades. Yet Bordeaux has a very long and storied history as a wine-making region, and it is plainly not the case that most, or even much, of the current economic or aesthetic value of Bordeaux wines results from recent innovations in wine-making. Third, and arguably most significantly, GI rights would not be linked, on this rationale, with regions as such--at least not unless a *region* can be deserving. It is possible, though, that a *group of people*, defined in a way that is inextricable from a region, can deserve, say, praise, blame, or property rights. As we discuss later, however, this group or individual members of it can move to a new region, and there is no good reason under a Lockean rationale why the property rights they enjoy in GIs would not move with them.

A subtly different defense of GI rights would stress *maintaining* the quality, tradition, and artisanal methods of production of a GI-labeled good. The idea is that a group of people could deserve property rights for having maintained quality over time. (We take up incentives to maintain quality below). Without doubt some effort and investment go into preserving attributes of a GI-labeled good. The effort and investment could ground desert, which in turn could justify granting property rights in GIs. Still, we doubt that the proportion of desert-tied effort and investment of current maintainers is very large compared to the desert of prior originators, improvers, and maintainers, and hence these property rights would not be too strong. Moreover, this rationale for rights runs into an important conceptual problem. The very concept of a GI rests on characteristics that result not only from human techniques but, critically, from the specific and special *natural* qualities of that region. GIs embody, in short, a claim of a place-quality nexus. This focus on locality, however, does not fit with labor-desert at all. To stress that a product's quality is chiefly locality-related, such as Carrara marble, says little or nothing about producers and their deserts. (The same argument applies to claims about improvement in quality, discussed above.) Further, arguments for GIs of this sort would work best only for the least-processed products. It would work poorly for most of the GIs claimed in practice, which concern wines, spirits, and artisanal foodstuffs. In sum, the very conceptual basis of GIs poses serious problems for a theory of desert based on human improvements. The more a desert rationale for GI protection hangs on human improvements and inputs, the less central a given locality is to product quality. There is a fundamental tension between the claims of desert based on subsequent human improvement and maintenance and the underlying concept of geographic indications.

As we mentioned earlier, some GIs are based entirely on human rather than natural inputs. Swiss watches are perhaps the best-known example. 'Swiss' and 'Swiss made' are protected GIs. Would labor-desert theory better justify property rights for this kind of GI? Although a GI shorn of geographic qualities fits labor-desert theory better, such a defense of GIs raises other

serious problems. Most problematically, it is hard to see why those skilled individuals who emigrate to a new location outside the border of the GI can no longer avail themselves of the GI. If the source of product quality is human skill and not natural features, there is no necessary connection to regional borders. So if labor-desert arguments can justify a GI such as ‘Swiss made,’ it is not at all clear why those Swiss craftsmen who move their facilities just across the border into France ought not be able to use the GI, for it is their human skill, not the climate or soil of Geneva, that imparts a special quality to the watches they produce. This is not to say that protection of Swiss GI for watches is unwarranted, only that a labor-desert theory cannot justify the existing regime of *geographically-based* indicators.

B. Firstness.

Arguments from firstness, or priority, surface in at least two quite different ways as a defense of property. One is as a justification for an institution of property generally or at least as a justification of certain types of property: those who claimed it first have a legitimate claim. Yet firstness does not work well as a general justification unless it brings in elements from Locke’s famous arguments for private property.⁶³ The other way is as a justification for *who* should have property rights in a given thing, sometimes called particular justification.⁶⁴ This use presupposes that other underlying justifications for property rights have already proved sound. In property law, firstness sometimes functions as a particular justification when disputes over desert or incentives prove very difficult or costly to decide on other grounds. Assigning a property right to the party who was ‘first’ promotes order because often priority can be determined even when other things cannot. Thus, property rights to a wild animal might be given to the first person who captures it, and property rights to land might be granted to the first person who occupies the land and makes productive use of it. Lurking in this thinking may be some form of a desert claim. Granting ownership to those who are second might equally promote order.

Some theorists of property rights contend that Lockean justifications, which are often identified or associated with firstness, support strong property rights in, for example, inventions, songs, and literary works.⁶⁵ However, others argue against Lockean justifications of exclusive control

⁶³ Becker, *Property Rights*, at 24-56.

