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## Reign of *Terroir*

### How to Resist Europe's Efforts to Control Common Food Names as Geographical Indications

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#### EXECUTIVE SUMMARY

The European Union's agenda in international trade negotiations includes an effort to secure the protection of their "geographical indications" (GIs) in foreign markets. If European officials have their way, a great number of common food and drink names will disappear from American grocery store shelves. American companies would have to make up new names for wines such as champagne, port, and sherry, and also for common cheeses such as parmesan, gorgonzola, and feta. Even such identifiers as "California champagne" and "parmesan-style cheese" would not be allowed.

At the heart of Europe's approach to GI protection is the idea of *terroir*—that there is an essential nexus between a product's characteristics and the place it was made. When others use place names in a generic way, they are, in the European view, unfairly usurping the value created in that name by generations of local producers. Supporters claim that strong GI protection is needed to prevent fraud, ensure fairness, and promote economic development.

In truth, Europe's approach to GI protection mainly serves to privilege traditional producers at the expense of consumer welfare and economic growth. The connection between quality and origin is often exaggerated by European

policymakers, and the level of protection that GIs enjoy prevents the flow of accurate information to consumers. Moreover, by incentivizing traditional production patterns through communal rights, Europe's GI system directly reduces both innovation and competition in their own market.

For its part, the U.S. government views Europe's position as a protectionist attempt to control the use of generic terms that correspond to European cities or regions where those products were first made. The United States has its own way of protecting GIs, but it does so, with some exceptions, through trademark law rather than a dedicated regulatory scheme. The consequence is that many European GIs are not protected.

The United States should fight against Europe's attempt to spread its GI protections around the globe. This means, first, resisting efforts to expand the mandate for GI protection at the World Trade Organization. Second, the United States should, like it did in the Trans-Pacific Partnership, secure open markets for generically branded products within regional and bilateral agreements. Finally and most importantly, U.S. negotiators should make it clear that GIs will not be a subject for negotiation in the Transatlantic Trade and Investment Partnership (TTIP).

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## INTRODUCTION

According to Merriam-Webster, champagne is “a white sparkling wine made in the old province of Champagne, France; also: a similar wine made elsewhere.”<sup>1</sup> But don’t tell that to the official Comité Champagne, whose slogan is “Champagne only comes from Champagne, France.”

So who is right? It may depend on where you are. Under European law the word “champagne” may only be used to refer to wine produced according to strict guidelines, one of which is that the entire process from grape to bottle occur within a delimited area near Epernay, France.

Champagne is one of many “geographical indications” (GIs) embroiled in an international debate over the proper protection of commercially valuable place names. If European officials have their way, a great number of common food and drink names will disappear from American grocery store shelves. American companies would have to make up new names for wines such as champagne, port, and sherry, and also for common cheeses such as parmesan, gorgonzola, and feta. Even such identifiers as “California champagne” and “parmesan-style cheese” would not be allowed.

For centuries, geographical place names have been used to convey more than just geographic origin. Some place names act purely as indicators of a product’s nongeographic qualities. For example, no one who orders French fries at an American restaurant believes they are—or should be—made in France.

Sometimes the nongeographic information conveyed by the descriptor is minimal (“Florida oranges” for oranges grown in Florida), while other times it is absolute (“Valencia oranges” for a type of orange, not an orange grown in Valencia, Spain, or Valencia, California). Controversy arises when a particular place name, such as Champagne, could convey both geographic origin and product characteristics.

When is it not okay for products named after a place to be made somewhere else? That is the questions at the heart of the policy debate over GIs. The United States and the European Union have adopted two very different ap-

proaches to GI protection that rely on different mechanisms to pursue different goals.

The European model of GI protection is very strict, reflecting the belief that the link between place and quality—the product’s so-called *terroir*—is an objective creation of traditional culture and practices. When others use place names in a generic way, they are, in the European view, unfairly usurping the value created in that name by generations of local producers. Supporters claim that strong GI protection is needed to prevent fraud, ensure fairness, and promote economic development.

In truth, Europe’s approach to GI protection mainly serves to privilege traditional producers at the expense of consumer welfare and economic growth. The connection between quality and origin is often exaggerated by European policymakers, and the level of protection GIs enjoy prevents the flow of accurate information to consumers. Moreover, by incentivizing traditional production patterns through communal rights, Europe’s GI system directly reduces both innovation and competition in their own market.

