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**Demanding Stronger Protection for Geographical  
Indications: The Relationship between Local Knowledge,  
Information and Reputation**

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# DEMANDING STRONGER PROTECTION FOR GEOGRAPHICAL INDICATIONS: THE RELATIONSHIP BETWEEN LOCAL KNOWLEDGE, INFORMATION AND REPUTATION

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## **Abstract**

Unlike patents and intellectual property rights in plant genetic material, TRIPs negotiations concerning geographical indications have not entered wider public imagination. However, TRIPs negotiations in this area have been and continue to be contentious. One area of contention is the explicit hierarchy in the level of protection, whereby indications for wines and spirits are offered stronger protection through Article 23 that indications for other products through Article 22. *Demandeurs*, which include many developing and transition countries, want a removal of this hierarchy with other products being offered protection similar to indications of wines and spirits. The paper critically reviews one aspect of the debate on GI-extension at the TRIPs Council: the comparison between Article 22 and Article 23. It presents a theoretical basis for analysing the rationale for protecting GIs in terms of local knowledge, informational asymmetries and the role of reputation.

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## 1.0 INTRODUCTION<sup>1</sup>

Unlikely as it may seem, geographical indications (GIs) – in particular, the call for extending higher protection currently offered to wines and spirits to other products<sup>2</sup> – have become a point of deep dispute at the TRIPs Council between members of the World Trade Organisation (WTO). In the case of GIs, contemporary problems could very well be a reflection of issues left outstanding from the negotiations. In this respect, Gervais (1998, p137) notes that ‘the only possible outcome not blocking the [Uruguay Round] negotiations was thus to agree to further talks’ (Gervais, 1998, p137); hence the built-in agenda for further negotiations. The difficulties encountered in negotiating GIs during the Uruguay Round are well noted in the literature (e.g. Geuze, 1998, p41; Watal, 2001, p265). However, this dispute does not grip public attention or imagination in a manner comparable to issues like patents and access to medicine or the patenting of plants. This difference could very well reflect specific attributes of the issues concerning GIs. To begin with, there are no civil society organisations centrally campaigning on the issue<sup>3</sup>. Furthermore, unlike the other issues, GIs cut across the traditional ‘North-South’ divide and have many developing countries as *demandeurs*. Thus, countries like Switzerland, the European Union and former Eastern bloc countries line up with a selection of developing countries in supporting GI-extension. On the other hand, countries like Australia, New Zealand and the US along with many Latin American countries oppose GI-extension. As such, it is fair to say the dividing line is more reflective of the ‘old world’-‘new world’ fault-line.

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<sup>1</sup> The paper is based on a seminar presented at INTECH in March 2003. Comments from participants at the seminar and an anonymous referee are gratefully acknowledged. Research contributing to this paper were initially conducted for the UNCTAD-ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development and published in Rangnekar (2003, 2004). Discussions and comments with the UNCTAD/ICTSD team, delegates to the TRIPs Council and members of multilateral trade and intellectual property institutions are gratefully acknowledged. Comments from Michael Blakeney, William van Caenegem, Biswajit Dhar, Graham Dutfield, Sergio Escudero, Jorge Larson, C. Niranjana Rao, Pedro Roffe, Christoph Spennemann, David Vivas, and Thu Lang Tran Wasescha are most gratefully acknowledged. The usual disclaimers apply.

<sup>2</sup> Throughout the paper the phrase ‘GI-extension’ is used as short-hand to refer to the demand for extending the scope of application of Article 23, which currently offers additional protection to only wines and spirits, to other products; in other words removing the hierarchy in the level of protection in Section 3.

<sup>3</sup> This may change in due course with the very recent (June 2003) formation of an international group called ‘ORIGIN’ (the Organisation for an International Geographical Indications Network) directed by a coffee-grower from Guatemala and includes representatives of Italian Parma ham manufacturers and Indian rice-and tea- growers (Anon., 2003). The central objective of ORIGIN is to extend to cheeses, rice and teas the same protection given to wines and spirits, so as to prevent their imitation by agricultural producers in other countries.

Underlying the submissions at the TRIPs Council which call for extending higher protection currently offered to only wines and spirits to other products, is recognition of the commercial value of labels that seek to secure the link between quality and the region of geographical origin: “considerable potential for commercial use ... [as having stimulated] awareness of the need for more efficient protection of geographical indications” (IP/C/W/204, paragraph 2). A more articulate statement of the commercial value of distinctive marks establishing a product’s geographical origin is presented by Australia, a country otherwise opposed to GI-extension: “... tea is more valuable than undifferentiated bulk tea in the market-place if it is sold as Darjeeling tea, more valuable still if it bears the distinctive certification mark “Darjeeling – The Tea Board’s Seal of Approval”, and potentially yet more valuable again if it bears a distinctive trademark and is packed in distinctive packaging. [...]” (IP/C/W/211, page 2). Clearly, GIs – like trademarks – are intrinsically associated with the buying and selling of goods. Hence, *demandeurs* see as ‘key’ the difference in the level of protection between Article 22 and Article 23, which forms the central focus for this paper.

In this paper we study the debate at the TRIPs Council on GI-extension, focussing on the issue of differences between Article 22 and Article 23. The analysis is placed in the context of the economics of information and reputation and the nature of local knowledge.



## 2.0 THE TRIPS AGREEMENT AND GEOGRAPHICAL INDICATIONS

GIs are entirely an invention of the TRIPs Agreement, reflecting in great measure the negotiating success of the EC and its member states. The interest of the EC and its member states in including GIs within TRIPs follows their frustrated attempts in strengthening the global protection of IGOs<sup>4</sup>. For example, at the 1958 Lisbon Conference for the Revision of the Paris Convention, attempts to include the term ‘origin’ in Article 10*bis*, so as to make explicit the application of principles of unfair competition on IGOs, were defeated by a single vote of the US (Conrad, 1996). Other efforts at WIPO, such as the preparation of a multilateral treaty on GIs in 1974-75 or deliberations in the nineties of WIPO’s Committee of Experts on Geographical Indications remained still-born. Thus, it is not surprising to learn that GIs were one of the most difficult areas of negotiation within the TRIPs Agreement and the final shape of Section 3 is a sensitive compromise with unfinished business (Geuze, 1999, p41; Watal, 2001, p265).

Provisions for GIs are set out in Section 3 (Part II) of the TRIPs Agreement through three articles (cf. Table 1).

<b>Table 1</b>			
<b>Section 3 (Part II) of the TRIPs Agreement</b>			
	<b>Article 22</b>	<b>Article 23</b>	<b>Article 24</b>
<b>Definition of Subject Matter</b>	22.1 – provides a definition for GIs		
<b>Basic Protection</b>	22.2-22.4 – outlines the basic scope of protection for GIs for all goods other than wines and spirits		
<b>Additional Protection for Wines and Spirits<sup>a</sup></b>		23.1-23.3 – outlines the additional protection available exclusively for wines and spirits	
<b>Provisions for Further Negotiations</b>		23.4 – obligation to enter into negotiations for establishing a multilateral register for wine GIs	24.1-24.2 – sets up provisions for further negotiations
<b>Exceptions to Obligations</b>			24.3-24.9 – outlines the exceptions to obligations for protecting GIs
<sup>a</sup> There are differences between the protection available for wines and that available for spirits. Article 23.3 (homonymous indications) applies only to wines. Article 23.4 (multilateral register) was originally directed at wines and has since been extended to include spirits. <i>Source:</i> Rangnekar (2003)			

<sup>4</sup> Mention should also be made of the fact that membership of and adherence to either the Madrid or the Lisbon Agreements was limited. For example, US, Germany and Italy are not members of the Madrid Agreement.

