

# *Coffee and chocolate – can we help developing country farmers through geographical indications?*

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“Coffee is simply an export crop to be consumed elsewhere. A major exception is when quality is embedded in a geographical origin (national, regional, local, or single-estate). When this is the case, producers and their cooperatives, associations or governments create symbolic attributes. It is not only the material coffee that is sold, but also a place, a story, sometimes a sense of exoticism.”

Daviron & Ponte<sup>1</sup>

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<sup>1</sup> BENOIT DAVIRON AND STEFANO PONTE, *THE COFFEE PARADOX – GLOBAL MARKETS, COMMODITY TRADE, AND THE ELUSIVE PROMISE OF DEVELOPMENT* 129 (Zed Books, 2005)

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DRAFT

## INTRODUCTION AND EXECUTIVE SUMMARY

The changes in the production, distribution, and consumption of food that occurred in the nineteenth and twentieth centuries are commonly described with a few key terms: homogenization, commodification, standardization, and consistency. Adoption of irrigation, fertilization, and pesticide practices made harvests more consistent; vast changes in distribution produced temporal homogenization in the sense that fresh strawberries, grapes, and apples became available year around whether they come from California, Ohio, Chile, Spain, or New Zealand. Commodification of basic products – establishing quality and measurement standards for wheat, corn, flour, eggs, dairy products, seafood, and all other kinds of ingredients for our cooking – became the basis for industrial scale production of processed foods, permitting standardization in the final product consumed, whether it is a packaged juice box on a grocery store shelf in Amsterdam or Atlanta – or the burger made right before your eyes at a Wendy's in Kansas City or Kuala Lumpur.

For many decades, there have also been counter-currents against this homogenization and commodification of food culture. Today consumers in wealthy countries continue to look for ways to differentiate their food intakes from mainstream, homogenized supplies, seeking better or special qualities in their products. Some of the differentiating characteristics being sought by these consumers are endogenous to the product, i.e. “organic,” “natural,” or “without RBH.” Some of the characteristics being sought by consumers are exogenous to the product, i.e. “fair trade” or “local” [where the sought characteristic is minimal transportation, not a particular locale]. Some of the distinguishing characteristics – and, therefore, identifiers -- for food are arguably both endogenous and exogenous. For example, “hallal” or “kosher” for meat imparts exogenous information about minimizing the pain the animal experienced in slaughter, but can also impart endogenous information about sanitation. “Shade grown” imparts principally exogenous information – the cultivation occurs in a way that permits a

broader, contemporaneous eco-system – but can also impart endogenous information if one believes that shade-grown plants produce a different quality or taste.

Perhaps the greatest force in de-homogenizing and decommodifying food markets today is increasing consumer interest in products of distinct *geographic origins*. This is visible in supermarkets more and more displaying the source of produce (*California, New Zealand, etc.*) and in farmers' markets systematically describing the location of vendor farms. But no geographic identifiers for food are more interesting for their mix of characteristics both endogenous and exogenous to the product in question than “geographical indications,” a special form of intellectual property in which the “indication” – the markings or label -- identifies a good as originating in a particular territory of a Member and that the good has certain qualities, reputation or other characteristics that are essentially attributable to that geographical origin.

Most countries are now obliged to provide legal protection for “geographical indication” (GIs) through the TRIPS Agreement and membership in the WTO, but unlike the laws on patents, copyrights, and trademarks, the “GI” is a concept of public international law and does not exist as such in most domestic laws. Instead, a great variety of legal tools are used by national laws to provide protection to GIs. France continues its system of *appellations d'origine contrôlée* (AOCs); the Italians and Spanish have parallel systems (*Denominazione di origine controllata, denominación de origen*); the European Union merges French and German juridical notions with its bifurcated system of *Protected Designations of Origin* and *Protected Geographical Indications*; the US, Canada, and Japan provide GI protection principally through certification mark law; Mexico has long-standing appellations law in its *Industrial Property Code*; the Brazilian, Chinese, and Indians have recently implemented special GI laws (in response to TRIPs); and to complicate things further, most major wine-producing jurisdictions have special laws on geographic names used in conjunction with wines and spirits (EU, US, Australia, South Africa, Chile). From a comparative law perspective, GI laws around the world make global legal norms for patent and copyright law look like tidy, harmonized packages.

Indeed, unlike in copyright and patent, TRIPS itself recognizes the uncompleted nature of the GI legal norms it prescribes to WTO Members by calling for further negotiations on GIs in several distinct ways. Since the Marrakesh Agreements, the EU – driven by France, Italy, and Spain – has pushed the hardest for strengthening and extending GI law, both in multilateral for a and in its bilateral trade dealings. For the European Commission, GIs are – in the words of two commentators -- “a legal and commercial basis for the development of rural areas, the preservation of cultural heritage [and] the promotion of small and medium firms in the rural economies context”<sup>2</sup> – in other words, as a supplement to and perhaps partial replacement of the EU’s expensive program of agricultural and rural subsidies. Consistent with this view of what GIs do in European countries, the EU strongly advocates GIs as an important development tool for agriculture in *developing countries*.

This study explores the potential for geographical indications as a tool to promote developing country agriculture in two specific products: coffee and chocolate (cocoa). I take as the singular goal of “rural development” giving farmers – in this case coffee and cocoa farmers – higher long-term incomes through sustainable production methods. To this end, marketing based on geographical indications (“GI-based marketing”) *can* bring higher incomes to these farmers. And for GI-based marketing to work, adequate legal protection of GIs is absolutely necessary.

At the same time, we must not oversimplify the project of bringing higher incomes to these farmers through GI marketing, a mistake made more often by government officials and commentators trained in law than by rural development experts writing about practical experiences with GI-based marketing and GI laws. To date, there is almost no discussion as to how economic growth from GI-based marketing is supposed to occur in the developing world; outside some studies by researchers at agricultural institutes, there is very little mid-level policy discussion connecting GI legal regimes to

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<sup>2</sup> Bertil Sylvander and Gilles Allaire, *Strengthening International Research on Geographical Indications for Research Foundation to Consistent Policy*, overview paper presented at the SINER-GI meeting, June 2008 [on file with the author].

economic development. (Part I.D) The discussion is kept quite vague and often circles around a conceptual error that strengthening GI law will, by itself, substantially help developing countries. This mistakes *the piling up of laws* for the *accumulation of reputational capital*, the real way to help developing world agricultural products. The mistake of oversimplification is the belief that *stronger* GI laws will somehow automatically lead to “decommodification” of agricultural products from the developing world. (Part III.A) By themselves, stronger laws will do no such thing; the process is much more arduous. With that in mind, the study that follows emphasizes the following conclusions:

#### On Strengthening Legal Protection of GIs

- The goal must be *appropriate* legal protection to produce the *most hospitable* environment for successful marketing of GI-based;
- The main international debate about strengthening GI law is about “usurpation” protection – that is protection of GI names without consumer confusion. This is the debate about “extension” of TRIPS Article 23. But beyond some point, *strengthened* GI law will do nothing to help marketing of developing world agricultural products because these products rarely have reputations that would be subject to usurpation (Part IVA);
- The occasional claims that “Article 23 extension” would help developing world products because it would lead to more robust GI law enforcement by *developed countries* usually proceed from the mistaken example of law enforcement concerning wines and spirits. Label law enforcement for wines and spirits is more robust not because of Article 23, but because of tax and health issues related to these alcoholic products (Part IV.C);
- The one area where Article 23 protection could help coffee and cocoa producers would be in the use of GI names in “blends,” assuming that such practices do not already deceive consumers. Usurpation protection *could* help managers of coffee and cocoa GIs in some of these situations (Part IV.B). But on the whole, it is lawyers and bureaucrats who talk about extending GI law beyond confusion-based causes of action, not experts doing actual agricultural development work.

### On building reputations and successful GI-based marketing

■ As long as GIs are protected against deceptive or confusing uses, the legal environment is usually adequate for their successful development. This is demonstrated by the most successful GI marketing campaign ever mounted for a developing country agricultural product, the now half-century promotion of *Colombian Coffee*, done completely with certification mark protection in the US and Europe (Part III.C.1)

■ Despite the *Colombian Coffee* success story, most developing countries which hope to promote their coffees and cocoas through GI-based marketing will rely on large corporations to make the investment in building GI consumer awareness. This trend – *western companies using developing world GIs to differentiate their products* – started with small coffee roasters in North America, but has spread globally to major coffee retailers, specialty chocolate makers, and large industrial foods concerns producing roasted coffee and chocolate products. There is no reason to think the trend is abating anytime soon; if anything, marketing trends point toward greater and greater geographic specifications (provinces instead of countries, estates instead of provinces). This movement toward greater specification is good for farmers and means that GI-based marketing of coffee and cocoas may actually move closer to a true terroir theory (Part III.C.2). Again, these market developments have happened regardless of whether the GIs are protected by certification mark law or *appellations*-style regulations, although the vast majority of the time; indeed, the vast majority of the time, the only thing that the coffee and cocoa GIs have had during this dramatic rise in GI-based marketing is protection against unauthorized, deceptive uses.

■ Development of coffee and cocoa GIs should recognize this market reality and the necessary trade-off between motivating these western companies to invest in GI promotion while ensuring that increasing portions of the economic rents from the GIs come back to farmers. Simply put, a GI that is too “expensive” from a corporate perspective – that is, too much of the surplus value is demanded too quickly by the developing country – will not be promoted as much by the western corporations. This may be the reason that Ethiopia – after a struggle to trademark its geographic regional names – now licenses them royalty-free (Part III.E)

### Quality control and GI control

- There is no ready formula for the proper role of the state or central government in quality control for GI-based coffees and cocoas, hence no grounds to say *a priori* that an *appellations*-style regulatory system or minimalist certification mark system is the best approach for any particular country. But we do know that developing countries often lack the public institutions, civil service, and transparency that have made appellations systems with significant government regulation workable in European countries. The history of central governments extracting rents from coffee and cocoa farmers should also caution us against any GI laws that rely too heavily on government regulation (Part II.A)
- At the same time, Jamaica (*Jamaica Blue Mountain Coffee*) provides an example of successful central government participation to restore and stabilize quality of a GI product, along with central government control of GI-marketing. Like *Colombian coffee*, the Jamaicans achieved their success with certification or trademark protection in their principal markets. But the *Blue Mountain* GI has recently suffered from perceptions of declining quality and lack of transparency in coffee production, suggesting that the Jamaican model of GI and product regulation may not be well-suited in a world of increasing direct links between farmers and roasters/consumers. Moreover, Jamaica may be a “best case scenario” for robust central government involvement in GI product quality control and there are good reasons to think conditions are less amenable to such regulatory systems in most of sub-Saharan Africa (Part III.D).
- A very different model is presently by the recent activities of the Ethiopian government, which has focused on controlling the country’s main GIs (*Harrar*, *Yirgacheffe*, and *Sidano*) in key markets without attempting to maintain a commensurate domestic regulatory structure to control product quality. From one perspective, the Ethiopian approach signals acceptance of the practical limits of governmental control of coffee production; on the other hand, the government’s actions could foreshadow another attempt of government elites to capture economic rents that rightfully belong to the GI region farmers (Part III.E). The history of government elites siphoning off economic rents from agriculture in developing countries strongly suggests that whatever GI legal regime is adopted, it should be one that places control of the GI as “close” as possible to

the farmers via regional cooperatives and/or ownership structures that include significant, mandatory participation of farmers.

### GIs and “traditional knowledge”

- GIs are often presented as both a means to promote economic development **AND** as a means to protect developing countries’ “traditional knowledge” (TK) and “traditional cultural expressions” (TCE). The connection between legal protection of GIs and the legal protection of TK/TCE is, as with other parts of the debate, often simplified to the point of misleading people.
- Legal protection of GIs does not directly protect TK/TCE in the sense that GI law does not prevent others from absorbing and exploiting a country’s traditional knowledge and cultural expression (Part III.B).
- Legal protection of GIs only help promote the protection of TK/TCE to the degree that the TK/TCE is needed to produce the GI-protected product; even then, it is only *successful GI-based marketing*, not the legal protection itself, that helps sustain the TK/TCE
- With **very** successful GI-based marketing, market pressures may in fact undermine the local TK/TCE as production is increased and adjusted to meet market demands; this course is visible, for example, in what happened to production of *Parmaggiano-Reggiano* cheese and *Oporto* fortified wines (Part III.B).

In all this, we must remember that “geographical indications” are *already* being used to differentiate coffees and chocolates, that is to help separate and decommodify a high-end of products that *already* command price premiums. Our question – our only question -- is how to arrange GI law in both developed countries (as markets) and developed countries (as producers) to leverage present and future GI-based marketing to produce higher, long-term incomes for coffee and cocoa farmers.

## PART I – AN OVERVIEW OF THE LAW AND ECONOMICS OF GEOGRAPHICAL INDICATIONS

The legal protection of GIs should be conceptualized at two levels: the [a] international legal norms for the protection of GIs and [b] differing national implementations of those international obligations. The international legal norms arise first (chronologically) from the 1958 Lisbon Agreement on the Protection of Appellations of Origin<sup>3</sup> and now predominantly from the TRIPS Agreement. It is also worthwhile to review briefly how different national laws protect GIs and, therefore, implement the TRIPS and/or Lisbon obligations. In the last section of this Part, we will consider what we know about the economic impact of GIs, observing how the rhetoric of GI advocates departs dramatically from what (little) we know about the economic reality.

In this Part, we will only briefly review proposals to increase the TRIPS multilateral obligations to protect GIs, i.e. to change the international legal norms. There are strong disagreements about any further development of the international law of GIs; these disagreements reflect, in part, “a debate [that] exists among the experts and within the public regarding the best governance for GI systems, especially in relation [to] the valorization of local specific resources.”<sup>4</sup> We will return to the disagreements about further, strengthened international norms to protect GIs in Part IV, considering the particular consequences that increased protection of GIs would and would not have for the successful marketing of coffee and cocoa.

### **A. *The 1958 Lisbon Agreement on the Protection of Appellations of Origin and their International Registration***

Although the Paris Convention and the 1947 GATT both mention the protection of

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<sup>3</sup> Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, 923 U.N.T.S. 189 (English text of Stockholm revision begins at 215), *available at* [http://www.wipo.int/lisbon/en/legal\\_texts/lisbon\\_agreement.htm](http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.htm) [hereinafter Lisbon Agreement] (revised at Stockholm on July 14, 1967, and as amended on September 28, 1979).

<sup>4</sup> Sylvander and Allaire, *supra* note \_\_ at 5.

indications of origin, the obligation they generates are vague at best.<sup>5</sup> It was not until the Lisbon Agreement in 1958 that a more rigorous system to protect *appellations of origin* was established.<sup>6</sup> Article 2(1) of the agreement provides: “[A]ppellation 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.”<sup>7</sup>

Under the Lisbon system each country decides how its domestic law will determine that an appellation is protected (i.e., judicial or administrative processes),<sup>8</sup> but the legal rubric must be “appellation of origin” or its linguistic equivalent.<sup>9</sup> Once an appellation is protected in its country of origin and registered with the World Intellectual Property Organization (WIPO), each member country of the Lisbon Agreement is required to protect that appellation within its own borders. The principal exception is a one year window in which a country “may declare that it cannot ensure the protection of an appellation of origin whose registration has been notified to it.”<sup>10</sup> There is no mechanism for review of a country’s declaration that it will not protect any particular appellation, but once accepted, the scope of protection is broad. Article 3 of the Lisbon Agreement

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<sup>5</sup> Article IX of the GATT 1947 concerns “Marks of Origin.” Although most of the Article is oriented toward ensuring that domestic laws on mandatory marking of origin do not constitute an unreasonable restraint on trade, Article IX(6) addresses trade names that deceive as to “the true origin of a product.” (“The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation.”) General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

<sup>6</sup> Lisbon Agreement, *supra* note \_\_, art. 1.

<sup>7</sup> *Id.* art 2(1).

<sup>8</sup> *Id.* art. 8.

<sup>9</sup> The Lisbon Agreement leaves no room for anything short of an “appellation” system. Article 1(2) makes it clear that the treaty obligation extends only to “appellations of origin of products . . . recognized and protected *as such* in the country of origin.” *Id.* art. 1(2) (emphasis added). The official French text is arguably more demanding, requiring that the protected appellations of origin be “reconnues et protégées à ce titre dans le pays d’origine,” arguably meaning that the phrase “appellations d’origine” or a close linguistic translation must be used in the country’s domestic legal regime. *See* Arrangement de Lisbonne concernant la protection des appellations d’origine et leur enregistrement international, [http://www.wipo.int/lisbon/fr/legal\\_texts/lisbon\\_agreement.htm](http://www.wipo.int/lisbon/fr/legal_texts/lisbon_agreement.htm) (last visited Nov. 5, 2006). The Spanish text seems to more closely follow the “as such” construction in English (“denominaciones de origen de los productos de los otros países de la Unión particular, reconocidas y protegidas como tales en el país de origen”). *See* Arreglo de Lisboa relativo a la Protección de las Denominaciones de Origen y su Registro Internacional Lisbon Agreement, [http://www.wipo.int/treaties/es/registration/lisbon/pdf/trtdocs\\_wo012.pdf](http://www.wipo.int/treaties/es/registration/lisbon/pdf/trtdocs_wo012.pdf) (last visited Nov. 5, 2006).

<sup>10</sup> *Id.* art. 5(3).

expressly mandates:

Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind’, ‘type’, ‘make’, ‘imitation’, or the like.<sup>11</sup>

This appears to give the holder of an appellation “as such” the right to stop *any* use in a descriptive phrasing such as “Port-like fortified wine,” “imitation Roquefort cheese,” or “Jaffa-style orange marmalade.” There is no confusion requirement. This protection of the GI word(s) appears to be against *all* usurpation and is not limited to the same product category. Thus, if “Parma” is a protected appellation for cured meat, under the Lisbon standard the Parma cured meat producers could stop commercial use of the word for trucks, undergarments, and soft drinks.

As of August 2009, only 21 countries have ratified the Lisbon Agreement, with five other states having signed the agreement but not yet deposited instruments of ratification.<sup>12</sup> Among coffee-producing countries, the Lisbon Agreement includes only some medium-sized Latin American producers: Costa Rica [1997], Cuba [1966], Mexico [1966] and Nicaragua [2006]. Separate from these, no cocoa-producing countries belong to the Lisbon Agreement. The most important coffee and cocoa consumer markets that belong to the Lisbon Agreement are nine of the 25 EU Member States: Bulgaria, France, Greece, Hungary, Italy, Portugal, Romania, Slovakia, and Spain.<sup>13</sup>

#### **B. *The TRIPS Agreement and continued negotiations***

The limited participation in the Lisbon system probably gave GI advocates a strong incentive to seek inclusion of GI provisions in the intellectual property agreement being drafted in the early 1990s as part of the World Trade Organization replacing the GATT. The history of the GI provisions in the Trade-Related Aspects of Intellectual Property Agreement (TRIPS)<sup>14</sup> will not be reviewed here, except to say that the contours of the

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<sup>11.</sup> *Id.* art. 3.

<sup>12.</sup> See The World Intellectual Property Organization, Lisbon Agreement Status on 8 September 2009, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=10](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=10).

<sup>13.</sup> *Id.* Greece, Roumania, and Spain are only signatories to the agreement and have not yet deposited instruments of ratification. The other two countries that have signed but not yet ratified the Lisbon Agreement are Morocco and Turkey. *Id.*

<sup>14.</sup> The European Union sought inclusion of GI provisions early in the Uruguay Round negotiations.

debate crystallized with the introduction of divergent U.S. and EU proposals in 1990<sup>15</sup> and the final Article 22–24 of the TRIPS text represent a compromise presented by GATT Director Arthur Dunkel on December 20, 1991.<sup>16</sup> That compromise was intentionally incomplete as between the EU’s efforts to import the Lisbon Agreement into the TRIPS system and the much more minimalist US position.

The GI section of the TRIPS Agreement begins with Article 22 which defines geographical indications and provides a “floor” of protection for all GIs. First, Article 22(1) defines geographical indications as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin.” This standard is looser than the definition of an “appellation” adopted in the Lisbon Agreement.<sup>17</sup>

Article 22(2) then provides the two basic treaty obligations applicable to *all* geographical indications:

[that] Members shall provide the legal means for interested parties to prevent:

- (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area

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*See* Communication, *European Community—Guidelines Proposed for the Negotiation of Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/16 (Nov. 20, 1987); Submissions, *European Communities, Japan & United States—Trade Problems Encountered in Connection with Intellectual Property Rights*, 2–3, MTN.GNG/NG11/W/7 (May 29, 1987) at 2–3 (European Union submitted that “[t]he protection of appellations of origin and of other geographical indications is of fundamental importance” and that “the wine and spirit sector is one which is particularly vulnerable to imitation, counterfeit and usurpation [which causes] damage not only to producers . . . but also to consumers.”).

<sup>15</sup> The critical texts were the Communication, *European Community—Draft Agreement on Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/68 (Mar. 29, 1990), *reprinted in* 10 *World Intell. Prop. Rev.* 128 (1990) [hereinafter EU Draft] and Communication, *United States—Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/70 (May 11, 1990), *reprinted in* 10 *World Intell. Prop. Rev.* 128 (1990) [hereinafter U.S. Draft].

<sup>16</sup> *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel Draft]. There was also a draft treaty text submitted to the GATT Brussels Ministerial meeting in December 1990 which had some bearing on the GI issue. *See Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods in Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 193–237, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990) [hereinafter Brussels Draft]. In 1990, there were three other draft treaty texts introduced by Switzerland, Japan, and a coalition of developing countries (including Argentina, Brazil, Nigeria, Egypt, China, Chile, and Tanzania), but those three additional drafts were not central to the geographical indications issues.

<sup>17</sup> For some detailed discussion of the different definitions in TRIPS and the Lisbon Agreement, *see* Justin Hughes, *Champagne, Feta, and Bourbon: the Spirited Debate about Geographical Indications*, 58 *HASTINGS LAW JOURNAL* 299, 314-316 (2006); Daniel Gervais, *Traditional Knowledge: Are We Closer to the Answer(s)? The Potential Role of Geographical Indications*, 15 *ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 551, 560-561 (2009)

other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).<sup>18</sup>

Article 22(2)(a) has three requirements: (1) that a word, phrase, or symbol “indicates or suggests” that a product comes from a geographic region, (2) that the product does *not* come from that producing region, and (3) that the public is misled by “1” and “2.” Other words, Article 22(2) does not address situations where use of a word or symbol meets (1) and (2), but fails to mislead. In practice, the first requirement may also fail to be met even though a geographic word is used, the word does not “indicate or suggest” a geographic origin. In France, a kitchen that opens into the dining or family area is an “American kitchen”; in America, potatoes sliced and deep fried are “French fries.” As for subsection (b), Article 10bis of the Paris Convention provides that member countries of that treaty are generally “bound to assure to nationals of such countries effective protection against unfair competition”<sup>19</sup> so that WTO Members must prohibit the use of any geographical indication which “in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.”<sup>20</sup> Obviously, there will be substantial overlap in the coverage of articles 22(2)(a) and 22(2)(b).

While TRIPS Article 22(2) addresses use in commerce, Article 22(3) bars registration of any trademark that includes a geographical indication “if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.” This provision is compatible with American law barring geographic terms in trademarks where the term would be

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18. TRIPS, *supra* note \_\_\_ art. 22(2)(a)–(b).

19. Article 10bis(1) of the Paris Convention for the Protection of Industrial Property, *opened for signature* Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention] (revised at Brussels on Dec. 14, 1900, at Washington on June 2, 1911, at The Hague on Nov. 6, 1925, at London on June 2, 1934, at Lisbon on Oct. 31, 1958, and at Stockholm on July 14, 1967 and amended on Sept. 28, 1979). Article 10bis(2) then provides that “[a]ny act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.” *Id.*

20. *Id.* art. 10bis(3)(3). Article 10bis(3) appears generally aimed at false or misleading advertising vis-à-vis competitors, i.e. “allegations” in 10bis(3)(2) and (3) and “acts [that] . . . create confusion . . . with the establishment, the goods, or the . . . activities, of a competitor,” *id.* art. 10bis(3)(1), but the 10bis(3)(3) inclusion of “indications” seems to return to issues of product labeling.

“primarily geographically deceptively misdescriptive,”<sup>21</sup> but not barring registration where the public is not misled as to the product’s place of origin. For example, Pepperidge Farms has a “Distinctive” line of U.S.-made cookies named BORDEAUX, GENEVA, MILANO, etc.<sup>22</sup> Such evocative marks can be registered on the grounds that American consumers do not expect the cookies to come from these places. The same probably applies to HAVANA brand chocolates in Argentina, COPENHAGEN brand chocolates in Brazil, and DARJEELING brand lingerie in France.<sup>23</sup>

If Article 22’s deception-based provisions stood alone, GI protection in TRIPS would be uncontroversial. But Article 23 adds another layer of obligations in relation to wines and spirits<sup>24</sup> by eliminating *any* confusion requirement for uses within their product categories.<sup>25</sup> Regardless of consumer confusion, a trademark embodying an inaccurate geographical indication for wines or spirits must be denied registration under Article 23(2)<sup>26</sup> and must be eliminated from commerce generally under Article 23(1).<sup>27</sup> In the words of one TRIPS delegate, this effectively constitutes a departure from the general rule laid down in Article 22 requiring deception or unfair competition.<sup>28</sup> Article 23(1) also explicitly expands the scope of protection for the wine and spirit geographical

<sup>21</sup>. 15 U.S.C. § 1052(e)(3) (2000).

<sup>22</sup>. See Pepperidge Farms, Cookies, [http://www.pepperidgefarm.com/indulgent\\_treats\\_cookies.asp](http://www.pepperidgefarm.com/indulgent_treats_cookies.asp) (last visited Nov. 5, 2006).

<sup>23</sup> DARJEELING lingerie was created in 1995 and now has over 100 boutiques in France, all using the famous tea GI for women’s undergarments. See <http://www.darjeeling.fr/marque.html>.

<sup>24</sup>. These are, at present, the bulk of the world’s “appellations.” According to the European Commission in 2003, the “European Communities have registered some 4800 geographical indications (4200 for wines and spirits; 600 for other products).” See European Commission, *Intellectual Property—Why Do Geographical Indications Matter to Us?*, July 30, 2003, [http://europa.eu.int/comm/trade/issues/sectoral/intell\\_property/argu\\_en.htm](http://europa.eu.int/comm/trade/issues/sectoral/intell_property/argu_en.htm) [hereinafter *Why Do Geographical Indications Matter to Us?*]. But something seems wrong about these numbers because the same document lists France having “593 GIs (466 for wines and spirits and 127 for other products);” Italy has having “420 GIs (300 for wines and spirits and 120 on other products);” and 123 GIs for Spain. *Id.* Since these three countries have the strongest GI traditions, it is hard to believe that they are, together, only 24% of the EU GI total. See *id.*

<sup>25</sup>. The United States implemented this TRIPS obligation by making changes to § 2(a) of the Lanham Act in Uruguay Round Agreements Act, Pub. L. No. 103-465, § 522, 108 Stat. 4809, 4982 (1994).

<sup>26</sup>.

The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, *ex officio* if domestic legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

TRIPS, *supra* note \_\_\_\_; accord Communication, *New Zealand—Geographical Indications and the Article 24.2 Review* at 3, 2, IP/C/W/205 (Sept. 18, 2000) [hereinafter *New Zealand TRIPS Council Submission*] (Under Article 23(1), “[t]here is *no* requirement that the public be misled or that the use constitutes an act of unfair competition.”).

<sup>27</sup>. Conrad, *supra* note \_\_\_\_ at 39.

<sup>28</sup>. *New Zealand TRIPS Council Submission, supra* note \_\_\_\_ at 3. A departure that is acknowledged as “essentially the result of the demands of a number of wine-producing countries during the Uruguay Round, notably in the European Union.” *Id.*

indication to bar a whole range of commercial practices:

Each member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind,” “type,” “style,” “imitation,” or the like.<sup>29</sup>

While this additional protection is broader than a likelihood of confusion standard, it is not nearly as expansive as the protection for GIs in the Lisbon Agreement. Article 3 of the Lisbon Agreement: requires that GIs be protected “against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind,’ ‘type,’ ‘make,’ ‘imitation,’ or the like.”<sup>30</sup> The European Union’s original TRIPS proposal similarly provided that all GIs would be protected from “usurpation” by *any* product or commercial use—a level of protection drawn from French law and most easily understood by American lawyers as a dilution or “dilution plus” standard. In contrast, TRIPS Article 23(1) provides this dilution-like protection only *within* the wine or spirit product category.

In this sense, it is *product-specific usurpation standard*. If you try to use “Cognac” for a wine – as in “California Cognac” or “Imitation Cognac” – you are barred, regardless of any likely confusion, by Article 23 *product-specific usurpation standard*. In contrast, if you use “Cognac” as the name of a restaurant or as the commercial name for a paint color, you are subject to the Article 22 confusion standard. Indeed, “California Scotch” for a distilled spirit is forbidden under Article 23, but “Scotch Vineyards Chardonnay” for a California wine would not fall under Article 23 and would be subject to the confusion standard of Article 22.

Beyond this two tier system of protection and a set of limitations and exceptions to

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29. TRIPS, *supra* note \_\_\_ at art. 23(1).

30. Lisbon Agreement, *supra* note \_\_\_ art. 3.

GI protection established in Article 24,<sup>31</sup> the TRIPS Agreement calls for continued discussion of geographical indications in several provisions. This contrasts sharply with the TRIPS Articles on copyrights and patents, which were written as complete and final.<sup>32</sup> One of the provisions, Article 23(4), mandates further negotiations for “the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.” The provision is clearly limited to wines and is expressed as a system in which participation is completely optional, although both aspects are subjects of debate. Separately, Article 24(1) creates a more open-ended obligation that “[m]embers agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23.” As a result of the reference to Article 23, this obligation formally extends to spirits as well as wines,<sup>33</sup> although, again, the actual negotiations are not so limited.

The discussions mandated by TRIPS Articles 23 and 24 began in earnest in June 1998 when the European Union made its first proposal for a notification and registration system for wine GIs under Article 23(4).<sup>34</sup> The 1998 EU proposal called for a binding system on all WTO members in which a country would designate a geographical indication and any other country that did not object to the GI within one year would be obligated to protect the GI, regardless of the Article 24 exceptions.<sup>35</sup> During the next

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<sup>31</sup> Including a broadly worded exception for situations where a geographic word has become the name for a product in a given country. For a description of these, *see* Hughes *supra* note \_\_ at 319.

<sup>32</sup> For that reason, discussion of further development of international legal norms in the copyright and patent fields has returned principally to the World Intellectual Property Organization. *See, e.g.*, WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

<sup>33</sup> At least one commentator believes that the EU intent with the Article 24(1) negotiations is the re-properitization of “Burgundy,” “Chablis,” and “Champagne” instead of countries being able to treat these terms as generic under Article 24(4). *See* Roland Knaak, *The Protection of Geographical Indications According to the TRIPS Agreement*, in *From GATT to TRIPs—The Agreement on Trade-Related Aspects of Intellectual Property Rights* 117, 135–39 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996). Countries advocating a widening of the negotiations to include all foodstuffs usually, if not always, have a specific issue in mind, as with the Czech Republic’s *Budweis* beer or India’s *basmati* rice. The third and most benign commitment for further discussions, not discussed here, is in Article 24(2), which establishes a special mechanism for dialog and review of both the substantive GI commitments and the procedural commitments for further negotiations.

<sup>34</sup> WTO Proposal, *Multilateral Register of Geographical Indications for Wines and Spirits Based On Article 23.4 of the TRIPS Agreement*, IP/C/W/107 (July 28, 1998) [hereinafter *1998 EU Proposal*].

<sup>35</sup> *Id.* at 2–3.

decade, the JUSCANZ+ group with additional countries from Asia and the Americas formally proposed a simple, streamlined registration system.<sup>36</sup> Additional possible systems were put forward by Hong Kong, China<sup>37</sup> and the International Trademark Association (INTA),<sup>38</sup> and the EU revised their own proposal several times.

At the WTO Ministerial meeting in Doha, Qatar in November 2001, WTO members agreed to expand discussion of the Article 23(4) notification and registration system to include spirits.<sup>39</sup> Although that is where things formally stand, there is widespread pressure to make any registration system applicable to all GI products. Perhaps the most persuasive basis for an international registration being limited to wines and spirits is that these products are already under distinct labeling regimes in many jurisdictions, both for GI and alcohol control purposes (Australia, the US, EU, South Africa).

In its most recent proposal, the EU has moved away from its initial idea that placement on the international registry would have binding effect in the domestic legal system of WTO Members (the “one stop” approach). In the current EU proposal once a WTO member submits one of its domestically-protected GIs on the international registry, it will still be necessary to apply for protected GI status in each jurisdiction where protection is sought. Entry on the international registry would, however, establish a rebuttable presumption that the GI meets the standards for legal protection and it would be incumbent on anyone opposing the registration to prove genericity (or any other bar to

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36. WTO Proposal, *Proposal for a Multilateral System for Notification and Registration of Geographical Indications for Wines and Spirits based on Article 23.4 of the TRIPS Agreement*, TN/IP/W/5 (Oct. 23, 2002) (Communication from Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, Philippines, Chinese Taipei, and the United States).

37. WTO Proposal, *Multilateral System of Notification and Registration of Geographical Indications Under Article 23.4 of the TRIPS Agreement*, TN/IP/W/8 (Apr. 23, 2003) [hereinafter 2003 WTO Proposal] (Communication from Hong Kong, China).

38. Int'l Trademark Ass'n [INTA], *Establishment of a Multilateral System of Notification and the Registration of Geographical Indications for Wines and Spirits pursuant to TRIPS Article 23 (4)*, (Apr. 2003), available at [http://www.wto.org/english/forums\\_e/ngo\\_e/posp31\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/posp31_e.htm).

39. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, at 4, 41 I.L.M. 746 (2002) (“With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference.”) [hereinafter DOHA DECLARATION].

GI registration).

For a time the GI debate at WTO was also weighed down by the EU's 2003 proposal of forty-one geographical indications that it wanted all WTO members to accept as non-generic, protected terms for "well established European quality products."<sup>40</sup> The Commission characterized its efforts as "recuperation" of the names, although it quickly became dubbed the "claw back" list. The EU recently took this topic off the negotiating table at the WTO, probably, in part, because the Commission was having more success "recuperating" at least the wine and spirit names through bilateral trade agreements (South Africa [1999], Canada [2003], United States [2006], and Australia [1994, 2008]). The claw-back list also did not jibe well with the EU position that strengthened GI laws would help developing countries, since it focused the GI issue on western European place names.

The other principle debate about GIs at the WTO is of greater interest to developing countries: whether Article 23's added, dilution-like protection of wine and spirit GIs should be extended to all geographical indications. This too was addressed in the Doha Declaration,<sup>41</sup> although there are conflicting views of the nature of the commitment to negotiate extension of Article 23 protection to other categories of goods.<sup>42</sup> The most straightforward arguments for extension of Article 23 protection to all product categories is that special protection for wines and spirits is unfair and a distinction that has no basis in commercial or trade practices. It has also been argued that other categories to intellectual property do not discriminate among types of products,<sup>43</sup> although that is true

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<sup>40</sup>. Press Release, European Comm'n, WTO Talks: EU Steps up Bid for Better Protection for Regional Quality Products (Aug. 28, 2003), available at [www.fas.usda.gov/gainfiles/200308/145985850.doc](http://www.fas.usda.gov/gainfiles/200308/145985850.doc).

<sup>41</sup> DOHA DECLARATION, *supra* note \_\_\_ at para. 18 ("We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this declaration.")

<sup>42</sup> Contrast Communication from Argentina regarding paragraphs 18 and 12 of the Draft Ministerial Declaration, 12 November 2001, WT/MIN.(01)/W/8 see <http://www.wto.org/> with Communication from Bulgaria, Czech Republic, EU, Hungary, Liechtenstein, Kenya, Mauritius, Nigeria, Pakistan, The Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey regarding paragraphs 18 and 12 of the Draft Ministerial Declaration, 14 November 2001, WT/MIN(01)/W/11 see <http://www.wto.org/>

<sup>43</sup> For example, these arguments can be found in James Otieno-Odek, *The Way Ahead – What Future for Geographical Indications?* at 3, paper presented at WIPO Worldwide Symposium on Geographical

of trademarks and patents, but decidedly not true of copyright (where different regimes apply to photographs and cinematographic works.) The European Union and other countries have proposed to “extend” this protection to all GIs with the following language:

Article 23: Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying goods ~~wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits for~~ such goods not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like.

Obviously, this proposal would open the Article 23 standard up to coffees and cocoa. The proposal has understandable appeal in developing countries that see the Article 23 limitation to wines and spirits meaning that Article 23 benefits accrue to only a handful of countries – almost all of them developed.<sup>44</sup>

We will consider below whether the extension of the existing *product-specific usurpation standard* could be of some benefit to coffee and cocoa producers, but here we should not a potential problem with the EU proposal: the proposal has an inherent ambiguity in the meaning of “goods” and “such goods” once the limited language regarding wines and spirits is struck. As presently proposed, the amended Article might move us from the product-specific usurpation standard now in TRIPS toward the broad usurpation standard the EU originally sought. For example, would expanded Article 23 protection of a coffee GI allow the GI owner to prevent non-confusing uses on *coffee* OR

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Indications, June 27-29, 2005 (Professor Otieno-Odek is Managing Director of the Kenya Industrial Property Institute) (paper on file with author).

<sup>44</sup> Argentina, Chile, and South Africa are the only developing economies whose wine industries are global competitors. There are also only a few developing countries that produce spirits with significant global presence – tequila (Mexico), rum (Caribbean and Latin American countries), and to a lesser degree cachaca and aguardiente.

on all *beverages*? Would PANAMA as a protected GI for coffee be used to stop PANAMA brand soft drinks? One could imagine that “any such goods” would be interpreted as applying the protection to entire Nice classifications – in which case, protection of ECUADOR as a cocoa and chocolate GI would bar use of "Ecuador" on *any food products*. This ambiguity could be addressed with more careful language.<sup>45</sup>

For now these discussions seem to be at an impasse. At different points in the Doha Round negotiations different officials from the EU or an EU Member have said that there would not be resolution of agricultural subsidies until EU concerns in the GI sector are adequately addressed – and that may imply, for other parties, linkage in the other direction: no better protection of GIs until there is an agreement to reduce substantially or eliminate agricultural subsidies. The paralysis on GI issues in the WTO is so evident that some parties have contemplated revision of the Lisbon Agreement (making it more attractive to countries) may be the best way forward for development of international norms for GI protection.<sup>46</sup>

### C. *Domestic law in producer states?*

In the near future leveraging geographical indications to increase income for coffee and cocoa farmers will turn principally on consumers in *developed* countries. Nonetheless, it is worthwhile to consider the status of GI laws in coffee and cocoa producing countries. Just as GI laws and broad GI-based marketing are relatively new in most **developed** countries, such laws and explicit marketing are rare in the developing countries that produce coffee and cocoa. In Africa, such laws are practically unknown and, in the words of one commentator, "the local nature of the product is maintained not

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<sup>45</sup> Obviously this problem could be avoided by more careful language, i.e., it would be better to specify more expressly that this is product-class usurpation. In other words, the added protection extended should be only to geographical indication identifying a particular class of products against products in that same particular class of products.

<sup>46</sup> Paulin Edou Edou, La protection des indications géographiques et des appellations d'origine en Afrique - état des lieux et perspectives, paper presented at WIPO FORUM SUR LES INDICATIONS GEOGRAPHIQUES ET LES APPELLATIONS D'ORIGINE, Lisbon, October 30-31, 2008 at 9 ("L'échec des négociations à l'OMC constitue une opportunité de faire évoluer le système de Lisbonne pour le rendre plus flexible, plus compatible avec les législations des différents pays, créer et élargir un registre des indications géographiques.")

by a label, but through tacit codification linked to the skills of the producers, traders, and consumers."<sup>47</sup> In Latin America and the Caribbean, there is a wide variety of domestic laws ranging from Mexico's highly developed *sui generis* GI laws to countries that follow the certification mark approach to countries where the situation is completely ambiguous.

This raises an interesting question about the continuing negotiations on heightened GI protection in international legal norms. The EU can advocate heightened protection based on its own internal laws and the experience it has had under those laws. But many of the developing nations advocating increased GI protection in international law do **NOT** have such heightened protection in their own domestic laws. (The same point has been raised in international discussions of copyright limitations and exceptions – many of those countries advocating more robust exceptions and limitations to copyright protection do not have such exceptions and limitations in their own law.) This disconnect between many countries' international negotiating position and their domestic laws can reasonably trigger a "get your own house in order first" reaction. But it is interesting to consider the underlying reasons for a country advocating legal norms at the international level which it has yet failed to implement in its own domestic system. For example, those representing a country with a slow and difficult domestic legislative process might say they prefer to "legislate once," i.e. passing domestic laws before international norms are established might require re-writing the domestic laws. A quite different reason is that a country's leadership or activists in a subject are might be unable to get domestic legislation passed by itself, but might be able to get such legislation passed in response to new international norms set in a treaty or recommended by an international body.