For its part, the U.S. government views Europe’s position as a protectionist attempt to control the use of generic terms that correspond to European cities or regions where those products were first made. The United States has its own way of protecting GIs, but it does so, with some exceptions, through trademark law rather than a dedicated regulatory scheme. The consequence is that many European GIs are not protected in the American market.

The European Union has made the spread of GI protection a key trade policy priority. EU policymakers want their robust approach to GI protection adopted by the World Trade Organization (WTO), and have had some success winning strong protections for their most prominent GIs in a variety of bilateral trade agreements. The United States has resisted those efforts directly at the World Trade Organization and indirectly by promoting alternative rules in its own free trade agreements.

The debate over GI protection is taking on greater importance now that the European

Union and United States are working to establish the Transatlantic Trade and Investment Partnership (TTIP). The question of how to protect GIs immediately became one of the most contentious issues in the negotiations.

The United States should fight against Europe's attempt to spread its GI protections around the globe. This means, first, resisting efforts to expand the mandate for GI protection at the WTO. Second, the United States should, like it did in the Trans-Pacific Partnership (TPP), secure open markets for generically branded products within regional and bilateral agreements. Finally, and most importantly, U.S. negotiators should make it clear that GIs will not be a subject for negotiation in TTIP.

## THE U.S. APPROACH

Sometimes geographic terms convey both geographic and nongeographic information about products to consumers. It is not unreasonable for governments to ensure that regional producers can use GIs as a branding strategy by protecting such brands from imitation or misuse. The United States does a pretty good job of achieving that goal by protecting GIs through trademark law.

Trademark law confers to producers exclusive rights in their brands with the ultimate goal of preventing consumer confusion in the marketplace. The test for trademark infringement is "likelihood of confusion," and the law does not protect marks that are merely descriptive or generic terms for products.<sup>2</sup>

The U.S. Patent and Trademark Office generally prohibits the registration of place names as part of a trademark if they are geographically descriptive or misdescriptive.<sup>3</sup> Thus, a company isn't normally allowed to register a name like "Chicago mattresses" because that would enable the company to prevent Chicago-based mattress makers from describing the geographic origin of their product. However, geographic signs may be protected if "it is clear that they are meant to convey some meaning other than geographic origin."<sup>4</sup> As a result, there are many geographic brands in

the United States that receive trademark protection—Philadelphia for cream cheese, Swiss Army for knives and luggage, Amazon for on-line shopping.

While trademark law is generally concerned with protecting the use of brands that identify a single producer, regional groups can also use the system to protect a shared geographic brand. Regional producer groups can register a collective mark or (more commonly) a certification mark. A registered certification mark can be used by a company to show that its product meets the standards established by the owner of that mark. The owner of a certification mark may not produce the product or use the mark itself. American consumers are used to seeing nongeographic certification marks on all sorts of products. Examples include the Underwriters Laboratories' "UL" symbol, the Good Housekeeping Seal, Fair Trade Certified, and various kosher food certifications.

The owner of the certification mark allows producers to use the mark only if they meet certain established criteria. The purpose of the mark can be "to certify [1] regional or other origin, [2] material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or [3] that the work or labor on the goods or services was performed by members of a union or other organization."<sup>5</sup> Registered certification marks are currently being used to protect both American GIs (Idaho potatoes) and foreign GIs (i.e., Roquefort cheese, Parmigiano-Reggiano cheese, Egyptian cotton) in the U.S. market.

Protecting GIs through certification marks offers two important features that make it somewhat comparable to the European approach (discussed below). The first is that certification marks can be registered even if they are geographically descriptive. That is, the place name does not need to carry "secondary meaning" in the eyes of consumers as it would for regular trademark protection.<sup>6</sup>

Second, protecting GIs through certification marks facilitates the use of the mark as a method of quality control. Many geographic certification marks require users to make their

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products not only in a particular place but according to specific standards. Some of them, in fact, are owned by government agencies, which can impose standards directly through law. Generally, though, protecting GIs through trademark law leaves much of the quality control and enforcement activities in the hands of private parties. The European approach, in contrast, involves a much more aggressive role for government.

The main complaints that European policymakers and industry representatives have about the U.S. system are that not enough European GIs are protected and that securing and enforcing GI rights in the United States is too expensive. Many of the GIs that Europe wants protected in the United States, however, are not protectable under U.S. law because in the United States they are generic names for types of food.

