TAKING 'TRADE AND CULTURE' SERIOUSLY: GEOGRAPHICAL INDICATIONS AND CULTURAL PROTECTION IN WTO LAW

Tomer Broude[*]

> *"Each bottle of American or Australian wine that lands in Europe is a bomb targeted at the heart of our rich European Culture."*
> - A winemaker from the Languedoc, 1999[1]

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[*] Lecturer, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem; BA, LLB, Hebrew University of Jerusalem; SJD, University of Toronto. The article was prepared for presentation at an international conference on "The World Trade Organization at a Crossroads", Bar Ilan University, Ramat Gan, Israel, December 12-14, 2004. The author is grateful for the comments of the conference participants on an earlier draft, and in particular Gail Evans, Joel Trachtman and Thomas Wälde.

[1] Quoted in WILLIAM ECHIKSON, NOBLE ROT: A BORDEAUX WINE REVOLUTION 15 (2003).

I. *ANTIPASTI:* THE (WORLD) WAR OF THE TWO BEANS

The regulation of the relationship between international trade law and cultural protection is one of the challenges that the World Trade Organization (WTO) will be facing with greater intensity in the second decade of its existence. Within the WTO, aspects of 'culture' and its sensibilities are being raised as important non-trade considerations to be factored into trade law disciplines, either in the context of Article XX GATT/Article XIV GATS argumentation,[2] or in the promotion of *sui generis* trade-related intellectual property rights.[3] Outside of the WTO, the trade-culture nexus also emerges in little-noticed developments in the emerging international law of cultural diversity, as promoted within the United Nations Educational, Scientific, and Cultural Organization (UNESCO), that may in the future impact upon trade law on the basis of cultural justifications.[4]

This article approaches the problem as it is reflected in the current debate on Geographical Indications (GIs) for food and wine products in the WTO.[5] It seeks to take 'trade and culture' seriously, looking not only at law's effects on trade but also on culture, and to examine the extent to which legal restrictions on international trade can in fact prevent the degradation of cultural diversity in a particular regulatory context. The paper's specific argument, *in nuce*, is that the conservation of local culture and

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[2] Cultural considerations may conceivably be cited as justifications for exceptions from WTO trade liberalization disciplines under Article XX(a) GATT (*General Agreement on Tariffs and Trade*, Oct. 30, 1947, 55 U.N.T.S. 194) or XIV(a) GATS (*General Agreement on Trade in Services*, 33 I.L.M. 1167 (1994) if deemed "necessary to protect public morals" (see recently, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (2005)(*US-Gambling*)(WTO Appellate Body Decision modifying prior WTO Panel decision and finding that United States (US) Federal legislation banning internet supply of gambling services is a restriction on trade in services but that it satisfies the Article XIV(a) GATS 'necessity' and 'public morals' tests, although in part confirming that some of the legislation was discriminatory under the *chapeau* of Article XIV GATS)); or under XX(f) GATT if "imposed for the protection of national treasures of artistic, historical or archeological value". For discussion of the legal implications of a general 'cultural' exception in WTO law, see section V *infra*.

[3] Such as the Geographical Indications (GIs) discussed in the present article or within the more general concept of 'Traditional Knowledge' (see, generally, Graham Dutfield, *Protecting traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation*, International Center for Trade and Sustainable Development (ICTSD), June, 2003).

[4] See UNESCO, *Universal Declaration on Cultural Diversity*, Adopted by the 31st Session of the General Conference of UNESCO, Paris, November 2, 2001 (the 'UNESCO Declaration'); and UNESCO, *Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions* (the 'UNESCO Draft Convention'), UNESCO Doc. CLT/CPD/2004/CONF-201/2, Paris, July, 2004, *available at:* http://portal.unesco.org/culture/en/ev.php-URL_ID=24973&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[5] Under Article 22.1 of the TRIPS (*Agreement on Trade Related Aspects of Intellectual Property*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, LEGAL INSTRUMENTS -- RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994), GIs are "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin". This is, however, to some extent a restrictive legal definition; the concept of GIs as eligible for legal protection may be considerably broader, encompassing "indications of source" (simply indicating the place of production); "appellations of origin" (indicating a place of production that enjoys certain local environmental characteristics) and "geographical indications" in a limited sense that falls between the previous terms (see BERNARD O'CONNOR, THE LAW OF GEOGRAPHICAL INDICATIONS 22-23 (2004)). For this paper's purposes, GIs also include traditional non-geographical names, to which similar considerations apply (see *infra* note 12).

cultural diversity cannot serve as an independent supporting rationale in favor of the expansion and strengthening of the international legal protection of GIs.[6] Historical experience and empirical evidence, mustered especially in the area of the protection of European wine appellations, shows that the national and international legal enforcement of GIs and similar measures has been ineffective in the prevention of cultural transformation and evolution, including trans-national and cross-cultural influences that have displaced pre-existing traditions, leading to degrees of cultural homogenization. More broadly, these findings will demonstrate that trade-restrictive or otherwise economically distortive measures are not a dependable policy for preserving local culture and traditions, casting doubts upon the validity of 'cultural exceptions' in international 'trade and culture' law in general.

Although building on food history and sociology, a cultural inquiry into this specific topic, despite common prejudice,[7] is neither esoteric nor frivolous, if only because it directly addresses one of the underlying complexities of an ongoing trade war - what might be termed the "World War of the Two Beans"[8] - the contest over the degree, nature and scope of the international legal protection to be granted to place- and place-related names associated with foods, beverages and other products,[9] e.g., Parma ham,[10] Darjeeling tea,[11] Feta cheese,[12] and Budvar beer.[13] The weight of the

[6] This does not necessarily imply that other rationales for such protection, such as wealth maximization or consumer protection do not have merit. These arguments are, however, dealt with in an extensive literature (see, e.g., most recently, O'Connor, *Ibid.*). This paper aims to query only the validity of the cultural justification.

[7] "Young scholars who are interested in food history are routinely advised not to go near the subject until their *second* book, *after* tenure"; Warren Belasco, *Food Matters: Perspectives on an Emerging Field*, in FOOD NATIONS: SELLING TASTE IN CONSUMER SOCIETIES 3 (Warren Belasco & Philip Scranton eds., 2002)).

[8] The original War of the Two Beans, "*La Guerre des Deux Haricots*" was a satirical editorial published in the French *Le Figaro* on September 5, 1908, lampooning the political struggle for the legal protection of agricultural products and their geographical names in France, as instigated primarily by producers of fine wines: "According to *Le Figaro*, hostilities began in the provinces of France, satirically dubbed the Kingdom of Little Peas. Two Beans, each originating from a different region, confronted each other at the market. One Bean argued that he was the superior vegetable, representative of the refined riches of the Kingdom, endowed with 'unique qualities' and heir to a rich historical legacy. His opposing legume, in the outlandish dialogue that followed, blasted these assertions by laying claim to very similar 'unique qualities'"; see Kolleen M. Guy, *Wine, Champagne and the Making of French Identity in the Belle Epoque* in FOOD, DRINK AND IDENTITY: COOKING, EATING AND DRINKING IN EUROPE SINCE THE MIDDLE AGES 163 (Peter Scholliers ed. (2002)); and also KOLLEEN M. GUY, WHEN CHAMPAGNE BECAME FRENCH: WINE AND THE MAKING OF A NATIONAL IDENTITY 144-147 (2003). The success of French wine and food producers to solicit legal protection at the national level has been replicated in the European Union (EU), and in the WTO as well.

[9] For a particularly illuminating presentation and analysis of the GI debate, see Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labeling*, 19 J. RURAL STUDIES 127 (2003). Barham focuses, *inter alia*, on the notion of *terroir* (essentially the unique connection between place and product) that indeed lies at the basis of the entire GI concept. *Terroir* is undoubtedly part of the cultural justification of GIs discussed here (see section III *infra*), but it is not identical to it; *terroir* also has significant non-cultural technical aspects (mainly climate and geology), and may act as the basis for the consumer protection rationale of GI rights, without recourse to cultural arguments. Conversely, the cultural aspects of GIs are not contingent on the scientific validity of *terroir* (On the role of *terroir* in winemaking, see James E. Wilson, TERROIR: THE ROLE OF GEOLOGY, CLIMATE AND CULTURE IN THE MAKING OF FRENCH WINES; and JACQUES FANET, GREAT WINE TERROIRS (trans. by Florence Brutton) (2004)).

[10] Indicative of some of the related international legal complications, "Parma" ham has enjoyed protection as a Geographical Indication in the European Union (EU), following Italian law, since the

business interests involved should itself justify our awareness; the manner in which alarmist cultural rationalization has been drawn into this legal-economic field should, however, be of no lesser concern.

Reflective of its importance in human exchange, food (and drink) has acquired a special status in international trade law. In the current Doha round of trade negotiations in the WTO,[14] it is clear that the international regulation of the production, consumption and commercial exchange of food products (at least partially captured by the label of "trade in agriculture")[15] is the ultimate deal-breaker, while in disputes adjudicated in the WTO dispute settlement system, food products attract a particularly bright spotlight,[16] as they have in the European Union (EU)[17] and the North American Free Trade Agreement (NAFTA).[18] In these contexts, not just food

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early 1990s; but it has also been recognized as a trademark held by the Maple Leaf Meats company in Canada since 1964; see O'Connor *supra* note 5, at 101-102 and related cases of the European Court of Justice (ECJ), cases C-108/01, *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Limited and Hygrade Foods Limited*, 20 May 2003 and C-469/00, *Sociéte Ravil v Société Bellon Import und Société SPA Biraghi,* 20 May 2003..

[11] Darjeeling, the name of a town in the West Bengal State of India famed for its quality tea, is also a registered trademark in the United States (US Trademark registration No. 2685923); see also Naba Kumar Das (Chairman, Tea Board India), *Protection of Darjeeling Tea*, WIPO/GEO/SFO/03/8, Worldwide Symposium on GIs, San Francisco, California, July 9-11, 2003, *available at* http://www.wipo.int/meetings/2003/geo-ind/en/documents/pdf/wipo_geo_sfo_03_8a.pdf; see also Niranjan Rao, *Geographical Indications in Indian Context: A Case Study of Darjeeling Tea*, Indian Council for Research on International Economic Relations Working Paper No. 110, September 2003, *online*: www.icrier.res.in/pdf/wp110.pdf).

[12] Feta is an example of a place-related food name that is not strictly speaking a Geographical Indication, as there is in fact no relevant geographical place called "Feta", which simply means "slice" or "slab" in Greek. Under EU law, "Feta" is, however, considered a "traditional non-geographical name" worthy of protection similar to GIs, and it is designated as a "Protected Designation of Origin" or PDO; see O'Connor *supra* note 5, at 130-131, n. 33. The arguments relating to food, trade and culture presented in this paper essentially apply to PDOs as well as GIs.

[13] Budvar is the Czech name for the town of Budweis, the qualitatively unlikely basis for the famous US beer brand - Budweiser - which is trademarked in the US and elsewhere. The conflict between the American Budweiser and Budéjovickỳ Budvar, the Czech manufacturer of Budweiser Budvar has reached the WTO's dispute settlement system, in WT/DS174 *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (*EC-GIs*).

[14] I refer to the negotiations under the 2001 Doha Declaration (WTO, Ministerial Conference, *Ministerial Declaration* (14 November, 2001), WTO Doc. WT/MIN(01)/DEC/W/1 (2001)), or 'Doha Development Agenda' (DDA).

[15] Of course agricultural trade is both broader and narrower than trade in food, as it encompasses, on one hand, non-food products such as cotton, while important food products, most notably fish, have been excluded from the ambit of agricultural trade disciplines (e.g., under Annex 1 of the WTO *Agreement on Agriculture*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Part of Annex 1A, LEGAL INSTRUMENTS -- RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. (1994)).

[16] By a rough count, approximately 40% of the disputes initiated in the WTO relate to edible products; some of the more famous ones that reached Panel and Appellate Body adjudication are *Japan - Taxes on Alcoholic Beverages* (1996), WTO Doc. WT/DS1/AB/R, WT/DS10/AB/R, WT/DS2/AB/4 (Appellate Body Report); *European Communities - Measures Concerning Meat and Meat Products* WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Appellate Body Report); and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report);

[17] Suffice it to mention European Court Justice (ECJ) Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, (1979) E.C.R. 649, otherwise known as *Cassis de Dijon*.

[18] Such as the Canada-US "beer wars" that ensued under the General Agreement on Tariffs and Trade but were carried over to NAFTA in the antidumping context in (see NAFTA Chapter 19 Bi-National Panel Report CDA-95-1904-01 *Certain Malt Beverages from the United States (Injury)*(1995).

itself but food "security" and "safety" have become especially important terms, highlighting the additional sensitivities that accompany edible commodities.[19]

On this background, the issue of GIs has emerged on two main fronts in the WTO. First, the front of international negotiation. Paragraph 18 of the Declaration of the WTO 2001 Ministerial Conference (the Doha Development Agenda – 'DDA') places two items relating to GIs upon the DDA negotiating table: (i) creating a multilateral system for notification and registration for wines and spirits, under Article 23.4 TRIPS;[20] and (ii) the extension of Article 23 TRIPS 'additional protection' of GIs (i.e., protection granted even when there is no risk of misleading consumers or unfair competition) to products other than wines and spirits. The latter point, although formally designated as a Paragraph 12 DDA 'implementation' issue, essentially entails the potential introduction of new rights and obligations for WTO Members. The outcome of these negotiations will determine the scope of statutory protection granted to GIs for years to come.

Second, the front of international litigation. The question of GIs and their protection under TRIPS has inevitably been subjected to WTO dispute settlement.[21] As of this writing, a WTO panel has issued a Report with regard to a challenge by Australia and the United States to the existing legislation of the European Union (EU) on GIs. The Panel Report, still subject to appeal, finds that significant components of the EU's GI legislation are TRIPS-inconsistent, while other aspects have been upheld by the panel as WTO consistent.[22]

To be sure, in both arenas the debate has focused on technical, legal and economic considerations that characterize much of the application of GI protection in international and domestic law. There is a distinct cultural backdrop, however, oft ignored or taken for granted: the assumption that beyond the private-interest and public welfare effects of legal protection, GIs are required for the preservation of local traditions, national culture and cultural diversity. Arguably, this assertion is necessary to justify the inclusion of GIs in intellectual property disciplines that are usually aimed at encouraging the interests of innovation and individual creativity through the grant of temporary monopoly.[23] GI rights do not represent these values, as they express commonly used place-names, establish permanent communal rights and are ostensibly maintained to protect "old knowledge".[24] The notion of GIs as cultural

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[19] For a document that places both terms in the context of the right to food as a human right, see Food and Agriculture Organization (FAO) Council, *Report of the 30th Session of the Committee on World Food Security, Final Report of the Chair*, Rome, 22-27 November, 2004 (adopting a voluntary set of guidelines to support the progressive realization of the right to adequate food in the context of national food security), *online*: http://www.fao.org/docrep/meeting/008/J3345e/j3345e01.htm.

[20] See DDA *supra* note 14.

[21] See *EC-GIs*, *supra* note 13.

[22] The dispute dealt mainly with two issues: first, whether the EC's legislation on GI protection discriminates against non-EC GIs (by granting them less than national treatment); and second, whether a registered trademark and EC-recognized GI that are identical (e.g., Budweiser, see *supra* note 13) can coexist in EC commerce.

[23] See, e.g., Allyn A. Young, *Increasing Returns and Economic Progress*, 38 THE ECONOMIC JOURNAL 527 (1928); and Karl Shell, *Towards a Theory of Inventive Activity and Capital Accumulation*, AMERICAN ECON. REV. 56 (1966).

[24] "Old Knowledge" is sometimes a euphemism for tradition and culture; moreover, some draw the distinction that knowledge becomes 'traditional' not because it is 'old', but rather because of the way it is gathered and used; see Dutfield *supra* note 3 at 23.

guardians compensates for this justificatory deficiency, providing an alternative quasi-intellectual property theoretical basis.