## 1. GI laws in sub-Saharan Africa

Outside South Africa's wine labeling laws, sub-Saharan Africa has **no** operative experience with domestic appellations laws,<sup>48</sup> although many African countries have laws

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<sup>47</sup> Denis Sautier and Pascale Moity-Maizi, *Relevance and challenges of geographical indication protection for emblematic origin-based products in Western and Central Africa*, paper delivered at SENER-GI FINAL CONFERENCE, Geneva, June 23-24, 2008, at 5.

<sup>48</sup> Bernard Roussel and Francois Verdeaux, *supra* note \_\_\_\_, ("With the exception of South African wines, such GI systems do not exist in Africa.")

providing for certification marks. There are two regional intellectual property organizations – principally divided between former French and British colonies: the l'Organisation Africaine de la Propriété Intellectuelle (OAPI) and the African Regional Intellectual Property Organization (ARIPO), consisting of English-speaking countries and Mozambique.<sup>49</sup> Among substantial African coffee producers, Ethiopia and Angola belong to neither organization, while Kenya, Tanzania, and Uganda belong to ARIPO. Among Africa's top cocoa producers, Côte d'Ivoire (#1) and Cameroun (#4) belong to OAPI, Ghana (#2) belongs to ARIPO, and Nigeria (#3) is in neither organization.<sup>50</sup>

The question of OAPI, ARIPO, or no membership has *potential* importance for the local protection of a coffee or cocoa GI because, as we might expect, OAPI has been more active on the question of GI protection. OAPI has a regional agreement for the protection of GIs.<sup>51</sup> OAPI's 1977 Bangui Accord established a system for regional protection of *appellations of origin* in line with the Lisbon Agreement.<sup>52</sup> Although the Bangui Accord became effective in 1983, no African *appellations of origin* have ever been registered at OAPI.<sup>53</sup> In 1999, OAPI revised their system to adopt a broader definition of geographical signs conforming to the TRIPs concept of a GI.<sup>54</sup> Yet as of

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<sup>49</sup> A list of ARIPO's member states can be found at [http://www.aripo.org/index.php?option=com\\_content&view=section&id=11&Itemid=74](http://www.aripo.org/index.php?option=com_content&view=section&id=11&Itemid=74)

<sup>50</sup> See [http://www.zchocolat.com/wswu/wswu.asp?id=h\\_economy&idb=h](http://www.zchocolat.com/wswu/wswu.asp?id=h_economy&idb=h) for cocoa production stats.

<sup>51</sup> James Otieno-Odek, *The Way Ahead – What Future for Geographical Indications?* at 4 ("In order to be protected, the geographical indications must be registered by OAPI or are to be treated as having been registered by virtue of an international convention to which the member states are parties.<sup>51</sup> If the requirements for registration of geographical indication are fulfilled, the geographical name is entered in Special Register of GIs.")

<sup>52</sup> Paulin Edou Edou, *La protection des indications géographiques et des appellations d'origine en Afrique - état des lieux et perspectives*, paper presented at WIPO FORUM SUR LES INDICATIONS GEOGRAPHIQUES ET LES APPELLATIONS D'ORIGINE, Lisbon, 30-31 October 2008 at 4 ("Cette réglementation, de par son intitulé, ignorait donc des concepts tels que celui de l'indication de provenance. À l'exception de l'Appellation d'origine, aucun autre signe géographique ne bénéficiait de la protection à l'OAPI"). The 1977 definition of an appellation used the Lisbon Agreement formulation that the qualities of the product had to be "exclusively or essential" due to the geographic milieu. (Dr. Edou Edou is Director-General of OAPI)

<sup>53</sup> Edou Edou, *supra* note \_\_ at 4 ("... depuis l'entrée en vigueur de l'Accord de Bangui en 1983, l'Organisation n'a procédé à aucun enregistrement d'appellation d'origine. ")

<sup>54</sup> The revised Bangui Accord uses a definition of geographical indications identical to TRIPs and should be interpreted as having the same scope. *Id.* at 5.

2008, still no African product GI had yet been registered in OAPI member countries.<sup>55</sup> Researchers have found that the GI "juridical framework supported by OAPI is yet hardly used or applied."<sup>56</sup> Not surprisingly, the first appellation protected under this regional system for former French colonies has been *Champagne*.<sup>57</sup>

In 2000-2001, with the support of WIPO and French government agencies, OAPI initiated a "pilot project" on GIs, covering eight products from four countries.<sup>58</sup> The project involved organizational discussions with producers and relevant government agencies, expert work on establishing product characteristics and "terroirs" coupled with establishing boundaries for the production areas, support for quality control at the producer level, and "the contribution of marketing expertise."<sup>59</sup> In describing this program, OAPI Director-General Edou Edou said it included recognizing which products would not have their value enhanced through GI protection and "could be developed better through other tools such as collective marks of certification."<sup>60</sup>

## 2. Domestic GI laws in Latin American and Caribbean countries

GI law varies significantly among Latin American and Caribbean countries, although, as a whole, the region shows much more sophistication in this area than sub-Saharan Africa. At one extreme, Mexico has had an appellations of origin (AO) law

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<sup>55</sup> Edou Edou, *supra* note \_\_\_ at 2 ("Depuis 1977, une législation sur les appellations d'origine, fortement inspirée de l'Arrangement de Lisbonne, a été mise en place mais n'a donné lieu à aucun enregistrement régional."); *see also* Sautier and Moity-Maizi, *supra* note \_\_\_ at 6.

<sup>56</sup> Denis Sautier and Pascale Moity-Maizi, *Relevance and challenges of geographical indication protection for emblematic origin-based products in Western and Central Africa*, paper delivered at SINER-GI Final Conference, Geneva, June 23-24, 2008, at 6

<sup>57</sup> OAPI, « Champagne » : première indication géographique protégée par l'OAPI, available at [http://www.oapi.wipo.net/fr/OAPI/actualites/indication\\_geo\\_champagne.htm](http://www.oapi.wipo.net/fr/OAPI/actualites/indication_geo_champagne.htm) (the webpage is undated, but refers to a future event in 2007, so the registration of champagne must have occurred before 2007). Prior to this, some had interpreted the provisions of the Bangui Agreement and its Annex as permitting only GIs for production in OAPI member states' territory. Marsha A. Echols, *Geographical Indications for Foods, TRIPS and the Doha Development Agenda*, 47 J. OF AFRICAN LAW 199, 216 (2003) and sources cited therein.

<sup>58</sup> Edou Edou, *supra* note \_\_\_ at 7. The countries were Burkina Faso (green beans and karate butter), Cameroun (manioc and cane sugar), Cote d'ivoire (Man (mountain) rice and Toile de Korhogo fabric), and Guinée (Mafrenya pineapples and Naine bananas).

<sup>59</sup> Edou Edou *supra* note \_\_\_ at 8 ("l'apport d'expertises en matière de marketing et de promotion commerciale des produits sous indications géographiques").

<sup>60</sup> *Id.* at 8 ("Les produits qui ne seront pas reconnus comme pertinents pour bénéficier d'une reconnaissance sous indication géographique pourraient être mieux valorisés à travers d'autres outils que sont les marques collectives de certification.")

within its *Industrial Property Code* for decades,<sup>61</sup> with TEQUILA being the first protected GI in 1974. As of 2003, Mexico had nine registered domestic appellations; as of 2008, that number had climbed to 14, including three coffee appellations: VERACRUZ, PLUMA, and CHIAPAS.<sup>62</sup> In Mexico, applicants for appellations of origin (AO) registration provide the Mexican Intellectual Property Institute with production protocols, including when those are established by other government agencies.<sup>63</sup> The Mexican state owns all registered AOs, which then grants 10 year licenses to any natural or legal person producing the product and meeting the production requirement,<sup>64</sup> prompting some commentators to analogize administration of Mexican AOs to a system of state-owned certification marks.<sup>65</sup> Article 157 of the Mexican Industrial Property Code generally forbids “illegal” – that is, unauthorized – uses of the AO or the use of related terms “that create confusion in the mind of the consumer or imply unfair competition.”<sup>66</sup> It is unclear whether Article 157 provides complete usurpation protection similar to French law or the more limited product category usurpation standard of TRIPS Article 23.<sup>67</sup>

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<sup>61</sup> Mexico, LEY DE LA PROPIEDAD INDUSTRIAL, Title 5, “De la Denominación de Origen” (Articles 156-178), available at [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=ES&id=3102](http://www.wipo.int/clea/en/text_pdf.jsp?lang=ES&id=3102)

<sup>62</sup> Eduardo Orendain Giovannini, *Protection of Geographical Indications: Appellations of Origin*, paper presented at USPTO/WIPO Worldwide Symposium on Geographical Indications, slide 7, July 9-11, 2003 (listing Veracruz as a protected AO in Mexico). Ignacio Dominiguez-Torrado, Jose-Juan Mendez, and Juan M. Alvarez del Castillo, *Appellations of Origin in Mexico*, 63 INTA Bulletin, No. 15, August 15, 2008 (listing Veracruz, Chiapas, and Pluma).

<sup>63</sup> Mexican Industrial Property Law, Article 158.IV (as amended August 2, 1994) (“Descripción detallada del producto o los productos terminados que abarcará la denominación, incluyendo sus características, componentes, forma de extracción y procesos de producción o elaboración. Cuando sea determinante para establecer la relación entre la denominación y el producto, se señalarán las normas oficiales establecidas por la Secretaría de Comercio y Fomento Industrial a que deberán sujetarse el producto, su forma de extracción, sus procesos de elaboración o producción y sus modos de empaque, embalaje o envasamiento »)

<sup>64</sup> Article 167-169 as amended August 2, 1994 (“The Mexican State shall be the owner of the appellation of origin. It may only be used by virtue of authorization issued by the Institute.”)

<sup>65</sup> Ignacio Dominiguez-Torrado, Jose-Juan Mendez, and Juan M. Alvarez del Castillo, *Appellations of Origin in Mexico*, 63 INTA Bulletin, No. 15, August 15, 2008 (listing Veracruz, Chiapas, and Pluma). Applications for AOs are published in Mexico’s *Official Gazette*, the publication triggering a period for oppositions by interested parties. Authorized user can sub-license the AO as long as the licensee continues to meet all production conditions (or is distributing or selling the AO product).

<sup>66</sup> Article 213 of the Code also provides that “using an appellation of origin without the appropriate authorization or license” is an administrative infringement. Article 213(XXII).

<sup>67</sup> Thanks to Jose-Juan Mendez of the firm Alegria Mendez & Fernandez Wong for his assistance on this point. Mr. Mendez agrees that it is unclear whether Article 157 would allow the Mexican government, as the owner of the *Tequila* appellation to move against a use such as the film “Tequila Sunrise” or a line of beachwear called “Tequila weekend.” Correspondence with Juan-Jose Mendez, September 11, 2009 (email on file with author).

Several other countries in the Americas have specific GI laws, but their use seems minimal, their standards of protection vary, and their interaction with trademark law is unclear. As a fellow member of the Lisbon Agreement, Peru appears to have a GI law similar to Mexico's, but as of 2005, only two Peruvian appellations had been recognized by the Instituto Nacional de la Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI).<sup>68</sup> Brazil established a GI law in 1996 with two categories of protections: Indications of Provenance (indicação de procedência - IdP) and Denominations of Origin (denominação de origem - DdO),<sup>69</sup> with only the latter requiring that the product's qualities be due exclusively or essentially to the natural or human elements of the product's geographic origin (i.e., tracking the Lisbon standard). Although the law was established shortly after Brazil took on TRIPs GI obligations, it was not until 2006 that the Instituto Nacional de Propriedade Industrial – the registering authority -- established a specific office to deal with IdP and DdO applications.

Following the TRIPs Agreement, a number of Caribbean island states implemented distinct GI registration systems mimicking their trademark systems (Trinidad & Tobago [1996], Dominica [1999], St. Lucia [2000], Barbados [2001]). In each law, the standards for protection of GIs closely track TRIPs Articles 22 and 23.<sup>70</sup> Under most of these laws, trademarks are only subject to invalidation for conflict with GIs “if use of the indication in the trademark for such goods . . . is of such a nature as

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<sup>68</sup> The two appellations are *Pisco* for the liquor and *Cusco* for giant white corn cultivated in designated districts of the Valle Sagrada. *Entre Pisco y Cusco*, DIARIO OFICIAL EL PERUANO, 28 October 2005. See also IP Tango, 27 August 2008.

<sup>69</sup> Title IV (DAS INDICAÇÕES GEOGRÁFICAS) of Lei Federal n.º 9.279, de 14 de maio de 1996, available at <http://www.inpi.gov.br/menu-esquerdo/indicacao/legislacao-1>. Much of the information in this paragraph comes from John Wilkinson & Claire Cerdan, *A Brazilian Perspective on Geographical Indications*, paper presented at Siner-GI, Final Conference, Geneva, 23-24 June 2008.

<sup>70</sup> Trinidad & Tobago: Geographical Indications Regulation, 1996, available at [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=EN&id=3893](http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=3893); Dominica: Act 13, Protection of Geographical Indications Act of 1999, 26 November 1999, available at [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=EN&id=1184](http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=1184); St. Lucia: Geographical Indications Act, 2000, No. 4 of 2000, available at [http://193.5.93.80/clea/en/text\\_pdf.jsp?lang=EN&id=2792](http://193.5.93.80/clea/en/text_pdf.jsp?lang=EN&id=2792); Barbados: Chapter 320, Geographical Indications Act, 19 February 2001, 3 L.R.O. 2002. The TRIPs-tracking standards of protection are in sections 13, 12, and 6 of the three respective laws. According to the WIPO CLEA database, Antigua and Barbuda introduced GI legislation in 2001, but there is no record of its passage. <http://wipo.int/clea/en/details.jsp?id=15>.

to mislead the public as to the true place of origin”<sup>71</sup> with wines and spirit GIs having more absolute protection.<sup>72</sup>

Venezuela is also reported to have specific GI provisions in its Industrial Property law by which GIs are registered on the country's IP registry, such registered GIs are owned by the state, and, generally speaking, GIs prevail over trademarks.<sup>73</sup> But GIs protection "is directed to protect consumers from likelihood of confusion as to the origins of the products," apparently not a usurpation standard.<sup>74</sup> It is unclear whether conflicts between GIs and trademarks by which trademarks may be cancelled are based on a confusion or usurpation standard, although legal protection appears to be focused on the former.<sup>75</sup> In contrast, Belize's 2000 revision of its Trademark Law subsumes GIs within certification and collective marks.<sup>76</sup>

#### ***D. The economic impact of GIs – rhetoric and (largely unknown) reality***

Those who believe that GI-marketing based on law protecting GIs offers a genuine

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<sup>71</sup> (Dominica) Geographical Indications Act of 1999, *supra* note \_\_\_ at Article 14; (St. Lucia) Geographical Indications Act, 2000, *supra* note \_\_\_ at Article 17; (Barbados) Geographical Indications Act, *supra* note \_\_\_ at Article 20. Under the Trinidad law, trademarks (outside wines and spirits) are only eligible for cancellation vis-à-vis GIs when the marks are “misleading.” Geographical Indications Regulation, 1996, *supra* note \_\_\_ at Article 19.

<sup>72</sup> (Trinidad) Geographical Indications Regulation, 1996, *supra* note \_\_\_ at Article 20; (Dominica) Geographical Indications Act of 1999, *supra* note \_\_\_ at Article 13; (St. Lucia) Geographical Indications Act, 2000, *supra* note \_\_\_ at Article 18; (Barbados) Geographical Indications Act, *supra* note \_\_\_ at Article 21.

<sup>73</sup> AIPPI, "Venezuela," Report Q191 in the name of the Venezuelan Group, "Relationship between trademarks and geographical indications" [document in file with author].

<sup>74</sup> *Id.* at 2.

<sup>75</sup> A confusion standard is clearly stated in the following questions and answers:

"6) *Can a GI be registered as individual trademark? If so, under what conditions?*

"A GI can be registered as a trademark only if the goods to be protected by the trademark are not related to those to which the GI refers.

.....  
"8) *Does inclusion of a protected GI as part of a trademark qualify as legal bar to registration of such trademark?*

"Yes, if the use of the mark will create confusion on the consumer as to the origin of the goods.

*Id.* See also question #9, *Id.* at 3. On the other hand, the answer to question 5 says that the Venezuelan law "establishes the prohibition for the granting of trademarks . . . when it is presumed that the use of a GIs is deemed to take profit from the reputation of the GI," suggesting something on the order of usurpation protection. *Id.* at 2.

<sup>76</sup> Trade Mark Bill, 2000, First Schedule, section 3, and Second Schedule, section 3 (providing that a collective or certification "mark may be registered which consists of signs or indications which may serve, in trade, to designate the geographical origin of the goods or services.") available at [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=EN&id=568](http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=568).

opportunity to raise coffee and cocoa farmers' incomes face a few problems in reaching a realistic understanding of this opportunity. Those problems include frequent overstatements of what GI law does economically, mixed empirical evidence of the impact of GI-marketing and GI law, and good reasons to think that GI-marketing of coffee and cocoa might be different. We will consider the overstatements about GI law in Part IV; here I will focus on the empirical evidence that we do have and inferences we might make about coffee and cocoa marketing.

In trying to get some empirical understanding of the impact of GIs (and, therefore, legal protection of GIs), there are a couple basic approaches or forms of argument. We use these two approaches both in rhetorical/political discussions and in more scholarly efforts. One approach is "diachronic" evaluation – comparing the situation of a product before and after (enhanced) GI legal protection *and/or* GI-based marketing. The other approach is "synchronic" evaluation – comparing two similar products, one with GI legal protection/GI-based marketing and one without. Methods can be direct (hard data on sales quantities and prices) or indirect (surveys on consumer recognition and stated willingness to pay premia). Examples of synchronic analysis used in policy discussions include the claims of GI protection increasing the price of *Poulet de Bresse* to four times that of a standard chicken, that the price of GI *Riviera Ligure* olive oil rose 30% above generic olive oil,<sup>77</sup> and that the average French cheese with a GI sells at an extra 3 euro per kg compared to a non-GI French cheese.<sup>78</sup> Examples of diachronic analysis are the claims that the price of *Roccamare* cheese increased by 100% after GI protection,<sup>79</sup> that *Toscana* olive oil increased its price by 10% since its recognition as a GI in the EU, and that *Jamao* coffee from the Dominican Republic saw its price rise dramatically since

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<sup>77</sup> These examples were given by an EU official. Francois Vital, *Protection of Geographical Indications: The Approach of the European Union*, WIPO SYMPOSIUM ON THE INTERNATIONAL PROTECTION OF GEOGRAPHICAL INDICATIONS, Somerset West, South Africa, 1-2 September 1999, WIPO document WIPO/GEO/CPT/99/5 E at 3.

<sup>78</sup> Claimed in Marija Radman, Zeljka Mesic, and Damir Kovacic, *Geographical indications in Croatia - A case study of Virovitica pepper*, paper presented at FOOD AND TERRITORIES, ALTER 2006, Baeza, Spain, 18-21 October 2006 at 14. But Radman, et al. were clearly repeating something they encountered and the actual provenance of this claim is unknown to the author.

<sup>79</sup> Carlos Correa, *Protection of Geographical Indications in Caricom Countries* (September 2002) at 17, available at <http://ctrc.sice.oas.org/geograph/crnm/Geographical.pdf>. Again, Correa was clearly repeating something they encountered and the actual provenance of this claim is unknown to the author.

registration as a GI. These claims get repeated over and over in the literature until they become a kind of policy folklore with the reported details sometimes making little sense.<sup>80</sup> More importantly, none of these stories try to identify other components of a product's ascendancy, particularly quality control and advertising. As commentator Carlos Correa wisely observed "the final price of the product that incorporates an intellectual property component is a poor indicator of the value of the intellectual property itself"<sup>81</sup> and "[s]eeking to quantify the current and, particularly, the potential, value generated by the use of a geographical indication is an extremely difficult task."<sup>82</sup>

Even if all these examples were cases in which price increases or price differentials were generated by GI marketing *alone*, we should recognize that the "GI effect" may often be small or non-existent. This point was brought home by a study of Darjeeling tea in the WTO's 2004 World Trade Report. *DARJEELING* received GI protection as a certification mark in a number of jurisdictions in the 1980s – UK, US, Canada, Japan, Egypt, and a number of European countries,<sup>83</sup> it has also been protected as a certification mark in India for decades.<sup>84</sup> The WTO researchers found that (at least this level of) GI protection given to *Darjeeling* has had no noticeable effect on price over a twenty year period. According to the report, "[t]he results obtained suggest that GI protection has increased the price of Darjeeling tea in total by less than 1 per cent in real terms over the 1986-2002 period. This result is suggestive of only a very modest price premium effect of GI protection."<sup>85</sup> Of course, *Darjeeling* is an extremely well-known kind of tea. Both common sense and researchers tell us that "some geographical indications, particularly those lesser known and of lower quality products, may earn small

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<sup>80</sup> For example, Radman, et al. present the claims on Toscano olive oil and Jamao coffee, Radman, et al, *supra* note \_\_ at 14. But, again, they were clearly repeating something they encountered and the actual provenance of this claim is unknown to the author. The actually claims "Jamao coffee from the Dominican Republic saw its price rise dramatically since registration as a GI. its price/lb rise from US\$ 67 to US\$ 107 since it has been registered as a GI" *Id.*, but no coffee from \_\_\_\_\_ sells for \$US 67 *per pound*. Citing to Vandoren, 2004.

<sup>81</sup> Correa, *supra* note \_\_ at 19.

<sup>82</sup> Correa, *supra* note \_\_ at 18.

<sup>83</sup> Dwijen Rangnekar, *The International Protection of Geographical Indications: The Asian Experience*, paper presented at UNCTAD/ICTSC Regional Dialogue on IPRs, Innovation, an Sustainable Development, Hong Kong, 8-10 November 2004, at 28.

<sup>84</sup> *Id.* at 8-9.

<sup>85</sup> WTO Report (?) at 86.

or insignificant price premiums and that a geographical indication does not in all instances result in a price premium."<sup>86</sup>

The report posited that one reason that "GI protection seems hardly to have improved Darjeeling tea prices" was the "gap between the legal protection that has been given to Darjeeling tea in India and the quality of enforcement."<sup>87</sup> To the degree the question is marketing to *nationals of the country of GI product origin* (in this case, India – a developing country with fairly robust rule of law), then that enforcement "gap" is quite likely to exist everywhere in the developing world. Of course, the more important issue is the gap between legal protection and the "quality of enforcement" in *developed* economies: there are estimates that four times as much "Darjeeling" tea is sold on world markets as actually is produced in India.<sup>88</sup> (As an important aside, if any European Commission officials say that this is proof that certification mark protection is inadequate, then they must explain why they tout EU exports of GI products as evidence of GI success because when those products are exported to the US, Canada, and Japan, their GI protection has been certification mark protection. *Darjeeling* has had the same level of protection in the US as *Cognac*, *Parmagiano-Reggiano*, and *Roquefort*.) If the problem for *Darjeeling* has been lax enforcement, then for reasons discussed in Part V, there is no reason to anticipate dramatically improved enforcement of GIs by OECD governments, regardless of whether the protection is at the TRIPS Article 22 or 23 levels.

Moving beyond these claims concerning single products, what do we know? Most commentators agree that

[a] there is fairly little empirical data on the effect of GI-based marketing or GI labeling (separate from the question of legal protection);<sup>89</sup>

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<sup>86</sup> Bramley, C., Bienabe, E., and J. Kirsten, *The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries*, Contributed Paper for the International Roundtable on the Economics of Intellectual Property Rights, WIPO, Geneva, November 26-27, 2007 at 117. See generally M. L. Loureiro and J.J. McCluskey, *Assessing Consumer Response to Protected Geographical Identification Labeling*, 16 (3) *AGRIBUSINESS* 309-20 (2000).

<sup>87</sup> *Id.*

<sup>88</sup> Jane Pettigrew, *Darjeeling Tea's New Certificate of Origin*, Tea & Coffee Trade Online, June 2000, available at [www.teaandcoffee.net/0600/tea.htm](http://www.teaandcoffee.net/0600/tea.htm).

<sup>89</sup> Bramley, C., Bienabe, E., and J. Kirsten, *The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries*, Contributed Paper

[b] there is *even less* empirical data on the economic impact of GI *legal* protection;  
[c] there is *even less (probably none)* empirical data on the economic impact of *different forms of legal* protection of GIs;<sup>90</sup>

[d] what empirical data there is has focused on sale of GI products from *developed countries* to consumers in *developed countries* – and typically on GI products to consumers in the country of origin (Italian GI products to Italians, Greek GI products to Greeks).

[e] even the empirical results we do have – of perhaps limited relevance to the issue of GIs as an economic tool in the developing world -- is quite mixed.

Among the studies available to us, perhaps the largest survey conducted to date was a 1998 Eurobarometre poll involving over 16,000 citizens in the European Union.<sup>91</sup> Persons surveyed were asked if they were willing to pay more for origin-guaranteed products; they were specifically asked “if the products of which the origin is guaranteed cost 10% more than those that you usually buy would you buy them?” Those giving an affirmative response to this question were asked if they would pay 20% more; those affirmative responses were asked about 30% more. In this abstract synchronic survey, the willingness to pay a price premia for "the origin [being] guaranteed" was as follows:

10% premium	43% of surveyed
20% premium	a little more than 8% of surveyed
30% premium	a little less than 2% of surveyed

There is nothing surprising in the survey’s conclusion that consumers are willing to pay more to guarantee the geographic origin of the foodstuffs. At the same time, this might not be considered a well-formulated question in litigation: it may have led consumers to

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for the International Roundtable on the Economics of Intellectual Property Rights, WIPO, Geneva, November 26-27, 2007 at 127 ("Despite arguments supporting the rural development potential of geographical indications, few empirical studies measure whether they actually contribute to endogenous development processes.").

<sup>90</sup> WTO WORLD TRADE REPORT, *supra* note \_\_\_ at 87 ("So far, the empirical literature on GIs is extremely limited. A number of studies have examined the contribution made by regional origin to prices but there have been few studies made on the effect of introducing legal protection for GIs and none which has sought to measure the impact of different levels of GI protection.")

<sup>91</sup> Vital, *supra* note \_\_ at 3. See also A. Berenguer, *Geographical origins in the world*, Paper presented at the workshop promoting Agricultural Competitiveness through Local Know-how (2004), Proceedings of the Montpellier Workshop, Washington, D.C. World Bank Group, Paris, MAAPAR; Montpellier, CIRAD.

assume products do not now have any origin "guarantee," which they do.<sup>92</sup> Skeptics also tend to point out that a "declared willingness to pay is not necessarily translated into purchasing decisions" and that "it is not at all clear that a consolidated disposition to pay a premium characterizes the GI world as a whole."<sup>93</sup> In the Eurobarometre survey, only 20% of the respondents reported actually purchasing GI products – a number which, when contrasted with the 43% who said they *would* pay more, could bear out the idea that willingness to pay is hard to measure by these sorts of surveys.<sup>94</sup>

There have also been a handful of studies showing mixed impact of GIs (and, by extension, their legal protection and marketing), although often the variations in the "GI effect" are predictable. Fotopoulos and Krystallis found that the PDO label for apples from Zagora, Greece, produced a willingness to pay significantly more for the apples only among certain segments of Greek consumers.<sup>95</sup> Van der Lans, et al. interviewed 165 Italian consumers on preferences and quality perceptions for extra virgin olive oil from Sabina and Canino, Italy.<sup>96</sup> The researchers found that the origin name and the PDO status each separately had an effect on perceived quality -- but that this effect was especially strong with consumers who came from the regions in question. Instead of finding an independent effect for the PDO status, a 2000 study by McCluskey and Loureiro concluded that a PDO status for Galician veal generated a significant price premium from Spanish consumers *only* for products that those consumers separately

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<sup>92</sup> The question presents the respondent with an implicit scenario that products "you usually buy" do not guarantee "origin," but a package of biscuits, for example, usually bears a trademark and a statement of origin [i.e. "Made in France"]. But let's assume that a well-constructed question set would produce these results.

<sup>93</sup> John Wilkinson, *Comments on 'The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries'*, Contributed Paper for the International Roundtable on the Economics of Intellectual Property Rights, WIPO, Geneva, November 26-27, 2007 at 142, 144 ("A similar point can be made about consumer demand. While willingness to pay is the decisive market test, it is not at all clear that a consolidated disposition to pay a premium characterizes the GI world as a whole. In addition, declared willingness to pay is not necessarily translated into purchasing decisions.").

<sup>94</sup> Although there is a way to make these numbers consistent. The difference between the 20% actually buying GI products and the 43% who said they would pay a 10% premium might be consumers who, rightly or wrongly, believed the price differential to be beyond 10%.

<sup>95</sup> C. Foutopolis and A. Krystallis, *Quality Labels as a Marketing Advantage. The Case of the "PDO Zagora" Apples in the Greek Market*, EUROPEAN JOURNAL OF MARKETING 37(10): 1350, 2003

<sup>96</sup> Van des Lans, I.A., K. Van Ittersum, A. Decicco and M. Loseby, *The Role of the Region of Origin and EU Certificates of Origin in Consumer Evaluation of Food Products*, 28(4) EUROPEAN REVIEW OF AGRICULTURAL ECONOMICS 451 (2001).

perceived as high quality meat and that the PDO did not generate any extra premium for either the highest quality meat or meat perceived as being of lower quality.<sup>97</sup> Contrasting to both these studies, Bonnet and Simoni's 2001 study of French consumers in relation to PDO and non-PDO Camembert cheese found that these consumers did not place significant value on the PDO label and that the commercial brand of the cheese was much more relevant to consumer preferences among alternative Camembert.<sup>98</sup> Counterbalancing Bonnet and Simoni, Arfini' 2000 study found that a far larger percentage of Italian consumers of *Parmigiano-Reggiano* cheese and *Parma* ham look for the "Consortia label" – that is, the local manifestation of those GIs – than look for the firm brand. For example, in relation to *Parmigiano-Reggiano* cheese, 75.8% of Italian consumers said they always look for "consortia" label versus 29.5% looking for the brand.<sup>99</sup>

Even if the Arfini study were the only data we had, it would be reading too much into the results to conclude that, in general, consumers care more about GIs (that is geographic origin) than about brands (that is, the specific producer) or that this study "vindicates the importance of collective labels."<sup>100</sup> That study *definitely* vindicates the use of local Italian collective labels in marketing to Italians. More generally, perhaps it vindicates our belief that, in many circumstances, consumers have a preference for local or national products. In fact, all these studies concern consumers willing to pay price premiums for GI products *from their own countries*. That is extremely important for a couple reasons. First, willingness to pay a premium for products from one's own region or country may reflect feelings of local pride, i.e. the GI serving as an enabler of patriotic feelings or community pride. Second, willingness to pay a premium for products from one's own country may reflect perceptions that "local" is better, ranging from the

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<sup>97</sup> M. L. Loureiro and J.J. McCluskey, *Assessing Consumer Response to Protected Geographical Identification Labeling*, 16 (3) AGRIBUSINESS 309-20 (2000).

<sup>98</sup> C. Bonnet and M. Simioni, *Assessing Consumer Response to Protected Designation of Origin Labeling: A Mixed Multinomial Logit Approach*, 28(4) EUROPEAN REVIEW OF AGRICULTURAL ECONOMICS 433-49, 2001.

<sup>99</sup> F. Arfini, *The value of typical products: The case of Prosciutto di Parma and Parmigiano Reggiano cheese*, in THE SOCIO-ECONOMICS OF ORIGIN LABELLED PRODUCTS IN AGRI-FOOD SUPPLY CHAINS (B. Sylvander, D. Barjolle, F. Arfini, eds.) 77-97 (2000). In the case of Parma ham, the parallel statistics were 66.9% versus 22.8%. *Id.*

<sup>100</sup> Rangnekar, *The International Protection of Geographical Indications*, *supra* note \_\_ at 24.

freshness of the products to desires to lessen the environmental impact of global transportation. *If* these are the reasons for the varied consumer willingness to pay premiums for local GI products found in the studies above, then we must be circumspect in how we recommend GI protection as a tool for rural development in *developing countries*.

In summary, the raw data about the prices of *some* European products and *Darjeeling* tea does not tell us much; the consumer studies done in Europe about European products do not tell us much more. As Ulrike Professor puts it, “[e]vidence on costs and benefits with respect to labeling as well as GI protection is still scarce.”<sup>101</sup> Given our very limited knowledge, we should be cautious in what we claim GI protection can do for developing countries and their farmers. In the 2007 words of some commentators to a WIPO Roundtable on the economics of intellectual property, “without a collective body of empirical evidence on the impact of geographical indications, policy decisions in the developing world will remain uninformed, potentially producing unintended welfare impacts.”<sup>102</sup>

To complicate matters, there are a set of considerations applicable to coffee and cocoa, either as developing world products or specifically to these two product categories. First, although studies indicate that a GI preference may often be a local preference, there is no local production of cocoa or coffee in Europe, Japan, or the continental US to compete with developing world cocoas and coffees. This does not mean there *will be* a GI preference for these products from distant lands, but does mean they will not have to compete with local products (as would be the case with developing world fruits, vegetables, meats, and cheeses). On the other hand, there is another set of reasons to be cautious about claims of what GI marketing can do for coffee and cocoa farmer incomes.

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<sup>101</sup> U. Grote, *Environmental Labeling, Protected Geographical Indications and the Interests of Developing Countries*, 10 ESTEY CENTRE JOURNAL OF INTERNATIONAL LAW AND TRADE POLICY, volume 1, 94, 102 (2009).

<sup>102</sup> Bramley, et al, *The Economics of Geographical Indications*, *supra* note \_\_\_ at 137.

To a degree that simple does not exist with wines and spirits,<sup>103</sup> coffee and cocoa have been subject to an explosion of “specialty” labeling that may appeal to the consumer along different vectors: organic, free-trade, and a set of growing/environmental conditions, i.e. shade-grown, bird-friendly, ‘wild,’ and ‘forest.’<sup>104</sup> For each of these “alternative valorization strategies,”<sup>105</sup> there are various certification standards and entities, producing a bewildering array of labels being used to elicit premium payments from the consumer.<sup>106</sup>

If concerns have been raised about the introduction of too many GIs for a particular product category weakening consumer interest,<sup>107</sup> this pales compared to the risk of consumer “label fatigue” with products being labeled by *origin* (GI), social responsibility (fair trade, etc.), health factors (organic), and environmental production (shade-grown, forest, organic, etc). There are also serious question about how much consumers actually understand about these labels/metrics, related to the ambiguity of the terminology<sup>108</sup> and conflicting standards where standards ever exist. These labels are intended to appeal to both consumers’ rational concerns and their emotions.<sup>109</sup> On the

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<sup>103</sup> This is not to deny that there is some “bio” or “organic” marketing with wines, but it is quite small. See generally *Nature d’abord*, L’EXPRESS – HORS SERIE: VIN, LE TEMPS DES BONNES AFFAIRES, June-July 2009 at 31.

<sup>104</sup> In relation to coffee “wild” and “forest” are synonymous for the ill-defined category of coffee not grown in controlled environments like plantations or gardens. Such coffee is also “entirely organic, simply because peasants cannot afford pesticides, herbicides or other chemical inputs.” Stellmacher, *forest coffee certification*, *supra* note \_\_\_ at 2.

<sup>105</sup> Wilkinson and Cerdan, *The Brazilian Perspective*, *supra* note \_\_\_ at 11.

<sup>106</sup> For varied, different discussions of these standards, see \_\_\_\_\_; \_\_\_\_\_; Stellmacher, *forest coffee certification*, *supra* note \_\_\_ at 3-4.

<sup>107</sup> A. Perret, *Le bleuët (myrtille) du Lac Saint-Jean: une potentielle AOC au Québec?* 40 REVUE SUISSE AGRIC. (2008) at 5 (Quoting an official from one of the Lac Saint-Jean blueberry freezing enterprises as expressing concern that a “Lac Saint-Jean” appellation would create confusion for consumers already used to wild blueberries marketed as “Boréal” or from Quebec.); Stéphan Marette, *Can Foreign Producers Benefit from Geographical Indications under the New European Regulation?*, 10 (1) The Estey Centre Journal of International Law and Trade Policy 65, 72 (2009) (citing the EU’s 1,397 wine & spirit GIs as well as 700 other GIs, “label proliferation is the main flaw of the GI system. . . . This label proliferation creates confusion for consumers.”)

<sup>108</sup> See, e.g. Jorg Volkmann, *How ‘wild’ is Ethiopian forest coffee? – the disenchantment of a myth*, COCE PROJECT REPORT, Subproject 5.4 (2008) at 4 (“Both inside and outside of Ethiopia, the term forest (wild) coffee is used indiscriminately. It is often practically impossible to distinguish old plantations abandoned for years from coffee growing spontaneously”)

<sup>109</sup> *Id.* at 5 (“In order to develop an appropriate definition, we have to be aware of the different uses purposes of the term wild. For coffee marketing purposes, it is mainly used to evoke a wide range of customers’ emotions and associations with exoticism, uniqueness or rarity.”)

other hand, as we will see in Part V, the most effective GI-based marketing *may* be marketing that combines a **geographic origin *with* fair trade or environmental labeling.**

DRAFT

## PART II - REAL WORLD PRACTICES IN COFFEE AND COCOA

Perhaps the first thing to appreciate in a discussion of coffee and cocoa GIs is the enormity of coffee and cocoa markets – and, therefore, how even very successful, long-term development of GI-based coffees and cocoas can only alter a modest portion of the total market. In 2007, global exports of coffee exceeded \$21 billion while cocoa exports topped \$9.8 billion. It is helpful to compare those figures to 2007 exports of some other foodstuff and agricultural products:<sup>110</sup>

Wheat and meslin, unmilled	\$30.3 billion
Cheese and curd	\$22 billion
Coffee (and coffee substitutes)	\$21.4 billion
Chocolate (processed foods with cocoa)	\$16.7 billion
Rice	\$13.1 billion
Cocoa	\$9.8 billion
Barley, unmilled	\$6.0 billion
Tea and mate	\$5.2 billion
Silk	\$0.45 billion

There are some things we should note about these figures. First, the coffee numbers are larger than actual exports by developing countries because they include reshipments after initial processing. In UN statistics, Germany, Italy, the United States, and the Netherlands all have substantial coffee "exports," representing beans imported, roasted, (sometimes ground,) and re-exported.<sup>111</sup> So the global market for source exports is considerably smaller. Second, one can see that the global market for chocolate far exceeds the global market for its principal raw ingredient, cocoa; in that case, the global exports for cocoa are essentially *source* exports because when developed countries *re-export* they export chocolate products.

<sup>110</sup> These statistics are from the United Nations Commodity Trade Statistics Database, <http://comtrade.un.org/pb/CommodityPages.aspx?y=2007>

<sup>111</sup> In UN statistics, Germany's \$2.3 billion in coffee exports actually exceeds Colombia's exports (\$1.8 billion). The Italy, US, and Netherlands exports are \$871 million, \$684 million, and \$348 million respectively. That Italy should be a large coffee "exporter" is no surprise. Starbucks roasts all its coffee beans for European stores in the Netherlands, forming a part of that country's coffee exports. According to Daviron and Ponte, "The roasted coffee trade takes place almost exclusively between consuming countries. This pattern of trade comes from the fact that green and roasted coffees can be stored for a long period of time, while roasted coffee loses its freshness much more quickly." BENOIT DAVIRON AND STEFANO PONTE, *THE COFFEE PARADOX – GLOBAL MARKETS, COMMODITY TRADE, AND THE ELUSIVE PROMISE OF DEVELOPMENT* 56 (Zed Books, 2005)

Seeing these facts in the trade numbers points out how both coffee and cocoa producers could, to some degree, move up the production chain, i.e. cocoa-producing states can market both GI-based cocoa and GI-based chocolate. For example, Colombia, Ecuador, and Venezuela each have at least one premium quality chocolate producer with meaningful exports to developed countries; in 2007-2008, 20% of Côte d'Ivoire cocoa production was processed locally into cocoa butter, cocoa powder, and chocolate.<sup>112</sup> The billions of dollars in trade in *roasted* coffee is almost exclusively among developed countries; some of this trade *might* be transferrable to developing countries. But climbing the production chain is not the primary goal of GI-based marketing; the primary goal should be to increase the income as one end of the production stream: the farmers.