### THE EUROPEAN APPROACH

European GIs may be backed by centuries of tradition, but the current system of GI protection is a fairly modern institution. The first mention in an international treaty of “appellations of origin” as something worthy of protection was the Paris Convention for the Protection of Intellectual Property in 1883, although that treaty did not define appellations of origin or impose any specific obligations.<sup>7</sup> The substance of GI law was developed in France in the early 20th century, driven largely by a desire to protect domestic producers in an increasingly international wine market.<sup>8</sup>

At the heart of Europe’s approach to GI protection is the idea of *terroir*—that there is an essential nexus between a product’s characteristics and the place it was made. French appellations of origin are about more than just preventing false advertising. The policy is driven by the goal of preserving the reputation and character of French regional wineries. Indeed, GIs are one part of a comprehensive quality-control scheme that imposes specific production standards for producers of each appellation. That means champagne is not

merely wine grown in the Champagne region, but wine grown in the Champagne region according to specific practices laid down in law.

Today, the French model has become the standard European approach. Nearby markets with traditional wine industries such as Italy, Spain, and Portugal quickly adopted their own version of appellation protection. The European Union allows for the registration of a union-wide GI known as a Protected Designation of Origin (PDO). Many cheeses imported from Europe and sold in U.S. grocery stores carry the PDO label.

National and international laws on GI protection vary to some degree, but there are central components of what can be called Europe’s approach to GI protection that are found in all of the jurisdictions that follow the model. The first is the *terroir* element: an essential land-qualities nexus that must exist for a GI to be protected. Article 22 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) defines GIs 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.”<sup>9</sup> The European Union’s GI regulation spells it out a bit more as “the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff . . . the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors.”<sup>10</sup>

The second essential feature is the inclusion of mandatory product standards for users of the GI. That is, producers must not only be located in the delimited region, they must also conform to prescribed production practices and quality standards in order to use the GI label. The standards of production for Parmigiano-Reggiano cheese, for example, dictate how many hours per day farmers can milk their cows and how the milk must be stored, delivered, and processed. One typical provision of the standards states, “A portion of the milk from the morn-



ing milking, up to maximum of 15%, may be set aside to make cheese the following day. In this case, the milk shall be kept at the dairy in special steel containers; if chilled, its temperature may not be lower than 10°C.”<sup>11</sup> Then there are specifications for the final product’s appearance, aroma, and texture.

The third essential feature of the European approach is absolute protection against unauthorized use. Unless you meet the geographic and regulatory requirements of the law, you may not use a protected GI to market your product even if there is no likelihood of confusion as to the source. The European Union’s GI regulation provides a thorough list of prohibitions:

Registered names shall be protected against:

- a. any direct or indirect commercial use of a registered name in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or in so far as using the name exploits the reputation of the protected name;
- b. any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as “style,” “type,” “method,” “as produced in,” “imitation,” or similar;
- c. any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;
- d. any other practice liable to mislead the consumer as to the true origin of the product.<sup>12</sup>

The focus is not on consumer perception but on ensuring that all commercial value contained in the geographic brand is captured by the protected producers. Others are not al-

lowed to “exploit the reputation of the protected name” or use it in ways that disassociate the place name from the geographical origin of the individual product being sold. The consequence of these prohibitions is that registered GIs are protected from becoming generic.<sup>13</sup>

## **GEOGRAPHICAL INDICATION PROTECTIONISM**

The most common and consistent complaint from U.S. industries and policymakers about Europe’s GI scheme is that it is protectionist. Opponents claim that Europe simply wants to protect traditional farming interests from the competitive forces of globalization and economic progress.<sup>14</sup> There’s little doubt that strong GI protection benefits the traditional producers it privileges but, like all forms of rent-seeking, it does so at the expense of economic growth, competition, and consumer choice.

Nevertheless, when European policymakers try to sell the European model of GI protection to their counterparts across the Atlantic and around the world, they argue that strong GI protection universally furthers the public interest. They argue that Europe’s GI system protects consumers by preventing fraudulent advertising; that generic uses of place names unjustly violate the intellectual property rights of traditional producers; and that GI protection promotes economic growth and development. As explained below, each of these arguments is misleading and inadequate to justify Europe’s model of GI protection.