The main proponent of this cultural rationale is the EU, who has also broadened the cultural argument to apply to developing countries, claiming that GIs "are key to EU and developing countries cultural heritage, traditional methods of production and natural resources".[25] Indeed, the claim that GIs can protect local culture has also been taken up by certain developing countries who are interested in acquiring enhanced international GI protection for food products other than wine and spirits.[26] Moreover, the proposition that GI protection can help preserve tradition (or can be justified on this basis) is usually taken at face value.[27] In critically examining this assumption in this article, I do not wish to argue that local culture and traditions are not worthy of protection, nor that cultural diversity should not be encouraged; only that history as well as informed economic analysis demonstrate that GIs are a questionable way of doing so. Indeed, this will lead to some more general conclusions on the legal protection of culture through trade restrictions on a few planes that transcend the particular 'case-study' of GIs.

In keeping with its subject matter, this article will follow the path of five courses and a bit more. After this (hopefully appetizing) introduction, in the next section, entitled "*Primi*: Trade, Culture, Food and Wine", I will expand on the more general context of the trade-culture nexus. First, I will briefly describe existing perceptions of the relationship between culture as a "national" or localized ideal, on one hand, and "globalization", as a universalized counter-notion, and discuss the broad scope of conceivable conflicts between international trade disciplines and national or local cultural assets and policies, as expressed by and expressive of three dimensions of culture: production, consumption and identity. Thereafter, food and wine will be drawn into the fray not merely as agents of subsistence, ingestion or intoxication but as reflective of culture, in the specialized local/national and global diversity senses.

Subsequently, in the third section entitled "*Secondi*: The Romance of Reputation - The Case for Cultural Protection through GIs", I will present an informal, positive (yet romantic) theory of the law and economics of cultural protection through GIs, and expand on the role of cultural justification in existing perceptions of GIs. In this regard, particular attention will be granted to the previously identified cultural dimensions of production, consumption and identity.

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[25] See EU Background Note No. 01/04 *Why Do Geographical Indications Matter to Us?* (2004), *available at* http://jpn.cec.eu.int/home/news_en_newsobj553.php.

[26] See, e.g., intervention by the delegate from Thailand, WTO, Council for TRIPS, *Minutes of Meeting* 5 February, 2003, WTO Doc. IP/C/M/38 at 41: "Extension was important because GIs were often related to culture and ancestors' traditional knowledge"; and intervention by the delegate from India, WTO, Council for TRIPS, *Minutes of Meeting*, 10 September, 2002, WTO Doc. IP/C/M/36/Add. 1 at 10 relating to the role of GI extension in the protection of the cultural heritage of developing countries. Also, most of the third-parties in the *EC-GIs* Panel proceedings were developing countries (see *supra* note 13).

[27] See Marsha A. Echols, *Geographical Indications for Foods, TRIPS, and the Doha Development Agenda*, 47 J. AFRICAN LAW 199 (2003): "The preservation of traditions and of community values may be of such significance that it helps to define and to distinguish a neighborhood or a community. Traditions maintain a sense of community and society. Traditions made 'new" could offer a lifeline to a rural community and might offer enough cachet for a few of its young adults who otherwise would flee to the city. Communities could be beneficiaries of the use of GIs".

In the fourth section entitled "*Contorni*: Culture as Commodity - Some Contrary Realities of the Food and Wine Trade", I will examine specific factual aspects of the history of the wine and food trade that contradict the romantic view of GIs as possible protectors of culture. These will ultimately expose the cultural rationalization of GIs, and its underlying legal and economic theory as unpersuasive.

In the fifth and final section entitled "*Dolci* The Future of Cultural Protection in the WTO", I will summarize the conclusions of the investigation of the cultural aspects of GIs, and argue that GI protection is an inadequate cultural protector, and so the cultural rationale should not influence the outcome of the Doha Round in these issues; more generally, I will draw some lessons for the future role to be played by cultural protection exceptions and argumentation, in three legal areas: *sui generis* trade restrictions (such as GIs); the employment and possible expansion of Articles XX GATT and Article XIV GATS as a general 'cultural exception' to trade disciplines; and the establishment of a separate international legal regime for cultural diversity, as suggested in the UNESCO Draft Convention, that would impact upon WTO law.

A short *Digestivo* will follow, offering a few thoughts on the nature of cultural diversity and culture-based protectionism.

II. *PRIMI:* TRADE LAW, CULTURE, FOOD AND WINE

A. On Culture and "Globalization"

The popular perception of the effects of globalization on world cultures is the apocalypse of a 'McWorld': "the onrush of economic and ecological forces that demand integration and uniformity […] pressing nations into one commercially homogenous global network".[28] In this vision, fragile local social and cultural structures are erased by exposure to powerful external forces. These are brought to bear by the onslaught of electronic telecommunications (an argument first presented by Herbert Schiller, well before the advent of the internet)[29] and other enhanced transnational interactions, which promote a global culture of 'consumerism'. This acculturation couples with free trade to cause local customs, products, and production methods to be vanquished by foreign, globally available alternatives. The global proliferation of standardized products of mass culture thus threatens to stifle national and local modes of cultural expression.[30]

Beyond this stylized depiction, however, we must acknowledge the wealth of nuanced and constantly developing theorizing on globalization and culture. Of course, the basic scenario owes much to Neo-Marxist thought, for it is often asserted that the

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[28] Benjamin R. Barber, *Jihad Vs. McWorld*, 269(3) ATLANTIC MONTHLY 53 (1992); and BENJAMIN R. BARBER, JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD (1996).

[29] HERBERT I. SCHILLER, MASS COMMUNICATIONS AND AMERICAN EMPIRE 112 (1969): "Everywhere local culture is facing submersion from the mass-produced outpourings of commercial broadcasting".

[30] See various passages in JÜRGEN HABERMAS, THE POSTNATIONAL CONTELLATION: POLITICAL ESSAYS (2001) (trans. By M. Pensky).

devastation of local cultures is the product of a triumph of "cultural hegemony"[31] or "cultural imperialism",[32] on the "ideological battleground" of culture,[33] the result of which, in the 'third world' context, is 'westernization' or 'Americanization'. These views are, however, wide open to criticism from all corners. For example, it has been argued that the notion of western cultural domination is itself a self-serving western concept, that "'cultural imperialism' is a critical discourse which operates by representing the cultures whose autonomy it defends in its own (dominant) Western cultural terms".[34] Others reject the danger of the domination by a 'western' monoculture, observing instead the emergence of "global cultures in the plural";[35] or explain how national cultures have post-modernly "reconceived themselves in order to persist in an era of intensified globalization".[36] [37]

Moreover, for immediate purposes it is not necessary to enter this debate (much as the following discussion may modestly contribute to it). Few, if any, would argue that globalization, however conceived, does *not* produce *any* changes in local cultures and traditions. Indeed, the loss of cultural diversity due to economic pressures causing homogenization has been an UNESCO agenda item for a decade,[38] signaling, at least, that there is some consensus on the existence of the problem. The academic and at times ideological debate is thus primarily descriptive - what is the nature and extent of the changes produced? - and/or normative - are the changes positive or negative. The fact that the phenomena exist is not usually questioned.

B. Trade and Cultural Dimensions: Production, Consumption, Identity

The 'trade and culture' debate poses 'trade' - or rather trade liberalization as enforced through the reciprocal trade obligations of the GATT/WTO and regional trade agreements - as an agent of the forces of globalizing cultural change. Free trade brings new imported products, services and production methods to the domestic market, and each of these may have a cultural influence that alters local tradition. Clearly, those who feel that their culture is at risk because of exposure to such global influences will protest, and confront the international law that facilitates it. In the context of trade, however, it is just as likely that those whose economic, non-cultural, interests are

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[31] To grossly simplify the Gramscian term; see ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (1971).

[32] For a full and critical exposition of the term, see JOHN TOMLINSON, CULTURAL IMPERIALISM: A CRITICAL READER (1991).

[33] Immanuel Wallerstein, *Culture as the Ideological Battleground of the Modern World System*, 7 THEORY, CULTURE AND SOCIETY 31 (1990).

[34] See Tomlinson *supra* note 33 at 2.

[35] MIKE FEATHERSTONE, CONSUMER CULTURE AND POSTMODERNISM 10 (1991); see also Ulf Hannerz, *Cosmopolitans and Locals in World Culture* in GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY 237 (1990) (Mike Featherstone, ed.).

[36] FREDERICK BUELL, NATIONAL CULTURE AND THE NEW GLOBAL SYSTEM 12 (1994).

[37] For additional works representing some of the diversity of views on the subject, see JOHN R. HALL AND MARY JO NEITZ, CULTURE: SOCIOLOGICAL PERSPECTIVES (1993); many of the contributions in CULTURE, GLOBALIZATION AND THE WORLD SYSTEM: CONTEMPORARY CONDITIONS FOR THE REPRESENTATION OF IDENTITY (Anthony D. King, ed.) (1997); to some extent, GEORGE RITZER, THE MCDONALDIZATION THESIS (1998); and contributions in 12 PUBLIC CULTURE (2000) (Arjun Appadurai, ed.).

[38] See UNESCO, OUR CREATIVE DIVERSITY: REPORT OF THE WORLD COMMISSION ON CULTURE AND DEVELOPMENT (1995); and more recently, UNESCO, 2000-2010 - CULTURAL DIVERSITY: CHALLENGES OF THE MARKETPLACE, Final Report of the Roundtable of the Ministers of Culture, December 2000.

threatened by international competition will use cultural arguments as a protectionist defense. Thus, as in many other "trade-related" or "trade and…" issue areas,[39] strange bed-fellowships may be formed to resist change, as Marxists and capitalists, cottage industries and multinational corporations, artisans and industrialists argue that national culture is being compromised by international trade. And as in other interactions between trade and non-trade values, the problem is in drawing the line between disguised trade protectionism and *bona fide* cultural policy, a dilemma that clearly arises when trade disciplines and cultural interests clash.

In the existing legal and regulatory spheres, conflicts between trade liberalization and cultural policy can arise in a broad variety of trade contexts. Prohibitive tariffs, import bans, quantitative restrictions, discriminatory taxation, subsidies, domestic content requirements, regulatory prohibitions; licensing restrictions; foreign investment constraints;[40] all of these have been used - and in some cases challenged[41] - *inter alia* in the name of cultural protection. The propensity of trade disciplines to interfere with 'cultural' policy is thus obvious. The question therefore arises, relating to the other, non-trade, side of the coin, that of culture: what is actually being protected by 'cultural policy'? For many reasons, the "trade and culture" debate has so far centered on the film and television industries, "to the extent that the term 'culture' became synonymous with the word 'audiovisual'".[42] Yet the recent *US-Gambling* case[43] and references to culture in broader contexts shows (as should perhaps be self-evident) that 'culture' is much more than television - indeed, cultural aspects may be found in virtually any aspect of human activity. The UNESCO Declaration and Draft Convention[44] go so far as to state virtually all-inclusively that "culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs".

It therefore seems futile to undertake the task of comprehensively defining or delimiting 'culture'. Instead, and assuming that culture is an inherently broad and subjectively delimited concept, it would perhaps be more effective to identify the *dimensions* of culture - however defined - that may be affected by trade in *any* good or service (generally, the 'culture-related aspects of trade'). To this end, let us simply assume that culture, generally conceived, as a value may be attached to all forms of human exploit and existence. In the trade context, imagine a commoditized and valorized human effort, a 'widget', that has in this sense some constituent cultural

[39] Much has been written about the 'trade and…' problem. A broad perspective can be gained from the various contributions by J.E. Alvarez, D.W. Leebron, S. Charnovitz, K. Bagwell, P.C. Mavroidis, R.W. Staiger, J.P. Trachtman, R. Howse, J.H. Jackson, J. Baghwati and D.P. Steger in "Symposium: The Boundaries of the WTO" 96 AM. J. INTL. L. 1-158 (2002); see also Meinhard Hilf and Goetz .J. Goettsche, *The Relation of Economic and Non-Economic Principles in International Law*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL ECONOMIC ORDER 5 (Stefan Griller, ed., 2003).

[40] See Mary E. Footer and Christoph Beat Graber, *Trade Liberalization and Cultural Policy*, 3 J. INT. ECONOMIC L. 115 (2000).

[41] See, e.g., *Canada - Measures Concerning Periodicals*, WTO Doc. WT/DS31/AB/R (1997); and *US-Gambling*, *supra* note 2, relating to public morals, which may be understood as a 'lifestyle' aspect of local culture; see in greater detail section V.B. *infra*.

[42] Footer and Graber *supra* note 40 at 119.

[43] *Supra* note 2.

[44] *Supra* note 4; 5th Preambular recital and Article 1, respectively.

value (and note that a widget service, rather than good, may also qualify). The UNESCO Draft Convention[45] follows a similar conceptual approach (in Article 4) by defining "Cultural Goods and Services" as goods, services and other activities that embody or yield "Cultural Expressions", which are in turn defined as either "Cultural Content" (the symbolic meaning or cultural values communicated or conveyed by the good, service or activity) or "Artistic Expression" (the result of creative work or aesthetic creation). The relationship between Cultural Content and Artistic Expression in the UNESCO Draft Convention is not entirely clear, but it appears that the drafters considered all creative and aesthetic work to be an expression of culture, even if it has no "Cultural Content", i.e., it has no symbolic value or intrinsic cultural value.

Generally, returning to the present analysis (and departing from the definitions of the UNESCO Draft Convention), a widget may become "cultural" in three possible (but non-mutually exclusive) ways - through the culture of its *production*; the culture of its *consumption*; or the culture of *identity*More specifically :

- *The culture of production*:[46] In this sense, it is the process of the widget's creation and/or the method of its production that ordain it with cultural value that is to be protected. A painting, a literary manuscript, a musical score - these quite clearly fall into this category; but such widgets may also be cultural in the manner of their consumption, not just their production. More restrictively, a widget's culture-ness may be related to production without even being apparent in the use of the finished product. For example, a hand-made kilim that will lie on floor and be trod upon by muddy boots can hardly be said to have cultural value unless one acknowledges the artisanal craft involved in its production;[47] the same function can be fulfilled by mass-produced, synthetic rugs. In this category, the assault of globalization threatens not the commodity produced but its underlying productive culture. The loss of the product due to cultural homogenization and mass-culture is not, perhaps, the true cultural cost. Like the pottery of Cipriano Algor in Saramago's *The Cave*,[48] it is the method of production and the lifestyle that both supports

[45] *Supra* note 4.

[46] This cultural attribute superficially corresponds to the requirement in Art. 4.4.a of the UNESCO Draft Convention that "Cultural Good or Services" be the "outcome of human labour (industrial, artistic or artisanal) and require the exercise of human creativity for their production". On one hand, however, the inclusion of the "industrial" category of labour expands the definition to include mass-produced goods and services that might otherwise have been considered of no particular value in the sense of a "culture of production" as employed here. On the other hand, the current wording of Article 4.4 appears to establish this requirement as one of a series of cumulative conditions for the existence of a "Cultural Good or Service", so that mass-produced goods might not be considered "Cultural" if they did not "express or convey some form of symbolic meaning" (as per Article 4.4.b. of the UNESCO Draft Convention) and "generate […] intellectual property, whether or not they are protected under existing intellectual property legislation" (as per Article 4.4.c of the UNESCO Draft Convention). This final requirement also raises several problems in the context of GIs (although not directly relevant to the current article's subject matter and analysis). If cultural protection is granted only to goods that constitute "intellectual property", this may imply an expansion of the latter term beyond its classical definitional confines and rationales; but then if for this purpose such intellectual property need not be protected by intellectual property law, how is it to be definitely recognized as intellectual property?

[47] On the tradition of Kilim weaving, see PETER DAVIES, THE TRIBAL EYE: ANTIQUE KILIMS OF ANATOLIA (1993).

[48] JOSÉ SARAMAGO, THE CAVE (2000) (trans. Margaret Jull Costa, 2002).

it and is supported by it, that may be displaced by alternative products, industrial substitutes and indifferently shifting consumer tastes. The consumer may be oblivious to the 'make' of the product: a hand-made ceramic vase and machine-made one will do just as well; but the knowledge and culture of handicrafts will be irreparably lost in the process.