Perhaps the most important thing to understand in these large export numbers are the stakes for millions of people in the developing world. There are approximately 6.5 million cocoa growers – mainly farmers and their families working small plots,<sup>113</sup> about 70% of these people are in sub-Saharan Africa.<sup>114</sup> In Africa, agriculture accounts for 60% of the active work force, 40% of the continent's foreign exchange earnings,<sup>115</sup> and a much higher percentage of GDP than in any other region of the world.<sup>116</sup> It is widely recognized that development strategies in Africa based on industrialization or import substitution have failed and, concomitantly, that an agriculture-led development process may be the best hope for Africa's poor. As one journalist covering Africa recently noted "[w]ith China occupying the cheap manufacturing rung of the ladder and India sitting firmly on services, agricultural production is something that Africa could make its

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<sup>112</sup> GROUPE JEUNE AFRIQUE, THE ECOFINANCE GUIDES 2009: CÔTE D'IVOIRE – A MARKET AND ITS POTENTIAL 57 (2009). We can assume almost all of this production was into cocoa butter and powder, but Côte d'Ivoire also has a medium-sized local chocolate manufacturer, Chocodi, which was recently purchased from the Swiss by a local holding company. *Id.* at 56. (*hereinafter* ECOFINANCE GUIDES 2009: CÔTE D'IVOIRE).

<sup>113</sup> For example, in Côte d'Ivoire, which provides over a 30% of the world's total cocoa supply in most years, almost all cocoa farmers' landholdings are 1.5-5 hectares. Powerpoint presentation, Market-oriented promotion of certified sustainable cocoa production - Côte d'Ivoire.

<sup>114</sup> Steve Lohr, *A Genetic Quest for Better Chocolate*, N.Y. TIMES, June 27, 2008.

<sup>115</sup> *Africa Recovery*, January 2004 at 13, quoted in Ayithey at 243. In Côte d'Ivoire, for example, coffee and cocoa "provide a livelihood, directly or indirectly, to approximately 9 million people." ECOFINANCE GUIDES 2009: COTE D'IVOIRE, *supra* note \_\_ at 52-53.

<sup>116</sup> ECA[UN], 1999 at 8.

own."<sup>117</sup> Given how extractive industries concentrate wealth in the elite (in Africa and elsewhere),<sup>118</sup> one could argue that getting agricultural strategy right is the *only* strategy for Africa's working people.

Although the statistics are not so stark for Latin America (nor for Indonesia), the importance of agriculture and, particularly, export cash crops is huge. In Jamaica, coffee is the fourth largest export earner. Colombian coffee officials advertise that 500,000 families in Colombia rely on coffee production as their primary source of income.<sup>119</sup> Of course, employment and livelihood numbers will oscillate with coffee and cocoa prices. Between 1999 and 2004, the Guatemalan government estimated that because of declining coffee prices employment in Central America's coffee sector dropped from 1.7 million persons to 1.2 million; Guatemala itself lost 250,000 out of 650,000 jobs.<sup>120</sup>

Because of the size of the agricultural sector in Africa and Latin America, fluctuations in agricultural markets can have dramatic effects on national economic health. Some developing economies remain extremely dependent on cocoa and/or coffee exports.<sup>121</sup> For such countries, it is an understatement to say that price swings are

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<sup>117</sup> Nicholas Norbrook, *Africa dreams of feeding the world*, THE AFRICA REPORT (International Edition), No. 15, February-March 2009 at 24-25.

<sup>118</sup> Extractive industries are an important part of the overall African economy: oil, diamonds, bauxite, uranium, copper, platinum, and other minerals. According to the African Union, "Africa dominates the world's precious metals and minerals supply in being the top producer of platinum, diamonds and gold. It is also the top-ranked producer of several ferrous and non-ferrous minerals and metals. . . . In 2005, Africa was the world's leading producer of chromite and ferrochromium, gold, manganese ore, palladium, platinum, and vanadium and the world's second ranked producer of manganese and ferromanganese, rutile, and zircon." African Union, AU Conference of Ministers of Industry, 1st Extraordinary Session, Sept. 24-27, 2007, Midrand, South Africa, available at [www.africa-union.org/root/AU/Conferences/2007/september/II/cami/doc/Doc.%208.doc](http://www.africa-union.org/root/AU/Conferences/2007/september/II/cami/doc/Doc.%208.doc). According to the same document, "[m]ine production of bauxite, copper and lead in 2005 was less than that of 1990." *Id.* However, the reason that agriculture holds out the best hope for Africa's working people is that extractive industries tend to concentrate wealth with governments and urban elites, no place more than in Africa. See Leif Wenar, \_\_\_\_\_ (and sources cite therein)

<sup>119</sup> Brochure, *Welcome to the select world of the Juan Valdez whole bean coffee varieties* (2008) (brochure on file with the author).

<sup>120</sup> Mary Jordan, *The Cappuccino Effect*, Washington Post Foreign Service, October 17, 2004, Page A01. Jordan also noted that "[u]employed coffee workers have moved to already overburdened cities, and others have gone illegally to the United States looking for work."

<sup>121</sup> The Food and Agriculture Organization of the UN reports that in the late 1990s nine developing countries relied on coffee exports for 23 per cent or more of export earnings. FAO, *The Role of Agricultural in the Development of LDCs and Their Integration into the World Economy* (Rome, FAO,

economically destabilizing. For example, between 1996 and 2000, Uganda's annual export earnings dropped from \$786 million to \$596 million because of sagging world coffee prices.<sup>122</sup> Just a three year decline in coffee prices (1999-2001) alone led to a drop of 1.2 per cent of GDP in the five main coffee-producing countries of Central America as a group.<sup>123</sup> Considering such numbers, there was only a little hyperbole when one coffee expert noted 15 years ago that "[i]f the coffee drinkers of the industrialized free world stopped drinking coffee, the main result would be some 'cold turkey' discomfort. The economic ramifications for the planet would be more extreme, and it is important to all of us that people like to drink coffee. . . . [t]he production and sale of coffee makes the difference between economic life and death for most of the sixty nations producing it."<sup>124</sup> The same can be said for countries that rely heavily on cocoa exports.

The coffee and cocoa sectors are particularly problematic because, generally speaking, [a] production increases have exceeded increases in consumption,<sup>125</sup> putting downward pressure on all prices, and [b] extreme price gyrations have been occurring in the coffee and cocoa markets since their inception.<sup>126</sup> As the International Coffee Organization summarizes the history, since becoming an important commodity in international trade in the 1700s, coffee "has suffered from long periods of over supply and low prices followed by relatively brief periods of short supply and high prices."<sup>127</sup> The historic volatility in green coffee prices led, in 1962, to the "International Coffee Agreement" (ICA), a multilateral agreement between exporter and consumer countries

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2001). *See also* ECOFINANCE GUIDES 2009: CÔTE D'IVOIRE, *supra* note \_\_ at 19 ("Cocoa beans represent, on average, a quarter of national exports").

<sup>122</sup> Ayittey, *supra* note \_\_ at 207.

<sup>123</sup> D. Kruger, A. Mason, and R. Vakis, *The Coffee Crisis in Central America*, 3 *Spectrum* 16-19 (World Bank, Washington, 2003)

<sup>124</sup> Castle, *supra* note \_\_ at 192 and 181, respectively. Or, as British domestic life historian Molly Harrison noted in 1975, "On a world scale, however, we are so interdependent that buying habits in any one country can have serious political repercussions elsewhere." MOLLY HARRISON, *PEOPLE AND SHOPPING – A SOCIAL BACKGROUND* 9 (London, Ernest Benn Ltd., 1975; published in the US by Rowman and Littlefield, 1975)

<sup>125</sup> INTERNATIONAL COCOA ORGANIZATION, *ANNUAL REPORT 2005/06* 15 (2007) (Cocoa production increases from 1995/96 through 2005/2006, exceeding cocoa grindings in every year but 2000/20001, with seven of eleven years showing global surplus in supply).

<sup>126</sup> Even in colonial statist capitalist arrangements, such as Javanese coffee in mid-19th century Netherlands. *See* Max Havelaar, *supra* note \_\_ at 246 (one character comments "Isn't oversupply threatening the coffee market with a slump?")

<sup>127</sup> International Coffee Organization – History, available at [www.ico.org/history.asp](http://www.ico.org/history.asp).

establishing a price floor for coffee. But that agreement collapsed in the late 1980s,<sup>128</sup> leading to the return of wild swings in coffee pricing. When the ICA system collapsed, the average global price paid to developing countries for green coffee dropped by almost 50%.<sup>129</sup> And volatility continues. For example, coffee prices fluctuated from \$US 165.00 to \$107.55 per 100 kilograms in 2007 alone;<sup>130</sup> in 2009, coffee future prices gyrated between \$US 1.09 and \$1.41 per pound in just the first six months and, in the words of one coffee analyst, "[t]here's nothing really new to keep the market up."<sup>131</sup> Cocoa prices are at least as volatile, both historically and currently, although perhaps with less long-term downward pressure. For example, in 1948, the price of cocoa beans reached 46 cents a pound only to slide to an average 22 cents per pound price in 1949.<sup>132</sup> Cocoa prices rose significantly early in 2008, then the global financial crisis caused cocoa prices to drop 40% in the fall -- only to bounce back to hit a 20-year high at the beginning of 2009, reaching \$US 2,700 - \$US 3,000 a ton, due mainly to a (feared) production shortfall in Ghana and Côte d'Ivoire.<sup>133</sup>

For both products the single greatest cause of price fluctuations appears to be supply fluctuations triggered by weather, followed by plant diseases.<sup>134</sup> And weather or

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<sup>128</sup> There have been a series of subsequent "International Coffee Agreements" (ICAs) but all the agreements since 1987 have been without price floors. The current ICA – September 2007, London – establishes industry definitions for types of coffee, creates "certificates of origin" obligations, maintains the structure of the International Coffee Organization, sets out statistical gathering goals, and makes vague commitments to sustainability and working conditions.

<sup>129</sup> Daviron and Ponte, *supra* note \_\_\_ at 88 ("[T]he average ICO indicator price for the first five years after the breakdown of the ICA (1990-94) was only US\$0.77 per pound as opposed to US\$1.34 per pound in the last five years before the breakdown (1984-1988)").

<sup>130</sup> Guatemalan coffee authority, *Café pierde valor en el Mercado*, Pulso Económico, Thursday, January 9, 2009

<sup>131</sup> Holly Henschen, *Coffee Prices Now Off 18% for Month*, Wall Street J., June 20-21, 2009 at B7, col 1.

<sup>132</sup> Brenner, *supra* note \_\_\_ at 231 (and getting as low as 17 cents a pound at one point in 1949). From the late 1970s until the late 1990s Brenner reports that the global price of cocoa beans declined from a high of \$5,500 a ton to less than \$1,000 a ton, largely due to increased production. *Id.* at 234.

<sup>133</sup> *Rough and tumble amid the cocoa boom*, THE AFRICA REPORT (International Edition), No. 15, February-March 2009 at 53.; Macrines Nyapendi, *Uganda: Government Plans to Plant 35 million cocoa seedlings as world supply dwindles*, allAfrica.com, Jan. 21, 2009, available at [www.allafrica.com/stories/200901220026.html](http://www.allafrica.com/stories/200901220026.html).

<sup>134</sup> For example, the 2008/2009 cocoa shortage is largely because of the shortfall in west African production, particularly in Cote d'Ivoire, due to weather and disease affecting the cocoa trees. Manraaj Dheensay, *Commodities: Wobbles in the Supercycle*, THE AFRICA REPORT (International Edition), No. 15, February-March 2009 at 57, 59 (reporting a 40% drop in Cote d'Ivoire's cocoa production due to weather and disease). Production of both products are subject to local drought in every region, except perhaps the

disease-caused fluctuations are obviously greater for single countries. For example, in the 1990s, Tanzania's coffee exports fluctuated between 18.4 million tons and 64 million tons – just in a period of three years (1996-1998).<sup>135</sup> Of course, when one or a few producers suffer because of weather or disease, other producing countries "win" in higher global market prices.

We should also consider broader political or macroeconomic policies that may so debilitate a country's economy that the best-run agricultural policies – including quality controls, standards, and GI-based marketing -- will not succeed. At one extreme, civil war caused coffee production in Angola to drop by 90% following the country's independence from Portugal.<sup>136</sup> Following independence, Tanzania pursued a "Socialism with Self-Reliance" policy that produced falling incomes and investment – to the point that by 1980 Tanzania had the second lowest per capita income in the world.<sup>137</sup> Despite the country having a literacy rate of 69%, a majority of Tanzania's population still live below the poverty line of \$1 a day.<sup>138</sup> Less dramatically, simple infrastructure issues – building and maintaining roads, bridges, and telecommunications -- are critical to production of these crops and for getting better prices to these farmers.<sup>139</sup>

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Caribbean and Central America, where hurricanes can badly damage crops. For example, Hurricane Ivan is estimated to have blown 45% of the berries off coffee trees in Jamaica in 2004. Jeremain O. Brown, *Coffee Board Seeks Funding to Rehabilitate Industry*, Jamaica Information Service, July 4, 2005, available at [www.jis.gov.jm/agriculture/html/20050701T09000-0500\\_6185\\_JIS\\_COFFEE\\_BOARD-SEEKS\\_FUNDING\\_TO\\_REHABILITATE\\_INDUSTRY.asp](http://www.jis.gov.jm/agriculture/html/20050701T09000-0500_6185_JIS_COFFEE_BOARD-SEEKS_FUNDING_TO_REHABILITATE_INDUSTRY.asp). But it would not be cynical to think that at least some of the 45% blown off the trees was quickly "harvested" since the berries most likely to be blown off are riper berries.

<sup>135</sup> Anders Danielson and Gun Eriksson Skoog, *From stagnation to growth in Tanzania – Breaking the vicious circle of high aid and bad governance?* In *From Crisis to Growth in Africa?* 147, 152 (Mats Lundahl, ed. 2001). Over the course of seven years in the 1990s, the price Tanzanian coffee fetched on the global markets went up 100% and then down almost as much. *Id.*

<sup>136</sup> Ayittey at 244

<sup>137</sup> For a general discussion of Tanzania's post-independence economic policies through 1980, see ANDREW COULSON, *TANZANIA: A POLITICAL ECONOMY* (Oxford, Clarendon Press, 1982). *See generally* Anders Danielson and Gun Eriksson Skoog, "From Stagnation to Growth in Tanzania: Breaking the Vicious Circle of High Aid and Bad Governance?" in MATS LUNDAHL, ED., *FROM CRISIS TO GROWTH IN AFRICA?* (Routledge, 2001); PIETRA RIVOLI, *THE TRAVELS OF A T-SHIRT IN THE GLOBAL ECONOMY* 188-190 (Wiley, 2005)

<sup>138</sup> <http://earthtrends.wri.org/povlinks/country/tanzania.php>.

<sup>139</sup> *See, e.g.* Stephen Odoi-Larbi, Ghana: Female Coffee Farmers Cry for Help, Dec. 3, 2008 (describing deteriorating bridge that will make it impossible for cocoa farmers in their region to transport product), available at [www.allAfrica.com/stories/200812030965.html](http://www.allAfrica.com/stories/200812030965.html). *See, e.g.* Jorgen Levin and Njuguna Ndung'u, *Kenya's growth prospects* in MATS LUNDAHL, ED., *FROM CRISIS TO GROWTH IN AFRICA?* 97, 106 (2001) (describing macroeconomic policies affecting coffee and tea farmers); Anders Danielson and Gun

A. *Structural and macroeconomic issues directly related to GI-based marketing of coffee and cocoa products*

Modern “commoditization” of agricultural products can reasonably be traced to changes in American agricultural marketing in the 19<sup>th</sup> century, particularly with the establishment of “grades” for wheat and cotton to facilitate trading on the Chicago and New York markets. At this time – and for a century before – the production of coffee and cocoa was already based on large-scale cultivation on plantations, initially made possible by slavery. The end of slavery undermined the then New World political economy of coffee and cocoa, although creative efforts to sustain it were attempted, particularly in Brazil and French colonial territories. In time, production by small landholders instead of plantations became dominant for both products. In Latin America, the Caribbean, and other tropical islands this happened through land reform and the collapse of plantations. In Indonesia and mainland Africa – whose cocoa and coffee production came “online” later, the plantation system did not become dominant and most production was initially organized based on small landholdings and individual farming families.<sup>140</sup>

Although the devolution to small farmer production was *forced* by the end of slavery, we should recognize that small farmer production was already *made possible* by the emergence of “commoditization.” Commodity standards allowed for the development of large-scale demand for relatively homogenized product *and* allowed for that demand to be met by completely decentralized producers whose small quantities of product could be aggregated into classes, grades, and qualities.<sup>141</sup> Indeed, the emergence

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Eriksson Skoog, *From stagnation to growth in Tanzania*, in MATS LUNDAHL, ED., FROM CRISIS TO GROWTH IN AFRICA? at 147.

<sup>140</sup> See, e.g. Daviron and Ponte, *supra* note \_\_ at 8 (“The Ghanaian smallholder displaced the Sao Tome *roca* (estate). The ‘native’ cultivating ‘jungle rubber’ displaced the European rubber estate. . . . Colombian peasants provoked the crisis of the Brazilian *fazendeiros*. This process created a sort of inversion in industrial organization between agriculture and manufacturing. Starting with a situation of large-scale enterprises in agriculture and small-scale manufacturing, the nineteenth century ended with small-scale production and low vertical integration in agriculture and large and vertically-integrated firms in manufacturing.”) The same authors report that 60% of current coffee production in Kenya and 95% in Tanzania come from small landholders. *Id.* at 99.

<sup>141</sup> *Id.* at 9 (For tropical products, “the household production revolution was accompanied—if not caused – by the emergence of traders and creation of standards.”); *id.* at 71-73 (describing emergence and

of *international* commodity standards has usually resulted from the efforts of one dominant national producer to promulgate its own product standards (regardless of whether its internal production was from large or small landholdings). The US did this with cotton in 1926, Malaysia with rubber in 1952, and Ghana with cocoa in 1963.<sup>142</sup> In other words, while we now see commoditization as a process that keeps prices low, it was a process that made the development of these decentralized markets – and therefore, at least *some* independent livelihood -- initially possible. In the case of both coffee and cocoa, markets never completely defined “objective quality criteria and ways of measuring them,” so that, in a sense, commoditization was never really complete.<sup>143</sup> This, of course, is key to the possibility of GI-marketing.

Beginning in the 1970s, there has been some continuing decommoditization in both the coffee and cocoa markets, so that each could be characterized as having “twin tendency for standardization in the mainstream market and increasing differentiation in the specialty market.”<sup>144</sup> In the case of both products – but more pronounced with coffee -- this has produced a “paradox” in the form of “the coexistence of a 'coffee boom' in consuming countries and of a 'coffee crisis' in producing countries.”<sup>145</sup> Benoit Daviron and Stefano Ponte describe this paradox in terms that provide a meaningful starting point for an analysis of what GI marketing might achieve for coffee and cocoa farmers:

“[T]he coffee boon in consuming countries and the coffee crisis in producing countries can coexist because the coffee sold on the international market and the coffee sold as a final product to the consumer are becoming increasingly 'different.' This happens because it is not the *material quality* 'content' that roasters, retailers, and cafes are selling, but mainly *symbolic* and *in-person service quality* attributes. As long as farmers and their organizations do not control at least part of this 'immaterial' production, they will be confined to the 'commodity problem' – even though coffee

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changes in “Santos” grades for Brazilian coffee, then development of New York futures contracts based on Central American standard).

<sup>142</sup> *Id.*

<sup>143</sup> Daviron and Ponte, *supra* note \_\_ at 69; *see generally, id.* at 69-80.

<sup>144</sup> *Id.* at 30 (“The case study of coffee – with its twin tendency for standardization in the mainstream market and increasing differentiation in the specialty market – illustrates both opportunities and constraints for upgrading in developing countries. . . . we will frame the issue in terms of the ability of producers to create and control the value embedded in various coffee quality attributes.”)

<sup>145</sup> Daviron and Sponte, *supra* note \_\_ at “About this Book”

may be moving away from 'commodity status' in consuming countries.<sup>146</sup>

Daviron and Ponte recognize that GI marketing is a way to capture some of this "immaterial production,"<sup>147</sup> a view shared by scores of people in the (quite separate) development and intellectual property policy communities.

I also think that view is correct. But as discussed in different sections below, the successful GI marketing system for any coffee or cocoa does not necessarily mean higher incomes for those farmers. First, even a completely honest and transparent GI marketing regime may bring little benefit to working farmers if premiums paid for the GI product must go into costly quality control and standardization systems – systems that are largely absent from developing world agriculture. Second, if central authorities control the GI then there is good reason to fear that they will find ways to pocket whatever premium the GI produces. This can be seen in the troubling history many developing countries have had with centralized agricultural management in which government authorities have extracted economic rents from small farmers, particularly for key cash crops.<sup>148</sup>

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<sup>146</sup> *Id.* at xvii. See also OXFAM, MUGGED: POVERTY IN YOUR COFFEE CUP (Oxford, 2002) (noting that the share of the final price of a cup of coffee filtering down to producing countries dropped from 30 percent in 1992 to 10 per cent in 2002).

<sup>147</sup> *Id.* at 38 (“An indication of geographical origin (IGO) is in some ways similar to a brand name. It creates differences within consumer opinion and makes it possible to organize a differentiation strategy in terms of price and quality.”)

<sup>148</sup> GEORGE B.N. AYITTEY, AFRICA UNCHAINED: THE BLUEPRINT FOR AFRICA’S FUTURE 74 (2005) (“Marketing boards, for example, were set up during the colonial era with the declared purpose to protect small African peasant producers from the vagaries of the world market. Marketing boards fixed prices well below world market levels, and the difference was to be used for the purpose of rural development.”); *Id.* at 69 (describing Kenya’s establishment of state monopolies over maize, tea, meat, and other food crops). See also Brenner, *supra* note \_\_ at 238 (“the boards control the entire cocoa crop, arranging for its shipment an export to producing countries. Although the board receives market price for their beans, they pay farmers only a fraction of what they earn, often less than half the world price.”); TONY KILLICK, DEVELOPMENT ECONOMICS IN ACTION: A STUDY OF ECONOMIC POLICIES IN GHANA 48 (London, 1978) (establishment of cocoa board in colonial Ghana). ROBERT BATES, MARKETS AND STATES IN TROPICAL AFRICA (1981) (viewing state bureaucracies as predatory on agricultural producers and markets). African countries are not unique in this respect. For example, the Philippines gives a monopoly in the country’s rice trade to a state-owned and managed corporation, the National Food Authority (NFA). The NFA imports rice at world prices and sells domestically at “prices which on average have been at least double world prices.” Bruce Tolentine and Thupten Norbu, *Souring World Food Prices Exacerbate Challenges Across Asia, Especially in the Philippines*, IN ASIA – WEEKLY INSIGHT AND FEATURES FROM THE ASIA FOUNDATION, March 26, 2008.

By the late 1950s almost every developing country was attempting or had attempted some form of central government control of coffee and cocoa exports – the coffee “instituto” in Latin America, the “caisse de stabilisation” in francophone Africa, and the “marketing board” in former English colonies.<sup>149</sup> Often the activities of these entities were disastrous for farmers. For example, in the mid-1980s, Ghana cocoa farmers were receiving less than 10% of the world price of cocoa<sup>150</sup> -- while the Ghana Cocoa Marketing Board continued its long history of enriching government elite off the backs of small cocoa producers.<sup>151</sup> Between 1960 and 1990, cocoa and coffee farmers in Cote d’Ivoire received on average only 37% of the world market price for their products while the national “Caisse de Stabilisation et de Soutien des Prix des Production Agricoles” sold the coffee and cocoa on world markets and, again, pocketed the difference.<sup>152</sup> In a 1988 address, Cote d’Ivoire’s President admitted that the country’s farmers had given up an even higher percentage of the value of their produce – 80% -- to central authorities (and, effectively, urban elites).<sup>153</sup> As a 2009 publication promoting Côte d’Ivoire euphemistically put it, “[c]ocoa and coffee exports helped finance the development of the country.”<sup>154</sup> The experience in Ghana and Côte d’Ivoire with cocoa is not unique; as Daviron and Ponte point out, in countries that have had centralized coffee marketing authorities, “[p]ayments to farmers were often late and resources were siphoned off the system as various levels.”<sup>155</sup> Andrew Dorward and a team of researchers described the sub-Saharan commodity board problem more directly:

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<sup>149</sup> Perhaps this happened partly because of the “world market fragmentation” of coffee up until the 1950s. See Daviron and Ponte, *supra* note \_\_\_ at 86. See also *id.* at 96 (describing activities of “institutos” in Brasil, Colombia, and Mexico).

<sup>150</sup> Ayittey, *supra* note \_\_\_ at 133.

<sup>151</sup> *The Punch*, Aug. 28 – Sep. 3, 1981 at 1 (“Since the establishment of the Cocoa Marketing Board (CMB) in 1947 nothing has been done for the welfare of the farmers in this country. While farmers are suffering, the Board gives huge sums of money to their officials to put up houses which are later rented to the Board at fantastic rates.”); *Daily Graphic*, Mar. 1, 1981 at 8 (“farmers in the country have been cheated for far too long . . .”) both quoted in Ayittey, *supra* note \_\_\_ at 135.

<sup>152</sup> J.C. Berthlemy and F. Bourguignon, *Growth and Crisis in Côte d’Ivoire*, World Bank Report (Washington, 1996)

<sup>153</sup> Ayittey, *supra* note \_\_\_ at 229.

<sup>154</sup> ECOFINANCE GUIDES 2009: CÔTE D’IVOIRE, *supra* note \_\_\_ at 7 (“Cocoa and coffee exports helped finance the development of the country and establish a solid foundation.”)

<sup>155</sup> Daviron and Ponte, *supra* note \_\_\_ at 102. As another example, Ethiopia had a relatively open coffee market until the Derg regime established a system of “Agricultural Service Cooperatives” in the 1970s that became a tool for the regime’s corruption and a focus of mismanagement. Till Stellmacher, *Prospects and Challenges of forest coffee certification in Ethiopia: the need to effectively link economic benefits and biodiversity conservation*, 2008 paper at 5, available at <http://userpage.fu->

[P]arastatals . . . were generally part of a bloated and inefficient state apparatus that was inefficient and ineffective in serving the agricultural sector and at the same time an enormous drain on government resources. These difficulties of parastatals were compounded by, and associated with, wider problems in macro-economic management.<sup>156</sup>

Beginning in the 1980s, producer country governments, particularly in Africa, began to liberalize their coffee and cocoa markets with government and quasi-government boards retreating from their oversight functions or being reorganized into allegedly more efficient or more transparent forms.<sup>157</sup> But bureaucratic reorganization has sometimes produced more chaos than efficiency and transparency. Again, Côte d'Ivoire is exemplary. The country's Caisse de Stabilisation (Caistab) was dismantled and "a new system put in place, which is supposed to associate producers and managers." The single board was replaced by *four* different administrative bodies. Not surprisingly, even pro-Côte d'Ivoire observers have concluded "transparency in the management of financial flows in the sector has not really been improved."<sup>158</sup> A 2006 study funded by the European Union was more to the point, concluding that two of the new industry bodies were trying to extract commissions from farmers that are not authorized by law and that most of the new administrative bodies should be abolished.<sup>159</sup>

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[berlin.de/~ffu/akumwelt/bc2008/papers/bc2008\\_9\\_Stellmacher.pdf](http://berlin.de/~ffu/akumwelt/bc2008/papers/bc2008_9_Stellmacher.pdf) [hereinafter, Stellmacher, *forest coffee certification*]. ("Derg" or "Dergue" is Amharic for "council" or "committee" and was used as a short form name for the Armed Forces Coordinating Committee that overthrew the Selassie government and ruled Ethiopia from 1974 until 1991.)

<sup>156</sup> Andrew Dorward, Jonathan Kydd, Colin Poulton and Michael Stockbridge, Executive Summary, *Agricultural Liberalisation in sub Saharan Africa*, Final Report prepared for EC-PREP, November 2004 at ii.

<sup>157</sup> *Id.* at 119.

<sup>158</sup> ECOFINANCE GUIDES 2009: CÔTE D'IVOIRE, *supra* note \_\_\_ at 57 (Caistab was replaced by four entities: a "Coffee and Cocoa Regulation Authority (ARCC), Coffee and Cocoa Exchange (BCC), Regulatory and Control Fund (FRC), and the Fund for the Development and Promotion of the Coffee-Cocoa Industry (FDPCC). However, transparency in the management of financial flows in the sector has not really been improved"). *See also* at 54.

<sup>159</sup> *WEST AFRICA: Reform needed in Cote d'Ivoire says EU*, 34 COFFEE & COCOA INTERNATIONAL 17 (June/July 2007) (quoting the report as stating "The coffee and cocoa sector structures have numerous practices not in conformity with the legal framework currently applicable in Ivory Coast" and saying the report also proposed the liquidation of the Coffee and Cocoa Bourse marketing body, the Regulatory and Control Fund, and the Coffee and Cocoa Producers' Fund.) *See also* Nicholas Norbrook, 'Agrologists' at home, THE AFRICA REPORT (International Edition), No. 16, April-May 2009 at 88, 90 (characterizing Cote d'Ivoire cocoa farmers as "overtaxed").

In the broader context, it is generally agreed that agricultural liberalization from the 1980s onward has not produced the income boost for farmers in sub-Saharan Africa that had been sought. There are different theories about why market liberalization has failed, but all the leading explanations of this failure "share a concern about the weakness of the state and a lack of capacity to perform critical functions."<sup>160</sup> That is a salient concern when discussing the potential for GI-based marketing to help these farmers and the kind of GI system that is appropriate. Simply put, we must ask if any state too weak to provide a reasonable transportation and communications infrastructure, any state too feeble to constrain "rent seeking behaviour by politicians, bureaucrats, criminals and the private sector"<sup>161</sup> -- is a state capable of putting in place the kind of GI system seen for GI products in Europe or the viticulture sectors in Australia, South Africa, and the US.

In the new, less-regulated (often chaotic) market environment in coffee and cocoa producing countries, "formal rules of quality control remain but are increasingly disregarded" and new quality attributes "are defined by buyers" who do the quality assessments themselves.<sup>162</sup> Market-based quality standards and testing will likely give farmers better feedback on what is sought by consumers in developed economies, but this market process does not necessarily produce more transparency. Again, we should take account of this trend when considering what kind of GI system is appropriate – or just practically possible – in these countries.

Even as government entities retreat from regulatory functions they may still seek to control the GI – as we will see with the case of Ethiopia. To give a straightforward example of the problem of central control of a GI, consider the issue of regulating the "supply" of a GI-marketed product. With any GI there is the problem of defining geographical regions with integrity. As soon as the produce of a particular region achieves a special reputation for high quality, there will be pressures to expand the

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<sup>160</sup> Dorward, Kydd, et al., *supra* note \_\_\_ at ii.

<sup>161</sup> *Id.* ("These conditions normally coexist with poor road and telecommunications; poor information (on prices, new technologies, and potential contracting partners); difficulty in enforcing personal contracts, and weakly constrained rent seeking behaviour by politicians, bureaucrats, criminals and the private sector.")

<sup>162</sup> *Id.*

“supply.” One way to do that is to expand the region’s legal or customary boundaries. This process is happening right now with the Champagne district in France and already allegedly happened – with much less transparency – in the case of Jamaica’s Blue Mountain coffee production region.<sup>163</sup> Many development experts have commented on the process of GI region definition, few of them favorably. The other way to expand the “supply” is mislabeling. The abuse of geographic names is no different than the abuse of trademarks; the mislabeling of a chocolate as Ecuadorian cocoa is just as deceptive as the fraudulent use of a well-known chocolate trademark<sup>164</sup> -- except that it might be sanctioned or tolerated by the central authorities. And that is an important point: generally speaking, central authorities are more likely to have reasons to tolerate or sanction such misuses of the GI; local farmers in the GI region rarely have any reason to tolerate such misuse.

That leads us to a final part of the macroeconomic agricultural picture for coffee and cocoa to which we should not turn a blind eye. It is impossible to look at the economic history of Africa without seeing the enormous amount of cross-border smuggling that has occurred and continues to occur. Sometimes this smuggling occurs because of military conflict and closed exports in one country -- Uganda did not start exporting “Ugandan” diamonds until Ugandan troops were operating in the diamond-producing regions of the Congo. But cross-border smuggling usually occurs because of selling price differentials. Such price differences are often caused by government price controls. In 1983, for example, the Ghana government claimed that there was 100 million \$US in cocoa being smuggled out of the country by farmers who would otherwise have to sell it at fixed prices to the national cocoa board.<sup>165</sup> This was a complete reversal from the mid-1960s, when large amounts of cocoa from Cote d’Ivoire were smuggled into Ghana’s higher-priced cocoa markets.<sup>166</sup> We know that price –based smuggling

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<sup>163</sup> Castle, *supra* note \_\_\_ at 45

<sup>164</sup> See, e.g. *Contrefaçon: 223.500 Euros de faux chocolats Ferrero saisis*, LE FIGARO, December 24, 2008 at 3 (counterfeit chocolates seized by French customs during Christmas holiday season).

<sup>165</sup> Ayittey, *supra* note \_\_\_ at 136.

<sup>166</sup> Ayittey, *supra* note \_\_\_ at 261 (“Much of the smuggling of produce that occurs in Africa is simply movements of good to places where they will fetch higher prices. In the early 1960s, the producer price of cocoa was higher in Ghana than in Ivory Coast. Consequently, cocoa was smuggled into Ghana,

across borders can also be the result of GI reputation – as economist George Ayittey notes, “Uganda coffee was regularly smuggled to Kenya” where it could fetch a higher price as “Kenyan” coffee.<sup>167</sup> And this problem is not limited to Africa. There are extensive reports in the food industries of Venezuelan coffee being rebagged as “Colombian,”<sup>168</sup> of Colombian coffee morphing into “Kona,” and of most “Yemen” coffee being, in fact, from Ethiopia.<sup>169</sup>

And that returns us to one of the principal challenges of GI-based marketing for developing country agricultural products. Short of a technological breakthrough – such as substantial refinement of spectrometry<sup>170</sup> – ensuring the origin of a product requires control of the supply chain, i.e. that each person between the tree and the consumer (*including the farmer*) is a “trusted intermediary.” Again, this is a reason to question giving control of GIs to central authorities and to prefer locating control of the GI as close to the tree as possible.

#### ***B. Appreciating coffee, cocoa, their terroir, and their markets***

The possibility of successful marketing of more GI-based products depends largely on consumer interest *in developed economies*. It is probably correct that rapid urbanization in *developing* countries could create some increased domestic demand for GI-based products in the products' home economies,<sup>171</sup> Denis Sautier and Pascale Moity-Maizi have noted that in the biggest African cities, migrants from rural areas find themselves on “an increasing search for guarantees on the origin, and hence the quest for

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culminating in Ghana’s record 1965 crop of 494,000 tons. But that was reversed in the 1980s when the price in Ivory Coast was higher, resulting in Ghana’s output of only 150,000 tons.”)

<sup>167</sup> Ayittey, *supra* note \_\_\_ at 136.

<sup>168</sup> Castle, *supra* note \_\_\_ at 46.

<sup>169</sup> *Id.*

<sup>170</sup> Centre de cooperation internationale en recherche agronomique pour le developpement, CIRAD 2002 Report, “Product origin and composition: measurement for certification” 11 (2002) (describing how near-infrared spectrometry can distinguish robusta from Arabica coffees, therefore making inferences as to a blend’s composition, and that “[t]he method should eventually be suitable for certifying the geographical origin of a given product.”)

<sup>171</sup> See Nicholas Norbrook, *Africa dreams of feeding the world*, THE AFRICA REPORT (International Edition), No. 15, February-March 2009 at 26 (noting Africa’s macroeconomic stabilization in the 1990s and 2000 created urban “earning higher incomes [and] generating a significant shift in consumption patterns”); Nicholas Norbrook, *‘Agrologists’ at home*, *supra* note \_\_\_ at 90 (“Gallop urbanization and an emergent middle class has created the conditions for the emergence of supermarket chains in South Africa and later East Africa that have implanted themselves in over 20 countries across the continent.”)

distinctive markets, networks or signs that would make it possible to ensure the origin of [local food] products."<sup>172</sup> But this demand for local products is focused on staples familiar to the migrant population – cereals, seafood, vegetables, meat, etc.<sup>173</sup> In contrast, coffee and chocolate are more luxury items – and while there is also a growing upper middle class in some Latin American and African metropolises, their initial consumption patterns seem to move toward luxury *imports*, not national products. For these reasons, demand for local coffee and local chocolate by the emerging middle class of developing countries will probably be more a function of *price* than GI marketing.<sup>174</sup>

In contrast, in the developed world the market for GI specialty food products is likely to continue to grow. For example, in Quebec the provincial Minister of agriculture and fisheries has noted a substantial increase in the market for “produit du terroir et d’origine,” accounting in 2005 for 4% of total Quebec demand for foodstuffs.<sup>175</sup> More

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<sup>172</sup> Denis Sautier and Pascale Moity-Maizi, *Relevance and challenges of geographical indication protection for emblematic origin-based products in Western and Central Africa*, paper delivered at SINER-GI Final Conference, Geneva, June 23-24, 2008, at 3.

<sup>173</sup> For example, three South African researchers note that “[w]ith many Afrikaners being urbanized over the last 40 years and the connection to rural South Africa being diminished,” nostalgia may be fueling a market for local lamb from the “Karoo” region. Bramley, C., Bienabe, E., and J. Kirsten, *The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries*, Contributed Paper for the International Roundtable on the Economics of Intellectual Property Rights, WIPO, Geneva, November 26-27, 2007 at 133. But these researchers conclude that demand for GI foodstuffs by domestic urban elites in developing countries will continue to be small. *Id.* at 130 (concluding that “the majority of the population is rather poor and will not normally respond to the niche market concept of geographical indications, so domestic willingness-to-pay studies will not necessarily be appropriate.”).

<sup>174</sup> But for commentators who hold out greater hope of developing country middle class groups providing a market for GI products, see John Wilkinson, *Comments on ‘The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries’*, Contributed Paper for the International Roundtable on the Economics of Intellectual Property Rights, WIPO, Geneva, November 26-27, 2007 at 142, 145 (discussing “the rapid growth of a middle class in many developing countries which can now be counted in the tens, and in some countries, in the hundreds of millions.”); Roland Herrmann, *Comments on ‘The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries’*, Contributed Paper for the International Roundtable on the Economics of Intellectual Property Rights, WIPO, Geneva, November 26-27, 2007, at 146, 148 (“there are middle-income developing countries like Brazil, China or India with huge domestic markets. Geographical indications may be an instrument here to successfully gain market shares domestically”).

<sup>175</sup> C. Chazoule and R. Lambert, *Quels dispositifs de certification de la qualité territoriale au Québec*, Acts de colloque SFER-Enita 8 (October 55-6, 2005).

and more Quebec retail food suppliers are launching geographically identified product lines<sup>176</sup>

Does the possibility of successful GI-based marketing of coffees and cocoas depends on genuine differences among these products based on their geographic origin, i.e. the issue of “terroir” having a genuine effect? The bottom line is that GIs can produce *believed* product differentiation even when no differences can actually be *perceived*. Consumers may be convinced that coffee from a particular place tastes better or different, just as they may be convinced that detergent bearing a particular trademark washes better. In other words, they may become convinced of *endogenous* product differences marked by the GI, even when they cannot objectively detect those differences. GI marketing could also be successful based on consumer beliefs about *exogenous* product differences, i.e. wanting to restore economic opportunity in Rwanda after that country’s turmoil, wanting to support Central American farmers to raise incomes (and/or reduce illegal immigration to the US), or preferring one country’s products over another because that country becomes known for better environmental or social conditions.

Nonetheless, it is true that GI-based marketing will have a firmer foundation to produce long-term decommodification for a segment of coffee and cocoa production if there are actual differences in product taste. Elsewhere I have discussed at length the reasons to believe that terroir does exist, but that neither law nor marketing do a good job capturing genuine product differences generated by place. That being said, there is no reason to think that coffee and chocolate do not have the same capacity for terroir as do wine or cheese (or beers, liquors, prepared meats, etc.). Even in the 1970s, professionals in the markets for both cocoa and coffee recognized that distinct bean flavors came from distinct areas in Africa and South America.<sup>177</sup> In 1991, writer

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<sup>176</sup> A. Perret, *Le bleuët (myrtille) du Lac Saint-Jean: une potentielle AOC au Québec?* 40 *Revue Suisse Agric.* (2008) at 1 (Québec supermarket chain Metro GP launching its own “Le marché du terroir” line). *See also* <http://www.groupegp.com/terroir/>.