### **Not Good for Consumers**

A central part of the GI argument is that strong protection is needed to prevent bad actors from deceiving the public.<sup>15</sup> To be sure, there are criminals out there who fraudulently label counterfeit products. But the purpose of GI protection is simply not to fight against fake products or deceptive advertising. Those behaviors are already proscribed by other laws that target fraudulent labeling in general.

The function of GI protection is to prevent use of a place name by legitimate competitors

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employing the name as a generic descriptor for their product. That’s why European law protects against uses that are not misleading. Remember that GIs cannot be used by unauthorized producers “even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as “style,” “type,” “method,” “as produced in,” “imitation,” or “similar.”

In other words, uses of a GI that have absolutely no chance of misleading consumers because they are used with words that clarify their generic nature are still prohibited. Expressions like “California champagne” or “parmesan-style cheese” are not allowed. Also prohibited is the use of flags or monuments or even picturesque village scenes on packaging if the product doesn’t come from the place alluded to by the image.

Prohibiting these uses does nothing to promote the interests of consumers or ensure the flow of accurate information. Instead, GI protection enables producers to maximize consumer association of the place name with the product’s nongeographic qualities without worrying that the term will become generic.

The reason GIs ever need protection is because they convey both geographical origin and product characteristics. If they did not convey characteristics or quality, they would have no real commercial value. Traditional producers want their place name to carry a strong reputation for quality, but they run the risk that the place name will become synonymous with the quality and less tied to the place. This is particularly likely for consumers who don’t even know that the place exists. Americans, by and large, do not know that many of the cheese varieties they enjoy, such as gorgonzola or gouda, are named after places, while others, such as mozzarella, are not.

Advocates say that protection is warranted even without consumer confusion because regional products are imbued with an inimitable *terroir*. According to these advocates, if consumers think that parmesan cheese can be made outside of Parma, they are wrong. Generic uses of place names are objectively deceptive and prohibiting their use protects

consumers, in this perspective.

Aside from the fact that many place names are uncontroversially used as generic descriptors even in Europe, advocates are guilty of greatly exaggerating the existence and importance of *terroir* for most products protected by GIs.<sup>16</sup> *Terroir* may be relevant for products that grow out of the ground because of the different characteristics imparted by different soils and climates. Winemakers cannot perfectly mimic the growing conditions for grapes in various places around the world in order to exactly reproduce famous wines. But the human element of production is just as transferable across space as it is across time.

There is nothing about making Parmigiano-Reggiano that requires that the machines be operated by Italians living in or near Parma, Italy. Perhaps the cheese would taste different if it were made from cows that ate grass grown in a different place, although it’s difficult to believe that any but the most discerning of connoisseurs would notice. Everything else about the production process can be copied in another location. People who live in different places simply do not have special genetic traits that affect the qualities of cheese they produce. Hundreds of years ago it would be reasonable to assume that traditional know-how would be kept within a small geographic area, but in today’s world of fast travel and immediate communication, cheesemakers are perfectly capable and likely to share their special knowledge with people all across the world. The reason that Kraft parmesan cheese tastes different from traditional Parmigiano-Reggiano is that it is made using different methods—methods that can produce cheese that consumers like at prices they want to pay. Kraft could make its cheese in Emilia-Romagna, just as traditional Italian producers could make their cheese in Illinois.

By exaggerating the impact of *terroir*, GI protection serves to limit the globalization of wine and cheese production. If grazing cattle on a particular hillside adds value, then the advantage is in the production of milk, an intermediate product that can be traded. Incentivizing a production model in which all parts of the

production process occur within a delimited area limits the creation of global supply chains or even urban relocation—it probably makes more economic sense to build your cheese factory in the city instead of out in the country—which could reduce production costs.

Efforts to prevent economic globalization in order to promote domestic jobs and preserve key industrial sectors are rightly condemned as protectionist. Excessive GI protection should be as well.

Finally, another reason that fraud prevention and an objective land-qualities nexus don't justify current levels of GI protection in Europe is that many GIs are not, in fact, the names of the places where the product is made. The EU protects "feta" as a GI for cheese from Greece, but you won't find feta on a map because it is, in fact, just the name of a type of cheese. Stilton cheese may legally be made in one of three counties outside of Stilton, England, but not in Stilton itself.<sup>17</sup> There are numerous other GI-protected cheeses that are no longer—or have never been—made in the town whose name they bear.<sup>18</sup> GI protection schemes that impose misleading and confusing rules actually hinder the public's ability to understand the geographic origin of products.

