

## Expanding the Protection of Geographical Indications of Origin Under TRIPs: "Old" Debate or "New" Opportunity?

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# EXPANDING THE PROTECTION OF GEOGRAPHICAL INDICATIONS OF ORIGIN UNDER TRIPS: “OLD” DEBATE OR “NEW” OPPORTUNITY?

IRENE CALBOLI\*

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## INTRODUCTION

Geographical indications of origin (GI), their definition, and rationale for protection have historically been the subject of heated debates in the international community.<sup>1</sup> Countries have long quarreled about the extent of protection of “their” GI, that is, the names they used to identify products grown or manufactured on their soil. Fierce defenders of GI protection, European countries have traditionally advocated that GI should not be used by unrelated parties because GI identify the unique qualities, characteristics, and reputation of the products to which they are affixed; thus, should others use GI improperly, consumers would be confused as to the origin of the products.<sup>2</sup> To this claim, the United States and other “new world” countries have generally responded by pointing out that many GI are generic terms on their soil, such as “champagne” or “Chablis,” and, thus, consumers could not be confused as to the origin of the products identified by these terms.<sup>3</sup> Accordingly, they have traditionally defended the right of their nationals to use foreign generic GI in their countries as they see fit.<sup>4</sup>

In the midst of this international debate, the adoption of the Agreement on Trade-Related Aspects on Intellectual Property Rights<sup>5</sup> (TRIPs) in 1994 marked an important victory for the European approach because it established general minimum standards for GI protection for all of its signatories. Distinguishing it from any previous international agreement adopted by the international community at

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1. See Michael Blakeney, *Proposals for the International Regulation of Geographical Indications*, 4 J. WORLD INTEL. PROP. 629 (2001); Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 86 TRADEMARK REP. 11 (1996); Stacy D. Goldberg, *Who Will Raise the White Flag? The Battle Between the United States and the European Union Over the Protection of Geographical Indications*, 22 U. PA. J. INT'L ECON. L. 107, 141–44 (2001); Paul J. Heald, *Trademarks and Geographical Indications: Exploring the Contours of the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 635, 648–49 (1996); Michael Maher, *On Vino Veritas? Clarifying the Use of Geographic References on American Wine Labels*, 89 CAL. L. REV. 1881 (2001).

2. Blakeney, *supra* note 1, at 629–30.

3. See Leigh Ann Lindquist, *champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT'L & COMP. L. 309, 309–10 (1999).

4. *Id.*

5. Agreement on Trade-Related Aspects of Intellectual Property Right, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPs Agreement].

large, TRIPs required all signatories to establish minimal protections for GI through their national laws.<sup>6</sup> In addition to this “minimal” protection, TRIPs also called for member countries to provide extra protection for GI that identify wines and spirits.<sup>7</sup> Last, but not least, member countries also had to agree to TRIPs’ “built-in agenda” to take part in future negotiations that would expand this enhanced protection for wines and spirits to other products.<sup>8</sup> To accommodate “non-GI-oriented countries,” TRIPs allowed for certain exceptions, particularly with respect to words that were considered generic on their soil.<sup>9</sup> Still, the overall tone of TRIPs on the issue was the result of the diplomatic activity of European negotiators who favored strong, expanding GI protection.<sup>10</sup>

Unsurprisingly, the adoption of TRIPs and its imposition of GI protection have not been “welcomed” in all member countries.<sup>11</sup> The divergences that characterized the pre-TRIPs discussion on GI have continued to define the post-TRIPs consultations, particularly with respect to the modalities to implement the enlarged GI protection advocated for by TRIPs.<sup>12</sup> As a result, negotiations to enhance GI protection have not yet produced the expected results, and diplomatic efforts seem to be at a standstill.<sup>13</sup>

This work briefly analyzes the issue of GI protection pre- and post-TRIPs and considers whether extension of the protection set forth by TRIPs is desirable for the international community. It is not the purpose of this discussion, however, to provide a deep analysis of GI or to elaborate on the nature of GI and the validity of the theories for their

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6. See José Manuel Cortés Martín, *TRIPS Agreement: Towards a Better Protection for Geographical Indications?*, 30 *BROOK. J. INT'L L.* 117 (2004).

7. See *infra* Part II.A.2.

8. See *infra* Part II.A.3.

9. *Id.*

10. See *infra* Part II.B.

11. For a critical analysis of the TRIPs provisions on GI, see Kevin M. Murphy, *Conflict, Confusion, and Bias Under TRIPs Articles 22–24*, 19 *AM. U. INT'L L. REV.* 1181 (2004). See also Lindquist, *supra* note 3, at 310 (“The inclusion of these [protections of geographical indications of source] caused heated debates during the Uruguay GATT Rounds and continues to generate discussion. The article that causes the most debate is Article 23 which deals with the protection of [GI] for wines and spirits.”); Harry N. Niska, *The European Union TRIPs over the U.S. Constitution: Can the First Amendment Save the Bologna That Has a First Name?*, 13 *MINN. J. GLOBAL TRADE* 413 (2004).

12. See *infra* Part II.B.

13. See Molly Torsen, *Apples and Oranges (and Wine): Why the International Conversation Regarding Geographic Indications is at a Standstill*, 87 *J. PAT. & TRADEMARK OFF. SOC'Y* 31 (2005).

protection. The work proceeds as follows: Part I provides a brief overview of GI, the traditional rationale for their protection, and the protection granted thereof before the adoption of TRIPs. Part II describes the status of the law under TRIPs and the failed diplomatic agenda to expand the current protection. Part III explores the recent developments on the debate on GI, particularly for wine and spirits, and considers whether the advantages of extending the current protection could outweigh the disadvantages of such an extension. Starting from the premise that enhanced GI protection in all areas could be more beneficial than detrimental for economic and agricultural development in most TRIPs countries, this work concludes by advocating for a “reasonable” expansion of the current GI protection among member countries of TRIPs.

