Registered geographical indications

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Published in:
Journal of World Intellectual Property

DOI:
10.1111/j.1747-1796.2003.tb00246.x

November 2003

Registered Geographical Indications Between Intellectual Property and Rural Policy—Part II

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Registered Geographical Indications
Between Intellectual Property and Rural Policy—Part II

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Part I of this article dealt with some of the theoretical issues underlying registration systems for geographical indications (GIs). Part II considers some aspects of the historical development in France and present regulatory structures of GI registration in Europe and the New World.

I. HISTORY AND DEVELOPMENT OF: REGISTED GIs

A. The History of GIs in France: Reclamation of Lost Property?

Since so much of the impetus for the expansion of GIs emanates from France, it is useful to delve into some of the history of GI protection in that country. This aids a proper evaluation of the French and European positions in the global GI debate, in the light of the theoretical discussion in Part I of this article. The current struggle to regain some control over French (and other EU Member country) GIs around the world is a geographic extension of a process that began at a more local level.

Of further interest is the fact that in the history of the privileges of French wine growers, as illustrated by Bordeaux and Champagne, one finds that combination of elements of rural policy, guarantees of authenticity and the search for competitive advantage which marks today's debate about global expansion of GI registration. The historical background provided below is not intended to be comprehensive, but rather illustrative. It focuses on wine, and in particular on the two wine-growing regions of Bordeaux and of Champagne.

1. BORDEAUX'S EARLY HISTORY: PRIVILEGES, IDENTIFYING MARKS AND RURAL POLICY[1]

In the Middle Ages in the South-West of France, and also in other French wine-producing regions, the sale and consumption of wines from other regions were prohibited. Only wines originating in the region were allowed entry into its towns.

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For acknowledgements relating to research and writing of this article, see Part I, which appeared in the September 2003 issue of The J.W.I.P.

1 The information in this part is largely drawn from A. Richard, *De la protection des appellations d'origine en matiere vinicole*, Imprimeries Gounouilhou, Bordeaux, 1918.

Right up until the time of the French Revolution of 1789, the Bordeaux region[2] also benefitted from two additional privileges:

(a) the privilège de la descente; and
(b) the privilège de la barrique.

The latter is said to have been akin to a mark of origin, and thus an early manifestation of the use of such marks to prevent confusion between wines from different regions. Nonetheless, both actually had protectionist motives and effects.

Most, if not all, transport of wine in that region of France was by river. The *privilège de la descente* meant that wines from outlying regions, not being part of the Bordeaux area, were not to be brought down by river to Bordeaux for sale before 11 November of each year, and some even later. This gave the Bordeaux wines a valuable window of monopoly over the sale of wines into the lucrative markets of England and Holland, whence transport became very difficult later in the year because of weather conditions and the icing up of northerly ports. When the wines from outside Bordeaux were brought into the city, they were held in discrete cellars in a specific area of the city. The effect of this privilege, although its intent was predominantly to stifle competition, was also *"l'authentification à peu près absolute des vins de la sénéchaussée pendant une période de I'année."*[3]
As to privilege (b), the wines of Bordeaux *vins de ville*) were the only ones entitled to a *barrique* (barrel) of a special form and dimensions. This differentiated them from wines from other regions; hence Richard says:

> *"Nous trouvons ici la première manifestation de la protection des appellations de provenance en matière vinicole; il s'agissait bien d'une véritable marque d'origine. D'autres villes ont eu elles aussi une barrique spéciale."* (emphasized in the original).[4]

But although the special shape was intended to prevent confusion, it also resulted in further trading privileges for the Bordelais: bigger *barriques*, made of better wood, which the Bordelais succeeded in preventing other regions from using, meant that the wine travelled better during export.[5] Because freight was the same whatever the size of the *barrique*, transport costs were also lower than for those who were forced to use smaller *barriques*. This was a distinct advantage in the all-important export trade to England.

A significant development occurred when, in 1764, to prevent the illicit use of the Bordeaux *barrique*, each wine-grower was compelled to identify, by way of a red brand on the bottom of each barrique, his name and that of the *paroisse* (parish) of origin.[6] This move was, in fact, opposed by the dealers of Bordeaux. They argued that rather than prevent fraud, this measure would encourage it.

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2 The *Senechaussee de Guyenne.*
3 "…the well nigh absolute authentication of the wines of the Bordeaux region during a certain time of the year." (all translations made by the author): see Richard, *supra*, footnote 1, at 50.
4 Id.: "We see here the first appearance of the protection of appellations of origin in relation to wines; it did amount to a true mark of origin. Other towns also had a special barrel."
5 This monopoly over barrel shapes brings to mind one of the contentious issues in the contemporary debate concerning the extension of rights to the shape of bottles, e.g. Champagne bottles.
6 *Arret de la Cour du Parlement concernant la police des vins,* 18 July 1764, Article 3.

