

GI Blues: The Global Disagreement over  
Geographical Indications

Michael Handler\*

Robert Burrell†

\*University of New South Wales

†University of Western Australia

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/unswwps-flrps12/30>

Copyright ©2012 by the authors.

# GI Blues: The Global Disagreement over Geographical Indications

Michael Handler and Robert Burrell

## **Abstract**

This chapter explores the vexed question of the legal protection of geographical indications of origin, or 'GIs', which control how terms indicating geographical origin may be used in relation to goods such as foodstuffs and alcoholic beverages. For many years GI protection has caused significant controversy among policy makers. More specifically, the debate over GIs tends to be characterised as a battle between the EU on the one hand, and various agricultural producers such as the USA, Australia and New Zealand on the other, over appropriate legal standards. The authors argue that although European policy makers make achievements on this issue, a global agreement on GI protection remains far away.

# GI Blues: The Global Disagreement over Geographical Indications

Michael Handler and Robert Burrell

Published in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property*, Oxford University Press, 2011, pp. 126-144

## The contours of the global debate over GIs

This chapter explores the vexed question of the legal protection of geographical indications of origin, or ‘GIs’, which control how terms indicating geographical origin may be used in relation to goods such as foodstuffs and alcoholic beverages. For many years GI protection has caused significant controversy among policy makers. More specifically, the debate over GIs tends to be characterised as a battle between the EU on the one hand, and various agricultural producers such as the USA, Australia and New Zealand on the other, over appropriate legal standards. At first glance the fact that issues of ‘geographical branding’ have proven so contentious might appear surprising. On any visit to a local supermarket, bottle shop, deli or restaurant it is impossible not to notice the extent to which geographical terms are used in the marketing of foods and alcoholic beverages, and it might be thought that the laws regulating the use of such terms would be well settled. But it is important to appreciate the different roles that such terms might play. In some cases these terms in fact have no geographical significance and are simply functioning as evocative brand names—think of PHILADELPHIA cream cheese, MONTE CARLO biscuits or MONTANA wine from New Zealand.<sup>1</sup> In other cases, the geographical term might form part of the generic product description, as is the [127] case with English muffins, Lebanese cucumbers, Singapore noodles and Worcestershire sauce. Most significantly for present purposes, however, a geographical term may be used for the purpose of indicating the origin of the goods—that is, that Spanish olive oil, Polish vodka, Tasmanian salmon and Queensland mangoes come from the country, region or place so indicated. In relation to this category of geographical sign, it might initially be thought that the law’s primary concern would be to ensure the accuracy of such origin claims, and that enforcement of this matter would fall

---

<sup>1</sup> The regulation of such terms is largely a matter of trade mark law: see, in Australia, *Trade Marks Act 1995* (Cth), ss 41 (distinctiveness) and 43 (deceptive connotations).

largely to various regulatory authorities.<sup>2</sup> However, the legal regulation of such geographical signs is far more complex than merely ensuring ‘truth in labelling’.

In understanding this complexity, it first needs to be recognised that some geographical terms applied to foods and alcoholic beverages are likely to communicate additional information to consumers beyond mere provenance. This further information might be that the goods have certain qualities or characteristics that are essentially attributable to their geographical origin, or even simply that the reputation of the goods is attributable to their geographical origin. In these cases, such signs become what are known in legal discourse as GIs.<sup>3</sup> Indications of source take on the character of GIs when goods have been produced in an identifiable, delimited region, generally over a period of time, often in accordance with specified techniques or standards or local, customary knowledge, such that the goods come to be of a particular quality or come to acquire a particular reputation. Depending on the type of product, this might occur through an interaction between natural factors (such as soil, terrain and microclimate) and human intervention (eg agricultural or viticultural practices in the choice of crop, grape variety or animal breed or diet, or in the employment of particular production methods and standards). In some cases, a GI might simply be the result of customary know-how that has traditionally been located in a particular place. World-renowned examples of GIs include ‘Roquefort’ cheese, ‘Prosciutto di Parma’, ‘Swiss’ chocolate, ‘Darjeeling’ tea, ‘Scotch’ whisky and ‘Beaujolais’ wine. Australian examples might include ‘Bangalow’ sweet pork, ‘Margaret River’ sauvignon blanc and ‘King Island’ cheese. Significantly, the role played by producers [128] and standard-setting organisations in ensuring that GIs function as more than mere indicators of source allows GIs to be conceptualised as a species of intellectual property (IP), with property-like characteristics.<sup>4</sup> Throughout the world, it is accepted that such producers or organisations have an interest in the commercial exploitation of their GIs and are to be afforded the ability to take legal action against parties that, broadly speaking, misuse such signs.

---

<sup>2</sup> For example, in Australia the government agency Food Standards Australia New Zealand (FSANZ) has set up the *Australia New Zealand Food Standards Code*, Standard 1.2.11 of which deals with ‘country of origin’ labelling requirements for packaged goods. Compliance with the Code is mandatory under State and Territory legislation (see, eg, *Food Act 2003* (NSW), s 21; *Food Act 2006* (Qld), s 39; *Food Act 1984* (Vic), s 16) and enforced by State and Territory health authorities. The Australian Competition and Consumer Commission (ACCC) also has a role to play in monitoring representations as to origin: see *Competition and Consumer Act 2010* (Cth), sch 2: Australian Consumer Law, s 18 (general prohibition on engaging in misleading or deceptive conduct), s 29(1) (k) (prohibition on false or misleading representations concerning the place of origin of goods), and the ‘safe harbour’ provisions for certain country of origin representations contained in s 255(1), items 1 and 2; and see further ACCC, *Country of Origin Claims and the Trade Practices Act* (2006).

<sup>3</sup> See the definition of GIs in art 22.1 of the TRIPS Agreement.

<sup>4</sup> Although there is ongoing debate on this point: see, eg, S Stern, ‘Are GIs IP?’ [2007] *European Intellectual Property Review* 39.