## I. A BRIEF OVERVIEW OF GEOGRAPHICAL INDICATIONS OF ORIGIN

### A. *Definition and Rationale for Protection*

The first challenge faced in any debate relating to GI protection is the definition of the subject matter covered by the wording “geographical indication of origin” itself.<sup>14</sup> Traditionally, the term “GI” has been used predominantly to define names that identify agricultural or other products as originating from the specific geographical regions in which these products are grown and manufactured, and from which they derive their qualities or reputation.<sup>15</sup> In this sense, the term GI has historically included the so-called “appellations” or “indications” of origin.<sup>16</sup>

This link between the products’ geographical origin and their quality or reputation has always been the essential element and fundamental basis, or *sine qua non*, on which various jurisdictions have construed GI protection. This essential relationship is also highlighted by the definition of GI provided by the World Intellectual Property Organization (WIPO), which defines GI as signs “used on goods that have a specific geographical origin and possess qualities or a reputation

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14. See generally Felix Addor & Alexandra Grazioli, *Geographical Indications beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO/TRIPS Agreement*, 5 J. WORLD INTEL. PROP. 865, 869 (2002) (defining GI as “any designation which points to a given country, region, or locality”).

15. *Id.*

16. For a comprehensive overview of the definition of GI under TRIPs and the relationship of this definition to the definition of “appellation of origin” and “indication of source,” see *id.* at 867–69.

that are due to that place of origin.”<sup>17</sup>

Until present, GI have been used to identify primarily agricultural products or products that derive their qualities “from their place of production and are influenced by specific local factors, such as climate and soil.”<sup>18</sup> “Idaho” potatoes, “Napa Valley,” “Chianti,” or “Bordeaux” wines, and “Roquefort” or “Parmigiano Reggiano”<sup>19</sup> cheeses are examples of famous GI for agricultural products. Agricultural products, however, are not the only products that can be or are identified by GI.<sup>20</sup> Unique qualities, due to the materials and labor associated with the place where they are manufactured, have also characterized products, such as “Swiss” watches, “Belgian” chocolate, “Waterford” crystal, or “Sheffield” sterling.<sup>21</sup> These non-agricultural GI are nonetheless less common, and their protection is even more controversial than the more traditional agricultural GI.

The geographical connection between GI and the qualities or reputation of the products they identify has also been reflected in the very special type of right that GI grant to their beneficiaries.<sup>22</sup> Because of this link with particular geographical areas, unlike other intellectual property rights, GI cannot, in fact, be “owned” by just one or a few owners. Likewise, GI cannot be licensed because their use strictly depends on their tie with the geographical place they identify. Instead, GI are traditionally “owned and exercised collectively” by all those individuals that are living and producing products in those geographical areas.<sup>23</sup> Despite this “‘relative impersonality’ of the right,”<sup>24</sup> however, GI still operate similarly to most other intellectual property rights insofar as they also confer to their legitimate users “the exclusive rights to use this distinctive designation, which grants it additional economic

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17. World Intellectual Property Organization, What is a Geographical Indication?, [http://www.wipo.int/about-ip/en/geographical\\_ind.html](http://www.wipo.int/about-ip/en/geographical_ind.html) (last visited Nov. 1, 2005) [hereinafter What is a Geographical Indication?]; see also Steven A. Bowers, *Location, Location, Location: The Case Against Extending Geographical Indication Protection Under the TRIPS Agreement*, 31 AIPLA Q.J. 129, 133–34 (2003).

18. See What is a Geographical Indication?, *supra* note 17.

19. For a list of some of the most famous GI worldwide, see Addor & Grazioli, *supra* note 14, at 865.

20. See Bowers, *supra* note 17, at 134.

21. *Id.* at 134–35.

22. See Addor & Grazioli, *supra* note 14, at 869.

23. *Id.* at 869–70.

24. *Id.* at 870 (quoting R. Silva Repetto & M. Cavalcanti, *Provisions of the TRIPS Agreement Relevant to Agriculture (Part One)*, in 3 MULTILATERAL TRADE NEGOTIATIONS ON AGRICULTURE: A RESOURCE MANUAL IV: AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS) 3.4.1 (Rome, 2000).

value.”<sup>25</sup>

As for their functions, GI have traditionally played a fundamental role as source identifiers by informing consumers about the origin of the goods to which they are affixed.<sup>26</sup> As highlighted by their definition, GI identify products “as originating in the territory of a Member, or a region or locality in that territory.”<sup>27</sup> “Napa Valley” wines have historically been produced in Napa, California, while “Chianti” wines come from Tuscany, Italy.

In addition to identifying products as coming from a certain geographical origin, GI have historically served as indicators of the commercial quality of the goods that they identify.<sup>28</sup> In other words, GI guarantee the products’ qualities and characteristics by informing consumers that the products to which they are affixed “come from an area where a given quality, reputation or other characteristic of the [products] is essentially attributable to their geographic origin.”<sup>29</sup> Accordingly, no other wines can have, for example, the same quality or characteristic of the Brunello di Montalcino except the wines that are produced in the Montalcino region of Tuscany and that are identified by the GI “Brunello di Montalcino.”

Finally, one of the most controversial, but still very important, functions of GI is to “promote the goods of a particular area,”<sup>30</sup> be that Napa Valley, Chianti, or Bordeaux for wines, or Parma, Reggio Emilia, or Roquefort for cheeses. As elaborated in Part III, GI critics have often defined this function as nothing more than indirect protectionist measures for national products that could undermine competition and negatively affect trade.<sup>31</sup> To this criticism, GI supporters have underlined the role of GI in fostering products’ quality worldwide while avoiding consumer confusion by preventing inappropriate use of GI by unauthorized parties.<sup>32</sup>

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25. *Id.* at 870.

26. *See* Bowers, *supra* note 17, at 134.

27. U.S. Patent & Trademark Office, Geographical Indications, <http://www.uspto.gov/web/offices/dcom/olia/globalip/geographicalindication.htm> (last visited Dec. 21, 2005) [hereinafter Geographical Indications].

28. *See* Bowers, *supra* note 17, at 135.

29. Geographical Indications, *supra* note 27.

30. Bowers, *supra* note 17, at 135.

31. *See infra* Part III.A.

32. *See id.*

*B. Protection of Geographical Indication of Origin Pre-TRIPS*

Prior to TRIPs, the most relevant sources for international protection of GI could be found in three different agreements:<sup>33</sup> Paris Convention for the Protection of Industrial Property<sup>34</sup> (Paris Convention), Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods<sup>35</sup> (Madrid Agreement), and Lisbon Agreement for the Protection of Appellations of Origin and their International Registration<sup>36</sup> (Lisbon Agreement).