Nothing would stop dishonest traders from sending poor wine in casks with the most desirable brands, and keeping the best wines for themselves in casks with the less-favoured brands.[7] The ability to hide true origin by misuse was to bedevil the use of marks. In the wine industry, where adulteration, cutting, admixing and other unsavoury practices were rife, and difficult to detect and control, this takes on additional significance.

But another significant problem was that the branding requirement would render illegal certain established practices of mixing and deriving supplemental wine from neighbouring, sometimes better-quality-producing parishes. Much wine was sold under the well-regarded name of a certain parish or vineyard location, but was, in fact, derived from contiguous parishes which were considered to have similar, if not even better characteristics. Again, this is illustrative of a modern problem – that of imposition of rigid regional delimitations and the resulting impossibility of dealing flexibly with varying levels of production within the area of demarcation or, more generally, to meet demand while effectively maintaining quality. The GI can act as a brake on growers' genuine attempts at maintaining consistent quality and supply of wine.

As well as enjoying other privileges, in Bordeaux (as in some other regions) wine sales were also protected against the sale of other beverages, such as beer and cider. Neighbouring regions constantly fought to deprive Bordeaux of its privileges, but in a sense were swimming against the swelling tide of monopolies in the period of the *Ancien Régime*.[8] Although in an edict of April 1776 free trade in wine was declared in the whole of France, Bordeaux was able to maintain most of its privileges, in practice at least. By November 1776 most of the effects of the edict of April 1776 were suspended. It was only with the abolition of all privileges of towns on 4 August 1789, during the Revolutionary period, that Bordeaux's privileged position came to an end.

It was at the time of the struggles about abolition that an interesting shift in argumentation occurred. In fighting for its privileges, Bordeaux emphasized that they were justified for the purpose of guaranteeing the genuineness of the *crus* (vintages) for foreigners. It also emphasised, invoking agricultural policy, that the land of Bordeaux was not amenable to the growing of other crops; therefore the growing of vines deserved encouragement.[9] Protectionist measures also allowed the people of

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7 One should remember that this was during a time when such crude impostures could not readily be exposed through chemical analysis and testing, as would now be possible. And, in the words of Thomas Barton who, on behalf of the traders, drew up a Memorandum to be presented to the Counseil du Roy: "*On ne juge point de Ia qualité du vin,, ny de pas une liqueur quelconque, à l'aspect de la futaille ou du tonneau qui le contient; c' est par le gout qu'on en decide, et c'est une vague illusion de penser qu 'une marque empreinte sur un tonneau puisse faire trouver le vin qu'il contient de meilleure qualite qu'il ne l'est en effet."* ("One does not judge the quality of wine by its container's appearance; one determines it by taste, and it is an illusion to think that the mark on the outside of a cask will make the quality of the wine contained any better than it actually is.") As quoted in Richard, *supra*, footnote 1, at 55.

8 Richard argues that Bordeaux went so tar in its protection of its wines that it managed to turn every other region against it, contributing to the eventual demise of the privileges; see Richard, *supra*, footnote 1, at 60.

9 It was well recognised that where soil was poor, the growth of vines was often one of the few options open, and deserved to be encouraged, by the grant of monopolies.

Bordeaux to build up a financial surplus so they could afford to import grain to feed the population.[10]

The injection into the debate of rural and agricultural policy considerations deserves attention. It was for the purpose of ensuring that poor soil areas were indirectly protected or subsidized in relation to growing vines that much of the original geographically-based protection systems were devised. The fact that GIs are an instrument of rural policy is still in evidence today – as mentioned in Part I of this article – and the Preamble to Regulation 2081/92 of the European Union states, in part:

> "... whereas the promotion of products having certain characteristics could be of considerable benefit to the rural economy, in particular to less-favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas;".[11]

2. CHAMPAGNE: REGULATION FROM PAST TO PRESENT

Champagne has a somewhat different history.[12] In 1670 the sparkling "*mousse*" style was accidentally discovered by Dom Perignon, a Benedictine monk, cellar master at the Abbey of Hautvillers near Epernay in France. Initially the new style came under vigorous attack. But the reputation of Champagne grew steadily both in France and, importantly, also abroad. By 1854-1855 nearly 2.5 million bottles of wine were sold in France and nearly 7 million abroad; in 1872-1873 19 million were sold abroad, and just before World War I total sales were about 30 million bottles, two-thirds of which was abroad.[13]

The Champagne appellation in the modern sense was initially delineated in 1908 over an area of 15,000 hectares. In 1927 it was definitively circumscribed for an area of 34,000 hectares. A set of thirty-five rules controls every aspect of the production of Champagne:

- the grape varieties used;
- planting and pruning of vines;
- limited yields;
- harvest by hand;
- minimum ageing periods.[14]

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10 In Fact, in the seventeenth and eighteenth centuries, much of the central attack on Bordeaux's privileges was inspired by the desire to encourage the growing of wheat; authorities wanted to prevent the substitution of vines for wheat to ensure a sufficient supply of the latter. The Bordelais twisted this argument to their advantage: giving Bordeaux more privileges would turn others off planting vines, thus maintaining wheat production!