- *The culture of consumption*:[49] In this category, the widget becomes cultural by virtue of the context in which it is consumed, the way it is used. The cultural value of the production of the widget, taken on its own, is not (necessarily) at risk. For example, the demand for music once spawned a tradition of musical performances, expressed through the (at times elitist) culture of concert- and opera- going, but also that of the dance-hall and the folk musician. When the same performances became available, with enhanced audio quality, through mass-produced long-playing records, the social context of consumption changed, from the communal to the private (to be sure, things are much more complicated than this; audio-visual technologies now enable a single artist to publicly perform, live, in front of tens of thousands, not only selected dozens - but here too the context of cultural consumption has changed). Much the same could be said about the shift from cinema to home-viewing via VCRs or Pay-Per-View video. In academia, a shift in the culture of consumption is evident as more and more primary sources, journals and books become available on-line in searchable electronic format: it is no longer necessary to physically browse the bookshelves, leaf through dusty books and even read through copious amounts of interesting (or not) but irrelevant material. Electronic databases, Google and other search functions do the hard work. The context of consumption has thus clearly changed, even for literary works whose production cannot have changed, if only because they were produced centuries ago.[50]

- *The culture of identity*:[51] This is perhaps the least tangible manner in which local culture may attach to a widget. In this case, there is nothing idiosyncratic in the widget's production or in its consumption, but culture is nevertheless embedded in the widget by its very existence, and through its content, that are somehow representative of a cultural value that is associated with the relevant group's identity. A national flag is a concrete example, though not a very helpful one in the trade perspective. Every nation has a flag, and they are all produced and 'consumed' in essentially the same way, yet the graphic content of each one is steeped

[49] This is a cultural aspect that appears to have been neglected by the drafters of the UNESCO Draft Convention in defining Cultural Goods and Products, although it may be discerned in several peripheral aspects of the Draft Convention.

[50] For example, the complete works of William Shakespeare are available online, in easily accessible electronic and searchable form at http://www.shakespeare.com. Another site delivers the Bard's sonnets, once a day, to your e-mail account (see http://www.online-literature.com/shakespeare/).

[51] The "culture of identity" that may be attributed to a good or service is expressly acknowledged in the UNESCO Draft Convention in Article 1.a (cultural goods as vehicles of "identity, values and meaning"); and Article 4.4.b (symbolic meaning as component of definition of "Cultural Goods and Services")).

> in a special historiography and imagery that both express and facilitate the creation of national identity.[52]
>
> In the context of identity, a widget becomes cultural by association - association with a cultural group; and by symbolism. In the area of international trade, the dominant issues of audio-visual and other media services demonstrate the centrality of 'identity' as a parameter of culture well. The production and consumption of magazines and television programming in Canada and the US is in essence the same - and yet Canada has cited and continues to cite national culture in defense of its policies in these fields.[53] This is not only because Canadian media content is different from US content; it is also, so the argument goes, particularly Canadian content, and the preservation of this content is important for the continuation of Canadian culture. If the Canadian-ness of Canadian magazines were erased by commercial integration, an important part of Canadian identity would ostensibly be obliterated. Clearly, the culture of identity has a strong subjective element, but it cannot be ignored in the trade-culture debate - in fact, it might lie at its core.

To more or less complete this picture, the cultural charge of a widget as assumed on any of these three levels can be either positive or negative. If the traditional method of production is 'positively' cultural in representing a local culture of production, the modern, international or dominant, foreign method that threatens it becomes a 'negatively' cultural widget, as its nemesis. For example, if it is argued that local culture is characterized by public morals that abhor gambling or pornography for that matter, the cross-border internet services that supply them become 'negatively' cultural widgets.

These three dimensions of culture - production, consumption and identity - should help us better understand the cultural basis of the arguments for increased GI protection for food and wine products; but first, an important aside: are food and wine even remotely 'culture'?

C. Food and Wine as Culture

There is no question that "food is important"[54] - most obviously as a basic source of nutrition and sustenance - and as such, on a world-wide scale. Halving the global proportion of malnutrition and hunger - those who simply do not have access to enough food, regardless of its quality or provenance - has become an internationally

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[52] See, e.g., JOHN ROSS MATHESON, CANADA'S FLAG: A SEARCH FOR A COUNTRY (1980) (paralleling the development of Canadian national flag with the quest for a Canadian national identity); and KIT HINRICH, LONG MAY SHE WAVE: A GRAPHIC HISTORY OF THE AMERICAN FLAG (2001) (tracing the evolution of the US flag and the extent to which it has become ingrained in popular US culture).

[53] See KEITH ACHESON AND CHRISTOPHER J. MAULE, MUCH ADO ABOUT CULTURE: NORTH AMERICAN TRADE DISPUTES (1999); and Chi Carmody, *When 'Cultural Identity Was Not an Issue': Thinking About Canada - Certain Measures Concerning Periodicals*, 30 LAW & POL. INT. REL. 231 (1999).

[54] See Belasco *supra* note 7 at 2.

agreed policy goal,[55] but even if and when this target is achieved, the world's hungry will still amount to many hundred millions,[56] by all means a mind-boggling number. Yes, certainly in these terms, food *is* important.

Moreover, the centrality of food in our human lives far transcends the primary, physical context of nourishment, and easily takes on additional cultural or quasi-cultural dimensions. Food is a lucrative, tradeable commodity, a foundation of personal and corporate income, a visibly significant component of the economy, and not least, a source of human delight: "There is in fact nothing more basic. Food is the first of the essentials of life, our biggest industry, our greatest export, and our most frequently indulged pleasure".[57] Furthermore, food is also an important expression of cultural practices, perceptions and identities, both individual and collective. Brillat-Savarin's celebrated quip on the subject has rightly become a truism.[58] Indeed, following somewhat more rigorous research, anthropologists have similarly concluded that "food is also a symbolic marker of membership (or non-membership) in practically any sort of social grouping".[59] Although not necessary for subsistence, alcoholic drinks are undoubtedly as intertwined with our social imagery as is food.[60]

In the clearest historical terms, the most significant shifts in early human development have related to innovative patterns of food production and consumption, most noticeably the move from hunting-gathering to agricultural practices,[61] a harbinger of urbanization, technological progress and ultimately, industrial production. History can also be convincingly retold through the prism of specific important foodstuffs, such as the potato,[62] or chocolate.[63] Throughout considerable chronological space, each human civilization has been characterized not only by its plastic art, literature and politics, but also - and at least as relevantly, without belaboring the point - by its cuisine and food habits. Food, in this regard, has been likened to language, as an expression of national and local culture.[64]

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[55] See Paragraph 19, *United Nations Millennium Declaration*, United Nations (UN) General Assembly Resolution A/55/L.2, 8 September, 2000.

[56] For a global toll of hunger, see UN, Department of Economic and Social Affairs, http://millenniumindicators.un.org/unsd/mi/mi_series_results.asp?rowId=566.

[57] See Belasco *supra* note 7 at 2.

[58] "Dis-moi ce que tu manges, je te dirai ce que tu es"; see ANSELME BRILLAT-SAVARIN, LA PHYSIOLOGIE DU GOUT (1825): "tell me what you eat, I will tell you what you are" (and one wonders what this says of the individual identity of each of the world's famished, just mentioned).

[59] Sidney W. Mintz. *Food and Eating: Some Persisting Questions* in 24 Belasco and Scranton, *supra* note 7.

[60] See, e.g., A. Lynn Martin, *Old People, Alcohol and Identity in Europe, 1300-1700*, in 119 Scholliers *supra* note 5; and GIOVANNI REBORA, CULTURE OF THE FORK: A BRIEF HISTORY OF FOOD IN EUROPE 153-161 (translated by Albert Sonnenfeld, 2001).

[61] See JARED DIAMOND, GUNS, GERMS AND STEEL: THE FATE OF HUMAN SOCIETIES (1999). For a kaleidoscopic work on the interaction between food, history and society, see REAY TANNAHILL, FOOD IN HISTORY (1973).

[62] See LARRY ZUCKERMAN, THE POTATO: HOW THE HUMBLE SPUD RESCUED THE WESTERN WORLD (1998); and THE HISTORY AND SOCIAL INFLUENCE OF THE POTATO (Redcliffe N. Salaman, 1949; with a new introduction edited by J.G. Hawkes, 1970, 2000).

[63] See SOPHIE D. COE AND MICHAEL D. COE, THE TRUE HISTORY OF CHOCOLATE (2000).

[64] See Mintz *supra* note 59: "Imagine convincing the Russian people to give up black bread in order to eat rice instead! Or the people of China, to give up rice to eat black bread! Such food habits are so close to the core of what culture is that they sometimes function almost like language. As with language, on many occasions people define themselves with food; at the same time, food consistently defines and redefines *them*". Another dimension of the food-language relationship/analogy, is the role

Food is thus as essential element of our culture as any, however defined, albeit - and perhaps taken for granted by many.[65] It is important at all levels of human individuality and social interaction - a point that has most necessarily and comprehensively been made by Bell and Valentine, in contexts virtually extraneous to the present one, relating the role of food in the political perception of our body, home, community, city, region, nation and global environment.[66] Indeed, at all levels of analysis, food and drink most easily lend themselves to the production-consumption-identity triad of culture presented above, as the joint crop of the earth and human inventiveness; as goods whose only use is in their physical consumption; and as representatives of significantly broader contexts of identity.

It is therefore evident that food and drink are objects of both trade relations and cultural regard, and as such are likely located at whatever intersections may exist between these two key expressions of human activity. This finding indeed finds support in the Non-Exhaustive List of Cultural Goods and Services in the UNESCO Draft Convention, in which "culinary traditions" are included under the heading of "cultural activities". This approach makes food – and hence GIs for food and wine products - an appropriate focal point for the discussion of the trade-culture nexus. What, then, are the functional and cultural arguments and justifications for utilizing GIs in the regulation of the trade-culture relationship in the context of food and drink?

III. *SECONDI*: THE ROMANCE OF REPUTATION - THE CASE FOR CULTURAL PROTECTION THROUGH GEOGRAPHICAL INDICATIONS

A. An Informal Positive Theory of the Law and Economics of Cultural Protection through GIs

Before elaborating on the cultural justifications for GI protection of food and wine products as reflected through the dimensions of production, consumption and identity, it is helpful to first gain some understanding of what the legal and economic functions of GIs are presumed to be in this cultural respect.

As already mentioned, the drive for protection of cultural assets can take virtually any form of protectionist international economic policy.[67] This is an almost superfluous observation: insofar as trade-related policy – cultural or otherwise - seeks to shelter production methods, preserve consumption patterns and prefer 'champion' products of identity, regardless of their economic merits, it is clearly diametrically opposed to the market logic of free trade theory. Liberal free trade essentially sees cultural communities as groups of consumers like any other, that should be permitted

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of the language *of* food as an indicator of the relative weight and characterization of food or particular foods in local culture; those interested in this aspect will find much to explore in Rebora, *supra* note 65 (for example, as noted in the translator's preface (p. ix), that Italian has sixty specifically named words for pork or beef sausage, where English has only *sausage* and *salami*).

[65] See *Ibid.* at 26.

[66] DAVID BELL & GILL VALENTINE, CONSUMING GEOGRAPHIES: WE ARE WHERE WE EAT (1997).

[67] See text accompanying note 40 *supra*.

to determine the market price or added-value of the cultural content of each 'widget', in comparison to the freely available, culturally-indifferent alternatives. Where the community attaches sufficient economic value to the preservation of its (real, alleged or imagined) cultural practices and icons, the local cultural widget will prevail. However, where the economic value of the cultural charge of the widget is low - in terms of the worth of its production and consumption peculiarities and its impact on identity, all as determined by its local market - the market share of the widget may well decrease, enacting significant changes in production and consumption and reflecting uncompetitive 'identity' values. In some cases, the 'cultural' widget may even be excluded entirely from the market - the economic forerunner of cultural extinction.[68]

It is in these instances that economic cultural-protection measures may become relevant. If consumer demand in the free market cannot independently sustain the cultural widget, its economic survival requires regulatory support and protection.[69] In the cross-boundary context, the most obviously pursuable measures to this end are protective tariffs and discriminatory taxation designed to preserve current domestic production and consumption methods and patterns. Of course, these may likely contravene the most basic GATT/WTO non-discrimination disciplines such as Article I GATT Most-Favoured Nation Treatment and Article III GATT National Treatment, and related rules in regional trade arrangements. This has indeed been the outcome in the relevant jurisprudence.[70] Moreover, in these leading cases cultural exceptions were not emphasized, reflecting the absence of an explicit general cultural exception in Article XX GATT.

GIs and their purported contribution to cultural preservation enter this arena in a complex, roundabout way; they do not have the same blatantlymarket -restrictive

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[68] One could well conceive of such cultural sacrifices to the market as 'tragedies of the commons', in the sense that private preferences determine the demise of the 'cultural' widget, but if preferences were pooled, it would persist. This is an intriguing idea worthy of further enhancement (for the original formulation of the tragedy of the commons in the context of the nuclear race, see Garrett Hardin, *The Tragedy of the Commons*, SCIENCE (1968)).

[69] The same could be argued about public morals and 'negatively' cultural widgets that offend them, such as gambling services. In this vein, if public morals are indeed publicly held, then arguably they do not paternalist legislation to uphold them; but see economic analysis suggesting that 'cultural' widgets might be particularly susceptible to market failures in Pierre Suavé and Karsten Steinfatt, *Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection* in ACHIEVING BETTER REGULATION OF SERVICES, Proceedings of a conference held by the Government of Australia's Productivity Commission (2000), *available* http://www.pc.gov.au/research/confproc/abros/paper13.pdf.

[70] For example, the respective taxation schemes of Korea and Japan openly granted significant advantages to the locally distilled rice-based beverage, Soju (in Korea) and Shochu (in Japan), over alternative distilled drinks (see *Japan - Taxes on Alcoholic beverages* (supra note 16); and *Korea - Taxes on Alcoholic Beverages*, WTO Doc. WT/DS75/AB/R, WT/DS84/AB/R (1999)); in a less overt fashion, Chile's taxation scheme set a low tax rate for the low alcohol category dominated by the local grape distillate, Pisco, and high tax categories for the higher alcohol categories of imported brandies (see *Chile - Taxes on Alcoholic Beverages*, WTO doc. WT/DS87/AB/R, WT/DS110/AB/R (1999)). All of these taxation measures were found to be non-compliant with WTO rules. In the much earlier GATT case of GATT Doc. BISD28S/102 *Spain - Tariff Treatment of Unroasted Coffee* (1981), local production was not the target of protection, but rather local consumption patterns of coffee (presumably for reasons related to inflationary pressures) that were to some extent described as the result of Spanish leisure and food culture (the Spanish authorities set tariff rates that preferred 'mild' types of coffee that had previously been purchased by the governmental coffee procurement monopoly).

effects of tariff or tax trade protectionism. It must be emphasized that the first function of GIs - indeed, their primary *raison d'etre* - is not the restriction of international trade with a view towards the safeguarding of culture. Rather, GI mechanisms have been founded on a combined quasi-intellectual property/consumer protection platform. Their initial justification is the prevention of fraud, of 'passing off' a good as if it has been sourced from where it has not, ostensibly preventing the dilution of a geographical production area's reputation by low-quality - or simply different-value - produce from another region.[71] At this level of analysis, GI requirements should in theory have virtually no effect on the *intrinsic* value of the GI-protected widget, simply informing the consumer of its provenance. In crude neo-liberal economic terms GIs thus could actually be said to promote free trade by facilitating full information, towards perfect market conditions; in this sense, GI protection needs no additional cultural justification, as it runs with - not against - the grain of trade theory, and the integration of intellectual property and consumer protection interests and disciplines (however controversial) therein. GI proponents have the ideals of free and informed markets, morally attributable intellectual property rights and consumer protection on their side; GI opponents or challengers end up in the uneasy seat of protectors of the right to defraud the public - unless they can show that the use of the particular GI does not risk confusing consumers.[72]

This picture is factually and economically incomplete, however, for a number of reasons.

First, the basic consumer protection/perfection of information argument does not in itself justify the institution of a legal GI mechanism, whether at the national or international levels. A simpler solution would have been a prohibition on misleading labeling, for example, without necessitating the establishment of quasi-intellectual property rights. Implicit in the GI system is a recognition that not all foods are created equal in their right to protection. Some products deserve protection, others do not; this requires a filtering norm that will allow the differentiation between them. In WTO law, this norm is found in Article 22.1 TRIPS: "Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where *a given quality, reputation or other characteristic of the good* is essentially attributable to its geographical origin" (emphasis added). Here culture enters as a possible "quality, reputation, or other characteristic of the good" that justifies it GI status.