## 2.1 Definition of Subject Matter

Article 22.1 defines the subject matter to be protected, i.e. GI, and simultaneously also sets out the conditions for grant of protection<sup>5</sup>. It is useful to note that Article 22.1 applies to all GIs and is not delimited to particular categories of goods. Consequently, as *demandeurs* have repeatedly noted, Section 3 of the TRIPs Agreement is unique in having a single subject-matter definition whilst allowing for a hierarchy in the level of protection, a discrimination that has no juridical rationale (IP/C/W204/Rev.1 and IP/C/W/247/Rev.1).

There are three broad elements to the definition. To begin with, Article 22.1 does not specify possible indications, thus allowing for words/phrases, iconic symbols and emblems, scripts and pictorial images, etc. Thus, for example, iconic symbols like the Pyramids for Egyptian goods, or the Taj Mahal for Indian goods, or the Statue of Liberty for American goods are permissible. It is essential that the ‘indication’ must *evoke* the territory from which the goods ‘originate’. In this respect, there is no requirement for the indication to be a *direct* geographical name, thus permitting indications that are not geographical terms<sup>6</sup>. It is also the case that Article 22.1 is delimited to ‘goods’. The use of the term ‘goods’, rather than ‘products’ – a correction made while preparing the Brussels negotiating draft (December, 1990) – would suggest that services are excluded (Rangnekar, 2003 for a discussion).

Second, the good must necessarily possess “given quality”, a “reputation” or “other characteristics”<sup>7</sup>. What is important here is that, *cetris paribus*, each one of these qualifiers is on its own an adequate condition for the grant of protection. The notion of “given quality” might be related to physical attributes of a good that are measurable to an extent. This approach would be consistent with the EC Regulation (EEC 2081/92) that, some suggest, adopts a “production management approach, where quality is intended as a standard set of characteristics which can be measured, observed and certified” (Segale et al., 1998, p367). However, quality remains a highly contested, socially constructed and ambivalent notion (Ilbery and Kneafsey, 1999). The separate reference to ‘reputation’ allows for the possibility *reputable* goods that may not have a

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<sup>5</sup> Here, note the analogy with patents (cf. Article 27[1]), where the definition sets out the conditions for grant of protection, viz. new, inventive step and industrial application.

<sup>6</sup> Relevant examples here would include *Feta* for a particular cheese originating in certain regions of Greece and *Basmati* for a particular long-grain aromatic rice originating in certain regions of India and Pakistan. This aspect of the TRIPs definition has not been missed by legislators in India when framing the relevant national law. Consider the explanatory note appended to India’s *Geographical Indications of Goods (Registration and Protection) Act, 1999*: “For the purposes of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that Country, region or locality, as the case may be.”

<sup>7</sup> These terms remain undefined in the TRIPs Agreement. It is only the case that they are “essentially attributable to its geographical origin” – a point that we discuss shortly.

particular quality characteristic or other characteristic attributable to their geographic origin. Conceivably, this allows public perceptions and expectations related to the good and its geographical origin to bear on the conditions for grant of protection.

Third, it is necessary that indication-quality<sup>8</sup>-geographical origin be linked together. This is clear from the dual requirements that “indications identify a good as originating in the territory” and that quality is “essentially attributable to its geographical origin”. It is axiomatic that indications identify goods as originating in a certain territory. And, by extension, it is not possible to issue licenses for use of GIs for similar goods produced outside the designated territory. Problematic in terms of the definition are the nature and size of the territory so indicated, the extent of the good’s production process implicated linked in the territory of origin and how national legislation administers these issues. It is neither the purpose of nor the scope of the paper to clarify this element of the definition. Referring to the WTO Secretariat’s survey of legislations implementing Section 3 (IP/C/W/253), we note that a wide range of geographical units are used, which include administrative and political units, non-political geographical units, and indirect geographical indications. The size of the geographical units is also highly variable. In respect to origin requirements, the WTO study observes that some countries state only general requirements that the product must be made in the indicated place or that the producer must be located in that area. However, some countries have more specific requirements (e.g. requirements that all stages of production must be in the designated area; requirements that the raw material, such as grapes, must have originated in the designated area). What is important from a legal and economic perspective is that protection requires a level of homogeneity in the distinguishing quality across goods produced by different manufacturing units is achieved.

## **2.2 Basic Protection<sup>9</sup>**

Article 22 provides the basic scope for the protection of GIs, where the obligation is for Members to provide the “legal means for interested parties”<sup>10</sup> to protect GIs. The required “legal means” are unspecified, as is the similar obligation for “legal means” under Article 23<sup>11</sup>. Like in

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<sup>8</sup> In this paragraph we use the term ‘quality’ as shorthand to refer to the phrase “given quality, reputation or other characteristics”.

<sup>9</sup> The protection offered under Article 22 must be read with the exceptions provided in Article 24 (discussed below). Also relevant is the comparison between Articles 22 and 23 in terms of the scope of protection, which lies at the basis for the demand for stronger protection.

<sup>10</sup> Article 10(2) of the Paris Convention defines ‘interested party’ as “any producer, manufacturer, or merchant, whether a natural person or a legal entity engaged in the production or manufacture of or trade in such goods”. The absence of the government and the implied inclusion of associations and/or co-operatives are notable (cf. Conrad, 1996). National law may through a definition of ‘interested parties’ limit access to the legal means required by Article 22.

<sup>11</sup> The WTO Secretariat’s review of legal means for the protection of IGOs (IP/C/W/253) identifies a range of methods, such as protection under common law doctrines of unfair

other areas of the TRIPs Agreement, notably the obligation under Article 27.3(b), there is the real potential for multiple systems for protection of GIs. No doubt, members are “free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice” while remaining in compliance with their obligation to the Agreement (Article 1.1).

Under Article 22, the scope of protection is composed of three components<sup>12</sup>:

- protection against the use of indications that mislead the public (paragraph 2(a)) or is deceptive (paragraph 4)
- protection against the use of indications in a manner that constitute acts of unfair competition (paragraph 2(b))
- refusal or invalidation of trademarks that contain or consist of indications, in a manner that misleads the public (paragraph 3)

It is useful to note that Article 22.2(a) uses reasonably expansive language with respect to the *evocation* of the geographical origin of the good in question: “the use of *any means* in the designation or presentation of a good that indicates or *suggests* that the good” originates in a place (emphasis added). Despite this broadness, the article is qualified by the requirement that a particular use of an indication would be considered infringing if it were to *mislead the public* as to the geographical origin of the good<sup>13</sup>. Consequently, use of the indication that is deemed not to mislead the public is permitted. Of relevance is the translated use of an indication (e.g. ‘kind’, ‘type’) or the use of an indication with delocalising appellations (e.g. California Chablis). Article 22.2(b) brings the Paris Convention’s Article 10*bis* to bear on the use of GIs and should be considered an important accomplishment in light of previous attempts to revise the Paris Convention.

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competition and passing off; registration of collective and certification marks; *sui generis* legislation protecting GIs and appellations of origin; and various administrative mechanisms.

<sup>12</sup> The scope of protection under Articles 22 and 23 is normally characterised as consisting of two components, viz. the first two bullet points. However, provisions for negotiating the relationship between trademarks and GIs (Articles 22.3 and 23.2) have important consequences in determining the economic value of a GI, hence its inclusion.

<sup>13</sup> This limitation can be considered analogous to trademark concept of ‘consumer confusion’ and ‘likelihood of confusion’ (UNCTAD/ICTSD, 2003, p29).