11 Council Regmlation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, O.J. L. 208, 24 July 1992; see also D, Hangard, *Protection of Trademarks and Geographical Indications in France and in the European Union*, Symposium of the International Protection of Geographical Indications 65, 75, 1999.

12 The information provided in this part is largely derived from R. Hodez, *Du droit à l'appellation Champagne,* Presses Universitaires de France, 1923.

13 See Hodez, ibid., at 12.

14 Recently, the minimum ageing period was increased to fifteen months for non-vintage and three years for vintage Champagnes. The use of vintage and non-vintage Champagnes adds vital flexibility to the system and allows some balancing out *qua* production levels over time.

Vineyards are not allowed to be planted just anywhere in the Champagne region, but are restricted to hillsides with particular soil characteristics. *Négociants* (merchants) buy grapes to augment their own vineyard's production and then go through the complex and labour-intensive production processes required.

The result is said to have a unique character, notwithstanding the fact that there are numerous imitations around the world. The system of regulation and control is the model of an *Appellation d'Origine Contrôllée* (AOC); wine production is heavily regulated, in an endeavour to guarantee its close connection with both the human and the physical characteristics of a narrowly circumscribed region. Stringent quality and production control ensures stability over time, to a degree at least. In the result, as Hodez says:

> *"Le vin de Champagne correspond à des qualités obtenues avec les plus grandes diffcultés et à grand frais; il est donc nécessaire de protéger le mot qui sert à le désigner."*[15]

3. NATIONAL REGULATION TO PREVENT ABUSES

Regulation in the *Ancien Régime* was piecemeal and adapted to local political and historical privileges and conditions, rather than based on a uniform national approach. It was very much inspired by the fear of fraudulent admixtures and false attachment of names. At that time, since it was not possible to test adulteration chemically, a very high degree of specific regulation and supervision of production was required to prevent subterfuge. This obviously imposed enormous costs and resulted in regulatory constraints whose effect was anti-competitive. It was only with difficulty that the notion of appellation of origin managed to emerge from this regulatory morass once the privileges were later abolished, and to become the focus of regulatory efforts:

> *"Pendant la grande partie du XIXième siècle, les abus en matière de marques et d'appellations étaient généralement considérés comme des faits normaux ... Quant au respect de l'appellation d'origine, il n'a pu s'obtenir que progressivement et avec beaucoup de peine."*[16]

Early twentieth-century France saw the start of an era of more general regulation of production and trade in foodstuffs, and of wines in particular. Uncertainty about the delimitation of wine-producing regions, and adjacent frauds, was finally removed by the Law of 6 May 1919 concerning *Appellations d'Origine*. This Law fixed the principles of delimitation of regions, and defined the characteristics that the products

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15 "The wine of Champagne has characteristics that are obtained at very great cost arid with great difficulty; therefore it is necessary to protect the word that identifies it."

16 "During the greater part of the nineteenth century, abuses of marks and appellations were generally considered to be par for the course ... Respect for appellations of origin only emerged gradually and with great effort." see Hodez. *supra*, footnote 12, at 18-19. This despite several general measures aimed at protecting regional names against imitation and against uses such as "in the style of..."; see Law of 22 Germinal XI, 12 April 1803. General provisions of Napoleon's *Code Civil* (Article 1382) and *Code Pénal* (Article 423) were applicable but the Law of 28 July 1824 was a complementary and more specific measure expressly making Article 423 applicable to false indications on goods, *inter alia* concerning the place where they were made. Other laws were directed specifically at fraudulent adulteration and admixture, culminating in the law of 1 August 1905 "Concerning fraud in the sale of goods and falsification of foodstuffs and agricultural products."

had to have, as well as the protection measures afforded them.[17] In 1935, the general system of establishment of AOCs, under the supervision of a Committee that, from 1947 onwards, became the INAO (*Institut National des Appellations d'Origine*), was set up under the Law (*Loi-décret*) of 30 July.

Nonetheless, a well-protected AOC such as Champagne, with all its attendant goodwill, naturally encouraged rival traders if not actually to use the same name to make their goods more attractive, then at least to attempt to ride on its coat-tails "*tantôt par d'adroits subterfuges ou de déformations de mots qui leur permettent parfois d'éviter de tomber sous le coup de la loi*"[18] The modern-day approach to registered GIs for wines, which is very strict and does not permit the use of the GI in combination with other terms, in translations, in the form of "... -style", etc., or with clear disclaimers, originates in earlier recognition of, and attempts to stamp out, this kind of duplicity.