The 1883 version of the Paris Convention provided that “indications of source or appellations of origin” are protectable subject matter.<sup>37</sup> This protection, however, was limited to guaranteeing certain protective measures at the border and was extended only to false or misleading uses of GI, not the use of GI in general.<sup>38</sup> In addition, the Paris Convention neither defined “indication of source or appellations of origin” nor introduced an international standard for their protection.<sup>39</sup>

Specifically, Article 10 of the Paris Convention prohibited the use of false indications of origin when they were accompanied by a false, fictitious, or deceptive trade name.<sup>40</sup> Article 10 mandated the seizure of the goods identified by false indications of origin when “[a]ny producer,

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33. For a detailed overview of GI protection prior to TRIPs, see Lee Bendekgey & Caroline H. Mead, *International Protection of Appellations of Origin and Other Geographic Indications*, 82 TRADEMARK REP. 765 (1992).

34. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305, available at <http://www.wipo.int/treaties/en> [hereinafter Paris Convention]. The Paris Convention was originally enacted in 1883, and subsequently revised in Brussels in 1900, Washington in 1911, The Hague in 1925, London in 1934, Lisbon in 1958, and Stockholm in 1967. See generally WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE (2d ed. 2004), available at <http://www.wipo.int/about-ip/en/iprm/index.htm>.

35. Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods, Apr. 14, 1891, 828 U.N.T.S. 168, available at <http://www.wipo.int/treaties/en> [hereinafter Madrid Agreement].

36. Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, 923 U.N.T.S. 205, available at <http://www.wipo.int/treaties/en> [hereinafter Lisbon Agreement].

37. Paris Convention, *supra* note 34, art. 1(2). “The protection of industrial property has as its object . . . indications of source or appellations of origin . . .” *Id.*

38. *Id.* art. 9(1)–(2). The provisions of Article 9(1)–(2) of the Paris Convention are directly extended to the subject matter of “indication of source” by Article 10(1) of the Paris Convention. Addor & Grazioli, *supra* note 14, at 876; see also Bowers, *supra* note 17, at 140.

39. Addor & Grazioli, *supra* note 14, at 876.

40. Paris Convention, *supra* note 34, art. 10(1). “The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant.” *Id.*



manufacturer, or merchant . . . engaged in the production or manufacture of or trade in such goods.”<sup>41</sup> This prohibition was reinforced in 1958 when Article 10*bis* was introduced into the Paris Convention. According to Article 10*bis*, indications that were “liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods”<sup>42</sup> ought to be forbidden as acts of unfair competition.

The Madrid Agreement, which was adopted in 1891, offered a slightly higher level of protection.<sup>43</sup> Similar to the Paris Convention, however, the Madrid Agreement only focused on guaranteeing protection at the borders and providing specific rules for the repression of false and deceptive indications of source.<sup>44</sup> Article 1(1) prohibited the use of false and deceptive indications of source and mandated the seizure of the goods bearing such indications.<sup>45</sup> Like the Paris Convention, Article 1(1) did not define “indications of source.” Yet, the Madrid Agreement introduced an additional level of protection for GI that related to wines and provided that member countries could not be exempt from the application of its provision relating to wines, but could be exempt for indications of origin relating to other goods.<sup>46</sup>

In spite of this slightly higher level of protection, only a limited number of countries signed the Madrid Agreement, resulting in the downfall of this Agreement throughout the past century.<sup>47</sup>

The Lisbon Agreement of 1958, the most serious attempt to achieve effective and enforceable international protection for GI, finally

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41. *Id.* art. 10(2).

42. *Id.* art. 10*bis*(3). “The following in particular shall be prohibited: . . . indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.” *Id.*

43. See Addor & Grazioli, *supra* note 14, at 876–77.

44. Madrid Agreement, *supra* note 35, art. 1(1). “All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.” *Id.*

45. *Id.*

46. *Id.* art. 4. “The courts of each country shall decide what appellations, on account of their generic character, do not fall within the provisions of this Agreement, *regional appellations concerning the source of products of the vine being, however, excluded from the reservation specified by this Article.*” *Id.* (emphasis added).

47. As of October 15, 2004, only thirty-four countries are Members of the Madrid Agreement. A list of those Members is published on the WIPO website, WORLD INTELLECTUAL PROPERTY ORGANIZATION, CONTRACTING PARTIES, available at <http://www.wipo.int/treaties/en/documents/pdf/g-mdrd-m.pdf>.

provided for a much stricter level of protection that was extended to all indications of origin, thereby expanding the protections beyond false or deceptive uses of these indications.<sup>48</sup> The subject matters protected under the Lisbon Agreement were “appellations of origin” defined in Article 2 as “geographical name[s] of a country, region, or locality, which serve[] to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.”<sup>49</sup> Under the Lisbon Agreement, signatories were also obliged to protect appellations of origin against “imitation or usurpation,” including their use accompanied by terms such as “like,” “type,” or “style.”<sup>50</sup> Moreover, the Agreement provided that no appellations of origin could be considered as generic terms in any member country.<sup>51</sup>

Finally, the Lisbon Agreement created a system of international registration for indications of origin modeled upon the trademark registration system,<sup>52</sup> which would work as notice and prevent illegitimate appropriation of GI in third world countries. Because such a strict level of protection would require major changes in the laws of most member countries—coupled with the fact that some appellations of origin were considered generic terms in many member countries—the Lisbon Agreement, like the Madrid Agreement, had few signatories.<sup>53</sup>

## II. GEOGRAPHICAL INDICATIONS OF ORIGIN UNDER TRIPS

### A. *The Current Status of the Law*

Because of its very large number of signatories, the adoption of

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48. See Addor & Grazioli, *supra* note 14, at 877.

49. Article 2(1) of the Lisbon Agreement defines “appellation of origin” as “the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.” Lisbon Agreement, *supra* note 36, art. 2(1); see also Addor & Grazioli, *supra* note 14, at 877.

50. See Bowers, *supra* note 17, at 142.

51. In Article 2, the Lisbon Agreement provides that “[p]rotection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind,’ ‘type,’ ‘make,’ ‘imitation,’ or the like.” Lisbon Agreement, *supra* note 36, art. 3; see also Bowers, *supra* note 17, at 142.