Second, it is often argued that GIs - particularly when restricted to specific goods and not accorded to all - do in fact *add* value to goods,[73] beyond their intrinsic value. GIs thus serve a value-enhancing or premium-creating role, above and beyond their informative function. It is the monopolization of the GI 'brand' that achieves this, so that some GI-designated food and beverage products may command higher

[71] This is easily discernable in the language of Article 22.2 TRIPS, wherein GIs are intended to prevent "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 any use "which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967)". The "Paris Convention" is the 1883 *Paris Convention for the Protection of Industrial Property*, as complemented by the *Madrid Protocol* (1891) and revised several times, ultimately at Stockholm (1967).

[72] An option that would itself not apply in the case of extended GI protection under Article 23 TRIPS.

[73] See EU Background Note *supra* note 25.

demand and higher prices than undesignated products - regardless of their actual qualitative or even reputational merit. A mediocre product may therefore gain additional economic value simply by virtue of having a GI attached to its label - and this may be true whether the GI was relatively unknown previously, or widely celebrated. At all events, it is clear that regulatory and legal protection of GIs constitutes a form of governmental intervention and manipulation in the market, that influences prices, market shares and trade flows. Trade negotiations, transnational or international litigation and the rules they produce (including, but not limited to the applicable filtering norm(s)) therefore determine which products will benefit from added GI-endowed value in the market - a dynamic clearly reminiscent of the War of the Two Beans.[74] Cultural protection enters this debate as an important possible justification for the *additional* value that GIs grant selected designated products: cultural 'widgets' are supposedly both worth the extra cost, and deserving of government intervention and regulation aimed at preserving culture that adds value. In this vein, GI exclusivity is only intended to valorize the culture embedded in the food and drink products selected for GI protection - independently of their otherwise inherent substantivevalue on the market.

Third, international rules on GIs have in substance gone significantly beyond the basic intellectual property/consumer protection rationale. Specifically, GI-protected wines and spirits have under TRIPS been given an enhanced degree of safeguarding, whereby GI protection is to be granted even where there is no problem of consumer protection. The regular degree of protection[75] essentially establishes exclusive rights of GI use through a rebuttable presumption whereby parallel use of the same GI may cause consumer confusion. Where it can be shown that circumstances exist preventing such confusion, or that effective measures have been taken to this end, GI exclusivity may be relaxed. The enhanced GI protection of wines and spirits goes a step further, however; the risk or existence of consumer confusion is formally immaterial to the degree of protection accorded the GI. Products in this category enjoy a near absolute degree of exclusivity, that prevents the use of the GI by others, even when measures have been taken to prevent confusion (such as clear indications of the true geographical origin of the goods in question, the use of the GIs in translated form or "accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like").[76]

As mentioned previously, a central negotiation issue in the DDA talks on GIs is the proposed extension of this 'enhanced' or 'additional' protection' beyond wines and spirits. Such an extension may have considerable economic impact on producers and consumers; presumably, the added-value of GIs granted 'enhanced' or 'additional' protection is higher, if only because the general marketing costs for 'brand' maintenance are lower under conditions of exclusivity, as are legal and litigation costs for the enforcement of the right (absent the need to confront arguments relating to consumer confusion), but also because of the added prestige involved in belonging to a higher category of protection, that may translate into market value. Once again, culture enters the debate as a justification - this time, as a justification for the higher, indeed inflexible, degree of protection. In the category of enhanced GI protection,

[74] See *supra* note 8.
[75] Article 22 TRIPS.
[76] See Article 23.1 TRIPS.

consumer protection ceases to serve as a rationale;[77] it therefore needs to be replaced by another justification. Culture, among other components of reputation, fulfils this role. Thus, in the area of 'enhanced' GI protection, cultural concerns may act as the foundation not only of the 'additional' degree of protection, but of the entire construct of GI protection of the relevant goods.

In sum, even taking into account the strong consumer-protection motivation of the GI system *de lege lata*, the preservation of culture is a necessary, if not the most debated, component of the argument for GI protection in its existing and potentially enhanced forms. In legal and economic theoretical terms, the cultural issue can be identified in the consumer protection argument itself; it explains, at least in part, why the GI system has been established, and the way it has been designed; and it is of critical importance in the justification of the 'enhanced' level of GI protection which has disentangled itself of the original consumer protection rationale.

What, then, are the aspects of culture purportedly protected by GIs? Let us follow the trade-related cultural dimensions previously identified, insofar as they may be separated: production, consumption and identity.

B. The Culture of Production: Terroir, *Traditional Methods of Production and Rural Culture*

The culture of production that some GI proponents consider embedded in food and wine products is multi-faceted and relates to several (mainly Euro-centric) ethos-like dimensions of common perceptions of these products' agricultural basis.

A central anchor in this respect is the difficult, mystified concept of *terroir* - a uniquely French term that has gained a following elsewhere in Europe and throughout the world. In its narrowest sense, *terroir* refers only to the physical environmental aspects of the geographical origin of a foodstuff or wine: soil, lay of the land, elevation, climate and related factors. For *terroir* advocates, each finished agricultural or viticultural product should be a faithful expression of its geography; better quality products will emerge from plots of land of superior quality and better endowments, and at all events each product will inimitably reflect its growing conditions. It is thus that different crops, cheeses and wines, are distinguishable from each other and may be associated with their geographical origin (this is also component of the culture of consumption that I will revisit shortly). In this respect, the idea of *terroir* forms one of the bases for the GI legal mechanism, regardless of culture, providing a technical conceptualization of the link between food and place of cultivation. Moreover, on the production side, philosoph(iz)ers of *terroir* expand the term to include also the 'human environment'[78] or even a 'mental' dimension - a link between producer and consumer that runs through the product and its unique, *terroir*-based qualities. At minimum, this implies a non-interventionist, *terroir*-driven culture of production: less human manipulation, more respect for the earth's independent capacity to express itself through its fruits and adequately satisfy human tastes, desires and indeed wants. At a

[77] Although it might be said that the risk of consumer confusion is still the basis for enhanced GI protection, with the stricter rules applied so as to regulate the distribution of costs between GI-holders, non-GI producers and consumers. In practice, however, the effect is to remove the consumer protection rationale of such GIs.

[78] See Fanet *supra* note 9 at 10.

more sophisticated level of thinking about *terroir*, however, just as nature and humankind have through progressive efforts established and confirmed which crops do best in which *terroir*, so have farmers and winegrowers discovered the 'best' winemaking practices most suitable for each area of production. *Terroir* is thus the epitomic opposite of globalization: an exemplary reflection of place and people. As such it arguably deserves protection, even enhanced protection, from commercial forces that threaten to compel homogenization and obliterate local *terroir*-ist cultures of production. GIs are ostensibly a targeted way of achieving this, since they grant each *terroir*, as officially defined and delimited, with a separate, legal source of protection.

An important part of the narrative of *terroir* is the celebrated distinction between 'Old World' and 'New World' food production sensibilities. In much food historiography, the production cultures of Europe, as a leading example, are the result of centuries, even millennia, of intimate human interaction with the earth that is absent in the Americas or Australia: "viticultural practice in the Old World - choice of sites, growing techniques and appropriate vines - is based on a trial-and-error process dating back at least two thousand years … New World viticulture, by comparison is still in its infancy. It officially started 400 years ago but only really got going a century and a half ago and much more recently in some countries".[79] Old World sensitivities are therefore presumed more vulnerable to global cultural tendencies, and their production peculiarities should be humored and protected. Of course, from a critical, 'third-world' standpoint there is something offensive about this approach: the 'New World' is not new, and there existed a thread of indigenous traditional human interaction with its *'terroir'* in many locales before European domination either cut it or shifted its course.

Nevertheless, *terroir*-based GI designation has gained significant support and emulation in 'New World' countries.[80] The *EC-GIs* case, although formally a dispute between 'Old' and 'New' world producers,[81] was not about the delimitation of the concept of GIs but rather about the equality of 'New World' and 'Old World' GIs and the conditions of their legal protection; and in negotiations on the extension of enhanced GI protection beyond wines and spirits, although a 'New'/'Old' World dividing line is discernable, some developing countries have also adopted the rationale of the preservation of traditional cultures of production, asserting their 'Old'-ness, where they might have been regarded as 'New World' producers from a narrow European perspective.[82]

At any rate, this discussion leads to a cultural aspect of production that need not rest on acceptance of the validity of *terroir*, old or new: the preservation of traditional production practices and methods. Even if one remains skeptical of the

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[79] See *Ibid.*; this truism is echoed also in Wilson *supra* note 9 at 6.

[80] Appellation systems for geographical classification of wines exist in Australia, New Zealand, South Africa, Canada, the United States, Chile and Argentina. Where there is no such legal regulation, wineries in emerging wine countries voluntarily label their produce with regional designations (e.g., in Israel).

[81] See *supra* note 22 and accompanying text.

[82] See WTO Doc. IP/C/W/353, 24 June, 2002 *Communication from Bulgaria* et al. (including India, Kenya, Mauritius, Sri Lanka and Thailand) at 3, citing traditional production methods as one of the components of a reputation relevant to GI protection**.**

numinous link between land, fruit, and local culture, it is indisputable as a dry fact that different regions grow different crops and varieties and process them employing different production methods, down to the resolution of particular pieces of equipment.[83] In many cases these practices are idiosyncratic, objectively anachronistic, being rooted in social, technological or historic circumstances that once prevailed but have since disappeared. Under open market conditions they may easily vanish, without necessarily altering the qualities of the finished product,[84] although as a result the associated culture of production might be eradicated. Some production methods are hence regulated legally. Many national systems of GI regulation are based on the original French *Appellation d'Origine Contrôlée* (AOC) system. In these systems, a product is eligible for GI (or similar) protection not only by virtue of its physical place of production, but also by its compliance with a set of (sometimes strict) criteria relating to content (grape varieties in wines and spirits;[85] permitted varieties of walnuts;[86] types of milk in cheeses[87]) and methods of production (yields per hectare,[88] harvesting dates and time in oak barrels for wines; detailed methods for the manufacture, aging and packaging of Balsamic Vinegar of Modena).[89] Rules such as these are to large extent quality-oriented, aiming to set a minimum quality level for GI-worthy products; but quality here has a double meaning: quality also means living up to traditional standards and reputations. Thus, GI rules also strive to preserve a certain historical purity of production.

As such they present a cultural rationale, based on traditions of production, for the maintenance of GI protection. This is a rationale that is particularly well accepted in public opinion, mainly in Europe: reportedly in two consumer surveys (1994 and 1996) of a 16,000 EU citizen sample, 17% considered the protection of traditional

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[83] As a figurative example, consider *Le Têtu* ("the stubborn one"), a wine press made of 1000-year old oak beams, erected at the historical and prestigious Burgundy vineyard Clos de Vougeot, reportedly still in operation (see Wilson *supra* note 9 at 178).

[84] For example, foot treading in 'lagares' is a traditional method still used in the making of port wines in the Oporto region of Portugal, purportedly contributing to the character of the wine in a manner not replicable by regular mechanical presses. Special robotic 'lagares' that simulate the foot treading action have recently been developed and are replacing some of the traditional foot treading; see Larry Walker, *Graham's Ports Uses Robotic Lager to Crush Grapes*, WINE AND VINES (February, 2003).

[85] See, e.g., *Décret du 5 Mai, 1982, Définissant l'Appellation d'Origine Contrôlée "Faugères"*, J.O. No. 111, and *Décret du 21 Juillet, 2000, Modifiant le Décret du 5 Mai 1982 Relatif à l'Appellation d'Origine Contrôlée "Faugères"*, available at: http://www.languedoc-wines.com/fr/pdf/decrets/decret_faugeres.pdf (defining in detail the relative part of each of the allowed varieties in the Faugères AOC red blend, reducing the proportion of Carignan Noir from below 100% in 1982, to below 50% in 1985, and below 40% in 2000).

[86] Under Article 4 of the *Décret n° 96-621 du 10 Juillet, 1996, Relatif à l'Appellation d'Origine contrôlée "Noix de Grenoble"*, the AOC Noix de Grenoble for walnuts (which was established in 1939) may only apply to walnuts of the three varieties Franquette, Mayette and Parisienne. This has been recognized under EC legislation, as have the varieties that may be included in United States walnut mixtures and products labeled under the label "California Walnuts" (see Commission Regulation No. 80/2003 of January 17, 2003, *Amending Regulation No. 175/2001 as Regards Certain Mixtures of Certain Varieties of Walnuts in Shell, Officially Defined by the Producing Country*, O.J. L 13/5.

[87] For an interesting paper on the history and practice of Cheese appellations, see Paraskevi Dimou, *Les Dénominations des Fromages* (2002), *available at*: http://www.ceipi.edu/pdf/memoires/Memoire_Demou.pdf.

[88] See, e.g., *Décret du 20 Octobre 1997 Relatif à l'Appellation d'Origine Contrôlée*, J.O. No. 246, p. 15353; the wine of Rabelais can bear its name only if it conforms to certain hectolitre/hectare yields.

[89] For details see the website of the *Consorzio Produttori Aceto Balsamico Tradizionale di Modena*, http://www.balsamico.it/ing/prodotto.html.

methods of production to be one of the two most important functions performed by GIs/Appellations of Origin.[90]

More broadly, like other forms of agricultural protectionism, GIs may be construed as necessary for the preservation of the 'farm culture' of production, in general, without a necessary link to specifically idiosyncratic, localized production methods or particular *terroir*. Concern for 'the vanishing peasant'[91] and associated rural culture has accompanied western industrialization and rationalization of agricultural practices for more than a century.[92] Notably, in some cases this argument only seeks to preserve a lifestyle of agricultural productive activity as an expression of family and community culture, regardless of quality benefits.[93] Indeed, this is an argument that relates to the culture of production, but borders also on the culture of identity, linking the product whose existence may depend on GI protection with a cultural way of life that ostensibly may be 'crushed by the wheels of global consumerism'.[94]

C. The Culture of Consumption: Traditions of Discrimination in Taste and Time

In granting market advantages to particular foods and wines, GI protection may arguably also contribute to the preservation of cultures of consumption, not just production.

The most obvious such case arises when there is an equivalence or dependence between local traditions of production, on one hand, and local traditions of consumption in the same place, on the other: where *local* types of food or beverage are produced, as they are, primarily or even exclusively for consumption by the producers themselves and their households and immediate communities, in accordance with *local* tastes. Competitive exposure to cheaper, better, ex-local alternatives might risk the survival of local production, precipitated by shifts in consumption patterns that produce changes in local traditions. Much as this seems a specialized scenario, one can more generally imagine a cultural, *terroir*-minded, defense for unabashed pro-local consumption traditions, in which it is argued that there exists a culture of consuming local food and beverage products, *because* they are local. This may be justified by objective quality factors (such as freshness of produce, edified as a cultural preference) or by the ethereal existence of a 'mental' or

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[90] See intervention by EU delegate, WTO Doc. IP/C/M/38 at 32-33.

[91] See HENRI MENDRAS, THE VANISHING PEASANT: INNOVATION AND CHANGE IN FRENCH AGRICULTURE (1970).

[92] See, e.g., GABRIEL TARDE, FRAGMENT D'HISTOIRE FUTURE (1896).

[93] The epigraph of this paper quotes a winegrower in the Languedoc. Belligerently defending the merits of French wine culture, the truth is that the Languedoc is the largest bulk-wine producing region in France, not particularly renowned for quality (with more recent and notable exceptions); see KERMIT LYNCH, ADVENTURES ON THE WINE ROUTE: A WINE BUYER'S TOUR OF FRANCE 73-74 (1988). The culture that the winegrower is adamantly trying to defend is a culture of labor, not quality or *terroir:* in 1970 it was reported that in the Languedoc "67 percent describe the good wine grower as one who knows how to work hard, while only 9 percent say he is one who has good grapevines, and 5 percent one who makes good wine"; see Mendras *supra* note 91 at 143.