<sup>177</sup> “Bean types are usually named after major shipping ports or country of origin. The flavor of Ivory Coast, Accra, Lagos, and Bahia beans from mild to strong in that order and the color of chocolate liquor from Ivory Coast, Accra, Bahia, and Lagos beans runs from light to dark in that order.

“Flavor beans, besides having a good basic chocolate character, have aromatic properties important to the overall chocolate flavor. These beans are not so common, are more expensive, and include

Timothy Castle waxed eloquently that “[a] coffee remembers where it came from and how it was raised: the soil, the weather, the processing, and the roasting are all recorded in the bean.”<sup>178</sup>

In fact, the argument can be made that terroir is more meaningful to coffee than to wine because grapes have varietal distinctiveness and many varieties. In the case of coffee, there are two main, quite distinct families of varieties – *robusta* and *arabica*. The former are harsher coffees, commonly used in European espressos and low-grade consumer coffees around the world; high-grade, premium, and specialty coffees are nearly exclusively *arabica*.<sup>179</sup> But within *arabica* experts are not convinced that the few variations of the *coffea Arabica* bush (*bourbon*, *typical*, etc.) actually produce taste differences.<sup>180</sup> Cocoa is similar to coffee in that different terrain, temperature, weather, and agricultural practices produce different tastes.

In contrast, it is widely recognized that differences among some basic varieties of cocoa beans do have a greater impact on chocolate taste, more similar to grapes than to coffee. Most industrial chocolate is made with the *Forastero* bean variety (the west African variety), whereas high-end chocolates are typically made from *Criollo*, *Trinitario*,

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Arriba from Ecuador, those from Trinidad, and those from Caracas, Puerto Cabello, Macacairbo, and Rio Caribe in Venezuela.” Joseph Allerton, *Chocolate and Cocoa Technology*, in ELEMENTS OF FOOD TECHNOLOGY (NORMAN DESROSIER, ED.) 579, 580 (1977). Coffee expert Timothy Castle is also of the mind that there are “generalities” over large regions “so the coffees of Central America, for instance, have more in common with each other than those of Brazil or Africa.” TIMOTHY JAMES CASTLE, THE PERFECT CUP 38-39 (1991). I certainly have disagreed with that kind of argument in relation to wine, although – given his arguments about roaster variations -- when he says “coffee” Castle may be speaking of the *bean* not the *beverage*. Later, in describing the “gout de terroir” of coffee, Castle recognizes differences in “[c]offees from different farms in the same area” and draws a direct parallel with wine. *Id.* at 86. See also M. Sivtz, *Coffee and Tea Technology, Chocolate and Cocoa Technology*, in ELEMENTS OF FOOD TECHNOLOGY (NORMAN DESROSIER, ED.) 601, 604 (1977) (describing different trade names characteristic of origin)

<sup>178</sup> Castle, *supra* note \_\_\_ at 63. See also. Castle, *supra* note \_\_ at 34-35 (“I think of good coffees, as ones that, despite their processing, roasting, and brewing, somehow transport the scent and flavor of the land, air, and water of their origin. Some coffees, when you taste them, transport you back to their birthplace.”).

<sup>179</sup> But see *Gourmet Robustas to benefit from CFC funding*, 34 COFFEE & COCOA INTERNATIONAL 22 (June/July 2007) (describing efforts to market high quality robusta coffees).

<sup>180</sup> Castle, *supra* note \_\_\_ at 157-163. See also Bernard Roussel and Francois Verdeaux, *Natural patrimony and local communities in Ethiopia: advantages and limitations of a system of geographical indications*, 77(1) AFRICA MAGAZINE 130 (January 1, 2007) (“It is generally not known whether the distinctive nature of a provenance is due to the genetic makeup of the coffee trees involved, to environmental factors in the place of production, or to cultivation practices or processing of the harvest.”)

*Arriba*, or other varieties. Hybridization and development of new cocoa bean varieties appears to be more of an on-going process in the cocoa/chocolate industry with keen awareness of the impact on chocolate manufacturing.<sup>181</sup> Nonetheless, varietal differentiations in cocoa need disturb GI-based cocoa marketing no more than such varieties affect the GI-based marketing of wine. As with wine, certain cocoa varieties are already identified with certain regions, particularly in Latin America. For example, all or almost Ecuadorian cocoa is from the *Arriba* or *Nacional* variety. As with wine, high-end chocolates are frequently advertised by the cocoa variety<sup>182</sup> often in conjunction with the geographic origin.<sup>183</sup> In this respect, the "fine" (or "flavour") cocoa sector seems to be quite conscious that the known qualities of cocoa from a particular producing region may be a function of traditional plant genetics as much as weather and topology; as a consequence there is some intra-industry pressure to keep genetic make-up stable in each region.<sup>184</sup> In this respect, the connection between cocoa variety and geography may come to resemble increasingly viticulture.

(With both coffee and cocoa, the drying/roasting of the bean can significantly affect quality and taste,<sup>185</sup> but this is no different than with the handling of grapes in viticulture.)

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<sup>181</sup> JOEL GLENN BRENNER, *THE EMPERORS OF CHOCOLATE* 120-121 (1999). There has also been, historically, an enormous amount of confusion as to cocoa varieties. *SEE* B.G.D. BARTLEY, *THE GENETIC DIVERSITY OF CACAO AND ITS UTILIZATION* 14-24 (2005) (chapter on "The Terminology Specific to Cacao").

<sup>182</sup> Progressive Policy Institute, PPI Trade Fact of the Week, *Top Valentine's Day Products: Cards, Roses, Chocolate, Lingerie, Jewelry*, February 13, 2008.

<sup>183</sup> An example of this would be Swiss chocolate maker Felchlin's "Maracaibo" series in which the Criollo variety gets about the same prominence as the geographic origin. *See, e.g.* <http://www.cooking.com/products/shprodde.asp?SKU=556474>, <http://www.shopwiki.com/criollo+chocolate>.

<sup>184</sup> For example, in expressing concern about Grenada cocoa farm losses from a 2004 hurricane, a 2005 International Cocoa Council's ad hoc Panel on Fine or Flavour Cocoa noted "that the destruction of many cocoa trees in Grenada by the recent hurricane may cause a temporary disruption in supply. Concerns were expressed at the meeting about a possible change in the replanted genetics. Subsequent information indicates that Grenada has chosen to preserve their fine flavour tradition by replanting/restoring with material taken only from Grenada." INTERNATIONAL COCOA COUNCIL (ICCO), *REPORT OF THE CHAIRMAN OF THE ICCO AD HOC PANEL ON FINE OR FLAVOUR COCOA*, Guayaquil, Ecuador, March 8-11, 2005 at ¶ 16.

<sup>185</sup> Brenner, *supra* note \_\_ at 118 (describing the "delicate process" of roasting cocoa beans).

However, there are a couple aspects of cocoa markets that are quite different from viticulture and *could* affect the capacity of GI-marketing to have a positive impact for cocoa farmers, particularly in West Africa. The first is that cocoa professionals understand their market to have a dichotomy between "fine" (or "flavour") cocoa and "bulk" cocoa, with the former coming from the Americas (as well as southeast Asia) and the latter coming from west Africa. Bulk cocoa is used by industrial confectioners (i.e. Mars, Cadbury, Kraft); high-end chocolates, whether for retail or for "couverture" chocolate, use fine cocoa. Although scientific studies of the chemical differences between fine and bulk cocoa have been "inconclusive" except as to theobromine/caffeine ratios,<sup>186</sup> it is widely agreed among cocoa professionals that there are substantial sensory differences between fine cocoas and Ghanaian or Ivorian cocoa.

Does this mean that GI-based marketing of cocoa from west Africa cannot succeed? There are some indications that people *in the chocolate industry* believe that to be the case. For example, ALT ECO Fair Trade chocolates use – and advertise – Bolivian cocoa for all their dark chocolates; Ghanaian cocoa is only used for – and advertised with -- milk chocolate, where cocoa flavor is considered less important. Another example is "Divine," a new brand of chocolate made in Germany from Ghanaian cocoa and marketed in the US and UK.<sup>187</sup> Divine prominently labels itself as Fair Trade Certified and the packaging declares it to be "Heavenly Chocolate with a Heart"; only in the fine print on the back label does it tell you the cocoa comes from the Kuapa Kokoo cooperative in Ghana.<sup>188</sup> The Divine websites does not hide the fact that Ghana cocoa is used, but the story is one of Ghanaian farmers coming together, not any special terroir.

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<sup>186</sup> *Fine and Bulk Cocoa Project*, INTERNATIONAL COCOA ORGANIZATION, ANNUAL REPORT 2005/06 27 (2007) (Reporting on a study that began in 2001, "[t]he results of the project clearly indicated that the physical parameters measured had provide to be inconclusive in differentiating fine from bulk cocoa. On the other hand, the theobromine/caffeine ration had proved to be a clear indicator in differentiating fine cocoa from bulk cocoa. However, this ratio could not differentiate qualities of expected flavour profiles, although aromatic profiles were promising indicators in achieving both origin and flavour differentiation. It was further demonstrated that all fine or flavour cocoa samples differed clearly in their organoleptic parameters from the Ghana bulk cocoa which was used as a reference.")

<sup>187</sup> <http://www.divinechocolate.com/siteselect.aspx>

<sup>188</sup> The cocoa could only be called Ghanaian because the Kuapa Kokoo cooperative is not a geographically delimited group. See <http://www.divinechocolate.com/about/kokoo.aspx>. ("The buying and logistics as well as management systems have been gradually "regionalised" and by the 2004/5 season, Kuapa was operational in 26 areas, with around 1200 village societies and 45,000 farmer members. The proportion of women farmers has grown from 13% to nearly 30%.")

These marketing decisions may reflect a keen understanding of chocolate consumers OR an unwarranted belief that *general consumers* cannot be attracted to GI-based marketing of Ghanaian and Ivorian cocoas. "Fine" and "bulk" cocoa are not terms of art known by most consumers. And separate from marketing *national* GI-based products ("Ghana cocoa"), there is no reason to think that specific regions in west Africa cannot acquire GI-based reputations for quality. For example, according to the official website of the Ghana Cocoa Board there are six cocoa growing regions in Ghana: Ashanti, Brong Ahafo, Eastern, Volta, Central, and Western.<sup>189</sup>

Second, there are some important reasons to believe that cocoa origin is *not* as important to the taste of chocolate. First, even for the darkest chocolate there is simply much more processing from cocoa to finished chocolate product than from raw to finished products with cheese, wine, or coffee.<sup>190</sup> Milk chocolate poses a different problem with more "inputs"; milk chocolate consists of three significant ingredients – cocoa, milk, and sugar – whereas the finished product of coffee is one input and water; wine and cheese are each one basic ingredient (with fermentation).

Still, it is fair to ask why terroir-based marketing of coffee and cocoa did not start earlier. But here we have to distinguish the question of *law* from the issue of *marketing* – and separate coffee from cocoa. Geography-based marketing of coffee may have been more prevalent in the 19<sup>th</sup> century than it was by the mid-20<sup>th</sup> century. In the 1860 book *Max Havelaar* the narrator, a Dutch coffee merchant, talks about judging "coffee by the repute of the brand," but clearly means by "brand" the particular Java province from which a lot of coffee came.<sup>191</sup> A 1970s coffee writer thought that geographic awareness of coffee origins was still largely the case among European consumers.<sup>192</sup> In contrast,

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<sup>189</sup> [www.cocobod.gh/history.php](http://www.cocobod.gh/history.php)

<sup>190</sup> See generally Allerton, *supra* note \_\_\_. With chocolate "the final product can be affected by hundreds of variables." Brenner, *supra* note \_\_\_ at 63. According to Brenner, chocolate contains more than 1,200 chemical components, about six times as many the components that constitute strawberry or lemon as flavors. *Id.* at 64.

<sup>191</sup> MULTATULI, MAX HAVELAAR – OR THE COFFEE AUCTIONS OF A DUTCH TRADING COMPANY 34 (1860) (Roy Edwards, trans. 1967) ("Just as we judge coffee by the repute of the brand."). But he refers to regions as brands, *Id.* at 37, 44 (Padang and Medano as "brands")

<sup>192</sup> M. Sivtz, *Coffee and Tea Technology, Chocolate and Cocoa Technology*, in ELEMENTS OF FOOD TECHNOLOGY (NORMAN DESROSIER, ED.) 608 (1977) ("In Europe, most of the coffee is purchased by

cocoa's finished product range – chocolates – were associated with the place of manufacture, i.e. Swiss or Belgian, if they had any geographic association at all.

It is also worthwhile to consider a dynamic in the development of European specialty foods that is missing from the developing world context is the positive, synergistic effect that *tourism* has on demand for geographically denominated goods as being from the visited region. Angela Tregear has discussed this in the context of specialty foods that developed in Victorian England (at 97)<sup>193</sup> and it is easy to understand holidaying in Burgundy or Provence as contributing to Parisian tastes for wines and food from those regions. But western tourists are unlikely to flock to most cocoa or coffee producing regions anytime soon, so this aspect of the GI-marketing is missing (except, perhaps, for Jamaican Blue Mountain, Hawaiian Kona, and a few others). This is hardly fatal to the project, but it is something which we should consider.

As to why legal protection of coffee and cocoa names did not form in the way that *appellations of origin* law developed to protect wine names in France, we can only make inferences. Elsewhere I have suggested that geographical indications law seem to have arisen for processed products (a) with a single dominant ingredient; (b) where the processing was done in roughly the same location as the ingredient was produced; (c) where there were multiple producers; (d) where those producers are citizens of the polity creating the protection; and (e) where the processing made the product transportable to distant markets.<sup>194</sup> Coffee and cocoa have both historically failed to meet conditions “b” and “d.” As to “b”, the most important processing has always been far from the point of agricultural production (which is also true of other agricultural products that have not

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consumers in the whole bean condition and they have full knowledge of the origin, variety, and caffeine content; whereas in the United States, the consumer buys by brand name which obscures the origin, grade, variety, and caffeine content. The main, but not the only reason for this is that vacuum packaging in cans in mass production requires ‘uniformizing’ the coffee.”)

<sup>193</sup> Tregear, *From Stilton to Vimto*, *supra* note \_\_ at 97, 101 (describing geographically denominated products that “have their origins in the late 19th century, when the forces of leisure and tourism market expansion, assisted in the UK by Queen Victoria's patronage of seaside and rural resorts, stimulated a demand for specialty food items associated with these places.”)

<sup>194</sup> Hughes, *supra* note \_\_ at 355. For a more nuanced account of the conditions for the rise of the AOC system in France, see Alessandro Stanziani, *Information, quality and legal rules: Wine adulteration in nineteenth century France*, 51 BUSINESS HISTORY 268 (2009).

traditionally had but are currently being considered for GI-based marketing).<sup>195</sup> As to “d”, the farmer/producers have not been citizens of the jurisdictions where protection would make a difference (developed economies).

Obviously, the politics of GI protection have changed greatly since the initial growth of appellations law to protect wines, cheeses, and cured meats. In France, various forms of GI protection now cover French-grown or raised cider, duck, fresh lamb meat, green beans, lentils, pears, potatoes, rice, and salt.<sup>196</sup> In other countries, domestically-produced blueberries, scallions, peaches, and peanuts are protected by or have applied for protection under domestic appellations laws. Geographic origin marketing of coffees and cocoas is already more extensive, sophisticated, pervasive, and successful than the geographic marketing of many of these products. So, the only question is what kind of protection is needed.

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<sup>195</sup> A. Perret, *Le bleuet (myrtille) du Lac Saint-Jean: une potentielle AOC au Québec?* 40 *Revue Suisse Agric.* (2008) at 2 (describing how most of the value-added processing – beyond freezing -- for wild blueberries from the Lac Saint-Jean occurs outside the area).

<sup>196</sup> See, e.g. *LE GRAND DOSSIER, Trésors du terroir*, 121 *CUISINE ET VINS DE FRANCE* 49 (April-May 2009) (describing AOC, PDO, or PGI-protected duck, green beans, lentilles, potatoes, rice, and salt); H elene Lacas, *La viande d'agneau*, 121 *CUISINE ET VINS DE FRANCE* 48 (April-May 2009) (describing PGI-protected lamb meat).

### **PART III - WHAT CAN BE DONE? – AVOIDING SIMPLE ERRORS, ADVOCATING INCREMENTAL STEPS**

Trademarks enable the 'consumption of an enterprise.'  
Geographical indications facilitate the 'consumption of place.'  
Sustainability labels make it possible to 'consume ethics'.

Davidiron and Sponte (2005)<sup>197</sup>

In considering how legal protection of GIs can be used to improve coffee and cocoa producers' incomes we should focus neither on certification mark versus *sui generis* GI protection nor on Article 22 versus Article 23 protection. Instead we should concentrate on practical obstacles, problems, and dangers. We will consider five topics. The first topic is a kind of obstacle to successful GI policy: the tendency of policy experts and government officials to describe GI law as a cause by itself of increased incomes for farmers and a concomitant unwillingness to see the complexity of producing a "GI effect." This sort of simplification happens in all kinds of policy discussions, particularly among those trained in the law, but it has been particularly bad in GI discussions, in part because of the way European Commission officials have pressed for increased GI protection. The second topic is another kind of misunderstanding of what GI law can do – in this case, in relation to the protection of traditional knowledge (TK) and traditional cultural expression (TCE). Moving past these two misunderstandings, we turn to marketing, quality control, and *where* GI rights are located.

In all this, we must not lose sight of the desired "GI effect": *successful marketing* that (a) produces *higher economic rents* and (b) is *controlled by or at least directly benefits farmers*. When considering marketing, we will contrast the self-funded approach -- as undertaken by Colombia on behalf of its coffee -- and approaches that rely more on the marketing efforts of developed world coffee and chocolate retailers. In terms of quality control, general observations have to give way to practical issues with each country and region, but we will use Jamaica as an example of the positive potential and

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<sup>197</sup> Daviron and Sponte, *supra* note \_\_ at 37.

limits of centralized quality control for coffee and cocoa production. In the case of Jamaica, GI marketing and centralized restructuring of the coffee industry successfully brought price premiums to Jamaica, although the centralized system makes it difficult to determine if farmers have benefited as much as they should and the centralized system may now be compromising the quality and reputation of Jamaican coffee. In contrast, Colombia coffee is a story not so much about centralization of production as *centralization of marketing*. Both countries achieved their GI reputations with certification mark protection, although some Colombian officials now see a virtue is further, TRIPs Article 23 protection to help them control “blends” of Colombian coffee – something that does not trouble Jamaican coffee authorities as much.

Finally, we will discuss how control of the GIs should be placed as “close” to farmers as possible – and with as much transparency as possible – to increase the likelihood that economic rents actually reach farming families. The 2006 dispute between Starbucks and Ethiopia over that country's coffee GIs stemmed from the Ethiopian government's decision to avoid both appellations and certification mark law and opt, instead, for regular trademarks – a decision that may speak to their own conclusions about governmental capacity to implement a serious quality control regulatory scheme. At the same time, vesting these trademarks with the central government in Addis Ababa raises different concerns. While Jamaica *may* offer a cautionary tale in which farmers may not receive the premiums the GI earns because of a para-statal entity in the marketplace between them and coffee roasters, Ethiopia *may* offer a cautionary tale in which farmers may not receive the premiums the GI earns because of the central government controls the GI without any local control.

**A. *Understanding that legal protection and successful marketing are completely distinct issues***

In policy discussions about law it is commonplace to reason that changing law in X way will produce Y socio-economic result. There is nothing wrong with such reasoning as long as we understand that there are sorts of assumptions about economics, morals, institutions, and human behavior built into each such argument about changing

the law. It is always a challenge to keep these other factors in mind, particularly for lawyers and policymakers who tend to think of the law as a set of easily managed and understood policy levers. But in the world of GIs, this problem is exacerbated by overblown, simplistic claims by advocates of strong GI laws. An extreme example of these kinds of broad claims comes from OrIGIN, the “Organization for an International Geographical Indications Network,” in its 2009 “Teruel Declaration”:

By providing jobs for millions of individuals around the world, helping preserve the environment and ensuring that the globalization of markets does not encroach on the diversity, quality and tradition of origin products, Geographical Indications (GIs) play a vital role in our economies and societies. Producers, both from developing and developed countries, increasingly rely on GIs for the sustainable development of their communities.<sup>198</sup>

This passage is well beyond the usual overstatements of industry or sectoral importance from trade associations. The usual “real” world examples of GI marketing successes usually do not approach empirical claims for “millions of jobs”; they focus instead on increased prices, both absolutely and relative to similar, generic products. Raw data is repeatedly given about total sales bearing legally-protected GIs with the imputation (if not, sometimes, direct assertion) that the GI is the sole cause of the products’ success.

Exhibit A is a slide used by an EU official in a presentation that implicitly claims that GI products have more export success for the EU *qua GI products*. But obviously, these products are a greater percentage of EU agricultural exports than total EU agricultural production because of (a) industries and global *reputations* built decades or centuries before GI protection (whiskeys, wines) and (b) the EU's relative disadvantage in other agricultural products (grains as against Australia, Canada, Brazil, and the US; flowers as against Colombia, Kenya; citrus as against Brazil, etc.). We should no more attribute the success of these exports to GI law than we should attribute the recent losses of global market share suffered by French wines to GI law – on the grounds that those

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<sup>198</sup> Organisation for an International Geographical Indications Network, TERUEL DECLARATION (Teruel, 26 June 2009) at 1.

wines are almost all protected by GIs. In the fiscal year ending in July 2009, sales of Italian Prosecco – an Italian sparkling wine named after the grape from which its made and unprotected by GI law – climbed 30% in the US while sales of French *Champagne* “nosedived.”<sup>199</sup> Should we attribute that to GI law?

We can only guess as to how much the GI marketing contributes to these exports' success – indeed, we may never be able to distinctly measure the GI effect. For example, in 1998 researchers found that among English consumers "Newcastle Brown Ale was instantly recognizable and unanimously confirmed as an example of a northern [English] regional product (though its PDO designated status was not recognized)."<sup>200</sup> Attributing the success of the product, both absolutely and as a *known regional* product to its "GI status" would be misleading – almost as misleading as attributing the success of Scotch whiskey among American and Japanese businessmen to its GI protection (when probably 99%+ of those business people have no idea what "GI" means in this context).

*Exhibit A – at back of document for now*

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<sup>199</sup> Elin McCoy, *Paris Hilton's Prosecco Cans Send Italians Into Fight Mode*, August 27, Bloomberg.com, available at <http://www.bloomberg.com/apps/news?pid=20601093&sid=avsWOx8pR0R4>

<sup>200</sup> Angela Tregear, Sharron Kuznesof and Andrew Moxey, *Policy initiatives for regional foods: some insights from consumer research*, 23(5) FOOD POLICY 383, 389 (1999).

As Carlos Correa has said, “geographical indications, like trademark, may in some cases play a decisive role in generating a premium over and above the price of equivalent goods, while in other cases their contribution cannot be distinguished from that attributable to the product itself.”<sup>201</sup> A case in point might be apples from the São Joaquim region of Brazil; discussing the prospect of GI protection and marketing of *São Joaquim* apples, John Wilkinson and Claire Cerdan write “[t]he reputation of *Maçã de São Joaquim* already exists at the wholesalers’ level. In fact, the companies of the area selling boxes containing 18 kg of this fruit charge between 2 to 5 R\$ more than firms or apples from other areas.”<sup>202</sup> If *São Joaquim* apples were granted Brazil IdP protection, it would be wrong to suddenly attribute the 2 to 5 R\$ premium to the GI status.

Yet officials of some governments continue to make claims that blur or confuse causation, as when an EU official in 1999 claimed that rural development was happening in the Terrincho area of Portugal “[t]hanks to the designation of origin which means developing the product and thus to make it possible to obtain a selling price higher the one of a standard [product].”<sup>203</sup> Clearly “developing the product” is a different process than just christening it with a protected “designation of origin”; it is true that the name of the product needs to be protected from unfair trade practices to provide results for the product’s development, differentiation, and improvement, but that protection could take many different forms.

Beyond this sort of simplistic claim, Exhibit B is an arguably more egregious example of a GI advocate showing how GI protection “works” in a developing country. In this slide, the “X 3” increase in the price of Vietnamese Phu Quoc nuoc mam (*nước mắm* - a fish sauce) between 2001 and 2003 is attributed as “GI results”. The arrow implies the causal relationship from “2001, GI”. Of course, the slide also points out that at the same time Unilever started marketing nuoc mam. Unilever struck a deal with 17 nuoc mam makers on the island of Phu Quoc, built a bottling facility on the island at a cost of over \$US 800,000, and started marketing the nuoc mam with the KNORR

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<sup>201</sup> Correa, *supra* note \_\_ at 18.

<sup>202</sup> Wilkinson and Cerdan, *The Brazilian Perspective*, *supra* note \_\_ at 12.

<sup>203</sup> Vital, *supra* note \_\_ at 3.

trademark. Unilever completed their plant in October 2002, meaning that (despite the slide's implied claim) it is very unlikely that the initial decision to invest was based on the GI's recognition in mid-2001 – even less likely that the negotiations with the Phu Quoc producers were triggered by the GI status. Indeed, internet commentary on nuoc mam focuses on the marketing, not the GI.<sup>204</sup> In other words, we simply do not know what impact the GI's legal protection had on the economics of Phu Quoc nuoc mam.

And there is nothing unique in our ignorance of what GI protection does and does not for Vietnamese fish sauce. At the level of theory, the single most important thing we know is that geographical indications *law by itself* does not raise prices for foodstuffs – and, as a corollary, stronger and stronger laws do not, *by themselves*, raise prices higher and higher. Too often GI commentators and policymakers frame the discussion as one in which increased legal protection is assumed to lead inextricably to improved incomes. Seeing how often this mistake is made can help inoculate us against this conceptual error that leads to unwarranted policy conclusions.

*Exhibit B – at back of document for now*

<sup>204</sup>

See, e.g.

<http://www.vietworldkitchen.com/blog/2008/05/fish-sauce-tast.html>.

<http://vietq.wordpress.com/category/nuoc-mam/>

<http://www.vietnamembassy-usa.org/news/story.php?d=20031202110206>

For example, in studying the wild blueberry of the Lac Saint-Jean region of Quebec, Anna Perret notes that creation of a “Lac Saint-Jean” AOC for the wild blueberries would lead to “an elevated price for Lac Saint-Jean wild blueberries, because this denomination has a value for certain customers.” But if the denomination already has a *value for certain customers*, nothing is preventing the marketing of the blueberries to those customers with the Lac Saint-Jean name and any imitators would already be liable under Canadian unfair competition and deceptive practices law.<sup>205</sup> So what is the mechanism by which *creation of a legal category* – the AOC – changes the market, i.e. produces an *elevated price*? (There is a possible mechanism – which seems to be at work in the EU, as discussed below.) A related, but different sort of error is made in recent commentary by both African and French experts. In a thoughtful 2005 paper on the debates about GIs, the head of Kenya's intellectual property office, Professor James Otieno-Odek, wrote the following:

In Kenya, the products that could benefit from GI extension include agricultural products such as Mt. Kenya coffee, Gathuthi tea, Kisii tea, Kericho tea, kangeta, miraa, meru potato, kikuyu grass, Mombasa mango, Machakos mango, Asembo mango, Muranga bananas and Kisii bananas . . . . Molo lamb, Kitengela ostrich meat, Omena fish and Mursik milk. . . . Keringeti mineral water and Victoria mineral water.<sup>206</sup>

By "extension" Professor Otieno-Odek meant the increased legal protection of extending Article 23 to all products. And this was not the end of his list; Otieno-Odek listed 10 more Kenyan products, ranging from fish to soapstone as well as 18 products from other African countries, ranging from pineapples to cotton to, basically, moonshine.<sup>207</sup> He

<sup>205</sup> A. Perret, *Le bleuët (myrtille) du Lac Saint-Jean: une potentielle AOC au Québec?* 40 *Revue Suisse Agric.* (2008) at 5 (“obtention d'une plus-value sur le prix du bleuëts du Lac Saint-Jean, car cette denomination a une valeur pour une certaine clientele.”)

<sup>206</sup> James Otieno-Odek, *The Way Ahead – What Future for Geographical Indications?* at 3.

<sup>207</sup> *Id.* The list included "Uganda Waragi," which is a brand of bottled and branded waragi, although a substantial amount of waragi is just home moonshine production. <http://en.wikipedia.org/wiki/Waragi>. Professor Otieno-Odek's list included 5 coffees: Kivu (Congo), Ituri (Congo), Chipinga (Zimbabwe), Konyagi (Tanzania), and Kilimanjaro (Tanzania). With the exception of the last of these, none have a substantial reputation for coffee. The Wikipedia entries for the Kivu and Ituri regions do not even list coffee production.

reasons that "GI protection would transform the African farmers from raw material producers to exporters of differentiated products easily identifiable in the global market" and that "[p]rotection would ensure better market access by creating a niche for GI product producers."<sup>208</sup> In a 2008 talk, the head of OAPI, Dr. Paulin Edou Edou, cited to *Bakongo* and *Chikwang* manioc (from Congo), *Penja* pepper and *Oku* honey (from Cameroun), *Savalou* gari (from Benin), *Man Mountain rice* (from Ivory Coast), and *Boké* palm oil (from Guinea) as examples of products that could benefit from GI law.<sup>209</sup>

In yet another example, after laying out the requirements of a European-style GI system, French researchers Bernard Roussel and Francois Verdeaux ask and answer the following: "[a]re there products in Ethiopia that might fit into this conceptual framework? A few hours spent in the big market place of Addis Ababa, the famous Mercato, Shola, or Shiromeda, suggests ample possibilities."<sup>210</sup> Roussel and Verdeaux then go into detailed descriptions of local grains, long peppers, kormina malaguetta, resins, and incense (before turning to coffee) – albeit in the context of domestic demand *within* Ethiopia.

The question that must be answered in all these examples is *how* enhanced legal protection would increase consumer demand these products – particularly since almost all (or all) are relatively unknown internationally and have little brand value outside their native countries. The answer is that increased legal protection does NOT increase consumer demand; it would do nothing, by itself, “to transform the African farmers from raw material producers to exporters of differentiated products easily identifiable in the global market.” As Dwijen Rangnekar has corrected noted, “[t]he introduction of GIs (IPRs for that matter) on their own will not generate the transformation that they are often allegedly connected with.” Common sense tells us that “[a]ppropriate collateral institutions” and a variety of other policy measures, particularly marketing efforts need to

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<sup>208</sup> James Otieno-Odek, *supra* note \_\_ at 5.

<sup>209</sup> Paulin Edou Edou, *supra* note \_\_ at 2.

<sup>210</sup> Roussel and Verdeaux, *supra* note \_\_.

be present alongside the GI legal regime to achieve any price premia.<sup>211</sup> As Professor Annette Kur at the Max-Planck Institute in Munich has written:

“Irrespective of the actual quality of goods grown or produced in developing countries, such goods will only be economically successful if they are in demand on the market in countries where consumers are willing to pay (more) for them. *It is obvious that such demand will not automatically result from registration of the term and the exclusive right it confers.* Rather, market success needs to be fostered in the same way as it would have to be done for trademarks, i.e. by launching marketing campaigns – and that is usually very costly. The promises made to developing countries tends to disregard that point.”<sup>212</sup>

To say that GIs can add value is fine – as long as the writer or speaker means that (a) GI marketing, as a form of branding,<sup>213</sup> can increase the value consumer attach (and are willing to pay) for a particular item; (b) that long-term the GI will rarely maintain its brand value without meaningful quality controls on the product, and; (c) that GI marketing works properly with effective legal protection of the GI against deceptive uses and unfair competition.

It is clear that within Europe, GI marketing is successful only when the particular product has its own established reputation for quality, not from being a protected GI *in and of itself*. For example, Italy has over 140 PDOs/PGIs, but Stéphan Marette has established that the top ten Italian PDOs/PGIs accounted in 2004 for 82% of all Italian PDO//PGI sales (domestic and export).<sup>214</sup> The top **three** Italian PDOs/PGIs – *Prosciutto di Parma*, *Parmigiano Reggiano*, and *Gran Padano* -- accounted for 56% of total

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<sup>211</sup> Dwijen Rangnekar, *The International Protection of Geographical Indications: The Asian Experience*, paper presented at UNCTAD/ICTSC Regional Dialogue on IPRs, Innovation, an Sustainable Development, Hong Kong, 8-10 November 200X at 20. *See also* Zografos, *supra* note \_\_ at 17 (“[T]he value and benefits of a geographical indication will depend on the way it is exploited, marketed and policed.”)

<sup>212</sup> Annette Kur, *Quibbling Siblings – Comments to Dev Gangjee’s Presentation*, 82 CHICAGO KENT LAW REVIEW 1317, 1323 (2007) (emphasis added).

<sup>213</sup> *See, e.g.* Echols, *supra* note \_\_ at 204.

<sup>214</sup> Stéphan Marette, *Can Foreign Producers Benefit from Geographical Indications under the New European Regulation?*, 10 (1) ESTEY CENTRE JOURNAL OF INTERNATIONAL LAW AND TRADE POLICY 70 (2009).

sales.<sup>215</sup> As Marette notes, the statistics "raise[s] the point that consumers recognize Prosciutto di Parma, Parmigiano Reggiano and Gran Padano as specific brands with established reputations rather than as products signaled via the GI system."<sup>216</sup> For products like *Penja* pepper (Cameroun), *Kitengela* ostrich meat (Kenya), or *Ethiopian* resins (all mentioned above), we can apply Marette's basic and common-sense insight:

"Foods marked with prominent locations are comparable to branded products, whereas a rather unknown EU label may not influence consumers' choices at all. . . . A few GIs dominate the market and are able to partially extract consumers' willingness to pay for products from a specific origin, while other GIs have tiny market shares with no influence on consumers' choices."<sup>217</sup>

Marette concludes that "It is difficult for small GIs or new entrants from third countries that benefit from the new EU regulation to establish their reputations."<sup>218</sup>

After discussing misconceptions about the role of GIs in protecting traditional knowledge, we will turn to the marketing and quality control issues that are far more important to produce a long term "GI effect" for any developing country product than whether the legal protection is the deception/fraud standard of TRIPS Article 22 or the quasi-dilution standard of TRIPS Article 23. While there are a host of reasons to be doubtful about the potential GI effect for *most* developing country food products, coffee and cocoa may be the exception for some of the reasons we have already discussed, e.g. there are no "local" coffee and cocoa production to compete with and, therefore, consumers in rich countries have already become accustomed to expecting quality coffees and cocoas to come from distant, less developed places. On that count, there is meaningful evidence that geographic specification of coffee source can produce increased premiums. A survey of German retail coffee sales showed some positive effect when the country of origin was indicated, whether the coffee was conventional or organic (as well

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<sup>215</sup> *Id.* at 71.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 72.

as a substantial premium when the coffee was organic, fair trade, and geographically specified):

*Retail Prices for Selected Coffee in Germany, 2007 (in €/250 g of 100% Arabica Coffee)*

	Country / region of origin specified	Average prices and price ranges
<b>Conventional (4)</b>		1.5
<b>Conventional (4)</b>	X	2.6
<b>Organic (1)</b>		2.0*
<b>Organic (2)</b>	X	2.4
<b>Organic &amp; Fair Trade (4)</b>	X	4.9
<b>Wild Coffee &amp; Organic / Fair Trade (4)</b>	X	5.8

Source: Based on a survey by Stellmacher 2007.

This price survey is particularly useful because it shows [a] consumer propensity to pay higher prices for coffee that is geographically specified without relying on the reputation of any one geographic region, and [b] not surprisingly, it shows a much more substantial price premium when the GI is *combined* with guarantees of specialty endogenous characteristics (organic) or specialty exogenous characteristics (fair trade). In other words, there are different ways to produce a “de-commodification effect” and, if we are working for the betterment of developing country farmers, that should be our goal, not just the “GI effect” by itself.

**B. Understanding the limited role of GIs in protecting traditional knowledge**

Interest in geographical indications in developing countries is often linked to the use of GI laws to protect and foster traditional knowledge (TK) and traditional cultural expressions (TCE). Unfortunately, the capacity of GI law to protect TK/TCE is frequently misdescribed and overstated. For example, in 2001 a group of Italian scholars

gave a theoretical account of the GI-TK/TCE connection, seeing that the goal of GIs was “to transform the local knowledge incorporated within the typical product into a collective form of intellectual property, that is into a ‘mark’”;<sup>219</sup> in 2004, Dweijen Rangnekar similarly characterized GIs as the “transformation of pre-existing cultural and social norms (of say, ‘good farming’) into juridical space as enforceable IPRs”;<sup>220</sup> and in 2005 another English academic wrote that “tangible indigenous knowledge can constitute the subject-matter of geographical indications, and that geographical indications can be used to protect such knowledge.”<sup>221</sup> All of these statements could be misunderstood to say that GIs *protect* traditional, local knowledge. Let’s first consider the foundation of the perceived relationship between GIs and traditional knowledge and local customs. What is important is that policymakers and activists understand how the juridical nature of GI protection means that GI laws offer only *very limited and contingent* support for TK and TCE – and that support through market mechanisms.

It is easy to see how people would draw a connection between geographical indications and TK/TCE in that, for both, “their focus [is] on old creativity and community ownership, rather than on the new knowledge and individual ownership usual in intellectual property law.”<sup>222</sup> The Lisbon Agreement specifies that an appellation product’s characteristics may come from “natural *and* human factors.”<sup>223</sup> Although the GI definition in TRIPS Article 21 lacks such wording,<sup>224</sup> there is no doubt that human factors – that is, the *land as cultivated* – have always been central to the passionate belief

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<sup>219</sup> Alessandro Pacciani, Giovanni Belletti, Andrea Marescotti, and Silvia Scaramuzzi, *The Role of Typical Products in Fostering Rural Development and the Effects of Regulation (EEC) 208/92*, 73rd Seminar of the European Association of Agricultural Economists, Ancona, 28-30 June 2001, at 11. The purpose of the GI being then to “to maximize at a local level the positive effects coming from the typical product rent.” *Id.* Available at <http://www.origin-food.org/pdf/partners/belmariscaparole.pdf>.

<sup>220</sup> Rangekar, *supra* note \_\_ at 7. [quoting Moran, 1991]

<sup>221</sup> Daphne Zografos, *Geographical Indications: An Opportunity for Asia?*, 5th Annual Asian IP Law and Policy Day, IP Academy, Singapore and Fordham University, New York, April 2008, at 21-22 (“In relation to indigenous knowledge, it was established that tangible indigenous knowledge can constitute the subject-matter of geographical indications, and that geographical indications can be used to protect such knowledge, essentially because of their compatibility with the nature of indigenous knowledge.”)

<sup>222</sup> Echols, *supra* note \_\_ at 199.

<sup>223</sup> Lisbon Agreement, *supra* note \_\_ at art. 2 (emphasis added).

<sup>224</sup> TRIPS Article 22(1) provides : “Geographical indications are for 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.”

in GIs.<sup>225</sup> At a macro level, GIs are *obviously* about local cultivation cultures, not innate characteristics of the land. For example, France and Italy together account for slightly less than 50% of the protected cheese designations in the EU – which may roughly represent the relative importance of cheese in the agricultural and consumptive cultures of these two countries, but certainly does not represent the innate superiority of French and Italian *land* for cheese production compared to the rest of the land in the European Union. German and British beers account for an even larger percentage of the EU's protected GIs for beer which, again, surely represents the production and consumption *culture*, not that German and English soil is innately different for beer production.

Nonetheless, the idea of an appellation or GI is primarily a product's unique connection to its particular *place* of origin and only secondarily -- and not necessarily -- to *traditions* or *customs* in a particular place. The connection to *place, not customs* is definitional to a GI because the GI cannot be used by those living outside the delineated geographic area. If GIs were understood to be primarily connected to custom and tradition, they would be transportable with the customs and traditions, but this is exactly the fissure between the EU and New World countries built on large immigrant populations. When late 19th century Sicilian immigrants to Wisconsin called their homemade wine "Marsala,"<sup>226</sup> this is something a GI advocate finds objectionable because the GI must be primarily connected to the land, not primarily connected to the (transportable) customs, traditions, and know-how. Connection to a specific, delineated geographic territory is a *necessary* condition for a GI.