52. See Martín, *supra* note 6, at 125.

53. As of February 16, 2005, only twenty-three countries are parties to the Lisbon Agreement. A list of those Members is published on the WIPO website, WORLD INTELLECTUAL PROPERTY ORGANIZATION, CONTRACTING PARTIES, available at <http://www.wipo.int/treaties/en/documents/pdf/j-lisbon.pdf>.

TRIPs represented a fundamental step forward for the protection of GI worldwide, thereby making TRIPs a true milestone in this respect. TRIPs provisions establishing GI protection took effect on January 1, 1996, in developed countries, on January 1, 2000, in developing countries, and on January 1, 2006, in least developed countries.<sup>54</sup>

As indicated earlier, the result of European negotiators' diplomatic efforts was that TRIPs established minimum standards for GI protection. Similar to the enhanced protection system first created by the Madrid Agreement, TRIPs also provided for an increased level of protection for national GI used to identify wines and spirits. Finally, because member countries could not reach an agreement on extended GI protection beyond wines and spirits, particularly because GI protection was, in fact, "new" for many TRIPs Members, TRIPs requires its Members to revisit and most likely to expand GI protection as part of future international negotiations. As elaborated in the following paragraphs, how such negotiations should take place and what their result should be is still one of the major points of contention among TRIPs Members.

#### 1. Article 22 of TRIPs: Definition and General Protection

Article 22 of TRIPs provides a general definition of GI and sets forth the general standards for GI protection under the Agreement. The subject matters protected are the "indications which identify a good as originating in the territory . . . or a region or locality" of a member country "where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."<sup>55</sup> Although modeled after Article 2 of the Lisbon Agreement, the TRIPs definition is broader in scope and extends to indications that confer only "reputation," but not necessarily "quality and characteristics" to the goods to which they are affixed.<sup>56</sup>

In line with the Paris Convention and the Madrid Agreement, Article 22 prohibits the use of false GI in the territory of member countries. According to Article 22(2), member countries must "provide the legal means . . . to prevent the use of [GI] in a manner which

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54. Martín, *supra* note 6, at 117 n.2.

55. TRIPs Agreement, *supra* note 5, art. 22(1).

56. Likewise, the definition of Article 22 not only applies to the indications that take their names from existing places, such as Chianti or Napa Valley, but also to those indications, such as basmati rice, that identify a product as coming from a certain geographical area—the Indian subcontinent in this case—but are not necessarily the name of a geographical area themselves. *See id.*

misleads the public as to the geographical origin of the good [or] which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention.”<sup>57</sup> In contrast with previous agreements, Article 22 not only provides for broader measures for GI protection but also sets minimum standards to be implemented into the laws of TRIPs member countries.<sup>58</sup> Furthermore, Article 22(3) states that Members must “refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of [the GI] is of such a nature as to mislead the public as to the true place of origin.”<sup>59</sup>

Considering the major differences among member countries, Article 22 leaves the individual Members free to decide how to implement the legal means to protect GI.<sup>60</sup> In spite of this freedom in the modalities of implementing GI protection, TRIPs explicitly states that member countries should provide, without hesitation, enforcement mechanisms for GI protection. In particular, under Article 41 of TRIPs, member countries must “ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement” covered by TRIPs,<sup>61</sup> including the protection of GI.

## 2. Article 23 of TRIPs: Additional Protection for Wines and Spirits

In addition to the general standards set forth by Article 22, Article

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57. TRIPs Agreement, *supra* note 5, art. 22(2).

Members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention.

*Id.*

58. See Sergio Escudero, *International Protection of Geographical Indications and Developing Countries*, 27–28 (Trade-Related Agenda Dev. & Equity (TRADE), Working Paper No. 10, 2001), available at <http://www.southcentre.org/publications/geoindication/geoindications.pdf> (last visited Jan. 3, 2006).

59. TRIPs Agreement, *supra* note 5, art. 22(3).

60. Article 22(2) of TRIPs simply provides that member countries “shall provide the legal means for interested parties to prevent,” thus leaving member countries free to choose what these “legal means” should be. *Id.* art. 22(2). See World Intellectual Property Organization, How is a geographical indication protected?, [http://www.wipo.int/about-ip/en/about\\_geographical\\_ind.html#P39\\_3766](http://www.wipo.int/about-ip/en/about_geographical_ind.html#P39_3766); Lindquist, *supra* note 3, at 316.

61. TRIPs Agreement, *supra* note 5, art. 41(1). “Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement . . .” *Id.*

23 provides additional rules for the protection of GI that are used to identify wines and spirits.<sup>62</sup> As a result, Article 23 imposes protections for GI for wines and spirits similar to the protections that were provided by the Madrid Agreement.<sup>63</sup> Specifically, Article 23(1) establishes that member countries must enact laws to prevent the use of GI identifying wines or spirits when they do “not originat[e] in the place indicated by the geographical indication” even when “the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind,’ ‘type,’ ‘style,’ ‘imitation’ or the like.”<sup>64</sup>

Unlike the general protection awarded to all GI by Article 22, but similar to the principles previously adopted by the Lisbon Agreement that prohibited the use of GI when accompanied by terms such as “like” and “type,”<sup>65</sup> Article 23 provides that GI that refer to wines and spirits are protected regardless of whether their use misleads the public or represents an act of unfair competition under Article 10*bis* of the Paris Convention.<sup>66</sup> In addition, building upon the general provision of Article 22, Article 23(2) also provides that member countries shall refuse or invalidate trademark registrations containing or consisting of GI identifying wines or spirits.<sup>67</sup>

Well aware of the fact that, in a few instances, wine regions worldwide have homonymous names because immigrants from the “old” world often named their new places after their motherlands, Article 23(3) provides for specific arrangements for homonymous GI, such as “Rioja” from Spain and “Rioja” from Argentina.<sup>68</sup> In this case, to ensure the co-existence of both names, Article 23(3) provides protection for homonymous GI and states that “protection shall be accorded to each indication.”<sup>69</sup> Yet, the provision calls on member countries to determine how to differentiate between homonymous GI, “taking into account the need to ensure equitable treatment of the

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62. See Felix Addor, Nikolaus Thumm & Alexandra Grazioli, *Geographical Indications: Important Issues for Industrialized and Developing Countries*, 74 IPTS REP. 24 (2003), available at [http://www.ige.ch/E/jurinfo/pdf/IPTS-74\\_GI\\_English.pdf](http://www.ige.ch/E/jurinfo/pdf/IPTS-74_GI_English.pdf) (last visited Dec. 21, 2005); Lindquist, *supra* note 3, at 316–17.