To elaborate on the final point above, prior to the international harmonisation of GI standards being raised in earnest in the run-up to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994) (the TRIPS Agreement) it was already possible to point to legal mechanisms throughout the developed world that provided a significant degree of protection for GIs. In countries such as France and Italy, for example, such protection flowed from early twentieth century laws that established governmental organisations that delimited the boundaries of geographical regions in which foods or wines were produced, administered *sui generis* systems for the registration of the names of such regions and, crucially, defined the qualities, characteristics and methods of production of goods from such regions whose producers were entitled to use the registered name in question. Because it was thought that a registered name indicated unique qualities and characteristics of goods as well as source, these laws gave entitled producers the right to prevent non-entitled traders from using the registered name outright—even to describe the qualities of their own goods, and even where the true origin of their goods was indicated.<sup>5</sup> In the UK and Australia, protection for GIs flowed from the action for ‘extended passing off’. This action, which emerged in the 1960s and 70s—and was later supplemented by provisions of consumer protection legislation in Australia—enabled traders with a collective reputation in a GI to prevent traders from outside that group misrepresenting that their goods came from the place indicated and had the qualities exclusively associated with goods from that place. More generally in the common law world, GI owners were long able to register their signs as certification trade marks, affording them rights to prevent non-certified parties from making use of such GIs.<sup>6</sup>

It might be thought that more recent problems with agreeing international standards for GI protection, in particular over the last twenty or so years, have stemmed from the fact that although all developed countries have long provided some [129] protection for GIs, the precise mechanism for legal protection varies significantly between countries. The situation is, however, far more complex. The kinds of differences described in the previous paragraph are not obviously more significant than the different approaches countries have taken, for example, to copyright,<sup>7</sup> where it has nevertheless been possible to secure a high degree of

---

<sup>5</sup> For further consideration of the French system, see, eg, W Moran, ‘The Wine Appellation as Territory in France and California’ (1993) 83 *Annals of the Association of American Geographers* 694; W van Caenegem, ‘Registered Geographical Indications: Between Intellectual Property and Rural Policy—Part II’ (2003) 6 *Journal of World Intellectual Property* 861.

<sup>6</sup> For detailed consideration of ‘extended passing off’ and other Australian laws protecting GIs, see R Burrell and M Handler, *Australian Trade Mark Law*, Oxford University Press, Melbourne, 2010, ch 13.

<sup>7</sup> Specifically, there has long been a division between the market-oriented approach of ‘copyright’ countries such as Australia, the UK and the USA, and ‘authors’ rights’ countries such as France and Germany. Although this division can be problematised, with some commentators insisting that there is a greater degree of historical

agreement as to the appropriate international minimum standards. More generally, any suggestion that disagreements over GI protection flow from deep differences in legal culture are unconvincing, and have not been borne out in practice. As a consequence of European harmonisation from the late 1980s—under which EU-wide registration schemes for GIs for agricultural foodstuffs,<sup>8</sup> wines<sup>9</sup> and spirits<sup>10</sup> were established—French-style protection for GIs has been introduced into the UK without significant difficulty.<sup>11</sup>

In a similar vein, while the provisions of the TRIPS Agreement relating to GIs are deeply unsatisfactory, these are merely a reflection, not a cause, of the tensions over the way GIs ought to be protected. Understanding this point requires some explanation of these provisions. The TRIPS Agreement was the first major convention with wide membership specifically to address GIs,<sup>12</sup> and the final form of the relevant provisions [130] represented a messy, politically expedient compromise between the EU and the USA, designed largely to bring the Agreement—so much of which was mutually beneficial to those parties—into being.<sup>13</sup> More particularly, World Trade Organization (WTO) Members are under a general obligation under art 22.2 in respect of other Members' GIs 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; [and]

---

convergence than the copyright/authors' rights narrative suggests, it is clearly the case that there are some significant doctrinal differences between the types of rule that are found in copyright countries on the one hand and authors' rights countries on the other.

<sup>8</sup> See currently Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ L93/12.

<sup>9</sup> See currently Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine [2008] OJ L148/1.

<sup>10</sup> See currently Council Regulation (EC) No 110/2008 of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks [2008] OJ L39/16.

<sup>11</sup> Similarly, Australia seems to have encountered relatively few problems in transplanting an (admittedly weak) model of *sui generis* GI protection for wines into its legal system, following the entry into force of the *Agreement between Australia and the EC on Trade in Wine* (1994, superseded in 2008). This is not to say that GIs have not caused some local difficulties (including, most notably, over setting the boundaries of the 'Coonawarra' region, as to which see G Edmond, 'Disorder with Law: The Determination of the Geographical Indication for the Coonawarra Wine Region' (2006) 28 *Adelaide Law Review* 59). Nevertheless, the advent of *sui generis* GI protection has caused relatively few legal disputes and those that have arisen have not been the result of bolting an alien legal construct onto Australia's legal system.

<sup>12</sup> Early treaties dealing with the misuse of geographical terms required parties only to require seizure by customs authorities of goods containing false designations of origin: *Paris Convention on the Protection of Industrial Property* (1883), art 10; *Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods* (1891), art 1. The *Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration* (1958) set up an international GI registration scheme and mandated French-style minimum standards of protection for GIs, but this treaty has never had any global impact because of its limited membership.

<sup>13</sup> On the negotiating history of these provisions, see generally D Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 3rd ed, Sweet & Maxwell, London, 2008, 24, 26, 305.

- (b) any use which constitutes an act of unfair competition within the meaning of Art 10bis of the Paris Convention (1967).

At first glance, this appears to afford a significant minimum degree of protection to GIs in international trade. However, it is a standard with which the EU has always been dissatisfied. Most concerning from its perspective was the tying of protection to a ‘misrepresentation’ standard. This has the effect of allowing the use by traders in country Y of a term recognised as a GI in country X in circumstances where consumers in Y either do not attribute origin significance to the term at all, or do not expect there to be any connection between the term and the place of production. For example this means that in countries where signs such as ‘feta’ or ‘parmesan’ are understood only to be references to a type of cheese, art 22.2 is not implicated, even though the use of these terms as GIs is tightly restricted under EU law.<sup>14</sup> The same might be true of ‘parma ham’—even if consumers outside Europe know that Parma is a place in Italy, they may not expect smallgoods marked as ‘parma ham’ to have any connection with that place. This is particularly the case if the product contains other signifiers that clearly suggest another place of manufacture, such as ‘Hungarian salami. Produce of Australia’.<sup>15</sup> In practice, this has meant that within the developed world there was little, [131] if any, need for legal reform to comply with art 22.2. A country such as Australia could point to its passing off action, related provisions of consumer protection legislation and certification trade mark laws as being sufficient to meet this TRIPS obligation.<sup>16</sup> From the EU’s perspective, however, the art 22.2 standard was thought to provide inconsistent and inadequate protection for its agricultural producers seeking to trade internationally in reliance on their EU-protected GIs.