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<sup>225</sup> French law defines an AOC as a region or locality name "that serves to designate a product of that origin whose qualities or characteristics are due to the geographic milieu, which includes natural and human elements. Code de la Propriété Intellectuelle [C. Prop. Intell.] art. L. 721-1 (citing C. Con. art. L. 115-1 (defining AOC as "la dénomination d'un pays, d'une région, ou d'une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique, comprenant des facteurs naturels et des facteurs humains.)); See also Mexican Industrial Property Law, Article 156 (An appellation of origin shall be understood to be the name of a geographical region of the country that is used to designate a product originating therein whose qualities or characteristics are due exclusively to the geographical environment, including both natural and human factors.), available at

<sup>226</sup> DONNA R. GABACCIA, WE ARE WHAT WE EAT: ETHNIC FOOD AND THE MAKING OF AMERICA 53 (1998).

If that is correct, what is the origin of the perceived connection between GIs and local traditions, customs, and know-how? The connection comes from paradigmatic European examples or, perhaps more strictly, the *idealized* versions of paradigmatic GI examples from Europe. Much of the narrative about appellations coming out of Europe is how appellations promote smaller-scale, traditional farming.<sup>227</sup> As Angela Tregear has aptly described, in this discourse GI products "are conceptualized as issuing from small-scale agricultural systems with special characteristics due to the combination of local raw materials with traditional, inherited production techniques."<sup>228</sup> To some degree, this conceptualization of GIs comes from the French system in which the Institut National de Appellations d'Origine (INAO) works with local "interprofessional" committees to establish production criteria for each GI well beyond delineation of the geographic area. When describing the *appellation d'origine* protection established by INAO, Moran writes "[t]his protection constitutes a legitimate safeguard of rights acquired by generations of producers of a region who have imposed on themselves a certain number of rules and disciplines." *When* the process of establishing the non-geographic production criteria happens with integrity, then, as Rangekar might say, the GI "specifications are essentially the codification of historically stabilized methods of producing the product."<sup>229</sup>

But "when this happens" carries some important caveats. First, few developing countries have the government infrastructure, civil service tradition, and socio-political transparency that permits the amount of local involvement and integrity one sees in the INAO system (even assuming that is enough). Second, the "depth" of non-geographic production specifications varies from product category to product category. For example, one might say that relative to the complexity of the production process, INAO specifications for *appellation* cheese production are more complete and "tradition-binding" than the parallel specifications for most still wines. Third, even this is *idealized* in its assumption that the GI is mainly protecting "generations" of small-scale, traditional

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<sup>227</sup> See, e.g. Echols, *supra* note \_\_ at 200 ("Many foods bearing a geographical indication are the product of small (or micro) businesses and are traditional, artisanal, and of rural origin.")

<sup>228</sup> Angela Tregear, *From Stilton to Vimto: Using Food History to Re-Think Typical Products in Rural Development*, 43(2) SOCIOLOGIA RURALIS 91 (2003)

<sup>229</sup> Dwijen Rangnekar, *The International Protection of Geographical Indications: The Asian Experience*, paper presented at UNCTAD/ICTSC Regional Dialogue on IPRs, Innovation, and Sustainable Development, Hong Kong, 8-10 November 200X, at 21

farmers – it's doubtful that's the case with some classic GI products (*Champagne, Roquefort*) as well as many newer appellations.

Nonetheless, this archetype of generations of small-scale, traditional farmers being "protected" by a GI has come to animate much GI advocacy. GI advocates from developing countries promote a narrative in which appellations of origin are “linked to cultural traditions which exist in the countries that have developed and perfected the manufacture of a product belonging to one of its regions”<sup>230</sup> and that that GIs are useful to protect TK/TCE because “[g]eographical indications are often based on traditional formulas and processes” and because “[t]he know-how attached to geographical indications is transmitted from one generation to the other.”<sup>231</sup> After a long stream of such arguments, as a team of South African researchers put it, “developing countries could be inclined to use mechanisms such as GI protection as a way to preserve (and possibly benefit from) their national intellectual and cultural heritage as well as their biodiversity.”<sup>232</sup> The appeal of GIs as a legal tool to protect TK/TCE and a “counter” to western notions of development is captured by Bernard Roussel and Francois Verdeaux:

"Agricultural development projects are often conceived in terms of technology transfer, be it the introduction of new plant varieties, tools or production techniques, [etc.] . . . The introduction of a system recognizing Geographical Indications reverses these approaches, in so far as it aims, not to produce differently, but the contrary (at least in theory) to recognize and enhance the value of products derived from existing resources and know-how.”<sup>233</sup>

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<sup>230</sup> Eduardo Orendain Giovannini, *supra* note at slide 18.

<sup>231</sup> Zografos, *supra* note \_\_\_ at 9.

<sup>232</sup> Bramley, et al, *The Economics of Geographical Indications*, *supra* note \_\_\_ at 129. *See also id.* at 118 (“origin-labeled products are one of the most evident manifestations of locality and are often considered useful instruments through which to preserve local culture and traditions and to foster rural development, especially in disadvantaged areas.”) *See also* John Wilkinson, Comments on ‘The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries’, Contributed Paper for the International Roundtable on the Economics of Intellectual Property Rights, WIPO, Geneva, November 26-27, 2007 at 142, 145 (“The bases of GI legitimacy have varied over time and place, but they are increasingly associated with sustainable forms of economic activity, whose social and environmental components will tend to become more important in the developing country context.”); A. Pacciani, G. Belletti, A. Marescotti and S. Scaramuzzi, *The Role of Typical Products in Fostering Rural Development and the Effects of Regulation (EEC) 2081/92*, 73rd Seminar of the European Association of Agricultural Economists, Ancona, Italy, June 28-30, 2001

<sup>233</sup> *Id.*

To some degree, these perspectives are true, but as Roussel and Verdeaux recognize, the connection between GIs and existing local know-how is more nuanced and contingent.<sup>234</sup>

We should distinguish between the possible effect of GI law in *guarding TK exclusivity* versus the possible effect of GI law in *general preservation of TK*. As to the former, GI law can do nothing to keep any TK exclusively within one region or community:<sup>235</sup> only the name of the product is protected by GI law, not the local production know-how, knowledge, or technology. Mistaking GI law as a means of *establishing exclusive rights* to TK/TCE would be the equivalent of mistaking trademark law as a means to protect a patented invention. The method of making sparkling wine promulgated by Dom Perignon and others around Reims and Epernay was a form of “traditional knowledge” that, at one time belonged exclusively to the Champagne region. That traditional knowledge migrated, such that the “*méthode champenoise*” is now practiced on at least four continents. In seeking recovery of the GI “Champagne” the winegrowers of the Champagne district are only seeking to secure the *name of the technology*, not the technology itself.<sup>236</sup> GI law can only keep the *name of the technology or TK* from migrating, not the TK itself.

Second, the question as to whether GI protection can help *preserve* and *foster* TK is more complex. To what degree GI protection fosters TK/TCE is a highly contingent issue: “it is strongly dependent on social interplay, the movement of the economy and the scale of exchanges involving local products.”<sup>237</sup> It is accurate to say that protection of a GI “does not directly or explicitly protect local knowledge,” but the GI can help preserve

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<sup>234</sup> *Id.* (“It should not be forgotten, however, that while GI mechanisms have proved themselves in terms of conservation and extracting greater value from local knowledge and biodiversity, originally they were not created for they have limitations.”)

<sup>235</sup> As Correa correctly notes, though the use of a geographical indication may be associated to the use of certain traditional knowledge (for instance, a particular process that determines peculiar characteristics of a product) a geographical indications *does not protect the underlying knowledge as such* which – in the absence of other forms of protection – could be used by third parties without restriction based on the existence of such indication.” Correa, *supra* note \_\_ at 25-26.

<sup>236</sup> This remains true even in the European Union where the phrase “*méthode champenoise*” cannot be used by vintners outside the Champagne district, but the actual know-how is widely used and labeled “*méthode traditionnelle*.”

<sup>237</sup> Sainte Marie and Bérard, *supra* note \_\_ at 181.

TK whenever the traditional knowledge “proves necessary to justify the specificity linked to a particular place.”<sup>238</sup>

To understand this, let’s start with the opposite situation. Many of the world’s most successful GIs may involve much local knowledge, but they do not require much *traditional* knowledge as a *necessary* condition. In fact, a large amount of industrial scale production is carried out under protected geographical indications. In France, protected *appellations d’origine* cheeses are actually classified into four production types: *fermier*, *artisanal*, *cooperative*, and *industriel* versions.<sup>239</sup> Of the more than three million cheeses cured in the caves of Roquefort-sur-Soulzon (and thus qualifying for the AOC *Roquefort*), 60% are made by one company.<sup>240</sup> Production of sparkling wines in “industrial quantities”<sup>241</sup> by the big Champagne firms has been true for decades.<sup>242</sup>

Strictly speaking, legal protection of a local GI only *helps* preserve local TK if the product’s unique qualities *depend* on local, traditional knowledge. If the claimed nexus between place and product qualities depends only on the weather and topology, then production techniques can evolve greatly and TK can be lost without jeopardizing the legitimacy of the GI. But if the claimed nexus between place and product qualities *absolutely depends* on some TK, then successful GI-based marketing of the product will preserve the TK – simply because the TK is needed to make the product. In other words, the geography is *always* a necessary condition for the GI product, but the local customs are only *sometimes* a necessary condition for the GI product.

Where the connection between the product’s GI name and the local knowledge/technology is not so fixed successful marketing of the GI serves to preserve

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<sup>238</sup> Christine de Sainte Marie and Laurence Bérard, *Taking Local Knowledge into Account in the AOC System*, in BIODIVERSITY AND LOCAL ECOLOGICAL KNOWLEDGE IN FRANCE 181 (Bérard, Cegarra, Djama, Louafi, Marchenay, Roussel, and Verdeaux, eds. 2005).

<sup>239</sup> See Kazuko Masui & Tomoko Yamada, *French Cheeses* 28 (1996)

<sup>240</sup> See Masui & Yamada, *supra* note \_\_\_ at 217 (the Société des Caves et des Producteurs Réunis); see also Roquefort Société, <http://www.roquefort-societe.com> (last visited Nov. 5, 2006).

<sup>241</sup> *Uncorking Success*, *The Economist*, Dec. 21, 2002, at 47.

<sup>242</sup> Alexis Lichine et al., *Alexis Lichine’s Encyclopedia of Wines & Spirits* 173, 185, 187 (Alfred A. Knopf, Inc., 1968) (1967) (“Almost all Champagne is made sparkling in the cellars of the big shipping firms . . . . Only in a few isolated cases does the grower in Champagne vinify his own grapes—they are nearly always sold to one of the shipping firms . . . .”).

the TK/TCE only loosely. And this is a problem for the GI/TK connection: the history of successful GIs is replete with examples of the local traditional knowledge being substantially modified or *abandoned* in order to ensure the GI product's continued success – whether it is the changing cow breeds used for the milk in Parmigiano-Reggiano cheese,<sup>243</sup> the shifting supply systems for Parma ham,<sup>244</sup> or the evolution in viticultural practices in Languedoc, Napa, and Mendoza.<sup>245</sup> A decade ago, production of *Port* fortified wine in Portugal's Douro region depended on “grapes still trodden by the feet of locals,” but major *Port* producers subsequently “have installed computer-operated alternatives to the human foot.”<sup>246</sup> Tregear gives a good general description of the situation when she writes “[m]odern technologies and mechanization are characteristic of many of the most renowned Mediterranean typical products, reflecting choices made by their producers to engage in high volume urban and international markets.”<sup>247</sup> Researchers Denis Sautier and Pascale Moity-Maizi have noted the same evolution of practices in western and central Africa in relation to tradition products that could be GI-labelled.<sup>248</sup> In other words, initial or limited success in GI-marketing can help local TK/TCE, but *great* success can actually put pressure on producers to abandon or modify TK/TCE to increase production.

Moreover, if the concern is small-scale farmers, not “TK” in some abstract sense, then we must remember that legal protection of the GI does not, by itself, prevent consolidation of producers. During the same period in which modern technologies were adopted, the major *Port* producers who control 80% of the region's production have

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<sup>243</sup> PAMELA SHELDON JOHNS, PARMIGIANO! 23-25 (1997). See also K. de Roest and A. Menghi, *Reconsidering 'traditional' food: the case of Parmigiano-Reggiano cheese*, 40(4) SOCIOLOGICA RURALIS 439 (2000).

<sup>244</sup> F. Arfini and C. Mora, eds., *Typical and traditional products: rural effects and agri-industrial problems*, Proceedings of the 52nd Seminar of the European Association of Agricultural Economists, 19-21 June 1997 (Istituto de Economica Agraria e Forestale, Universita di Parma, Parma, Italy).

<sup>245</sup> Hughes, *supra* note \_\_\_\_ at 356 - 357 (and sources cited therein).

<sup>246</sup> Janice Robinson, *The port trade's calling card*, FINANCIAL TIMES, May 30/May 31, 2009, Life & Arts at 4.

<sup>247</sup> Tregear, *From Stilton to Vimto*, *supra* note \_\_\_\_ at 102.

<sup>248</sup> Denis Sautier and Pascale Moity-Maizi, Relevance and challenges of geographical indication protection for emblematic origin-based products in Western and Central Africa, paper delivered at SINER-GI Final Conference, Geneva, June 23-24, 2008, at 3 (“Far from just ‘sticking to secular traditions,’ origin products that are know-how in Western and Central Africa have evolved to meet the new quantitative and qualitative demands of urban consumers.”)

added 2,500 acres of their own vineyards and “no longer buy nearly as much from local growers who are now increasingly dependent on the local co-ops and their relatively paltry prices.”<sup>249</sup> In short, in a period when the *Port/Oporto* GI is quite successful, “[l]ife is becoming tougher and tougher for the legions of smallholders in the Douro.”<sup>250</sup>

Not only should we recognize the limited role of GI laws to preserve and foster traditional knowledge, we have to recognize that many of the places where we are deploying GI laws – and believe we *should be deploying* GI laws – there may be little or no production “knowledge” that really qualifies as “traditional.” Brazil is a telling story about the weak connection between GI-marketing and TK/TCE. Brazil’s first two domestically protected indicações de procedência (IdPs) are *Pampa Gaúcho da Campanha Meridional* beef and *Café do Cerrado* coffee. Beef production has a long history in the “pampas” region of the *Pampa Gaúcho* IdP (albeit with changing breeds), but as to the Cerrado area of the state of Minas Gerais, coffee “was not a traditional product in this region. Coffee only began to be grown in the region in the 70s by farmers who had emigrated there from the State of Paraná further to the south.”<sup>251</sup> In Cerrado, the connection between the GI and any notions of TK is further attenuated by the fact that, like Champagne vintners and cheesemakers in Parmigiano-Reggiano, “[t]he Cerrado coffee producers use advanced technologies and management systems.”<sup>252</sup> Indeed, when the Brazilian government established a unit to promote GIs in 2005, it was placed within the Ministry of Agriculture – the government arm identified with Brazilian agri-business – and not in the Agrarian Development Ministry, the government arm responsible for family farming and rural development.<sup>253</sup> And this is not just a characteristic of the New World. Researchers studying likely candidates for GI protection in Croatia focused on peppers from the Virovitica area, but pepper production in that region “started some years

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<sup>249</sup> Janice Robinson, *The port trade’s calling card*, FINANCIAL TIMES, May 30/May 31, 2009, Life & Arts at 4.

<sup>250</sup> *Id.*

<sup>251</sup> Wilkinson & Cerdan, *A Brazilian Perspective*, *supra* note \_\_ at 11.

<sup>252</sup> *Id.* Wilkinson and Cerdan also discuss another candidate for domestic protection as a IdP in Brazil, the *São Joaquim* apple. But the relevant apple varietal has also only been grown in *São Joaquim* for thirty years. *Id.* at 13.

<sup>253</sup> Wilkinson & Cerdan, *A Brazilian Perspective*, *supra* note \_\_ at 2.

after World War II<sup>254</sup> and of the farms they surveyed, about 50% had been producing the peppers less than 20 years.<sup>255</sup> This is not to deny that GI-marketing may help *rural development* in all these areas, but to insist that we recognize the economic health of rural and agrarian communities is not the same thing as preserving TK/TCE.

The only way for the connection between a GI and any related TK/TCE to be stronger is for the party controlling the GI – whether it is a central government or a local association of producers – to impose production conditions, requirements, or specifications that maintain the traditional methods. This is implicit in many commentators' discussions of GIs as a development tool, but it is something we must make much more explicit. A local coffee or cocoa authority could insist that beans be picked by hand, that they be dried (or, for cocoa, fermented) a certain way traditional to the locale, and that they be bagged and stored under certain conditions traditional to the locale. In similar fashion, France's INAO has regulations for AOC cheese establish legal requirements for each type of cheese on rennet used in coagulation, curd drainage, milk temperature at different points in curing, salting, and the use of lactic proteins.<sup>256</sup> One could even envision horticultural regulations on the growth and care of the coffee bushes and cocoa trees – by parallel, the French regulations for Domfront pear liquor AOC designate the principal pear variety (Plant de Blanc), the other pear varieties that may be used, mandatory sizes for pear trees, and planting density for orchards.<sup>257</sup>

Without question, *where there is TK/TCE to be preserved*, GI-marketing can help preserve TK where the TK elements are embedded into the GI product specifications. In that sense, one can promote continuation of local TK/TCE within the rubric of a GI

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<sup>254</sup> Marija Radman, Zeljka Mesic, and Damir Kovacic, *Geographical indications in Croatia - A case study of Virovitica pepper*, paper presented at Food and Territories, ALTER 2006, Baeza, Spain, 16-21 October 2006 at p. 16.

<sup>255</sup> Id. at 19 ("about 50% of farms have a tradition of pepper production longer than 20 years" – which means about 50% have a tradition shorter than 20 years).

<sup>256</sup> See Masui & Yamada, *supra* note \_\_\_ at 50, 92, 108; see also *L'adjonction d'eau ou de colorants est interdite*, Le Monde, Aug. 20, 2002, at 8 (noting requirements for the "calvados domfrontais" AOC issued on December 21, 1997).

<sup>257</sup> Sainte Marie and Bérard, *supra* note \_\_\_ at 186. See French Ministry of Agriculture, Food, Fisheries, and Rural Affairs, Décret du 20 décembre 2002 portant reconnaissance de l'appellation d'origine contrôlée « Domfront », J.O. number 299 du 24 décembre 2002, page 21556, texte number 71.

system. But for that to happen, one needs a different sort of local capacity, whether it is "traditional knowledge" or recently developed: local capacity to establish relatively transparent, relatively inclusive, relatively non-corrupt institutions to establish the GI specifications, enforce the GI specifications, and successfully manage the GI and its marketing. If all that is done, one can quibble whether the institutions are governmental, para-statal, or private. But in Africa (and, to a lesser degree, Latin America), experience teaches that all that is not likely to be done well by a governmental or para-statal entity.

**C. *Self-marketing versus marketing programs that leverage corporate interest -- and the push toward even greater geographic specification***

While some policymakers and GI experts on the "law" side make the mistake [intentional or unintentional] of treating strengthened GI laws as themselves making developing world GIs more valuable, *all* development experts recognize that legal protection is not enough and must be accompanied by, in the words of the 2004 WTO Trade Report "significant investments in promotion of the product if consumers are to attach value to the indication."<sup>258</sup> Other commentators have concludes that "[I]arge amounts of additional advertising expenditure would be necessary for a sizeable shift of demand for products protected by geographical indications",<sup>259</sup> that "[i]n all but a few cases, most products of developing countries do not have the cachet of Champagne or Scotch and will require a considerable marketing campaign to convince consumers they should pay a premium",<sup>260</sup> and that if the GI "does not have an established reputation,

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<sup>258</sup> World Trade Organization, 'Exploring the Linkage between the Domestic Policy Environment and International Trade', World Trade Report 2004 at XIX, available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report04\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report04_e.pdf), 2004. [hereinafter "World Trade Report 2004"]

<sup>259</sup> Roland Herrmann, *Comments on 'The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries'*, Contributed Paper for the International Roundtable on the Economics of Intellectual Property Rights, WIPO, Geneva, November 26-27, 2007 at 146 (Research in generic promotion suggest that "[I]arge amounts of additional advertising expenditure would be necessary for a sizeable shift of demand for products protected by geographical indications. This might imply that their successful protection for developing countries' products does pay, mainly for the countries which are already rather successful on international markets. ")

<sup>260</sup> William A. Kerr, *Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development*, THE ESTEY CENTRE JOURNAL OF INTERNATIONAL LAW AND TRADE POLICY, 7 (1): 1, 8, 2006 (expressing doubts that most developing countries could justify the significant investment in advertising needed to break even on economic rents from product differentiation).

activities of promotion are crucial for the GI success, but they imply some fixed costs: without economies of scale, it will not be possible to development sufficiently those activities.”<sup>261</sup> As one trade magazine put it bluntly “[o]ne problem for developing countries which launch brands will be a lack of funds to communicate and promote them.”<sup>262</sup>

Indeed, some of the misplaced focus on increased legal protection may be rooted in a sense of frustration over the core problem that developing countries lack the funds to communicate and promote the local products and their names. One answer is that careful, limited spending on promotion is possible for some countries. I will describe Colombia's efforts to promote its own coffees, probably the most ambitious efforts by a developing country to GI-market its own products. Most countries will not be able to promote their GIs to the Colombia did, but they may be able to engage in wholesale and upstream efforts that will prompt others to undertake the GI promotion at the retail level. taking on the promotion; public and private foreign aid funds *might* be available for such promotion by developing country governments.<sup>263</sup> One could say that the best answer is *always* to have *others* pay for the promotional activities that built the GI's reputation. And that is exactly what has been happening in the world of coffee – and is increasingly happening with cocoa and chocolate. (There remains, of course, the question whether these marketing mechanisms lock in patterns of rights that prevent the economic rents from "trickling back" to the farmers – an issue discussed in Part III.E below.)

### **1. The marketing of Colombian coffee**

There is no more successful example of the creation of a globally valuable geographical indication from a developing country than COLOMBIAN coffee. The first

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<sup>261</sup> SINER-GI, *Are Geographical Indications a way to 'decommoditize' markets of raw materials?* SINER-GI Final Conference, Geneva, 23-24 June 2008 [paper on file with author] (discussing a new coffee GI in the Dominican Republic). See also Ryan Tyler Cardwell, 'Three Essays in Agricultural Economics: International Trade, Development and Commodity Promotion', unpublished PhD dissertation, Department of Agricultural Economics, University of Saskatchewan, 2005 (study of the marketing of closely substitutable commodities ("CSC") suggests that only engagement – including advertising investment – can sufficiently differentiate lesser known GI foodstuffs so that price premia are enduring.).

<sup>262</sup> *Trademarking: Grown in Ethiopia*, MARKETING WEEK, April 24, 2008 at 26.

<sup>263</sup> *Id* (quoting one advertising executive that "[s]ome spending is needed . . . . But there enormous amounts of development aid money floating around to back these sorts of things.")

reports of coffee cultivation in Colombia come from the 1730s, although it was not until the end of the seventeenth century that there were coffee plantations in the departments of Santander (also an important cocoa region) and Boyacá. One could argue that the development of Colombia's coffee brand began as early as 1932, when the Colombian president decreed that all coffee being exported should be labeled "Café de Colombia."<sup>264</sup> Yet by the late 1950s a survey showed that only 4% of consumers in the United States (then and still the largest national market for coffee) even knew that the country of Colombia produced coffee beans.<sup>265</sup> Beginning in the 1960s, Colombia began a marketing campaign in the United States featuring the fictional character "Juan Valdez," personifying the individual Colombian coffee farmer; the Colombian government registered a JUAN VALDEZ COFFEE OF COLOMBIA trademark in 1963.<sup>266</sup> During this period the Colombian government also had a US registration for a 100% COLOMBIA COFFEE trademark linked to the Juan Valdez character.<sup>267</sup> In 1979, the Colombian government applied for registration of the certification mark COLOMBIAN with simple certification standards that the coffee was grown in Colombia, subject to standard inspection by the national coffee federation, and approved for export to the US.<sup>268</sup> This was apparently done because a significant portion of specialty coffee channels did not want to participate in the Juan Valdez marketing program.<sup>269</sup>

There is no question that this dual prong branding campaign – trademark/JUAN VALDEZ and certification mark -- paid off enormously for Colombia. As coffee expert Timothy Castle wrote in 1991:

<sup>264</sup> W. UKERS, ALL ABOUT COFFEE (New York, The Tea and Coffee Trade Journal Company, 1935)

<sup>265</sup> *Making the Origin Count – Two Coffees: Colombia – 50 Years of Evolving Strategies*, 5 WIPO MAGAZINE, October 2007 at 4.

<sup>266</sup> USPTO Registration 0752589, July 9, 1963. This registration expired in favor of newer JUAN VALDEZ trademarks filed in 2005.

<sup>267</sup> USPTO Registration number 0866905, March 18, 1969. The trademark was a circular shape with "Juan Valdez" image in the center, although the character's name did not appear in lettering, only "100% Colombia Coffee."

<sup>268</sup> USPTO Registration number 1160492, July 7, 1981 ("THE MARK CERTIFIES THAT THE COFFEE WAS GROWN IN THE REPUBLIC OF COLUMBIA AND THAT SUCH COFFEE HAS BEEN SUBJECTED TO STANDARD INSPECTION AUTHORIZED BY APPLICANT AND SUCH COFFEE HAS BEEN APPROVED FOR EXPORT TO THE UNITED STATES AS PASSING RECOGNIZED CURRENT MINIMUM QUALITY STANDARDS REQUIRED FOR SUCH EXPORT AS SET AND ENFORCED BY SAID FEDERACION AS AGENT FOR AND SUBJECT TO THE ULTIMATE CONTROL OF THE APPLICANT.)

<sup>269</sup> *Making the Origin Count – Two Coffees: Colombia*, *supra* note \_\_ at 5.

“The marketing of Colombian coffee has been very effective. By dint of their Juan Valdez advertising program, an extensive rebate/price protection plan, and a comprehensive advertising-allowance program offered to roasters, the Colombians have succeeded in making their product and logo one of the most recognized in the world, particularly in the United States, where, everyone knows that Colombian coffee is the ‘richest.’”<sup>270</sup>

As of 2008, the Associated Press still called Juan Valdez the “world's biggest coffee icon.”<sup>271</sup> Appreciating the brand value that they had established, the Colombian coffee federation revamped its strategies in North America, updating the JUAN VALDEZ logo and opening a chain of JUAN VALDEZ coffee shops that had originally begun in Colombia (in 2002). By 2008, there were 10 JUAN VALDEZ coffee shops in the US; as many more in Spain, Ecuador, and Chile; and plans for a massive expansion in North America and Europe.

In the 1980s, Colombia had begun similar efforts to promote its coffee in France, albeit without Juan Valdez. In 1984, its share of the green coffee market in France was 4%; by 1992, it has risen to 11%. In 1984, “it was quite difficult to buy a pure Colombian coffee anywhere in France, only the food store chain Casino was offering one under its store brand label,” but by 1992, there were 90+ brands and private label offerings of 100% Colombian coffee.<sup>272</sup> Colombia’s campaign to promote their coffee included placement as Air France’s coffee provider and a café in reconfigured, underground commercial space at the Louvre.

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<sup>270</sup> Castle, *supra* note \_\_\_ at 41.

<sup>271</sup> Associated Press, *Juan Valdez v. Starbucks: the coffee war is on*, Oct. 17, 2008, available at [http://www.nydailynews.com/latino/2008/10/17/2008-10-17\\_juan\\_valdez\\_vs\\_starbucks\\_the\\_coffe\\_war\\_i-2.html](http://www.nydailynews.com/latino/2008/10/17/2008-10-17_juan_valdez_vs_starbucks_the_coffe_war_i-2.html)

<sup>272</sup> Phillippe Juglar, *Colombian Coffee in France*, TEA AND COFFEE TRADE JOURNAL, June 1, 1993, available at <http://www.allbusiness.com/manufacturing/food-manufacturing-food-coffee-tea/377048-1.html>. See also, Jonathan Bell, *Colombian coffee's market share in the French market*, TEA AND COFFEE TRADE JOURNAL, Jan. 1, 1990, available at <http://www.thefreelibrary.com/Everything+except+the+girl+with+the+smile+in+the+bikini-a08945023>

In all this, Colombian coffee is almost certainly the single best example of sustained, GI-based coffee or cocoa promotion *by the producing country itself*. And all this success was achieved with trademark and certification mark protection, i.e. certain protection only against unauthorized uses that created consumer confusion. As mentioned above, Colombia's US trademark registration date back to the 1960s; in Europe, trademark registrations for JUAN VALDEZ date from 1960 through 1990s [1967 – Denmark; 1975 – UK; 1988 – Poland, Solvenia; 1989 – Italy, Slovakia, Czech Republic; 1992 – Portugal; 1990 – Germany; 1999 - Greece].<sup>273</sup> Colombia also established extensive trademarks rights in Europe to CAFÉ DE COLOMBIA during this period<sup>274</sup> and was granted a Community trademark for CAFÉ DE COLOMBIA in 2001.<sup>275</sup> (And at some point COLOMBIAN no doubt became a famous trademark in the US and therefore eligible for wide protection against dilution, but there appear to be no litigation in which Colombia asserted dilution protection of the mark.)

It was not until August 2007 that, after a two year process, “Café de Colombia” was awarded status as a Protected Geographical Indication (PGI) in the European Union.<sup>276</sup> One French agricultural researcher noted that one cannot gauge the likelihood of other developing countries achieving PGI status for their products in the EU based on Colombia's success because “producers of Colombian coffee were already organized for promoting quality and the product was recognized in Europe by many consumers before the PGI application.”<sup>277</sup> Of course, what is interesting for our purposes about this

<sup>273</sup> Information from JUAN VALDEZ Community Trademark CTM 002401933, available at [http://oami.europa.eu/CTMOnline/RequestManager/en\\_Detail\\_NoReg](http://oami.europa.eu/CTMOnline/RequestManager/en_Detail_NoReg), last visited 25 July 2009. The Colombian government also applied to protect JUAN VALDEZ in France in 2003 and received French trademark number 3230623 in 2004. See BOPI 03/29, Volume 1 at 258 and [http://bases-marques.inpi.fr/Typo3\\_INPI\\_Marques/marques\\_fiche\\_resultats.html?index=7](http://bases-marques.inpi.fr/Typo3_INPI_Marques/marques_fiche_resultats.html?index=7).

<sup>274</sup> See German trademark registration 1105419 for CAFÉ de COLOMBIA, registered 24 April 1987; <sup>275</sup> CTM 001185990, application filed on 26 May 1999 and granted 29 March 2001. Available at [http://oami.europa.eu/CTMOnline/RequestManager/en\\_DetailCTM\\_NoReg](http://oami.europa.eu/CTMOnline/RequestManager/en_DetailCTM_NoReg) (last visited 25 July 2009).

<sup>276</sup> *Id.* See also “CAFE DE COLOMBIA is the first non-EU product to receive the PGI recognition in the 27 members of the EU” available at <http://cafedecolombia.cz/en/PGI/>. A summary of Colombia's application for PGI status is available at <http://cafedecolombia.cz/en/PGI/CafeDeColombiaApplicationEN.pdf>. It was not also until 2004 that the Colombia coffee growers sought *within Colombia* geographical indication registration of “Café de Colombia”; that registration was granted in 2005. *Making the Origin Count – Two Coffees: Colombia*, *supra* note \_\_ at 5.

<sup>277</sup> Stéphan Marette, *Can Foreign Producers Benefit from Geographical Indications under the New European Regulation?*, 10 (1) *The Estey Centre Journal of International Law and Trade Policy* 65, 68-69

comment is not so much the statement on PGI/PDO applications, but the realistic assessment of where the *value comes from*: from the successful marketing and establishment of a reputation for quality, not from the PGI/PDO legal status itself. Indeed, Colombia has continued its trademark-based marketing strategy, filing new Community trademark applications both immediately before and *after* receiving the PGI designation.<sup>278</sup> In an ironic twist, in 2006 Colombia secured a community trademark for a logo which says “CAFÉ DE COLOMBIA denominación de origen,” the very thing the PGI status is supposed to communicate to consumers.<sup>279</sup>

At the same time, the story of the marketing of Colombian coffee is a cautionary tale. The strength of the overall COLOMBIAN brand may now limit the ability of Colombia or others to develop more specific, more high-end, niche geographical brands for Colombian coffees. As an executive at one American specialty coffee company noted "they spent the better part of a generation teaching consumers that all Colombian coffee was the same and special by reason of being from Colombia."<sup>280</sup> A major coffee information website, CoffeeReview, puts it another way: "It would appear that Colombia's remarkable success at producing large and consistent enough quantities of decent quality coffee to position it at the top of the commercial market has doomed it as an elite origin."<sup>281</sup> If you were a Colombian farmer from an area that produces only "decent quality" coffees, that would not matter – or it would even be to your benefit. If you were a farmer from an area with the potential for greater niche marketing, this would be a concern.

In its own JUAN VALDEZ cafes, Colombia is now attempting to differentiate Colombia's coffees, offering two ranges of coffee brands or sub-brands under the

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<sup>278</sup> See Community mark 7116486, application filed 31 July 2008 and registered without modification 15 December 2008. See [http://bases-marques.inpi.fr/Typo3\\_INPI\\_Marques/marques\\_fiche\\_resultats.html?index=1](http://bases-marques.inpi.fr/Typo3_INPI_Marques/marques_fiche_resultats.html?index=1)

<sup>279</sup> CTM 004353553, application filed on 22 April 2005 and granted 2 May 2005. Available at [http://oami.europa.eu/CTMOnline/RequestManager/en\\_DetailCTM\\_NoReg](http://oami.europa.eu/CTMOnline/RequestManager/en_DetailCTM_NoReg)

<sup>280</sup> Interview with Jay Isais, Senior Director of Green Coffee Manufacturing and Distribution, Coffee Bean and Tea Leaf, Summer, 2008 (notes on file with the author).

<sup>281</sup> <http://www.coffeereview.com/reference.cfm?ID=58>

COLOMBIAN and JUAN VALDEZ umbrellas. Interestingly, the dominant range of new sub-brands are *not specifically* tied to particular geographic regions, but are nonetheless identified with topological land types -- *COLINA* (hill), *SIERRA* (mountain), *VOLCAN* (volcano), etc.<sup>282</sup> Interestingly, although the names are topological terms, there are no topological characteristics of the origin of each coffee in the marketing descriptions. Instead, the marketing descriptions focus on taste profiles with vague descriptions that read like they were written by a refugee from a wine tasting career.<sup>283</sup> Separately, and with apparently more limited distribution, the JUAN VALDEZ stores are offering some geographically specified sub-brands, particularly *AMAZÓNICO* (launched in 2006).<sup>284</sup> But it is unclear that even these coffees correspond to an GI region as it would traditionally be understood.

One way to interpret these marketing efforts is that the JUAN VALDEZ management recognizes that consumers want choice between different types of coffee, but that over the long term marketing geographically-specific Colombian sub-regions does not make sense. We can imagine different reasons for such a conclusion. First, the JUAN VALDEZ management may have determined that there is insufficient differentiation between geographic regions or insufficiently consistent differentiation over time, i.e. that there are not really *terroir* differences. But this sort of conclusion has probably never stopped GI-based marketing in the past. Alternatively, Colombian officials may have also concluded that they could achieve greater consistency through blending coffees from different Colombian sources as needed once they established archetypical tastes for each sub-brand – precisely what Folgers did on a global scale for

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<sup>282</sup> The seven types are "colina" (hill), "cumbre" (summit), "ladera" (slope), "macizo" (massif), "pico" (peak), "sierra" (mountain), "volcan" (volcano). *Welcome to the select world of the Juan Valdez whole bean coffee varieties* (2008) (brochure on file with the author).

<sup>283</sup> For example, "colina" is described as "exotic with a very distinctive taste profile. A delicate whininess combined with a medium body and nice finish create a unique profile that is as special as the peaberry used to make it" and "volcan" is described as "[o]ur most intense coffee. A great coffee for espresso and drip alike. It delivers a delightfully pleasant and balanced cup with sweet overtones and a full finish." Brochure, *Welcome to the select world of the Juan Valdez whole bean coffee varieties* (2008) (brochure on file with the author).

<sup>284</sup> The coffee comes from the "Cuenca Amazonico," the Amazon river basin.  
<http://www.cenicafe.org/modules.php?name=News&file=article&sid=727>;  
<http://www.cenicafe.org/modules.php?name=News&file=print&sid=727>.

its coffee blend and what Champagne wine producers do more locally for their different brands of non-cuvee sparkling wines.

Third, the JUAN VALDEZ management may concluded that consumers want choice, but do not remember easily (or do not want to remember) foreign geographic names well. There are two ways to understand this.

The first is an odd and *very* underdiscussed dissonance between theory of GI protection and the reality of GI marketing. While the TRIPS Agreement establishes that protected GIs can be national names, as they were originally understood appellations needed to be small regional names on the grounds that only small regions would have sufficient internal consistency in topology and climate, not to mention cohesive production techniques. But in real world marketing, it is often the “national” geographic names that are the most successful -- Scotch whiskey, Canadian whiskey, Swiss chocolate, Belgian chocolates, Kenyan coffee, New Zealand lamb, etc. Particularly in terms of establishing a *new* reputation, it is surely easier to do this when the consumers already know the region’s name – and the consumers tend to know nations more than smaller units and regions. (There are obviously exceptions to this, i.e. California, Tuscany, Texas, the Riviera, the Pampas.) Along these lines, Colombia's marketing experts could have concluded that consumer choice is better served (and exploited) with sub-brands based on comparatively familiar Spanish/English words (*SIERRA*, *VOLCAN*) than with previously unknown Colombian geographic names.

The Colombians may have taken as a case in point the recent market position of French wines versus Australian and American wines. From the 1980s onward, New World wines have eclipsed French wines in global sales growth partly because New World wines were marketed by easily remembered varietals ("Chardonnay," "Zinfandel") instead of geographic names unfamiliar to those who haven't traveled widely in France. As I said earlier, we cannot attribute these declining sales to GI *law*, although we can attribute it partly to GI *marketing* among different marketing options. Finally, of course, the JUAN VALDEZ management may have simply determined that Colombia does not

have the infrastructure in place to guarantee precise geographic origins *and* regular supplies for dozens or hundreds of stores in different countries. As we will see, this *may* be a key factor in the "non-GI" strategy Ethiopia has adopted in relation to its coffee GIs.

## 2. Corporate marketing of coffee and cocoa GIs

“If you enter a Starbucks, you will see a list of blends named for the islands, countries, and territories from which they came.”

JUNIOR SCHOLASTIC, 2008<sup>285</sup>

The fact that a 2008 article U.S. magazine designed for grades 6-8 is discussing the geographic marketing of coffee by the country’s largest “specialty” coffee company speaks volumes to effective marketing of *developing* country GIs by *developed* country *corporations*. The situation was quite different 40 years ago when small coffee roasters had a much smaller presence in the North American market and retail coffee sales were completely dominated by large supermarket chains. Los Angeles-based "Coffee Bean and Tea Leaf" (CBTL), founded in 1963, is exemplary of the rise of specialty coffee roasters during those decades. As CBTL's current head of coffee buying, Mr. Jay Isais, noted that in the 1970s small coffee roasters were looking for "anything they could find that could give them some market differentiation from supermarket brands."

Marketing whole beans – which consumers ground themselves – and marketing "varietals," a 1970s misnomer for geographic origins coffees – were the two approaches that CBTL and other specialty coffee shops pursued. This was the foundation for what is a basic characteristic of the coffee and cocoa markets today: specialty coffees retailers in developed countries promote themselves by promoting developing countries' geographic names. In the midst of its 2006 disagreement with the Ethiopian government over the trademark registration of Ethiopian geographic areas (which is explored below),

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<sup>285</sup> Jim McMahon, *The coffee belt*, JUNIOR SCHOLASTIC, Sept. 15, 2008, at 22, “GeoSkills” section.

Starbucks's characterized its own promotion of geographically identified coffees in insightful words:

Starbucks names our coffees to honor the country of origin and to demonstrate how high quality *Arabica* coffees are grown. By naming coffee growing regions, we provide significant awareness to 40 million customers in more than 12,000 stores worldwide. This helps provide insight into coffee growing regions and celebrates coffee origins with coffee drinkers around the world. We hope to continue using regional names to educate about and promote the Ethiopian regions where these coffees are grown.<sup>286</sup>

As much as these comments were self-serving in the dispute with Ethiopia, they are basically true. Specialty coffee retailers in North America, Japan, the UK, Europe, and Australia have created "awareness," i.e. brand value, with tens of millions of consumers for geographic regions that produce coffee. Mainstream supermarkets around the world are now themselves getting into this GI-marketing game for coffees. [Exhibit C] Most everyone accepts that these developments have *already* produced better returns for premium coffee growers,<sup>287</sup> even if there is widespread belief that those growers are not get a fair portion of the retail value being produced.