[94] For a particularly romantic depiction of the traditional lifestyle that centers on wine production, warts and all, see Anne Tyler Calabresi, *Vin Santo and Wine in a Tuscan Farmhouse* in CONSTRUCTIVE DRINKING: PERSPECTIVES ON DRINK FROM ANTHROPOLOGY (Mary Douglas, ed., 1989).

symbolic factor of consumership, linking place of consumption with place of production.[95] At its most abstract (and most protectionist), however, the argument would simply be that there is cultural merit in preserving the dependence of consumers on the fruits of the very land where they reside, whether they are themselves producers or not. This is, however, perhaps more appropriately an argument couched in terms of local identity, to which I will turn shortly

Moreover, the overtly discriminatory nature of such narrow consumption-culture arguments, however plausible (or not), make them extremely difficult to reconcile with basic GATT/WTO principles.[96] Indeed, in terms of simple economic analysis, if the preservation of such 'neighborhood' production-consumption cultural networks is indeed so important to local tradition or culture, one would expect this sentiment to overcome external market pressures, even at greater cost to consumers.[97] The rejoinder would be that while these cultural arguments do not, indeed, give good reason for tariff or tax preference, they do justify accurate geographical-source labeling, permitting the public to choose between local and foreign or ex-regional produce. Thus, the informative function of GI protection may arguably serve a purpose in the context of the culture of consumption.

An additional, broader justificatory basis may be supplied, however, also reliant on the informative function of GIs, if it is accepted that there do exist local 'traditions of discrimination' - in the positive cultural sense of particularity, preference and discernment, not in the negative trade law sense - that are not chauvinistic and trade-protectionist because they do not prefer (at least not exclusively) local products. In these traditions, a local consumer-culture market preference exists for food and wine products of specific geographical sources - a preference that is based on traditional perceptions of the type of production practiced at the products' source, or the quality of the finished product, and of course, on real distinctions between different products.

For example, England produces very little wine itself, even less of viable quality or distinction.[98] Yet historically, England (or more precisely, influential social classes in England) has demonstrated an independent consumption-culture of discriminating taste. The English, not the French, Germans, Portuguese or Spaniards, have been responsible for the production *cum* cultural edification and reputational

[95] This completes the trinity of the ultimate ethos of *terroir* - land, producer, consumer; see text accompanying note 78 *supra*.

[96] The national treatment and, in certain circumstances, most favoured nation principles defined in Articles I and III GATT, but potentially also Article XIII GATT, as well as non-discrimination rules in TRIPS and also GATS (the latter at least with regard to distribution services), as well as the Article XX GATT and Article XIV GATS exception mentioned above and discussed in section V.C. *infra*.

[97] But again the possibility of market failure arises, in the same way that it did with regard to the discussion accompanying note 68 *et seq. supra*.

[98] It is not a matter of coincidence that Ricardo's famed exposition of the principle of comapartive advantage compared England's winemaking faculities unfavourably with those of Portugal (DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION, Chapter 7, paragraph 35 (1817)). However, in the current era one must distinguish between "British Wine", usually made from low quality grape must imported from any place on earth to be vinified in Britain, and "English Wine", wine made from grapes grown in England. An English specialty of repute is *Méthode Champenoise* sparkling wine of Nyetmber, a small winery in West Sussex, that prides itself as being "Distinctly Anglais!", deliberately casting itself against the exclusive tradition of Champagne; see www.nyetimber-vineyard.com.

establishment of some of the 'Old World's greatest wine regions, such as Bordeaux;[99] Oporto;[100] Jerez;[101] and the Rheingau.[102] Individual English entrepreneurs facilitated these developments, on the production side, arguably as early globalizers,[103] yet this process has been consumer-driven, propelled by English tastes and capitalizing on an English consumer culture of discrimination.[104] At least in theory, such a local culture of discrimination is the opposite of global homogenization, of "McDonaldization". The preference for products sourced from specific locations rests, of course, on a confidence in the quality and durability of the production in those locations, on a belief that food or wine from a given location is guaranteed to reflect a certain, desirable, style or quality. The culture of consumption is thus inextricably linked to the culture of production that exists elsewhere. Moreover, it is self-evident - particularly because the qualities and characteristics of food and drink products require their consumption in order to be appreciated - that for such a culture of consumption to survive, consumers need prior accurate information on the geographical source of products, and to this end GIs may serve a positive purpose; the cultural justification is here in harmony with the consumer protection rationale.

Ultimately, cultures of discrimination can be couched in nigh post-modernist terms, in the most generally applicable way, advocating geographical transparency: "Consumers these days want to know what they are eating, where it comes from and how it is produced"[105] (however vague the argument may be, it is perhaps as relevant to the debate on Genetically Modified Organisms as it is to the debate on the extension of GI protection).

Consumer practices may have additional supporting - some might say central - aspects that focus on particular traditional habits. For example, the culture of serving

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[99] Bordeaux was established as an important wine region in the 12th century with the marriage of Eleanor of Aquitaine to Henry Pantagenet, future Henry II of England. The ease of access to the large English fleet from the mouth of the Gironde, just across the channel, made Bordeaux the ideal source for the English taste for 'claret'. On the subsequent history of English relations with Bordeaux, see DEWEY MARKHAM, JR., 1855: A HISTORY OF THE BORDEAUX CLASSIFICATION 39 *et seq.* (1988).

[100] The wines of Port (Oporto) flourished in the 18th century because of increased English demand brought on by unreliable supply from Bordeaux due to French-English strife; this was encouraged by the 1703 Treaty of Methuen that granted Portuguese wine lower duties than those of France and Germany.

[101] The truly unique wines of Jerez - known in England as Sherry - were often mentioned in Shakespearean plays and were even coveted by the English by non-peaceful means in the early 17th century. Failure to take Cadiz in 1625, coupled with the shortage of Bordeaux wine brought on a wave of English investment in Jerez; to this day, many of the main shippers of Jerez go under old English or Irish names, such as Garvey's, Duff & Gordon, Williams & Humbert, Sandeman and Osborne; see in more detail, JULIAN JEFFS, SHERRY (1961,2004).

[102] The white wines of Hochheim in the Rheingau were held in high esteem in 18th-19th century England, temporarily supported by a Germanic fad related to Prince Albert's heritage, at all times under the colloquialism of 'Hock'.

[103] For example, the wine industry on the Spanish island of Madeira was in fact founded virtually from scratch by the English.

[104] As an historical footnote recording both geographical interest and discriminating taste, on April 10, 1663, Samuel Pepys noted in his diary that he had drunk "a sort of French wine, called Ho Bryan, that hath a good and most particular taste that I never met with" - referring to Chateau Haut Brion - still a highly prestigious first growth Bordeaux wine today; see SAMUEL PEPYS, THE DIARY OF SAMUEL PEPYS, Vol. IV (1663) (ed. and with a preface by Richard le Gallienne and an introduction by Robert Louis Stevenson) (reprinted 2001).

[105] See Fanet *supra* note 9 at 10.

meals, or rather courses of meals, with the wines that are most complementary from a sensory perspective. Some of such food-wine pairings have become staples of consumption;[106] their preservation arguably requires continued and perhaps extended accurate geographical labeling and hence, GI protection. Traditions also sometimes match foods or wines with festive, seasonal or other special occasions.[107] In these cases, the use of the most prestigious or desirable ingredients, or the opening of the most celebratory type of beverage may have a social meaning of cultural dimensions. Again, we are brushing with the culture of identity, but it is nevertheless an identity expressed through patterns of consumption.

D. The Culture of Identity: Local Champions and Cultural Landscapes

On this level of analysis, GIs arguably protect the integrity of national food icons that construct identity. Food plays an important part in defining locales, regions and nations. Guidebooks and textbooks on particular regions or countries will normally dedicate at least a few pages to the food and drink that characterizes them; and the shelves of the cooking sections of bookstores are often geographically categorized. A distinctive kitchen, like a flag, a currency or a dialect, serves to distinguish one nation or region from others, to the point that the development of an independent cuisine may be seen as an integral part of projects of nation-building.[108]

Ultimately, where singular traditions are absent or incoherent, the quest for distinction may rely solely upon the use of locally sourced ingredients or products,[109] regardless of how unique they may be, and so these too are assimilated as components of identity; and in well-established food cultures, local produce is unabashedly raised on a pedestal. In both Piemonte and Perigord the locals will argue the superiority of their truffles and sneer at those of the Himalayas; some Spaniards regard their Cítricos Valencianos with national pride, just as the farmers of Prince Edward Island adulate their new potatoes, or the Italians their Chianina beef.

Moreover, not only pride is at stake; food or drink can be adopted as symbolic of the nation or even personifying the country, much as the poultry of Bresse[110] and sparkling wine of Champagne[111] is viewed by many, to this day, in France.[112] The

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[106] E.g., Chablis and oysters, Rioja and lamb.

[107] See Mary Anna Thornson, Sekt *versus* Schnapps *in an Austrian Village*, in Douglas *supra* note 94 at 102 *et seq.*.

[108] See Richard R. Wilk, *Food and Nationalism: The Origins of 'Belizean Food'* in 63 Belasco and Scranton *supra* note 7.

[109] The creative use of local ingredients becomes, for some, the popular test for the metal of an emerging local kitchen, such as that of Canada: "The debate swirls: is there a Canadian cuisine? One that uses local ingredients in imaginative ways to produce a distinctive, indigenous culinary style?" (Don Douloff, *Delicious Cancon Chez Metropolis* (EYE WEEKLY, April 16, 1992).

[110] The poultry of Bresse (Poulet de Bresse AOC) is physically recognizable as a Tricolor, with red crest, white plumage and blue feet; they must also, by law, wear a Tricolor badge at the base of their neck, and poultry satisfying conditions of the AOC must also be packed, by law, under a Tricolor etiquette; see *online* www.pouletbresse.com.

[111] "The wine resembles us, it is made in our image; it sparkles like our intellect; it is lively like our language" (Adolphe Brisson, preface to ARMAND BOURGEOIS, LE CHANSONNIER DU VIN DE CHAMPAGNE EN 1890 (1890), quoted in Guy (2003) *supra* note 8.

[112] In the French context, one might add the truncated pyramid-shaped cheese of Valençay, by legend the result of Napoleon's rage on his unhappy return from Egypt.

international exclusivity of usage of the geographical term is thus perceived as imperative for the preservation of a part of national identity. The appropriation of the name of a foodstuff or beverage by a nation can even give rise to international disputes that stem from struggles for identity, such as the longstanding quarrel between Peru and Chile over Pisco, in which each party would appear to feel stripped of a national symbol if recourse to the term were not restricted.[113] GIs can therefore be seen as guardians of local identity, and such, as bulwarks against globalizing homogeneity.

Identity may also underpin arguments for GI protection for foods when it is deemed necessary for the maintenance of the 'cultural landscape' that forms part of the character of a region or nation;[114] the UNESCO Draft Convention would have policies aimed at preserving and safeguarding "cultural landscapes" recognized as "Cultural Policies".[115] This concept may be, as already indicated, intimately linked to the cultures of production that determine the landscape, but it may be formulated as a separate argument. It is not the production that is being protected, but the environment that it generates.[116]

IV. *CONTORNI:* MARKETS AND TRADITION - SOME CONTRARY ECONOMIC AND CULTURAL REALITIES OF THE FOOD AND WINE TRADE

A. Can GIs Actually Prevent Market-Induced Changes to Culture?

On the backdrop of these seemingly compelling arguments for cultural protection through the instrument of GIs, it is not necessary to merely speculate about the effect of GIs on the preservation of traditions of production, consumption and identity. In Europe, GIs have been legally regulated and enforced at varying degrees since the early decades of the twentieth century, in some cases from the mid-nineteenth century, and in other rarer cases - even the eighteenth century.[117] particularly with regard to wine. There exists, therefore, sufficient historical as well as current empirical material to examine, as a living, regulatory laboratory.

In this section I will present a (non-exhaustive) series of phenomena in particular real cases that demonstrate the contrary ways in which GIs have proven

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[113] See *online*, American University, http://gurukul.ucc.american.edu/TED/PISCO.HTM: "Pisco is as Peruvian as llamas and Arroz con Pollo" and "Peruvians hold a deep-seated national pride in pisco"; of course, here too it may be impossible to draw bright line distinctions between the culture of identity and the cultures of consumption and production, since Peru's background entiments also relate to the role of Pisco in consumption traditions (they "have been drinking [pisco] at parties and rowdy peasant festivals for more than 400 years.") and production methods (*op. cit*., quoting a Peruvian farmer: "To make real pisco, you have to take your shoes off, crush the grapes and let it ferment in clay bottles. In Chile they make something called pisco, but it doesn't taste as it should").

[114] 'Cultural landscape' is "a geographic area (including both cultural and natural resources and the wildlife or domestic animals therein), associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values" (see NATIONAL PARK SERVICE, THE SECRETARY OF THE INTERIOR'S STANDARDS FOR THE TREATMENT OF HISTORIC PROPERTIES WITH GUIDELINES FOR THE TREATMENT OF CULTURAL LANDSCAPES (1996).

[115] See UNESCO Draft Convention *supra* note 4, Annex II, Third Paragraph.

[116] For a detailed study on the ways in which viticultural practices form different cultural landscapes, see DAN STANISLAWSKI, LANDSCAPES OF BACCHUS: THE VINE IN PORTUGAL (1970).

[117] See *infra* note 122 and accompanying text.

ineffective in conserving culture and safeguarding cultural diveristy; short of undertaking a comprehensive study that would overstay the welcomeof this paper's menu, I would submit that these instances are in fact not exceptional but rather representative of the limits of GI-based cultural protection. If there is a general theme to these examples, it is that the market forces involved in the food and wine industries - commodity markets, production markets, labor markets, corporate markets, and indeed, as we shall see, GI markets - are so pervasive, that GIs cannot in and of themselves, as legal agents, prevent market influence on local culture, leading to degrees of cultural transformation and international cultural homogenization.

B. The Culture of Production: Markets Change Cultures of Production Despite GIs, Even When Methods Are Regulated

A first proposition along these lines is that local traditions and cultures of production that benefit from GI protection change nevertheless when markets cause them to, and remain constant when markets, again, cause them to. The safeguarding of cultural diversity is thus at the mercy of market forces, with or without legal GI protection. This happens not only with regard to production methods that are unregulated and legally free to change with consumers' demand or producers' creative requirements, but in some cases also when production methods are stringently regulated by the laws establishing the GI itself.

A prominent example is the evolution of competing styles of winemaking in important wine appellations in Europe since the 1980s, usually demarcated along "traditional" vs. "modern" or "international" lines. One aspect of this divide is the use of oak barrels in determining a wine's body, flavour and overall character. While many national wine appellation laws set minimum periods that the wine must age in oak barrels before it may be bottled, they do not determine several additional dimensions of oak aging, such as the type of oak to be used (e.g., French, American or Slavonian); the size of barrels (large 30 hectolitre vats or relatively small 224-litre *barriques*); the age of the barrels (new or used, and the percentage of new barrels to be employed); and the degree of 'toasting' the oak undergoes during cooperage.[118] Each of these variables can significantly affect the organoleptic qualities of the finished wine.[119] These and other technical oenological flexibilities allow for creativity and personal stylistic expression by winemakers, as well as modernization. Moreover, they have also allowed 'new wave' winemakers to depart appreciably from winemaking practices that although unregulated by statute were considered by previous generations as traditional and representative of local sensibilities.

To be sure, in many locales the innovation has been driven by quality considerations aiming at better market access and higher prices: prior 'traditions' were sometimes the upshot of years of wine-production whose unscrupulous main goal was quantity and cost-effectiveness, resulting in insipid bulk-products. Changes in

[118] See, e.g., commentary by Tom Maresca, *Spotlight on Barolo*, THE WINE NEWS, November 2002, *online*: http://www.thewinenews.com/octnov02/cover.html.