As a consequence of the perceived limitations of art 22.2, the EU has long been interested in establishing a global standard that does not turn on consumer confusion and instead prevents outright third parties from making any use of a GI—a standard comparable

---

<sup>14</sup> Although the fact that these terms are protected is highly controversial: see the European Court of Justice’s (ECJ’s) decisions in Joined Cases C-465/02 and C-466/02, *Germany and Denmark v Commission* [2005] ECR I-9115 (on ‘feta’) and Case C-132/05, *Commission v Germany* [2008] ECR I-957 (on ‘parmesan’).

<sup>15</sup> See, eg, *Comité Interprofessionnel du Vin de Champagne v NL Burton Pty Ltd* (1981) 38 ALR 664 (producers of French Champagne were unable to show that the word ‘Champagne’ was distinctive of their product in Australia because it had become a generic description of sparkling wine. Note that the result of this case would now be different in light of Australia’s bilateral treaty obligations, above, n 11). Much will, however, clearly depend on how the geographical term is understood by consumers in the country in which protection is being sought. See *Wineworths Group Ltd v Comité Interprofessionnel du Vin de Champagne* [1992] 2 NZLR 327; *Taittinger SA v Allbev Ltd* [1993] FSR 641 (allowing passing off actions to be maintained in New Zealand and the UK respectively against non-French producers of beverages marketed as ‘champagne’).

<sup>16</sup> See WTO Document IP/C/W/117/Add.19 (9 July 1999) at [www.dfat.gov.au/ip/australia\\_response.pdf](http://www.dfat.gov.au/ip/australia_response.pdf).

to that which exists under the harmonised European regime.<sup>17</sup> In the TRIPS negotiations it had some success in establishing this higher standard, but only in relation to wines and spirits,<sup>18</sup> with art 23.1 obliging Members to proscribe the

use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.

Thus, to emphasise, art 23.1 establishes something much closer to an absolute bar on the use of a particular type of GI—an Australian distiller could not call its product ‘Australian cognac’ or describe it as ‘Cognac-style brandy’.<sup>19</sup> That there is no principled reason for providing one level of protection for GIs for wines and spirits and a lower level of protection for all other GIs is one clearly unsatisfactory element of the TRIPS provisions. Further complexity is caused by the fact that both art 22.2 and art 23.1 are subject to a number of exceptions in art 24 that permit the use of terms even if these are recognised as GIs elsewhere. The key exceptions allow the use of pre-existing trade marks as well as terms that have become generic in the country in which protection is being sought.<sup>20</sup> Given the limitations contained in the GI provisions as a whole, it is [132] unsurprising that the EU, supported by a number of other countries, has since sought to argue that the TRIPS Agreement ought to be amended so that the art 23.1 standard should apply to all GIs, and that a multilateral GI register ought to be set up, the effect of which would be to require all countries to protect listed GIs and which in practical terms is likely to limit the operation of the art 24 exceptions.<sup>21</sup> This expansionist agenda has received a hostile response from countries such as

---

<sup>17</sup> See currently Council Regulation (EC) 510/2006, above, n 8, art 13; Council Regulation (EC) 479/2008, above, n 9, art 45; Council Regulation (EC) No 110/2008, above, n 10, art 16.

<sup>18</sup> In the TRIPS negotiations the EU claimed that GIs for wines and spirits were particularly susceptible to misuse and warranted special protection. See J Ross and J Wasserman, ‘Trade-Related Aspects of Intellectual Property Rights’ in T Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986–1992)*, Volume II: *Commentary*, Kluwer, Deventer, 1993, 2302.

<sup>19</sup> Australia complies with its art 23.1 obligations through s 40C of the *Australian Wine and Brandy Corporation Act 1980* (Cth) (for wine) and the *Australia New Zealand Food Standards Code*, Standard 2.7.5, cl 4 (for spirits).

<sup>20</sup> TRIPS Agreement, arts 24.5 and 24.6.

<sup>21</sup> The EU’s plans are most clearly set out in WTO Documents IP/C/W/353 (24 June 2002) (on extension); TN/C/W/52 (19 July 2008) (on the GI register); and TN/IP/W/11 (14 June 2005) (on proposed TRIPS amendments). The EU even went as far as presenting, as part of the WTO agriculture negotiations in 2003, a list of 41 of the most famous European GIs and demanding that all other countries cease using these terms other than to identify European products, irrespective of any TRIPS flexibilities (see European Commission, ‘WTO

Australia and the USA.<sup>22</sup> Yet for present purposes, the key point to note is that it is hardly the case that the provisions of the TRIPS Agreement and their reception are the *cause* of the current international disagreement. It needs to be remembered that the complexity that surrounds the GI provisions as a whole reflects their negotiating history and the underlying tensions between the EU on the one hand and countries such as the USA and Australia on the other. It is these underlying tensions that need to be explored in greater detail.

### **Unpacking the reasons for the global disagreement over GIs**

If we are to understand the tensions that underpin the GI debate we need to look beyond differences in legal history, legal culture and the admittedly unsatisfactory multilateral legal framework. It has to be recognised that the core of the disagreement over GIs is the issue of market access for agricultural and viticultural products. One of the major reasons for this is that valuable GIs are not equally distributed throughout the world. Rather, the vast majority of the world's established GIs are located within European countries that have long sought to control and privilege a particular type of localised, rural production of foods, wines and spirits. Unsurprisingly, these European countries tend to have the greatest interest in affording GIs higher levels of legal protection domestically, and in seeking to ensure that those GIs are protected at [133] the same levels in foreign export markets—and these countries have driven the EU's position on GIs. For countries such as Australia and the USA, the EU's expansionist agenda can often seem little more than a crude attempt to secure a monopoly for its producers by shielding certain valuable product names from competition.<sup>23</sup> In this respect the EU's agenda can be seen as part of a broader strategy to protect its producers from competition from the new world, particularly at a time when the EU is being required to phase out other forms of export subsidies for its agricultural producers.

Once GIs are conceptualised primarily as a tool of agricultural policy, it would be easy

---

Talks: EU Steps Up Bid for Better Protection of Regional Quality Products', Press Release IP/03/1178, Brussels, 28 August 2003, [europe.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1178](http://europe.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1178)). Although the EU has since retreated from demanding 'clawback' protection for these particular GIs, its initial demand gives a strong indication of the roughshod nature of its tactics in attempting to export its GI standards throughout the world.

<sup>22</sup> On reactions to the EU's expansionist agenda, see generally M Handler, 'The EU's Geographical Indications Agenda and its Potential Impact on Australia' (2004) 15 *Australian Intellectual Property Journal* 173; J Hughes, 'Champagne, Feta and Bourbon: The Spirited Debate about Geographical Indications' (2006) 58 *Hastings Law Journal* 299; G Evans and M Blakeney, 'The Protection of Geographical Indications after Doha: Quo Vadis?' (2006) 9 *Journal of International Economic Law* 575.