4. FROM NATIONAL TO INTERNATIONAL PROTECTION

Although the protection of GIs, as it emerged during the nineteenth century and then evolved from piecemeal regulation to generally applicable administration, was gradually strengthened and the use of names such as Champagne brought under control within France, unrestrained use of French names continued abroad. International treaties such as Paris 1883 and Madrid 1891[19] did contain provisions against false indications of origin. But neither these nor more specific treaties signed during the twentieth century – in particular Lisbon – had much effect outside a small number of jurisdictions that already favoured registered GIs.[20] Thus, before the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and recent bilateral agreements, it fell to non-State actors to pursue the cause of the protection of GIs around the globe.

The actions of the *Comité Interprofessionnel du Vin de Champagne* (CIVC) are well known in this regard. However, the efforts of the CIVC did not meet with universal Success,[21] and in any case they were of little or no assistance to owners of other registered GIs. Hence, the international treaty negotiations in the context of TRIPS offered proponents at~ opportunity to make uniform advances favouring all producers using GIs, continuing the expansion of protection by registration from the local, to the national, to the regional and finally to the global arena. In France, historical developments have culminated in the current system combining the pre-existing system of AOCS with the superimposed structure of PDO/PGIs

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17 See Hodez, *supra*, footnote 12, at 20.

18 Ibid., at 21: "... by cunning subterfuge or modification of terms which sometimcs allowed them to escape the effect of the law."

19 The Paris Convention for the Protection of Industrial Property, 1883; The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, 1891.

20 The Lisbon Agreement for the Protection of Appellations of Orig~n a~d their international Registration, 1958; the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIIPs), Articles 22-24.

21 See, for instance, in Australia, *Comité Interprofessionel du Vin de Champagne v. N.L. Burton Pty Ltd.,* (1981) 57 FLR 434.

(protected designations of origin/protected GIs) resulting from European Council Regulation 2081/92, which deals with such protection (see further below). Olszak points out that:

> *"Malgré le souci habituel de précision que l'on connait en droit, la terminologie employée dans notre domaine demeure malheureusement assez fluctuante"*[22]

Terminological confusion abounds in this area of the law, but there is no doubt that the system of AOCs is universally recognized as the high water mark of protection for registered GIs. The description below illustrates the complexity and pervasiveness of such a high-level system of registration of Gls. Together with the EU PDO/PGI model, it is a significant model in terms of the global expansion of GI protection by registration proposed by the EU in the context of TRIPS.

5. THE CURRENT SYSTEM OF GI REGISTRATION IN FRANCE

Leaving registered trade-marks law issues aside, French law relating to GIs in general has three levels of regulation; one general, aimed at preventing misleading conduct in relation to geographical names, and two relating to the registration of geographical indications with varying levels of quality significance. As a general principle, geographical indications can be used freely,[23] subject to the general prohibition on the use of false indications of origin, by virtue of Section L 217-6 of the *Code de la Consommation*. Any person who attaches or knowingly uses any indication on or in relation to any goods, in a manner that causes others to believe that they have an origin other than their true origin, is in breach of the Code. However, the law expressly provides that if the true origin is clearly marked on the product, no liability will ensue, unless the false indication of origin is a protected (i.e. registered) regional designation.[24]

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22 The current system of protection of geographical indications in France is well described in N. Olszak, *Droit des Appellations d'Origine*, Tec&Doc, Chapter III *Le droit francais des indications Geographiques,* 2001. For a recent precis of the protection of GIs in the broad sense, see also P. Pollaud-Dulian, *Droit de la propriete industrielle,* Montchrestien, 1999. For this passage, see Olszak, at 69: "Despite the usual desire for precision in law, the terminology in our area of study [i.e. that of GIs in general] unfortunately remains fluid."

23 See Olszak, ibid., at 152.

24 For all products in general, Article L 115-2 to 4C of the *Code de la Consommation* does provide for an administrative procedure for the registration of designations of origin. A prescribed process of public inquiry and consultation with affected industry groups results in a decree of the *Conseil d'Etat*. Only very few registrations have been granted by this method, and now it is only relevant for industrial products, as procedures for agricultural produce and foodstuffs are now integrated in the regular procedure for PDOS (or AOPs, to use the French acronym), AOCs for wines, and PGIs (or IGPS), paralleling the European Union system (see further below). The administrative procedure is an alternative to the longer established judicial procedure, finding its origins in the Law of 6 May 1919 and now codified in Article L 115-8 to L 115-15 of the *Code de la Consommation.* This procedure allows conflicts concerning the legitimate use of denominations to be referred to a court, which can resolve the conflict and determine for the future the delimitation of an area and the characteristics of the product concerned. This process was previously mainly used in relation to wine, and only rarely in relation to industrial products; according to Olszak, *supra*, footnote 22 at p. 15, it was last used in 1986. Decision Grenoble, 1re Ch., 14 February 1989, PIBD, 1989, III, 118, relating to the term *Raviole du Dauphine*.