The growth of GI-based marketing for chocolate has been slower than for coffee, although it also appears to have taken hold in Europe before the US -- in contrast to coffee, where GI-marketing first took hold in North America. One reason that GI-based marketing of chocolate would be easier in continental Europe is the greater preference in Europe for dark chocolates, i.e. that cocoa bean variations do make a bigger difference in dark chocolates. The pre-existing reputation of Ecuador's quality cocoas undoubtedly helped it become one of the first well-established cocoa GI among smaller European labels and manufacturers, i.e. Vivani's Ecuadorian bittersweet chocolate, Feletti's 67%

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<sup>286</sup> Starbucks Press Release, *Relationship with Coffee Farmers*, November 15, 2006, available at <http://www.starbucks.com/aboutus/pressdesc.asp?id=713>

<sup>287</sup> For example, Seth Pitchers, then directing the Oxfam "Make Trade Fair" campaign noted in 2008 that "Starbucks has been building demand around premium coffee, which holds profit for farmer because it sells at a premium price." Rowenna Davis, *The people vs. Starbucks*, NEW INTERNATIONALIST, April 1, 2008 at 1.

Ecuador Dark Chocolate, and Frey in Switzerland [Exhibit D, E & F]. Large European chocolates maker Lindt now produces GI bars (Cuba, Ecuador, and Madagascar) [Exhibits G] while its higher-end line, Sprungli, has more precisely GI-identified “pralines” (Maracaibo)<sup>288</sup> The middle-rung French supermarket chain Monoprix has GI-based store brand chocolate bars – Ecuador and Santo Domingo [Exhibit H]. In the United States, high end chocolate makers like “Lake Champlain” are marketing GI bars [Exhibit I]. Even the chief industrial chocolate players are starting to get in GI-marketing with their principal trademarks. In the past two years, Hershey’s introduced GI-based chocolates in a “Cacao Reserve” line: Arriba, Java, Santo Domingo, and Sao Tome [Exhibit J].<sup>289</sup> As with coffee, the important market dynamic for our purposes is that the western corporation is developing consumer awareness for/desire for the developing country GI label.

Where will such coffee and cocoa marketing go in the future? Even assuming a long-term economic slowdown, it seems unlikely that specialty coffee retailers will contract significantly. American coffee franchises are expanding internationally and local competitors to the American coffee shops are themselves expanding out of their home turfs. Starbucks, which is now in over 25 countries; Los Angeles-based CBTL is in 19 countries; Seattle-based Tully's has a higher concentration of stores in Japan than in the US. Both based in the UK, Costa Coffee is in at least 18 countries and Coffee Republic in at least seven. Australia's "Gloria Jean" coffee shops are in Singapore and California as well as expanding into India. Indian entrepreneurs have themselves founded coffee shop chains "Café Coffee Day" and "Barista" (recently bought by Italian coffee company Lavazza).<sup>290</sup> In Japan, local chain Doutor competes vigorously with Starbucks and Tully's.

Since specialty coffee stores have been promoting GI-identified coffee for decades, the continued expansion of these stores almost certainly means continued

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<sup>288</sup> <http://www.spruengli.ch/index.php?lang=en> (last visited July 20, 2009)

<sup>289</sup> See <http://www.hersheys.com/products/details/CacaoReserve/index.asp?name=Single%20Origin> (last visited July 20, 2009).

<sup>290</sup> For information in this paragraph, see generally Varun Soni and Ruchi Hajela, *Coffee chains smell aroma of growth*, THE HINDUSTAN TIMES, January 8, 2008 at 30.

expansion of the market for GI-identified coffees. Of the 15 coffee types marketed by Tully's in Japan during early 2009, five are GI coffees, the most general being "Vintage Colombia" and the most specific being "Sumatra Lintong";<sup>291</sup> At the same time Doutor Coffee, also in Japan, markets at least six GI coffees, not including GI-specified "blends"<sup>292</sup> (discussed below). In early 2009 in Singapore and Malaysia, CBTL was marketing 14 different GI-specified coffees -- a majority of their total 26 coffee offerings.<sup>293</sup> Of the 25 coffees advertised in its 2009 brochures for the Sydney, Australia market Gloria Jean Coffee offered eight (8) GI-specified coffees.<sup>294</sup>

Moreover, both GI coffee marketing and GI chocolate marketing are now well-established in grocery store and supermarket distribution channels. For cocoa, more and more GI-based chocolates have continued to appear in 2008 and 2009. While we do not know the overall impact of the 2008-2009 economic downturn and any attendant "reset" on consumer attitudes, an argument can be made that "simple" or inexpensive luxury goods actually flourish (or are hurt less) during economic serious economic downturns. (This is the same argument that Hollywood – i.e. box office attendance – does not suffer as much as the vacation industry.<sup>295</sup>)

Although a few countries have made modest efforts to market their own GI coffees and cocoas,<sup>296</sup> Colombia probably remains the only example of a full-blown successful advertising campaign and brand development where the costs were born by the

<sup>291</sup> In addition to those two, they are Ethiopia Yirgacheffe, Guatemala Antigua, and Organic El Salvador. Brochure, obtained March 2009 in Sapporo, on file with author.

<sup>292</sup> Because Doutor markets some packaged coffees completely in Japanese, there might be others, but their selection includes Kona, Kilimanjaro, Jamaican Blue Mountain, and Mandheling. In March 2009, "Java Arabica Volcano" and "Bolivia Organic" were also being promoted as "Premium Beans Selections" - #11 and #12 respectively. Brochures, obtained March 2009 in Sapporo, on file with author.

<sup>293</sup> Brochure, obtained January 2009 in Singapore, on file with author. In an earlier period, CBTL had marketed only 17 types of coffee in its stores in Singapore and Malaysia, of which 8 were GI coffees. They were 100% Jamaican, 100% Kona, Brasil – Cerrado, Colombia – Nariño, Costa Rica – La Cascada Tarazu, Papua New Guinea – Sigri A, Colombia – Nariño DARK, and Kenya – AA. The remaining coffees are CBTL blends and flavored coffees. The Coffee Bean & Tea Leaf (Malaysia) Sdn Bhd, "The Coffee Guide." [brochure on file with the author].

<sup>294</sup> Brochure, obtained August 2009 in Sydney. Of the 25, another eight were flavored coffees, so that of the 17 unflavored coffees, 8 were GI-specified coffees. [brochure on file with the author].

<sup>295</sup> But see Robert Hofler, *No Silver Linings?*, VARIETY, August 10-15, 2009 at 1 (describing how Hollywood also suffers in economic recession despite the "truism that "[t]he entertainment biz does good biz during recessions.")

<sup>296</sup> Castle, *supra* note \_\_\_ at 185 (describing promotion efforts in Colombia, Kenya, and Guatemala).

developing country. In characteristic understatement, a representative of the Jamaica Coffee Board said, "we have yet to organize our industry such that the marketing dollars come from the producers"<sup>297</sup> Beyond needing to rely on the financial power of western corporations, developing countries who do not take the Colombian approach will tend to be handicapped in market information; as the Director General of the Jamaica Coffee Board reported, producer countries simply don't know tastes and trends in each developed economy:<sup>298</sup> "a producer country does not know consumer tastes." This is secondary reason for developing countries to continue to rely on western corporations – specialty coffee chains and high-end chocolate manufacturers.

This does not mean there is no role for the developing country's government, cooperatives, or farmers. In contrast to Colombia's long-standing retail efforts, Guatemala has now organized a more modest effort to have geographically-based brands under the umbrella of Guatemalan coffee. ANACAFÉ, the Guatemalan National Coffee Association, designates eight regional coffees.<sup>299</sup> Whereas the Colombians use topological terms without geographic names – like *PICO* (peak) and *SIERRA* (mountain)– the Guatemalans use geographic terms, but also feel compelled to add topological terminology in a way one normally does see with GIs, i.e. *FRAIJANESE PLATEAU*, *HIGHLAND HUEHUE*, and *VOLCANIC SAN MARCOS*.<sup>300</sup> At a minimum, the added topological words may make the otherwise unfamiliar geographic names more memorable. But what is more important is that Guatemala's efforts are at marketing and "branding" its coffees upstream – among coffee roasters, middlemen, and "taste makers." Presenting coffee

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<sup>297</sup> Gentles Interview, *supra* note \_\_\_\_.

<sup>298</sup> Gentles Interview, *supra* note \_\_\_\_ (characterizing Jamaica, along with other countries, as "a producer country that does not know consumer tastes").

<sup>299</sup> The regional coffees each have individual webpages at [www.guatemalancoffees.com](http://www.guatemalancoffees.com). They are ACATENANGO VALLEY, ANTIGUA COFFEE, TRADITIONAL ATITLÁN, RAINFOREST COBÁN, FRAIJANES PLATEAU, HIGHLAND HUEHUE, NEW ORIENTE, and VOLCANIC SAN MARCOS. Interestingly, Anacafé claims that that each of these is registered (by using the ® mark), but they can be found neither on the USPTO databases nor the Canada Intellectual Property Office trademark databases.

<sup>300</sup> The regionally designated coffees (Antigua, Atitlan, Cobán, etc) are tasted and approved as meeting flavor profile criteria established for these regions by ANACAFE, the Guatemalan coffee association. Those coffees that do not meet regional flavor profile criteria are only allowed to be sold as Strictly Hard Bean (SHB) – the highest grade of Guatemalan coffee -- without regional designation. See <http://www.coffeereview.com/reference.cfm?ID=49>

roasters will clearly established sub-regions gives these retailers, in essence, a set of new "pre-packaged" niche GIs.

Ethiopia's strategy also offers a good lesson on this point. Having registered its geographic names as regular trademarks (see below), the Ethiopian government has had the good sense to understand – unlike some GI commentators -- that legal rights in themselves do not increased prices. In April 2008, Ethiopia hired a London “design consultancy” to create unified branding and logos for its geographic name trademarks.<sup>301</sup> Like Guatemala's efforts, this is upstream and structural branding; the Ethiopian authorities have recognized that the most logical route to promoting GI-based coffees is for them to "enlist the big companies to do what we don't have the skills or financial means for – that is, building recognition of our brands in international markets and so increasing the long term demand for them."<sup>302</sup> To that end, the Ethiopian government has granted, at least for now, royalty-free licenses for specialty coffee companies for the use of the H-S-Y trademarks.

For the outsider watching the process of western corporate marketing of developing country GI-based coffee and cocoa products, there is an interesting and potentially very helpful trend. The trend seems to be for specialty coffee retailers to seek greater and greater geographic specificity in order to continue to give the consumer the impression that she is receiving a special product, not just a commodity. If the consumer's initial context is "mountain grown" coffee (how FOLGERS has been marketed for decades<sup>303</sup>), then when the consumer is presented with coffee that is "Colombian," "Java," "Brazilian," or "Tanzanian" she is being presented with a de-commodified specialty product.<sup>304</sup> For the consumer who has become accustomed to choosing among "Colombian," "Sumatran," or "Tanzanian" coffees, a specialty product

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<sup>301</sup> *Brandhouse to work on Ethiopian coffee identities*, MARKETING WEEK, April 24, 2008 at 11.

<sup>302</sup> Getachew Mengistie as quoted in *Making the Origin Count – Two Coffees*, *supra* note \_\_ at 3.

<sup>303</sup> [http://www.folgers.com/coffees/ground/g\\_classic.shtml](http://www.folgers.com/coffees/ground/g_classic.shtml)

<sup>304</sup> Folgers, the US's largest coffee retailer, itself now also markets Java, Brazilian, and Colombian "Gourmet Selections," <http://apps.folgers.com/gourmet-selections-coffee/products.php>, as well as a "Brazilian Blend" and a "100% Colombian" in its "Coffeehouse Series." [http://www.folgers.com/coffees/ground/g\\_coffeehouse.shtml](http://www.folgers.com/coffees/ground/g_coffeehouse.shtml). Its competitor, Maxwell House, also markets "Colombian Supreme" (100% Colombian) and "South Pacific Blend" coffees. <http://www.maxwellhouse.com/>

may now be SUMATRA MANDHELING or TANZANIA MWANDA. As Jay Isais commented, "[p]eople are wanting more transparency, more specificity. There is a thirst for more information about the coffee. For example, our consumer wants to know the differences among Sumatra coffees."

Regardless of whether this is what consumers *want*, this is certainly what high-end coffee retailers and chocolate makers *want* to give consumers. An example of the stunning increase in geographic specificity for very high end coffee is the 2008 coffees brochure from Fortnum and Mason in London. The brochure's identification of geographical origins is down to the *estate level* often with discussion of individual *persons* as producers for each coffee (as well as processing methods). For example the "El Salvador Finca Las Delicias Picamura Arabica" is identified as being produced by Miguel Menendez; the Jamaican Blue Mountain comes from the "Flamstead Estate"; and the Rwanda "Red Bourbon Arabica" comes from "small producer members of Musasa Cooperative."

This movement toward highly specified geographic origin is very visible in high-end chocolates. Valrhona, probably France's top producer of couverture chocolate for chefs, restaurants, and candy makers, only began serious retail marketing of the VALRHONA name in the past few years. Beginning about 2004, Valrhona began marketing "domain" chocolates identified – like wine – with the domain/estates and the year of cocoa harvest.<sup>305</sup> French chocolatier Michel Cluizel is doing the same, but without the vintage years [Exhibit K]. Rohr, one of Switzerland's boutique chocolate makers, now offers "Maracaibo" (Venezuela) chocolate bars – at \$6.00 a piece – in 49% and 65% cocoa content.<sup>306</sup> The same goes for German chocolatier Rausch, offering chocolates made from single plantation cocoas sourced in Papua-New Guinea,

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<sup>305</sup> The types are : Ampamakia, Plantation Millot, Origine Madagascar  
Gran Couva, Plantation Granc Couva, Origine Trinidad  
Palmira, Fino Criolla, Origine Venezuela  
<http://www.flickr.com/photos/21637784@N03/2970729704/> (picture of Palmira 2007 vintage bar).

<sup>306</sup> [http://www.rohr.ch/advanced\\_search\\_result.php?keywords=maracaibo&osCsid=uak9cbfg7c0pcv7sf3phk79n34](http://www.rohr.ch/advanced_search_result.php?keywords=maracaibo&osCsid=uak9cbfg7c0pcv7sf3phk79n34). In their print publicity, Rohr also advertises 35% milk chocolate "Criolait" and 33% milk chocolate "Crème" of Maracaibo origin. [materials on file with author] Of course, Maracaibo is a city, so the use of this geographic origin is in the form of an export port.

Madagascar, Venezuela, Costa Rica, Peru, Trinidad, and Ecuador.<sup>307</sup> In the United States, organic chocolate maker Dagoba markets chocolates from cocoa sourced at particular cooperatives [Exhibit L].

To the degree that specialty coffee retailers and high end chocolate makers [a] develop their consumers taste for and demand for *very* geographically specific coffees and [b] insist of reasonably transparent supply chains that prevent fraudulent labeling of coffee or cocoa origins, we are seeing true brand equity being built for specific groups of farmers *by western corporations*.<sup>308</sup> To the degree "a" and "b" happen, we are also seeing the genuine de-commodification of at least a small part of the coffee market. The signs of (geographic) brand equity are all around. An independent website that bills itself as the "leading coffee buying guide," CoffeeReview, reports on Guatemalan coffee in these terms:

There are many excellent Guatemalan estates. To name just a small selection: in the Antigua Valley San Sebastián, La Tacita, San Rafael Urias, Pastores, and Las Nubes. In Huehuetenango Santa Cecilia, Huixoc, and El Coyegual. In the Coban region Yaxbatz, Los Alpes, and El Recreo. In San Marcos, Dos Marias. . . .

CoffeeReview also identifies Costa Rica, Hawaiian, Indian, Panamanian, Mexican, Zimbabwean, and Nicaraguan (one – Selva Negra) farms.<sup>309</sup> It is because of this movement in high-end coffee that Colombia's tremendously successful GI-based branding has now "doomed it as an elite origin. . . . [t]he regional origins famous in the earlier part of the 20th century -- names like Armenia, Manizales, Medellin -- are now lost in a well-organized but faceless coffee machine."<sup>310</sup>

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<sup>307</sup> See, e.g. <http://www.rausch-schokolade.com/plantagenschokolade/noumea.html> (Noumea plantation in Papua-New Guinea), <http://www.rausch-schokolade.com/plantagenschokolade/madanga.html> (Madanga plantation in Madagascar), <http://www.rausch-schokolade.com/plantagenschokolade/puerto-cabello.html> (Puerto Cabello plantation in Venezuela) (last visited July 20, 2009).

<sup>308</sup> Isais, *supra* note \_\_\_ ("There is definitely equity that is gained by the people growing the coffee.")

<sup>309</sup> While not identifying estates for Brazil, Burundi, Colombia, Ecuador, El Salvador, Ethiopia, Haiti, Honduras, Jamaica, Kenya, Peru, Puerto Rico, Tanzania, Uganda, Yemen, and Zambia. [FOOTNOTE]

<sup>310</sup> <http://www.coffeereview.com/reference.cfm?ID=58>

Perhaps true de-commodification only happens when the coffee retailer is unable to offer a brand it has presented to consumers because of insufficient supplies – much like a top chef being unable to offer one of her signature dishes because of what was available at market that day. Speaking of a single farm Guatemalan coffee, Jay Isais of CBTL says "[w]e just can't get enough San Sebastian to meet our needs."<sup>311</sup> Much-praised coffee from the Bella Vista estate in Costa Rica has been known to be available only at a few Starbucks,<sup>312</sup> while some Mexican estate coffees are exclusively sold to German roasters.<sup>313</sup> Ethiopia's two coffee unions providing "wild" or "forest" coffee have experienced problems "provid[ing] clients with guaranteed amounts of certified forest coffee over a period of several years."<sup>314</sup> To the degree this happens – niche consumer demand for highly localized GI coffees and chocolates being met by unique, ad hoc supply chains and sometimes insufficient supplies, the niche markets for coffee and chocolate will better resemble wine markets.

This trend could be important because the more the brand value is established in highly localized GI names, the more local farmers are likely to reap the economic rents from the GI names. If the brand value is in GUATEMALAN coffee, it will be easier for central government officials to keep those economic rents to themselves than if the brand value is in ANTIGUA coffee; if for no other reason that the government can play farmers of one part of Guatemala off another in terms of prices. If the brand value is in ANTIGUA SAN RAFAEL URIAS, it will be harder for bureaucrats to prevent the farmers of that estate or cooperative from insisting that they profit from the brand value of their own coffee. In short, the very best thing that might happen for farmers is for

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<sup>311</sup> Isais, *supra* note \_\_\_. Peat's Coffee also describes and praises this single farm coffee: There are few places more suited to coffee production than the Antigua Valley of Guatemala, 5000 feet up, tucked among three massive volcanoes. There are even fewer places where the heirloom variety of Arabica coffee known as Bourbon produces such sublimely sweet coffee fruit, where the dry climate slows growth just enough so the beans yield tantalizingly complex flavor. And there's just one farm where everything comes together just about perfectly. Welcome to Finca San Sebastian."

[http://www.peets.com/shop/coffee\\_detail.asp?rdir=1&id=36](http://www.peets.com/shop/coffee_detail.asp?rdir=1&id=36).

<sup>312</sup> <http://www.coffeereview.com/reference.cfm?ID=53>

<sup>313</sup> <http://www.coffeereview.com/reference.cfm?ID=48> (discussing Liquidambar, Santa Catarina, Irlandia, Germania, and Hamburgo estate coffees from Mexico).

<sup>314</sup> Stellmacher, *forest coffee certification*, *supra* note \_\_ at 7.

individual coffee roasters and chocolate makers to become champions of particular, highly localized GI regions.

**D. Governmental quality control for developing country coffee and cocoas**

In addition to the "significant investments in promotion" and the "[l]arge amounts of additional advertising expenditure" discussed immediately above, the other fundamental component of establishing a strong reputation for a developing country agricultural product is quality control – making production quality consistent with the positive reputation the product has and/or improving that quality as a foundation for an enhanced, more widespread reputation. Countries that rely on certification mark laws or simple geographic delimitation systems (like Australia's wine regions) rely on market disciplines to produce improved quality levels and consistency; appellations systems provide much over governmental regulation/participation in quality control procedures. In terms of the proper government role in GI quality control, general observations have to give way to practical issues with each country and region. Jamaica provides a good case study of government intervention – far more interventionist than regular *appellations* system – successfully improving product quality and reputation. At the same time, Jamaica may represent the "best case scenario" of government involvement in quality control for a number of reasons – size of the country, sophistication of Jamaican public institutions, and the period in which the government involvement produced the best results. The story of Jamaican Blue Mountain Coffee also has many familiar themes: ebbs & flows in exports, investment from developed economies in the promotion of the GI product, difficulty in delineating the GI region, exploitation over time of both certification mark and regular trademark rights, and issues of both quality control and origin guarantee.<sup>315</sup>

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<sup>315</sup> Unless otherwise noted, factual information in this section comes from [1] web pages of the Coffee Industry Board of Jamaica (CIBOJ), [www.ciboj.org](http://www.ciboj.org); [2] telephone interview with Christopher Gentles, Director General of CIBOJ, July, 2008 (notes on file with author) [*hereinafter* Gentles Interview]; and [3] Timon Waugh, *The Experience of the Coffee Industry Board with the JAMAICA BLUE MOUNTAIN Mark*, September 2008, PowerPoint presentation on file with the author. Mr. Gentles' biography is available at <http://www.ciboj.org/cib/>.

Coffee was introduced to Jamaica in 1728, just a few years after it had first been brought to the New World. Cultivation expanded rapidly with over 650 plantations in operation by 1800. But labor shortages from the end of the British slave trade (1807) and the subsequent emancipation of slaves (1838) sent the Jamaican coffee agriculture into steep decline. By 1850, there was less than 1/3 of the plantations that had existed in 1800 and the volume of coffee exports had dropped by 90%. By the early 20th century, Canada had become the primary export market for what Jamaican coffee was producing, followed by the US. Quality control problems and World War II led to a steep decline in North American purchases of Jamaican coffee in 1942-43; that decline, in turn, triggered a substantial reorganization of the country's coffee production under, first, a Coffee Clearing House established in 1944 and, then, the Coffee Industry Board of Jamaica (the "Coffee Board" or "Board")<sup>316</sup> established in 1948-50.

Upon its establishment, the Coffee Board was given sweeping powers to buy and manage coffee estates, run nurseries to develop (and distribute) coffee seedlings, operate research stations to improve coffee agriculture, dry and process harvested coffee, and borrow monies to do all of the same.<sup>317</sup> The Coffee Board was also empowered to license all coffee growers, processors, and dealers. Most importantly, the Board was given the powers of "restricting . . . the export from Jamaica of any coffee or coffee products by any person other than Board"; of "prescribing the grades and types and quality of coffee and of any coffee product"; and of "regulating the delivery points of coffee berries and the persons to whom delivery may be made of coffee berries."<sup>318</sup> The Board was also empowered to establish the *penalties* for any person "collecting or receiving coffee berries without complying with the [Board's] regulations."<sup>319</sup> In other

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<sup>316</sup> Established pursuant to Section 3 of the Coffee Industry Regulation Act of December 9, 1948. For a general discussion of the Coffee Board's activities to reinvent the Jamaican coffee industry, see John Talbot, *Jamaican Blue Mountain Coffee: Quality Standards and Their Impact on Upgrading in Commodity Chains*, paper available from allacademic.com

<sup>317</sup> *Id.*, sections 4-6.

<sup>318</sup> *Id.*, section 7(1)(i), (m), and (o) respectively.

<sup>319</sup> *Id.*, section 7(2)(a). Section 15 of the 1953 regulations provide that anyone who violates the Board's regulations can be brought before a Magistrate's Court and fined "twenty thousand dollars or an amount not exceeding treble the value of the coffee or coffee product in respect of the purchase, sale, export or manufacture of which the offence is committed." Section 15, Coffee Industry Regulations 1953 (March 12, 1953; approved by the Governor March 23, 1953) at 10 [hereinafter 1953 Jamaica Coffee Regulations].

words, the Coffee Board – subject to the Parliament's veto<sup>320</sup> – had total control over Jamaica's coffee production and exportation, including quality control and labeling issues.

Although coffee can be grown throughout Jamaica, the country's GI region is the "Blue Mountain" area in the extreme east of the island, consisting of land in four parishes (Portland, Saint Andrews, Saint Mary, and Saint Thomas). The Blue Mountains are sandwiched between Kingston in the south and Port Maria in the north; the highest peak, "Blue Mountain" proper, rises to just under 7,500 feet (2,300 meters), making it one of the highest elevations in the Caribbean. Above 5,500 feet, the mountain range is nature preserve; coffee is cultivated below that elevation with the higher elevation beans being eligible to be labeled "Blue Mountain." The 1953 regulations promulgated by the Coffee Board have provided a reasonably precise delineation of the Blue Mountain growing region,<sup>321</sup> although there is some commentators (as discussed below) who believe the designated area has been improperly expanded – or so weakly enforced as to produce the same effect. During the 1950s and 1960s, exports of Blue Mountain coffee moved increasingly to the UK, with substantial transshipment to Japan. Direct shipment to Japan from 1965 onwards replaced this "trade triangle" with coffee shipments to Britain becoming de minimis by 1974.<sup>322</sup> Today, Japan absorbs roughly 85% of Jamaican coffee exports with almost all the rest going to the prior principles markets, i.e. the United States, Canada, and the UK.<sup>323</sup>

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<sup>320</sup> The 1948 Act provided that all Board regulations would be laid before Parliament, which could reject them. *Id.* section 7(3)

<sup>321</sup> The definition is done in general surveyor's terms, i.e. "Starting at Skibo and proceeding in an east-south-easterly direction to Swift River; thence east-south-easterly to Chelsea; thence east-south-easterly to Durham (Samba Hill); thence south-easterly to Bellview . . ." See Schedule, 1953 Jamaica Coffee Regulations, *supra* note \_\_\_\_\_. One could certainly imagine arguments about individual tracts of lands or entire small hills and valleys based on this delineation.

<sup>322</sup> Jamaica Coffee Industry Board, "Re-Routing [Trade Triangle]" graphs, downloaded February 16, 2009 [on file with author]

<sup>323</sup> Another sources says "Jamaica exports roughly 65% of its total production and of the [sic] part 95% is exported to Japan. The remaining 5% is shipped to the United States and Europe, which [sic] much smaller quantities going to Australia, Argentina, and other emerging markets." [www.aco.ca/featurepages/premium\\_Jamaican\\_coffee/index.html](http://www.aco.ca/featurepages/premium_Jamaican_coffee/index.html). The 65% number seems low, even if that was all Jamaican coffee, not just Blue Mountain. On the other hand, the Mavis Bay Coffee Factory, which claims to process 40% of all Blue Mountain Coffee, says 70% of their production is exported. See [www.bluemountaincoffee.com/index.cfm?method=AboutUs](http://www.bluemountaincoffee.com/index.cfm?method=AboutUs).

Jamaica's marketing structure is based on the core, umbrella mark JAMAICA BLUE MOUNTAIN COFFEE ("BLUE MOUNTAIN"). It is registered as a certification mark in Canada, Great Britain,<sup>324</sup> and the United States,<sup>325</sup> In the case of Canada, the CIB initially filed a regular trademark application and, when faced with a descriptiveness issue, abandoned that application in favor of a certification mark.<sup>326</sup> The trademark rights are held by a subsidiary of the Coffee Board. Jamaica has had a long history of fighting against parties that have tried to capitalize on the evocative value of BLUE MOUNTAIN or "Jamaica" without selling Jamaican coffee, including against a Canadian entity attempting to trademark Jamaica Blue Mountain in the 1980s<sup>327</sup> and against "Jamaica Gold" coffee being marketed in Florida.<sup>328</sup> Nonetheless, Coffee Board leadership characterizes American, UK, Canadian, and Japanese law as having a good understanding of the intellectual property needs of Jamaica as a coffee producer.<sup>329</sup> Although Jamaica seems to support efforts to strengthen GI protection internationally, as of late 2008, Jamaica had not attempted to apply for an EU-wide PGI/PDO<sup>330</sup> and the Coffee Board leadership clearly understands the marketing of Jamaican coffee in terms of *trademarks* and "branding."<sup>331</sup>

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<sup>324</sup> UK Intellectual Property Office (UKIPO) Registration number 1222993 for certification mark JAMAICA BLUE MOUNTAIN, registered July 18, 1984; UKIPO Registration number 1237893 for JAMAICA BLUE MOUNTAIN COFFEE and design, registered March 15, 1985. Jamaica also seems to have received a regular trademark on the same JAMAICA BLUE MOUNTAIN COFFEE and design, UKIPO Registration number E2093060, registered February 12, 2001.

<sup>325</sup> USPTO Registration 1414598 (JAMAICA BLUE MOUNTAIN COFFEE), registered Oct. 21, 1985. Curiously, I cannot find any registration for Japan, although there are a few "Blue Mountain" brand-specific trademarks registered in Japan, as described in footnote \_\_\_\_.

<sup>326</sup> Canadian Intellectual Property Office (CIPO) certification trademark registration TMA65512 for JAMAICA BLUE MOUNTAIN COFFEE was granted to JCIB on December 20, 2005, after JCIB's regular trademark application (#1096285) for the same was abandoned March 8, 2005.

<sup>327</sup> See, e.g. CIPO application 0581314 for JAMAICA BLUE MOUNTAIN COFFEE filed by Montreal entity, April 2, 1987 and abandoned October 21, 1988.

<sup>328</sup> Gentles Interview, *supra* note \_\_\_\_\_. The databases of Japan's National Center for Industrial Property Information and Training list a few registered trademarks that belong to Japanese companies and use the Jamaican GI. They are SALADA FOODS JAMAICA Mountain Peak INSTANT COFFEE, registration number 5149582 (11 July 2008); THE BOUNTY OF NATURE ESTATESTORY JAMAICA FROM UCC COFFEE ESTATE, registration number 4796638 (20 August 2004); POKKA COFFEE BLUE MOUNTAIN BLEND, Registration number 4361521 (February 10, 2010).

<sup>329</sup> Gentles Interview, *supra* note \_\_\_\_\_. (Gentles added that the Japanese "regulatory framework is excellent.")

<sup>330</sup> Gentles Interview, *supra* note \_\_\_\_.

<sup>331</sup> Describing the need to protect JAMAICA BLUE MOUNTAIN and JAMAICA HIGH MOUNTAIN from infringement, the then Director-General of the Coffee Board described them as "valuable trademarks for the industry, which need to be protected." Jeremain O. Brown, *Coffee Board Seeks Funding to Rehabilitate Industry*, Jamaica Information Service, July 4, 2005, available at

Jamaica also has what could be called a secondary umbrella mark, JAMAICA HIGH MOUNTAIN COFFEE. Traditionally, coffee grown in the Blue Mountain region between 1,500 and 3,000 feet elevation has been given this name with coffee grown in even lower elevations called "Jamaica Supreme" or "Jamaica Low Mountain."<sup>332</sup> Beyond these GI brands, the Coffee Board has a fairly elaborate classification and quality control system for its coffees based on the sub-region/producer-producer cooperative, bean size, the amount of "peaberry," and the percentage of defective beans that are allowed to pass through the screening process. (resulting Jamaican classifications include "Blue Mountain #1," "Blue Mountain #2," "Blue Mountain #3," "Blue Mountain Peaberry," and a catch-all "Triage" classification).<sup>333</sup> In these regulations – at least on paper – the Jamaicans are not unique in honoring Max Havelaar's 19<sup>th</sup> century observation that "[e]very broker knows how important it is to grade the various lots of coffee properly."<sup>334</sup> As to sub-regions, under the BLUE MOUNTAIN umbrella, the WALLENFORD ESTATE<sup>335</sup> and MOY HALL ESTATE (or CO-OP) producers may be the most respected, although, as we will see, the reputation of these GI or quasi-GI brands has deteriorated. Moreover, calling these "estates" in the geographical sense may be misdescriptive: the Moy Hall Co-op "consists of three thousand farmers, 23 districts, and 35 collection outlets where farmers sell their coffee cherries."<sup>336</sup>

Japan's ascendancy as Jamaica's principal coffee market was not a matter of chance. Beginning in the 1970s, the Japanese overseas development agency provided a \$US 12 million loan to Jamaica's coffee farmers to improve production. Japanese private

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[www.jis.gov.jm/agriculture/html/20050701T09000-0500\\_6185\\_JIS\\_COFFEE\\_BOARD-SEEKS\\_FUNDING\\_TO\\_REHABILITATE\\_INDUSTRY.asp](http://www.jis.gov.jm/agriculture/html/20050701T09000-0500_6185_JIS_COFFEE_BOARD-SEEKS_FUNDING_TO_REHABILITATE_INDUSTRY.asp).

<sup>332</sup> Gentles Interview, *supra* note \_\_. (describing the non-Blue Mountain branding as HIGH MOUNTAIN SUPREME, JAMAICA PRIME, and JAMAICA SELECT).

<sup>333</sup> "#1" and "#2" are defined by bean size, each with a maximum of 2% "defective" beans. "Peaberry" is coffee that is all from single seed berries. *See generally*

[www.bluemountaincoffee.com/index.cfm?method=TypesCoffee](http://www.bluemountaincoffee.com/index.cfm?method=TypesCoffee).

<sup>334</sup> Multatuli, *supra* note \_\_ at 53.

<sup>335</sup> There is a registered trademark in Japan for WALLENFORD, registration number 510938 (1 February 2008). The Coffee Board has a registered US trademark for WALLENFORD ESTATE, registration number 2634011 (15 October 2002) as well as for WALLENFORD, registration number 3440008 (3 June 2008).

<sup>336</sup> See [www.aco.ca/featurepages/premium\\_Jamaican\\_coffee/index.html](http://www.aco.ca/featurepages/premium_Jamaican_coffee/index.html)

investors augmented this, identifying Jamaican coffee as a softer coffee flavor that was more marketable to Japanese consumers accustomed to tea. These investors have been blamed in some quarters for an unwarranted expansion of the "Blue Mountain" production area in Jamaica, with a resulting decline in coffee quality (or at least a decline in the consistency of coffee quality).<sup>337</sup> A leading coffee review describes what happens this way:

In the mid-1970s, when I first tasted Jamaica Blue Mountain coffee from a mill that exported a famous mark called Wallensford Estate, it was indeed a splendid coffee . . . . In the 1970s and 1980s, however, the Coffee Industry Board began investing in Jamaica Blue Mountain with money provided by Japanese interests. New mills were constructed that use a short-cut version of the wet-processing method called aquapulping or mechanical demucilaging, and volume increased dramatically while quality decreased despite the Coffee Industry Board's efforts to maintain it.

The famous Wallensford mark now has become close to meaningless: It simply describes coffee wet-processed at a mill that pretty much resembles all of the other government mills. (True, the Wallensford mill is located in the central part of the Blue Mountains, which may give its coffees a slight edge in altitude over coffees produced by some of the other mills.) Most Blue Mountain coffees now are a decent to mildly impressive version of the Caribbean taste profile . . . . with an understated acidity that is sometimes gently vibrant, other times barely sufficient to lift the cup from listlessness.<sup>338</sup>

Meanwhile, rate of growth for sales of Jamaican coffee have slowed considerably in recent years – presumably from export being tied to a single low-growth economy. In 2008, the Director-General of the Coffee Board reported some continued growth in the "gift market," increased sales in China, and some indications that the newly developed Asian economies (Singapore, Korea, Taiwan) have tastes like the Japanese that align with Jamaican coffee profiles.

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<sup>337</sup> Castle, *supra* note \_\_\_ at 45 (“The Jamaican coffee industry, in league with non-Jamaican investors, have milked the legend of Jamaican coffee dry while expanding the Blue Mountain region with cynical indifference.”)

<sup>338</sup> <http://www.coffeereview.com/reference.cfm?ID=55>

Given the low growth (in limited markets), it's fair to ponder how much Jamaica coffee is now suffering from a sort of reputational stagnation attached to the perceived decline in quality or distinctiveness. It does not help that Jamaica's centralized system is widely criticized by experts in the specialty coffee industry. The Coffee Board remains, by statute, the only authorized exporter of Jamaican coffee. The Board receives all coffee in its warehouses, assesses the coffee, and exports it to purchasers. The Board claims they are transparent about their standards,<sup>339</sup> but are also keen to keep foreign purchasers at a distance.<sup>340</sup> Thus, even when a specialty coffee roaster deals directly with a Jamaican coffee grower, the coffee must transit the Coffee Board warehouses and it is Board that exports the coffee on behalf of the client. Because all coffee comes into Coffee Board warehouses there is, in the words of one coffee industry executive, a "tremendous temptation to play games behind the scenes."<sup>341</sup> Centralization Jamaica-style also means that coffee buyers cannot be sure exactly how much money gets back to growers. Indeed, Starbucks identifies Jamaica along with Ethiopia as the two countries where it is unable to achieve transparency on the prices paid back to farmers for Starbucks's coffee purchases.

One could even argue that what has happened to Jamaican coffee recently is *loss* of geographical distinctiveness – both for the island's coffee generally and for the specific mills/estates – due to investment, ramping up production, and the inability of the centralized, regulatory system to respond to changing market conditions. This is largely the conclusion of John M. Talbot, a professor at the University of the West Indies who has extensively studied the Coffee Board's management of Jamaica's coffee industry, both past and present. Talbot concludes that the Coffee Board was successful in its post-World War II restoration of quality coffee in Jamaica, establishment of the Blue Mountain GI, and judicious use of the *Blue Mountain* cachet also "to raise the price for other grades of Jamaican coffee grown outside the Blue Mountain region." All this

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<sup>339</sup> Interview with Jamaican Coffee Board official (stating that they are "willing to be quite transparent about our standards" and recognizing that in patrolling coffee quality the Board "can only take random samples.")

<sup>340</sup> Interview with Jamaican Coffee Board official ("From time to time companies will get intrusive and seek levels of control beyond what the Coffee Board is willing to cede).

<sup>341</sup> Jay Isais, *supra* note \_\_\_\_.

helped coffee farmers receive higher prices "even after a healthy share of the world market price has been deducted by the Coffee Board."<sup>342</sup> Professor Talbot concludes, however, that the centralized control of the Coffee Board has removed incentives to improve the coffee supply chain and now inhibits direct marketing to roasters that would be beneficial to farmers. *And these problematic developments occurred regardless of legal protection and the particular GI scheme in place in the destination markets.*

Earlier I characterized Jamaica as a “best case scenario” for robust government involvement in quality control of a developing country GI agricultural product. By this I mean that if Jamaica-style centralized quality and production control was attempted in most countries in sub-Saharan Africa, it is hard to believe that the results would not be much worse. Jamaica is a relatively small jurisdiction with a sophisticated legal establishment<sup>343</sup> and on at least one index of business freedom and lack of corruption the only coffee or cocoa producer that rates better than it is Mexico.<sup>344</sup> Being an island nation, Jamaica does not have the problem of porous frontiers that characterizes west Africa, east Africa, and, to a lesser degree Central and South America. Jamaica’s success in para-statal stabilization of quality and improved marketing occurred when there were not the same opportunities for farmer/roaster marketing as exist today, so – roughly put – there was less downside to the central control of both the GI and the product. In all this Jamaica is a cautionary story of centralized control of GI rights in tandem with centralized control of production, marketing, and exportation. We turn next to a cautionary tale of centralized control of the GI rights *without* any apparent attempt to control quality and production.

#### ***E. Locating GI rights with producers***

The debate about how to implement GI protection in domestic law usually focuses on certification mark versus appellation of origin systems, the conditions for registration,

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<sup>342</sup> *Id.*

<sup>343</sup> *See generally* THE WORLD BANK, THE ROAD TO SUSTAINED GROWTH IN JAMAICA (2004).

<sup>344</sup> <http://www.heritage.org/Index/Ranking.aspx>. Although Jamaica rates lower than Mexico, Colombia, Brazil, and Costa Rica on another index. <http://www.infoplease.com/ipa/A0781359.html>

and the strength of protection offered. But all this overlooks perhaps the most important issue in this debate: local control and *whether additional economic rents successfully reach the farmers*. In their 2004 study of the coffee industry, Raphael Kaplinsky and Robert Fritter concluded that economic rents from specialty coffee differentiation “have been almost entirely appropriated by residents of high-income countries.”<sup>345</sup> Maria Christina Carambas’ study of organic rice in Thailand similarly concluded that middlemen in the value chain could be enjoying most of the additional value generated by organic labeling.<sup>346</sup> To confront this problem, we should adopt a simple principle: among whatever types of intellectual property are available to protect geographical indications in developing countries, there are *strong* reasons to prefer the kind of IP that can be vested *locally* and *with the producers* – and from which they cannot be *divested*.