<sup>23</sup> See, eg, C Lister, 'A Sad Story Told Sadly: The Prospects for US–EU Food Trade Wars' (1996) 51 *Food & Drug Law Journal* 303; J Chen, 'A Sober Second Look at Appellations of Origin: How the United States Will Crash France's Wine and Cheese Party' (1996) 5 *Minnesota Journal of Global Trade* 29.

to conclude that there is not a great deal more to say about them from an IP perspective, other than to provide detailed analyses of the specifics of the way any particular country or region's GI regime operates. On this view, if a country wishes to introduce a *sui generis* GI regime, with a high level of protection, this will presumably be because it regards such protection as being in its overall best interests in furthering its rural policies. In some cases, this may be because in the context of a broader bilateral trade agreement the country is offered a greater degree of market access for its goods, which it believes more than offsets any disadvantages that may be incurred by setting up a domestic GI regime primarily to benefit producers from the other party. Arguably, the Agreements between Australia and the EC on Trade in Wine of 1994 and 2008, under which Australia has agreed to protect a large number of European wine GIs and to phase out its use of generics such as 'champagne', 'port', 'sherry' and 'tokay' in exchange for improved access for its producers to European wine markets, could be characterised in this way. Alternatively, a country might have a small number of local products with a significant export market that would benefit from GI protection in Europe. For example a country such as Mexico might well take the view that securing an EU-wide monopoly for the GI 'Tequila' is more valuable than surrendering any right to allow its domestic producers to sell spirits under European names that might have become generic in Mexico.<sup>24</sup> On this reductionist view, an easy resolution to the international disagreement over GIs is apparent. If the EU wants a higher level of international protection for its GIs, it needs to give up something of equal value in return. It should thus be regarded as unsurprising that it is in the bilateral rather than [134] the multilateral arena that the EU has had the most success in exporting its higher standard of GI protection.<sup>25</sup>

To our mind, it would be idle not to acknowledge the significance of the raw political and economic drivers that underpin much of the disagreement about GIs. However, we also believe that a number of other issues complicate the way the EU's agenda has been received in countries such as Australia and the USA, and that these are worthy of attention.

---

<sup>24</sup> See *Agreement between the European Community and the United Mexican States on the Mutual Recognition and Protection of Designations for Spirit Drinks* [1997] OJ L152/16. Under this Agreement the EU is only obliged to protect 'Tequila', 'Mezcal', 'Sotol' and 'Charanda', whereas Mexico is required to protect around 200 European GIs.

<sup>25</sup> This has mainly been in relation to securing TRIPS-plus protection for its wine and spirit GIs. See generally M Handler and B Mercurio, 'Intellectual Property' in S Lester and B Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, Cambridge University Press, Cambridge, 2009, 317–22. The EU is, however, likely to seek increased protection for GIs for all goods in future preferential trade agreements: see, eg, *Economic Partnership Agreement between the CARIFORUM States and the European Community* [2008] OJ L289/I/3, art 145. More generally, see A Taubman, 'Thinking Locally, Acting Globally: How Trade Negotiations over Geographical Indications Improvise "Fair Trade" Rules' [2008] *Intellectual Property Quarterly* 231, 260–7.

One issue that has attracted some attention is that the GIs debate is bound up with broader issues about the role of the state in the agricultural sector. This is often presented as a clash between the pro-free market approach to agriculture adopted in countries such as the USA and Australia, and an interventionist and protectionist policy adopted in the EU. Thus it is sometimes said that agricultural industries in the former countries are characterised by higher levels of private control, resulting in production being dictated by market considerations such as the cost of labour and obtaining raw materials.<sup>26</sup> On the other hand, it is said that the EU seeks to promote small-scale, artisanal and localised production, and hence a traditional rural way of life, through its agricultural policies. These competing agricultural policy goals are said to explain the different approaches taken to GI regulation by the antagonists in the GI debate.

By itself, however, this account is somewhat limited. All Western countries have some mechanisms to support rural producers and a rural way of life. For example Australia's trading partners have long accused it of using non-tariff barriers to protect its agricultural producers, most notably in the manipulation of sanitary and phytosanitary quarantine measures to prevent the import of many types of agricultural produce.<sup>27</sup> Moreover, in the Australian context, it is possible to point to numerous other measures by which the state has intervened in agricultural production. These include the creation of single-desk marketing boards, which have a state-backed monopoly over the export of certain types of agricultural produce; compulsory producer [135] levies (a form of hypothecated tax)<sup>28</sup> to fund agricultural research through quasi-governmental research and development corporations;<sup>29</sup> and tax expenditure regimes that subsidise agricultural production.<sup>30</sup> Having said this, even if the free-market/ protectionist dichotomy is often overplayed in the GI debate, it remains true to say that the overarching policy framework in both sets of countries remains different. Even when the state intervenes in countries such as Australia, it does not do so in ways that chime with the logics of GI protection. Above all, in terms of production values, state intervention is

---

<sup>26</sup> See, eg, J Asker and A Stoeckel, 'Intellectual Property in Agricultural Trade', Rural Industries Research & Development Corporation Publication 99/93 (1999), 42.

<sup>27</sup> For a recent example see the WTO Dispute Settlement Body's finding that Australia's quarantine measures restricting the import of New Zealand apples contravened its international trade obligations: *Australia—Measures Affecting the Importation of Apples from New Zealand*, WTO Document WT/DS367/R (9 August 2010).

<sup>28</sup> That is, a tax whose revenue is 'ring fenced' for a specific purpose.

<sup>29</sup> For discussion, see Productivity Commission, 'Rural Research and Development Corporations' Draft Report (September 2010), ch 9, at [www.pc.gov.au/projects/inquiry/rural-research/draft](http://www.pc.gov.au/projects/inquiry/rural-research/draft).