### 2.3 Additional Protection for Wines and Spirits<sup>14</sup>

The protection offered under Article 23, which should be read along with the exceptions in Article 24, is significantly stronger than protection offered under Article. Thus, Article 23 is often, though incorrectly, referred to as ‘absolute’ protection in the TRIPs Council.

Unlike Article 22.2(a), protection offered through Article 23.1 (and Article 23.2) is not circumscribed by a requirement of for use to be *misleading the public* for it to be considered infringing. Further, Article 23.1 also prohibits the use of GIs (for wines and spirits) even where the true origin of the good is indicated or when the indication is used in translation or accompanied by delocalising expressions such as “kind”, “type”, “style”, “imitation” or the “like”. By way of illustration, it is possible under Article 22 to label a pack of bananas as ‘Antarctica bananas’ as the term Antarctica in the context of bananas would not be considered misleading the public, whereas ‘Antarctica Merlot’ is strictly prohibited under Article 23, even though it is not considered misleading<sup>15</sup>.

It is useful to note that while Article 23.1 borrows language from Article 3 of the Lisbon Agreement, the latter is not circumscribed to any category of goods. Consequently, the unlikely precedent – in recent times – of a succeeding multilateral treaty (TRIPS) being narrower in its application than its predecessor (Lisbon).

Article 23.2 concerns the relationship between trademarks and GI that identify wines and spirits. Provisions exist for the invalidation or refusal of trademarks that “contain or consist of” GIs identifying wines or spirits. Again, in comparison to Article 22.3, the scope of protection is greater as it does not require proof of consumers being misled and only requires establishing the false origin of the goods bearing the (infringing) trademark.

Article 23.3, which applies only to wines, deals with homonymous GIs, i.e. indications that are either spelt or pronounced alike and used to designate the geographical origin of goods stemming from different countries. The problem is further complicated where the goods in question are identical. A well-known case is that of ‘Rioja’, which is the name of a region in Spain and in Argentina and used as an indication for wine produced in both countries. Honest

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<sup>14</sup> Spirits were added to Article 23, paragraphs 1 and 2 only, towards the end of negotiations (Gervais, 1998, p130). A close reading of these provisions suggests a three-level hierarchy in protection (Escudero, 2001). To be clear, Article 23.3 (homonymous indications) deals exclusively with wines and Article 23.4 (multilateral register), initially restricted to wines, concerns wines and spirits. It is useful to note that neither are the terms ‘wines’ and ‘spirits’ defined in the TRIPs Agreement nor can anything meaningful be inferred from negotiating history (UNCTAD/ICTSD, 2003, p32, thus providing a degree of flexibility to national legislators.

<sup>15</sup> The example of Antarctica is a modification of the example in O’Brien (1999). As far as the public is concerned, ‘Antarctica’ does not evoke any goods/place association in the case of bananas or Merlot and thus the indication should be considered as arbitrary.

use of the indication by producers in each of the different countries is envisioned. Article 23.3 obliges each Member to “determine the practical conditions under which the homonymous indications in question will be differentiated from each other”, while ensuring equitable treatment of producers and that consumers are not misled.

## **2.4 Provisions for Further Negotiations**

As negotiations around GIs were deeply contested, the only solution was to agree to further talks in the future; hence, the built-in agenda for further negotiations (Gervais, 1998, p135; Watal, 2001, p265). The first provision for further negotiations in Section 3 is set out in Article 23.4, under which Members have agreed to engage in negotiations to establish an international register for notification and registration of GIs for wines (later extended to include spirits)<sup>16</sup>. Reflective of the strong and conflicting views on GIs, the obligation is for negotiations and *not* to establish a system of notification and registration (Watal, 2001, p265; Gervais, 1998, p124). In line with this reading, we also note that Article 23.4 is not time-bound, i.e. neither is there a deadline for commencement of negotiations nor an end date for the completion of the same<sup>17</sup>. Importantly, the Doha Ministerial Declaration (WT/MIN(01)/DEC/W/1, paragraph 18) places an end-date for completion of negotiations, the 5<sup>th</sup> Session of the Ministerial Conference.

Article 24.1 is directed at “increasing the protection of individual geographical indications under Article 23”. The Article cautions Members from using the exceptions listed in Articles 24.4-24.8 either as an excuse to avoid negotiations or to conclude bilateral or multilateral agreements. Yet, this Article also recognises the “continued applicability of these provisions” – the exceptions – to the indications that are the subject of future negotiations. There is no time limit to these mandated negotiations. Article 24.1 is concerned with individual indications under Article 23, thus suggesting that it applies exclusively to indications for wines and spirits. However, a group of countries have contested this interpretation as ‘narrow’ and ‘legalistic’ and suggest that, when read along with Article 24.2 in that the reference to Article 23 is not to the category of goods but to the means of protection (see, IP/C/W/204). This interpretation has been contested within the TRIPs Council (e.g. IP/C/W/205) and the issue remains unresolved (Rangnekar, 2003, pp31-32).

Article 24.2 instructs the Council for TRIPS to maintain a “watchdog role” over the operations of this Section, where the first review “shall take place within two years of the entry into force

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<sup>16</sup> The 1996 Annual Report of the TRIPs Council (IP/C/W/8, paragraph 34) stated that issues relevant to notification and registration of GIs for spirits will be part of the preliminary work to be initiated under Article 23.4. Members differed in the understanding of and interpretation of this endorsement. However, these doubts have been removed by the explicit reference to ‘spirits’ in the Ministerial Declaration at Doha (WT/MIN(01)/DEC/W/1, paragraph 18).

of the WTO Agreement”. While no explicit powers have been granted to the TRIPS Council, the Article instructs the Council to “take such action as may be agreed to facilitate the operation and further objectives of this Section”. The mandated review of Section 3, initiated in November 1996, focussed on national legislations implementing the GI Section of the TRIPs Agreement (IP/C/W/253).

## 2.5 Exceptions

Article 24.3 is more accurately characterised as a ‘standstill clause’ and not an exception. This article seeks to ensure that the (higher) level of protection for GIs that existed in national legislation of Member countries at the time of entry into force of the WTO Agreement, 1 January 1995, is not diminished. This clause presumes benchmarks for the strength of protection, however, it remains unclear how such measurement will be effected (UNCTAD/ICTSD, 2003, p39).

An important exception to the scope of protection for GIs of wines and spirits is Article 24.4, which permits the “continued and similar use” of GIs for wines and spirits by “nationals or domiciliaries who have used that geographical indication in a *continuous* manner with regard to the *same or related* goods or services” in that territory for at least 10 years preceding 15 April 1994 or in good faith preceding that date (Article 24.4, emphasis added). There are important qualifiers in this Article: (i) nationals and domiciliaries can only seek to use the indication in context and (ii) prior and continuous use must be established within the time frames stated in the Article.

The relationship between GIs and trademarks is complicated. Article 24.5 sets out some exception to the protection offered to GIs under Articles 22.3 and 23.2. The exception states that a trademark acquired or registered in good faith either (a) before the date of application of the provisions of Section 3 or (b) before the GI in question has been protected in its country of origin should not prejudice the eligibility for or validity of registration of the trademark or the ‘right to use’ the trademark. However, questions remain as to where the burden of proof lies and establishing ‘bad faith’ is juridically problematic:

This test [i.e. establishing good faith] is sometimes difficult to apply, as evidence of bad faith is not always easy to produce. Showing bad faith based entirely on circumstances is sometime rendered more difficult in legal systems that presume good faith until the contrary is shown. In applying the test, the fact that an indication is particularly well-known and/or used (directly or indirectly)

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<sup>17</sup> This contrast with Article 27.3b where Members have agreed to review the sub-paragraph four years after the date of entry into force of the WTO Agreement.



by undertakings located in or near the “true” place of origin should be taken into account (Gervais, 1998, p136).