The bottom line is that, other things being equal, locating GI rights with *national* governments increases the risk that “any profits . . . merely end up in the pockets of the country’s politicians and middle men.”<sup>347</sup> This is particularly true in large countries; it is doubly true in countries that lack stable, transparent, democratic institutions of government. Appellations of origin or certification marks that are truly controlled locally are the best form of GI protection *if our goal is to benefit the farmer producers*.

Most of the developed world discussions of GI protection implicitly focus on the triadic relationship of producers, governments, and consumers. Those who favor appellations of origin favor a larger role for the government as guarantor for the consumer, not just of geographic origin, but also of various quality issues associated with the product. Those who favor certification marks favor a more direct relationship between consumers and producers in which the market provides most of the day-to-day discipline for both quality control and veracity of geographic origin. Reasonable people disagree on the right approach and both approaches rely, ultimately, on the state for

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<sup>345</sup> Raphael Kaplinsky and Robert Fritter, *Technology and globalization: who gains when commodities are de-commodified?*, 1 INT. J. TECHNOLOGY AND GLOBALISATION 5 (2004); See also R. Kaplinsky and R. Fitter, *Who gains from product rents as the coffee market becomes more differentiated? A value chain analysis*, INSTITUTE OF DEVELOPMENT STUDIES (IDS) WORKING PAPER, VOLUMBER 32, NO. 3 (2001). <http://www.id21.org/society/s8brklgl.html>

<sup>346</sup> Carambas, *supra* note \_\_\_\_.

<sup>347</sup> Gallu, *supra* note \_\_\_\_ at 2.

enforcement of the veracity of geographic origin and whatever quality standards have been established.

With legal protection of developing country GIs, we should focus on the triadic relationship of *developing country* producers, *developing country* governments, and *developed country* purchasers. As discussed above, national governments of producer countries can have an important role in establishing quality standards, ensuring farmers are treated fairly by developed country purchasers *and/or* in promoting the protected GI globally. On the other hand, the troubled history of economic rents from coffee and cocoa being siphoned off to support government elites (particularly in sub-Saharan Africa) is largely ignored by those writing about geographical indications, even agricultural development experts. For example, in a 2007 paper, three researchers from South Africa pointed repeatedly to the "the danger of large agribusiness capturing the rents embedded in the geographical indication,"<sup>348</sup> but neither they nor the two scholarly commentators on their research made any mention of the danger of governmental and para-statal entities capturing most or all of the economic benefits. I will first explore the 2006 brouhaha between Ethiopia and Starbucks to show that we need to ask some very serious questions about the control of GIs, *questions that many development experts and almost all law experts seem to ignore*. Then, we will turn to some basic considerations in where to vest control of GIs.

### **1. The 2006 Ethiopia-Starbucks dispute**

Humanity's consumption of coffee began in Ethiopia; modern coffee consumption is closely identified with Starbucks and its over 16,000 stores worldwide. So the 2006 feud that erupted between Ethiopia and Starbucks over Ethiopian coffee names had all the makings of a good news story. Unfortunately, the story did not get the

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<sup>348</sup> Bramley, C., Bienabe, E., and J. Kirsten, *The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries*, Contributed Paper for the International Roundtable on the Economics of Intellectual Property Rights, WIPO, Geneva, November 26-27, 2007 at 109, 119. See also *id.* at 137 (" A further consideration is ensuring an inclusive and a representative industry organization which can facilitate GI protection. Without this, there exists a danger that the larger-scale farmers and agribusiness firms could capture the economic benefits without any of those benefits (higher employment and higher income) flowing to the workers and small rural enterprises.")

sustained media attention that would have produced good news analysis. When the Ethiopia/Starbucks dispute is more fully understood, it points to serious concerns about the shortcomings, potential misuse, and squandered opportunities of GI-based marketing.

In the past few decades, Ethiopia has taken very different approaches to management of its coffee production. Prior to the 1974 revolution that deposed Emperor Haile Selassie, coffee could be sold and exported directly or was sold at auctions in Addis Ababa and Dire Dawa; regulation of the Ethiopian coffee industry was limited to quality standards and regulating the auctions.<sup>349</sup> After 1974, coffee was heavily regulated by the military *Derg* government. “Hard Arabica” coffee were handled by two distinct layers of traders,<sup>350</sup> but mild Arabica beans were mandatorily delivered by farmers to cooperative or state-owned washing stations; participation in the auction system was mandatory and, in 1977, a price and quota system was established in which private parties could not participate in the ‘auctions’ until the state-owned trading company had filled its own quota to meet export markets.<sup>351</sup> Different commentators describe the history of the Ethiopian system differently, but there seems to be agreement that “[t]he coffee value chain in Ethiopia involves a large number of intermediaries and is largely state-controlled.”<sup>352</sup> With the end of the *Derg* regime, a process of liberalization began in 1991 in which the state trading entities have essentially disappeared.<sup>353</sup> Participation in the state-run auction system is still mandatory, except for a limited number of new cooperatives which, since 2001, are permitted to export coffee directly.<sup>354</sup> Of course, the liberalization that has happened in Ethiopia is part and parcel of the general trends against “marketing boards,” “institutos,” and “caisses de stabilization.” This liberalization –

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<sup>349</sup> See generally R. Love, *The Ethiopian Coffee Filière and Its Institutions: Cui Bono?*, 88 *Review of African Political Economy* 225 (2001).

<sup>350</sup> According to Stellmacher, farmers collecting forest coffee would sell to local *sebsabies* who resell the dried coffee to wholesalers, the *akrabies*, who further process the beans (de-hulling) and transport them to Addis Ababa. Stellmacher, *forest coffee certification*, *supra* note \_\_ at 4

<sup>351</sup> Daviron and Ponte, *supra* note \_\_ at 102-103.

<sup>352</sup> Stellmacher, *forest coffee certification*, *supra* note \_\_ at 4.

<sup>353</sup> *Id.* at 108-109.

<sup>354</sup> *Id.* at 108; Stellmacher, *forest coffee certification*, *supra* note \_\_ at 5 (Since the end of the 1990s the new Ethiopian EPRDF government facilitated the restructuring of the cooperative system and the formation of cooperative umbrella associations, the coffee cooperative unions. Unions buy the coffee from their member cooperatives and take over the processing and transport to Addis Ababa. Since 2001 the unions are legally allowed to by-pass the coffee auction and directly negotiate with and sell to international exporters.)

effectively the withdrawal of the government from control of the market – provides an important context for what has happened recently with Ethiopian coffee GIs.

Beginning in March 2005, the Ethiopian government – through the Ethiopian Intellectual Property Office (EIPO) sought to register in the United States three geographic names used for Ethiopian coffees: HARAR, YIRGACHEFFE, and SIDAMO. The Ethiopians sought to register the names as *regular* trademarks. The United States Patent and Trademark Office (USPTO) quickly granted the registration application for YIRGACHEFFE,<sup>355</sup> but the HARAR and SIDAMO application were held up.<sup>356</sup> First, Starbucks had already applied for a trademark that *included* “Sidamo.” But contrary to some media reports, Starbucks was not attempting to monopolize the Sidamo name; its application was for SHIRKINA SUN-DRIED SIDAMO<sup>357</sup> Second, Ethiopia’s application was informally opposed by the National Coffee Association (NCA), which argued the two names had become generic terms for styles of coffee. The NCA was widely reported to be fronting for Starbucks,<sup>358</sup> a fact that Starbucks denied, although it is one of the primary funders of the NCA.

Regardless of its role in the NCA, Starbucks clearly believed that it was a bad idea to grant regular trademarks to these Ethiopian names. In an October 2006 press release denying their involvement in the NCA activities but staking out their position, Starbucks stated:

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<sup>355</sup> USPTO Registration number 3126053. The application for YIRGACHEFFE was filed on March 17, 2005; published for opposition on April 11, 2006, and granted on August 8, 2006.

<sup>356</sup> *Making the Origin Count – Two Coffees: Ethiopia and the Starbucks Story*, 5 WIPO MAGAZINE, October 2007 at 2,3 (reporting that USPTO initially denied the HARAR application in October 2005 and the SIDAMO application in August 2006).

<sup>357</sup> USPTO Serial number 78431410. The application was for SHIRKINA SUN-DRIED SIDAMO; filed on June 8, 2004; published for opposition in December 27, 2005; and abandoned on July 8, 2006. “Shirkina” is an Amharic word for partnership. See <http://www.starbucksstore.com/products/shprodde.asp?SKU=439270>. The press sometimes misunderstood this. See, e.g. *ETHIOPIAN COFFEE: Every bean counts*, BRANDS STRATEGY, Sept. 14, 2007 at 48 (describing Starbucks’ application correctly, but stating that if Starbucks had received the trademark, Ethiopian farmers “could have lost the right to name their own product.”)

<sup>358</sup> Joshua Gallu, *Starbucks, Ethiopia, and the Coffee Branding Wars*, DER SPEIGEL Online (English), Nov. 16, 2006, available at <http://www.spiegel.de/international/0,1518,448191,00.html>.

We have never filed an opposition to the Ethiopian government's trademark application . . . however, we believe a far better alternative to protect geographically descriptive terms and ensure they represent quality products that come from a specific region is through a geographic certification program.<sup>359</sup>

Starbucks argued that “that trademarking coffee beans might introduce legal complexities that will deter firms from buying trademarked beans, thereby hurting farmers instead of helping them.”<sup>360</sup> For their part, the Ethiopians recognized that seeking regular trademarks for the names was a “new approach,” but said it was one justified by the situation of small coffee farmers and traders in the country.<sup>361</sup> After receiving a blitz of (largely undeserved) bad publicity – much of it fomented by Oxfam on behalf of the Ethiopians – Starbucks and the NCA softened their positions. In November 2006, Starbucks and Ethiopia reached some type of entente<sup>362</sup> – with SIDAMO and HARAR eventually proceeding to registration as regular trademarks at the USPTO.<sup>363</sup> That's the public story of what happened with the Ethiopian coffee GIs.

As with many complex policy issues, the media reports were forced to simplify the legal and policy issues in the Ethiopia/Starbucks controversy. Misunderstandings that

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<sup>359</sup> Starbucks Press Release, *Starbucks Sets the Record Straight on Press Coverage Regarding Starbucks, the Ethiopian Government, and Oxfam*, Oct. 26, 2006, available at <http://www.starbucks.com/aboutus/pressdesc.asp?id=714>.

<sup>360</sup> *Storm in a coffee cup*, THE ECONOMIST, Nov. 30, 2006 [New York edition]; Gallu, *Starbucks, Ethiopia, and the Coffee Branding Wars*, *supra* note \_\_ (“Starbucks favors a geographic certification model . . . which guarantees a point of origin and standards of quality.”)

<sup>361</sup> *Starbucks and EIPO reach agreement*, TEA AND COFFEE TRADE JOURNAL, June 1, 2007 at 62 (Ethiopian government offices “[w]e realize our approach to trademarking and licensing these coffees brands that originate in and represent the best of Ethiopia's coffee heritage is a new approach . . .”).

<sup>362</sup> After a meeting between Starbucks CEO and the Ethiopian Prime Minister, the former announced that “Starbucks and the Ethiopian government agreed that they will work together toward a solution for the between protection and use of Intellectual Property Rights of Ethiopian coffee names.” Press Release, *Starbucks and the Ethiopian Government Agree to Work Together Toward a Solution that Supports the Ethiopian Coffee Farmers*, Nov. 29, 2006, available at <http://www.starbucks.com/aboutus/pressdesc.asp?id=729>. Starbucks subsequently sponsored Ethiopia as the first “African Portrait Country” at the annual meeting of the Specialty Coffee Association of America in 2008. *Country Takes Center Stage at US Specialty Coffee Conference*, THE DAILY MONITOR (ETHIOPIA), April 30, 2008.

<sup>363</sup> SIDAMO -- USPTO registration number 3381739; application dated March 17, 2005; published for opposition on November 27, 2007; and registered on February 12, 2008. HARAR – USPTO registration number 3457979; application dated March 17, 2005; published for opposition on April 15, 2008; and registered on July 1, 2008.

directly resulted from these simplified reports were probably few, but did exist. For example, in 2009, a University of Hannover professor characterized the dispute as one in which [t]he Ethiopian government wants to protect coffee originating in those specific regions by using GIs as opposed to labeling as proposed by Starbucks."<sup>364</sup> Of course, that's just the *opposite* of what happened: Starbucks had proposed the traditional GI mechanism (in the US) and Ethiopia has insisted on regular trademarks (akin to just "labeling").

There are different ways to interpret the Ethiopia/Starbucks dispute and, unfortunately, only one of those interpretations dominated the public discourse during the short controversy. In that interpretation, Starbucks was already using these geographic names in conjunction with Ethiopian coffees (as the result of buying bona fide Ethiopian beans at auction) and Starbucks did not want to start paying trademark licensing fees to the Ethiopian government on top of the coffee price. Thus, according to Oxfam, Starbucks was trying to avoid paying \$US 88-90 million a year to Ethiopia.<sup>365</sup> It is anyone's guess how Oxfam got these numbers – in effect, the value of the trademarks over the coffee. According to this version of the story, Ethiopia wanted regular trademarks, not certification marks, because it would give the Ethiopians more leverage.

As both sides tried to provide popular explanations of their positions, the story did not become much clearer. In a YouTube video counsel for Ethiopia argued that “[a] certification mark provides much weaker control in the holder of the certification mark.”<sup>366</sup> Given that certification marks get the same level of protection under US trademark law (Lanham sections 32 and 43), what was Ethiopia's lawyer trying to say in asserting that a certification mark gives the mark holder less “control”? The point he may have been trying to make is that once a coffee roaster/retailer purchases coffee beans

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<sup>364</sup> U. Grote, *Environmental Labeling, Protected Geographical Indications and the Interests of Developing Countries*, 10 ESTEY CENTRE JOURNAL OF INTERNATIONAL LAW AND TRADE POLICY, volume 1, 94, 95 (2009).

<sup>365</sup> *Ethiopia is now trademarking its specialty coffees . . .*, THE FOOD INSTITUTE REPORT, November 19, 2007 at 5 (Oxfam America reporting that trademarks would bring Ethiopia an additional \$US 88 million).

<sup>366</sup> Robert Winter, Arnold & Porter, January 29, 2007  
<http://www.youtube.com/watch?v=2DiWK81j7fg>

genuinely produced in the applicable region (and pursuant to any quality controls the certification mark requires), at that point the coffee roaster/retailer would be free to use the appropriate mark (HARAR, SIDAMO, or YIRGACHEFFE [H-S-Y]). Indeed, US law would *bar* the holder of the certification mark from refusing permission to such a roaster/retailer. In that sense, with certification marks the Ethiopian Government would have little further leverage. He may have also meant that certification marks would give the Ethiopian government less leverage over its own farmers – again, as long as the farmer meets the certification mark standards, the farmer cannot be denied the right to sell his coffee as HARRAR or SIDANO. But with regular trademarks, the Ethiopian Government is required to be even-handed neither with Starbucks nor its farmers; it can deny use of the H-S-Y trademarks to companies that own beans genuinely produced in the applicable Ethiopian regions. That really does give it more “control,” particularly if the country’s farmers are increasingly selling directly to coffee roasters/retailers. With regular trademarks, the central authorities *could* say “too bad, you bought genuine beans from our farmers, but you cannot use the name.”

The question is: is that the sort of control one wants to give an undemocratic, non-transparent central government over its farmers? To be fair, the Ethiopian government has not yet tried to extract rents from specialty coffee roasters and retailers. At the conclusion of the dispute, EIPO gave Starbucks royalty-free licenses to use the H-S-Y trademarks in conjunction with its sales of Ethiopian coffees – the same as it had done for other coffee retailers.<sup>367</sup> (But this should also make one reasonably ask what Oxfam meant when it claimed that Starbucks was denying Ethiopia \$US 90 million that would come from regular trademarks.)

In other words, Oxfam's intervention was clearly helpful to the central government in Addis Ababa but not clearly helpful to the farmers in Harar, Sidamo, or Yirgacheffe provinces. Once a Starbucks, CBTL, or Costa Coffee has purchased beans

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<sup>367</sup> See, e.g. *ETHIOPIAN COFFEE: Every bean counts*, BRANDS STRATEGY, Sept. 14, 2007 at 48; *Ethiopia: Starbucks to sign licence agreement with EIPO*, 34 COFFEE & COCOA INTERNATIONAL 4 (June/July 2007); See Janet Adamy, Starbucks, Ethiopia Agree on Licensing, WALL ST. J., June 21, 2007, at B6.

genuinely produced in the H-S-Y regions – whether directly from farms or through government auctions – should the central government have this additional leverage? Does the effort to obtain regular trademarks manifest the central government’s fear that, over time, they will not be able to stop direct sales between farmers and western buyers – and, therefore, will be cut out of the usual middleman rents that African governments have extracted from coffee or cocoa farmers? If we believe that the central government has informational and negotiating sophistication that the farmers lack, we might want the central government to have this policy lever. On the other hand, it is a policy lever that looks easy to abuse.

In another interpretative variation, does the quest for regular trademarks manifest an admission by the Addis Ababa government that practically speaking it cannot police even minimal certification standards? Apparently, at approximately the same time as Ethiopia sought regular trademarks for the coffee names, there was a GI pilot project between the Addis Ababa Environmental Protection Authority and some French institutions, including the Institut de Recherches pour le Developpement (IRD).<sup>368</sup> But Ethiopia’s overall inability to police agricultural production standards is an implicit theme in many commentaries. This was the suggestion made implicitly by Ron Layton, the head of “Light Years,” an NGO that is trying to head African countries capitalize on their intellectual property. While praising the certification model, Layton was sanguine about its potential in Ethiopia:

So what’s wrong with the regional [certification] model? Layton argues that certification – while it works well for a smaller country like Jamaica – would be too difficult to implement in Ethiopia. There are literally millions of Ethiopians moving coffee beans to only a handful of distributors like Starbucks.<sup>369</sup>

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<sup>368</sup> Roussel and Verdeaux, *supra* note \_\_ at FN 8.

<sup>369</sup> Gallu, *supra* note \_\_\_\_ at 2. Mr. Mengistie has said the same thing: “[o]ur coffee is grown on four million very small plots of land. Setting up a certification system would have been impracticable and too expensive. Trademarking was more appropriate to our needs. It was a more direct route offering more control.” *Making the Origin Count – Two Coffees*, *supra* note \_\_ at 3.

Ethiopia “has no national certification agency”<sup>370</sup> for coffee and the narrative that a certification system would be too costly for Ethiopia was repeated over and over during the dispute. In 2007, one advertising magazine reporting on Ethiopia's efforts to obtain regular trademarks commented:

While [they are] not wrong about the benefits a trademark confers, it is an unusual step for a food producer to take. More commonly, they try to establish geographic certification. This is the process undertaken by Roquefort cheese and Parma Ham. It means that the product must be from the stated region and thus quality is assured. However, it can be a costly mark to maintain. As the majority of Ethiopian farmers still live in extremely basic conditions, it is not a cost they can afford to absorb.<sup>371</sup>

While a few commentators have considered that Ethiopia could be “favourable terrain” for an EU-style GI system,<sup>372</sup> by seeking regular trademarks in lieu of certification marks, the Ethiopian authorities may be impliedly stating that the regulatory structure of EU-style GIs is not feasible for a country as economically poor and/or for a state as politically weak as Ethiopia.

Indeed, there is a troubling possible future that needs to be discussed in relation to the HARRAR, SIDAMO, and YIRGACHEFFE trademarks. The most serious problem with giving the Ethiopian government regular trademark rights over Harar/Harrar should be evident from the discussion in Part \_\_\_ above. As Timothy Castle noted in the early 1990s:

“The trouble is that almost all the ‘Harrar’ you see in a store is usually lower-grade Ethiopian coffee that has been upgraded by the exporter or importer (‘upgrading’ in this case involves the competent, but certainly not fastidious,

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<sup>370</sup> Stellmacher, *forest coffee certification*, *supra* note \_\_\_ at 8.

<sup>371</sup> *ETHIOPIAN COFFEE: Every bean counts*, BRANDS STRATEGY, Sept. 14, 2007 at 48. *See also Direct from the source, Coffee in Ethiopia*, THE ECONOMIST, (U.S. edition), April 19, 2008 (head of EIPO says that there was neither time nor money for Ethiopia "to pursue a complicated certification process.")

<sup>372</sup> Roussel and Verdeaux, *supra* note \_\_\_. While the authors believed that "Ethiopia can provide a favourable terrain for the application" of a European-style GI system, they provided little detail beyond some discussion of Ethiopian farmers associations and domestic marketing conditions for some agricultural products.

use of a stencil and some ink.) If you didn't pay a lot, it wasn't Harrar. If you paid a lot but after drinking it you don't understand why you paid a lot, it wasn't Harrar, either."<sup>373</sup>

Regular trademark rights give the Ethiopian Government much more leeway to do just this – either *not worry about the true geographic origins of the coffee* OR *actively label coffee beans as coming from these exclusive regions which come from elsewhere in Ethiopia, if not elsewhere in East Africa*. Unfortunately, this prospect has been hinted at several times. Ethiopian officials have been very blunt in their claim that the H-S-Y names "refer[red] not to geographical locations, but to distinctive coffee types"<sup>374</sup> and that "[t]he coffee varieties *were not strictly regional* . . . so wine-style designations would have made no sense."<sup>375</sup> (Ironically, this position is similar to the NCA ground for opposing the applications.) One trade industry report characterized the Ethiopian government's efforts this way: "[w]hile certification marks are commonly used as a means of identifying products associated with a particular geographic region, *the Ethiopian government elected to assert traditional trademark rights to identify itself as the ultimate source of the country's specialty coffees*."<sup>376</sup>

Of course, if H-S-Y do NOT "refer to geographical locations" and if the central government IS "the ultimate source of the country's specialty coffees" which are just "distinctive coffee types," then in the future the coffees labeled HARAR, SIDAMO, and YIRGACHEFFE may come from anywhere. Policymakers and non-profits like Oxfam need to be realistic about this issue. Ethiopia ranks 126<sup>th</sup> in Transparency International's index of perceived corruption in 180 jurisdictions; in Africa, it ranked 25<sup>th</sup> out of 47 countries – most of whom occupy the bottom third of the global index.<sup>377</sup> On the World Bank's "ease of doing business" index, Ethiopia fares not much better: #116 out of 181

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<sup>373</sup> Castle, *supra* note \_\_\_ at 43.

<sup>374</sup> *Making the Origin Count – Two Coffees*, *supra* note \_\_\_ at 3.

<sup>375</sup> *Direct from the source, Coffee in Ethiopia*, The Economist, (U.S. edition), April 19, 2008 (quoting Getachew Mengistie, head of EIPO).

<sup>376</sup> *ETHIOPIAN COFFEE; Trademark versus geographical certification*, BRAND STRATEGY, Sept. 14, 2007 at 49 (emphasis added).

<sup>377</sup> [http://www.transparency.org/news\\_room/in\\_focus/2008/cpi2008/cpi\\_2008\\_table](http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table)

jurisdictions.<sup>378</sup> In that context, have authorities in Addis Ababa been given the legal tools to profitably turn a blind eye to – or actively engage in – transshipment of coffee from other regions and countries to label it HARAR, SIDAMO, or YIRGACHEFFE?

## 2. Locating GI rights with farmers because of non-transparent public institutions

Weak, non-transparent public institutions are not unique to Ethiopia. As development researchers Denis Sautier and Pascale Moity-Maizi have noted "[m]aking the origin of certain products official, and protecting the same, is a political process which implies a strong capacity for a state to decide, control, invest, and organize."<sup>379</sup> A weak state apparatus, unable to patrol its farmer production (or other activities), might rationally *intend* to get out of the middleman role – and, necessarily, all quality assurance/certification roles.<sup>380</sup> Indeed, this could be a rational strategy of a government with its farmers' best interests at heart. As Ulrike Grote recently noted,

Many developing countries are afraid of the potential for GIs to act as non-transparent protection measures that may lead to the loss of export opportunities. Their concerns relate to the costs of meeting technical and administrative requirements, the high costs of compliance and monitoring and the fact they would need to establish a legal framework to protect other countries' GIs. They are afraid that, especially, small-scale farmers will be marginalized as a consequence.<sup>381</sup>

In other words, many countries reasonably understand that they lack the capacity to establish the system Jamaica did and/or understand that the downsides of the Jamaican system might be magnified in their own country.

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<sup>378</sup> <http://www.doingbusiness.org/economyrankings/>

<sup>379</sup> Denis Sautier and Pascale Moity-Maizi, *supra* note \_\_ at 5. *See also* Echols, *supra* note \_\_ at 218 ("... it is unclear whether developing countries have the capacity to implement a detailed and extended international system for the recognition and protection of GIs, such as that proposed by the European Communities and Switzerland.")

<sup>380</sup> *See also* Correa, *supra* note \_\_ at 23 (Recognizing that for developing countries "registration systems are likely to entail higher transaction costs than systems based on the regulation of business conduct.")

<sup>381</sup> U. Grote, *Environmental Labeling, Protected Geographical Indications and the Interests of Developing Countries*, 10 ESTEY CENTRE JOURNAL OF INTERNATIONAL LAW AND TRADE POLICY, volume 1, 94, 102 (2009).

Many commentators reasonably express the fear that demanding production standards attached to a GI will [a] become a highly politicized, dysfunctional process and [b] disenfranchise many of the smallest, poorest farmers that should be our primary concern. In the case of Brazil's first domestically registered IdP, *Pampa Gaucho da Campanha Meridional* beef, researchers John Wilkinson and Claire Cerdan report that the IdP's "code of practices . . . [and] methods of production appear rather distant from local realities and are difficult for all farmers to follow, especially for local family breeders who are, to date, excluded from the group."<sup>382</sup> A 2008 SINER-GI<sup>383</sup> report describes efforts to develop a local coffee GI for the Jarabocoa region in the Dominican Republic supported by USAID, the Agence Française pour le Développement, and the Dominican government.<sup>384</sup> The report described problems in getting farmers to participate in the process of standard setting, pressures within the group to strengthen or weaken quality standards, and the ability of larger local coffee buyers to dominate even a very 'grass-roots' process.<sup>385</sup> The SINER-GI report concludes that "[t]he result of the collective decision-making process can be viewed as ineffective and unfair" although none of the facts described in the history of the local consultation seem unusual from the perspective of development work in many emerging economies and least developed countries.<sup>386</sup>

Those who approach the problem prescribing a single type of "best" *legal system* overlook the most fundamental teachings of political science that, to use Samuel

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<sup>382</sup> Wilkinson and Cerdan, *The Brazilian Perspective*, *supra* note \_\_ at 11. They also report that "[t]en months after the official recognition of their product as a Geographical Indication, farmers still do not see a profit from the valorization of their meat." *Id.* Wilkinson and Cerdan also report that the state government of Minas Gerais has established "artisan" cheese production law as part of an "attempt to transform very traditional on-farm producers of cheese from raw milk into a GI based on AOC procedures" but that "[t]o date only around half a dozen producers have managed to comply with the new requirements out of a universe of almost 2,000 such producers . . ." *Id.* at 8.

<sup>383</sup> SINER-GI is a multinational project among university faculty, principally in Europe and principally in development or agricultural studies, on practical issues related to geographical indications. "SINER-GI" stands for "Strengthening International Research on Geographical Indications." *See* <http://www.origin-food.org/2005/base.php?cat=20>

<sup>384</sup> SINER-GI, *Are Geographical Indications a way to 'decommoditize' markets of raw materials?* SINER-GI Final Conference, Geneva, 23-24 June 2008 [paper on file with author] (hereinafter SINER-GI, *decommoditizing markets*). The GI for the Jarabocoa region was eventually called *Pico Duarte*.

<sup>385</sup> *Id.* at 12-13.

<sup>386</sup> *Id.* at 13. And to be fair to the French and American development agencies involved, the SINER-GI authors seem to criticize when the quality standards were being raised (local farmers being excluded or high costs) and when the quality standards were being lowered (becoming too generic), making it unclear what would be a good process from the perspective of the SINER-GI observers.

Huntington's phrase, the "degree of government" determines both what is possible and what is desirable in any one country.<sup>387</sup> A system for transparent, equitable, scientifically-based establishment of GI areas and production codes – followed by the enforcement of those codes -- clearly requires a greater "degree of government" than, for example, a system of copyright and trademark registrations followed by reasonable enforcement of copyrights and trademarks.

Questioning the *capacity* of many developing country governments is not to question their *intention*. One does not need to make any assumptions about who – between developing country governments and developed country corporations -- are the good guys. It makes sense that giving farmers the opportunity to become owners/shareholders in marketing and processing enterprises is important<sup>388</sup> for fairness in prices. Assuming that most developing country governments are not as "effective" in the Huntington sense as western European governments that have well-established *appellations* system, it also makes sense that farmers should have significant participation in quality control systems and *significant ownership* of the relevant GIs, whether they are protected as appellations, certification marks, collective marks, or regular trademarks. Having the central government "own" the GI in question *can* work – the long history of *Tequila* seems to be a case in point -- but as a general rule, locating control of the GI with the relevant farmers surely has a stronger probability to bring any economic rents that the GI generates back to the farmers.

Moreover, *where* one locates control of the GI should take account of the evolving markets for coffee and cocoa. Despite the brand presence of large coffee shop chains, the specialty coffee business still had a very large element of small entrepreneurs.

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<sup>387</sup> As Samuel Huntington observed over four decades ago, "[t]he most important political distinction among countries concern not their form of government, but their *degree* of government. The differences between democracy and dictatorships are less than the differences between those countries whose politics embodies consensus, community, legitimacy, organization, effectiveness, and stability and those countries whose politics is deficient in those qualities." SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968).

<sup>388</sup> A. Perret, *Le bleuets (myrtille) du Lac Saint-Jean: une potentielle AOC au Québec?* 40 *Revue Suisse Agric.* (2008) at 3-4 (40% of the producers of wild blueberries from the Lac Saint Jean region of Quebec are shareholders in two blueberry freezing enterprises – with five factories -- that market the blueberries forward to food-processing companies in the US, Europe, Canada, and Japan).

Historically, these small coffee roasters have purchased their coffees through elaborate supply chains involving middlemen in both the source country and the US or Europe – growers sell to local exporters (or often to local aggregators before the local exporter); these local exporters may or may go through government-sponsored or private auctions; the coffee is sold to US or European importers; the importers sell to individual roasters. The most obvious effect of so many parties in the value chain is that each party is remunerated – as the expense of the farmers, who receive a relatively small percentage of the retail prices commanded by specialty coffees. But that is not the only downside. The many layers between grower and consumer make weaker information feedback on coffee quality and weaker guarantees of geographic origin.

But many of these small coffee roasters are now establishing direct, one-on-one relationships with coffee farms and cooperatives. Such relationships can improve quality, raise farmer incomes, and produce a significantly different kind of globalization. Reporting on efforts by a small Chicago coffee roaster, Jeff Dreyfuss of Metropolis Coffee, to build tie to Brazilian farmers, a trade publication noted:

His plan is to form direct relationships with farm owners and their employees so he'll have more input in the practices that affect quality and taste, such as giving incentives to pick only ripe cherries rather than concentrating on volume, and making sure beans picked from different areas of the farm aren't lumped together. He can also teach them how to taste their own coffee, which many never do.<sup>389</sup>

Spearheaded by "large" specialty coffee roasters – Starbucks, Green Mountain Coffee, CBTL, etc. – more and more specialty coffee purveyors seek to establish direct relationships so there is only one company between the particular farmer and the consumer (whether the consumer is purchasing a prepared coffee drink or beans/ground coffee). Metropolis Coffee, for example, bought half the beans shipped to the US by one farm: 19,800 pounds of green coffee;<sup>390</sup> Vermont Artisan Coffee & Tea imports all its

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<sup>389</sup> Laurie Cunningham, *Globalization in a Cup: From the fields of Brazil to the North Side of Chicago*, Crain's Chicago Business, Oct. 1, 2007 at 25.

<sup>390</sup> *Id.*

coffee from individual farms, after its own site visits.<sup>391</sup> In Kenya, the Kenyan Highland Cooperatives – cultivating coffee on the southwestern slopes of Mount Kenya – are the first grower cooperatives to be able to form a direct relationships with roasters outside Kenya’s national system of coffee auctions.<sup>392</sup> In Ethiopia, the licensing – since 2001 -- of direct sales from a handful of “coffee unions” to international exporter is seen by many stakeholders “as a chance to create an alternative ‘shorter’ coffee value chain in order to promote efficiency, transparency, traceability, and ecological and social responsibility.”<sup>393</sup>

Sometimes the establishment of a direct farmer/retailer relationship is not possible while remaining respectful of locale customs and traditional production systems. One US coffee buyer who "usually seek[s] out superior micro-lots from one farm" accepts that beans from the Lintong region of Sumatra must "pass through at least four hands" on their way to market and has not tried to disrupt this system in both respect for the local culture and concern for the livelihood of coffee traders, many of whom are women.<sup>394</sup> Fortnum & Mason in London claim they "trace the precise origin of each of our coffees (bar one) and pay for the pick of the harvest"; their coffee brochure explains: “[t]he exception is our Yemeni coffee, traded in the traditional way from highland farmers to tribal middlemen – guaranteeing both quality and fair play.” It is unclear whether this actually "guarantees" anything about the origin,<sup>395</sup> but it does show the inevitability of some trade-off between modern guarantees of quality control/origin and respect for local practices.

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<sup>391</sup> Mark Prendergast, *The Fine Art of Blending*, WINE SPECTATOR, Jan. 15, 2008 at 25 (reporting on Mané Alves, owner of Vermont Artisan Coffee & tea, who "imports his coffee directly from farms he has visited" including getting his Yirgacheffe from the Oromia Cooperative and Rwandan coffee from the Bufcafe Cooperative).

<sup>392</sup> Mark Pendergrast, *A Life in Coffee*, WINE SPECTATOR, June 30, 2008 at 21 (describe direct relationship between three cooperatives and Vermont’s Green Mountain Coffee company).

<sup>393</sup> Stellmacher, *forest coffee certification*, *supra* note \_\_ at 5.

<sup>394</sup> Mark Pendergrast, *A Transporting Brew*, WINE SPECTATOR, Nov. 15, 2007 at 27 (reporting on purchasing experience of Peter Guiliano of Counter Culture Coffee).

<sup>395</sup> As the CoffeeReview site says of Yemeni coffees, "Mysterious Market Names. Market names for Yemen coffee are as irregular as the beans themselves. Many names refer both to variety of tree and to growing district. For example, it is never entirely clear when a coffee seller says he has an Ismaili coffee available whether he is describing a coffee from the Bani Ismail growing district, beans from the Ismaili variety of coffee tree, or both." At <http://www.coffeereview.com/reference.cfm?ID=65>.

It is also true that in some scenarios "middlemen" from the developing country governments may have more sophistication in negotiating with developed country purchasers<sup>396</sup> – and we can imagine scenarios where *too* direct a link to downstream production produces questionable outcomes.<sup>397</sup> Nonetheless, most rural development specialists favor more direct relationships between private purchasers from developed countries and farmer/farmer groups in developing countries. More direct relationships eliminate rent-dissipating middlemen, allow farmers to receive more direct quality signals, and allow purchasers based in developed countries to offer technical and general assistance more directly. So, to the degree that small coffee roasters in developed economies "are finding their own growers and signing contracts to buy all or part of a harvest,"<sup>398</sup> this is something that the legal system for the relevant GI should promote. To the degree coffee and cocoa farmer cooperatives *can* connect directly to coffee roasters and to chocolatiers in bringing GI products to consumers, the legal system for the relevant GI should promote such connections without GIs being unduly controlled by (central) government officials.

Coffee farmers may, under the right circumstances, be able to form direct relationships with consumer, launching their own retail operations. Two Costa Rican groups, the Community Agroecology Network (CAN) and Café Britt, roast the coffees they grow and "ship from origin."<sup>399</sup> This is not an option for most coffee farmers or cooperative groups – in the case of Costa Rican growers, this is possible because of

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<sup>396</sup> See, e.g. Stellmacher, *forest coffee certification*, *supra* note \_ at 6 (discussing concern that in Ethiopia farmer lack "know-how and expertise on modern business-management" and that "[r]elevant knowledge is extremely unequally spread along the value chain, being highest among the actors in Addis Ababa . . . .")

<sup>397</sup> For example, the high-end Italian chocolate-maker Vestri purchased their own "finca" (plantation) in Punta Cana, Santo Domingo, to have complete control over the cocoa production. See Undated Vestri Cioccolato brochure on file with author and [www.vestry.it](http://www.vestry.it) ("the finca" webpage) ("To guarantee the production of a high quality chocolate about five years ago, the Vestri family undertook a new business adventure – perhaps the best yet – the purchase of a cocoa plantation, an eight hectare "finca" . . . . This treasure is located precisely in Punta Cana (Santo Domingo), an uncontaminated island . . . .") No matter how enlightened Vestri's cocoa production and treatment of the plantation workers, it is hard not to have mixed feelings about such results. Imagine global reaction if Starbucks starting buying large tracts of Colombian, Costa Rican, and Kenyan land to control its own coffee-sourcing.

<sup>398</sup> *Id.*

<sup>399</sup> Mark Prendergrast, *Direct Shipment Coffee*, *Wine Spectator*, May 15, 2008 at 29.

proximity to the US and the “reliable Costa Rican postal system.”<sup>400</sup> For cocoa, it is obviously not possible at all unless there is local processing to produce final chocolate and/or cocoa powder products.

But that leads up to another point. Improved market value in regional and local GIs (*particularly* along with regional and local control of the GI) can be the foundation for developing country citizens to move “up” the production ladder with integrated marketing or, in the case of cocoa, chocolate manufacturing. Colombia’s Compañía Nacional de Chocolates produces “single origin” chocolates with cocoa from Colombia’s Santander region, which they promote as would any winemaker, with the region’s “unique geographic and agricultural conditions” and “rural traditions.”<sup>401</sup> The company claims that its cocoa purchases support 12,000 farming families<sup>402</sup> and publishes a set of corporate principles, largely regarding its duties to those farmers and their cooperatives.<sup>403</sup> If all that is accurate, in combinations with the awards that Santander has won,<sup>404</sup> it is a genuine success story of vertical integration based on GI product production. Venezuela’s Chocolates El Rey has been even more successful marketing a range of chocolates made from “only the famed Carenero Superior Cacao Beans from the north-central region of Venezuela.”<sup>405</sup> The blossoming chain of JUAN VALDEZ coffee shops, owned by the non-profit Federación Nacional de Cafeteros de Colombia is probably the most ambitious example of organized producers moving into a direct, retail relationship with consumers in developed countries. The Colombians are quite express in their message to American consumers about their trademarked retail effort: “[t]he JUAN VALDEZ CAFES make it possible for our farmers to obtain a fair revenue for their

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<sup>400</sup> *Id.*

<sup>401</sup> Liner notes, 36% cacao Milk Chocolate Santander [on file with the author]. Compañía Nacional de Chocolates is located and presumably makes the chocolate in the next-door department of Antioquia. *Id.*

<sup>402</sup> [www.chocolatesantander.com/english/fromBean.html](http://www.chocolatesantander.com/english/fromBean.html).

<sup>403</sup> [www.chocolatesantander.com/english/socialResponsibility.html](http://www.chocolatesantander.com/english/socialResponsibility.html).

<sup>404</sup> [www.chocolatesantander.com/descargas/pdf/press3.html](http://www.chocolatesantander.com/descargas/pdf/press3.html).

<sup>405</sup> The packaging does identify the beans as being from a region traditionally called “Barlovento.” Liner notes, Caoba Milk Chocolate [on file with the author]. That name probably refers to “the stretch of Venezuelan coast centered on the inland villages of Birongo and Curiepe, and the coastal villages of Chirimena, Caruao and Chuspa, all east of Caracas.” <http://www.venezuelavoyage.com/baptismbybeat.htm>. The Chocolate El Rey company is located and presumably makes the chocolate in Barquisimeto in the state of Lara. *Id.* Barquisimeto is considerably to the west of Caracas. The El Rey packaging claims that CAOBA and CARENERO SUPERIOR are registered trademarks, but TESS shows both registrations to have been cancelled in 2005, last visited March 30, 2009.

work."<sup>406</sup>

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<sup>406</sup> Brochure, *Welcome to the select world of the Juan Valdez whole bean coffee varieties* (2008) (brochure on file with the author).