<sup>30</sup> As to the operation of tax expenditure regimes in Australia generally, see K Sadiq, 'The Implementation of Social and Economic Policy through the Tax Regime: A Review of Australia's Tax Expenditure Program' (2008) 23 *Australian Tax Forum* 339.

normally only focused on ensuring that minimum (usually health-driven) standards are met. In contrast, GIs provide a tool that enables the state to play a role in fostering and encouraging development of agricultural products with particular qualities and characteristics that are said to be bound up with the ‘uniqueness’ of place. The EU thus faces the problem in international negotiations of trying to sell a system of IP protection that (with some cause) appears to outsiders to rest on a very different understanding of the appropriate relationship between government, agricultural producers and the land.<sup>31</sup>

A second issue that complicates the way the EU’s agenda has been received relates to the fact that considerable disagreement still attends the question of how conflicts between GIs—particularly those protected under *sui generis* schemes—and trade marks are to be managed. To explain how such conflicts might arise, although trade mark registration laws worldwide are intended to make it difficult for parties to register descriptive or misleading geographical terms, it is possible to point to many situations where traders have been able to register marks featuring names of places. This might be because the name was not recognised by consumers in the country in question as having any geographical significance at the time of registration, or because the owner was able to demonstrate that its *prima facie* geographically descriptive sign had become factually distinctive. Difficult questions then arise if an unrelated group of traders claims an interest in the sign as a GI. Often this will be the case where either the trade mark or the GI owner seeks to expand its trade into another country where the other party has an established interest in the sign.<sup>32</sup> The most famous example of this sort of clash, which has led to countless cases in numerous jurisdictions, is [136] that between US brewer Anheuser-Busch, the owner of BUDWEISER and BUD trade marks around the world, and Czech brewer Budějovický Budvar, which claims rights to signs including ‘Budweis’, ‘Budweiser’ and ‘Bud’<sup>33</sup> primarily as GIs.

The TRIPS Agreement treats trade marks and GIs as separate subject matter, imposing discrete obligations on members to prevent the misuse of each, and affording only limited explicit guidance as to how conflicts between the two are to be addressed. The Agreement requires members to allow for the refusal or invalidation of the registration of a mark containing a GI if the mark owner’s goods do not originate in the place indicated—although if the goods are other than wines and spirits this obligation only applies if the use of the mark

---

<sup>31</sup> See generally J Dibden, C Potter and C Cocklin, ‘Contesting the Neoliberal Project for Agriculture: Productivist and Multifunctional Trajectories in the European Union and Australia’ (2009) 25 *Journal of Rural Studies* 299.

<sup>32</sup> But see below, n 40, on disputes between local GI and trade mark owners.

<sup>33</sup> These signs are said to denote beer made in the Czech town of České Budějovice, the German translation of which is ‘Budweis’.

would be misleading as to the true place of origin of the goods.<sup>34</sup> Further, art 24.5 provides that members, in implementing GI protection, are not to prejudice eligibility for or the validity of the registration of certain pre-existing marks, or the right to use such pre-existing marks.<sup>35</sup> However, this article, when read alongside the separate obligation on members to provide trade mark owners with exclusive rights to prevent the misuse of their marks, leaves unanswered the more difficult question of the extent to which a trade mark owner's rights can be curtailed in the face of a conflicting GI. Brand owner advocates in countries such as the USA have raised concerns about the impact of allowing concurrent trade mark and GI use, and have thus proposed that a later GI should never be able to co-exist with an earlier trade mark.<sup>36</sup> The EU, on the other hand, has set up its system of protection such that the owner of a pre-existing trade mark is unable to prevent the use of a later registered GI. Whether the EU's system violated its TRIPS trade mark obligations was the subject of a WTO dispute brought by the USA and Australia, with the WTO Dispute Settlement Body Panel ultimately accepting the EU's argument that allowing for co-existence of an earlier trade mark and a later GI was a permissible exception to a trade mark owner's exclusive rights. This was the case notwithstanding that the GI owner's use of its GI in such circumstances might cause origin confusion among consumers.<sup>37</sup> Disagreement over GIs and trade marks can also be seen in the context of bilateral trade agreements: the EU requires some partner countries to [137] exclude the operation of the TRIPS art 24.5 exception<sup>38</sup> and to cancel the registration of local trade marks featuring European GIs,<sup>39</sup> while the USA encourages its partner countries to protect GIs as trade marks and to give priority to the latter in disputes between the two.<sup>40</sup>

---

<sup>34</sup> See the combined effect of arts 22.3 and 23.2 of the TRIPS Agreement.

<sup>35</sup> More particularly, marks that have been applied for or registered in good faith, or in respect of which rights have been acquired through use in good faith, before 1 January 1996 or the time at which GI was protected in its country of origin. On the implementation of the TRIPS provisions in Australia, see *Trade Marks Act 1995* (Cth), s 61 and *Bavaria NV v Bayerischer Brauerbund eV* [2009] FCA 428.

<sup>36</sup> See, most notably, International Trademark Association, 'Protection of Geographical Indications and Trademarks' (24 September 1997), at [www.inta.org/index.php?option=com\\_content&task=view&id=242&Itemid=153&getcontent=3](http://www.inta.org/index.php?option=com_content&task=view&id=242&Itemid=153&getcontent=3).

<sup>37</sup> *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Documents WT/DS174/R and WT/DS290/R (15 March 2005).

<sup>38</sup> See, eg, EC–Mexico Spirits Agreement, above, n 24, art 4.4.

<sup>39</sup> See, eg, *Agreement Establishing an Association between the European Community and the Republic of Chile* [2002] OJ L352/1, Annex V, art 7 and Appendix VI.

<sup>40</sup> See, eg, *Australia-US Free Trade Agreement* (2004), arts 17.2.4 (owners of registered marks to be given the exclusive right to prevent the use of identical/similar signs, including GIs) and 17.2.12(b) (v) (grounds for refusing an application for protection or recognition of a GI to include conflict with a confusingly similar trade mark). For consideration of the operation of the latter provision as implemented in Australia, see *Rothbury Wines Pty Ltd v Tyrrell* [2008] ATMO GI 1, at [www.ipaustralia.gov.au/pdfs/trademarks/hearings/Rothbury%20determination.pdf](http://www.ipaustralia.gov.au/pdfs/trademarks/hearings/Rothbury%20determination.pdf) (owner of the trade mark THE ROTHBURY ESTATE for wine successfully objected to a group of Hunter Valley vignerons' attempt to register 'Rothbury' as a GI).