[119] Similarly, many wine appellation rules do determine minimum alcohol levels in the finished wine, but not maximum levels. While earliest harvest dates may be mandatory, the minimum or maximum sugar ripeness at harvest of grapes intended for dry wines is usually set by each winemaker. Duration of maceration and types of yeasts are also usually not regulated. The combination of these factors allows for considerable flexibility in the degree of alcohol in the finished wine.

production methods have in part been aimed at changing this scene. Yet in other cases, quality, as well as local typicity, were achieved using the old traditional ways, albeit more dependently on unpredictable annual vintage conditions, and the more recent changes have aimed at producing wines of a different nature, at times meant for modern, foreign tastes.[120] Either way, the result has been a break with traditional methods of production, despite GI protection. Differences of opinion between 'traditional' and 'modern' winemakers can be deeply entrenched and have even been known to carry acrimonious social effects, partly on the background of economic competition, partly as a genuine divisiveness of aesthetic philosophy; case in point is the Piemonte region of northern Italy, where the traditional/modern divide is sometimes referred to as the 'Barolo Wars'.[121]

Market-induced changes in traditional methods of production can therefore occur working within the regulatory space of the GI/appellation legal system, which is ineffective in preventing such innovations. On the other hand, some modernization that significantly strays from traditional methods embodied in appellation rules cannot benefit from the GI. Indeed, market forces are sometimes strong enough to encourage producers to forego the GI they are legally entitled to, in order to pursue new production methods. This happened in Tuscany, where innovators looking at international markets abandoned the prestigious Chianti Classico *Denominazione d'Origine Controllata e Garantita* (DOCG), preferring to introduce non-Tuscan grape varieties such as Cabernet Sauvignon into the blends that made up some of their best wines and to bottle them under the formally inferior Toscana *Indicazione Geografica Tipica* (IGT). These luxury wines soon became known as 'Super Tuscans' and overtook the Chianti Classico wines in terms of international, high-end demand, but also entered low-end markets, all at the expense of traditional blends. This is an evolutionary model that has been replicated in various other regions in Europe. With innovators working *outside* the appellation system, in these cases GIs have been unable to forestall the erosion of what may be regarded as one of the most basic traditions of wine production: the local *cépage*, or varietal composition of local wines.

The history of the Chianti Classico DOCG also reveals that market pressures may actually bring national GI regulators to amend the traditional production requirements set out in the appellation rules themselves, making a clean break between the GI and its underlying tradition. Chianti is perhaps the world's first legally defined GI, by virtue of a Decree by Grand Duke Cosimo III de' Medici from 1716[122] The father of modern Chianti, however, was the Baron Bettino Ricasoli, who in the 1850s defined a standard varietal blend for Chianti wine, to be composed mainly of the red grapes (Sangiovese and Canaiolo Nero), but also up to 30% white grapes (Malvasia and Trebbiano), the white varieties intended for freshness and accessibility

[120] In particular, traditionalists decry the effect of the taste of a single palate - that of the influential American wine critic Robert J. Parker, on the development of regional wines. See Echikson *supra* note 1at 89 *et seq.*; Suzanne Goldberg, *'I Am the Most Powerful Person in the Wine World'* , THE GUARDIAN, July 23, 2003; and Parker's own website, www.erobertparker.com. See also Jonathan Nossiter's controversial documentary film, *Mondovino*, for a stylized depiction of the role of powerful figures such as Parker and the winemaking consultant, Michel Rolland, in the design of the modern wine trade.

[121] See, e.g., Craig Camp, *Barolo Wars: Not-So-Long-Ago in This Galaxy* (2003), *online* http://www.vinocibo.com/winecamp/barolowar.htm; and JOSEPH BASTIANICH AND DAVID LYNCH, VINO ITALIANO: THE REGIONAL WINES OF ITALY (2002) 147-148.

[122] See *Ibid.*at 201.

in early drinking. This became the traditional composition of Chianti wine for more than a century. The Chianti region gained protected status by ministerial decree in 1932, and under post-war legislation, a DOC in 1967 which adopted the Ricasoli recipe, including the mandatory inclusion of a high minimum content of white varieties in the red wine as a binding condition for the use of the Chianti name.

Moreover, the use of white grapes in the red wine was being abused by winemakers to 'stretch' or increase production quantities with little regard to quality.[123] At the same time, the 'Super-Tuscan' breakaways were threatening the Chianti reputation. In 1984, when Chianti as a whole and the Chianti Classico sub-region were elevated to the more prestigious DOCG status, the new legislation significantly reduced the minimum content of white grapes in Chianti wines to only 2% - a proportion so small that it is safe to say that it was kept simply in order to preserve a shadow of the Ricasoli tradition - and allowing the inclusion of non-local varieties up to 10% of the blend. The law was changed again in 1996, eliminating entirely the requirement of white variety inclusion, now rather subjecting it to a 6% maximum, and increasing the allowed proportion of foreign varieties to 15%. Finally, under the current production code, as of the 2006 harvest, the inclusion of the indigenous white varieties will be prohibited if the wine is to be called Chianti Classico.[124] Thus, market requirements - the achievement of higher quality that conforms to internationally accepted tastes and standards - and pressures, notably the abandonment of the DOCG system by many producers for their highest quality wines, have stood what was previously deemed a tradition on its head: a winemaking practice that was once a mandatory legal condition for GI status is now prohibited by the successor law.[125]

Another manner in which different market pressures may detract from the integrity of cultures of production that is supposed to be protected by GIs relates to the ease with which appellation maps are drawn and redrawn. For example, the St. Joseph AOC was once "a single hillside",[126] "a snug local appellation centred on a handful of communities on the west bank of the northern Rhône", with a vineyard area of 97 hectares".[127] In 1969 the AOC's permitted area of production was tripled, including much low quality land and causing a "stampede of indiscriminate planting",[128] leading one (American) expert to write that "nothing is sacred to these officials of the INAO[129] who continue to devalue these historic sites even though they

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[123] *Ibid.*.
[124] *Available at*: http://www.chianticlassico.com/english/il-chianti-classico.htm.
[125] Less drastic though significant changes in the traditional varietal composition of regional wines has occurred elsewhere within the regulatory space of GI definitions, due to economic factors relating to production. To name two: First, Very few of the current wineries of the French Southern Rhône AOC of Chateauneuf du Pape, practice the somewhat mythical traditional blend that includes no less than thirteen local varieties, as allowed by AOC rules. For many decades of the twentieth century, Chateauneuf du Pape wines relied mainly on a single variety (Grenache); this 'tradition' has also been supplanted, as today most domaines use the three main varieties of the region (Grenache, Syrah and Mourvedre). Second, in the Northern Rhône AOC of Côte Rôtie, tradition called for blending a noticeable proportion of the aromatic white variety into the red Syrah-based wine. In practice relatively few producers follow this practice today. See JOHN LIVINGSTONE-LEARMONTH, THE WINES OF THE RHÔNE (1992) 325 and 8 respectively.
[126] See Lynch *supra* note 93 at 178.
[127] See Livingstone-Learmonth *supra* note 125 at 177.
[128] *Ibid.*.
[129] INAO - Institut National des Appelations d'Origine, is the French governmental regulator of AOCs.

were hired to protect them".[130] This was a change with implications for traditions of consumption (once St. Joseph's reputation declined) and of identity (expanding the 'community' of winegrowers who may sell their wares under the St. Joseph GI, but eroding its quality); it should, however, be seen foremost as a shift in a culture of production, since it signaled an abandonment of the *terroir*-driven principles of winemaking. Or rather, one should say that it constituted a threat to these cultures, because in the early 1990s renewed local quality-consciousness (prompted, no doubt, also by difficulties in sales) launched an effort to redefine the St. Joseph territory, limiting its use to only worthy sites,[131] evidently with growing success.[132] Notably, in this case it was not the GI that saved the culture of production, but the producer's culture (and the decreasing value of the wines) that appears to be saving the GI.

Much the same could be said of the great classified estates of Bordeaux. These are wine-making enterprises whose quality was ranked and classified according to their market prices, in 1855. Subject to constant criticism, the 1855 classification has survived, with very few changes. Yet as a prominent historiographer of the classification has noted, "in theory, there is nothing to prevent a classed growth that consisted of, say, 25 hectares in 1855 from acquiring 100 hectares of neighboring vineyards that were classed lower in the hierarchy - or, for that matter, not classed at all".[133] Nevertheless, quality rankings have been substantially preserved to this day. This cannot only be attributed only to the prescience of the original classifiers, but also to the care taken by successive proprietors to preserve the territory and quality to which the original ranking was granted.

In sum, with regard to patterns and practices of production, from the tested experiences of GIs in France and Italy (as well as Spain), it is evident that market pressures are independently and markedly more influential than legal GI regulation as far as culture is concerned. Where the market demands change, change is enacted, regardless of GI rules, whether directly or indirectly; where the market encourages constancy, constancy in GIs is achieved.

C. TheCulture of Consumption: Markets Change Cultures of Discriminating Consumption Despite GIs

A second proposition regarding the ineffectiveness of GIs as agents of cultural preservation is that markets change cultures of consumption relating to GI-protected products, even those that are based on traditions of discrimination (in taste, not in trade). Not only are GIs not enough to conserve cultures of discrimination; indeed, GIs - or at least the way that they are legally defined and managed - may even contribute to these changes.

This can be exemplified by recent trends in the market for wine in Britain, *vis-à-vis* 'Old World' and 'New World' wines. As discussed already, England is an example of a consumer market with established traditions of non-protectionist

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[130] See Lynch *supra* note 93 at 179.
[131] See Livingstone-Learmonth *supra* note 125 at 177-179.
[132] See Todd M. Wernstrom, *Saint-Joseph: Less Proves More in the Northern Rhône*, THE WINE NEWS, April-May, 2004, *online* http://www.thewinenews.com/aprmay04/cover.asp.
[133] See Markham *supra* note 99 at 184 (1988).

geographical discrimination in terms of tastes and preferences in food and wine.[134] Not surprisingly, France has historically been Britain's main supplier of wine; and Britain has always been an important export market for French wine. Yet sales figures for the year 2000 shockingly revealed that Australian wine exports had, by value, for the first time ever surpassed those of French wine,[135] a shift that reflected trends in other world markets as well,[136] and that has continued since.

The severity of this finding for the French wine industry must be understood in the context of more general market trends. Wine consumption in France has decreased significantly in the post-World War II era, making export markets more important than in the past. Wine consumption in non-traditional markets has grown, but so has the quantity and quality of wine products from 'New World' sources. In fact, a combination of factors, not least French overproduction of low quality wine, has led to a global wine glut. The share of exports in world wine consumption is growing, although in most wine-producing countries, the majority of produce is still consumed locally.[137] In short, the loss of ground in a traditionally faithful export market served as a frightening 'wake up call' for the complacent French wine industry, leading the French Department of Agriculture to commission a report on the need for reform.[138] A key issue subsequently identified as requiring rethinking is the regulation of French AOCs and wine-labeling for export. In the debate that has ensued, proposals have run from scrapping the system, liberalizing it,[139] adding new high quality categories,[140] or various variations or combinations of these ideas. Thus, the future of French AOC regulation may hold many changes in mandatory methods of production within the GI system - what may yet emerge as another example of the ineffectiveness of GIs as protectors of the culture of production.

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[134] See section III.C. *supra*.

[135] See *France's Wine Market Losing Global Market Share to New World Producers*, FOOD AND DRINK WEEKLY, August 20, 2001; it has been claimed that by volume, France's exports to Britain exceeded those Australia (see Jim Budd, *CAP 2010: France Faces the Competition*, WINE BUSINESS MONTHLY (December 3, 2002)), but this only indicates that on average, the British was willing to pay more for a bottle of Australian rather than French wine.

[136] Reportedly, the share of French exports in the United States wine market has dropped from over one-third in the 1990s to 15%; see Gordon T. Anderson, *Can Anything Save French Wine?*, CNN/MONEY MAGAZINE (August 23, 2004), *online*: http://money.cnn.com/2004/08/19/pf/goodlife/french_wine/.

[137] For various angles of commentary and fact on the current state of the global wine market, see: Brian Croser, *Annual WSET Lecture 2004: rand or Authenticity*, *online*: http://www.bibendum-wine.co.uk/news/wset04.pdf ; Budd, *supra* note 135; Nicholas Le Quesne, *Vintage Advantage* (August 12, 2002), TIME EUROPE; and Andrew Inkpen and Rod Phillips, *The Wine Industry*, Case study, Thunderbird, The American Graduate School of Management Studies (2003), *online*: http://www.thunderbird.edu/pdf/about_us/case_series/a09030026.pdf.

[138] See Jacques Berthomeau, *Comment Mieux Positionner les Vins Français Sur les Marchés d'Exportation?* (2002), *online*: http://www.agriculture.gouv.fr/spip/IMG/pdf/rappberthomeau-0.pdf (the 'Berthomeau Report'),

[139] See Alain Bloeykens, *Jacques Berthomeau: The Money Flow Will Be Cut Off Without Hesitation*, Interview with Jacques Berthomeau (2002), *online*: http://www.underthecork.be/en/community/archief/may_02_art1.html.

[140] Such as a new *Appellation Contrôlee d'Excellence* that would require new technologies and methods in winemaking and be subject to stricter regulation; see Jon Henley, *French Move the Goalposts in an Attempt to Halt Plunge in Wine Sales*, THE GUARDIAN (May 1, 2004), *online*: http://www.guardian.co.uk/france/story/0,11882,1207403,00.html.

Concerned as we are in this section with traditions of consumption, however, let us focus on the British consumer market itself, not on its implications for French production. The gradual shift from French dominance to Australian (and American - North and South) wine preference in Britain is likely the result of many combined market factors: the comparative advantage of Australia and other 'New World' countries in the production of low cost, stereotypically wines full of ripe and vivid fruit flavors that provide easy drinking immediately upon release, coupled with successful marketing, presented consumers with higher quality in lower price brackets and evidently pandered to contemporary British consumer preferences. What is important for our purposes, however, is that underlying this market-induced change in consumption *patterns* is what may be perceived as a near-paradigmatic shift in consumption *culture*: the demise of a tradition of geographically discriminating consumption, and the emergence (or rather, reinforcement) of a culture of consumption based on commercial branding. One of the distinctions between 'Old World' and 'New World' wine products is the system and style of their labeling and the degree of prominence accorded on them to geographical designations. Beyond the name of the producer or merchant, French wines list the name of the GI: an AOC or a lesser denomination. In France alone there exist in excess of 500 such indications, sometimes distinguishing small, adjacent plots with vastly different historical or current quality ratings and market prices. Furthermore, quality French wine labels are prohibited from displaying the name of the grape variety from which the wine is made. In contrast, Australian wines, like American and other 'New World' wine labels usually list the producer, a brand and the name of the grape variety involved - even when it is a blend;[141] there may also be a GI, but for most wines, certainly low-tier ones intended for mass-marketing, these will be very general - California or South-East Australia, for example, designations that refer to territories of a size comparable to that of all of France.

In theory, the GI-intensive French system should therefore enjoy a comparative advantage in promoting its wines in a market with consumer traditions of geographical discrimination, yet the experience in Britain shows that GIs have failed to prevent the erosion or rather, transformation of consumer culture. It has simply become too difficult for the casual, non-expert consumer to maintain a working knowledge of French appellations and their association with the kinds of wine he or she wants most. Examples of difficulties abound. If the consumer wants a Chardonnay, should she order a Pouilly-Fuisse or a Pouilly-Fume? If he likes Bourgogne, should he consider a Bourgogne-Passe-tout-grains? Is a Montrachet really so much better than a Puligny-Montrachet? If one likes Syrah, should one buy a Côtes du Rhône or a Cote Rôtie? Is a Muscadet des Coteaux de la Loire any different from a Muscadet Côtes de Grand Lieu? Similar problems of the density and intricacy of GIs surface in other 'Old World' countries, such as Italy, in which the palette of legally defined and protected GIs has grown and spread to new DOCs in every region, including many that will sound obscure to even the reasonably knowledgeable wine buff (e.g., in Tuscany alone, and beyond the better known DOCs and DOCGs: Montecucco, Monteregio di Massa Maritima, Montescudaio, Candia dei Colli Apuani,

[141] The normal rule in 'New World' jurisdictions is that a wine may be labeled as a mono-varietal wine (e.g., Chardonnay or Cabernet Sauvignon) if a single variety constitutes 85% or more of the volume. Below that figure, the wine must be labeled as a blend, e.g., Cabernet Sauvignon-Merlot.

Capalbio, Orcia, Sant'antimo)[142] and Germany (which has a particularly elaborate wine law and labeling system).[143]

In comparison, it has become much easier for the general consumer to make informed assumptions on the character of a potential wine purchase on the basis of passing experience with a few grape varieties from a handful of countries and producers, not regions: "Americans walk into a store and ask for a Chardonnay or a Cabernet. They don't come in and start rattling off the names of this or that obscure chateau".[144] The slipping sales of French wine in Britain indicate that the British consumer has become more 'American' in this respect. Yet this cultural shift is not exclusively or even necessarily the outcome of aggressive globalization or 'Americanization'. In fact, it is to some extent the result of the overambitious GI protection programs pursued in the legal systems of continental European countries for wine products intended for export. Quite simply, the proliferation of GIs, that in GI justificatory theory should lead to full information and to better purchasing decisions, has led to information-overload that considerably obscures the consumer's view of her purchasing options and decisions. Absurdly, it might be said that free trade is at fault even here: if not for liberalization of trade, the wines of the most incomprehensible AOCs would simply not be available in foreign, "barbarian"[145] countries, leaving consumption up to the local French market.

At all events, in the field of traditions of consumption, again we see that GIs cannot withstand the cultural influences of market forces; and that it is not GIs that uphold culture, but rather culture that upholds GIs.[146]

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[142] For a full listing of Italian wine IGTs, DOCs and DOCGs, see Bastianich and Lynch *supra* note 121 at 400 *et seq.*.

[143] On the wine laws of Germany and the problems encountered in the reform of the vineyard classification system, see STEPHEN BROOK, THE WINES OF GERMANY 1-31 (2003).

[144] See quote in Le Quesne *supra* note 137.

[145] A term used in the Berthomeau Report, *supra* note 138.

[146] At least two plausible objections could be raised in relation to this admittedly stylized depiction of the changes in the British wine market that stands behind this conclusion. First, surely the class-minded British society was not always, and never entirely, a 'geographically discriminating' consumership, and so the shift is not as dramatic as it would appear. Socio-historically, this criticism appears to be correct (for a highly nuanced, intelligent and historically sensitive analysis of the evolution of British consumption patterns in the pre-industrial, industrial and post-industrial eras, see Angela Tregear, *From Stilton to Vimto: Using Food History to Re-Think Typical Products in Rural Development*, 43 SOCIOLOGICA RURALIS 91 (2003)); building on Tregear, geographical taste in the pre-industrial era was a localized aspect of the close proximity of production and consumption (although it should be assumed that with regard to imports it applied additionally mainly to nobility). Ever since, however, geographical discrimination has been restricted to the affluent classes and social elites, in the industrial era as a taste for specialty items, and in the post-industrial era as a reflection of nostalgia for rural roots and interest in 'exotica'. It is therefore possible that the high-rolling wine consumers have managed to overcome the complexities of ongoing geographical knowledge accumulation posed by the proliferation of GIs (increasing the gap between *cognoscenti* and non-geographically minded consumers) or, alternatively, that they have weathered the storm by standing by the most time-tested appellations. Second, a distinction should be drawn between 'super-premium' wines that command high prices and may benefit from prestigious GIs at the proverbial 'Grand Cru' level and low-price market leading brands that need to sell on the less geographically-inclined consumer market (on the imperatives of such distinctions in modern wine markets, see Kym Anderson, David Norman and Glyn Wittwer, *Globalization and the World's Wine Markets: An Overview*, Centre for International Economic Studies, Discussion Paper No. 0143). The cumulative effect of these two precisions might suggest that there has not been a change in the importance of geographical discrimination. However, the increase in the average price commanded by Australian wines in relation to French wines suggests

D. The Culture of Identity: TheMarket for GIs Invents Traditions, Dilutes Culture and Distorts Identity

A third proposition regarding the ineffectiveness of GIs as legal guardians of culture relates to their uncertain and potentially distortive effect on local identity. Much as some unique GIs do signify local idiosyncratic culture, reflecting a deeply inbred relationship between society and a uniquely local food and wine product, from a critical perspective many, and perhaps most of them in fact represent legally 'invented traditions'[147] and 'imagined local communities'.[148] Even the most technically original, culturally-charged GI of all, Champagne, was legally established for primarily economic purposes; local identity and French nationalist symbolism served as rallying cries, an embellishment of reality for the purposes of a political campaign devised and pursued to ensure market protection.[149]

As the use of GIs spread throughout Europe, later under the canopy of international treaties and ultimately within the WTO, one of the phenomena that emerged is what may be described as a market for GIs, with both private and public choice aspects. On the private side, it was assumed that the consumer market assigned higher value to GI-designated products, and besides, the GI-have-nots needed to level the playing field with the GI-haves, resulting in a demand by producers for GIs - either as entirely new ones, as break-aways from established ones, or as ones to be promoted along the hierarchy of GIs. On the public side, government regulators became suppliers of legally protected GIs. The pattern established in Champagne became the standard, as regional groups of producers, together with labor unions and local municipal governments, lobbied national agencies for GI recognition. Part of this lobbying process required arguments regarding the quality and singularity of the product (usually satisfied by a relatively simple demonstration of *terroir*); but GIs, as rights, have to be given to somebody - not a private entity, but a community, and one with a tradition. Thus, communities had to crystallize around the common interest of attaining GI status for local products, both for simple collective action needs and in

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that this is not the case, and that a shift has occurred even in the more affluent - and traditionally geographically discriminating - classes of English society.

147 "Invented traditions" are "'traditions' actually invented, constructed and formally instituted and those emerging in a less easily traceable manner within a brief and traceable period - a matter of a few years perhaps… 'Invented tradition' is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past… however, insofar as there is such reference to a historic past, the peculiarity of 'invented' traditions is that the continuity with it is largely factitious"; see Eric Hobsbawm, *Introduction: Inventing Traditions* in THE INVENTION OF TRADITION 1-2 (Eric Hobsbawm and Terence Ranger, eds., 1983).

148 To borrow the phrase coined by Benedict Anderson in the context of nationalism; BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM (2nd ed., 1991).

149 See Guy (2002, 2003) *supra* note 8; more generally, what may be understood as the role of fantasy in the association of French national identity with wine is presented by the same author in Kolleen M. Guy, *Rituals of Pleasure in the Land of Treasures: Wine Consumption and the Making of French Identity in the Late Nineteenth Century*, in 34 Belasco and Scranton *supra* note 7. Much as Champagne has become perhaps the most belligerent of GIs, there is considerable evidence that the term was internationally used as a generic term for sparkling term in the late 19th century. Anecdotal evidence also suggests that for many years the sparkling wines produced outside of France by foreign subsidiaries of the great Champagne houses also used the term on their labels. If put to the test of litigation, these arguments might undermine French claims.

order to satisfy the reputational and legal criteria for GI acquisition. This process proved self-perpetuating, as governments found it difficult and indeed politically inexpedient to refuse GI status to one region after having granted it to another, so that ultimately, the wine AOCs and DOCs in France and Italy, respectively, might be said to cover virtually every viticultural area that could be associated with a locality. These market dynamics of GI acquisition have resulted in a proliferation of wine appellations in the 'Old World' and, increasingly, in 'New World' producing countries as well.

It has already been noted how the proliferation of GIs has contributed to consumer confusion, eroding the consumer culture of geographical discrimination.[150] It has also likely contributed to a general devaluation of GIs and GI-led products - an advantage enjoyed by many, if not all, is not generally an advantage anymore - and so reducing the economic capacity of GIs to protect tradition. Furthermore, the abundance of GIs hints at a low threshold of regional or local distinctiveness as required in practice for bestowal of GI status, including only vague references to local traditional practices - a functional dilution of the cultural rationale. In many cases, new GIs are indeed attempts to establish 'instant reputations' through invented traditions: building a novel culture through self-reference to the distant or at least irrelevant past. Some of the more recent Tuscan DOCs listed above are cases in point,[151] as are others in several emerging regions of Italy, inasmuch as they are in fact areas that may (or may not) have had some reputation for distinctive wines more than a century ago (at best) or in the time of the Etruscans (at worst), but for generations this aspect of the land and the people has been defunct.[152] Moreover, these regions have been invigorated with some local efforts, but no less by capital and enterprise flowing from other established areas. For example, according to popular knowledge, the coastal Tuscan Morellino di Scansano DOC, established in 1978, can boast some positive references to its wines in the middle ages, and as late as 1848.[153] When it was granted a protected GI it had little to offer, however, in the way of quality. A handful of local wineries made good efforts, but more importantly, some of the big players in the central Tuscan wine industry recognized commercial potential in the area, bought land, planted new vines and built wineries.

In short, in this and other cases, a DOC whose cultural foundation had little to do with present local culture, reinvented itself by recalling its distant past, in order to be more commercially relevant in the future. The 'award' of a GI provided an incentive to invent tradition; the effects on the real tissue of local culture are, however, unknown.

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[150] Section IV.C. *supra*.

[151] See text accompanying note 142 *supra*.

[152] The invention or re-invention of tradition can appear in commercial contexts even when there is no GI involved. For example, the relatively new Israeli wine industry has some wineries that stress the historic roots of wine in the holy land, by depicting ancient grape presses or ruins on their labels. In one very new project in the Negev desert, vines have been planted along terraces that are designated as archeaological relics from the Nabbatean (Byzantine) period. In another development, one sees the emergence of 'borrowed traditions', as local municipalities organize maps of 'wine routes', and publicity material hails the Galilee or Judean Hills as an Israeli 'Tuscany' or 'Provence'. Indeed, in the absence of formal GIs for Israeli wines, one of the best and longest established Israeli wineries labels its wines as *"Grand Vin de Haut-Judée"*, emulating but also informally assimilating the regional traditions of France.

[153] See *online*, Italian Trade Commission http://www.italianmade.com/wines/DOC10213.cfm.

Perhaps most importantly, although most difficult to substantiate on a sound anthro-sociological basis without considerable research, the invented traditions themselves, pursued for commercial purposes within the market for GIs, may ultimately emphasize the more marketable aspects of local wine and food culture, even invented ones, neglecting other less commercially attractive aspects. Again Champagne is somehow instructive in this regard, because until the mid-nineteenth century local culture was more related to still wines, not *Méthode Champenoise* sparkling wines. Economic expediency produced the push for early GI protection, that required an emphasis on the local and French ethos of sparkling wine. This is similar to the complex effects of tourism on communities.[154] In order to attract tourism, communities must emphasize what makes them special, but of course agreeable from an external, market perspective, not in terms of their own self-determination of identity and aspiration. A community, real or imagined, who for economic purposes is interested in a gaining GI status, will clearly need to emphasize those aspects of its local food or wine culture that are marketable for this purpose. As in the example of Morellino di Scansano DOC above, the cost in terms of lost, un-invented tradition is forever unknown.

V. *DOLCI* THE FUTURE OF CULTURAL PROTECTION IN WTO LAW

A. Implications for the WTO GI Debate and Beyond

This article could have ended here, with a simple, neat conclusion: GIs, as legal mechanisms and quasi-intellectual property rights, evidently do not have the capacity to protect local cultures of production, consumption or identity, or to prevent the erosion of cultural diversity. Market forces inevitably induce changes in local production methods and consumption preferences, in spite of the GIs that should in theory play a role in preserving them; and the proliferation of GIs has itself diluted the claims of special reputation, typicity and cultural identity of GI-endowed locales.

For negotiators at the WTO the consequent recommendation would therefore be to abandon the romantic rhetoric of cultural protection in the debate over expansion of Article 23 TRIPS 'additional protection',[155] and to recognize and treat GIs for what they are: legal tools for granting commercial advantages to certain products, sectors and regions. GIs are instruments of trade policy, like tariffs, subsidies or service-provider regulations. GIs should therefore be negotiated and maintained as such, free of all overweight 'cultural' baggage – like tariff concessions, subject only to reciprocal commitments and non-discrimination obligations of WTO Members relating to their respective GIs. Furthermore, since culture cannot of itself justify *any* GI protection, it should not be used as a justifying measure for selecting *some* GIs as eligible for 'additional protection', for preferring *some* GI-able products over others. There may (or may not) be plausible reasons to provide only regular protection to some GIs and 'additional protection' to others; but cultural diversity is not among them.

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[154] See, e.g., contributions in TOURISM AND LOCAL SOCIETIES IN ORIENTAL ASIA, special issue of ANTHROPOLOGIE ET SOCIÉTÉS (2001)(Jean Michaud and Michel Picard, eds.).
[155] See *supra* text following note 20.

Moreover, we have endeavored to take 'trade and culture' seriously, beyond the limited test-case of GIs. What emerges more generally, then, from the case-study of cultural protection through GIs, is the following striking image. An international legal mechanism with trade restrictive effects, widely believed to have a positive effect on preserving cultural diversity, and with a plausible underlying theory of cultural protection to boot, in practice simply does no such thing. Cynics or uncompromising neo-liberal trade theorists might be quick to interpret this as proof that trade restrictions in general cannot contribute to cultural diversity, that all trade-related claims calling for cultural protection are merely disguised calls for economic protectionism. While this may be true in some or even many cases, I would instead suggest some less simplified observations, not rejecting the idea of cultural protection through trade restrictions entirely, but rather qualifying the ways in which proposed legal methods for cultural protection are to be assessed and applied.

These thoughts, laid out hereunder (in an initial way, worthy of further contemplation and discussion), relate to

(i) the desirability of specific, *sui generis* cultural protection from trade liberalization;

(ii) the viability, applicability and mechanics of a general cultural exception in international trade law; and

(iii) some of the problems associated with the development of a separate, UNESCO-based cultural protection regime that would impact upon rights and obligations in the WTO.

B. Thinking About Sui Generis *Cultural Protection*

Insofar as GIs represent an approach to cultural protection based upon *sui generis* legal measures in international trade law, it is apparent that the real cultural effects of such measures must be analyzed with care, if not caution (which is not always to say, with skepticism).

Tailor-cut, *sui generis*, case-by case methods have the advantage of avoiding unnecessarily restrictive generalized exceptions to trade rules (an advantage significantly eroded if specialized measures are established in *addition* to general exceptions). Nevertheless, *sui generis* measures have the obvious potential to expand trade-protectionism beyond what is necessary – or effective - for cultural protection even within their own targeted scope. Specifically agreed trade-restrictive measures and mechanisms that are based upon a theory of cultural protection should therefore be defined in the strictest possible terms, on the basis of sound empirical research, adhering in practice and effect to their cultural rationale. This is not only necessary to mitigate the welfare-reducing economic effects of such measures, but also to maintain their coherence and indeed legitimacy as cultural protection mechanisms. 'Culture' should not be allowed to become a euphemistic code-word for protectionism.

It is probably too late to undo the idea of GI protection entirely, on the mere argument that it is not conducive to cultural protection. However, proposals for similar *sui generis* trade or intellectual property disciplines that refer to a cultural

protection justification (and traditional knowledge may be deemedone of these) should be subjected to rigorous cultural – not only legal and economic – analysis, in order to discern their real effects on both trade and culture. The GI experience suggests that it is not enough to demonstrate how free trade may harm cultural diversity. Of greater importance is substantiation that the *sui generis* measure can in fact prevent this harm in practice. Since such proof may be difficult or indeed impossible to procure before the measures in question are imposed, it would appear advisable for WTO Members agreeing on new specialized measures aimed at cultural protection to define a 'test-run' period for the measure, at the end of which not only will its trade impact be evaluated, but a 'cultural impact assessment' be conducted, relating to predetermined, quantitative and qualitative criteria. This could be conducted by recognized experts, with UNESCO involvement. If these criteria are not met, the international legal measure should be abolished or modified accordingly – not because it is trade-restrictive, but because it does not promote cultural protection.