Article 24.6 is an exception that concerns ‘generic’<sup>18</sup> GIs across all goods and includes a specific application of this principle in the instance of ‘products of the vine’<sup>19</sup>. The first part of Article 24.6 allows exceptions from obligations in Section 3 where a term is customary in common language as a common name for certain goods and services (e.g. “china” for porcelain)<sup>20</sup>. As such, there are two tests to be established for the exemption: the term is customary in common language and it is the common name for certain goods and services. The second part of Article 24.6 is a specific application of the same principle for ‘products of the vine’. Here, Members are exempt from protecting indications that are identical with the “customary name” of a grape variety in the territory at the date of entry into force of the WTO Agreement<sup>21</sup>. Evidence of widespread use would be considered sufficient, as in the case of ‘Cabernet Sauvignon’ (Gervais, 1998, p136)<sup>22</sup>.

Article 24.7 is another exception that is directed at negotiating the very complex trademark-GI relationship. The Article establishes a time limit (5 years) and a contingency (‘bad faith’) with respect to exercising the right to invalidate or refuse registration of trademarks that consist of or contain an indication. To exercise their right with respect to an indication against a trademark, the GI-holder(s) must initiate their action within five years. The five year period is calculated as follows (Gervais, 1998, p137),

The request for the measure just described must be presented (made known officially) not more than five years after the “adverse” (opposed to trademarks) use of the protected indication had become generally known (a factual criterion to be judged on a case by case basis), or five years after the date of registration (with previous or simultaneous publication) of the trademark if it predates the other test.

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<sup>18</sup> However, the term ‘generic’ and ‘non-generic’ were considered during negotiations, but eventually rejected (UNCTAD/ICTSD, 2003, p41).

<sup>19</sup> This explicitly includes those spirits made from vine

<sup>20</sup> The example is taken from Gervais (1998, p136).

<sup>21</sup> Note that the first part of Article 24.6 is not predicated on the date of entry into force of the WTO Agreement.

<sup>22</sup> The EC has raised questions about the use of this exception, amongst others, by Canada and the US (IP/C/W/37), when it asked “how it [i.e. Canada] has determined that names, like Champagne, Madeira, Port and Sherry, which were previously protected in Canada as geographical indications for wines from France, Portugal or Spain through bilateral agreements with those countries, can be now defined as customary in the common language in Canadian law (TRIPS Article 24.3 standstill obligation)?” The US has been asked a similar question with respect to the designations of certain indications as ‘generic’ or ‘semi-generic’ by the Director of the of the Bureau of Alcohol, Tobacco and Firearms under the authority of 27 C.F.R. ̄4.24.



This is clearly a complex exception that aims at providing a degree of legal security to trademark-holders, but which will see difficult legal disputes.

Article 24.8 recognises the right of a person to use his/her name or the name of their predecessor in business in the course of trade. This right is circumscribed by requiring the name not to “mislead the public”. Consequently, names that the competent authority consider misleading will be not allowed.

Article 24.9 is framed as a ‘dependency’ exception (Gervais, 1998, p137) that exempts Member countries from protecting indications that are either not protected in their country of origin or cease to be protected in their country of origin or are in disuse. In other words, a GI must be protected nationally before an obligation for protection falls on other Member countries. Consequently, in the absence of prior protection in the home country, claims of misappropriation are legally incorrect and reflect a misunderstanding of the obligations under Section 3 and, in particular, of this exception.



### 3.0 GI-EXTENSION: THE DEBATE AT THE TRIPS COUNCIL

Beginning with informal papers at the TRIPs Council in 1997<sup>23</sup>, some WTO Members, many of them developing or transition economies, have been arguing for GI-extension. These expressions were reiterated at the Seattle Ministerial (cf. table 2). However, it was in September 2000, with the tabling of a proposal for GI-extension that the TRIPs Council debate on GI-extension is *formally* initiated<sup>24</sup>.

**Table 2:** GI-extension proposals for the Seattle Ministerial

A variety of Member countries made specific recommendations on GI-extension during preparation for the 1999 Seattle Ministerial. Below is a sample of some of these recommendations<sup>a</sup>.

**Czech Republic (WT/GC/W/206):** work on expanding the scope of Article 23 should continue and be completed within a given time-period.

**Cuba et al. (WT/GC/W/208):** general recommendation that additional protection be extended to products other than wines and spirits.

**India (WT/GC/W/225):** additional protection under Article 23 be extended to products other than wines and spirits

**Turkey (WT/GC/W/249):** recognising that GI-extension would play an important role for the development of local producers and industries concerned, recommends that the General Council submit a recommendation to the 3rd Ministerial to extend the coverage of Article 23 to products other than wines and spirits

**Kenya (WT/GC/W/302):** noting that the Singapore Ministerial accepted the inclusion of spirits within the scope of negotiations under Article 23.4, it recommends that negotiations under Article 23.4 be extended to other product groups (viz. handicrafts and agri-food products)

<sup>a</sup>The list of *demandeurs* has expanded considerably since the Seattle Ministerial. For a more recent list Members proposing GI-extension, see the Communication from Switzerland, dated 14 November 2001, to the Doha Ministerial Conference (WT/MIN(01)/W/11).

Source: Rangnekar (2003)

Reviewing the submissions to the TRIPs Council on GI-extension, Rangnekar (2003) identifies three broad themes in the debate. To begin with there is the legal question of whether the ‘balance’ achieved at the Uruguay Round is immutable or re-negotiable? In the debate, this question takes the form of examining the juridical basis of the demand for GI-extension in terms of the built-in agenda for further negotiations within Section 3. Equally, questions also have been raised on the legal justification for a hierarchy in the level of protection on the basis of

<sup>23</sup> Job No. 4152 (31 July 1997, Switzerland), Job No. 4486 (4 August 1997, Czech Republic) and Job No. 5023 (16 September 1997, India).

<sup>24</sup> IP/C/W/204 (15 September 2000) was sponsored by Bulgaria, the Czech Republic, Iceland, India, Liechtenstein, Slovenia, Sri Lanka, Switzerland and Turkey. At the subsequent TRIPs Council meeting on 21-22 September 2000, Egypt, Kenya and Pakistan became co-sponsors to the paper.

product categories<sup>25</sup>. A second set of issues concerns the potential impact of GI-extension on trade and production patterns, consumers, producers and existing obligations under the TRIPs Agreement. For instance, concern has been expressed about the re-balancing of rights and obligations and the consequent shift in burden between Members. In addition, the theme is also concerned about the administrative burden of GI-extension, the costs associated with consumer confusion and the costs on account of disruption to production and trade. A final theme concerns the insufficiency or adequacy of protection available under Article 22 (in contrast to Article 23), which clearly is the “key” point of the debate for *demandeurs* (IP/C/W/308, paragraph 18). The analysis that follows focuses on this aspect of the TRIPs Council debate<sup>26</sup>. Within this theme, two issues are identifiable: (a) does Article 22 provide ‘effective’ protection? and (b) does Article 23 provide ‘absolute’ protection?