However, despite the abovementioned complexity and lack of consensus, it is important not to overstate the significance of this issue. Despite the notoriety of the ‘Budweiser’ dispute, conflicts between trade marks and GIs are likely to be rare, and it is strongly arguable that the WTO dispute was pursued for tactical reasons largely unrelated to the interests of brand owners.<sup>41</sup> It is also the case that even in countries such as the USA and Australia the potential for trade marks and GIs to co-exist is far greater than is often appreciated.<sup>42</sup> What is perhaps most interesting is that in seeking to promote its GI agenda on the multilateral stage the EU has not sought to put forward a workable compromise solution to the problem of conflicting trade marks and GIs. Instead, it has for the most part attempted to use broadly similar tactics to those it has used at the bilateral level—and these fail to address the concerns that many countries have about the potential impact of GIs on their domestic brand owners’ rights.<sup>43</sup>

The first two issues identified above (namely, that the GI debate has to be seen in the context of at least somewhat different understandings of the appropriate aims of agricultural policy and of legitimate, if sometimes overblown, concerns about the impact of protection on trade mark owners) lead into the more general question of why the EU has failed to advance its agenda outside of some success in bilateral negotiations. We have already noted that the explanation is no doubt in very large part to be found in economic self-interest—it simply does not make sense for most countries to support stronger, French-style GI protection, at least without securing something very definite in return. To our mind, however, what is also interesting is that [138] the EU has generally done a poor job of making its case for expanded GI protection. It has not developed the type of cogent rhetorical framework that can ease policy ideas to general acceptance.<sup>44</sup> Put more crudely, it has not managed to convince sceptical parties that its agenda represents anything other than a naked attempt to grab an economic advantage for its rural producers.

Much of the EU’s case for why stronger protection is warranted has rested on crude claims about ‘misappropriation’ or ‘theft’.<sup>45</sup> This type of rhetoric is commonly employed in IP debates, but it has also long been recognised that without further elaboration or

---

<sup>41</sup> See M Handler, ‘The WTO Geographical Indications Dispute’ (2006) 69 *Modern Law Review* 70.

<sup>42</sup> See D Gangjee, ‘Quibbling Siblings: Conflicts between Trademarks and Geographical Indications’ (2007) 82 *Chicago-Kent Law Review* 1253.

<sup>43</sup> See the EU’s initial plans for a multilateral system of notification and registration of GIs set out in WTO Document IP/C/W/107/Rev.1 (22 June 2000).

<sup>44</sup> Cf N Netanel, ‘Copyright and a Democratic Civil Society’ (1996) 106 *Yale Law Journal* 283, 306.

<sup>45</sup> See, eg, the arguments in WTO Document IP/C/W/353 (24 June 2002), [4], [13]; F Addor and A Grazioli, ‘Geographical Indications Beyond Wine and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPS Agreement’ (2002) 5 *Journal of World Intellectual Property* 865.

justification claims of this type should be regarded as carrying little force. Judged in purely moral terms it must be remembered that ‘we neither live in [a] romantic world of perfectly self-sufficient individualists ... nor would want to’.<sup>46</sup> Rather, we inhabit a world where we are constantly enriched by those around us. Consequently, there must always be something other than a mere act of copying or borrowing that makes a taking unfair; there must be a *misappropriation*. All too often claims of unfairness or injustice rest solely on the assumption that the defendant is appropriating the claimant’s (intellectual) property without consent, but this is entirely circular—property is the label given to that which the law protects; the question is why the law should grant protection in the first place.<sup>47</sup> Bald complaints about the theft or misappropriation of IP should thus always be viewed sceptically, but there are two further reasons why this is particularly true of complaints about the misappropriation of GIs. First, insofar as terms such as ‘parmesan’ or ‘feta’ enjoy a positive reputation among consumers, this cannot be attributed solely to the efforts of cheese makers based in Italy or Greece. On the contrary, in countries such as Australia it was often immigrants who popularised these foodstuffs among the broader community through goods produced *locally*. On this view producers of Australian ‘parma ham’ and the like are merely reaping the benefits of their labour and the labour of their predecessors; the introduction of a GI regime would transfer the benefit of this labour and investment to European producers without compensation—it would be the European producers who would be ‘reaping without sowing’. A second, related, problem with any attempt [139] to cast the GI debate in the ethical language of misappropriation is that European producers often sat back for many years and allowed the terms in which they are now claiming a monopoly to become generic. Complaints about the limitation of existing legal regimes ring hollow when producers either failed to take advantage of existing mechanisms in a timely manner or did so in a way that suggests they were only interested in a more narrow monopoly than that which is now being claimed on their behalf.<sup>48</sup> That the EU and supporters of its agenda have failed to develop a

---

<sup>46</sup> M Spence, ‘Passing Off and the Misappropriation of Valuable Intangibles’ (1996) 112 *Law Quarterly Review* 472, 489.

<sup>47</sup> Cf E Weinrib, ‘The Fiduciary Obligation’ (1975) 25 *University of Toronto Law Journal* 1, 10–11 (‘Property is itself merely the label for that crystallized bundle of economic interests which the law deems worthy of protection. When intangibles such as information and opportunity are at stake, affixing the label of property constitutes a conclusion not a reason’).

<sup>48</sup> It is notable, for example, that Australia introduced a certification trade mark regime in 1955 and, before that, had a system for the registration of ‘standardization’ marks (see, respectively, *Trade Marks Act 1955* (Cth), ss 83–92; *Trade Marks Act 1905* (Cth), s 22). Yet it was only in the mid-1990s that organisations such as the Stilton Cheese Makers Association and the Consorzio del Formaggio Parmigiano Reggiano took steps to avail themselves of this facility. See also *Vine Products Ltd v MacKenzie & Co Ltd* [1967] FSR 402, where the owner

cogent response to the criticisms that can so easily be levelled at the misappropriation argument merely reinforces the perception that the EU's case is nothing more than a grubby attempt to secure an unwarranted monopoly for its producers.

Insofar as the EU and its supporters have framed their arguments other than through the language of misappropriation, they have tended to appeal to the desirability of diversity in agricultural production. By appealing to the uniqueness of place, GIs are said to offer the promise of something produced in accordance with traditional, perhaps even artisanal, practices that are superior in quality to, or at least substantially different from, competing goods. In this respect GIs are put forward as affording an antidote to a globalised agrifood industry that tends to be characterised by an over-production of broadly homogenous goods, sourced as cheaply as possible from largely anonymous sources, which are then sought to be differentiated primarily by price.<sup>49</sup> At a time when many consumers are turning away from these kinds of mass-produced foods and are expressing preferences for 'locally' or 'sustainably' produced goods as part of the 'new food movements',<sup>50</sup> GIs operate as a convenient shorthand for values such as heritage, cultural diversity and authenticity.<sup>51</sup> The authors, like most members of the left-leaning segment of the legal academy, have considerable sympathy for the argument that there needs to be a change of mindset about the production and consumption of food. However, the claim for a link between the generation of a different cultural attitude toward food and higher standards of GI protection is weak at best.