#### **IV. THE IMPACT OF “ARTICLE 23 EXTENSION” FOR COFFEE AND COCOA PRODUCERS -- STRONGER GI RIGHTS VERSUS BETTER ENFORCEMENT**

Instead of focusing on the important issues – how to build up developing country GI reputations and how to locate GI rights to benefit farmers -- current international discussions of GI law focus on concerns that emanate from the European Union. One of these is whether the heightened, quasi-dilution protection of Article 23 should be extended beyond wines and spirits. Viewing GIs as a form of communal property – or as rights (loosely) attached to TK/TCE -- some commentators see the extension of Article 23 protection to all products as part of the “rebalancing” of TRIPS for the benefit of developing countries. These arguments have been embraced by a number of IP activists and professionals from the developing world, although the reasoning is sometimes unclear. For example, James Otieno-Odek, the head of Kenya’s IP office, noted in 2005:

The goal for GI extension is to increase the legal certainty of protection that the TRIPS Agreement affords to geographical indications for products other than wines and spirits. In accordance with their submissions before the TRIPS Council, the Friends of GI observe that the extension is to ensure that GIs will only be used for products actually originating from the place indicated by the GI.<sup>407</sup>

Of course, national laws implementing Article 22 protection already should “ensure that GIs will only be used for products actually originating from the place indicated by the GI” – that is, if the TRIPS-compliant national law is enforced. So Mr. Otieno-Odek’s statement could be construed as someone misunderstanding the current TRIPS standards.

On the other hand, when Mr. Otieno-Odek says that Article 23 protection would “increase the legal certainty of protection,” he is obliquely correct in the sense that proof of consumer confusion would no longer be necessary to stop unauthorized use of a protected GI. In *theory*, without the need to establish consumer confusion, it would be

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<sup>407</sup> See WTO Doc. TN/C.W/14 “Geographical Indications – The Significance of Extension in the TRIPS Agreement and Its Benefits for WTO Members at 5. See also IP/C/W/204/Rve.1, IPC/C/W/247/Rev.1 and IP/C/W/353. This echoes Francois Vital’s view that Article 22 “protection is weaker and more difficult to implement, insofar as, contrary to the wines and spirits [Article 23], it is advisable to demonstrate the deception on the consumer.” Vita, *supra* note \_\_ at 8.

easier for GI holders to prevail on summary judgment and equivalent preliminary proceedings in other countries. Carlos Correa gives a good summation of this line of argument for “Article 23 extension”:

Those [Article 23 extension] proposals aim at obtaining for other products the same type of ‘absolute’ protection conferred to geographical indications for wine and spirits. A distinct advantage of such protection is that there is no need to prove unfair commercial practices or that the public is misled (as is the case under Article 22). Any person or entity that does not produce within the territory alluded by a geographical indication could be prevented from using the corresponding denomination. This, of course, enormously facilitates the enforcement of rights, though rightsholders must still face the substantial costs that litigation in the intellectual property area generally entail. A further advantage of absolute protection is that it would permit *ex officio* action by a WTO Member against false indications of origin, thus reducing the cost of protection in foreign markets.<sup>408</sup>

Correa’s description of the reasons for Article 23 extension is quite helpful in providing points for our discussion, particularly the nature of Article 23 protection and the question of enforcement – both private and public. Considering the nature of Article 23 protection, I conclude that, generally speaking, extending Article 23’s heightened protection will offer very little to developing countries. Nonetheless, Article 23 extension could make an important difference concerning some coffee and cocoa marketing practices. We will consider the general impact of Article 23 extension; the impact that Article 23 protection would have on coffee and cocoa marketing practices; and, then, the broader issue of enforcing accuracy in coffee and cocoa origin labeling.

**A. *The actual nature of Article 23 protection for GIs***

The first point that needs to be addressed is Correa’s characterization of Article 23 is that Article 23 does not provide “absolute” protection. EU law requires that PDO/PGIS be protected from all forms of “usurpation,” a standard interpreted by French courts to foreclose the unauthorized use of the GI on completely unrelated products. This

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<sup>408</sup> Correa, *supra* note \_\_ at 29.

is the most "absolute" form of protection for GIs in national laws and, as I have discussed elsewhere, it is roughly similar to the protection against "dilution" afforded a famous mark in American law. In contrast, Article 23 provides a distinctly more limited form of protection: protection against dilution or usurpation *solely within the product category*:

Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like

Elsewhere, I have called this a "product class usurpation standard." Not only is this considerably narrower than current EU law, it is also considerably narrower the protection originally sought by the European Union in the TRIPS negotiations and the protection accorded GIs in the Lisbon Agreement.<sup>409</sup>

The current Article 23 draws the product category fairly narrowly because it clearly indicates that "wine" and "spirits" are not the same sort of product ("prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated"). Thus, Article 23 bars a Los Angeles company from marketing "Scotch-like whiskey" or "California Scotch," but it does not bar a Napa Valley vintner from marketing "Scotch wine," as long as there is no consumer confusion (i.e. an Article 22 violation). This probably makes no difference as between wine and spirits, but the limitation of the usurpation/dilution protection is important for other uses of the word in commercial speech. In Canada and the US, a popular brand of cookies are called BORDEAUX, a permissible use because cookies are not wine. In California, there is a small chain of bakeries called CHAMPAGNE BAKERY, again permissible because

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<sup>409</sup> Lisbon Agreement, *supra* note **Error! Bookmark not defined.**, art. 3. ("Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as 'kind,' 'type,' 'make,' 'imitation,' or the like.")

baked good and breakfast restaurant services are not wine. Both of these uses could be prohibited under the broader EU standard.

Elsewhere, I have discussed how any "extension" of Article 23 **must** address the difficult task of drafting language that keeps the Article 23 at *product class dilution*. The justifications for Article 23 extension to non-alcoholic products would not justify any stealth proposal to expand TRIPS obligations in the direction of a general usurpation standard – if that should be any negotiating party's intent. If negotiations on Article 23 extension advance, there should be a clear drafting history, including "agreed understandings" that if the Article 23 standard applies for any good against use of the GI on "such goods," that "such goods" is understood narrowly.

But for our purposes the important point is that a general usurpation standard would be of *extremely limited benefit to developing countries*. The general usurpation or dilution standard is important when there is likely reputational free-riding outside the product category. That tends to occur when the geographic word can be used broadly for evocative purposes – as when European and Japanese automobile manufacturers name their cars BROADWAY, MURANO, NEVADA, TACOMA, AND TRIBECA.<sup>410</sup> In the word of cookies and biscuits, there are Swiss-made JAPONAIS and FLORENTINS, Malaysian-made LAUSANNE, Brazilian-made CHAMPAHNE biscuits, and American-made GENEVA, BRUSSELS, and MILANO cookies.<sup>411</sup> But the number of geographic names from the developing world being used for such "evocative marketing" is quite limited. Evocative use of geographic names from the developing world is most likely to happen with well-known resort destinations, culture, or urban centers (such as Phuket, Rio, or Delhi) – which will have limited overlap with areas producing GI foodstuffs.

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<sup>410</sup> See generally <http://renault9.wordpress.com/renault-9-modelleri/renault-broadway97-00/> (Renault BROADWAY); <http://www.nissanusa.com/murano/> (NISSAN MURANO); [http://en.wikipedia.org/wiki/Renault\\_21](http://en.wikipedia.org/wiki/Renault_21) (Renault NEVADA); <http://www.toyota.com/tacoma/> (Toyota TACOMA); <http://www.subaru.com/vehicles/tribeca/index.html> (SUBARA TRIBECA);

<sup>411</sup> For American-made "Milano" cookies see Pepperidge Farm, Indulgent Treats: Cookies, [http://www.pepperidgefarm.com/indulgent\\_treats\\_cookies.asp](http://www.pepperidgefarm.com/indulgent_treats_cookies.asp) (for Geneva and Brussels cookies, on same page click menu bar titled "You'll love them all . . .") (last visited Nov. 5, 2006).

In short, a general usurpation standard in the TRIPS provisions on GIs would be most beneficial to European and American geographic names, not GIs like Molo, Kitengela, Oku, or Savalou (these are some of the GIs mentioned by Messrs. Otieno-Odek and Edou Edou in Part IV above). But as a general proposition, such a general usurpation standard is unneeded and inappropriate – and it is not what is being discussed with "Article 23 extension."

Similarly, extension of Article 23's product class usurpation standard is going to have minimal impact on developing country GIs *unless* there is some evidence that the consumer confusion standard in Article 22 is unworkable for enforcement purposes. Advocates of Article 23 extension may it would make enforcement easier, but there have not been an examples of inability to enforce protection of these GIs, neither in the form of failed litigations nor extensive distribution of unauthorized, non-confusing products using the GIs. The response, of course, is that the Article 22 standard is too demanding to even *try*. That is a common argument by people who do not like some aspect of existing law,<sup>412</sup> but policymakers should rightly be skeptical of such too-hard-to-try claims.

***B. The impact of Article 23 “extension” on coffees and cocoas/chocolates***

Separate from the general issue of Article 23 extension's limited impact, there may be some special impact that Article 23 extension would have on coffee and cocoa/chocolate marketing practices.

At the retail level – whether as beans or prepared beverages – coffee is often sold as "blends." This is how coffee retailers achieve consistency for their brands, whether it is large-scale supermarket sales (FOLGER'S in the US, CARTE NOIR in France) or more specialized retailers (all ILLY coffee or Starbuck's "breakfast" blend ). When no coffee-producing GI is used in the branding there is, of course, no possibility of free-

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<sup>412</sup> For example, those arguing that Berne Convention standards in copyright law need to be loosened for developing countries have to explain why no developing country has ever tried to avail itself of the compulsory licensing provisions in the Berne Annex. While that compulsory licensing system is admittedly complex, it is still appropriate to ask why no country has tried.

riding or usurpation. This is also true with the many coffee brands that use the names of places that do not produce coffee (for example, any company's "French roast" blend).

The problem arises when the coffee blend is branded with a coffee-producing GI -- with two distinct situations. In the first, the coffee blend uses is branded with the name of a coffee-producing region, but *arguably* in a non-confusing way. For example, Zabar's in New York City has sold a blend of coffee called "Blue Mountain Style" which does not contain any Jamaican Blue Mountain coffee. Zabar's is honest about their "Blue Mountain Style" *not* containing any Jamaican Blue Mountain coffee -- indeed, they explain that Zabar coffee roasters created the blend to recreate the taste of classic Blue Mountain which they believe has been lost through exploitation and abuse of the Blue Mountain name in Jamaica.<sup>413</sup> Assuming their disclosure was adequate, Zabar would be using the name "Blue Mountain" without causing any confusion -- but in a way that would be prohibited by Article 23 protection.

Another example -- again, arguably to Jamaica's detriment -- are the activities of the Australian coffee chain JAMAICA BLUE. [Exhibit M] This coffee shop chains markets only a handful of coffee blends, including one that is 100% Wallenford Estate from Jamaica. Clearly the use of "Jamaica Blue" in conjunction with that coffee is no problem. But the company also markets a "Jamaica Blue Signature Blend" and a "Jamaica Blue Fairtrade Blend," neither of which clearly has Blue Mountain coffee in it. The company would say that all they are doing is attaching their corporate trade name ("Jamaica Blue") to the names of their coffee blends ("Signature" and "Fairtrade"), but if there is no Blue Mountain coffee in these two blends, the result is more likely to be deceptive than the Zabar situation since a consumer might reasonably think that any blend from the Jamaica Blue company would have at least *some* Jamaican coffee in it.

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<sup>413</sup> Castle, *supra* note \_\_\_ at 93 ("... a general erosion in the consistency and quality of Jamaican coffee have created a situation in which genuine Jamaican Blue Mountain coffee, while more readily available, is not worth the price. Zabar's, therefore, sells a blend they call Blue Mountain Style, which they feel approximates the qualities one used to find in the genuine article but at a substantially lower price. This coffee contains no beans from Jamaica.")

The second kind of situation is when the coffee blend *includes* some coffee from the GI region, i.e. "Colombian Blend." The first question is whether consumers believe that the coffee is [a] a blend that *includes* Colombian beans OR [b] a blend of *different Colombian beans* (i.e. 100% Colombian). As far as my research has shown, there are no studies on this question for any group of consumers in developed countries. If consumers believe "b" and the blend *only* has *some* Colombian beans, then the use of the GI name is, by itself, deceptive. But let's assume that consumers are smart enough to know that something marked "Colombian blend or "Kenyan blend" is not going to have beans that are 100% from the indicated region. Even without survey evidence, we can infer this happens under certain marketing situations. For example, Douter Coffee in Japan markets "100% Blue Mountain" and "Blue Mountain Blend" side by side – as well as 100% Kona and Kona Blend side by side. [Exhibit O]

When labels like Colombian Blend, Kenyan Blend, Sidano Blend are accurate (there *is* coffee from the region) and non-confusing (consumers don't believe it's 100% from the region), there is still arguably *free-riding* off the reputation of the GI. This is probably the point intended by James Otieno-Odek when he commented:

Enhanced GI protection would ensure that blending and branding of GI protected products results into income earned by the producers of the goods. For example, with regard to Kenyan tea and coffee with distinctive quality and flavour, traders and blenders in pursuit of higher margins from the sale of inferior tea and coffee do blend these with Kenyan tea or coffee. This has denied farmers the high premium prices realized but also identity in the global market.<sup>414</sup>

At the same time, it is clear that appropriate marketing of less-than-100% blends can be good for GI region farmers. Let's return to the Douter Coffee example: marketing, side-by-side, coffees labeled "100% Blue Mountain" and "Blue Mountain Blend," the former at a considerably higher price point. Presumably, this *increases* the revenues to Blue Mountain coffee growers by "versioning" the availability of Blue Mountain coffee

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<sup>414</sup> James Otieno-Odek, *supra* note \_\_ at 5-6.

to consumers with different disposable incomes and, perhaps, different coffee tastes. Indeed, such blends are foreseen by *Jamaican law*. Jamaica's 1953 Coffee Regulations provide that "'blue mountain blend' means any coffee or coffee product comprising blue mountain coffee in such proportions as to account for not less than 20 per centum of its weight."<sup>415</sup> Apparently the Jamaicans who drafted this regulation believed that it was to their financial benefit to market a greater amount of Jamaican coffee (Blue Mountain and non-Blue Mountain) using the well-known GI.

Another example of such blending practices comes from the AlterEco company, based in Paris. AlterEco markets fair trade products in Europe, North America, and Australia,<sup>416</sup> distributing a milk chocolate labeled "Peru"<sup>417</sup> and specifically identifying the cocoa as coming from the Acopagro Cooperative in the Upper Huayabamba region of Peru.<sup>418</sup> But the product is actually a cocoa blend – with more cocoa butter originating in the Dominican Republic than cocoa paste originating in Peru.<sup>419</sup> The AlterEco milk chocolate example is arguably *confusing* – the average consumer would not distinguish between cocoa butter and cocoa paste in understanding the origin of the "cocoa" in a chocolate. But there is no question that non-confusing "blend" marketing can often be beneficial to GI region growers.

Would Article 23 extension disrupt such practices? In *theory*, Article 23 extension, its implementation in national laws, and then the strict enforcement of these national laws *would* disrupt these marketing practices: in principle, there is nothing to distinguish "Colombian blend" for a coffee that has 30% Colombian coffee from a "Scotch-style whiskey" or a "Burgundy type pinot noir wine." But in *practice*, those who control a coffee or cocoa GI would, if behaving rationally, license the use of blends that increased a region's coffee or cocoa sales without damaging the GI's reputation. If

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<sup>415</sup> Section 2, 1953 Jamaica Coffee Board Regulations, *supra* note \_\_\_\_.

<sup>416</sup> <http://www.altereco-usa.com/main.php?section=home&subsection=main>

<sup>417</sup> AlterEco markets this product in France, see [http://www.altereco.com/fr/nos-produits\\_fiche\\_25\\_chocolat-lait-fondant.html](http://www.altereco.com/fr/nos-produits_fiche_25_chocolat-lait-fondant.html). But the product is not shown for their web pages for the US. See <http://www.worldpantry.com/cgi-bin/ncommerce3/CategoryDisplay?cgmenbr=688899&cgrfnbr=773887>.

<sup>418</sup> [http://www.altereco.com/fr/les-producteurs\\_coop\\_62\\_acopagro.html](http://www.altereco.com/fr/les-producteurs_coop_62_acopagro.html).

<sup>419</sup> Packaging on file with the author.

anything, the danger is that GI licensing might be under the control of a party who would not have the best interests of the GI region farmers at heart. For example, a responsible GI regulator might monitor the market to determine the highest minimum percentage of GI beans for licensing use of the "GI Blend" label, i.e. one might determine that a minimum of 40% GI beans could be required instead of the 30% being proposed by a large coffee purchaser. A less responsible GI regulator might accept a lower GI bean percentage (to the detriment of the farmers) in lieu of a licensing fee (to the benefit of the regulator).

In other words, Article 23 extension would not necessarily protect consumers from "blend" marketing practices by which a very low percentage of GI region beans permitted use of the GI region name. Such "blend" labeling might not be literally deceptive or confusing, while nonetheless being manipulative. One way to address this problem is regulatory – as with the rules in many jurisdictions that require particular percentages of the grapes used in a region-labeled wine to come from that particular viticultural region. This could be done in domestic laws and/or international industry guidelines.<sup>420</sup> But outside a regulatory solution, one would want to put control of the GI – and, therefore, control of the GI "blend" labeling – in the hands of people most interested in the long-term wellbeing of the farmers in the GI region.

**C. *The question of enforcement – public and private***

Assuming that Article 23 extension *could* help coffee and cocoa producers cut down on non-confusing, but nonetheless free-riding marketing practices, it still must be remembered that Article 23 extension will **not** cure the basic problem for GI laws: **poor enforcement**. In contrast to the controversy around Article 23 extension, there is

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<sup>420</sup> For example, the 2007 International Coffee Agreement – the current governing document of the International Coffee Organization – provides the following in Article 27:

Members shall not maintain any regulations requiring the mixing, processing or using of other products with coffee for commercial resale as coffee. Member shall endeavor to prohibit the sale and advertisement of products under the name of coffee if such products contain less than the equivalent of 95% green coffee as the basic raw material.

Article 27(1), International Coffee Agreement (London, September 2007). But there is no provision establishing a percentage requirement for using the name of a coffee region, i.e. no requirement that one must have 95% green coffee from Kenya before the product can be labeled "Kenyan Coffee."

absolutely no question that coffee and cocoa farmers would benefit from better enforcement of domestic laws enforcing existing TRIPS standards against confusing mislabeling of coffee, cocoa, and chocolate. Such mislabeling is rampant, as are many other kinds of intellectual property infringements and many other kinds of mislabelings of foodstuffs, particularly those from developing countries. There is no point in putting stronger GI protection on the books if we do not have adequate enforcement of the GI laws already on the books.

We have already considered some of the problems in cross-border smuggling of cocoa and coffee in sub-Saharan Africa. But the problem of deceptive and fraudulent GI labeling occurs everywhere. One experienced US green coffee buyer recounts seeing a tremendous supply of Colombian coffee – bags and bags – in a Kona coffee mill in Hawaii, "a more significant quantity than a small roaster would see in a year."<sup>421</sup> In 2001, an American entrepreneur, Michael Norton, was convicted of fraudulently labeling millions of dollars worth of Costa Rican and Panamanian coffee as "pure Kona coffee" during the 1990s.<sup>422</sup> Even after that high profile case, problems for "Kona" coffee have not stopped. One coffee review website describes the current situation, decrying both "blend" labeling and straight-out deceptive practices:

However, retail sales of Kona coffee continue to be rife with dubious marketing practices. Commercial roasters produce Kona style coffee, Kona blend coffee, and Hawaiian hotels brew coffee vaguely labeled Kona that probably consists in large part of (often low-grade) Central America beans. In fact, it is difficult to find a good cup of Kona coffee in Kona, and flat-out impossible in hotels. The colorful bags of Kona coffee sold in Hawaiian supermarkets and airport gift stores are almost always poor quality and stale. Tourists who visit Kona often do come across that one splendid cup, however, and driven by its fragrant memory, plus recollections of the warm air insinuating itself under their newly purchased aloha shirts and muu-muus, spend the next six months trying to find a

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<sup>421</sup> Interview with Jay Isais, Senior Director of Green Coffee Manufacturing and Distribution, Coffee Bean and Tea Leaf, Summer, 2008. Mr. Isais mentioned the quantity to explain that it was very improbable that the mill was handling some Colombian coffee for a local roaster.

<sup>422</sup> Michelle Meadows, *Investigators' Report: California Man Convicted of Brewing a Coffee Scam*, FDA Consumer Magazine, November-December 2001.

comparable coffee experience through mainland supermarkets and specialty stores. Most, I suspect, give up and buy something else.<sup>423</sup>

Darjeeling tea has had problems parallel to coffee and cocoa. The Indian Tea Board estimates that 40,000 tons of tea is sold every year as Darjeeling tea in the world market, whereas production of Darjeeling tea in the area has not exceeded 10,000 tons in any year since 1976.<sup>424</sup> As the 2004 WTO analysis of Darjeeling indicates, the enforcement issues concern producing countries and consuming countries – not to mention any countries where transshipment occurs. A few years ago, India passed its own free-standing GI law and *Darjeeling* was the first name granted GI status,<sup>425</sup> but there is no evidence that the changed legal status has diminished the supplies of *faux* Darjeeling anywhere.

But changes in the TRIPS norms, particularly Article 23 extension, will **not** increase developed countries' public enforcement of GIs (whether from developed or developing countries). Some commentators have pointed to the special regulation and enforcement of alcoholic beverage labeling in the US and other countries, as evidence that Article 23 protection for all GIs would bring greater public enforcement resources from western countries. That, of course, is completely fallacious reasoning. Developing country officials should not be misled by the special, enhanced enforcement regimes for alcoholic beverages (wine and spirits) into believing that those regimes are a result of Article 23 protection; enhanced enforcement of laws relating to alcoholic beverages is part of their unique, contested histories in western societies – not to mention their special role of alcoholic beverages in the tax base of many governments.

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<sup>423</sup> <http://www.coffeereview.com/reference.cfm?ID=63>

<sup>424</sup> Jane Pettigrew, *Darjeeling Tea's New Certificate of Origin*, *Tea & Coffee Trade Online*, June 2000, available at [www.teaandcoffee.net/0600/tea.htm](http://www.teaandcoffee.net/0600/tea.htm).

<sup>425</sup> Indian GI applications #1 (Darjeeling as a word) and #2 (the Darjeeling tea logo), both filed on 27 October 2003 on behalf of the Tea Board. The two applications were issued registration #1. As of 1 August 2009, the Indian Controller-General of Patents, Designs, and Trademarks had received 122 applications for indigenous Indian GIs.

Enforcement of geographic origin is NOT a priority for developed country regulatory or police officials<sup>426</sup> -- and there is no reason to think it be: while inaccurate labeling of geographic origin causes consumer deception, it is not in itself threatening to health. Food safety issues have gotten more public attention in the last couple years, largely because of lapses in sanitation in food processing in the US and food adulteration in China. Globalization has significantly increased the importation of FDA-regulated products,<sup>427</sup> so better monitoring for compliance with FDA food safety regulations is much more likely to receive government attention<sup>428</sup> than better monitoring of geographic origins. The most likely scenario for improved **governmental** monitoring of food *origins* would be as a by-product of a radical improvement in the overall surveillance of the food chain.

## CONCLUSION

Domestic laws complying with TRIPS Article 22's standard for the protection of geographical indications unquestionably provide the needed environment for successful GI-based marketing, although largely the same environment may be available with general unfair competition laws. The further protection of GIs against (non-confusing) usurpation – whether product class-specific (Article 23) or general (EU law) – is of use to GIs that are already famous. Very few developing country GIs are. Nonetheless, in the case of a few coffee and cocoa/chocolate GIs, Article 23 extension could those managing the GIs to extract better economic rents from their product reputations.

But focusing on the “extension” of Article 23 or advocating an appellations or certification mark system as the “best” approach oversimplifies the difficult problem of (a) making GI-based marketing of developing country products successful, and (b) ensuring that the economic rents from that successful GI marketing come back to farmers. The first

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<sup>426</sup> Interview with Jay Isais, *supra* note \_\_ (discussing little or no FDA policing of coffee origins).

<sup>427</sup> Progressive Policy Institute, PPI Trade Fact of the Week, March 11, 2009 (in 2006 FDA deputy commissioner Murray Lumpkin stated that FDA-regulated imports went from 1.5 million discrete units in 1991 to 14.4 million in 2004) [on file with author]; Jessica Milano, *Spoiled – Keeping tainted foods off America's tables*, PPI Policy Report (Sept. 2007) available at [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=108&subsecid=206&contentid=254430](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecid=206&contentid=254430).

<sup>428</sup> See, e.g. Gardiner Harris, *Bipartisan Calls for Food Safety Fixes*, N.Y. TIMES, March 11, 2009 (describing food safety problems and strong efforts in Congress to address the issues).

real challenge is building up the reputation of a coffee or cocoa GI. As *Colombian coffee* demonstrates, this can be done by the developing country itself, but most investment in coffee and cocoa GI reputations is now being done by coffee roasters and chocolate makers from rich economies – and developing countries should welcome this investment, seeking to extract additional reputation rents but not so much as to stop the roaster or chocolate company from being interested in promoting the GI. Quality control and regulation of the GI is another area where no single approach is best for all countries. Although Jamaica provides an excellent case study of a central government involvement in restoration of quality and reinvigoration of the GI reputation (*Blue Mountain Coffee*), there are good reasons to believe that many coffee and cocoa producing countries do not have the government resources, public institutions, and transparency to make such governments efforts fair and efficient. Indeed, the recent decisions of the Ethiopian government in relation to *Harrar*, *Yirgacheffe*, and *Sidano* may indicate an acceptance of their inability to establish production protocols, control quality and/or guarantee source in the ways that would be basic to an appellations law or expected in certification marks.

Another element that must be considered in GI-based marketing, both as a matter of practical and ethical responsibility, is the tremendous energy and environmental costs associated with transporting food stuffs over long distances. While eating “local” products is not always better for the planet, it clearly *IS* in many fact patterns.<sup>429</sup> Sending New Zealand apples to Chicago during July-November<sup>430</sup> or trans-oceanic transportation of bottled water to New York are not environmentally sensible things to do. This is a topic that needs careful consideration by those who want to create demand in developed economies for agrarian products from distant, developed countries.

Advocacy of GI-based coffee and chocolate marketing does not have these worries for a simple reason: coffee and cocoa cannot be grown in the rich economies of Europe, Japan, Korea, Australia, and the continental United States. Creating taste and

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<sup>429</sup> Justifying the new surge in “locavores,” people who want to eat principally locally-grown foods See Kim Severson, *A Locally Grown Diet with Fuss but No Muss*, N.Y. TIMES, July 22, 2008 (reporting the rise of “locavore” practices).

<sup>430</sup> Given that those months are prime apple production periods in Washington state, New York, New England, Pennsylvania, and Ohio. [http://ohioline.osu.edu/rb1188/b1188\\_2.html](http://ohioline.osu.edu/rb1188/b1188_2.html)

demand for GI-based high-end coffees and consumption as a form of consumption makes sense, improving the lives of both “those Americans who decide they’d prefer Brazil Santos #2 in the morning with their eggs, [and] those Brazilians who decide it might be nice to have an egg, just one, anytime they can get one.”<sup>431</sup> Moreover, cocoa is one of the few cash crops that can be grown *in* the rain forest;<sup>432</sup> coffee is one of the few crops that can be economically grown in higher altitudes as well as forested areas. In short, promotion of improved, high-end coffee and cocoa production can be a responsible path for development, serving both developing country farmers and the planet.

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<sup>431</sup> Castle, *supra* note \_\_ at 188.

<sup>432</sup> Brenner, *supra* note \_\_ at 237.

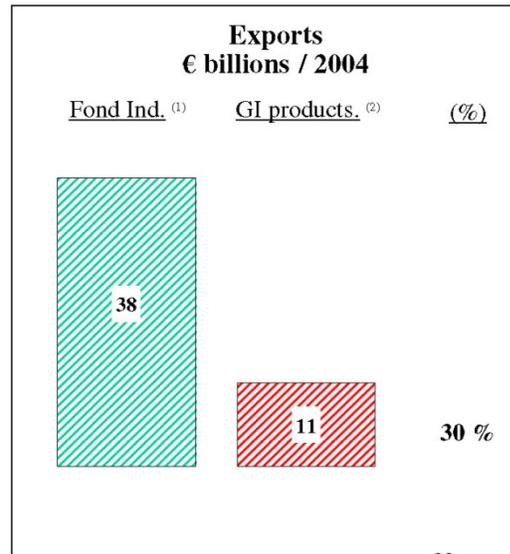
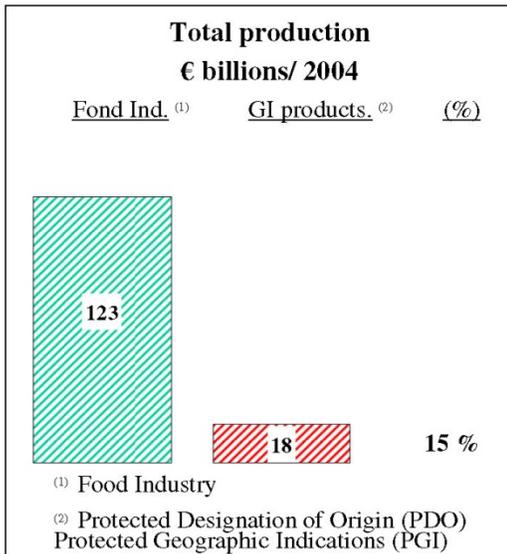
## EXHIBITS

Exhibit A	[page 62] <i>a-ip27 ExhibitA</i>	EU official Powerpoint
Exhibit B	[page 65] <i>a-ip27 ExhibitB</i>	EU official Powerpoint - Phu Quoc nuoc mam
Exhibit C	[page 89]	Supermarket shelves in Riga, Latvia, showing a wide variety of GI-marketed coffees; a coffee stand in Tokyo with lots of “house” brand GI coffees.
Exhibit D	[page 90]	Vivani’s Ecuadorian bittersweet chocolate
Exhibit E	[page 90]	Feletti’s 67% Ecuador Dark Chocolate
Exhibit F	[page 90]	Frey Ecuador chocolate
Exhibit G	[page 90]	Lindt GI bars (Cuba, Ecuador, and Madagascar)
Exhibit H	[page 90]	Monoprix Ecuador and Santo Domingo bars
Exhibit I	[page 90]	Lake Champlain GI bars
Exhibit J	[page 90]	Hershey’s GI bars
Exhibit K	[page 95]	Michel Cluizel plantation bars
Exhibit L	[page 95]	Dagoba single cooperative bars
Exhibit M	[page 128]	“Jamaica Blue” coffee chain, Beijing location
Exhibit O	[page 129]	Douter Jamaican Blend coffees, Japan

## EXHIBIT A

### 18 billions € annual turnover

- **18 €B** turnover in 2004 for Geographical Indication (GI) products, accounting for **15%** of global food industry turnover.
- GI products over-perform **export** statistics, with a share of **30%** of food industry exports.



## EXHIBIT B

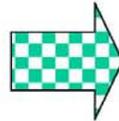
### A Vietnamese example : Nuoc Mam from Phu Quoc

• The implementation of a geographic indication for Nuoc Mam from Phu Quoc in 2001, **increased the value of the product** and attracted a **foreign investor** (Unilever) which injected 1 million US \$ on a **partnership** with local producers.

#### Nuoc Mam from Phu Quoc

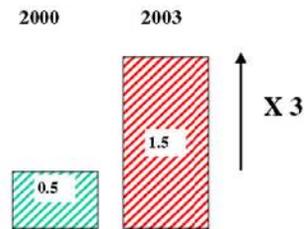
- A well-known product in Vietnam and outside the country
- 90 firms produce Nuoc Mam on Phu Quoc island
- A 10 million-liter production
- 1/2 million liter exported
- 80% of counterfeited products in Japan and the EU

2001, GI



#### GI results

- High increase in prices on domestic market (from 0,5 to 1,5 €/l)



- 1 M US \$ from Unilever to upgrade a processing and bottling plant.
- Knorr trademark.
- GI / trademark association, vehicle for local development.
- GI implementation : a tool to fight against counterfeiting.

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# EXHIBIT C

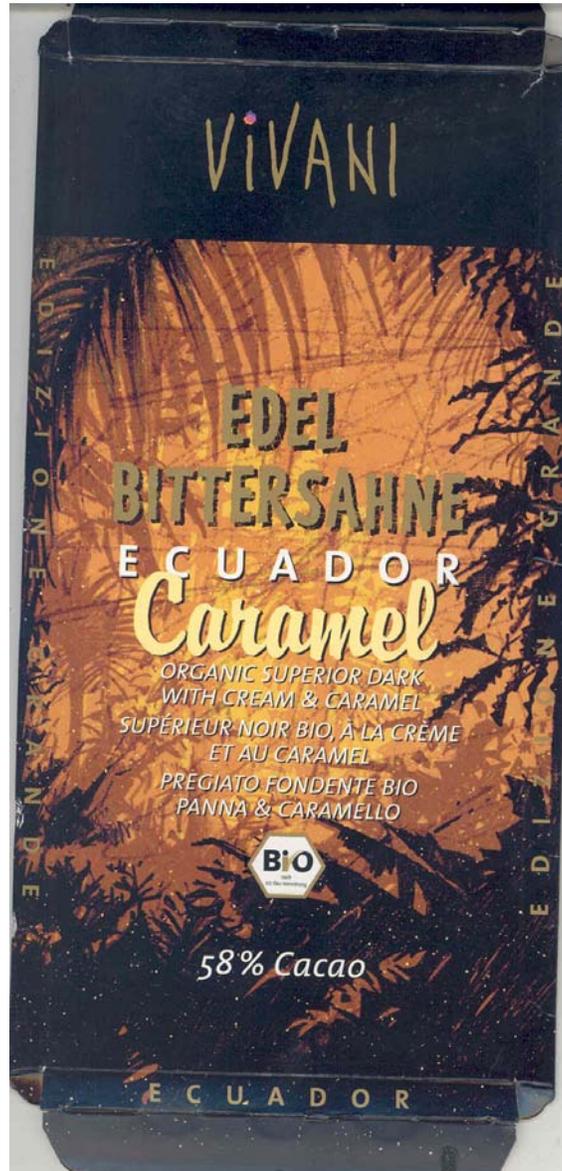
GI-labeled coffees on sale at a large supermarket in Riga, Latvia as well as a simple coffee stand in Tokyo



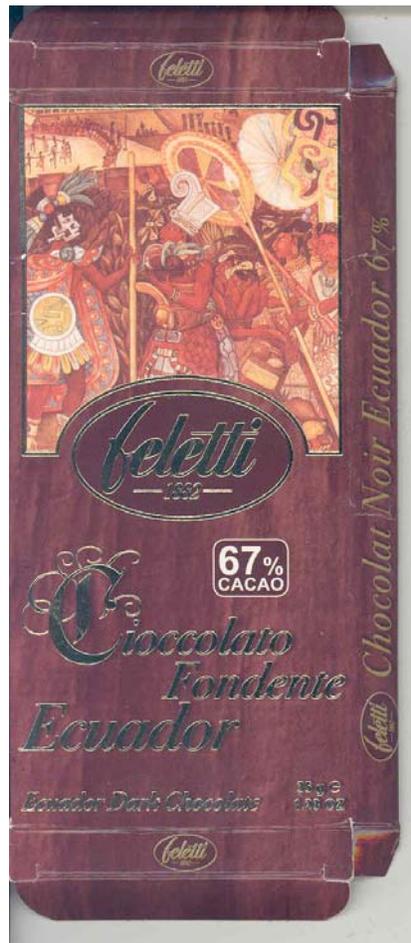
Tokyo coffee stand with extensive “house” brand GI coffees



**EXHIBIT D**



**EXHIBIT E**



**ЕХНІВІТ F**



# EXHIBIT G



EXHIBIT H

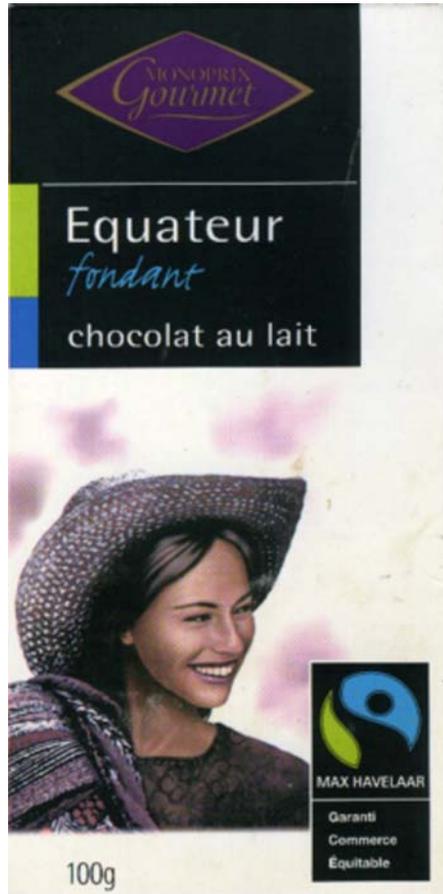


EXHIBIT I

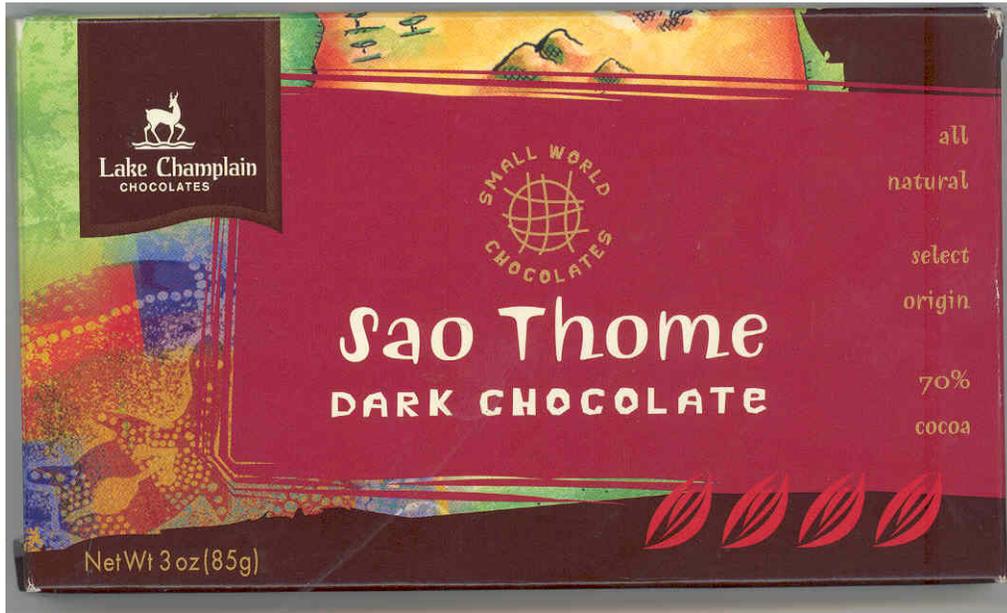


EXHIBIT J



**EXHIBIT K**

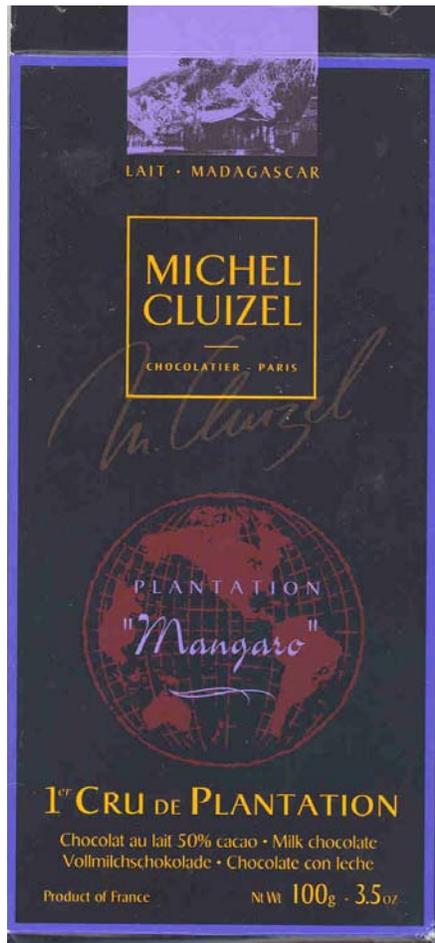


EXHIBIT L



**EXHIBIT M**

“Jamaica Blue” coffee chain, Beijing location



## EXHIBIT O

Douter Coffee's display of "100%" Jamaican Blue Mountain and Blue Mountain Blend (and Kona) side-by-side in a store in Sapporo, Japan