### 3.1 Does Article 22 provide ‘effective’ protection?

As far as those opposing GI-extension, the existence of legal means to register and enforce GIs, such as through certification marks is good evidence of the use of Article 22 (IP/C/W/289). Registered certification marks in the US include ‘Darjeeling’ for tea, ‘Stilton’ for Cheese, ‘Swiss’ for chocolate and ‘Roquefort’ for cheese; those in Canada include ‘Suisse/Swiss’ for chocolate, ‘Indian spices’ for spices, ‘Ceylon’ for tea, ‘Florida’ for oranges, and ‘Freiburger’ for cheese (IP/C/W/289). Further, it also (informally) stated that the lack of evidence of either problems with the level of protection under Article 22 or damages from the same undermines the case of the *demandeurs*. It is fair to say that the *demandeurs* have not provided compelling evidence of the economic loss on account of weaker protection<sup>27</sup>.

Members advocating GI-extension make a contrasting presentation of the ‘effectiveness’ of protection under Article 22, highlighting three interrelated issues: possibility to ‘free-riding’, the risk of rendering GIs as generic terms, and the uncertainty of and undue burden in enforcing GI-protection in comparison to Article 23 (cf. IP/C/W/247; IP/C/W/308). The low standard of protection under Article 22 allows producers from other locales to use a GI and ‘free-ride’ on its reputation without infringement as long as the product’s true origin is stated (IP/C/W/247, paragraphs 10-11). In particular, it is suggested that the requirements for establishing ‘unfair competition’ or that the ‘public has been misled’ erect a relatively higher threshold – in comparison to Article 23 – thus, making it relatively easier for other producers to use a

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<sup>25</sup> For a persuasive argument against the embedded “double standards” in the TRIPs Agreement, see Rademeyer (2000).

<sup>26</sup> Readers interested in the other two themes are directed to Rangnekar (2003).

<sup>27</sup> In this respect, note the series of studies published in the run-up to the Uruguay Round that ‘documented’ and provided ‘empirical’ evidence of the economic loss to intellectual property right holders on account of what was deemed to be piracy and/or counterfeiting (e.g. Gadbow and Richards, 1988; USFTC, 1988). While some of these studies adopted questionable

reputable GI and ‘free-ride’. This is aggravated by the limited protection – in contrast to Article 23 – that does not prevent the use of a GI in a translated form, i.e. the indication accompanied by expressions like ‘such as’, ‘type’, ‘kind’ or ‘imitation’. Hence, the ever-present risk of GIs becoming generic (IP/C/W/247, paragraph 12), which makes this the “key reason” for demanding GI-extension (IP/C/W/308, paragraph 18).

The exchange of views on the risk of GIs becoming generic makes interesting reading. Members opposing GI-extension contend that the risk is over-stated (IP/C/W/289, pp5-6),

[The risk of a GI becoming generic is] overstated: commercial experience clearly indicates that genuine, internationally recognised GIs will always command a premium on world markets. Indeed, far from detracting from the market value of a genuine GI, free and fair imitation of the product often enhances the intrinsic value (and premium) of the genuine GI.

In response, Members advocating GI-extension state the following (IP/C/W/308/Rev.1, paragraph 18):

... such a line of argument seems to lead to dangerous waters when applied to other fields of intellectual property rights. There is no valid argument why it should be different for geographical indications.

The catalogue of ‘once famous’ GIs that are now considered generic – Arabica coffee, Indiarubber, chinaware, Cheddar cheese, and kiwifruit – makes worrisome reading. In this respect, the outcome of the EC’s (IP/C/W/37) concern about practice in the US and Canada on determining indications as generic would shed useful insights for *demandeurs*<sup>28</sup>. However, questions remain as to whether the lack of effective protection in the first instance rendered these indications generic or whether insufficient ‘policing’ of the reputational quality led to the indication being deemed generic? It could also be the case that regulatory authorities in distant markets might be protecting domestic interests by deeming certain indications as generic.

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economic methods and used non-verifiable data, they were provided moral capital to the *demandeurs* in the debate on stronger, globally-harmonised standards of protection.

<sup>28</sup> The EC has questioned Canada’s determination of indications like Champagne, Madiera, Port and Sherry as ‘customary in the common language’ (cf. Article 24.6) on grounds that Article 24.3 (the ‘standstill clause’) preserves the level of protection that existed at the time the TRIPs Agreement came into force. In the case of the US, the EC has raised similar questions while also requesting information on the procedures through which indications are determined to be either ‘generic’ or ‘semi-generic’.

### 3.2 Is Article 23 protection ‘absolute’?

All Members recognise that Section 3 provides for a hierarchy in the levels of protection and that Article 23 grants a higher level of protection. However, Members opposing GI-extension caution the enthusiasm of *demandeurs* by noting that Article 23 protection is not absolute as often characterised by the *demandeurs* (IP/C/W/289, p5; IP/C/W/386, paragraphs 10-12). Quite apart from the fact that any/all potential indications may not qualify for protection (cf. Article 22.1), there are a number of exceptions in Article 24 that could diminish potential economic returns:

- Existing use is preserved through Article 24.4 (in the case of wines and spirits) – an exception that would apply to GIs of other products if they were included within the scope of Article 23.
- Terms that have already become generic (e.g. Cheddar cheese) would be exempt from protection (Article 24.6).
- Other exceptions to Article 23 could either diminish or prohibit the protection of some indications.

For instance, Article 24.6 allows Member the right to determine whether a term is to be considered ‘generic’ within its jurisdiction. Naturally, there will be situations where a particular indication is deemed generic in one or some jurisdiction(s)/market(s) while being protected elsewhere. Thus, to the extent to which Members deem an indication to be generic – and these decisions are held to be valid, if contested – the potential gain would be diminished. This potential loss could be resolved through bilateral agreements that secure continued protection of such indications – a strategy best exemplified by the EU<sup>29</sup> – or through a globally accepted list of protected indications as in a multilateral register.

In response, *demandeurs* draw attention to the juridical tests required to demonstrate infringement and the fact that under Article 22 the ‘burden of proof’ rests on the right holder (IP/C/W/247, paragraphs 13-14; IP/C/W/308/Rev.1, paragraphs 9-10)<sup>30</sup>. It is suggested that Article 22 allows wide juridical discretion because of the requirement of establishing that the public is misled leading to “inconsistent decisions and legal uncertainty [...] [which] undermines and damages the good functioning of international trade in goods having the added value of a geographical indication” (IP/C/W/247, paragraph 13). In contrast, protection under Article 23 requires the rather simple test of establishing whether the product originates from the

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<sup>29</sup> The EU has concluded several bilateral agreements that are either exclusively focussed on, or, include provisions for, the protection of GIs. These include agreements with Australia, Bulgaria, Chile, Hungary, Mexico, Romania, and South Africa.

<sup>30</sup> In this respect, note that Article 34.1 requires defendants to bear the burden of proof in <sup>civil</sup> proceedings concerning process patent <sup>infringements</sup>.

place indicated by the GI. Hence, *demandeurs* conclude that protection under Article 23 is more effective, easier to access and cheaper to actualise (IP/C/W/308/Rev.1, paragraph 11).

Members opposing GI-extension have not made responded to this point. The relative difference between Articles 22 and 23 in terms of the efforts required by a claimant to prove infringement have clear economic consequences in terms of the effectiveness of protection and the concomitant risk of rendering an indication generic. However, if the essence of the argument by *demandeurs* gravitates towards advocating uniformity across jurisdictions it runs the risk of usurping Article 1.1.