[140] It is important to bear in mind that consumers who are concerned to locate goods produced at a particular place or in a particular manner can already do so readily—Parmigiano Reggiano, feta produced in Greece and Prosciutto di Parma are readily available in Australia, and any consumer keen to avoid mass-produced cheaper alternatives will have no trouble doing so.<sup>52</sup> Consequently, increased GI protection is in no way a precondition for the emergence of a changed attitude towards food production. The claim must therefore be that higher standards of GI protection will help generate a broader cultural shift in attitudes. In the case of terms that already enjoy a high level of market recognition a GI 'clawback' will

---

of the GI 'Sherry' was unable to restrain the defendant's use of 'British Sherry' because it had delayed enforcing its rights for a number of years while the defendant established goodwill in its 'British Sherry'.

<sup>49</sup> For a critique of the American agri-food industry, see *Food, Inc*, Magnolia Pictures, 2009.

<sup>50</sup> Cf M Pollan, 'The Food Movement, Rising', *The New York Review of Books*, 10 June 2010.

<sup>51</sup> See generally D Giovanucci, E Barham and R Pirog, 'Defining and Marketing "Local" Foods: Geographical Indications for US Products' (2010) 13 *Journal of World Intellectual Property* 94.

<sup>52</sup> Even if there are cases where foreign GI owners face difficulty in securing the registration of their names as certification trade marks because similar signs have already been registered as trade marks (as to which see Gangjee, above, n 42, at 1270–6), it must be remembered that consumers who are sufficiently motivated to do so will always be able to source the original product.

serve to reserve well-recognised signs for high-end products and consumers will thereby be encouraged to try superior goods and develop a more nuanced appreciation of food. In the case of new GIs, a high level of protection will encourage producers to market their goods by reference to geographical insignia, thereby encouraging greater respect for localism and the importance of place. Even if one disregards the taint of elitism that underpins such an account, and even if one is untroubled by the importance that this account assigns to law in changing cultural attitudes, attempts to link calls for GI protection to the rise of the new food movements are deeply problematic. Most obviously, once they enter the international arena GIs fit very uncomfortably alongside calls for the consumption of sustainable, locally produced foods—judged in environmental terms a regime that encourages people to buy smallgoods produced many thousands of kilometres away (as the EU clearly intends) has to be judged with extreme suspicion. There is also something disingenuous about any attempt to tie GIs to artisanal standards and practices. While it is true that, within parts of Europe, many GIs are owned by small collectives with local markets, on the world stage the GIs that are being disputed are predominantly employed by large corporate entities. However good Champagne may be, the French Champagne houses are very much part of, and not an answer to, global agribusiness.

If the EU faces problems selling its agenda in terms of appeals to diversity in agricultural production even to supporters of the new food movements, for governments in countries like Australia and the USA any agenda sold in these terms is obviously problematic, since it rests on hostility to the dominant model of agricultural production and distribution. Moreover, there is in the EU's stance an implicit appeal to the mystique and superiority of Old World products and values that is unlikely to find favour with New World policy makers. Insofar as such policy makers [141] are sceptical about the uniqueness or superiority of Old World locales, they would have the support of geographers who are critical of the idea that 'place' should be considered as something immutable that can lend fixed, irreproducible characteristics to agricultural produce.<sup>53</sup>

If calls for increased GI protection based on complaints about 'misappropriation' or appeals to artisanal production values are unconvincing, one might think that the EU and its supporters would, in any event, have expended most energy in developing the economic case for GI protection. After all, these arguments are being marshalled in the context of trade

---

<sup>53</sup> See, eg, B Parry, 'Geographical Indications: Not All "Champagne and Roses"', in L Bently, J Davis and J Ginsburg (eds) *Trade Marks and Brands: An Interdisciplinary Critique*, Cambridge University Press, Cambridge, 2008.

negotiations, where the case for all other forms of IP protection is made almost exclusively in economic terms. Yet in this respect too the EU's case has not been made with the sophistication one might expect.

The first obstacle that the EU and its supporters need to overcome in developing the economic case for GI protection is that the default rule in market economies is that copying a rival trader's product is allowed, and that deviation from this logic needs to be justified. Nevertheless, the entire IP edifice rests on precisely such deviations, and one might therefore expect the EU to have relatively little problem in reasoning by analogy to other forms of IP protection. Most obviously, the EU might point to the economic rationale for protecting trade marks. Specifically, it is normally said that trade marks are protected because they lower consumers' 'search costs'. That is, they allow consumers to identify quickly goods and services that they liked (or disliked) previously, thereby enabling them to make more rapid purchasing decisions.<sup>54</sup> However, it is problematic to seek to justify expanded GI protection on this basis. In the short term, meeting the EU's agenda (both for increased protection and for a multilateral register that would limit the operation of the genericness exception) might well *increase* consumer search costs in countries such as Australia. Consumers would need to learn that terms that once served as generic product descriptions were now performing a different function, and that products formerly sold under those generic terms were now known by different descriptions.<sup>55</sup> For example if Australia were to recognise 'feta' as a GI, consumers would have to become accustomed to the fact that henceforth this term denotes only sheep's milk cheese in brine produced in particular regions in Greece, and that soft cheese in brine produced in Australia, Denmark, Bulgaria or any other country will henceforth be known by a new generic [142] descriptor. Even in the longer term, the idea that consumer search costs will be lowered by a higher standard of GI protection rests on an untested assumption about the way consumers will respond to a particular type of terminology. It cannot be taken for granted that consumers will latch onto GIs as providing a second-order<sup>56</sup> description of source that will allow them to make more informed purchasing decisions.<sup>57</sup>

---

<sup>54</sup> Trade marks are also said to offer a number of other consequential economic benefits. For more detailed discussion, see Burrell and Handler, above, n 6, ch 1.

<sup>55</sup> See also B Goebel, 'Geographical Indications and Trademarks: The Road from Doha' (2003) 93 *Trademark Reporter* 964, 988–9.

<sup>56</sup> We say 'second order' because such goods will almost invariably also carry a brand name that consumers will treat as the primary indicator of source.

<sup>57</sup> See, eg, C Bonnet and M Simioni, 'Assessing Consumer Response to Protected Designation of Origin Labelling: A Mixed Multinomial Logit Approach' (2001) 28 *European Review of Agricultural Economics* 433.