### Not Intellectual Property

Supporters claim that GIs are a distinct form of intellectual property that belong to traditional producers, which is infringed when place names are used as generic terms.<sup>19</sup> Comparing GIs to intellectual property is an understandable position considering that GI law decides who has the right to extract value from an intangible asset through exclusive use. But the differences greatly outweigh the similarities.<sup>20</sup>

The basic economic case for patents and copyrights is that monopoly privileges are needed to ensure that people have adequate incentive to invent new technologies or create art. They further innovation by conferring private property rights in a competitive market place.

GI protection does just the opposite. It rewards companies who maintain old ways of doing things by making it more difficult for innovative competitors to communicate product

qualities to consumers, and it directly impedes innovation and competition by privileging established firms using traditional methods.

The intellectual property argument is often used to claim that traditional producers *deserve* GI protection because generic uses misappropriate the reputation built up by countless generations of local producers. But this moral argument for GI protection rests on the thoroughly illiberal idea that ancient economic arrangements should determine the rights and obligations of groups of people.

Traditional producers are better understood as the beneficiaries of protectionist regulation rather than the owners of a property right. GIs are not alienable and cannot be used to exclude qualifying producers. Moreover, the communal nature of GI rights eliminates their value as a driver of innovation. Because they are enjoyed by a group of producers who would otherwise compete against each other, GIs actually reduce competition. Once all the producers in a particular country are divided by region and style, the industry starts looking a lot like a cartel. There may be multiple producers, but they all agree to keep making the same thing in the same place forever. They no longer have to compete on product quality. In short, rather than reward innovative producers for making something new, GI protection privileges traditional producers for doing something old by preventing innovative producers from efficiently communicating product characteristics to the public.

### Not Good for the Economy

In their bid to spread their excessive form of GI protection around the world, European officials have argued that strong GI protection is good economic policy, not just for Europe, but for everyone. One argument supporters make is that other countries' producers would benefit from protection of their own GIs to distinguish their own regionally distinctive products.<sup>21</sup> But very few, if any, non-European countries have a large number of regionally distinctive products named after those regions where producers are losing profits because competitors are using the name as a generic descriptor.

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Supporters of strong GI protection point out that some American producers that rely on geographic brands struggle to prevent foreign counterfeiting or misuse. Indeed, some U.S. industry groups support the European approach and have lobbied for its adoption in the United States.<sup>22</sup>

The biggest problem with the argument that American producers could benefit from GI protection is that the most famous American geographical indications do not face the problem of genericization. The place names most likely to become common names for types of food are those that carry a strong association with particular characteristics rather than a simple reputation for quality. “Napa Valley” is a place in the United States known for its winemaking, but it is not associated with a particular kind or style of wine. Even more so, “Idaho” potatoes are simply potatoes that come from Idaho. Consumers may, for some reason, think those are better potatoes, but there’s no possibility that consumers will think the term could apply to potatoes grown outside of Idaho.

Producers in those regions are surely interested in fostering consumers’ association between quality and origin. They will likely have to deal with counterfeiters and competitors trying to pass off their products as from the region. But those goals don’t line up with the high level of protection afforded under the European approach, which is designed to prevent generic uses rather than false or misleading ones.

Supporters also claim that strong GI protection promotes economic development in poor countries. The European Commission, for example, states that GIs “can create value for local communities through products that are deeply rooted in tradition, culture and geography. They support rural development and promote new job opportunities in production, processing and other related services.”<sup>23</sup>

The evidence, however, does not support this claim. Numerous studies seeking to determine how GI protection can help agricultural producers in the developing world have found that GI regimes have not helped farmers unless they are coupled with other forms of government support.<sup>24</sup>

The empirical evidence against GIs as a development tool should not be surprising. The intentional effect of GI protection in Europe is to prevent modernization of traditional food markets. In this way, they operate like agriculture subsidies by insulating producers from competitive market forces.

Protecting GIs not only preserves traditional products but traditional ways of life in rural communities. That’s because GIs provide a valuable incentive to maintain old-style production processes and locations. Rather than promote economic progress and improve the lives of poor people, GI protection has been found to reinforce existing economic arrangements and the social hierarchies and institutions threatened by economic change.<sup>25</sup> This is just as true in Africa as it is in Europe.