To sum up, the difference between the scope of protection under Articles 22 and 23 is well appreciated by *demandeurs* and opposers of GI-extension. *Demandeurs* have incorrectly characterised Article 23 as ‘absolute’ protection and thus would benefit by acknowledging the cautions expressed by those members opposing GI-extension. On the other hand, Members opposing GI-extension need to acknowledge the economic and legal reality of the differences between Article 22 and Article 23. The debate at the TRIPS Council would benefit by moving beyond these points<sup>31</sup>.

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<sup>31</sup> As such, there has been little novelty or progress at the TRIPs Council in the more recent papers on GI-extension (cf. IP/C/W/353, IP/C/W/386).





#### 4.0 PROTECTING DISTINCTIVE SIGNS: THE ECONOMICS OF INFORMATION AND REPUTATION

The search for information, in particular reliable information, is a ubiquitous feature of life and includes simple tasks like identifying a reliable newsagent in the neighbourhood and more complex tasks like making profitable investments. As anyone's personal experience would testify, collecting reliable information to make these decisions is a costly and time consuming process that is also fraught with uncertainty. Individuals rely on a variety of information sources, which include among others previous experience, family and friends, trade journals and consumer magazines, public advisory bureaus and advertisements, to assess the comparative trustworthiness of potential sellers.

Economists have classified goods on the basis of how information is accessed by and/or conveyed to consumers (Nelson, 1970; Darby and Karni, 1973):

- Search goods: These are goods where consumers develop a robust notion of quality prior to purchase through either inspection and/or research.
- Experience goods: These are goods where quality is known through use and experience, which then guides future consumer decisions.
- Credence goods: These are goods where neither prior inspection nor subsequent use is sufficient for developing a robust notion of quality.

Goods do not neatly fall into any one of the three categories and many display characteristics of more than one category. In addition, as individual consumers differ in their preferences, goods can be varyingly classified across consumers. For example, a bag of coffee beans could be considered a search good for those consumers that are largely concerned about price rather than other product attributes. In contrast, it would be classified an experience good if other attributes (e.g. flavour and aroma) were of comparable (or more) importance than price. Finally, the *same*<sup>32</sup> bag would be classified a credence good if the consumer expressed interest in hard-to-attest attributes (e.g. working and production conditions). These differences between consumers relate to the segmentation of markets and product differentiation strategies adopted by firms.

It is in this world of asymmetric information that reputation and distinctive signs play a role of signalling a certain level of quality that consumers learn to expect. By persistent maintenance of

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<sup>32</sup> To be accurate, it is not the 'same' bag of coffee. It is this embedded heterogeneity in goods that allows for the use of a variety of socially constructed markers, e.g. fair trade and organic, to differentiate goods and convey non-observable product characteristics.

a certain minimum level of quality, reputation – conveyed through a distinctive sign<sup>33</sup> – economises search costs for consumers. Distinctive signs allow consumers to repeatedly recognise goods as coming from the same source as previously purchased and consumed goods that possessed characteristics that they preferred. To protect themselves from the risks of asymmetric information, consumers use various *signs* as markers of quality and assurance of reputation; thus saving on search costs. The ‘saving’ in search costs allow reputable goods to receive a premium on price, which consumers are somewhat willing to pay (Stigler, 1961 [1970, p79]<sup>34</sup>). However, asymmetric information also has implications for firms. For instance, Akerlof (1970) demonstrated that when asymmetric information exists in a market with heterogeneous goods and without means of differentiating goods, then these goods would tend to sell for the same price. Akerlof concluded that “bad cars drive out good”: there is no incentive for producers of high-quality goods to remain in this market. It is in this framework that consumer learning and firm reputation play important roles. Shapiro (1982) suggests that a firm’s decision to invest in developing quality products is dynamic: the returns from (current) investments in producing high-quality products occur in the future following repeated purchases by consumers. It is through repeated purchases that a link is established between a firm’s current investments in maintaining quality and consumer’s perceptions of the firm’s reputation. To elaborate, it is because consumers learn about the reputation through past purchases, experience and other information channels<sup>35</sup> that it becomes economically meaningful for firm’s to invest in producing high-quality (reputable) products. Usefully for consumers, reputation communicated through distinctive signs provides the means to retaliate by curtailing future purchases if quality does not meet expectations (Akerlof, 1970, pp499-500)<sup>36</sup>.

Because of the association with quality and reputation, trademarks embody the accumulated goodwill of the company; hence the need for legal protection (Grossman and Shapiro, 1988a, p60). This understanding reflects a development beyond the role of trademarks as indicators of source. It has been suggested that with the development of brands and advertising, the rationale for trademark protection has been modified. For instance, Schechter (1927) holds the view that

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<sup>33</sup> There are a number of different ways in which a producer conveys and a consumer comprehends the distinctiveness and reputation of a good. Apart from advertising, this could include particular forms of packaging, sales through select outlets, certificates of guarantee and association with personalities/institutions, among others. Naturally, each of these is not independent and firms tend to adopt these strategies cumulatively.

<sup>34</sup> Previously alluded to strategies, which built the reputation of the good, feed the willingness of consumers to pay the premium. Not surprisingly, price is invariably used as a marker for quality.

<sup>35</sup> In this regard, advertisements – an institutions that Stigler (1961 [1970, p73]) characterises as an “immensely powerful instrument for the elimination of [market-based] ignorance” – plays an important role.

<sup>36</sup> There are limits to this potential for retaliation because of the diffused corporate ownership patterns.

trademarks should be protected because of their brand value, i.e. their “hold upon the public mind of the mark or name”. Thus, there are two interrelated rationales: protection of the investments undertaken to develop brand names and associated reputation and safeguard the informational role of trademarks as indicator of source (e.g. Landes and Posner, 1987; Economides, 1988; Grossman and Shapiro, 1988a, 1988b; Cornish, 1999). Economides (1988, p526) states these principles as follows,

*In many markets, sellers have much better information as to the unobservable features of a commodity for sale than the buyers. ... Unobservable features, valued by consumers, may be crucial determinants of the total value of the good. ...However, if there is a way to identify the unobservable qualities, the consumer's choice becomes clear, and firms with a long horizon have an incentive to cater to a spectrum of tastes for variety and quality, even though these product features may be unobservable at the time of purchase.*

The conditions for grant of protection also reflect the principles underlying the protection of trademarks. Thus, for example, for a trademark to act as an efficient ‘channel of information’ and lower search costs, it must be distinct and differentiated from previously existing trademarks. It is also the case that certain words cannot be protected through or used in trademarks. For instance, generic (e.g. airplane, pen, car) and functional (e.g. circular in relation to car tyres) terms cannot be trademarked as this would translate a monopoly in a term/phrase/word into a monopoly in a product category (see Landes and Posner, 1987). Misappropriation of a trademark leads to two broad sets of problems. At one level, it generates confusion amongst the public, further aggravating informational asymmetries by breaking down the links between goods, previous experience and perceptions of reputation and expectations of quality. At another level, and closely related, is the dilution of the reputation of the trademark owner. The legal remedies available are also based on the dual rationale directed at protecting the consumer, on the one hand, and protecting against unfair competition, on the other hand.



## **5.0 THE RATIONALE FOR PROTECTING IGOs: LOCAL KNOWLEDGE, INFORMATION AND REPUTATION**

Marks indicating the geographical origin of goods are the earliest types of trademarks and were established to differentiate goods that possessed some unique quality either because of environmental factors, processing methods or manufacturing skills. Schechter (1925) reports evidence of the use of marks denoting geographical origin in pre-industrial periods for a variety of products like minerals, simple manufactured goods and agricultural products. Blakeney (2001) reports of the use of animals (panda beer), landmarks (Mt. Fuji sake), buildings (Pisa silk), heraldic signs (fleur de lys butter), and well known personalities (Napoleon brandy, Mozart chocolates) as distinctive signs indicating geographical origin whilst also conveying a certain quality or reputation. Here, we consider the two principle rationale for the legal protection of IGOs: informational asymmetries and damage to reputation.