63. See *supra* Part I.B.

64. TRIPs Agreement, *supra* note 5, art. 23(1).

65. See *supra* Part I.B.

66. See Addor & Grazioli, *supra* note 14, at 879.

67. TRIPs Agreement, *supra* note 5, art. 23(2).

68. Addor & Grazioli, *supra* note 14, at 879.

69. TRIPs Agreement, *supra* note 5, art. 23(3).

producers concerned and that consumers are not misled.”<sup>70</sup>

Finally, to facilitate GI enforcement and prevent their illegal use, Article 23(4) provides for future negotiations to establish a multilateral system of notification and registration of GI for wines and spirits.<sup>71</sup> A decade after the adoption of this provision, however, such a system of notification and registration still needs to be created by the international community; in fact, the lack of a system has proven to be one of the most controversial issues of the current negotiations on GI protection within TRIPs.<sup>72</sup>

### 3. Article 24 of TRIPs: Negotiations and Exceptions

Article 24 of TRIPs, the final provision on GI protection, re-emphasizes that future negotiations are a fundamental part of TRIPs members countries’ commitment under the Agreement.<sup>73</sup> Article 24 also addresses the limitations and exceptions to the general standards set forth in Articles 22 and 23 that TRIPs Members can invoke while implementing GI protection into their laws.<sup>74</sup>

Specifically, according to Article 24(1), member countries agreed “to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23”<sup>75</sup> when they signed TRIPs in 1994. To prevent possible excuses based on a broad interpretation of the exceptions to GI protection granted to member countries, Article 24 provides that member countries shall not refuse to conduct such negotiations.<sup>76</sup> Specifically, they should not use any of the limitations or exceptions indicated in sections four through eight as an excuse to avoid or delay such negotiations.<sup>77</sup>

As additional evidence of TRIPs’ push for GI protection, Article 24(2) also grants an active role to the TRIPs Council in supervising GI protection internationally. Under Article 24(2), the TRIPs Council has, in fact, the duty to monitor the application of Articles 22 and 23 and to

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70. *Id.*

71. *Id.* art. 23(4). “In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for [TRIPs] concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.”  
*Id.*

72. *See infra* Part II.B.

73. *See* Escudero, *supra* note 58, at 31–32; Bowers, *supra* note 17, at 151–52.

74. *See* sources cited *supra* note 73.

75. TRIPs Agreement, *supra* note 5, art. 24(1).

76. *Id.*

77. *Id.*

“take such action as may be agreed to facilitate the operation and further the objectives” of GI protection envisaged under TRIPs.<sup>78</sup>

As mentioned earlier, however, Article 24 also establishes important limitations and exceptions to the general and enhanced protection for GI set forth by TRIPs. Specifically, to accommodate those countries that were not traditionally in favor of GI protection, Article 24(4) grants a grandfather clause and exempts member countries from having “to prevent continued and similar use of a particular [GI] of another Member identifying wines or spirits in connection with goods and services [where the GI has been used] in a continuous manner with regard to the same or related goods or services in the territory of that Member” for at least ten years prior to April 15, 1994, or where this continuous use has been in good faith.<sup>79</sup> Likewise, Article 24(5) provides a similar clause with respect to trademarks that have been acquired or registered in good faith before the date of the application of TRIPs in the member country where the mark is registered, or before the GI was protected in its country of origin.<sup>80</sup>

A clear compromise between “old” and “new” worlds, Article 24(6) finally provides that TRIPs countries do not need to protect GI “with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services,”<sup>81</sup> thereby exempting GI that are generic terms in some countries from being protected under their laws.<sup>82</sup>

### *B. The Failing Diplomatic Agenda to Expand the Current Protection*

In spite of the obligations set forth by Articles 23 and 24, the same ideological divide as to GI protection that characterized pre-TRIPs negotiations has continued to affect the post-TRIPs debates. No results have been reached so far as to the enhanced GI protection advocated by TRIPs.<sup>83</sup> Not surprisingly, “the qualities that best describe the [post-TRIPs] negotiations are a lack of dynamism and an unwillingness of

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78. *Id.* art. 24(2). To date, the Council has confined its efforts in this respect to the proposal of a multilateral register of GI for wines, as suggested by Article 23(4). For details about the proposals for such registry, see *infra* Part II.B.

79. TRIPs Agreement, *supra* note 5, art. 24(4).

80. *Id.* art. 24(5).

81. *Id.* art. 24(6).

82. See Tyler Cabot, *Naming Rights: Is America the Home of the Free but Not of the Brie?*, WASH. POST, May 21, 2003, at F1.

83. See Martín, *supra* note 6, at 141–42 (summarizing the debate on GI after the adoption of TRIPs).

some members to advance questions established in the Built-In Agenda.”<sup>84</sup> Although the Doha Ministerial Declaration of 2001<sup>85</sup> “placed the protection of GI on the agenda of WTO trade negotiations,” it did not ultimately provide the “definitive impetus to the negotiations” auspicated in many circles.<sup>86</sup>

More specifically, TRIPs Members are still divided both as to the modalities and the legal effect of the registration system for GI advocated by TRIPs and to the issue of extending protection for non-false or misleading uses of GI beyond wines and spirits.<sup>87</sup> As expected, European countries have continued to promote their agenda in favor of greater GI protection in the past ten years, whereas the United States and other countries, primarily Canada and Australia, have opposed such an expansion. Interestingly, developing countries have increasingly taken sides with the European Union.<sup>88</sup>

As a result, the submissions that have been presented at the TRIPs Council as to the registration system to be implemented can be divided into two groups:<sup>89</sup> a maximalist approach supported by the European Union, Switzerland, former Eastern Bloc countries, and several developing countries, and a minimalist approach defended by the United States, Australia, New Zealand, Japan, and many Latin American countries.<sup>90</sup> Supporters of the maximalist approach advocate for a compulsory system in which a GI would benefit from unconditional protection in the markets of all Members upon its inscription in the register.<sup>91</sup> Instead, supporters of the minimalist

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84. *Id.* at 172.

85. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at <http://docsonline.wto.org/> (follow “Simple Search” hyperlink; then enter document symbol in search field).

86. Martín, *supra* note 6, at 174.

87. The different positions of member countries are summarized on the WTO website. World Trade Organization, Geographical Indications in General, [http://www.wto.org/english/tratop\\_e/trips\\_e/gi\\_background\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm) [hereinafter Geographical Indications in General].

88. Martín, *supra* note 6, at 169 n.213. “As a general matter, it has been argued that developing countries may find it in their interest to use GI as a tool to help create and maintain both domestic and export markets for distinctive goods originating in their territory.” *Id.* (citing Ralph S. Brown, *New Wine in Old Bottles: The Protection of France’s Wine Classification System Beyond Its Borders*, 12 B.U. INT’L L.J. 471 (1994)).

89. A detailed list of the proposals submitted to the TRIPs Council in this respect is available on the WTO website. Geographical Indications in General, *supra* note 87.

90. Martín, *supra* note 6, at 142.

91. Council for Trade-Related Aspects of Intellectual Property Rights, Communication from the European Communities and their Member States, *Proposal for a Multilateral Register of Geographical Indications for Wines and Spirits Based on Article 23(4) of the TRIPS Agreement*, IP/C/W/107 (July 28, 1998), available at <http://docsonline.wto.org>



approach advocate for a voluntary system that would not require protection for the registered GI by other Members.<sup>92</sup> Likewise, according to the minimalists, the applicability of the exceptions would remain in the local jurisdiction in accordance with domestic law, and the obligation to give legal effect to registration under the system would only be binding on participating Members.<sup>93</sup>

A similar divide has inundated the proposals for the expansion of Article 23 beyond wines and spirits.<sup>94</sup> In June 2002, European and other “old world” countries tabled a proposal<sup>95</sup> (European Proposal) that would significantly extend GI protection. The European Proposal also included a “claw back” clause that would allow countries to register GI terms that are currently generic or registered as trademarks in other countries, such as “feta” for cheese or “champagne” for sparkling wine.<sup>96</sup> Because of its impact on generic words and on existing registered trademarks, the European Proposal has been fiercely criticized by

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(follow “Simple Search” hyperlink; then enter document symbol in search field). The original proposal was revised in 2000. Council for Trade-Related Aspects of Intellectual Property Rights, *Implementation of Article 23.4 of the TRIPS Agreement Relating to the Establishment of a Multilateral System of Notification and Registration of Geographical Indications*, IP/C/W/107/Rev.1 (June 22, 2000), available at <http://docsonline.wto.org> (follow “Simple Search” hyperlink; then enter document symbol in search field).

92. Council for Trade-Related Aspects of Intellectual Property Rights, *Proposal for a Multilateral System for Notification and Registration of Geographical Indications for Wines and Spirits Based on Article 23.4 of the TRIPS Agreement*, IP/C/W/133 (Mar. 11, 1999), available at <http://docsonline.wto.org> (follow “Simple Search” hyperlink; then enter document symbol in search field). The primary proposal for a minimalist approach was led by the United States, Canada, Chile, and Japan. Martín, *supra* note 6, at 142. Argentina, Australia, New Zealand, Colombia, Costa Rica, Ecuador, El Salvador, the Philippines, Guatemala, Honduras, Namibia, the Dominican Republic, and Chinese Taipei also supported this proposal. *Id.* at 142–43 n.104.

93. See sources cited *supra* note 92.

94. See Martín, *supra* note 6, at 164.

95. Council for Trade-Related Aspects of Intellectual Property Rights, *The Extension of the Additional Protection for Geographical Indications to Products Other than Wines and Spirits*, IP/C/W/353 (June 24, 2002), available at <http://docsonline.wto.org> (follow “Simple Search” hyperlink; then enter document symbol in search field); see also Council for Trade-Related Aspects of Intellectual Property Rights, *Work on Issues Relevant to the Protection of Geographical Indications: Extension of the Protection of Geographical Indications for Wines and Spirits to Geographical Indications to Other Products*, IP/C/W/247/Rev.1 (May 17, 2001), available at <http://docsonline.wto.org> (follow “Simple Search” hyperlink; then enter document symbol in search field).

96. See Bruce A. Babcock & Roxanne Clemens, *Geographical Indications and Property Rights: Protecting Value Added Agricultural Products* (Midwest Agribusiness Trade Research & Info. Ctr. (MATRIC), Briefing Paper 04-MBP-7, 2004), available at <http://www.card.iastate.edu/publications> (search for “04-MBP-7” in series number search field).

representatives of “new world” countries who have argued that this proposal violates the grandfather clauses of Article 24, does not provide adequate protection for non-misleading geographical trademarks, and adopts an overbroad definition of GI that is per se inconsistent with Article 22.<sup>97</sup>

In October 2003, TRIPs member countries met in Cancún, Mexico to discuss the extension of GI protection as provided by Articles 23 and 24.<sup>98</sup> Because of the deep divide on the issue that has plagued the international community pre-TRIPs, the Cancún negotiations collapsed without reaching any result. No progress has been reached by the international community as to the issue of post-TRIPs GI protection.<sup>99</sup>

### III. THE WAY FORWARD: “OLD” DEBATE OR “NEW” OPPORTUNITY?

#### A. *The “Old” Debate on Geographical Indications of Origin*

To briefly summarize the arguments of the international debate, the basic premises upon which supporters of the extension of Article 23 have built their positions are that GI ought to be protected because of the unique features of the products that result from their geographical origin and because of the considerable investment and long tradition that usually characterizes the products that are identified by GI.<sup>100</sup> Starting from this utilitarian interpretation of GI as incentives for product qualities and reputation linked to a precise geographical area, supporters of GI protection have traditionally argued that the lack of adequate protection would result in consumer confusion as to the origin and the qualities of the products identified by GI or at least in unfair free riding on the reputation of the products that are produced in the original territory from which the products take their names.

Against these premises, opponents of stronger GI protection have repeatedly argued that this geographical link is very often nonexistent in today’s society, and that several “old world” GI have long been generic terms in their countries.<sup>101</sup> They stress that immigrants brought many geographical terms, the products, or the techniques to develop the products that they identified into their new lands. After some time, the

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97. *Id.* at 1–2.