But agricultural produce and foodstuffs, including wines, are far more prescriptively regulated than products in general. As Olszak puts it:

> *"… les produits agricoles et les denrées alimentaires font l'objet d'une politique particulièrement detaillee et complexe, en raison de l'importance évidente des terroirs dans leur cas."*[25]

This level of regulation is so extensive and pervasive that Olszak argues that the exercise of the theoretical right/freedom to employ simple indications of provenance is now liable, in almost every case, to fall foul of the protection afforded to AOCs and PGIs (the French acronym is IGP). In other words, the system of registered GIs has progressively become more predominant and virtually displaced reliance on unfair competition torts.

6. ADMINISTRATION OF THE GI REGISTRATIONS BY THE INAO

The registration system for food and wine GIs is administered through the *Institut National des Appellations d'Origine*, which previously (before 1990) was only responsible for wines and spirits and in relation to the grant of AOCs, but now is responsible also for the grant of PGIs, and for all agricultural products and food. The system administered by the INAO, which itself is a complex body constituted of numerous national and local committees, is the apogee of regulation, enforcing the closest connection between origin and quality control.

Although this, according to Olszak, is not essential,[26] the registration process is normally instigated by an interested local syndicate.[27] The request is examined by INAO officials and then, after consultation of the relevant regional committee, by the national committee responsible for the produce category in question. This committee then opens an inquiry and commissions experts' reports (which are submitted to the national committee). The committee then rejects, adjourns or approves the proposed project, in the latter case appointing a delimitation committee to determine the definition of the *terroirs* (soils) within the denomination. This, in turn, is incorporated in a draft Decree which, once approved, is submitted for promulgation to the Minister for Agriculture. The Minister cannot amend but can refuse to promulgate, and thus the process is subject to an ultimate exercise of political rather than administrative control. The whole process is subject to review by the *Conseil d'Etat.* According to Olszak, applications for review to the *Conseil* are now more common, in particular with respect to anti-competitiveness and procedural conformity.[28] When the Decree is promulgated, the INAO is responsible, through its inspection system, for the supervision and control required by the Decree's provisions. It is also competent, both nationally and internationally, to pursue infringers, as are the relevant syndicates.

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25 "... agricultural produce and foodstuffs are subject to a particularly detailed and complex policy approach, because of the evident importance of *terroirs* [soils]."

26 See *Olszak*, supra, footnote 22, at 158.

27 Indeed, in order to obtain EU registration under Regulation 2081/92 this is mandatory – a process instigated by the INAO itself would result in a registration ineligible for European notification.

28 See Olszak, *supra*, footnote 22.

The AOC corresponds to the Community PDO, and the EU definition is said by Olszak to be applicable. He summarizes the characteristics of the AOC in the following terms:

> *"C'est d'abord une appellation d'origine encardree par un ensemble complexe de controles administratifs et syndicaux, dans la reconnaissance, la delimitation et la production."*[29]

Whereas the AOC system pre-dates European Regulation 2081/92, the grant of PGIs represents a systematization of previously disparate approaches. As such, it is a relative novelty in the French legal landscape. The pre-existing system of"*labels*"[30] and "*Certification de Conformite*" forms the exclusive basis for the grant of PGIs via the INAO processes. In other words, PGIS cannot be granted unless they incorporate a "*label*" or a certificate of conformity which has been granted in accordance with the relevant administrative procedure. Not all labels or certifications, of course, incorporate a geographical element.[31]

As illustrated above, the French system is partly the inspiration for, and partly based on, the EU Regulation 2081/92 system of registration of PDOs and PGIs. It is therefore opportune to examine the EU rules for registration of GIs more closely as to their substantive requirements and rights. The EU-wide registration system for the protection of GIs also illustrates the steady expansion of high-level registration: from local, to national, to regional, to global.

B. The European System of Registration

It is not the case that there was strong universal support for the expansion of high-level GI protection beyond its heartland by way of adoption of an EU regional system of registered GIs.[32] Certain northern-European countries, although recognizing actions for unfair competition and the like in relation to place names, did not provide for registration for products at all, or only for wine.[33] Nonetheless, European

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29 Ibid,, at 162-163: "It is above all a designation of origin surrounded by a complex set of administrative and syndicate controls, both in its recognition, its delimitation and in production."

30 The English term "label" is the term used in France in this context.

31 Labels will only be granted where the product to be labelled (with what is known as a *label rouge*, i.e. a red label) is an edible or other unprocessed agricultural product, which itself is different from the currently commercialized product, in either production, processing or geographical origin. This implies a quality at least different from, if not better than, the norm, usually due to its artisanal and local production. The Certificate of Conformity, on the other hand, implies no more than that the goods are produced in conformity with certain certified requirements in relation to production, processing or geographical origin. In truth, Certificates indicate conformity to certain rules of production, which does not necessarily imply greater quality than the norm. But, according to Olszak, they are usually promoted as importing guarantees of better quality. Again, only recognized Certificates incorporating a geographical indication will be able to be registered as PGIS.

32 The EU system is not the only regional registration system for GIs; e.g. Decision 486 of the Andean Community concerning a Common Intellectual Property Regime, which entered into force on 1 December 2000. Note that by virtue of Article 212 of that Decision, there is no limitation as to type of product for which appellations of origin can be protected, whether natural, agricultural, handicraft or industrial.

33 Germany, incidentally, undertook, in the Treaty of Versailles, to protect a large number of French GIs. Another example of a country without registration for goods in general is Austria; as pointed out in the Opinion of the Advocate-General in the *Spreewalder Gurken* case (see Opinion of the Advocate General, 5 April 2001, in *Carl Kuhne GmbH & Co. v. Jutro Konservenfabrik GmbH & Co. KG*, Case C-269/99), the northern Member States in general did not have registration systems, relying on legislation relating to misleading and deceptive conduct. This caused some difficulty, since these States did not dispose of established lists from which to notify names to the Commission when regulation 2081/92 came into force – they had to draw up such lists and determine which names would qualify as registrable indications.

harmonisation was achieved by the introduction of an EU-wide registration system for GIs for all foodstuffs, in 1992.[34] Partially, the Register consists of notified GIs emanating from national Registers pre-dating the EU-wide system, and partly it consists of applications made since. This Register excludes wines,[35] which are the subject of a separate system by virtue of Council Regulation 1493/99 of 17 May 1999 on the Common Organisation of the Market in Wine.

The most celebrated case under Regulation 2081/92 is, arguably, the *Feta cheese* decision.[36] The long process, which ultimately resulted in the registration of *feta*, illustrates some of the difficulties faced with the introduction of new levels of protection for GIs across still disparate jurisdictions, and the disruption to well-established practices arid uses that can result. The European Commission ultimately recognized "*feta*" as a registered GI, rejecting arguments that the term was a generic descriptor of a style of cheese. As a result the term can only be used by producers in certain areas in Greece in accordance with strict product standards. Well-established producers of cheese who employed the denomination as a generic will be compelled to convert to alternative names or alternative products, or cease production altogether.

1. REGULATION 2081/92: PDOs AND PGIs

EC Regulation 2081/92 provides for two categories of registered GIs: protected designations of origin and protected geographical indications.[37] The essential difference between the two categories is that for a PDO, all the production, processing, and preparation must occur within the designated area. For a PGI, only one of either production, processing or preparation must take place within the designated area.[38] Further, whereas indirect Gls can be registered as PDOs, they cannot be registered as PGIs. The PDO category equates to the previously established AOC system for wines in France.[39]

As well, for a PDO, the quality or characteristics of the product must be “essentially or exclusively due to a particular geographical environment with its inherent natural and human factors”, whereas for a PGI, “a specific quality, reputation or other characteristics [must be] attributable to that geographical origin” (Article 2(a) and (b)).

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34 Council Regulation (EEC) No. 2081/92, 14 July 1992, *supra* footnote 1 I, 1-8.

35 Ibid., Article 1.

36 See Council Regulation(EC) No. /829/2002 of 14 October 2002. Subject to the fulfilment of certain conditions, producers in other States of the European Union dispose of a five-year transition period before they have to change the name of their product or cease production.

37 In this sense, and in the statutory definitions of regulation 2081, the European model and categorizations parallel the French AOC system; see G. Schricker, *Recht der Werbung in Europa,* Nomos (Looseleaf), at 47.

38 So, for example, ham may be processed and prepared in the designated area, but if the pork is derived from pigs imported from outside the area, the resulting ham may be entitled to a "protected geographical indication" but not to a "protected designation of origin". Nonetheless, by virtue of Article 2(4) of Regulation 2081, if the raw material comes from a different, but defined area, production there is under special conditions, and the conditions are enforced by an inspection system, then the product concerned is entitled to a protected designation of origin rather than a mere "protected geographical indication".

39 See F. Addor and A. Grazioli, *Geographical Indictioms beyond Wines and Spirits – A Roadmap for a Better Protection for Geographical indications in the WTO TRIPS Agreement*, 5 J.WI.P. 6, November 2002, at 865.

So, even if a product emanates from within an area and is entirely processed and prepared there, it may not be entitled to a PDO if it cannot be established that its quality or characteristics are "essentially or exclusively" due to the geographical environment which includes both human and natural characteristics.[40] In the *Spreewalder Gurken* case the Advocate-General, in his Opinion, touched upon the essential distinction: the Spreewalder gherkins were known to consumers to originate from the Spreewald area and therefore have certain qualities, hence they would be entitled to registration as a PDO, rather than just as a PGI, which would have been appropriate had the term been regarded by consumers as simply referring to the style of processing or recipe of the gherkins.[41]

All applications for PDO or PGI registration must be accompanied by specifications, including details concerning geographical limits, production methods "and, if appropriate, the authentic and unvarying local methods" (Article 4(2)(e)), and the link between geography and qualities of the product. Member States must police the continued application of the specifications in the relevant area.