C. Thinking About a General GATT/GATS Cultural Exception

Our examination of the questionable practical ability of GIs to fulfill the role of cultural guardians raises several questions and suggestions relating to the viability, applicability and mechanics of a general cultural exception in international trade law. To be sure, the existing general exceptions in Article XX GATT and Article XIV GATS cannot be said to expressly establish a comprehensive exception for cultural policies, but some cultural legislation may be covered. The term "public morals" in Article XX(a) GATT/Article XIV GATS has recently been interpreted as denoting "standards of right and wrong conduct maintained by or on behalf of a community or nation",[156] the content of which "for [WTO] Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".[157] It is not difficult to see how this exception so defined could apply to preventive policies such as age limits for legal alcohol consumption, legal regulation of the sale and shipping of alcoholic beverages and so on, that relate not only to public order but also to cultural mores; or to restrictions on the sale and importation of foodstuffs that are culturally offensive in the importing state, for religious reasons (e.g., beef products to a Hindu region, alcohol to a Moslem state, non-kosher foods to Israel).[158] It is, however, much more difficult to envision this language applying to import restrictions based on a positive cultural policy aimed at the preservation of a certain local craft or trade (such as artisanal wine- or cheese-making), if only because such a policy would not regularly relate to "standards of right and wrong". Indeed, to include all cultural policies in the "public morals" exception would be tantamount to expanding its scope to include practically any legally regulated field. For the same reasons, it would also be an exaggeration to allow domestic GI legislation (as an example of ostensibly cultural policy) to benefit from the "public morals" exception had GIs not been specifically permitted and regulated by TRIPS.

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[156] See *US – Gambling supra* note 2 at para. 296, implicitly affirming the definition of "public morals" found by the Panel in WT/DS285/R *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2004) at para 6.487.

[157] See *US-Gambling* Panel Report *Ibid. at* para. 6.461.

[158] Of course such legislation would also have to satisfy all other elements of Article XX(a) GATT/Article XIV(a) GATS in order to be WTO-consistent.

Thus, while culture may at times inform local "public morals", surely not all cultural issues are related to morality.

Similarly, the Article XX(f) GATT exception is limited to the protection of "national treasures of artistic, historical or archeological value". This should properly be read as relating to specific, physical artifacts of national importance, directed mainly to justify export rather than import restrictions. Champagne may sincerely be regarded by the French as a national treasure,[159] but in general it would be an abuse of this exception to interpret it as permitting trade restrictions on food and wine products. The same logic should apply to other cultural policies. For example, each nation's language may be a national treasure of sorts, but Article XX(f) GATT cannot be stretched to justify trade-restrictive measures based on language policies.

Moreover, WTO Members could conceivably expand the meanings of these exceptions to include a broader range of cultural policies (through treaty amendment or "authoritative interpretation" under Article X or Article IX.2 of the WTO Agreement, respectively).[160] Regardless of the specific wording of such an expanded exception relating to cultural protection,[161] and whether through amendment or interpretation (judicial or quasi-legislative), the question would then arise regarding the conditions to be met by a trade-restrictive measure in order to benefit from the cultural exception.

Drawing from Article XX(a) GATT/Article XIV(a) GATS case law and otherwise analogous Article XX GATT jurisprudence, two cumulative conditions specifically addressed at "cultural protection" seem likely (in addition to the other conditions of the *chapeau* of Article XX GATT/Article XIV GATS). First, the trade-restrictive measure must be within the scope of the "cultural protection" exception;[162] Second, the measure would be required to be "necessary" for the protection of local culture and cultural diversity.[163]

In this regard the present article's conclusions regarding the problematic actual effect of GIs, as a nominally 'cultural' policy, on the preservation of local and cultural diversity, may cast a critical shadow on current WTO jurisprudence, if applied to cultural issues. This is because the Panels and Appellate Body are often receptive to non-trade theories underlying trade-restrictive measures insofar as finding the measures to be within the scope of an exception (the first condition), while more critical at the later analytical stages relating to the "necessity" of the challenged

[159] See text accompanying note 111 *supra*.

[160] For discussion of the legislative capacities of the WTO General Council, see TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION 213-217 (2004).

[161] The language of the various sub-provisions of Article XX GATT and Article XIV GATS is not consistent, including the most frequently used and applied "necessary to" (e.g., sub-Articles XX(a), (b), (d) and also (i) GATT), "relating to", "imposed for" "undertaken in pursuance" and "essential to". Different language has led to different interpretations, reflecting a varying "required nexus" or "degree of connection" between the measure and the protected interest (see *US-Gambling supra* note 2 at para. 292). In the present analysis we assume that the wording "necessary to" would be applied to a general cultural exception.

[162] Building upon, e.g., *US-Gambling* Panel Report *supra* note 156 at para. 6.449, relying on prior Appellate Body Reports, including *Korea – Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R (2001)(*Korea-Beef*).

[163] Building upon, e.g., *Korea-Beef Ibid.* at para. 161.

measures (the second condition), and the overarching requirement of their conformity with the Article XX GATT/Article XIV GATS *chapeau*.[164] In the *US-Gambling* case, for example, the Panel adopted a very lax test for the satisfaction of the first condition, regarding the measures' inclusion within the scope of "public morals". It only briefly examined the legislative history of the challenged measures, and concluded that the record shows that their rationale was one aimed at the protection of public morals.[165] The requirement that the measure be "within the scope" of an exception has in practice been transposed into a requirement that the measure "be designed to" achieve the goal of the exception.[166] In a cultural exception, the measure would therefore be required, for example, to "be designed to protect local culture". This may be (and with regard to other protected interests, has in practice been) constructed as a mainly subjective test (building principally on the declared intent of the legislator), ignoring the possibility of ulterior, multiple or misguided motives for legislation. As a legal test, it does not objectively examine the actual effectiveness of the challenged measure in achieving its alleged aims. On appeal, the Appellate Body itself also disposed of this issue very briefly, limiting itself to the grounds of appeal which did not include a challenge to the inclusion of the challenged measures within the scope of the "public morals" exception,[167] and so it was "quick to justify"[168] the challenged legislation as conducive to the substantive purpose of the "public morals" exception.

Regarding the second condition, the Panel followed the established relevant jurisprudence (particularly *Korea–Beef*)[169] whereby the "necessary to" (or "necessity") test means significantly more than "making a contribution to" the protected interest, much closer to "indispensable". Consequently, and in keeping with a large mass of prior jurisprudence, the Appellate Body focused its review to an examination of the existence of viable, less trade-restrictive, substitutes for the challenged measure (a comparative, "indispensability" test), and not on the actual efficacy of the challenged measure (an absolute, objective "effectiveness" test).

In other words, the Panel and the Appellate Body in *US-Gambling* in practice accepted the protective "public morals" theory underlying the measures in question, with little questioning, and then proceeded to examine the extent of protection on a

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[164] WTO adjudicators may consider it more legitimacy-enhancing to embrace the non-trade considerations at stake, and grant national authorities considerable leeway in their delimitation, only to strike the contested national measures down because they are overly trade-restrictive given the ostensible existence of alternatives.

[165] See *US-Gambling* Panel Report *supra* note 156 paras. 6.479-6.487, in particular paras. 6.486-6.487. The Panel referred to a 1961 Report to the House of Representatives and to a statement by the Late Robert F. Kennedy, but did not require positive evidence regarding the effectiveness of the legislation in meeting its declared purposes in the four decades that had passed. The Panel concluded on this point that it was satisfied that "various arms of the government of the United States consider these Acts were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling", that fall within the scope of "public morals" and/or "public order" within the meaning of Article XIV(a) GATS.

[166] See, e.g., *Ibid.*, para. 6.487.

[167] The Appellate Body seems understatedly critical of this; see *US-Gambling supra* note 2 at para.297: "Antigua contests this finding on a rather limited ground…".

[168] See Joost Pauwelyn, *ASIL Insights: WTO Softens Earlier Condemnation of US Ban on Internet Gambling* (April, 2005), online, American Society of International Law, http://www.asil.org/insights/2005/04/insights050412.html.

[169] See *supra* note 162 at para. 161.

comparative rather than absolute basis, mainly alluding to the availability of alternatives. Thus, at no point did the Panel or Appellate Body critically examine the fundamental contention that the restrictive legislative had *any* measurable positive effect on the safeguarding of public morals.[170] This approach stands in stark contrast to our current analysis of the cultural protection role of GIs, which suggests that some 'cultural' policies have no real effect on the protection of culture, and suggests that evidence on the real futility of cultural protection trade-restrictive measures might be ignored by WTO adjudicative bodies. This would be particularly problematic, if under the "indispensability" test, unworthy, trade-restrictive 'cultural' policies were sustained under an Article XX GATT-style or -stylized cultural exception because there were no readily apparent less-trade-restrictive policy alternative, even though the measures themselves were not in fact effective as cultural protectors.

Furthermore, this also becomes a burden of proof issue. While it is accepted that the party invoking an Article XX GATT/Article XIV GATS exception (normally the respondent) bears the burden of proving the affirmative of the particular defense,[171] in practice it is the complainant who must show that the challenged measure is not indispensable in terms of the "necessity" test by demonstrating the existence of WTO-compliant alternatives. If, as in *US-Gambling* among others, the respondent is not seriously required to show that the challenged measure has a materially positive effect on culture, the burden of proof is thus effectively shifted to the complainant, and the substantive question of the absolute effectiveness of the challenged measures is bypassed. This grants both substantive and tactical advantages to the cultural consideration which, as our analysis of GIs demonstrates, may have no real empirical basis.

It is therefore evident that if 'trade and culture' is to be taken seriously, the WTO dispute settlement system should be more inquisitive regarding theories of non-trade, cultural protection that are claimed to underlie trade restrictions, and devote more objective attention to the substantive question whether challenged trade-restrictive measures do in fact contribute to the achievement of the protected non-trade value, such as culture and cultural diversity – well before considering the extent (interpreted as indispensability) of such protection. For example, if GIs had not (counterfactually) established under specialized TRIPS rules, an investigation into the actual cultural effect of GIs might demonstrate their questionable contribution to cultural protection as presented in this article, making unnecessary an examination of the theoretical degree of protection offered, both absolutely and in relation to conceivable alternatives.

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[170] This is even despite evidence provided by Antigua and Barbuda, the complainant in the case, whereby some US military research had found that "the presence of military casinos did not have a negative effect on the morale or financial stability of the United States forces, their family members and other persons – including foreign nationals – who gambled at the government-owned facilities" (see *US-Gambling* Panel Report *supra* note 162 at 6.480).

[171] See *US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (1997) at pp. 15-16.

D. Thinking About a Parallel UNESCO Regime

In more ways than one circumventing the question of a cultural exception *in* WTO law, the UNESCO Draft Convention,[172] if adopted, may establish a parallel or separate legal regime for the regulation of trade and culture with significant external impacts *on* the WTO. Under Article 5(1) of the Draft Convention, States Parties will affirm "their sovereign right to adopt measures to protect and promote diversity of cultural expressions within their territory, and recognize their obligations to protect and promote it both within their territory and at the global level". "Cultural expresions" are broadly defined in Article 4 of the Draft Convention as including both the "cultural contents" and "artistic expressions" of "cultural goods and services", whose definition has already been discussed.[173]

Most importantly, under Article 6(1) of the Draft Convention, "each State Party may adopt measures, especially regulatory and financial measures, aimed at protecting and promoting the diversity of cultural expressions within its territory, particularly in cases where such expressions are threatened or in a situation of vulnerability".

Under Article 6(2) of the Draft Convention, such protective and/or promotive cultural measures may include (among others) the following:

> "(a) measures which in an appropriate manner reserve a certain space for domestic cultural goods and services among all those available within the national territory, in order to ensure opportunities for their production, distribution, dissemination and consumption, and include, where appropriate, provisions relating to the language used for the above-mentioned goods and services;
>
> (b) measures which guarantee independent cultural industries effective access to the means of producing, disseminating and distributing cultural goods and services;
>
> (c) measures which grant public financial aid; in granting such aid, States Parties may determine the nature, amount and beneficiaries thereof;"

The only precondition required is that these measures be "within the framework of [the State Party's] cultural policies", which are broadly defined in Article 4(7) of the Draft Convention as "policies, whether at the local, regional, national or international level, which address or affect any aspect of the cultural expressions of an individual, community, or society, including the creation, production, distribution, dissemination of, and access to, cultural goods and services".

In other words, so it seems (without undertaking more detailed analysis), the UNESCO Draft Convention grants virtual *carte blanche* to national discrimination in all relevant aspects of commercial activity ("domestic cultural goods and services"), including the provision of direct subsidies ("public financial aid"), as long as these national measures can fit into a framework of "cultural policies"; and these only need

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[172] See *supra* note 4.

[173] See *supra* text following note 45.

"address any aspect" of cultural expressions. In terms of the 'trade and culture' debate, this approach seems to grant full priority to a broadly defined vision of 'culture' over all aspects of 'trade'.

Of course one must ask what would be the status of these proposed UNESCO obligations and rights in the WTO? Article 19 of the nascent Draft Convention provides two possibilities. Under Option B, the Draft Convention would not affect the rights and obligations of the States Parties under any other existing international instruments", *viz*, when push came to shove, trade and culture issues would continue to be regulated by WTO disciplines. Under Option A, however, a less cogent relationship is constructed. On one hand, the Draft Convention's provisions would not affect international "intellectual property rights". On the other hand, existing international rights and obligations would step aside where they would "cause serious damage or threat to the diversity of cultural expressions".

These legal constructions do not seem satisfactorily meaningful, for several reasons, but for present purposes suffice it to say that neither of them allocates any weight to the question of whether the "cultural policies" at hand actually have any proven positive effect on cultural protection and diversity. This may lead to a significant expansion of the breadth of national policies that benefit from the Draft Convention's provisions without actually making a contribution to the achievement of the Draft Convention's purposes. Thus, while the idea of a separate UNESCO cultural protection regime counterbalancing the trade disciplines of the WTO may certainly be worthy of additional consideration, in the light of this article's conclusions regarding the dubious merits of GIs as a form cultural policy, and the potentially material adverse effect of such a regime upon free trade, it appears incumbent upon such a separate cultural regime to undertake a regulatory system that would more strictly define the cultural effects it intends to achieve, and more seriously monitor and verify the achievement of these effects.

As in our discussion of *sui generi*s cultural protection and of a general cultural exception in WTO law, the actual positive influence of a proposed measure, international or national, upon cultural protection and diversity simply cannot be taken for granted, even in the face of a persuasive cultural theory, even within the framework of a parallel UNESCO regime of 'trade and culture'.

VI. *DIGESTIVO:* OF CULTURAL PROTECTION AND CULTURAL PROTECTIONISM

The challenge of the 'Trade and Culture' nexus lies, like in other 'Trade and…' situations, in designing workable legal mechanisms for distinguishing between genuinely 'cultural' national regulatory measures, on one hand, and measures whose effect is merely to distort international trade, on the other: between cultural protection and cultural protectionism. In this article I have endeavored to demonstrate that GIs, as *sui generi*s internationally agreed legal measures are closer to the latter than to the former. Furthermore, I have argued that in drawing the boundary between cultural protection and protectionism, 'trade and culture' should be taken seriously, or rather, that culture itself should be taken seriously as a non-trade consideration. As the battle-cry of the disgruntled Languedoc *vigneron* in this article's epigraph illustrates, the flag of culture is all too easily unfurled in the name of trade protectionism. If, however,

culture is to be taken seriously as a justification for trade-restrictive policies, it must first be proven that these policies do indeed contribute to the protection of local culture and to the safeguarding of cultural diversity. This must be the first test of a cultural policy; only then may it be allowed to establishdigressions from general international trade law disciplines, be it through specialized mechanisms, under the rules of a general GATT/GATS cultural exception or through a separate UNESCO cultural diversity regime. This may seem to be a 'trade first' approach, but it is no less a 'culture first' one, because it would not tolerate the institution of rules of international cultural diversity law that may look good on paper but have no real effects on culture in practice.

Here lies a problem that runs through the core of the 'trade and culture' issue, distinguishing it perhaps from other 'trade and…' relationships. Are trade and culture really conflicting values, opposing interests? Both trade and culture are expressions of human activity and exchange: the exchange of goods and services, but also of ideas. As Article 7 of the UNESCO Declaration[174] acknowledges, "creation draws on the roots of cultural tradition, but flourishes in contact with other cultures". Culture is not static, it flows and changes as do the individuals who create and practice it. The traditions of today are the unthinkable innovations and foreign influences of yesteryear. Without international trade and interaction, global culture might simply dry up. As pressure mounts to establish international legal mechanisms of cultural protection that entail restrictions to trade, we must ask ourselves whether by curtailing *economic* human exchanges such mechanisms do not at the same time prevent human *cultural* exchanges in whose vibrancy lies the future of human cultural development and its diversity.

But these are thoughts best left for another meal.

[174] See *supra* note 4.