## HOW TO COUNTER EUROPE’S GEOGRAPHICAL INDICATION AGENDA

The battle over GI protection is going to take place primarily on three fronts. The first is at the multilateral level, where the European Union and some of its key member states hope to enshrine their form of GI protection into international norms. The TRIPS Agreement currently reflects a compromise on GIs from the Uruguay Round of trade negotiations. It is vital that the United States and other like-minded countries oppose efforts to strengthen GI disciplines in any future WTO negotiations. The United States should also put forward proposals to scale back existing rules that privilege Europe’s protectionist agenda.

The second front concerns the rules for GI protection contained in regional and bilateral trade agreements. The European Union has been using trade agreements to advance its agenda one foreign market at a time, hoping to eventually establish favorable international norms. At the same time, the United States has been using its own trade agreements, often with the same countries, to defend market access for U.S. products using terms that are generic in that market. The United States wisely



used the TPP as an opportunity to fight back against excessive GI protection by blocking the European Union's agenda in other TPP member countries and securing coexistence of GIs and trademarks in the region. The United States should insist that any future trade agreements with non-European countries follow the TPP's approach to GIs.

The third, and most important, venue for the United States to prevent the spread of GI protection into the U.S. market is the TTIP, a potential free trade agreement between the United States and the European Union. European negotiators know that GI protection is an area where cooperation with the United States is highly unlikely. Nevertheless, they are under great pressure to make some progress on the issue. U.S. negotiators need to be resolute in rejecting compromise offers that appease powerful U.S. industries at the expense of the public. The United States must not accept even a partial or heavily limited list of GIs that could push the American market closer to the European model of anti-competitive, geography-based marketing practices.

### Global Norms at the WTO

The current provisions on GI protection in the TRIPS Agreement reflect a compromise between the European and American approaches. As noted above, Article 22 defines GIs according to the European model, placing the emphasis on *terroir* as the basis of GI protection. But Article 22.2 lays out a level of protection that depends on consumer perception:

In respect of geographical indications, 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 other than the true place of origin *in a manner which misleads the public as to the geographical origin of the good*; (emphasis mine)<sup>26</sup>

This changes in Article 23, which establishes a stricter level of protection for wines and spirits that is more in line with the European approach:

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>27</sup>

Article 23.4 provides for the establishment of an international wine and spirit GI registry at the WTO:

In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning 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.<sup>28</sup>

The concept of an international registry is not new. The highly restrictive Lisbon System for the International Registration of Appellations of Origin allows any of its 27 members to place a GI on an international registry of GIs, which all members are then required to protect. Twenty years after TRIPS was signed, the WTO has still not established a wine and spirit GI registry.

Finally, and most importantly, there is an exception to both Article 22 and Article 23 for generic terms. Article 24 allows a WTO member not to protect a GI when its use is "customary in common language as the common name for such goods or services in the territory of that Member."<sup>29</sup>

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The European Union wants to strengthen TRIPS GI rules by extending the higher protection for wine and spirit GIs to all GI products.<sup>30</sup> This would mean that the consumer perception standard in Article 22.2(a) (“in a manner which misleads the public”) would be eliminated and all GIs would be protected from nonconfusing uses (“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”).

The EU has also proposed the creation of a WTO-wide registration system for GIs. Every WTO member would be required to protect any qualifying GI placed on the registry unless that member actively “lodges a reservation” within 18 months. Reservations could only be made on the grounds that the GI is not valid or is a generic term. Also, “the reservation shall identify the applicable ground or grounds and be duly substantiated.”<sup>31</sup>

The United States has resisted and should continue to resist all of these efforts. As noted at length above, Europe’s approach to GI protection that prohibits non-confusing uses of place names is conceptually unjustified and economically harmful. An international mandate to extend that level of protection to all products would benefit established producers of traditional products at the expense of everyone else.

The United States has proposed that if a WTO GI registry is created it must not impose any obligations on nonparticipating members. This is a direct rebuttal to the EU’s proposal to require WTO members to file reservations against listed GIs. But a better position would be for the United States to block the creation of any registry, because the existence of a registry privileges those countries that offer *sui generis* protection of GIs through a dedicated regime over those countries that protect GIs through a decentralized trademark system.

It is not enough simply to insist that trademark-style protection be allowed to coexist with the European model; the United States should put its system forward as the ideal form of protection that all countries should follow. The cre-

ation of an international GI registry at the WTO would thwart such an effort by helping the EU enshrine its system as an international norm.