⁶⁴ *Ibid.* at 23.

⁶⁵ See, for example, James Child, ‘The Moral Foundations of Intangible Property’, 73 *The Monist* (1990) 578; Robert Nozick, *Anarchy, State, and Utopia* (1974) 181-82. Labor dominates Locke’s own discussion of property, but his examples of picking up acorns and gathering apples, which involve precious little labor, suggest that something hinges on firstness. ‘And ‘tis plain, if the first gathering made them not his, nothing else could.’” John Locke, *Second Treatise of Government*, § 28. In the

over access to and the use of intellectual works. Seana Shiffrin, for example, contends that there is a Lockean presumption *against* natural, private rights over intellectual property.⁶⁶ Although Shiffrin identifies different understandings of the ‘intellectual commons,’ her argument presumes that ‘initial common ownership applies to intellectual property.’⁶⁷ One might question this presumption on the ground that many intellectual commons are open-access resources rather than owned in common. For open-access resources, arguments sounding in firstness have some bite. For resources owned in common, arguments invoking firstness would be harder to make.

But even if one assumes that firstness has some justificatory force, it fails to justify GIs decisively. The first people to make Roquefort cheese or Chianti are long dead. It is again not easy to see why their remote descendants should be able to invoke ancestral firstness after 100 or 200 years -- or more. But even if one grants this claim, it is especially hard to see why *only those descendants still in France or Italy, and not the many who emigrated in decades past to other nations*, should enjoy this right.

Moreover, the actual history of developments within a region affects the force of an argument from firstness. The most favorable case for this argument is when many producers hit upon the relevant techniques simultaneously. Much less favorable is the case where only one or a very few producers develop the relevant techniques and over time other producers in the region copy them. Suppose that feta cheese was initially produced only by Georgios, Charmides, and Menon in a small area of present-day Greece. Over the next centuries other cheesemakers in Greece began using their techniques. Even if today we can identify our mythical trio, it is, at first blush, hard to understand why all contemporary Greek cheese producers should have a GI of indefinite duration in feta cheese. This point is particularly valid in a global economy. It is hard to fathom why a French agribusiness conglomerate, which purchases a local Greek feta factory, ought to be able to avail themselves of a legally-protected GI. Likewise, it is difficult to grasp why an American professor of international law, who owns shares in a mutual fund that invests in the conglomerate that then buys a Greek cheese factory, ought to enjoy the rents accruing from robust GI protection for Greek feta.⁶⁸

present era, Richard Epstein, ‘Possession as the Root of Title’, 13 *Georgia Law Review* (1979) 1221, at 1238-43, offers a qualified defense of first possession. Jeremy Waldron, *The Right to Private Property* (1988) 173, 176, 284-87, 386-89, has a shrewd treatment of first occupancy in Locke and other thinkers.

⁶⁶ Seana Valentine Shiffrin, ‘Lockean Arguments for Private Intellectual Property’, in Stephen Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (2001) 138-67.

⁶⁷ See *ibid.* at 158-66.

⁶⁸ As this example suggests, strong GI protection in relatively open economies could stimulate

Aside from trademark, the primary intellectual property rights--patents and copyrights--are of limited duration. In those cases we can, and often must, identify who was first to invent or to compose. We limit the duration of these rights because follow-on inventors and composers benefit by having earlier advances in the public domain. These reasons apply with at least some force to GIs. Now trademarks, the standard intellectual property right that GIs most resemble, in principle are eternal, unlike patents and copyrights. The primary rationale for trademark protection is generally held to be the prevention of consumer confusion, which is a different argument from firstness. (We discuss consumer confusion below.)⁶⁹ Trademarks enable consumers better to distinguish among different products in the marketplace. In turn, firms have an incentive to increase or maintain quality in order to retain customers. Similarly, GIs help consumers to distinguish products in the marketplace, and to associate certain qualities with certain products. Just as a trademark can be awarded as a protected identifier to the first firm to use a particular mark, so can a GI be awarded.