2. THE SCOPE OF PROTECTION

Although more stringent criteria apply to the grant of PDO status, there is no difference in the protection enjoyed by both PDOs and PGIs. A registered GI cannot be used in relation to products that do not comply with the specification – producers within the designated area are thus compelled to use the specified processes and sources, etc. By virtue of Article 13 of Regulation 2081/92, the protection has all the typical characteristics of high-level GI registration:[42]

- prohibiting any use of the name on comparable products;
- prohibiting use in any circumstances--i.e, also in relation to unrelated products--if using the name exploits the reputation of the protected GI;
- prohibiting imitations, evocations, translations or use with certain qualifying terms such as "imitation";
- prohibiting false or misleading indications of any kind on containers, packaging, advertising, etc., and use of containers liable to convey a false impression as to origin; or
- anything else that is liable to mislead the public as to the true origin of the product (see Article 13(1)).

Registered names also cannot become generic (Article 13(3)), but as seen above, a name that is generic cannot be registered.

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40 The differences between the French and English versions are the source of some uncertainty The French text being clearer, I have preferred that.

41 See Opinion of the Advocate-General in the *Spreewalder Gurken* case, *supra*, footnote 33.

42 As analysed in Part I of this article.

The term "evocation" – which is weaker than "imitation" and thus further extends the scope of protection of the registered name – was considered in the *Cambozola* decision of the European Court of Justice (ECJ). Because "Cambozola" has the same number of syllables, and the same ending (-ola) as the registered term "Gorgonzola", the phonetic and visual similarity would conjure up a mental association in the minds of consumers, given the similarity between the products. It was not necessary to establish a likelihood of confusion.[43]

The scope of protection under Regulation 2081/92 is thus undoubtedly very broad. One would expect the threshold for registration to be concomitantly high. This is clearly the case for PDOs, but the requirements for registration of a PGI are less stringent. Nonetheless, the two requirements of geographical origin and enforceable product standards are present to some degree for both categories. If one accepts that the level of geographical connection required for the grant of a PGI is sufficient, the EU system has the characteristics, identified above, of a system with a sound theoretical basis. However, it emerges clearly from the foregoing discussion of the associated administrative, regulatory and supervisory structures that such a system comes at a high cost, both in financial terms and in terms of administrative constraints on agricultural and commercial decision-making.

By contrast, under the Australian system of registered GIs for wines, which is briefly outlined below, such costs and constraints are much reduced, because it imposes minimal product standards. The guarantee of consistent quality is almost exclusively indirect, i.e. it is derived from a requirement of geographical origin only, without any additional requirements to follow more- or less-elaborate specifications. This Australian wine system (there is no general product equivalent) parallels the U.S. approach as, for instance, employed in the wine-grooving areas of California, and is thoroughly different from the EU system.[44] While more flexible, it is arguably less sound in theory, although it does have the incidental benefit of reducing future transaction costs by *a priori* delineation of geographical boundaries.

C. THE AUSTRALIAN MODEL: REGISTERED GIs FOR WINE

The Australian system was established in the wake of the signature of the Australia-EU Wine Agreement.[45] This Agreement bound Australia to providing registered GI-type protection for European registered wine GIs; for that purpose an Australian Register of some sort was required. Because the Agreement also incorporates an undertaking by the EU to protect Australian registered GIs, the legislation also

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43 *Gorgonzola/Cambozola,* ECJ, 4 March 1999, (1999) ECR I, 1301, as commented upon by P.. Knaak, *Case-Law of the ECJ on the Protection of Geographical Indications and Designations of Origin Pursuant to EC Regulation No. 2081/92,* IIC 32, 375-484, 2001, at 383.

44 The Australian system approximates the Californian system much more closely; see W. Moran, *Wine Appellations as Territory in France and California,* 83 Annals of the Association of American Geographers, Vol. 4,1993, at 706 *et seq*.

45 By way of amendment of the Australian Wine and Brandy Corporation Act, 1980 (Cth).

provides for a mechanism for assessment and registration of Australian wine GIs.[46]

In contrast to the European model, the connection between geography and quality required under the Australian provisions is tenuous; as long as the wine concerned contains 85 percent or more of grapes grown in the designated area, the registered GI can be used.[47] It does not matter how or where the wine is processed. The only guarantee of consistent quality or character lies in the fact that the area of the designation is determined on the basis of statutory factors that should ensure a certain degree of homogeneity of geographical features and conditions.[48] But in truth, the designated area can be quite large and because there is such a multitude of factors that the Act requires to be considered, it can also be geographically heterogenous.[49] Not one single further requirement is imposed: no specifications, no restrictions qua varietals, production or processing methods, colour or style of wine, etc. Although an Australian registered GI may thus have a reputation predominantly for certain varietals – for example, Barossa for Cabernet Sauvignon – there is no legal restriction on different varietals being sold under the same GI as long as 85 percent of the grapes are from within the designated area.[50]