One of the reasons for protecting distinctive signs, like trademarks, is because of the systemic informational asymmetries between buyers and sellers. As some unobservable features of a commodity may be important determinants in the consumer's decision making process, their inaccessibility or, at a minimum, the difficulties in accessing information, leads to suboptimal market outcomes. Akerlof (1970) has demonstrated that with asymmetric information and without means for differentiating products, the market will clear at lower levels of quality. Distinctive signs allow consumers to link the source of a product with their experience with earlier products from the same source; thus, lowering, to some extent, search costs. Stigler (1961 [1970]) has observed that reputable products sell for a premium on account of their saving in search costs. No doubt, price is also used by consumers as an indicator of potential quality.

Products bearing IGOs tend to be either from the agri-food sector, as broadly classified to include particular product categories like spirits and beverages, cigarettes and cigars, mineral water, agricultural products, meats and meat products, among others, and the artisanal and handicraft sectors. It has been suggested that agro-food products exhibit characteristics of all three ideotypes (i.e. search, experience and credence); thus experiencing the problems of asymmetric information (OECD, 2000, p32). Contemporary food scares (e.g. mad cow disease) and concerns about traceability (e.g. GM foods) and continuous media attention about additives in and quality of food, suggests that agri-food products should be considered as credence goods. Clearly, for individual consumers, many claims concerning agri-food products (e.g. use of traditional production methods, absence of GM ingredients) are hard-to-attest credence attributes. No doubt, as consumers are differentiated, the 'same' product (e.g. the ubiquitous bag

of coffee noted earlier) can be differentiated to meet the varying demands for product quality and attributes. In this respect, Caswell and Padberg (1992) consider the role of labelling as a tool to deal with informational asymmetries in the case of food. The European Union legislation protecting IGOs, EEC 2081/92, has as one of its justifications the demand by consumers for quality and identifiable geographical origin in agri-food products. This rationale corresponds with the growing proliferation of socially constructed labels, e.g. organic, fair trade, no animal-testing, etc., and the emergence of certification agencies, e.g. the recently launched (Jan., 2004) Fair Trade Organisation Mark administered by the International Fair Trade Association ([www.ifat.org](http://www.ifat.org)). As aspects of quality increasingly move into the credence domain the role of trust-worthy and credible labels become increasingly important (McCluskey, 2000). This importance increases with the length of the supply chain and the distance – both geographical and cultural – between sites of consumption and production.

In markets where credence and search attributes tend to predominate labels come to play an important role in balancing, to some extent, the asymmetries in information between consumers and producers. A number of commentators conclude that in these markets a third-party certification agency would be best suited at administering the label and generating trust amongst patrons (e.g. Barjolle and Sylvander, 2000; McCluskey, 2000; Albisu, 2002; Sylvander, 2002). Underlying the importance of a third-party agency is the nature of the distinctive sign – the IGO. As ‘geography is at the heart’ of IGOs and the reputation embedded in the indication is the collective contribution of previous and contemporary generations, these distinctive signs are a particular type of public goods, club good. Consequently, they confront collective action problems in their provision. Third-party agencies representing the interests of different producer groups located at various points along the product’s supply chain are best suited at resolving these collective action problems. In this respect the evidence from the Parma region is notable not only in confirming the importance of intermediate institutions but also illustrative of the trust invested by consumers in collective labels (cf. table 3).

	Parmigiano-Reggiano Cheese			Parma Ham		
	1	2	3	1	2	3
Consumers looking for Consortia label (%)	75.8	19.6	4.5	66.9	24.9	8.2
Consumers looking for firm brand (%)	29.5	33.2	33.9	22.8	39.7	34.8

Note: 1 = always; 2 = sometimes; 3 = never  
Source: Arfini, 2000.

Both consortiums have a long history of regulating aspects of their relevant supply chain; the Parmigiano-Reggiano Consortia being established in 1934 and the one for Parma ham in 1963. Through various Italian regulations each consortia have become the public face for the producers they represent. Evidence in table 3 demonstrates that consumers predominantly look for the consortium's label when purchasing the product and only a small percentage of consumers look at the private/firm label. It is also the case that many consumers (>70%) could not remember the name of the firm producing the product (see Arfini, 2000).

Table 3 also sheds useful insights into the other rationale for protecting distinctive signs: the dilution to reputation on account of 'free riding' on the distinctive sign. It is important to recognise the trust consumers place in the collective reputation of a label. It is to this dimension of the subject that we now turn.

Geographical specialisation within and across product categories is directly apparent from an analysis of protected IGOs. For instance, this becomes clear from a study of the appellations protected under the Lisbon Agreement for the Protection of Appellations of Origin and their Registration (table 4): Cuba accounts for all the protected appellations for cigarettes and the Czech Republic 93% of the appellations in beers and malt while France holds over 80% of the wine and spirit appellations. Regional specialisation within product categories is also reflected in the EU data on IGOs (cf. Annex 1). There, for example, the countries holding leading share of protected indications in cheese are France (28%), Italy (20%) and Greece (13%), in meat-based products it is Italy (41%) and Portugal (22%) and in beers it is Germany (80%) and the UK (20%). This geographical specialisation is equally apparent at lower levels of product aggregation. For example despite widespread distribution (internationally and within nations) of the species *Vitis vinifera*, the major production areas are highly localised and, in some instances, each grape variety has its own distinctive geographic pattern (Moran, 1993b).

Product	Registrations		Top Holder	
	Number	%age	Country	%age
Wines	470	61	France	81
Spirits	73	10	France	82
Agricultural Products	51	7	---	
Cheeses	50	7	France	74
Ornamental Products	33	4	Czech Republic	65
Tobacco & Cigarettes	33	4	Cuba*	100
Miscellaneous	25	3	---	
Mineral Water	17	2	Czech Republic	82
Beer and Malt	14	2	Czech Republic	93

Note: All percentages are rounded off.  
\* Only cigarettes  
Source: Assembled from data in Escudero (2001)

In explaining this pattern, geographers, rural sociologists and anthropologists have sought to move beyond latent environmentalism and geographical determinism by exploring the role of local knowledge and the cultural and economic processes through which these come to be in the known and reputable. Rejecting a separation of the natural from the human, the aim is to explore the methods that peoples have adopted to harness and modify their natural environment. For geographers, the organising analytical category is *terrior*: ‘the attempt to affect, influence, or control actions and interactions (of people, things, and relationships) by asserting and attempting to enforce control over a geographic area’ (Sacks, 1983). Not too dissimilar is the notion of culture economy suggested in the rural sociology literature: “the word ‘economy’ signals that one is dealing with the relationship between resources, production and consumption, while ‘culture’ tries to capture the reorganisation of economies, at least partially, onto the geographical scale of local cultures-territories” (Ray, 1998: p3). Without deliberating on the differences between these analytical categories, it is fair to note the commonality: both notions focus on use of different means to localise economic control to enable effective endogenous development.