Nevertheless, GIs differ from trademarks in that they are highly aggregated identifiers. A GI such as Champagne refers to a large and varied class of sparkling wines within which there are dozens of producers. Trademarks such as *Veuve Clicquot* and *Pol Roger* belong to individual firms. The larger scale of the typical GI somewhat undermines the consumer-confusion rationale. The more aggregated a class of goods, the less likely it is that consumers can identify and associate a particular quality with a given GI. Consider a GI of 'French Wine.' There is little, perhaps nothing other than the presence of alcohol and grapes, that links together the wide array of wines from such a diverse region as France. A narrower GI such as 'Bordeaux' begins to tell the consumer more, but even here the variation in style and quality within the region can be striking. Further demarcations ('Entre Deux Mers') can narrow the scope of quality further. Yet even at this level differences among producers plainly exist. This inherent heterogeneity is one reason why GIs do not attach to any just producer from a given region. Rather, producers seek to ensure that the techniques and styles of the GI-protected product are moderately uniform.⁷⁰

foreign direct or portfolio investment, which could, ironically, crowd out traditional producers. We thank Christina Davis for this point.

⁶⁹ Firstness is not immaterial in trademark law. A tiny but venerable company with a similar trademark to a newer, much larger firm may still prevail in a confusion suit. See *Dreamwerks Production Group Inc. v. SKG Studio*, 142 F.3d 1127 (9th Cir. 1998).

⁷⁰ GIs, unlike trademarks, also suffer from collective-action problems. Producers within a region face an incentive to free-ride on the quality of others. Hence the policing methods employed — only *this* grape, only *that* minimum age before release — are often aimed at ensuring that quality does not undergo a race to the bottom. One defense of GIs, as we discuss, is that they help solve this collective

Aggregation not only casts doubt on the consumer-confusion rationale for GI protection, it also bedevils the argument from firstness. If anyone can buy a chateau in Champagne and produce Champagne, or purchase shares in Louis Vuitton Moët Hennessey, S.A., a major champagne producer, what does firstness represent? (Or desert, for that matter). Again, analogy to trademark is instructive. Trademarks may be bought and sold, and the shareholders, managers, and employees of the firm that owns the trademark change over time. The trademark nonetheless persists as long as it retains its distinctive significance for consumers -- what trademark law refers to as 'acquired distinctiveness' or 'secondary meaning' Likewise, GIs may retain distinctive significance for consumers over long stretches of time. So we see no reason in principle to distinguish GIs from trademarks in this respect. The touchstone, however, is lowering consumer search costs: firstness as such has little bearing on the specific justification of trademarks or GIs unless the underlying mark has acquired distinctiveness. And the more aggregated a GI is, the less acquired distinctiveness it likely possesses--and the weaker the rationale for protection.

C. Moral Right of the Author and the Community.

Continental intellectual property law stresses the moral right of the author more than Anglo-American law does. Drawn from Kant and Hegel, the idea of moral right traditionally stresses the way in which the author — including here artists and composers as well as writers — has projected his or her personality into the work. Perhaps it possible to adapt this theory in order to justify rights in GIs. The adaptation views the community of growers or producers as a group of persons extended over time and region that plays a role in the creation and continued use of the GI. Although it stretches the concept of personality to apply it to groups, overtones of moral right theory can be discerned in the debate over GIs today. Still, the argument thus adapted is not especially powerful. GIs involve much else besides the efforts of the community over time. By definition they involve the natural attributes of the locality, such as the existence of native plants and a local climate for which no human beings can take credit.

To illustrate, consider the central idea of *terroir*. The most extreme arguments about *terroir* in the wine industry hold that even if the same grapes and techniques are used in Sonoma as in the region of Médoc, the concept of a 'California Médoc-style wine' is oxymoronic. A wine could be Médoc-style only if it came from Médoc. The key to making Médoc wine, in short, is producing in Médoc. But perhaps the Médoc wine community can take pride in the way it

action problem.

makes effective use of its local *terroir*. Or perhaps the community, over time, has hit upon the best techniques to match its microclimate and soil.⁷¹ Echoes of this symbiotic view of human and natural factors can be found in the EJC Feta decision.⁷²

As a general matter, we do not believe that the existence of a non-human element necessarily vitiates a possible moral right of the author or the community. A photographer who takes pictures of the sea or a craggy mountain peak could invoke a moral right of the author as part of the basis for a copyright in the photographs. Similarly, winemakers who take advantage of the soil and microclimate of Médoc and work together, or borrow from one another, to make Médoc wine could claim that a moral right of their community exists. Such a right could be part of the ground for GI protection for Médoc wine.