98. Details about the WTO negotiations in Cancún are available at the WTO website. Geographical Indications in General, *supra* note 87.

99. See Martín, *supra* note 6 at 172 n.220.

100. See Addor & Grazioli, *supra* note 14, at 882–83.

101. See Bowers, *supra* note 17, at 153–55

link between the territory from which these products originated and their names were forgotten, and the terms that were used to identify these products entered the common language as the generic name of the products rather than the name of their geographic origin.<sup>102</sup>

Starting from this premise, opponents of expanded GI protection have, thus, argued that to now reclaim these names from the public domain would be costly and time-consuming.<sup>103</sup> More importantly, they have observed that it will likely create consumer confusion in the market, because companies will be obliged to change the names under which they currently market their products.<sup>104</sup> To expand the protection of Article 23 beyond wines and spirits will, in fact, oblige new world companies to discontinue the use of “generic” GI to describe their products. For example, what will they then call “Dijon” mustards?<sup>105</sup>

In addition to forcing Members to rename products that currently use GI as generic words, an expansion would also affect trademark owners in the new world. If the general protection for GI were expanded or if an international registry were created that requires TRIPs Members to protect registered GI on their soil, companies that have traditionally used foreign GI as trademarks in new world countries would be forced to stop using their marks or face cancellation, which would result in inevitable and quite considerable financial losses. In this sense, opponents of GI expansion have often cited the dispute over the name “Budweiser” as a general example of unwanted results from increased GI protection.<sup>106</sup>

Because of the problems created by the renaming of generic products and the possible cancellation of their companies’ marks, GI skeptics have resisted any expansion of the current TRIPs provisions, arguing that the expansion would inevitably penalize their national products and affect competition in their markets.<sup>107</sup> In addition, an extended GI protection will primarily benefit countries that, unlike the United States or other new world countries, provide direct GI protection in their laws.<sup>108</sup> Because TRIPs does not prohibit the use of

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102. See Torsen, *supra* note 13, at 51–60.

103. See Bowers, *supra* note 17, at 154–55, 158.

104. *Id.*

105. See Babcock & Clemens, *supra* note 96, at 8–9.

106. See generally Philippe Zylberg, *Geographical Indication v. Trademarks: Lisbon Agreement: A Violation of TRIPS?*, 26 U. BALT. INTELL. PROP. J. 1, 39–58 (2003) (providing an analysis of the several Budweiser cases in Europe and Israel).

107. See Addor & Grazioli, *supra* note 14, at 890.

108. See TRIPs Agreement, *supra* note 5, arts. 22–24; Dwijen Rangnekar, *The Pros and*

GI that are not protected in their home countries, most “new world” countries would not enjoy the benefit of an enlarged GI protection without a direct system of national protection for GI. Instead, they will only suffer its effects by recognizing and protecting foreign GI.<sup>109</sup>

In response to these arguments, supporters of the expansion of GI protection have re-emphasized the function of a guarantee of product quality, that is, protection from the confusion created by “illegitimate” uses of GI.<sup>110</sup> European countries have compared the debate on GI to the fight between David and Goliath, such that local farmers fight against the giant corporate America and its trademarks.<sup>111</sup> Supporters of an increase in protection have also repeatedly stated that GI protection is about preserving traditional food culture by prohibiting the tarnishing of established culinary traditions. With some reason, they have affirmed that the reputation of Italian Parmigiano-Reggiano or Grana Padano is tarnished every time Americans shake a can of Kraft Parmesan over their pasta and call it Italian.<sup>112</sup>

Specifically, arguing against the claim that renaming national “new world” products would be costly and time-consuming, GI advocates have stressed that such a renaming would be quite limited because Article 24 directly protects trademarks that have been registered in good faith prior to the enactment of TRIPs.<sup>113</sup> They have also pointed out that the dramatic picture painted by GI opponents is unlikely to become reality because unfairly registered marks would, in fact, be cancelled.<sup>114</sup>

Along the same lines, GI advocates have dismissed the concerns over the decrease in competition in the market by pointing out that GI protection does not refer to the products themselves, but to the names of the products. Accordingly, they have argued, competition will most

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*Cons of Stronger Geographical Indication Protection*, BRIDGES (Int'l Ctr. for Trade & Sustainable dev.), Mar.-Apr. 2002, at 3, available at <http://www.ictsd.org/monthly/bridges/BRIDGES6-3.pdf>.

109. Rangnekar, *supra* note 108, at 3.

110. See Addor & Grazioli, *supra* note 14, at 891–92.

111. See *supra* Part III.A.

112. *Id.* The author should disclaim that she is originally from Bologna, Italy, a city traditionally well-known not just for its university but also for its culinary tradition. As such, she is particularly susceptible to the substantive qualitative difference between Kraft Parmesan and “real” Italian Parmigiano. Regardless of their nationalities, most of her International Intellectual Property students have come to a similar conclusion after testing the difference between the two grated cheeses.

113. TRIPs Agreement, *supra* note 5, art. 24(4).

114. *Id.*

likely not be affected, while product quality will undoubtedly benefit from such an expansion.<sup>115</sup> Last, but not least, they have stressed that an increase in protection will substantially benefit local agricultural economies. As a result, developing countries, which have economies that are still primarily based on agriculture, will be among the most benefited by such a change.<sup>116</sup>

*B. Toward a “New” Opportunity? The Case for a “Reasonable” Expansion of the Current Protection*

As it is clear from the foregoing discussion, the arguments in favor and against the expansion of GI protection raise important and serious concerns. Therefore, it is not difficult to understand why the debate on GI has become a controversial topic within the international community. As often happens, all interested parties have important, distinct interests at stake; thus, they differ on how to best serve these interests. These differences have contributed to the collapse of the negotiations held under the framework of Article 24.<sup>117</sup> Yet despite the validity of the concerns that have been raised by the opponent of stronger GI protection, a reasonable expansion of Article 23 and the creation of an international GI registry could ultimately prove more beneficial than detrimental for all interested parties, including “new world” countries.