If GIs cannot be justified by reference to their positive impact on consumer search costs, the EU faces the more daunting task of finding a justification divorced from that traditionally employed to explain trade mark protection. Nevertheless, alternative economic justifications for trade mark protection do exist, particularly for the type of extended protection offered by legal prohibitions on the ‘dilution’ of famous trade marks. For instance it has been claimed that antidilution protection lowers ‘imagination costs’ for consumers by helping to preserve the clarity of brand messages and preventing them from making burdensome associations between unconnected products.<sup>58</sup> However, this imagination costs argument has been the subject of fierce academic criticism<sup>59</sup> and enjoys no general acceptance even among those who are otherwise supportive of high levels of IP protection. A better strategy for the EU might therefore be to seek to draw an analogy with patent and copyright law, where we provide protection as an incentive to invest in expensive-to-create but cheap-to-copy products whose creation and distribution may well benefit society as a whole. Again, however, any such analogy would be unlikely to survive serious scrutiny. First, incentive arguments can never justify the retroactive creation of monopolies over things already in existence,<sup>60</sup> which leaves the EU’s core demands for protection of established GIs unmet. Second, and more generally, attempts to justify trade mark type regimes by reference to the need to prevent free-riding and to preserve incentives for ‘brand entrepreneurs’ have been subject to considerable criticism.<sup>61</sup>

The EU’s failure to develop a robust narrative as to the economic advantages of GI protection has meant that the economic case has been lost by default. Part of the problem may well be that, as we have tried to indicate, the economic case for such [143] protection is weak.<sup>62</sup> It nevertheless seems extraordinary that the EU has not done more in this regard, and its failure at least to seek to package the case for extended GI protection in economic terms has most likely increased suspicion of GIs as nothing more than protectionist measures designed to support a European agricultural sector that is simply not globally competitive.

Having failed to persuade developed agricultural exporter countries such as Australia

---

<sup>58</sup> *Ty Inc v Perryman*, 306 F 3d 509, 511 (7th Cir, 2002).

<sup>59</sup> See, eg, R Tushnet, ‘Gone in 60 Milliseconds: Trademark Law and Cognitive Science’ (2008) 86 *Texas Law Review* 507; G Austin, ‘Tolerating Confusion about Confusion: Trademark Policies and Fair Use’ (2008) 50 *Arizona Law Review* 137.

<sup>60</sup> Cf the tortuous attempts of the US Supreme Court to do this in *Eldred v Ashcroft*, 537 US 186 (2003).

<sup>61</sup> See D Gangjee and R Burrell, ‘Because You’re Worth It: L’Oréal and the Prohibition on Free Riding’ (2010) 73 *Modern Law Review* 282 and the sources cited therein.

<sup>62</sup> See also K Raustiala and S Munzer, ‘The Global Struggle over Geographic Indications’ (2007) 18 *European Journal of International Law* 337 (suggesting the economic case for GI protection only justifies the current TRIPS art 22 standard).

and the USA to embrace GI extension as being in their own best interests, the EU has increasingly sought to promote extension as a measure that benefits developing countries. This is an interesting development. It has allowed the EU to recapture some of the moral high ground by making the debate about more than perceived narrow European self-interest and by aligning itself with a broader 'development agenda' in international trade negotiations. The EU has had some success in persuading a number of developing countries to support GI extension, particularly those that have one or more products that have already secured significant international market access and have developed a strong global reputation.<sup>63</sup>

The argument that EU-style GI protection can benefit developing countries runs as follows. Building up a reputation in agricultural produce is a time-consuming and expensive business. Much agriculture in developing countries is conducted by individual farmers or small collectives that will never have the resources to develop recognisable brands in foreign export markets. For such producers, GI protection offers a means of securing strong rights quickly, thereby preventing Western companies from misappropriating geographical terms before they have become widely recognised in an export market.<sup>64</sup> Once a term is recognised as a GI it will rapidly attract a price premium, with consequent benefits for the producers. None of these arguments are necessarily convincing. Establishing a domestic GI regime entails significant cost, and a developing country would need to think carefully about whether the requisite resources would not be better spent in other ways.<sup>65</sup> This is particularly true since the argument that consumers are willing to pay a premium for GI-branded [144] goods does not appear to be borne out by the available empirical evidence.<sup>66</sup> More generally, in a detailed study of the relationship between GI protection and the creation of reputational capital for developing country coffee and chocolate products, Justin Hughes has argued convincingly that the development case for expanded GI protection is much weaker than its advocates insist, and that it must be remembered that the process of securing higher incomes for farmers in developing countries is much more complicated than merely encouraging the

---

<sup>63</sup> Countries that support the EU's agenda include Cuba, India, Jamaica, Kenya, Pakistan and Sri Lanka.

<sup>64</sup> See C Correa, 'Protection of Geographical Indications in Caricom Countries' (2002), 29, at [www.crnw.org/index.php?option=com\\_docman&Itemid=82](http://www.crnw.org/index.php?option=com_docman&Itemid=82).

<sup>65</sup> See, eg, M O'Kicki, 'Lessons Learned from Ethiopia's Trademarking and Licensing Initiative: Is the European Union's Position on Geographical Indications Really Beneficial for Developing Nations?' (2009) 6 *Loyola University of Chicago International Law Review* 311 (considering the Ethiopian government's conscious rejection of *sui generis* GI protection in favour of reliance on existing trade mark laws to support its coffee growers).

<sup>66</sup> See, eg, A Tregear, S Kuznesof and A Moxey, 'Policy Initiatives for Regional Foods: Some Insights from Consumer Research (1998) 23 *Food Policy* 383.

export of high GI standards.<sup>67</sup>

It is difficult, therefore, not to view the EU's change of focus with a somewhat cynical eye. Nevertheless, the EU's change of direction clearly makes good politics and has allowed it to advance the moral and intellectual case for broader GI protection for the first time. It also seems likely that the EU will secure increased protection for GIs in a significant number of developing countries through future bilateral agreements.<sup>68</sup> European policy makers will no doubt regard this as a success, particularly if they are able to secure protection for their GIs in important emerging markets. Ultimately, however, a global agreement on GI protection remains as far away as ever, and it is difficult to see how this will change short of a multilateral, genuine (and hence almost certainly never to be realised) agreement to open up agricultural markets.

---

<sup>67</sup> J Hughes, 'Coffee and Chocolate: Can We Help Developing Country Farmers through Geographical Indications?', International Intellectual Property Institute, Washington, DC (2009), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1684370](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684370). See also A Kur, 'Quibbling Siblings: Comments to Dev Gangjee's Presentation' (2007) 82 *Chicago-Kent Law Review* 1317, 1323–4 (arguing that securing market access for developing country products is far more important than the question of legal standards).

<sup>68</sup> See D Shabalala et al, 'Intellectual Property in European Union Economic Partnership Agreements with the African, Caribbean and Pacific Countries: What Way Forward after the Cariforum EPA and the Interim EPAs?', Centre for International Environmental Law (2008), at [www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08.pdf](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf).