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The International Intellectual Property Roots of Geographical Indications

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THE INTERNATIONAL INTELLECTUAL PROPERTY ROOTS OF GEOGRAPHICAL INDICATIONS

RUTH L. OKEDIJI*

"Brands are powerful symbols that reflect not only the image with which manufacturers and advertising agencies try to imbue them but also the cultural milieu in which they are imbedded."[1]

INTRODUCTION

Just barely a decade after its conclusion, claims that the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement")[2] wrought substantial and important changes to the landscape of intellectual property law have quickly become passé. The TRIPS Agreement is the context in which delineations of the coordinated—if at times competing—goals of domestic and international intellectual property law, and their relationship *inter se*, are compared, evaluated, and rationalized. No other intellectual property agreement has enjoyed the pervasive, exacting, and intense scrutiny to which the TRIPS Agreement has been subject.[3]

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1. Giana M. Eckhardt & Michael J. Houston, *Cultural Paradoxes Reflected in Brand Meaning: McDonald's in Shanghai, China*, 10 J. INT'L MARKETING 68, 68 (2002) (citing Sidney Levy, *Symbols for Sale*, 37 HARV. BUS. REV. 117–24 (1959)).

2. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

3. This can be attributed to several factors, including the central role of intellectual property in the Uruguay Round trade negotiations, the (largely) unexpected success of the TRIPS negotiations, and the backlash arising from the welfare implications of strong global protection for intellectual property rights. Others point to the WTO enforcement mechanism as the singular reason for the importance of the TRIPS Agreement; still others identify the breadth of obligations and the comprehensive, upgraded treatment of the various intellectual property categories as the notable feature of the Agreement. All these, and perhaps more, are certainly significant in considerations of the importance of the TRIPS Agreement. Yet, as many scholars recognize, perhaps the overarching force of the Agreement would have been far less potent but for the historical moment in which it was accomplished—a moment when globalization impelled a fundamental shift in the comparative advantage of the U.S. and the EU, requir-

With great passion, the TRIPS Agreement is commonly perceived as the genesis of contemporary global-scale battles over the appropriate normative pitch of intellectual property law. Indeed, the Agreement is widely accepted by scholars writing from diverse disciplinary backgrounds and theoretical perspectives as the defining framework for analyses of the impact of intellectual property rights on a variety of pressing global welfare issues ranging from public health to the digital divide. The Agreement has thus assumed "super-sized" social and intellectual dimensions in a global economy where knowledge goods represent far more than human creativity carefully wrapped in legal doctrine and channeled into the discrete subjects of patents, copyrights, and trademarks.[4] Instead, knowledge goods, defined, regulated, and appropriated through intellectual property law, reflect the cultures, personalities, practices, needs, markets, innovation, and ingenuity of individuals, corporations, communities, and nation-states.[5] Nowhere is this more explicitly evident than in the seemingly intractable discourse over the suitability of trademark protection, or for that matter any type of strong protection, for geographical indications.

In this reflection on the relationship between different national approaches to intellectual property subject matter,[6] I briefly examine and probe latent assumptions in the ongoing efforts to rationalize geographic indications broadly as credible objects for mandatory global protection. My goal is to set forth what I view as the chief normative encounters in the

ing these economies to identify and establish a new global basis on which their economic growth could be leveraged and sustained against the emerging industrialized economies of Asia and Latin America.

4. As illustrated by debates over the nature of legal protection for traditional knowledge, the scope and conditions of protection of these major subjects of intellectual property do not accurately or completely capture the values, methods, or processes of creative endeavor in societies not structured principally around commoditization, consumption, and the absence of strong kinship/communal ties. This is not to say, however, that the terms of intellectual property protection are somehow neutral or that they operate in neutral space. Indeed, as argued before, intellectual property rights are inherently culturally based. *See* Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J.L. & JURISPRUDENCE 249, 285 (1993); Rosemary Coombe, *Challenging Paternity: Histories of Copyright*, 6 YALE J.L. & HUMAN. 397, 398 (1994); Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 112 (1995).

5. While the TRIPS Agreement only obligates Member States, its beneficiaries include private actors. As a WTO Panel Report notes, "a particularity of the TRIPS Agreement is that the assessment of the conformity of measures with Members' obligations generally requires an assessment of the manner in which they confer rights or protection on private parties." *See* Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, ¶ 7.741, WT/DS174/R (Mar. 15, 2005) [hereinafter Panel Report]. In this regard, violations of TRIPS reflect on the public and private interests of nation states and their citizens however organized. *See id.* ¶¶ 7.742–.743.

6. My comments during the conference were in response to issues raised in the paper by Dev Ganjee. *See* Dev Gangjee, *Quibbling Siblings: Conflicts Between Trademarks and Geographical Indications*, 82 CHI.-KENT L. REV. 1253 (2007).

debate about geographical indications in the international arena, and to offer a perspective on the importance of an international regime and why the kind of regime that is chosen matters significantly in an era characterized by intellectual property harmonization. My central claim is that failure to protect geographical indications generally, or success in providing protection on grounds that subordinate geographical indications to the realm of "other" in trademark law has material consequences for owners of geographical indications and engenders significant tension for trademark doctrine. Some commentaries frame the question of protection for geographical indications as an aspect of the broader consideration of the status of traditional knowledge in the intellectual property rubric.[7] Yet, the current debate is much more than merely a claim for intellectual property status by "foreign" subject matter (no pun intended). Using evidence from literature on marketing, cultural psychology, and consumer behavior, I illustrate preliminarily how protection for geographical indications qua trademarks might produce results more consistent with the traditional goals of trademark law than even traditional marks do currently. My analysis occurs both within and outside the trademark context, as I highlight the polymorphous tendencies of intellectual property rights more generally, and as I situate the current debate in the historical context of the international intellectual property system.

This article is structured as follows. In Part I, I discuss questions surrounding the pedigree of geographical indications as trademarks and argue that the definitional scope provided by the TRIPS Agreement was both incomplete as a historical matter and wholly artificial in terms of its legal function. In Part II, I examine the economic value of geographical indications as trademarks and address why the priority principles used in domestic trademark jurisprudence are both culturally contingent and normatively inconsistent with aspects of trademark jurisprudence in the U.S. In Part III, I analyze how the economic value derived from cultural association is precisely what lies at the root of the argument in favor of strong protection for geographical indications. I should observe that my efforts are not just directed at encouraging a regime of strong protection in the way accorded wines and spirits under the TRIPS Agreement.[8] Instead, I argue principally for geographical indications to be viewed and understood as trademarks per

7. *See, e.g., Traditional Knowledge and Geographical Indications*, *in* INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY, REPORT OF THE U.K. COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 73 (2002) [hereinafter REPORT OF THE COMMISSION]; Marion Panizzon, *Traditional Knowledge and Geographical Indications: Foundations, Interests and Negotiating Positions* (NCCR Trade Working Paper No. 2005/01, 2006), *available at* www.nccr-trade.org.

8. *See* TRIPS Agreement, *supra* note 2, arts. 23, 24(6).

se. This is not only because the "total concept and feel"[9] of geographical indications is akin to trademarks. As I discuss more fully below, geographical indications offer the possibility of returning trademark law to its classic beginnings, which protect investments in quality and distinction made by producers of goods, while also educating the public about the goods themselves.

I. THE "QUESTIONABLE" NATURE OF GEOGRAPHICAL INDICATIONS

Most commentary on the controversy surrounding international protection for geographical indications ("GIs") assumes the framework adopted by the TRIPS Agreement as a starting point for efforts to define outstanding issues and as the basis for moving the debate toward some resolution. Absorbed into the narratives of GI treatment under the TRIPS Agreement are evaluations of treaties that preceded TRIPS and thus informed the contours of the compromise between the U.S. and the EU reflected therein.[10] Even from commentators in favor of protection, the genesis of analyses on the topic is a presumption that GIs are something other than trademarks,[11] whether in nature, function, or underlying rationale.[12]

9. This phrase is borrowed from copyright law and adapted for my purposes in this article. The "total concept and feel" test is used by some jurisdictions to determine copyright infringement. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 302 (1996). The essence of the test is an analysis of "the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting." Williams v. Crichton, 84 F.3d 581, 588 (2d Cir. 1996); *see also* Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).

10. For a review of the negotiating positions and proposals, see generally Panizzon, *supra* note 7, at 30–39.

11. This is mainly due to concerns that trademark protection will insufficiently accommodate values and interests associated with traditional knowledge. *See, e.g.*, Meghana RaoRane, Comment, *Aiming Straight: The Use of Indigenous Customary Law to Protect Traditional Cultural Expressions*, 15 PAC. RIM L. & POL'Y J. 827, 839 (2006). This view is also reflected in the organizational structure adopted by WIPO to address "other" forms of creative activity. *See* World Intellectual Prop. Org., *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WO/GA/26/6 (Aug. 25, 2000), *available at* http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/ga26_6.pdf (describing the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore as the "international forum for the interplay between intellectual property, traditional knowledge, genetic resources, and traditional cultural expressions [i.e., folklore]" because "these themes cut[] across the conventional branches of intellectual property law and do[] therefore not fit into existing WIPO bodies" which are organized by IP subject matter categories).

12. Gangjee, *supra* note 6, at 1267 ("Despite their apparent functional similarity to trademarks, GIs are ontologically distinct beasts."); Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 131 (2004) ("Geographical indications are not trademarks; though both are source indicators, the protection these two types of intellectual property offer is fundamentally different."); Leigh Ann Lindquist, *champagne or Champagne? An Examination of U.S. Failure to Comply*

A. *Trademarks by Any Other Name?*

The treatment of GIs as an appendage of trademark law has become the cornerstone for the approach, championed primarily by the U.S., that in the face of conflict between GIs and trademarks, the latter should prevail.[13] This emphasis on trademark ascendancy is encoded in a more nuanced fashion through the so-called "first in time, first in right" principle,[14] which accords the first user of a mark the exclusive right to its use. From this straightforward rendition of a principle that has strong intuitive appeal and an established pedigree in the intellectual property world[15] flow a series of underlying assumptions about what counts as "first," when "time" begins, and the nature of the right thus acquired by virtue of "use."[16] None of these terms, which are critical to the determination of priority disputes under the "first in time, first in right" approach, occupies a neutral space. Existing definitions reflect deliberate choices directed at a particularized vision of what trademarks should be in a relatively homogenized national cultural milieu.

with the Geographical Provisions of the TRIPS Agreement, 27 GA. J. INT'L & COMP. L. 309, 311–12 (1999) ("Geographical indications are similar to trademarks in that they function as source indicators. Producers use such designations to signify the place from which a good originates. Geographical indications, however, are not trademarks; trademarks, for example, Nike® or Coke®, inform the consumer of the specific producer of a product." (footnotes omitted)); Molly Torsen, *Apples and Oranges (and Wine): Why the International Conversation Regarding Geographic Indications Is at a Standstill*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 31, 33 (2005) ("A geographic indication is dissimilar to a trademark on many levels.").

13. Echoes of this refrain are pervasive in the literature and were recently reflected in a U.S. WTO complaint against the EU. In determining an interpretive approach to Article 16(1) of the TRIPS Agreement, the Panel concluded that "under Article 16.1 of the TRIPS Agreement, Members are required to make available to trademark owners a right against certain uses, including uses as a GI." *See* Panel Report, *supra* note 5, ¶ 7.625.

14. Gangjee, *supra* note 6, at 1262–63 (describing the "first in time first in right" as the emerging dominant approach). The U.S. is aggressively pursuing the incorporation of this approach internationally through a network of bilateral trade agreements. "First in time, first in right" is the suggested principle in, for example, the U.S.-Chile Free Trade Agreement. *See* Free Trade Agreement, arts. 4, 10, U.S.-Chile, June 6, 2003, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html. The "first in time, first in right" approach is also an obligation under the U.S.-Australia Free Trade Agreement and the recently concluded U.S.-South Korea Free Trade Agreement. *See* U.S.-Austl. Free Trade Agreement, U.S.-Austl., art. 4, May 18, 2004, T.I.A.S. No. 6422, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file148_5168.pdf; Office of the U.S. Trade Representative, Free Trade with Korea: Summary of the KORUS FTA, at 5 (Apr. 2007), *available at* http://www.ustr.gov/assets/Document_Library/ Fact_Sheets/2007/asset_upload_file649_11034.pdf.

15. Stephen Stern, *Geographical Indications and Trademarks: Conflicts and Possible Resolutions*, at 4, WIPO Doc. WIPO/GEO/SFO/03/13 (June 13, 2003).

16. Courts construing the term "use" under the Lanham Act describe it as a trademark use that is "deliberate and continuous, not sporadic, casual or transitory." *See, e.g.*, Circuit City Stores, Inc. v. CarMax, Inc., 165 F.3d 1047, 1054–55 (6th Cir. 1999).

GIs, as a particular strain of signaling devices, were not consciously encompassed in the construction of trademark function and value prior to the TRIPS Agreement. In the GIs versus trademarks debate, resort to familiar trademark definitions is a reflexive move—portrayed as though it were scientific principles and not strategic choices that governed the development of what constitutes a trademark. Thus, "first in time" is shorthand for the legal person who employs a mark to identify itself as the origin of a product and to distinguish that product in a particular market such that affected members of the consuming public associate the mark with that producer.[17] The fact that another may have used the mark earlier in an absolute sense is irrelevant; only use of the mark in a way that identifies commercial origin counts for these purposes.[18] Further, trademark doctrine advances a lore that it is the public that in a sense defines the mark, because the *public's* recognition of the mark is so critical to the notion of "first in time." Ironically, however, public recognition plays a more powerful and very distinct role in the GI context; public recognition of GIs is fixed in actual experiences rooted (in some cases) to real physical spaces evoking norms of behavior that condition—not merely grant—existing and future use of the mark in question.

Given the materiality and role of public interaction in constructing and affixing meaning to GIs (as with trademarks), it seems implacable to argue that GIs can only achieve trademark status if other aspects of trademark function can be replicated. Resort to definitions of priority and other constitutive trademark criteria derived in pursuit of narrowly and explicitly circumscribed trademark ends (i.e., tying use with commerce) as a method of reconciling conflicts between GIs and trademarks simply entrenches a rebuttable presumption of trademark superiority as the governing paradigm in this global debate. A priority principle might very well be an equitable response to a conflict between two similarly situated objects.[19] And as a

17. The post-1988 Lanham Act uses the terminology "bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark." *See* Lanham Act, 15 U.S.C. § 1127 (2000). Courts in the U.S. require "evidence showing, first, adoption, and second, use in a way sufficiently public to identify or distinguish the marked goods in an appropriate segment of the public mind as those of the adopter of the mark . . . ." New England Duplicating Co. v. Mendes, 190 F.2d 415, 418 (1st Cir. 1951).

18. *Mendes*, 190 F.2d at 418.

19. Opinions differ on the equities of using a priority principle, whether between trademarks and geographical indications, or even between two trademarks. *See, e.g.*, Gangjee, *supra* note 6, at 1269–70 (asserting inequities); Frank Z. Hellwig, *Why the Principles of Priority and Exclusivity Cannot Be Compromised—The Trademark Owner's Perspective on Geographical Indications and First in Time, First in Right*, http://web.archive.org/web/20040404155547/http://inta.org/articles/firstintime_ firstinright.html (last visited Oct. 28, 2007) (asserting otherwise); *see also* Stern, *supra* note 15. *See generally* World Intellectual Prop. Org., *Possible Solutions for Conflicts Between Trademarks and Geographical*

mechanism to resolve ownership disputes, the "first in time, first in right" approach certainly resonates within the larger framework of intellectual property doctrine.[20] But in a global environment, the question of priority is not mechanical; priority is heavily context-dependent and assumes different meanings for purposes of determining who should be entitled to the exclusive rights at issue.

Consider that in pre-TRIPS U.S. patent law, for example, priority of invention was determined differently, depending on where innovative activity first took place. Until the TRIPS Agreement necessitated a change, foreign inventors could not count inventive activity in their home country for purposes of a priority dispute, but instead were limited to the actual filing date in the U.S.[21] Territoriality principles in trademark law, admittedly with far less rigidity today, also preclude consideration of trademark use in a foreign country for purposes of determining priority.[22] These are a few examples of ways in which countries may exercise specific national interests through facially neutral doctrines; such doctrines can serve to advance and/or mask many underlying policy objectives, including discrimination against foreigners.

In the end, despite the centripetal force of harmonization, the point is clear: priority is a relative term subject to, and dependent on, factors that are deemed eligible for consideration consistent with underlying norms or policy prescriptions. For example, in determining priority of trademark use, courts in the U.S. weigh a variety of elements, including evidence of sales

Indications and for Conflicts Between Homonymous Geographical Indications, WIPO Doc. SCT/5/3, June 8, 2000.

20. Stern, *supra* note 15, at 4.

21. *See* Griffith v. Kanamaru, 816 F.2d 624 (Fed. Cir. 1987). For discriminatory effects of patent rules regarding prior art, see Margo A. Bagley, *Patently Unconstitutional: The Geographical Limitation on Prior Art in a Small World*, 87 MINN. L. REV. 679 (2003).

22. *See* Person's Co., Ltd. v. Christman, 900 F.2d 1565 (Fed. Cir. 1990). "[F]oreign use has no effect on U.S. commerce and cannot form the basis for a holding that appellant has priority here. The concept of territoriality is basic to trademark law . . . ." *Id.* at 1568–69 (footnote omitted); *see also* Int'l Bancorp, LLC v. Societe des Bains de Mer et du Cercle des Etrangers a Monaco, 329 F.3d 359, 385 (4th Cir. 2003) (Motz, J., dissenting) ("Until today, every court to address this issue has held that use of a *foreign trademark* in connection with goods and services sold *only* in a foreign country by a foreign entity does not constitute 'use of the mark' in United States commerce sufficient to merit protection under the Lanham Act."); *accord* Fuji Photo Film Co., Inc. v. Shinohara Shoji Kabushiki Kaisha, 754 F.2d 591, 599 (5th Cir. 1985); Fin. Matters, Inc. v. PepsiCo, Inc., 806 F. Supp. 480, 484 (S.D.N.Y. 1992); *see also* CBS, Inc. v. Logical Games, 719 F.2d 1237, 1239 (4th Cir. 1983) ("[W]e accept the assertion . . . that 'trade dress use in foreign countries does not create protectible trademark rights in the United States.'"); La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265, 1270 n.4 (2d Cir. 1974) ("It is well settled that foreign use [of a trademark] is ineffectual to create trademark rights in the United States."). The *Person's* court noted two exceptions to the rule against crediting foreign use for purposes of priority disputes in the U.S.: (1) where the mark in question is a famous mark; and (2) where the U.S. user made only nominal use of the mark solely to block the prior foreign user's planned expansion into the U.S. market. *See Person's Co.*, 900 F. 2d at 1570.

of the products, advertising efforts, and public recognition of the mark.[23] What factors are relevant will be determined largely within national frameworks.[24] Priority is also a dynamic concept, changing contours and meaning across jurisdictions, between real-time markets and within the ubiquitous space of the Internet.[25] Once GIs are set off (as they are now) as something other than trademarks and made peripheral to the trademark system, priority of use as a governing principle to mediate conflict between the two is less than satisfactory for purposes of bridging this forced dichotomy. Under current schemes, the context in which priority is determined will likely skew heavily in favor of trademark owners unless associated doctrines like "use" or "distinctiveness" are malleable enough to accommodate cultural conditions and other values underlying the demand for protection of GIs.

B. New (If Not Strange) Bedfellows: Cultural Claims and Coherency in Intellectual Property Categorizations

Unlike its patent or copyright counterparts, the trademark provisions[26] of the TRIPS Agreement have received far less scholarly criticism, outside of the treatment of GIs. Several reasons can be adduced for this, as well as for the unusual coalitions of countries that stand on either side of the debate[27] over the nature and extent of mandatory protection for GIs.[28] Trademark use enjoys a rich vintage dating back, by some accounts, 4,000

23. Courts have stated that determining priority requires a case-by-case determination. A "totality of the circumstances test" allows courts to weigh, among other things, industry context, the producer's activities, and public perception/association. *See, e.g.*, Planetary Motion, Inc. v. Techsplosion, Inc., 261 F.3d 1188 (11th Cir. 2001).

24. Indeed, this is the gravamen of the territoriality principle. *See Person's Co.*, 900 F.2d 1565. "[T]rademark rights exist in each country solely according to that country's statutory scheme." *Id.* at 1569; *see also* Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 885, 887–909 (2004) (identifying policy objectives that dictate the territorial nature of various aspects of trademark law).

25. *See generally* Dinwoodie, *supra* note 24 (evaluating similar features with respect to the territoriality principle).

26. *See* TRIPS Agreement, *supra* note 2, sec. 2.

27. There is an unusual alliance and convergence of interests around geographical indications between those who favor and advocate broad protection, mainly the EU and some developing countries, and those who do not, chiefly the United States and other members of the Cairns group (e.g., Argentina, Brazil and Australia). From a consumer perspective, what unites these countries is the presence of immigrants from Europe who laid claim to cultural roots associated with products in Europe and who would lose a competitive advantage by being denied the right to market highly competitive, like-products to compete with typically higher priced niche goods. *See* Panizzon, *supra* note 7.

28. The WTO Panel Report represents a culmination of tension and difference between the U.S. and the EU perspectives over the nature, extent, and value of protection for geographical indications. For a review of the history of the debate and negotiating positions, see Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 86 TRADEMARK REP. 11, 29–31 (1996).

years,[29] and the use of marks to indicate source or distinguish the wares of merchants was not limited to particular regions of the world. Such marks were used in Rome and Greece as much as in India, China, and Egypt.[30] Thus, the relative comfort with enhanced trademark protection under the TRIPS Agreement is likely attributable to the long-established pervasiveness of trademark use in global trade and the lack of perceived imbalances between developed and developing countries in affording strong trademark protection under a new globalized regime.[31] This is not to say, however, that negotiations over the trademark provisions of the TRIPS Agreement were without debate.[32] Among other things, questions relating to the scope and method of protection generated different proposals during the TRIPS negotiations.[33] It was, however, recognition of "geographical indications," a term never before used in a multilateral text, which marked a milestone in the Agreement's treatment of trademark protection.

Under the TRIPS Agreement, 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."[34] Trademarks on the other hand are defined as "[a]ny sign, or any combination of signs, *capable of distinguishing* the goods or services of one undertaking from those of other undertakings."[35] As a matter of definitional exercise then, a geographical indication *could* constitute a trademark where such an indication serves to distinguish goods in the market.[36] But, as it turns out, not all

29. WILLIAM HENRY BROWNE, A TREATISE ON THE LAW OF TRADE-MARKS 1–14 (1885); FRANK I. SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS (1925).

30. BROWNE, *supra* note 29; *see also* World Intellectual Prop. Org., *Intellectual Property Reading Material*, at 60, WIPO Pub. No. 476 (E) (1998).

31. Among other things, international trademark protection in the pre-TRIPS era lacked an enforcement mechanism, as did other intellectual property counterparts. For an overview of the pre-TRIPS international trademark regime, see Conrad, *supra* note 28.

32. *See* Jim Keon, *Intellectual Property Rules for Trademarks and Geographical Indications: Important Parts of the New World Trade Order*, *in* INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 165, 167, 178 (Carlos M. Correa & Abdulqawi A. Yusuf eds. 1998) (noting that negotiations over trademark rights "followed the general TRIPs 'North versus South' pattern" and "geographical indications was one of the most difficult sections to negotiate").

33. *See* DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 102–19 (2001); JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 244 (2003).

34. TRIPS Agreement, *supra* note 2, art. 22(1) (emphasis added); *see also* Justin Hughes, *Champagne, Feta, and Bourbon—The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 313–22 (2006) (providing a detailed overview of TRIPS's GI provisions).

35. TRIPS Agreement, *supra* note 2, art. 15(1) (emphasis added).

36. *See* Gangjee, *supra* note 6, at 1254–55. This is well-established under the Lanham Act, on which the provisions in TRIPS are substantially based. *See* 15 U.S.C. § 1052(e)(2) (2000) (proscribing registration of a trademark which "when used on or in connection with the goods of the applicant is primarily geographically descriptive of them . . . ."); *see also* Burke-Pasrons-Bowlby Corp. v. Appala-

distinctiveness is equal. To qualify for the enhanced trademark protection[37] and enforcement provisions of the TRIPS Agreement, more is required of GIs. GIs were introduced into the global order as something less than trademarks, since, by definition, their distinguishing characteristics are "essentially attributable" to geographic origin. Only if distinctiveness over and above these elements is present would a GI qualify as a trademark. Put differently, to be on equal footing with trademarks under the TRIPS Agreement, GIs must be *more* than just a reflection of quality, reputation, or other characteristic essentially attributable to geographic origin; GIs must have distinctiveness independent of geography. It makes no difference that some GIs only have geographical relevance because an "open-source" type model of production in which shared traditions, skills, and processes that have evolved over time characterize the manufacturing processes and methods of an industry, or that other GIs reflect natural elements such as weather, soil conditions, and topography that contribute to the competitive advantage of a particular product. Some GIs fall in neither category but have nevertheless come to be associated with a region, creating a sort of reverse-secondary meaning in which the region becomes famous for a product and not vice-versa. Examples may include Murano, Italy, known for its glass; Waterford, Ireland,[38] known for crystal; or closer home, Hot Springs and Eureka Springs, Arkansas, known literally for therapeutic hot springs.

GIs for goods whose attributes are derived solely from natural elements clearly are the primary object of protestations about GI distinctiveness.[39] Yet, as conceived in the TRIPS Agreement, the ratio of distinctiveness due to human ingenuity to that which is due only to natural elements has to be weighed, contested, and determined on a case-by-case basis.[40] Once linked to a collective experience in production and associated with a geographical space, GIs are somehow rendered incapable of functioning in the constructed realm of trademark distinctiveness. They must be

chian Log Homes, Inc., 871 F.2d 590, 594–95 (6th Cir. 1989) ("Where it is determined that the mark as perceived by potential purchasers describes the geographic origin of the goods the mark is primarily geographically descriptive. . . . A trademark that is primarily geographically descriptive must have acquired secondary meaning to invoke the protection of the Lanham Act.").

37. For a review of new standards for international protection of trademarks under TRIPS, see generally Paul J. Heald, *Trademarks and Geographical Indications: Exploring the Contours of the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 635 (1996); *see also* Keon, *supra* note 32, at 167–74.

38. WATERFORD is a geographic name that serves as a trademark.

39. This is evident in definitions, analyses, and examinations of GIs in the literature.

40. Under Article 22(1), the phrase "essentially attributable" to geographical origin suggests that the sphere of distinctiveness attributable to non-geographic factors must be considered non-essential or peripheral in determining that a geographic name is a GI. TRIPS Agreement, *supra* note 2, art. 22(1).

"trademarks-plus"—finding distinctiveness in purely artificial realms unrelated to the context from which the product originates.

This point deserves careful attention. Like other trademark terms such as use and priority, distinctiveness is a multilayered concept, inherently unstable and covering a wide spectrum of functionality.[41] The spectrum of distinctiveness in U.S. trademark law[42] recognizes the inescapable variance of symbols in terms of how they interact with consumer perceptions, understanding, and, ultimately, persuasion to buy the product.[43] Trademarks represent many things at once or nothing at all,[44] perform multiple functions at once and at different times, and communicate in various ways differently to different individuals.[45] Indeed, in a global context, a danger faced particularly by American brands is that trademarks exported to different cultural contexts can communicate things wholly unintended by the owner.[46] Thus, in China for example, research suggests that brands can take on inconsistent meanings due to the cultural values embedded in that society.[47] In writing about McDonald's in China, one commentator notes that Western "fast-food fever in Beijing provides . . . [an] example of how in certain circumstances customers may care less about the [product] and more about the cultural message it delivers."[48] As discussed more fully later on, this cultural dimension of trademarks is keenly important in a globalized marketplace where product differentiation is marked less by

41. For an insightful examination of the different shades/meanings of distinctiveness under the Lanham Act, see Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2026–35 (2005).

42. *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976).

43. *See* Beebe, *supra* note 41, at 2028–35.

44. In the sense that it is consumer interaction with the symbol that infuses it with meaning.

45. Levy, *supra* note 1, at 118–19 ("People buy things not only for what they can do, but also for what they mean. . . . When people talk about the things they buy and why they buy them, they show a variety of logics. They refer to convenience, inadvertence, family pressures, other social pressures, complex economic reasonings, advertising, and pretty colors. . . . The things people buy are seen to have personal and social meanings in addition to their functions."); *see also* Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1205 (1948) (recognizing that symbols "represent: (1) the source of goods[,] (2) the reputation of that source[,] (3) satisfaction with the goods themselves[,] (4) persuasive advertising value[, and] (5) intrinsic symbol value. We have agreed that the first three are desirable private interests, entitled to protection. The last two are not. But if they are all combined in a single symbol, the degree of exclusive use permitted as a safeguard against confusion of source, reputation, or goods, necessarily carries the rest along with it.").

46. Particularly in foreign settings. *See* Eckhardt & Houston, *supra* note 1, at 72–74 (noting some negative perceptions of McDonald's in China based on social space concerns arising from a specific scenario (family birthday party)).

47. *Id.* at 74 (noting that McDonald's in China is "permeated with alternative meanings and evaluations"); *see also id.* at 75–76 (describing other scenarios where McDonald's was perceived negatively due to its foreignness as related to the cultural context at issue).

48. Yunxiang Yan, *Of Hamburger and Social Space: Consuming McDonald's in Beijing*, *in* THE CONSUMER REVOLUTION IN URBAN CHINA 201, 210 (Deborah S. Davis ed., 2000).

what the actual brand may be and more by the culturally contingent reality of consumer values.

C. *International Trademark Treaties and the Constraints of Precedent*

Trademarks, like GIs, had never before been defined in a multilateral text.[49] Efforts to derive an acceptable definition for trademarks within TRIPS thus required two elements: (1) minimum principles derived from common practices; and (2) coherence with pre-existing international agreements, which related to or could be affected by the definitional scope adopted.[50] These two factors are consistent with the process and methodology by which the substantive provisions of the chief international intellectual property agreements were negotiated.[51] The political and practical necessity of these guiding factors imposed certain important constraints on the approach to GIs taken in the TRIPS Agreement. First, the definition of the subject matter was linked to existing definitions in the preceding multilateral treaties, namely (1) the Paris Convention for the Protection of Industrial Property[52]; (2) the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods[53]; and (3) the Lisbon Agreement for the Protection of Appellations of Origin and Their International Regis-

49. There is a slight difference here worth elucidating. Although trademarks had never been defined in a multilateral text, trademarks have been regulated in multilateral agreements prior to the TRIPS Agreement. Geographical indications, on the other hand, had never before been defined or regulated as geographic indications. In essence, geographical indications as we think of them today are legal constructs of the TRIPS Agreement.

50. There exists a collage of agreements that touch on various aspects or features of geographical indications. These include the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, Apr. 14, 1891, as revised at Lisbon, Oct. 31, 1958, 828 U.N.T.S. 165 [hereinafter Madrid Agreement]; Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, Oct. 31, 1958, as revised at Stockholm, July 14, 1967, 923 U.N.T.S. 197 [hereinafter Lisbon Agreement]; and the Convention on the Use of Appellations of Origin and Denominations of Cheeses, June 1, 1951, Journal Officiel de la République Française, June 11, 1952, p. 5821, *available at* http://www.admin.ch/ch/f/rs/0_817_142_1/index.html. For more background on these agreements, see Xuan-Thao N. Nguyen, *Nationalizing Trademarks: A New International Trademark Jurisprudence?*, 39 WAKE FOREST L. REV. 729, 757–67 (2004).

51. *See* Ruth L. Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 97–105 (2000) (discussing the process of reconciling national laws in the context of negotiating substantive provisions for the Berne Convention); *see also generally* Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819, 842–51 (2003) [hereinafter Okediji, *Public Welfare and the Role of the WTO*] (describing the formation of coalitions and the process of arriving at a minimum set of obligations generally).

52. Paris Convention for the Protection of Industrial Property, art. 1(2), Mar. 20, 1883, as revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305, amended Sept. 28, 1979 [hereinafter Paris Convention] ("The protection of industrial property has as its object . . . trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition."); *see also* Hughes, *supra* note 34, at 311–12.

53. Madrid Agreement, *supra* note 50.

tration.[54] These agreements, however, did not seek to provide protection for GIs as a prescriptive matter. Rather, all of these agreements addressed particular needs, gaps, and challenges in cross-border trade in goods. I will return to this point later, but suffice it to say that there is widespread consensus that GIs are broader than the notion of appellations of origin or indications of source.[55]

With respect to identifying widely shared minimum principles for GI protection, much has been made of the different concerns of the U.S. and EU. However, there is some consensus that the protection of GIs has roots in similar concerns underlying modern trademark law, particularly with respect to prevention of consumer deception as to the origin of a product[56] and, to a lesser extent, strains of unfair competition. Treaties such as the Lisbon Agreement, which established protection for appellations of origin—a particular utility of GIs—through means of a registration system, had not been particularly successful in terms of impact or widespread adoption.[57] Neither was the 1891 Madrid Agreement, which addressed a narrow set of problems associated with protection of GIs.[58] However, it is the Lisbon Agreement that provided a premise for the TRIPS Agreement.[59] Parties to the Lisbon Agreement agreed to recognize and protect appellations of origin in which the quality or characteristics are "due exclusively or essentially to the geographical environment, including natural and human factors," so long as the appellations are recognized and protected as such in the country of origin and registered at WIPO.[60]

As mentioned earlier, the Lisbon Agreement was not intended to address the full breadth of GIs, but merely a particular component. Under the Lisbon Agreement, appellations of origin[61] are defined in a manner quite

54. Lisbon Agreement, *supra* note 50; *see also* Hughes, *supra* note 34, at 312–13.

55. *See* Conrad, *supra* note 28, at 13 (defining GIs to include indications of source and appellations of origin); *see also* World Intellectual Prop. Org., About Geographical Indications, http://www.wipo.int/about-ip/en/about_geographical_ind.html#P34_3188 (last visited Aug. 13, 2007) (noting that "[t]he concept of geographical indication encompasses appellations of origin").

56. Lee Bendekgey & Caroline H. Mead, *International Protection of Appellations of Origin and Other Geographic Indications*, 82 TRADEMARK REP. 765, 765–66 (1992).

57. Currently, the Lisbon Agreement has only twenty-six contracting parties; the U.S. is not a member. *See* World Intellectual Prop. Org., Contracting Parties, Lisbon Agreement, http://www.wipo.int/treaties/ en/ShowResults.jsp?lang=en&treaty_id=10 (last visited Apr. 5, 2007).

58. The Madrid Agreement (also known as the Madrid Arrangement) expanded on the Paris Convention by requiring members to seize goods bearing false or misleading indications of origin and to prohibit the use of false representations on the product or in advertising or other forms of communication to the public, and prohibited members from treating geographical indications of wines as generic terms. *See* Madrid Agreement, *supra* note 50, arts. 1(1), 3bis, 4.

59. For example, TRIPS Article 22(1) is based on Article 2 of the Lisbon Agreement.

60. *See* Lisbon Agreement, *supra* note 50, arts. 1–2.

61. WIPO describes appellations of origin as "a special kind of geographical indication." *See* World Intellectual Prop. Org., About Geographical Indications, *supra* note 55.

similar to the definition of GIs in the TRIPS Agreement.[62] On closer examination, however, there are material differences between the two terms as defined under each treaty. Appellations of origin can be no more than geographical names of a country, region, or locality,[63] have no reputational factor, and are used for designation purposes. In this derivation, appellations of origin are similar to "primarily geographically descriptive" marks in that they merely describe the geographic origin of the goods.[64] Appellations of origin clearly are understood to be narrower than GIs, and the regime established by the Lisbon Agreement focused on addressing perceived limitations of the Paris Convention and the Madrid Agreement.[65] These treaties were not intended to, nor did they, establish a rationale for GIs as such; instead, consistent with the primary purpose of preventing deception, these agreements devised strong protection for cross-border treatment for GIs.

Justifying current approaches to protection for GIs by reference to the failure of the Lisbon and Madrid Agreements was peculiar in the sense that it required a move backward in time. All other intellectual property subjects in TRIPS were upgraded with a view toward contemporary issues, values, and priorities, recognizing the significance of the objects of protection and preserving space for future challenges. While the patent and copyright provisions were based upon the nineteenth-century Paris Convention[66] and Berne Convention,[67] respectively, none were frozen in time by these important predecessors. Instead, to both were added important provisions reflective of current economic interests and policy rationales.[68] Even trademarks were given a face-lift in this regard.[69] It is not

62. There seems to be a consensus in commentaries that the Lisbon Agreement was a starting point for the GI provisions in TRIPS. According to the Lisbon Agreement, "appellation of origin" means "the geographical name of a country, region or locality which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors." Lisbon Agreement, *supra* note 50, art. 2(1).

63. Under TRIPS, geographical indications can be broader than just a name; they are any indication that points to an association with a geographic place for reasons that extend beyond the natural environment. *See* GERVAIS, *supra* note 33, at 191; *see also* Florent Gevers, *Geographical Names and Signs Used as Trade Marks*, 8 EUR. INTELL. PROP. REV. 285 (1990); L. Sordelli, *The Future Possibilities of International Protection for Geographical Indications*, 30 INDUS. PROP. 154 (1991).

64. *See* Lanham Act, 15 U.S.C. § 1052(e)(2) (2000).

65. Conrad, *supra* note 28, at 25-26.

66. Paris Convention, *supra* note 52.

67. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris, July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention].

68. Both the Paris Convention and the Berne Convention have undergone multiple revisions. *See supra* notes 52, 67; *see also* Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 299 (2003) ("This idea of moral rights as personal rights, in contrast with the primarily economic nature of the intellectual property rights that were recognized

simply that GIs were left behind, as it were, in the TRIPS Agreement, but that they were reconceived in a manner much narrower than the values they reflect and the functions they serve might otherwise have suggested. GIs are burdened with a demand for coherency and legitimacy to which trademarks are not subject—stripped of the value they derive from consumer recognition and appreciation of the time, talent, skill, reputation, and uniqueness associated with their products, be it the produce of the earth or the work of skilled artisans.

It is clear that modern trademarks suffer from many of the same challenges leveled against GIs. Trademarks serve multiple interests, communicate multiple, inconsistent messages, and can be imbued with requisite distinctiveness not just because they identify a source,[70] but for the ways in which consumer interaction confers meaning (and thus distinctiveness) on them.[71] It is well settled in trademark law that some consumers may be confused by a competing mark while others may not[72]; that what is protectable is dependent on perceptions of a particular subgroup of the population[73]; and that safeguarding, however inexactly, consumer expectation, attribution, and association between the origin of a product and its symbol are all functions that serve the interests of classic trademark policy. There can be no real doubt that, whether intended or not, GIs fit comfortably into

over works of authorship, filtered into the 1928 revision of the Berne Convention for the Protection of Literary and Artistic Works."); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 340 (2004) (noting that at the 1967 Stockholm revision conference less-developed countries sought to adjust the Berne Convention system to their economic, social, and cultural needs).

69. E.g., recognition of service marks, in addition to general improvement of the system.

70. Nora Beverages, Inc. v. Perrier Group of Am., Inc., 269 F.3d 114, 123 (2d Cir. 2001) ("Even an inherently distinctive mark can, in its commercial context, lack strength as a mark.").

71. *See* Beebe, *supra* note 41, at 2059–60 (referring to this idea as representative of a "[c]ultural [p]opulist [s]train of [t]rademark [c]ommentary").

72. *See, e.g.*, Exxon Corp. v. Texas Motor Exch., Inc., 628 F.2d 500, 507 (5th Cir. 1980).

73. Whether the question is likelihood of confusion or exclusion under section 2 of the Lanham Act, it is the assessment of a community smaller than the entire population which will serve as the focal point of the inquiry. *See* Int'l Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr., 103 F.3d 196, 201 (1st Cir. 1996) ("[T]he law has long demanded a showing that the allegedly infringing conduct carries with it a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care."); Harjo v. Pro-Football Inc., 50 U.S.P.Q.2d (BNA) 1705, 1748 (T.T.A.B. 1999) ("As we have indicated, . . . determining whether matter is scandalous involves, essentially, a two-step process. First, the Court or Board determines the likely meaning of the matter in question and, second, whether, in view of the likely meaning, the matter is scandalous to a substantial composite of the general public."), *rev'd*, 284 F. Supp. 2d 96 (D.D.C. 2003); *In re* Hines, 31 U.S.P.Q.2d (BNA) 1685, 1688 (T.T.A.B. 1994) ("In determining whether or not a mark is disparaging, the perceptions of the general public are irrelevant. Rather, because the portion of Section 2(a) proscribing disparaging marks targets certain persons, institutions or beliefs, only the perceptions of those referred to, identified or implicated in some recognizable manner by the involved mark are relevant to this determination."), *vacated on other grounds*, 32 U.S.P.Q.2d (BNA) 1376 (T.T.A.B. 1994).

this policy space. Whether or not they are accorded that space as a matter of right, however, is not a matter of doctrine.

II. PRECEDENT, POWER, AND THE POLITICS OF REPRESENTATION IN THE DEBATE OVER GEOGRAPHICAL INDICATIONS

Assimilating appellations of origin into the concept of GIs as some countries did during the TRIPS negotiations,[74] or juxtaposing GIs with appellations of origin and yet another term "indication of source,"[75] has had the practical effect of confusing function with distinctiveness. As defined in earlier treaties, appellations of origin and indications of source appear to be primarily utility-serving mechanisms whose efficacy lay not principally in the communication to consumers of intrinsic or extrinsic product traits.[76] Rather, similar to country-of-origin labeling requirements in the U.S.,[77] indications of source and appellations of origin also serve important policy goals that include public safety/awareness, the administration of trade rules regarding appropriate customs duties and tariff schedules, import and export controls, etc.[78] Indeed, the concerns addressed in the Madrid Agreement and the Lisbon Agreement suggest that the efficiency of trade flows was in part a motivating factor behind the treaties.[79]

74. *See* GERVAIS, *supra* note 33, at 189 (describing the Swiss proposal).

75. Paris Convention, *supra* note 52, art. 1(2) ("The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.").

76. This may explain partially why no efforts were made to define more broadly the distinctiveness of GIs, and treatment was limited to border controls under the Paris Convention and Madrid Agreement.

77. The Tariff Act, 19 U.S.C. § 1304(a) (2000) (stating that the Customs Service may require every article of foreign origin be marked "in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article").

78. *Id.* The U.S. Customs Service and the Federal Trade Commission ("FTC") both have jurisdiction over several aspects of geographic labeling. Regulations for designating country of origin have been issued by the Customs Service pursuant to the Tariff Act, while the FTC acts on its authority over unfair competition to prohibit misrepresentations of geographic origin for goods imported into the country. In addition, the Food and Drug Administration ("FDA") and the Bureau of Alcohol, Tobacco and Firearms ("BATF") play a role in determining the distinctiveness of particular kinds of geographic indications: BATF—wines and alcoholic beverages; FDA—certain types of cheeses.

79. These concerns were very similar to those expressed by the U.S. and EC at the onset of the Uruguay Round negotiations, namely that infringing products distorted the flow of trade. As stated in the TRIPS Preamble, Member States,

> *[d]esiring* to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade; *Recognizing*, to this end, the need for new rules and disciplines concerning: . . . (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights . . . .

See TRIPS Agreement, *supra* note 2, pmbl.

On the other hand, U.S. objections to these treaties were based on the perceived lack of need for such a system when less rigid alternatives existed[80] and in light of the damage a strong regime would portend for U.S. businesses in addition to necessitating changes in U.S. domestic law.[81]

Nonetheless, echoes of earlier resistance to geographic associations to products generally and objections to the older treaties[82] were absorbed into the context in which TRIPS negotiations over GI protection occurred. The objections, from developed and developing countries alike, include assertions such as increased cost and inconvenience, ineffectiveness, infringement on free speech, consumer confusion, the possibility of an ever-expanding list of terms for which protection is demanded, and suspicion that the effort to protect GIs is merely a trade-protection device.[83]

A. The Socio-Cultural Context of Trademarks

Much has been written about the politics underlying the TRIPS negotiations, particularly the unprecedented influence of private industry on the negotiations.[84] Although some laud the Uruguay Round as having involved more gains for developing countries than any previous trade round,[85] many

80. Conrad, *supra* note 28, at 26 n.77 ("On that point [treatment of generic indicators] the [Lisbon] Agreement is directly contrary to the United States trademark law and the Bureau of Alcohol, Tobacco and Firearms (BATF) regulations (see 27 CFR § 4.24(c)(1)) and was the main reason why the United States has not become a member."); Philippe Zylberg, *Geographical Indications v. Trademarks: The Lisbon Agreement: A Violation of TRIPS?*, 11 U. BALT. INTELL. PROP. L.J. 1, 21 (2003) ("The US was not a signatory of either the Madrid Agreement nor the Lisbon Agreement because of their strict protection and lack of flexibility.").

81. *See* Bendekgey & Mead, *supra* note 56, at 766 ("[T]he United States has been unwilling to restrict use of geographic indications that the public understands as generic, just as it has been willing to afford trademark protection to terms that, in the United States market, denote a business, rather than a geographic, source. Beyond this doctrinal difficulty, there is the obvious problem of retroactivity: it simply seems politically and economically unpalatable to restrict the use of geographic indications that have historically been in the public domain in this country, just as it does to alter the laws in a manner prejudicial to the existing rights of United States trademark owners.").

82. *See* Paris Convention, *supra* note 52; Madrid Agreement, *supra* note 50; Lisbon Agreement, *supra* note 50.

83. Ivy Doster, Note, *A Cheese by Any Other Name: A Palatable Compromise to the Conflict over Geographical Indications*, 59 VAND. L. REV. 873, 892–95 (2006) (summarizing U.S. objections to the European push for protection); *see also* Hughes, *supra* note 34, at 331–42.

84. Obijiofor Aginam, *Between Life and Profit: Global Governance and the Trilogy of Human Rights, Public Health and Pharmaceutical Patents*, 31 N.C. J. INT'L L. & COM. REG. 901, 913 (2006) (noting influence of pharmaceutical industries in TRIPS negotiations); Peter Drahos, *The Regulation of Public Goods*, 7 J. INT'L ECON. L. 321, 335 (2004) (referring to the "business lobbying in the 1980s that eventually produced the signing of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994").

85. Judith H. Bello, *Review of* The Jurisprudence of Gatt & the WTO: Insights on Treaty Law and Economic Relations, 95 AM. J. INT'L L. 984, 986 (2001) (book review) ("Perhaps most notably, the Uruguay Round established rules for 'new' areas of trade law and policy (trade-related intellectual property protection and investment, and trade in services), resolved key problems that had hindered the effective resolution of GATT disputes, and provided benefits especially valuable to many developing

have not been so sanguine.[86] With particular regard to the trademark provisions, developed and developing countries were divided and no power coalition emerged to secure absolute gains in this regard.[87] Nevertheless, there is a telling absence of concepts, values, interests, and priorities that are generally identified as developing country concerns. These concerns are associated not necessarily with location (North versus South) or stage of development, although these are relevant and contributory considerations. Rather, the major issue is whether and how a society mediates the distance between symbols and the goods they represent or with which they become associated. The higher the level of consumerism, the more symbols become necessary (and indeed indispensable) to the market.[88] As one commentator describes, "[a]s the distance between promisor and product grew, consumers turned to a species—Pillsbury or Hormel—as the guarantor of a genus of goods, flour or ham."[89] Consumers make choices "more easily—either more routinely or more impulsively, seemingly—because one object is symbolically more harmonious with our goals, feelings, and self-definitions than another."[90]

Consumers, no matter where they live—New York or Nepal, Paris or Patigi[91]—are not simply engaged in buying goods, they are engaged in interactions that generate and communicate information.[92] Beyond trademark's myth that marks or symbols serve mainly to communicate information about source,[93] empirical work, particularly from the field of

countries (for example, reducing agricultural subsidies and improving access to developed countries' textile and apparel markets by phasing out a long-standing trade-restrictive sectoral agreement)."); Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 372 (1997) ("Economists from industrialized countries have commented on the benefits accrued in the Uruguay Round by developing and emerging countries.").

86. Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735 (1996); Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613 (1996); A. Samuel Oddi, *TRIPS—Natural Rights and a "Polite Form of Economic Imperialism,"* 29 VAND. J. TRANSNAT'L L. 415 (1996).

87. The TRIPS Agreement reflects a compromise between the U.S. and the EU, but there remains dissatisfaction from some countries. Accordingly, GI protection remains a "live" issue in the global market.

88. *See generally* Levy, *supra* note 1, at 117–19; Jerre B. Swann, Sr., *Dilution Redefined for the Year 2002*, 92 TRADEMARK REP. 585, 586–618 (2002).

89. Swann, *supra* note 88, at 587.

90. Levy, *supra* note 1, at 120.

91. A small village on the banks of the River Niger in Nigeria, West Africa, with a population of less than 12,000, known for its pottery artisans.

92. *See* Beebe, *supra* note 41, at 2059–60.

93. This is a stronghold in economic rationalizations of trademark law. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 166 (2003). But scholars have increasingly refuted this claim as a primary utility of trademarks. Trademarks do convey information, but the question is about what information do they convey. Source identification is increasingly far less a communicative function of trademarks. *See* Swann, *supra* note 88, at 591 ("Few

marketing, shows clearly that symbols reflect what the consumer thinks about herself, what she wants others to think about her, and what kind of associations she makes about the trademark given her particular social setting.[94] Thus, in a study examining whether forms of brand associations—overall beliefs about the brand (Kodak is good) versus exemplars (Kodak film)—differences were found between societies in which people view themselves in isolation or independent from others and those that are interdependent.[95] The "independents" tended to show greater reliance on traits of products in order to make judgments; thus association with the brand was found more easily accessible to consumers in such cultures.[96] Conversely, "interdependents," who are characterized by their emphasis on value, context, and interrelatedness, attributed meaning more readily and easily to exemplars of the brand.[97]

It is not a surprise to most that cultural orientation has been shown to influence attitudes and behavior toward manufacturer efforts to differentiate their products and communicate their products' uniqueness—as noted before, communication and distinctiveness are important features of trademark function and policy.[98] Individualistic cultures generally are motivated by personal preferences and view differentiation favorably, while collectivist cultures focus on relationships. Further, individuals within communal contexts are influenced by the preferences of others.[99] Admittedly, these are very broad generalizations. Indeed, some U.S. court decisions recognize the economic value of social identification in the U.S. market.[100] But the point is that cultural settings affect what associations are made by the relevant public to a trademark and, as such, the extent to which that trademark really functions as a source identifier instead of some other social meaning,[101] or both.

strong brands today have source- and quality-limited messages. TIDE, CHEER and IVORY SNOW do not identify different detergent manufacturers—they all, in fact, come from Proctor and Gamble . . . .").

94. In this regard, much work has been done about the symbolism of U.S. trademarks in China. *See, e.g.*, Eckhardt & Houston, *supra* note 1; Yan, *supra* note 48.

95. Sharon Ng & Michael J. Houston, *Exemplars or Beliefs? The Impact of Self-View on Nature and Relative Influence of Brand Associations*, 32 J. CONSUMER RES. 519 (2006).

96. *Id.* at 522–23.

97. *Id.*

98. Jennifer L. Aaker & Durairaj Maheswaran, *The Effect of Cultural Orientation on Persuasion*, 24 J. CONSUMER RES. 315 (1997).

99. *Id.* at 315.

100. *See, e.g.*, Int'l Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 918 (9th Cir. 1980) ("We commonly identify ourselves by displaying emblems expressing allegiances. Our jewelry, clothing, and cars are emblazoned with inscriptions showing the organizations we belong to, the schools we attend, the landmarks we have visited, the sports teams we support, the beverages we imbibe.").

101. *See* David K. Tse, *Understanding Chinese People as Consumers: Past Findings and Future Propositions*, *in* THE HANDBOOK OF CHINESE PSYCHOLOGY 352 (Michael Harris Bond ed., 1996).

1. The Geopolitics of GIs

Cultural orientation affects how consumers respond to a symbol[102] and, ultimately, decisions about buying a product—not only for the product's sake but also for the symbol in and of itself.[103] That developing countries were on both sides of the debate—with the U.S. and EC also divided—speaks loudly to an elemental problem in the international intellectual property system, namely that the centripetal logic of harmonization is a core set of values that most materially resonates in a culture of commoditization and mass marketing. Such a culture is reflected in proprietary norms that de-contextualize products and facilitate consumer association with mere symbols.[104] This would explain why, for example, use of a geographical mark that is unconnected to the goods could be considered an arbitrary mark under U.S. law and thus qualify for the strongest level of trademark protection.[105] On the other hand, in cultures where brands are more likely to be viewed as communicating information about the underlying product and its "fit" into the social context, a geographical mark is a critical factor in the purchasing decision because there is a specific meaning to the consumer about the origin. In such cultural contexts, the symbol alone is insufficiently communicative about the *product*.

The opposite is generally true in a mass-market, consumer-oriented culture. As one scholar tellingly described it almost half a century ago,

> [S]ellers of goods are engaged, whether willfully or not, in selling symbols, as well as practical merchandise. Formerly, . . . [t]he consumer was apt to be an "economic man," who was more or less careful how he distributed his pennies. To do this meant giving closer attention to the concrete value of what he bought . . . . [B]ut today people know that it is hardly the practical considerations which determine their choices between Post's and Kellogg's, Camels and Luckies, Oldsmobiles and Buicks, or Arpege and Chanel No. 5. . . . And, what is more, when they cannot really tell the difference among competitive brands of the same product, they do not believe that a manufacturer should necessarily go

102. *See* Jennifer L. Aaker & Patti Williams, *Empathy Versus Pride: The Influence of Emotional Appeals Across Cultures*, 25 J. CONSUMER RES. 241 (1998).

103. *See generally* Levy, *supra* note 1; *see also* Ng & Houston, *supra* note 95.

104. Levy, *supra* note 1, at 120 ("Choices are made more easily—either more routinely or more impulsively, seemingly—because one object is symbolically more harmonious with our goals, feelings, and self-definitions than another."); *see also* Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labeling*, 19 J. RURAL STUD. 127, 129 (2003).

105. The spectrum of distinctiveness in U.S. trademark law ranges from arbitrary to generic, with arbitrary marks considered the strongest category. *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976). For a rationale of the different treatment of marks along this spectrum of distinctiveness, see Graeme B. Dinwoodie, *Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress*, 75 N.C. L. REV. 471, 500–04 (1997).

out of business because he is unable to produce a distinguishable product.[106]

2. The Political Economy of the GI Outcome in TRIPS

The fact that in a global process intensely driven by common views on intellectual property shared by *developed* countries, which, nonetheless, did not have a united front with respect to GI protection, is not as remarkable as it might appear. Protection for GIs is not neatly divisible into "North-South" conceptions, but the underpinnings of the North-South divide are tellingly evident. The divide is, at its core, about modes of production, export markets, and cultural values in tension with consumerism. In this regard, Western countries vary in their taste for and tolerance of mass marketing and what I term "anonymization"—that is, the indifference and inability to experience products or services other than by the symbols by which they are represented. It is often asserted, for example, that on average the choices of European consumers are still largely affected by considerations of authenticity, quality, and customary production modes with respect to certain goods, including wines, cheeses, and agricultural goods.[107]

Why did the EU settle for the subordination of GIs to trademarks[108] if GI protection is so important to its sense of political well-being? Several possibilities exist but one is particularly worth some reflection. By engaging in a definitional exercise constrained by the forces of historical developments already established in the area of trademark law, and by the coordinated alliance with the U.S. on other intellectual property subjects,[109] could it be that it was precisely the EC's position of power and influence during the negotiations that precluded a more robust consideration of GIs?[110] In political economy terms, the EU had a responsibility and a stake

106. Levy, *supra* note 1, at 117–18.

107. *See, e.g.*, HANNE TORJUSEN, LOTTE SANGSTAD, KATHERINE O'DOHERTY JENSEN & UNNI KJAERNES, EUROPEAN CONSUMERS' CONCEPTIONS OF ORGANIC FOOD: A REVIEW OF AVAILABLE RESEARCH, *available at* http://www.organichaccp.org/haccp_rapport.pdf; European Comm'n, Directorate-General for Agric., Economic Impacts of Genetically Modified Crops on the Agri-Food Sector, http://ec.europa.eu/agriculture/publi/gmo/fullrep/ch4.htm (last visited Apr. 13, 2007).

108. *See* Conrad, *supra* note 28, at 45–46 (noting goals of the TRIPS GI provisions, including preventing the registrability of GIs as trademarks).

109. *See* Okediji, *Public Welfare and the Role of the WTO*, *supra* note 51, at 829 ("The shared objective of heightened global standards for intellectual property engendered a cooperative game among developed countries during the TRIPS negotiations. In game theory, this pre-commitment to cooperation typically alters the expected outcome of the game in unforeseen ways . . . .").

110. *See* Molly Torsen, *Apples and Oranges: French and American Models of Geographic Indications Policies Demonstrate an International Lack of Consensus*, 95 TRADEMARK REP. 1415, 1416 (2005) ("This debate underscores the friction that exists between the sensibilities of the 'Old World' and the new . . . .").

in ensuring a successful outcome of the TRIPS negotiations. Having obtained victory in key areas of the TRIPS Agreement common to U.S./EU interests, and having carved out wines and spirits from other objects of GI protection,[111] the level and scope of protection was something on which the EU could compromise because its principal interests had been satisfied.[112] The losing interests here were not developing countries as such; and what prevailed were also not developed countries. Instead, the outcome of the TRIPS Agreement on GIs reflected the triumph of methods and processes of production divorced from social contexts that might cause a return to considerations of the value of the product over the symbol.

Unlike other categories of intellectual property, GIs represent that "last frontier" in Europe's old world—the space where the developed country coalition lacked a common cultural and normative base from which to operate strategically.[113] And given the strong relationship between GIs and agricultural goods[114]—another sensitive area of the Uruguay Round negotiations—it was important to achieve some success in this regard. Accordingly, a fractionalized scheme was agreed upon, with the most critical subject, namely wines and spirits, splintered off for strong protection[115] while other GIs were left behind as some form of *tertium quid,* or worse, generic marks not susceptible to protection. GIs were thus strategically defined in opposition (or at least in tension) to trademarks, setting the stage for a debate about which would be superior.

B. Trademark Incoherence

Defined to derive their distinctiveness from qualities drawn from natural space, GIs cannot but be less than trademarks.[116] Yet, paradoxically, to

111. TRIPS Agreement, *supra* note 2, art. 23.

112. This should not be taken to suggest that the EU is no longer interested in pursuing strong global protection for GIs. The converse is indeed true. *See, e.g.*, USDA FOREIGN AGRIC. SERV., EUROPEAN UNION, TRADE POLICY MONITORING—GEOGRAPHICAL INDICATIONS: AN OVERVIEW OF THE ARGUMENTS SURROUNDING PROTECTIONS (2003), *available at* www.fas.usda.gov/ gainfiles/200308/145985728.doc.

113. Burkhart Goebel, *Geographical Indications and Trademarks—The Road from Doha*, 93 TRADEMARK REP. 964, 969 (2003) ("Trademarks serve as the main communication tool between a manufacturer and the consumer. Trademarks inform the consumer not only about the origin of a particular product, but carry a variety of different functions in the communication process between brand owners and consumers. Trademarks inform consumers about the quality of a product, they carry emotions, they communicate a certain lifestyle and the like.").

114. Conrad, *supra* note 28, at 31 ("In contrast to the other topics of the Intellectual Property package, this battle was not the typical line-up between the first and the third world, but between the United States and the EC. In essence, it was a fight over agricultural subsidies.").

115. *See* TRIPS Agreement, *supra* note 2, arts. 22–24; *see also* Hughes, *supra* note 34, at 317–19.

116. *See* TRIPS Agreement, *supra* note 2, art. 24(5) (incorporating formally the subordinate status of GIs).

claim a place in the TRIPS trademark regime, GIs must do more than your average trademark.[117] Even within trademark jurisprudence, this trademarks-plus approach is an anomaly. Oppositions to GIs are not credibly framed in the Lanham Act sense as merely about geography. To the contrary, the quality, goodwill, specialized knowledge, practices, and traditions inherent and/or associated with GIs are precisely what trademark law purports to recognize and protect.[118] That these distinguishing qualities derive in part from a comparative advantage related to topography, place, or other natural elements, makes GIs no less capable of distinguishing a product than technology, resources to pay advertising agencies, and advantages of mass media outlets do for trademarks.[119] Further, trademark case law reveals instability about the consumer—who she is and what it is that trademarks really do in the modern market place.[120] It seems clear that source identification—the principle that dealt a *fait accompli* to GIs—is not credi-

117. Zylberg, *supra* note 80, at 30 ("Thus, according to TRIPS, when a trademark and a geographical indication coincide, the trademark always wins.").

118. Steven A. Bowers, *Location, Location, Location: The Case Against Extending Geographical Indication Protection Under the TRIPS Agreement*, 31 AIPLA Q.J. 129, 135 (2003) ("Geographical indications serve a wide range of important functions that have far-reaching economic consequences. First, geographical indications serve as source identifiers, in that 'they identify goods as originating in a particular territory or a region or locality in that territory.' Second, geographical indications serve as indicators of quality, as they inform consumers 'that the goods come from an area where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographic origin.' Finally, geographical indications serve important business interests because they 'promote the goods of a particular area.'" (footnotes omitted)); Jacob Laufer, *Good Faith and Fair Dealing with the American Consumer*, 1987 COLUM. BUS. L. REV. 167, 173–74 ("Trademarks serve three basic purposes: 1) to indicate origin; 2) to guarantee equal quality of all goods under that mark; and 3) as an embodiment of good will."); Jonathan L. Schwartz, *Making the Consumer Watchdog's Bark as Strong as Its Gripe: Complaint Sites and the Changing Dynamic of the Fair Use Defense*, 16 ALB. L.J. SCI. & TECH. 59, 79 (2006) ("Trademark law's most basic objective is to 'reduce[] the customer's costs of shopping and making purchasing decisions' by facilitating 'the flow of information . . . to lead to better-informed [consumers] and . . . competitive markets.' To further this objective, trademarks facilitate a purchaser's identification of 'the quality, history, and dependability of an item.'" (alteration in original) (footnotes omitted)); Zylberg, *supra* note 80, at 61 ("Thus, protecting geographical indications fosters at least a higher level of consumer protection against deception than any other intellectual property right (such as, for example, trademarks).").

119. Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 420 n.212 (1999) ("[A]dvertising and a trademark successfully generate an unthinking buying response—a trained reaction to the presence of a trademark where perception of the mark stimulates hand to wallet without conscious thought—does that represent a legitimate form of welfare enhancement? Were Pavlov's dogs happier after they had been trained to salivate at the sound of a dinner bell?"); *see also* Smith v. Chanel, Inc., 402 F.2d 562, 567 (9th Cir. 1968) ("The primary value of the modern trademark lies in the 'conditioned reflex developed in the buyer by imaginative or often purely monotonous selling of the mark itself.' To the extent that advertising of this type succeeds, it is suggested, the trademark is endowed with sales appeal independent of the quality or price of the product to which it is attached; economically irrational elements are introduced into consumer choices; and the trademark owner is insulated from the normal pressures of price and quality competition. In consequence the competitive system fails to perform its function of allocating available resources efficiently." (citation omitted)).

120. *See* Beebe, *supra* note 41, at 2028 (describing distinctiveness of source as "the first, and increasingly obsolete" function of trademark law (footnote omitted)).

bly at the root of trademark protection today, even in the U.S.[121] Further, consumer perceptions are inherently problematic as a basis for determining distinctiveness.[122] Major doctrinal grounds on which the U.S. has opposed trademark status for GIs are all contested claims in modern trademark jurisprudence.[123]

As it stands today, GIs are neither *really* trademarks nor even more generally "intellectual" property; protection for GIs is not usually listed among the accomplishments of the Agreement, nor for that matter considered a failure or weakness of the TRIPS regime. This cloudiness regarding the form and function of GIs is not, as some commentators have suggested, attributable to any uniqueness of GIs. Instead, the hand-wringing reflects most directly the competing interests, priorities, and values within the relatively settled sphere of North-North intellectual property relations.[124]

III. WHY PROTECTION OF GEOGRAPHICAL TRADEMARKS MATTERS: THE NATIONAL LOGIC OF THE GLOBAL TRADEMARK FUNCTION

"Every so often, there comes along a new symbol, one that makes a leap from the past into the present and that has power because it captures the spirit of the present . . . ."[125]

Intellectual property law at the national level generally absorbs new subject matter with some facility, but the same is not the case within the international framework. The rigidity of intellectual property categorization

121. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1709 (1999) (suggesting that we should not be concerned about the fact that "consumers seem to want to treat trademarks as things in themselves"); Levy, *supra* note 1, at 117 ("[S]ellers of goods are engaged, whether willfully or not, in selling symbols, as well as practical merchandise."); Jerre B. Swann, Sr. et al., *Trademarks and Marketing*, 91 TRADEMARK REP. 787, 793 (2001) ("Source, for many experience goods, is not merely anonymous; it is irrelevant and can be counterproductive.").

122. *See* Beebe *supra* note 41, at 2021 n.1 ("[T]he perfect convergence advertisers seek between the sign, corporate, and consumer identity is an indelibly precarious enterprise because it relies on traditionally unstable tools like image, suggestion, and visual expression to build economic value. By relying on these unstable tools—speech, suggestion, performance—a trademark becomes Janus-faced, both mutable and immutable at the same time." (quoting Sonia K. Katyal, Anti-Branding (Sept. 20, 2004) (unpublished working paper))).

123. Graeme Dinwoodie puts the questions squarely when he states that considerations of trademark rules ought to be weighed against trademark's purposes reflecting social practices that are already in a state of flux. *See* Dinwoodie, *supra* note 24, at 889.

124. *See* Okediji, *Public Welfare and the Role of the WTO*, *supra* note 51, at 840–41, 848–49, 854 (describing the EU/U.S. TRIPS negotiating alliance as a "policy blind" coalition; such coalitions are rooted in power and tend to obscure the policy differences between members of the coalition). The split over geographic indicators, however, divided the U.S. and the EC. *See* Bendekgey & Mead, *supra* note 56, at 766 ("The divergent evolutions of the older and newer economies have resulted in an international conflict over the proper treatment and protection of geographic indications.").

125. Levy, *supra* note 1, at 124.

at the international level is partly a reflection of the minimalist approach that has defined the process of intellectual property harmonization for over two centuries,[126] as well as the absence of competent institutions mandated with the task of generating a normative context within which global intellectual property obligations could be derived. While there are concerns about the capacity of the WTO dispute settlement process to effectively generate balanced norms,[127] particularly in the absence of compelling language in the TRIPS Agreement to this effect, this is precisely what the seminal WTO Panel Report[128] on GIs heroically attempted to accomplish, but it did so on terms of trademark superiority.[129] The Panel, building on the canonical rule of treaty interpretation,[130] built into its analysis a per se exclusion of GIs from trademarks, indeed from intellectual property subject matter entirely. According to the Panel, "[t]he object and purpose of the TRIPS Agreement . . . includes the provision of adequate standards and principles concerning the availability, scope, use and enforcement of trade-related intellectual property rights."[131] In light of this, the Panel concluded that "under Article 16.1 of the TRIPS Agreement, Members are required to make available to trademark owners a right against certain uses, including uses as a GI."[132]

126. *See* Ruth L. Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 142 (Keith E. Maskus & Jerome H. Reichman eds., 2005) (discussing the stages of copyright multilateralism and the structure of the Berne Convention); *see also* RUTH L. OKEDIJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES (2006), *available at* www.iprsonline.org.

> At its genesis, the Berne Convention served primarily a coordinative function, which was to correlate existing national laws and practices into a core of international minimum standards for the protection of copyrighted works. Given its elemental goal of building consensus on basic norms and thus eliminating discrimination against works of foreigners, the Berne Convention was originally "pragmatically instrumental." It combined common elements of national laws, national practice and bilateral agreements to derive a set of normative criteria that would produce the necessary compromise for a multilateral accord on copyright.

Id. at 5 (footnotes omitted).

127. *See* Okediji, *Public Welfare and the Role of the WTO*, *supra* note 51, at 822–23.

128. *See* Panel Report, *supra* note 5.

129. *See id.*

130. *See* Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

131. *See* Panel Report, *supra* note 5, ¶ 7.620.

132. *See* Panel Report, *supra* note 5, ¶ 7.625.

A. *Constructing GIs in the TRIPS Agreement: Issues of Text and Pretext*

Assertions of the value of GIs to developing countries, the overlap between the protection of geographical indicators and traditional knowledge, and the particularly strong resistance of the U.S. to geographical indicators earmark the "quibble" over the scope of protection for GIs, with all the indicators of a classic North-South debate over the legitimacy of proprietary rights. Importantly, the quibble exposes cultural cleavages in the face of a treaty that represents a zenith in utilitarian justifications for intellectual property, and imposes those justifications as a mandatory global paradigm that is, ironically, largely predicated on cultural assumptions about the creative process.[133] It is precisely the strenuous, even if historically inexact, effort to strip intellectual property completely from national cultural moorings[134] that now presents our relatively innocuous global trademark law[135] with the injudicious demarcation between trademarks and GIs.

Unlike copyright or patent law definitions in the TRIPS Agreement, which admit no qualifiers, TRIPS Article 22(1) defines GIs "for the purposes of this Agreement" only. Thus, while GIs could and almost certainly do encompass trademark functionality, they are recognized in a much more limited fashion under the TRIPS Agreement.[136] The rationale for a narrow conception of GIs arguably has both substantive and instrumentalist merit. Formally, GIs as a category of intellectual property were invented by the TRIPS Agreement. Given the various multilateral treaties already in existence to address distinct aspects of geographical denominators of goods, a narrow definition could provide greater substantive coherence in the family of related treaties. Further, in keeping with the commitment to respect pre-

133. *See generally* Gana, *supra* note 4.

134. As I have argued elsewhere, there is indeed a culture to international intellectual property law; culture underlies, informs, and molds national intellectual property law doctrines even in developed countries. That these doctrines and norms are cloaked in utilitarian terms such as "economic" or "efficient" cannot obscure the values and priorities that permeate and reflect particular views of the world—or put simply, "culture."

135. Of all the intellectual property subject matters, trademark law has largely been devoid of the suspicion, incredulity, and conflict that pervades patent and, to a lesser degree, copyright law. From a developing country perspective, global trademark regulation is rarely confronted by claims of economic irrelevance, cultural inappropriateness, or adverse effects of adopting a trademark regime. Indeed, as evident in the debate about geographical indications, the demand for strong geographical indication protection has disrupted the traditional alliance between the EU and the U.S. over global intellectual property protection, and instead created unusual partnerships between the EU and developing countries.

136. TRIPS Agreement, *supra* note 2, art. 22(1) ("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)); GERVAIS, *supra* note 33, at 184–87 (discussing various proposals for definitions of geographical indications, including some that combined both geographical indications and appellations of origin).

existing intellectual property agreements[137] (which omitted most of those directly relevant to GIs),[138] a narrow conception of GIs had the advantage of minimizing substantial overlap or the potential for conflict. And third, as an instrumental matter, a narrow definition facilitated agreement on the broad principles on which the demandeurs of strong protection for GIs staked their claims.

B. Reconceiving and Reframing What Geographical Indications Tell Us About Them, Us, and "That Place"

There is no serious question that GIs can and do function as trademarks.[139] But the converse is also true: trademarks function as geographical indications. The focus has unnecessarily been directed at distinguishing GIs from trademarks, rather than assessing how trademarks function to identify origin in less restrictive ways than simply a business source, and as such, invariably function similarly to GIs. Even if, arguendo, distinctiveness were a stable, consistent doctrinal force with which GIs must contend, there is a murky middle where countries, including the U.S., would argue that trademark-style protection for GIs is feasible[140] and perhaps even appropriate.[141]

1. The Geography of Consumer Confusion and the Inadequacy of Geographic Marks as a Possible Solution

In general, objections to trademark protection for GIs are intertwined around cultural expectations and, as such, tend to cluster around a basic theme, namely that such indications are not distinctive in the sense of associating a product with an origin other than geography or that trademark law is too limited a tool to protect all that GIs might represent to a particular

137. *See* TRIPS Agreement, *supra* note 2, art. 2.

138. *See id.*

139. Gangjee, *supra* note 6, at 1254 (noting that "the distilled essence of trademarks and GI's is that they both regulate the use of signs in the marketplace. . . .").

140. This is not surprising from a U.S. perspective. There is no absolute proscription against geographic marks under the Lanham Act unless such marks are deceptive. Geographic marks that are neither deceptive nor primarily geographically and deceptively misdescriptive are registrable upon a showing of secondary meaning.

141. Lilian V. Faulhaber, Note, *Cured Meat and Idaho Potatoes: A Comparative Analysis of European and American Protection and Enforcement of Geographic Indications of Foodstuffs*, 11 COLUM. J. EUR. L. 623, 625 (2005) (noting that the U.S. provides greater protection to geographic indications of foodstuffs than Article 22 of the TRIPS agreement requires); Zylberg, *supra* note 80, at 22 ("Because the Paris Convention only provides for limited protection for geographical indications, the US was among its signatories.").

community.[142] I have already addressed the former issue above. With regard to the latter concern, which invokes the geographical indication/traditional knowledge overlap, the objection to trademark law as a paradigm for protection inverts the usual perspective from which conventional justifications for trademarks arise, namely the perspective of the consumer. While protecting owners from unfair competition is important, the central goal of contemporary trademark law is to prevent consumer confusion.[143] This concern is the key premise for enforcing the exclusive rights of trademark owners.[144]

As with other principles discussed earlier in this paper, the concept of consumer confusion is highly contextual. In the GI debate, geographical marks have been identified as a possible "fit" for GI protection under the trademark rubric. This may be plausible but there are reasons why such a fit is inappropriate. In determining whether a geographic mark is protectible as a trademark, three factors are generally considered: (1) is the primary significance of the mark geographic; (2) would purchasers likely make a goods/place association (i.e., think that the goods or services originate in the geographic place identified in the mark); and (3) does the mark identify the geographic origin of the goods or services?[145] The U.S. Court of Customs and Patent Appeals put the consumer squarely at the center of the analysis: "[i]f the goods do not come from the place named, and the public makes no goods-place association, the public is not deceived and the

142. *See* RaoRane, *supra* note 11; Silke von Lewinski, *The Protection of Folklore*, 11 CARDOZO J. INT'L & COMP. L. 747, 762–63 (2003).

143. Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 630–31 (6th Cir. 2002) (noting trademark law's goal of protecting distinctiveness and avoiding consumer confusion); *see also* Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 567 (2006); Maxim Grinberg, *The WIPO* Joint Recommendation Protecting Well-Known Marks *and the Forgotten Goodwill*, 5 CHI.-KENT J. INTELL. PROP. 1, 3 (2005) ("The underlying policy of trademark law is to protect consumers from confusion as to the source of the products they buy.").

144. Exclusivity in trademark law is, of course, not as robust as it is in patent law. For example, trademark law in the U.S. recognizes geographic space constraints based on use of the mark. *See, e.g.*, United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 98–99 (1918) ("The owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly. In truth, a trade-mark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one's good-will . . . ." (citations omitted)); *see also* Dawn Donut Co., Inc. v. Hart's Food Stores, Inc., 267 F.2d 358 (2d Cir. 1959) (denying plaintiff, owner of a registered mark, any accounting or damages because the parties operated in different markets and there was no likelihood of confusion. The court did note however, that because of the constructive notice provision of the Lanham Act, the plaintiff could later show intent to use the mark in the defendant's market area and at that point would be entitled to enjoin the defendant's use of the mark.). Further, under the common law, good faith concurrent use of a mark is permitted and concurrent use registrations are permissible. *See* 15 U.S.C. § 1052(d) (2000); *see also* U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1207.04 (4th ed. 2005).

145. U.S. PATENT & TRADEMARK OFFICE, *supra* note 144, § 1210.01(a).

mark is accordingly not geographically deceptively misdescriptive."[146] The core question on which protection of geographic marks hinges is how consumers perceive or understand the mark.[147]

The measure of consumer perception (and thus likelihood of confusion) for GIs is problematic for a number of important reasons. First, despite being the subject of caricatures, it is no laughing matter for proponents of GIs that knowledge or awareness of geography is disturbingly low in the U.S.[148] This creates something of a paradox in considering treatment of GIs as trademarks. If consumers do not make the goods/place association due to ignorance, this counts in favor of a finding that the mark *is* protectible.[149] If consumers do make the goods/place association, the converse is true (i.e., this counts *against* finding that the mark is protectible). If the other factors are also present, the mark likely will be deemed primarily a geographic mark and thus not protectible under the Lanham Act in the absence of secondary meaning. To add insult to injury, a U.S. business could appropriate a GI, capitalize on geographic ignorance in the U.S., and thus have one factor (i.e., no goods/place association) in its favor, and yet not fall afoul of the prohibition against deceptive marks. Using a geographical mark is not deceptive under the Lanham Act unless it is clear that an intent to deceive is present.[150] At least one court has added a materiality element to the test.[151]

146. *In re* Nanatucket, Inc., 677 F.2d 95, 99 (C.C.P.A. 1982).

147. Bendekgey & Mead, *supra* note 56, at 769 ("Under United States trademark law principles, consumer perceptions are of paramount importance. Thus, the critical distinction between a word, name, symbol, or device that serves as a trademark, and one that serves as a geographic indication or appellation of origin but not as a trademark, depends on what consumers perceive."); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory of Fait Accompli?*, 54 EMORY L.J. 461, 487 (2005) ("In the context of likelihood of confusion analysis, trademark law has traditionally adapted itself to reflect societal norms, rendering a use illegal if but only if it confuses consumers.").

148. Becky Orr, *How Well Do Young Americans Know the Globe?*, WYO. TRIBUNE-EAGLE, Nov. 5, 2006 ("A 2006 survey conducted by the National Geographic Society concluded that most Americans between the ages of 18 and 24 don't know enough geography and that geography illiteracy is unacceptably high."); Nat'l Geographic, 2006 National Geographic-Roper Survey of Geographic Literacy: What We Found, http://www.nationalgeographic.com/roper2006/findings.html (last visited Apr. 14, 2007).

> [M]ajorities of young adults fail at a range of questions testing their basic geographic literacy. Only 37% of young Americans can find Iraq on a map—though U.S. troops have been there since 2003. 6 in 10 young Americans don't speak a foreign language fluently. 20% of young Americans think Sudan is in Asia. (It's the largest country in Africa.) 48% of young Americans believe the majority population in India is Muslim. (It's Hindu—by a landslide.) Half of young Americans can't find New York on a map.

Id.

149. *See* Consorzio del Prosciutto di Parma v. Parma Sausage Products, Inc., 23 U.S.P.Q.2d (BNA) 1894, 1898 n.5 (T.T.A.B. 1992) (noting a lack of evidence that the consuming public was aware of Parma, Italy, as a geographical location, which was the source of prosciutto).

150. *In re* Amerise, 160 U.S.P.Q. (BNA) 687, 691 (T.T.A.B. 1969).

151. *In re* Cal. Innovations, Inc., 329 F.3d 1334, 1336–37 (Fed. Cir. 2003).

2. The Trademark Value of Attribution

Turning to a brief application of the test, the answer to the first question, "is the primary significance of the mark geographic?," is not entirely straightforward in the U.S. context where GIs are concerned. The fact is that U.S. consumers tend to think quite highly of goods from certain parts of Europe and thus domestic producers of similar goods benefit from using foreign names on their products. Adopting a GI as a trademark in the U.S. is profitable precisely because consumers attribute the origin to that foreign locale. Even where an actual association between the geographic region and the product does not exist, foreign names/regions evoke mental images in the mind of a consumer that may have persuasive effect on the purchasing decision. To use the ubiquitousness of American fast food as an example, once again, eating McDonald's food in China or Johannesburg is likely more about associating with something "foreign" or explicitly "American."[152] Thus there is a way in which the answer to the first element is not necessarily or ineluctably "yes." Just as Paris may evoke images of idyllic romance, Silicon Valley images of computer chips and dynamic geek-entrepreneurs, or Rodeo Drive expensive fashionable boutiques, GIs have an attributional element that should not be overlooked. As one scholar recently noted,

> Attribution has a commodity value distinct from the value of the intellectual property or human capital to which it is attached. The commodity value of credit is entirely informational: it tells consumers, current and prospective employers, creators, and the world at large about products and their creators. The commodity value of credit and blame is dissipated if the right to it is transferred because the information is lost. Attribution is a type of signal . . . .[153]

Indeed, where the primary significance of the mark is to evoke images of carefully cultivated vineyards, master tutors passing on ancient secrets of meat production, or to persuade consumers of product quality and authenticity, then the significance of a GI encompasses more than geography. Or at least, it is geography imbued with a signaling function appealing to consumers interested in identifying with the images of ancient rites and great skill in making the product. In a world where ignorance counts negatively for a GI holder but attribution holds a distinguishing quality that conveys meaning to consumers, the weight of the third factor, "does the mark iden-

152. Eckhardt & Houston, *supra* note 1, at 76 (noting that in certain scenarios set in China, the McDonald's brand is deemed "novel and prestigious but yet not meaningful or deep because its foreignness is also prominent"); *see also id.* at 77.

153. Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 54 (2006).

tify the geographic origin of the goods or services?," may not be so significant.

Put differently, trademarks, once exported from a particular social, economic, and political context, signify a much more elastic kind of "origin" than is narrowly conceived at the national level. The mark "Coca-Cola" in Johannesburg, Tokyo, or Beijing surely does not signify origin in a trademark sense in those countries. Instead, what it might signify is "American," which in turn could be short form for status, class, or membership "in a group."[154] Consumers wanting a taste (literally) of American culture or an association with the imagery of life in the U.S. may choose McDonald's, Coke, or Pizza Hut for all these reasons.[155] "Origin" in this sense of the foreign consumer is all about geography and how geographic location invokes particular associations in a particular market.[156] This fact is amplified in that marketing strategy in foreign markets takes into account local peculiarities, and goods are often adapted to conform to domestic culinary tastes and/or sensitivities.[157] Thus, in one manner, the product on which the mark is affixed varies from jurisdiction to jurisdiction; all that the mark does in this regard is to give consumers an external association. This has been evidenced by studies that demonstrate the influence of culture on consumer brand association.[158] Societies in which community and interdependence define social interaction respond differently to marketing stimuli, advertising, and, ultimately, brand association.[159] As indicated earlier, one study has found that in cultures that emphasize interdependence, consumers focus more on specific products and respond favorably to context. Thus, particularized information is important as opposed to gener-

154. *See* Eckhardt & Houston, *supra* note 1.

155. Joel B. Eisen, *The Trajectory of "Normal" After 9/11: Trauma, Recovery and Post-Traumatic Societal Adaptation*, 14 FORDHAM ENVTL. L.J. 499, 548 (2003) (citing ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE AMERICAN MEAL 243–44 (2001)) ("McDonalds' restaurants are viewed as archetypal symbols of America throughout the world."); Ron Ruggles, *China Syndrome: U.S. Chains Tap Billion-Consumer Market*, NATION'S RESTAURANT NEWS, Nov. 15, 2004, *available at* http://www.findarticles.com/p/articles/mi_m3190/is_46_38/ai_n7584417 (noting status appeal of Western brands to Chinese consumers).

156. Maria Luz Loureiro & Jill J. McCluskey, *Assessing Consumer Response to Protected Geographical Identification Labeling*, 16 AGRIBUSINESS 309, 309 (2000) ("This escalating demand for high quality and high status products and a desire for cultural identification have created a growing market for value-added products that carry a strong identification with a particular geographical region."). "In the same way, the 'country-of-origin-effect' has significant implications for international trade and consumer's perception of quality products." *Id.* at 311.

157. *See, e.g.*, Ram Ramgopal, *The Maharaja Mac: Fast-food Indian Style—Spicing It up for the Indian Market*, CNN.COM, July 14, 2002, http://archives.cnn.com/2002/WORLD/asiapcf/south/07/14/india.spicy.fast.food/index.html (last visited Apr. 14, 2007) (describing how McDonald's has adapted its offerings in India).

158. *See* Ng & Houston, *supra* note 95.

159. *See id.*; Aaker & Maheswaran, *supra* note 98; Aaker & Williams, *supra* note 102.

alizations. Yet, trademark policy is directed at generalized information about origin, rather than specific instantiations of peculiar attributes as is the case with GIs.

3. The Challenge of Origin and Country-of-Origin Rules

But perhaps, the real question is what counts as "origin" under the Lanham Act. In discussing GI protection, commentators are quick to start with the proposition that the function of trademark law is to denote the origin of a product, which is typically a business entity.[160] While this austere rendition of this rule is accurate, it does not tell the whole story. As Justice Scalia recently noted, origin is another trademark term that is elastic in nature.[161] In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, a near unanimous U.S. Supreme Court noted that origin under § 43(a) of the Lanham Act includes geographical origin as well as origin of source or manufacture.[162] Acknowledging that with respect to certain types of goods consumers are interested in attribution-as-origin, the Court explained,

> It could be argued, perhaps, that the reality of purchaser concern is different for what might be called a communicative product—one that is valued not primarily for its physical qualities, such as a hammer, but for the intellectual content that it conveys, such as a book or, as here, a video. The purchaser of a novel is interested not merely, if at all, in the identity of the producer of the physical tome (the publisher), but also, and indeed primarily, in the identity of the creator of the story it conveys (the author). And the author, of course, has at least as much interest in avoiding passing off (or reverse passing off) of his creation as does the publisher. For such a communicative product (the argument goes) "origin of goods" in § 43(a) must be deemed to include not merely the producer of the physical item (the publishing house Farrar, Straus and Giroux, or the video producer Dastar) but also the creator of the content that the physical item conveys (the author Tom Wolfe, or—assertedly—respondents).[163]

The Court ultimately found this argument problematic for several reasons relating mostly to copyright policy,[164] but also the implications of such attribution-as-origin for claims arising under the Lanham Act.[165] Nevertheless, there is value in evaluating GIs as a reflection of innovation, attribution, production, and geography. If consumers care where a product was made because they associate or attribute certain values with that place,

160. Bendekgey & Mead, *supra* note 56, at 765–66.
161. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 28–31 (2003).
162. *Id.* at 29–30.
163. *Id.* at 33.
164. *See id.* at 30–37.
165. *See id.* at 36.

GIs certainly can lay equal claim to much of how modern trademarks operate in the market.

Some proposals have advocated use of country-of-origin rules as a possible recourse for GI owners. Country-of-origin rules may complicate matters in this regard, since the signaling function of a trademark could be disrupted by the requirements that producers should indicate from where the product originates.[166] Indeed, it was precisely to create such signaling confusion that some developing countries such as India insisted, prior to the TRIPS Agreement, on the integration of foreign trademarks with local trademarks when marketing the products domestically.[167]

A strong body of research shows that trademarks in foreign settings generate higher awareness by consumers and thus have significant economic leverage in today's market, especially since "customers have displayed a willingness to pay higher prices for products originating from desirable locations."[168] Accordingly, like trademarks and GIs,

> [c]ountry-of-origin [indicators are] often viewed as a piece of information that helps consumers assess the quality/reliability of products from that country and subsequently affects purchase intentions. A product's country-of-origin activates concepts about the country and the general quality of products originating from there. . . . and the psychological processes underlying these evaluations can be affected by consumer factors such as motivation—the personal relevance of the decision or product to evaluate—or product familiarity or experience.[169]

When a GI also is protected as a trademark, country-of-origin rules administered outside of the trademark system actually serve to reinforce the trademark function of communicating information to consumers. According to one source,

> COO [country of origin] effects sometimes rival the effects of price, brand name, and specific product attributes in determining preferences, but there is considerable variation in relative importance by product category. It is likely that the variation in the relative importance of COO

166. Irvine Clarke, III et al., *Integrating Country of Origin into Global Marketing Strategy*, 17 INT'L MARKETING REV. 114 (2000) ("From the other side of the argument regarding country of origin, it may also be that the company would be best served by not having its goods marked as 'Made in America.' One example of this can be seen in the high quality perceptions of US consumers toward products made in Japan or Germany. It may be that goods from these countries would automatically be afforded perceptual quality simply based on the perceived country of origin. Certainly, US carmakers have heavily relied on improved perceptions after announcements of joint ventures with Japanese carmakers. Sometimes, even confusion over the country-of-origin markings can help, as was the case when the Saturn was introduced, since many Americans thought that it was a Japanese car.").

167. WATAL, *supra* note 33, at 251.

168. Clarke, III et al., *supra* note 166, at 114–15.

169. Dale W. Russell & Cristel Antonia Russell, *Explicit and Implicit Catalysts of Consumer Resistance: The Effects of Animosity, Cultural Salience and Country-of-Origin on Subsequent Choice*, 23 INT'L J. RES. MARKETING 321, 322 (2006) (citations omitted).

> across product categories is based on consumers' perceptions of "core competencies" associated with specific countries. When a country's core competencies are relevant to assessing the quality of a product (e.g., German engineering, French fashion and style, Japanese electronics, etc.), the COO effect is magnified.[170]

The effect of country-of-origin information on consumers' perceptions about quality[171] and their willingness (or otherwise) to purchase the product also goes directly to the cultural context in which the consumers' decisions are made. In cultures where interdependence and social connectivity is significant, consumers will rely more heavily on particular or discrete exemplars; thus, trademarks as indicators of particular origin may not be as valuable.[172] However, in atomistic cultures with independent values, a brand generates loyalty and will likely evoke the source-identifying function of trademark law more quickly.[173] Accordingly, cultural tendencies could also tell us who favors strong geographical protection and who benefits from weak GI protection.

The combination of a strong cachet for foreign goods, the perceptions of quality associated with foreign goods, and the low entry barrier for U.S. producers who want to use foreign names is at least one scenario in which the battle over who gets to use geographical information on products is of significant economic value today. The market for foreign-labeled goods is estimated to be about 1.7 billion dollars.[174] If use of a GI will facilitate a domestic producer's accessibility to this market, then legal protection of GIs is not merely about the niceties of trademark doctrine but entirely about market share and sustainability in a global marketplace.

C. *Rescuing (International) Intellectual Property Law from the World: Why GIs Matter as Marks*

As many have argued, intellectual property law is much more and *does* much more than just respond to the public goods nature of intangible works. The objects at issue are a reflection of ways, methods, and practices

170. Charles S. Areni, *An Examination of the Impact of Product Organization and Region Equity on the Comparison and Selection of Wines*, 26 ADVANCED CONSUMER RES. 359, 359 (1999) (citations omitted).

171. John Gwin & William Kehoe, *United States Market Entry: Strategic Imperatives*, 1999 J. MARKETING MGMT. 60, 60 ("In today's US marketplace, the reverse situation is often true. Products from other countries are increasing in number, their market shares often challenge or outpace domestic products, and a product displaying a 'made in a foreign country' label has cachet.").

172. *See* Ng & Houston, *supra* note 95, at 523.

173. *Id.*

174. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 2007, at tbl.1284 (2006), *available at* http://www.census.gov/prod/2006pubs/07statab/foreign.pdf (reporting total value of imports for consumption as 1,662.4 billion dollars).

of production that conform to particular historiographies, environments, cultures, and, yes, ultimately markets. The peculiar rules of patents, copyright, and trademarks are all intrinsically and unavoidably rooted in specific cultural moments, reflecting important values to a nation—whether that value is purely economic or essentially tradition-based. For example, the fact that copyright protects only "fixed" expressions or that unwritten prior art does not operate as a bar to patentability are not scientifically derived notions inherent in the subject matter itself.[175] Instead, these rules about definitions, scope, and nature of rights granted are best understood as methods of channeling particular values into legal doctrine. Thus, for example, values of individuality and self-expression are reflected in the assumptions that undergird authorship in copyright law; the fixation requirement reflects the value of the written word in most European cultures; and the discriminatory prior art rules that facilitate appropriation of non-written useful knowledge generated outside of the U.S. reflect the perceived ascendancy of formal knowledge.[176]

To the extent that global rules regarding trademarks seek to reflect a global market place, the principles of priority and use are unlikely to afford the facility necessary to also reflect the reality that consumer associations of trademarks may be wholly separated from the product's origin. Having been thrust into the spotlight of world trade, greater effort must be made in trademark law and policy to coordinate values and priorities. These efforts must occur not under the pretext that contemporary doctrines are inherently neutral, but rather by unmasking and isolating those underlying principles to determine if there is a basis for a one-size-fits-all regime.

GIs should be considered trademarks because in many respects they arguably are more credibly consistent with the classic policies underlying trademark protection. They provide an important "speed bump" in an economy where producers increasingly labor to differentiate their products based not on quality but on brand image. GIs disrupt the homogenizing tendency associated with the age of mass marketing and thus potentially facilitate differentiation more effectively by compelling investments into

175. Rochelle Cooper Dreyfuss, *A Wiseguy's Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 SUP. CT. REV. 195, 221–22 ("[A]dvances in production and reproduction make it increasingly clear that the distinctions that seemed to be inherent in the terms 'patent' and 'copyright' are in fact illusory because they fail to capture anything that is significant about the products of human intellect."); Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1816 (1984) ("[I]t is well known that the empirical foundations for current patent policy are shaky at best.").

176. *See* Bagley, *supra* note 21.

underlying products[177] over image,[178] and thus improve the value *to consumers* of being able to identify a particular source as the origin of a product.[179] While a fuzzy consensus exists about the principle of protecting GIs, there is significant dispute about the scope and purpose of GI trademark function. Even where such function can be found, there is ongoing controversy over the appropriateness of absorbing GI protection into a trademark system based on "priority"[180] rather than superiority, sociological relevance, or other value. In other words, while there is certainly nothing implausible about mechanically applying existing trademark jurisprudence to resolve conflicts between claimants of marks based on commercial origin and those based on geographically derived values (commercial or otherwise), there is equally nothing ineluctable about this resolution. The resolution lies squarely in the answer to a question posited by Graeme Dinwoodie: "should trademark law be structured reactively to protect whatever consumer understandings or producer goodwill develops, or should it proactively seek to shape the ways in which consumers shop and producers sell or seek to acquire rights, thus shaping how the economy functions?"[181] Currently, arguments in favor of trademarks over GIs point towards the former.

D. The Limits of the Reconciliation Paradigm

The determined effort to reconcile trademarks and GIs within a trademark rationale has occasioned a paucity of proposals to reconsider the question of what trademarks do and why, and thus to imagine alternative solutions in a neutral space. Using trademark priority as a starting point

177. Industries that are knowledge-intensive or dependent on assurance of quality demonstrate high investment in foreign sourcing. *See* Mark Casson, *The Theory of Foreign Direct Investment*, *in* THE ECONOMIC THEORY OF THE MULTINATIONAL ENTERPRISE 113 (Peter J. Buckley & Mark Casson eds., 1985); Victor V. Cordell, *Effects of Consumer Preferences for Foreign Sourced Products*, 23 J. INT'L BUS. STUD. 251, 251–52 (1992).

178. Levy, *supra* note 1, at 117 (noting that as American society has become less concerned about "a survival level of existence," consumer responses to the quality of goods are more abstract). As a result, "the market place is increasingly . . . symbolic [and] . . . it means that sellers of goods are engaged, whether willfully or not, in selling symbols, as well as practical merchandise." *Id.*

179. For example, it is well established that the country of origin of a product affects, among other things, perceptions of product quality. *See, e.g.*, Sung-Tai Hong & Robert S. Wyer, Jr, *Effects of Country-of-Origin and Product-Attribute Information on Product Evaluation: An Information Processing Perspective*, 16 J. CONSUMER RES. 175 (1989); Sing-Tai Hong & Robert S. Wyer, Jr, *Determinants of Product Evaluation: Effects of the Time Interval Between Knowledge of a Product's Country of Origin and Information About Its Specific Attributes*, 17 J. CONSUMER RES. 277 (1990); Johny K. Johansson, Susan P. Douglas & Ikujiro Nonaka, *Assessing the Impact of Country of Origin on Product Evaluations: A New Methodological Perspective*, 22 J. MARKETING RES. 388 (1985); Johny K. Johansson & Hans B. Thorelli, *International Product Positioning*, J. INT'L BUS. STUD. 57 (1985).

180. Gangjee, *supra* note 6, at 1269–70.

181. *See* Dinwoodie, *supra* note 24, at 889–90.

automatically preempts any real global alternatives because priority is generally nationally constructed. Proposals to "reconcile" both objects inevitably relegate GIs to the periphery. And while such Solomonic wisdom is plausible, it is not entirely satisfactory. The reconciliation approach dilutes GIs by casting them merely as descriptive marks whose utility is constrained by requiring non-trademark use of GIs. Yet, if priority of use were to be considered outside the narrow confines of existing doctrine one might, for example, imagine a regime where GIs are considered a form of prior art limiting the trademark owner's use of the priority club.

Reconciling priority disputes between trademarks derived primarily or solely from commercial origin and those derived from other values in addition to commerce is persuasively possible without much disequilibrium to the traditional trademark jurisprudence.[182] However, doing so assumes an implicit accuracy that priority is an absolute concept, that it is mostly what should count in trademark law, and that cultural values have no economic merit. Recent developments in both patent and copyright law tell us that these assumptions are not scientific and do not have to govern the global discourse. The choice to make them the primary determinants of the role and function of GIs in the global economy is one made not by economics or legal doctrine but by power and the politics of identity.

CONCLUSION

The essential weakness of the TRIPS Agreement, and what lies at the core of the North-South divide, is the failure of the international intellectual property system to reflect interests or values that are not manifestly dominant in the societies of post-modern economies. That the subject of GIs made it to the world stage, and that interest in strong protection is shared by some developing countries and the EU, while opposed by other developing countries and the U.S., is not an indication that the TRIPS Agreement cracked open a door of something plausibly beneficial for developing countries. Indeed, many doubt the benefit of GI protection for developing countries.[183] Instead, the debate over GI protection may be no more than feeble attempts to place road signs on the autobahn of high consumerism. And in the end, it may simply be a question of two powers—the U.S. and EU—traveling at different speeds but ultimately going to the same destination.

182. Indeed, this is precisely the object of Dr. Gangjee's proposed solution to the conflict between trademarks and GIs.

183. *See, e.g.*, REPORT OF THE COMMISSION, *supra* note 7.