There are at least two problems with this argument, however. First, the concept of a group personality bound up in a particular product is certainly weaker than the concept of an individual's personality bound up in their creations, if for no other reason than personality is a concept tied to personhood. Second, moral right theory would seem to preclude copying not of the GI itself, insofar as it is merely a label, but rather of the underlying product: in this example, Médoc wine. Depending on one's view of *terroir*, Médoc wine is either simply uncopyable as a factual matter--in that the quality of the wine directly and intrinsically reflects the soil, climate and so forth of Médoc--or Médoc wine is in fact copyable in style and production process. If the former view is held, then the law need not intervene. Direct copying cannot occur. If the latter view is held, however, the law arguably ought to intervene to protect the copying of the Médoc style and technique, not the GI itself (or at a minimum, not *just* the GI). In short, this argument seems to prove too much.

This case for GIs is nonetheless somewhat stronger than arguments that rest on firstness or desert. The latter arguments hinge on the different contributions of different individuals over time. It is harder to present firstness or desert based on labor as a justification for a group right. But to speak of the moral right of the *community* is already congenial to the possibility of a group right. The 'group' would extend throughout a region and across time. In the case of Médoc wine, the group or community would include those who planted and grew the relevant vines, harvested the grapes, and made them into wine, from the beginning down to the present day.

⁷¹ These arguments reflect concepts of desert as well.

⁷² *Supra* note 18.

The Achilles heel of the argument for a community-based moral right in GIs is that it is often difficult to define the relevant ‘community.’ This point is a variation on the aggregation problem discussed under the heading of firstness. If the GI is quite broad, such as Bordeaux wine or Champagne, the community of producers tends not to be closely knit. Thus, the moral right of the community seems more plausible and compelling when the GI is rather narrower, such as Entre Deux Mers or Turrón de Alicante. But even in these examples, individuals move in and out of the region. The community is fluid, which makes demarcation hard. Perhaps most significantly, individuals emigrate and immigrate. If a producer of long-standing moves to a new, very geographically similar region in another state, does he or she lose community-member status? If so, why? If the notion here is that the personality of the community is projected into its products and this projection justifies legal protection via property rights, then it is again very hard to see why community members who move just outside the borders of a GI region cannot still avail themselves of the GI. It is equally hard, if not harder, to see why a perfect stranger from a far-away community can move *into* the region and so avail themselves of the GI. In short, moral rights justifications for property fit uneasily at best with the protection of GIs. To the degree they do fit, they demand a radically different legal structure than that currently in place in the TRIPs Agreement.

D. Incentives to Innovate, Maintain Quality, and Market.

The commonest argument for patents, copyrights, and trade secrets, especially in Anglo-American law, rests on appeals to utility: Unless one recognized such rights, there would not be enough incentive to innovate, and the world would have to do without the benefits of innovation. Of course, this common argument needs to be calibrated. We want to have optimal incentives — namely, those that will elicit the most valuable products at the lowest cost. Still, even if we could optimize incentives, they scarcely seem pertinent to GIs. Whoever first began to develop Antigua coffee and Rioja wine, and even members of the first several generations of developers, are long in the grave. No incentive can operate on them. And because Antigua coffee and Rioja wine now exist, and indeed have long histories, no need arises to provide a continuing incentive to innovate to the current generation. The same could, of course, be said of existing patents or copyrighted works. The argument in favor of continued protection is instead to incentivize new creations: in our case, new GIs. Unlike patented inventions and copyrighted works, however, GIs in and of themselves are not useful or desirable. Like trademarks, they are signs. Incentivizing the creation of new signs, without creating new underlying goods that they refer to, is not very compelling.