The repute of a region is substantially located in the historical evolution of local knowledge and its relationship with the proximate socio-cultural geography. Van der Ploeg’s work on the development of farming styles, or what he termed *art de la localité*, is suggestive of this approach: “every location acquired, maintained and enlarged ... its own cultural repertoire: its norms and criteria that together established the local notion of ‘good farming’ (Van der Ploeg, 1992: p20)<sup>37</sup>. Richards (1994) has extensively documented the active selection and crop breeding by local and indigenous peoples in West Africa. Fairhead and Leach (1996) demonstrate that deep local agro-ecological practices have curated and enriched landscapes; thus, demanding a need for retheorising of the relationship between peoples and their ecology. Clearly, the natural environment has actively co-evolved with the peoples who inhabited the surrounding environs. Thus, it is erroneous to conceptualisation *natural* resources, such as genetic resources, as ‘free gifts of nature’ (e.g. Sedjo, 1988 [Kloppenburg]). Important in recognising the role of indigenous and local knowledge is the dimension of patrimony: the historical, collective, and on-going contributions of the previous and current generations of peoples of the region in creating the range of products with specific characteristics and attributes. Here we take cognition of the International Treaty on Plant Genetic Resources for Food and Agriculture, where in its preamble it states the following: “Affirming that the past, present and future contributions of farmers in all regions of the world, particularly those in

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<sup>37</sup> J.D. Van der Ploeg, ‘The reconstitution of locality: technology and labour in modern agriculture’ In T. Marsden, P. Lowe, and S. Whatmore, eds., *Labour and locality: uneven development and the rural labour process*, David Fulton: London. Quoted in Ray (1998).



centres of origin and diversity, in conserving, improving and making available these resources [plant genetic resources for food and agriculture], is the basis of Farmers' Rights”.

In a regulatory sense, it is the ‘mode of production’ that defines the typicality of the product; thus, differentiating it from others within the same product category. The mode of production is itself constituted by the natural environs, local know-how, raw materials used, the stages and method of production/processing, etc. These are codified in the cultural repertoire of the peoples of the region. The relationship between these codified cultural repertoires and reputation came under scrutiny at the European Court of Justice in the case brought by Consorzio del Prosciutto di Parma & Salumificio S. Rita SpA against Asda Stores Ltd & Hygrade Foods Ltd (C-469/00 and C-108/01). At issue was whether the slicing of (Parma) ham in front of the consumer – a step in the specifications defining ‘Prosciutto di Parma’ – is a disproportionate measure. The Court decided in favour of the Consorzio and stated the ‘mode of production’ is “intended to guarantee that the product bearing them [the protected indication] comes from a specified geographical area and displays certain particular characteristics. ... For consumers, the link between the reputation of the producers and the quality of the products also depends on his being assured that products sold under the designation of origin are authentic”. Attitudes to food and quality are cultural; thus it was not too surprising to read an Asda spokesperson’s views in the *Telegraph* (21 May 2003) as saying that “no one doubts that Scotch beef remains Scottish if sliced in Southampton, Jersey potatoes are still Jerseys when boiled in Blackpool, Cheddar’s still Cheddar if grated in Gretna”.

What is important is the collective and geographical dimension of creativity that underlies these products. The stabilisation of particular cultural repertoires in a particular geography is the historical, collective and on-going product of the peoples’ of the region. The reputation on account of a product’s distinctive characteristics is not on account of a single enterprise. This symbiotic relationship between an indication and its region has been noted by Moran (1993a, p266): “Burgundy gives its name to one of the best known wines in the world but at the same time the region of Burgundy becomes known because of its wine”. It is to safeguard this reputation, on account of codified production rules, that protection is required: “This protection constitutes a legitimate safeguard of rights acquired by generations of producers of a region who have imposed on themselves a certain number of rules and disciplines” (INAO). This rationale for the protection of indications was expressed by Judge Gault while passing a judgement in favour of the *Comite Interprofessionel du Vin de Champagne*<sup>38</sup> – the consortium representing Champagne producers – to protect the geographical indication of Champagne in New Zealand:

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<sup>38</sup> Bérard and Marchenay (1996, pp235-36) note that the first court ruling concerning the relationship between a product and its *terrior* related to Champagne and was an order issued in April 1894 that completed a ruling initially made in July 1845.

“Champagne is a geographical name. When used in relation to wine the primary significance it would convey to persons who know that would be as the geographical origin of the product. If the name conveys something of the characteristics of the wine it is because those familiar with wine sold by reference to the name associate those characteristics with it” ([1991] 2 NZLR 432). The defendants, Wineworths Group plc, were selling sparkling wine under the name of ‘Australian Champagne’ and ‘Brut Champagne’.

## 6.0 CONCLUSION

GIs present a unique case for analysing on-going multilateral negotiations concerning intellectual property rights. A significant part of the uniqueness is on account of the fact that *demandeurs* include developing and transition countries – countries normally seen as resisting stronger intellectual property protection. Consequently, unlike other TRIPs-related issues, the fault-lines do not fall into the proverbial normal ‘north-south’ divide. Discussions concerning GIs are also *fascinating* for other reasons: all interested parties agree that the hierarchy has no legal rationale, so what will be traded away in exchange for GI-extension?

Our review of the TRIPs debate indicates that *demandeurs* consider the difference in the scope of protection between Article 22 and Article 23 as the ‘key’ reason. In focussing on this dimension of the issue, *demandeurs* highlight two interrelated problems: the possibility of free-riding on indications and the risk of rendering an indication generic. Also notable is the difficulty in establishing infringement under Article 22 in comparison to Article 23. In closing this paper the analysis brings together this concern with the discussion on the rationale for protecting GIs.

Like other intellectual property rights, GIs define the rights and obligations. However, GIs are distinctively a collective monopoly right that erects barriers to entry on producers either within or outside the relevant geographical area. This ‘barrier’ defines who can make a particular product, where the product is to be made, and what ingredients and techniques are to be used so as to ensure ‘authenticity’ and ‘origin’. It is for this reason that a various commentators, some reviewed here, see GIs as a means of localise economic control and enabling endogenous development. However, differences between Article 22 and Article 23 have implications for the significance of the barrier of entry. Under Article 22, a protected indication can be used in translated form with delocalising phrases (e.g. ‘like’, ‘kind’, ‘style’) as long as the true origin of the product is conveyed. As such, it is possible for a producer to free-ride on GIs without fulfilling any of the barriers to entry (e.g. location, ingredients, or method) requirements. The dominant characteristic of the agri-food regime to seek low-cost alternatives and globally disperse production makes it a constant predator on new sites for accumulation. It is this dynamic of the dominant agri-food regime that makes it a threat to GIs. Two other aspects of this predatory threat warrant attention:

- Information and reputation: The translated use of an indication has the potential for sending mixed signals to consumers, which generates problems in discerning authenticity and reputation. As consumers get increasingly distant, geographically and

culturally, from sites of production, this may undermine the authentic indication. Economic models predict that with information asymmetries and lack of means of differentiating products, good quality products will move out of the market.

- ‘Counterfeiting’: The translated use of an indication allows for competitors to enter a premium market without bearing the higher cost of entry (e.g. location, ingredients and method). These entrants are thus able to change the dynamics of competition from ‘quality’ to ‘price’. Exploiting the economies of scale and seeking ‘low-cost’ production sites, these entrants have the potential of out-competing the authentic producers.

It is suggested that the above dynamics might be the factors that have rendered some indications into the category of generic indications.

At the TRIPs Council, *demandeurs* for GI-extension might have succeeded in the battle of ideas now that both sides of the debate agree that there is no rationale for the hierarchy in the level of protection between Article 22 and Article 23. However, multilateral trade negotiations, particularly at the WTO, are not limited to, or, one by, a battle of ideas. Apart from indicating a willingness to ‘trade’ on other issues, *demandeurs* will need to mobilise a variety of resources and shift the debate to favourable forums to get what they want.

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