As has been elaborated in Part I, GI protection serves economic policies and fosters national developments, particularly in the agricultural or food industry.<sup>118</sup> Undoubtedly, in providing for a greater level of GI protection as established by Articles 23 and 24, TRIPs could directly increase the current benefits for local economies in terms of the quality of traditional products. Of course, countries that have economies based primarily on agriculture or that have established local traditions in manufacturing different products would benefit from an increase in GI protection. These benefits would not be limited to “old world” countries but, at least in the long-term, could eventually be shared by all TRIPs Members.

The boom that has characterized the Australian wine industry in the past decade is a direct example of the above statement. After signing a bilateral agreement with the European Union in 1994, Australians

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115. See Addor & Grazioli, *supra* note 14, at 891–92.

116. *Id.*

117. See discussion *supra* Part II.B.

118. See discussion *supra* Part I.A.

stopped “using the names of French regions like Burgundy or Chablis to describe their wines.”<sup>119</sup> Far from creating the decrease in production and competition feared by opponents of stronger GI protection, the signing of this agreement represented “the making of the Australian wine industry.”<sup>120</sup> By “[r]elying on their own regional names like Coonawarra and Barossa, and stressing grape varieties like Chardonnay and Shiraz, the Australians have built the world’s most dynamic wine industry. [In 2003], for the first time ever, Australian wines [outsold] the French in both Britain and the United States.”<sup>121</sup> Likewise, imports of European wines in Australia did not grow during the past decade, thereby proving that concerns over the renaming of national products and the risk of a decrease in competition are not necessarily a reality.<sup>122</sup>

Like the Australian wine industry, “new world” countries can also benefit from adequate GI protection. In other words, an enhanced GI protection system in which countries would have to invest in building the reputation of their own GI could represent a new opportunity, rather than an obstacle for competition in the marketplace. Under this exact premise, at least partially developed countries have pushed for the implementation of intellectual property protection in developing countries.<sup>123</sup>

Bringing new hope to the old debate, the recent agreement between the European Union and the United States over generic GI for wines seems to show that divergences over GI could be overcome.<sup>124</sup> Somewhat supporting this interpretation of GI as a new opportunity, this agreement seems to take the position that the renaming of “champagne” as “sparkling wine” in the United States is probably less important than the acceptance of national winemaking practice by the European Union.<sup>125</sup> In other words, this agreement will undoubtedly simplify the exports of United States wines into the European Union while providing the opportunity for Napa Valley and other United States winemakers to increase the reputation of their names abroad.<sup>126</sup>

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119. See *Europe’s Trademarks: Protecting Names*, ECONOMIST, Aug. 2, 2003, at 49.

120. *Id.*

121. *Id.*

122. *Id.*

123. In addition to imposing intellectual property protection for the sale of their products in developing countries, developed countries have often observed that it would be beneficial for developing countries to invest in their industries rather than free riding on foreign trademarks, copyrights, and patents.

124. See discussion *supra* Part II.B.

125. See *id.*

126. See *id.*

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As long as alternative generic names are available to describe products in new world countries, a stronger GI protection could be seen as a new opportunity for new world countries rather than as a punishment imposed on them by the old world that would require the renaming of an excessive number of products. As seamlessly as new world consumers will soon start drinking “sparkling wines,” they could also refer to “grated pasta cheese” instead of “parmigiano.” This interpretation is also compatible with the grandfather clause provided by Article 24 for existing trademarks.<sup>127</sup> Despite the arguments of the opponents of enhanced GI protection, trademarks that have been registered in good faith will not be cancelled unless otherwise directly agreed to by various TRIPs Members.<sup>128</sup>

A stronger GI protection would not benefit the market, however, when alternative names to defining existing products do not exist, that is, when other generic terms to identify the same products do not exist. In this case, the interest of society in generic terms should prevail over the interest of GI “owners,” and the exception provided by Article 24(4) should also continue to apply in the case of expanded protection.<sup>129</sup> Along the same line, to prohibit the descriptive use of existing GI to describe products as “kind,” “like,” or “type” does not seem compatible with an interpretation of GI as new opportunity; thus, it should not be implemented in spite of the clear push in this direction by GI advocates.<sup>130</sup> Likewise, the use of registered GI in comparative advertisements, parodies, and other fair use doctrines should not be forbidden unless they represent an act of unfair competition.<sup>131</sup>

That being said, the major problems with GI protection continue to remain: the precise boundaries of the rationale and scope of their protection and the defenses applicable to their unauthorized uses. Because of the limited scope of this work, it does not allow for an exhaustive analysis of these issues; however, it is nevertheless important to point out that GI represent a unique type of intellectual property rights such that overprotection and abuse could be very detrimental to the international community. As elaborated in Part I, GI, like trademarks, are identifiers of commercial origin and signifiers of

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127. TRIPs Agreement, *supra* note 5, art. 24(4).

128. *Id.*

129. As an alternative, new terms should be created, and the public should be educated so society will not be deprived of necessary wordings.

130. See discussion *supra* Part II.B.

131. TRIPs Agreement, *supra* note 5, art. 22.

product qualities.<sup>132</sup> Yet, because of their perpetual protection and the prohibitions against their use with non-GI products, GI clearly represent a perpetual right to exclude, even though the rationale for this right is still somewhat unclear. To date, this right to exclude is granted by the international community, as a matter of general policy, to individual geographical areas so that they can sustain their products' quality and local investments.<sup>133</sup> As such, while their protection will undoubtedly benefit local business, their indiscriminate protection will likely not prove beneficial.

#### CONCLUSION

The issue of GI protection and the extension of Articles 23 beyond wines and spirits have undoubtedly polarized TRIPs Members in the past decade. Because of the major national interests at stake—such as the cancellation of trademarks or the protection of local economies—the international debate on GI has grown increasingly complex, and diplomatic negotiations under Article 24 still have not reached the results auspicated when TRIPs was signed in 1994.

The recent agreement between the United States and the European Union seems to suggest, however, a possible realization that a reasonable expansion of GI protection could be more beneficial than detrimental for all interested parties. As this discussion has highlighted, such an extension could, in fact, foster agricultural interest in all TRIPs Members, benefiting not only Europe but also new world countries, as the booming Australian wine industry has shown. This expansion should neither affect the market or consumers nor undermine previous rights that have been acquired in good faith. Under these terms, the expansion of GI protection could represent a new opportunity for all TRIPs Members. Accordingly, it should be welcomed.

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132. See discussion *supra* Part I.A.

133. See *id.*