GIs resemble trademarks in their potentially unlimited duration and in their signifying

function--their ability to convey information to consumers. They also supply incentives to producers to maintain quality, since consumers know to look to the mark as a shorthand for a bundle of qualities. However, trademarks typically provide incentives to particular firms, say, for BMW to sell automobiles. GIs, by contrast, apply to large sets of individuals and firms within a region, or even to entire countries, as for Swiss watches or Greek feta.⁷³ GIs consequently face serious collective-action problems: each producer faces an incentive to lower quality, if quality is expensive, and free-ride on the quality of others within the GI. Typically this collective-action problem is alleviated by some regulatory process that polices quality and technique within the GI. This difference between GIs and trademarks weakens still further and spreads even more thinly an incentive to invest in maintaining the reputation of a place-name.

Is there nonetheless an incentive to *improve* goods to which GI labels attach? Some improvements may relate to the process rather than the good or product itself. Present-day Greeks may learn how to make equivalently good feta cheese faster or more cheaply, and they have an incentive to do so because their profits may rise or their share of the global cheese market may increase. Yet GI protection is not necessary to have this incentive (trademark certainly supplies it, as may patent), though GI protection may enhance this incentive. The winemakers of Bordeaux go to a good deal of trouble and expense to promote their wine. The wine must be made from certain grapes in a particular way. The continued-improvement argument gets some traction from the idea that others ought not to be able to intercept and appropriate the fruits of the efforts of Bordeaux winemakers to improve their wine quality. But again, this rational runs into a problem: the more that improvement is found, the less that the product's qualities rest on its locational qualities, such as climate or soil. This point does not vitiate the continued-improvement argument. It may be that granting geographically-based property rights is a good way to promote improvement. Still, it plainly cuts against the existing conception of GIs, which rests fundamentally on a place-quality connection.

Finally, GIs also can be said to give an incentive to market products identified by place-names or similar identifiers. Suppose that 10,000 farmers grow Basmati rice. If most farmers are small producers rather than large agribusiness firms, no single small producer has much to gain from putting money into the marketing of Basmati rice, or perhaps even in creating a trademark. But if GI protection is available, a large group of small producers has an incentive to promote Basmati rice and to fight off alleged impostors. Though good for producers, it is less clear whether, on balance, this incentive is good for consumers. If it were to lead to

⁷³ There are collective trademarks, such as 'Sunkist' for oranges, that have similar qualities — and problems.

improvement in the quality of Basmati rice over time, improvement that but for the GI protection would not have occurred, that would add force to this argument.

E. Preventing Confusion.

The most powerful argument in favor of GIs tracks the most powerful argument for trademarks: the aim of preventing confusion among consumers and lowering their search costs.⁷⁴ If just any liquor could be called Scotch whiskey, at least some consumers might not get what they think they are paying for. This point underlies the ‘passing off’ of shoddy goods as the esteemed goods of a competitor, and passing off has long been barred in many legal systems as an unfair method of competition.

It would be easy to prevent the confusion associated with passing off through simple labeling requirements. Producers of Prosciutto di Parma will find their interests protected if makers of Prosciutto Toscano put ‘Not the Same as Prosciutto di Parma’ on their labels. French vintners will be protected if Australian winemakers put the following on their labels: ‘Product of Australia: Burgundy-style wine.’ Such practices suffice to keep consumers from confusing products from one region with another, perhaps more well-known, region. Yet the TRIPs Agreement currently protects GIs for wines and spirits in a manner that goes well beyond preventing this form of passing-off. These rules prevent any invocation of a protected GI for wine and spirits, even if the label makes clear that the product is not actually from the protected region.

It is, however, often hard to market a similar product without using a well-known GI. Consider Madeira, a fortified wine with a very long history. Unless a Chilean winemaker can use a phrase such as ‘Madeira-style’ or ‘tastes like madeira,’ or ‘Chilean madeira wine,’ the consumer will not know what to expect. It will not do to substitute ‘fortified sweet wine,’ because Port and Sherry also fall under this rubric. Furthermore, under TRIPs a distiller in Hong Kong or Hungary may not sell ‘Scotch-style Whiskey’ or ‘Scotch-like Whiskey,’ even if consumers know that it is not from Scotland. Indeed, the UK could fight off Chinese or Hungarian efforts to label their product ‘Ersatz Scotch Whiskey’ or ‘Fake Scotch Whiskey.’ It is hard to comprehend how using words like ‘Ersatz’ or ‘Fake’ would be a good marketing strategy, but the existing TRIPs standard would still bar prefixing them to ‘Scotch Whiskey.’ It is especially hard to grasp how