Contrast this with French AOCS, or the requirements to be met for European PDOS. It is immediately apparent that the Australian system is based on a rather different philosophy. Partly, of course, it is not based on any philosophy at all, but was simply a minimal response to the exigencies of the EU Agreement. Some have argued that the connection between geography and quality of wines is unproven at the best of times,

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46 The complexities involved in administering a system even as relatively simple as this are well illustrated by the case concerning the Coonawarra GI; see *Coonawarra Penola Wine Industry Association, Inc. & Others and Geographic Indications Committee,* [2001] AATA 844, 5 October 2001.

47 Regulation 21 of the Australian Wine and Brandy Corporation Regulations, 1981, provides that at least 85 millilitres per litre must originate from grapes within the designated region; see also Section 5D of the Australian Wine and Brandy Corporation Act, 1980 (Cth): *Where Wine Originates*.

48 It has been advocated that it may make sense in some cases to restrict the types of grape variety grown in a GI: "*Restrict the use of a GI to wines that are made only from limited grape varieties? 'Never!' we say. However, we know that there is a much greater value to the name or description 'Coonawarra Cabernet' than to 'Coonawarra Riesling'.* Perhaps that is only because of a lack of adequate experimentation to date, but the concept of particular regions being best suited to particular grapes is well acknowledged in Australia. That is, of course, the first step on the path." (emphasis added): see S. Stern and C. Fund, *The Australian System of Registration and Protection of Geographical Indicators for Wines,* Flinders Journal of Law Reform, Vol 5, Issue 1, 2000, on page accompanying footnote 7. The term "GI" in Australia does "not necessarily mean, or imply anything unique about the location's climate or environment.": id. Yet, further in the same article, the authors say: "Our system of wine GIs is, at the present time, no more informative to consumers than the indication of source 'Carrera [sic] Marble'. This is because they tell consumers nothing about the product save the source of the taw materials, namely, the grapes. There is nothing said even about the quality of the grapes themselves let alone about the wine that incorporates them. It is this omission that I believe needs to be addressed, if not now, at some time in the near future. Certainly I hope that this can happen before consumers see that our system gives little useful information about the wine bearing the GI.": text on page accompanying footnotes 10 and 11.

49 See Australian Wine and Brandy Corporation Regulations, 1981, Regulation 25.

50 In California, where a very similar system exists, the ATF, which is the responsible administrative body, stresses that they do not wish to "give the impression by approving a viticultural] area that it is approving or endorsing the quality of the wine from this area", and that granting an area status implies it is different but not better than surrounding areas: as quoted in Moran, *supra*, footnote 44, at 707.

and the Australian system seems to implicitly endorse this scepticism.[51] With areas of provenance that are both large and geographically diverse, the system requires little real connection between local conditions and quality characteristics of the wine.[52] It may well be that the Australian system of GI registration, therefore, given the conclusions arrived at above, has little to commend it in theory. But it is an unsurprising adaptation of a European registration model to manifestly different Australian agricultural and industrial policies, conditions and practices. Legitimacy is traded off in favour of flexibility.

II. CONCLUSION

This trade-off illustrates the conundrum faced when considering policy in relation to GI registration systems. On the one hand, to justify the strong rights granted, not subject to any defence of genericness – and with a strict prohibition on use even in good faith or in the absence of consumer deception – a system of registered GIs should require an intimate geographical connection and high and pervasive product standards. On the other hand, if a system with such characteristics is adopted, restraints on competition, grave rigidities in terms of land use, production levels and innovation, and considerable private and social costs are imposed.

Some might question whether GI registration really should be regarded as a branch of intellectual property at all, and belonging in TRIPS. In many ways, it is a system which contributes to the implementation of rural and agricultural policies. Whether or not a system of GI registration should be adopted, and the shape it should have, is therefore largely a question determined by the nature of rural industries in a given jurisdiction, the broader agricultural and rural policy framework, and historical conditions. It is certainly the case that where some regulatory framework does not already exist, and regional reputation is less pervasively used in the market for foodstuffs the arguments for and against the introduction of a GI Register should be very carefully weighed.

Furthermore, GI registration does not in itself result in a valuable reputation. While some geographical terms from European countries may benefit from an established worldwide reputation – whether enhanced by imitation or not – the investment required to generate positive consumer recognition for little-known terms is very considerable. Such efforts at differentiation can only generate adequate returns in the long run. It may also be that there are more flexible alternatives available for the promotion of local reputation, such as certification trade marks, or that reliance on corporate brands is a perfectly effective tool for the promotion of rural and agricultural produce, just as it is for other products.

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51 See Section IV C in Part I of this article.
52 See Moran, *supra*, footnote 44.