⁷⁴ Consumer confusion, while still the core rationale, is decreasingly important in American case law. See Mark A. Lemley, ‘The Modern Lanham Act and the Death of Common Sense’, 108 *Yale Law Journal* (1999) 1687.

such a result increases consumer confusion.⁷⁵

The net result of this legal rule is to allow GI holders to keep their prices at a supracompetitive level. Consumers pay more because they are unaware of a comparable or similar product made elsewhere. This consequence runs directly counter to the idea of aiding consumers. And some potential imitators cannot get started at all, if they are unable to market their product effectively. Consequently, though a confusion rationale supports a bundle of rights in GIs that bars passing off, the formulation of GI rights currently in the TRIPs Agreement for wine and spirits has to rest on something besides preventing confusion.

F. The Sum of the Parts.

Just because each of the arguments for GI rights we have examined is not wholly persuasive, it hardly follows that the entire set of these arguments taken together is not persuasive. That is why we believe some international legal protection for GIs is justified. Our support for GI rights rests on an amalgam of claims. The arguments from firstness, desert, and an incentive to innovate are jointly and severally weak. But there is some force in the arguments from the moral right of the community, incentives to market and improve, and especially in preventing consumer confusion. These last three arguments are the source of our claim that the standard in TRIPs for products other than wine and spirits, which allows use of a GI by producers outside the region as long as the true origin of the product is made clear, is defensible and an appropriate international legal standard for all products.

Most important from a practical standpoint, the protection of GIs justified by these property rationales is less than the current package of protection afforded for wines and spirits under the TRIPs Agreement. *A fortiori*, it is less than the broader package now sought by the EC in the Doha Round of negotiations within the WTO. The European Union would expand the current wine and spirits level of protection--no use of the GI, even if the label clearly indicates that the product is not from the relevant region--to additional products. This extension lacks justification and would represent a boon for the relative producers with little social benefit. Indeed, the arguments in this Article suggest that the existing WTO wine and spirit standard ought to be revoked; while the discrimination the EU has noted in products exists, the proper solution is to harmonize downward to the general TRIPs standard rather than upward to the unusual and problematic wines and spirits standard.

⁷⁵ For similar problems in contemporary trademark law, see Lemley, *supra* note 73.

VI. Conclusion

Geographic indications stand at the intersection of three increasingly central and hotly debated issues in contemporary international law: trade, intellectual property, and agriculture policy. Within the WTO the regulation of agricultural production has been called “the ultimate deal-breaker.”⁷⁶ The progressive globalization of the world economy has dramatically altered agricultural politics and policy; it has also raised hard questions about the place of tradition and locality in a world that seems, to many, ever-more homogenous and borderless. Hence GIs raise heated emotions. This Article has both offered a positive explanation for the rise of GIs in international law and a normative critique of these rights as articulated in the TRIPs Accord of the WTO, the most powerful international agreement in the field. We have argued that the level of protection afforded most products by TRIPs is justified by a number of theories of property. Most forceful in our view is the consumer confusion rationale that undergirds trademark law generally. The higher level of protection afforded wine and spirits, however, cannot be justified in this way because often it increases, rather than decreases, consumer confusion.

The GI debate is driven, of course, not by philosophical arguments but by political interests. Agricultural producers in Europe have pushed forward this higher standard in an effort to protect traditional producers from increasing competition from abroad. The expansion of GI protection within Europe is of course not uncontroversial, as the Feta case illustrates. All the same, the European Commission has continued to fight for greater GI protection at the international level. As of this writing it is unclear whether the current effort to expand GI protection in the Doha Round will succeed. But however misguided, it unlikely to be the last such effort. The continuing progress of globalization, the striking pace of technological progress, and the deepening of economic liberalization around the world seem likely to ensure that efforts at propertization through international law will continue to accelerate.

⁷⁶ Broude, *supra* at 4.