The United States ought to forward its own proposal to improve the TRIPS Agreement’s GI provisions. This could include the removal of Article 23 entirely, so that all GIs are entitled to the same level of protection, one contingent on whether consumers are actually misled. Another simple and very effective proposal would be to amend Article 24, which currently *allows* members not to protect generic terms, so that it would *require* that members not protect generic terms.

### Fighting Geographical Indications in the TPP

Unable to get strong GI norms mandated through the WTO, the EU has turned to bilateral trade agreements to push a more targeted agenda. Like the United States, the EU has negotiated dozens of free trade agreements with countries around the world. Those agreements typically include a list of European GIs that the other country is required to protect. The EU is perfectly willing to protect the other country’s GIs if it has any.

Europe’s trade agreements do not always require a level of protection equal to that provided in Europe, but the scope of protection is generally higher than what is required under the TRIPS Agreement. The phenomenon of TRIPS-plus obligations in trade agreements is rightfully controversial in areas such as patent and copyright policy. Europe’s TRIPS-plus position on GIs should raise special concern because it applies only to the EU-origin GIs imposed through the agreement. That is, European trade agreements may require the other country to protect Europe’s GIs more strongly than those from a third country, a potential violation of TRIPS Article 4 (Most-Favored-Nation Treatment).

Europe’s actions have prompted a curious sort of proxy war with the United States over GI norms in bilateral trade agreements. Europe’s agenda disadvantages American producers of generic products by making it more

difficult for them to sell in those markets using names consumers understand. More importantly, though, the spread of Europe's GI-based marketing model acclimates consumers and businesses toward a less competitive and innovative environment for food products.

So even though the European Union is not in the TPP, there was good reason for the United States to make GI liberalization a major issue in the negotiations. Removing regulatory barriers to trade, such as excessive GI protection, that incentivize local production at the expense of consumer welfare and economic growth serves the broad goals of the TPP in facilitating cross-border supply chains. The goal should be to block Europe's ability to further spread its GI protections through its own bilateral agreements in the region.

The best way to ensure that countries maintain a liberal GI system is to include a broad prohibition against protecting generic names. That simple prohibition would strike at the heart of the problem that Europe's GI agenda poses for international trade. It would also let countries maintain whatever GI regulatory scheme they want as long as it doesn't restrict the use of common food names.

The TPP's provisions on GI protection aren't quite that simple, but they do take on the problem of generic GIs. Article 18.32 of the TPP provides that an interested party can oppose a new GI or seek to cancel an existing one on the grounds that its registration is "likely to cause confusion with a pre-existing trademark or geographical indication" or "the geographical indication is a term customary in common language as the common name for the relevant goods in that Party's territory."<sup>32</sup>

These are essentially mandatory exceptions to GI protection that ensure that U.S. companies can challenge any improperly protected GI in another TPP country. More importantly, it introduces the element of consumer perception and confusion into the GI regimes of all 12 members.

The EU already has trade agreements mandating strong protection of European GIs in a number of TPP countries, including Canada,

Mexico, Peru, and Chile. For those members, a TPP GI cancellation provision could potentially place them in violation of their agreements with the EU that mandate protection even against generic use.

So, there was debate among negotiators over whether the past agreements should be outright exempt from the cancellation procedures.<sup>33</sup> A number of countries that are currently negotiating free trade agreements with the EU, notably Japan and Vietnam, wanted any GIs added as part of an international agreement made during the first three years of TPP to be exempt from the cancellation procedures. Not being constrained by TPP rules against generic GIs would strengthen their ability to make offers to the EU in trade negotiations.<sup>34</sup>

In the final text of the TPP, the parties agreed to exempt from the cancellation procedures all GIs added as part of agreements that were completed before the TPP was completed, ratified before the TPP was ratified, or entered into force before the TPP entered into force.<sup>35</sup> This may end up including GIs in EU agreements with Japan and Vietnam, depending on how quickly those are wrapped up relative to the TPP.

Expanding the TPP's GI disciplines is one of many reasons why the United States should welcome other countries to join the agreement in the near future.

### **High Stakes for the Transatlantic Trade and Investment Partnership**

If completed, the Transatlantic Trade and Investment Partnership promises to be the single most important bilateral free trade agreement in history. The United States and the European Union are not only two of the largest economies in the world, but major trading partners who already experience significant commercial interdependence. The idea of TTIP has broad support on both sides of the Atlantic, but actually reaching an agreement will be a difficult task. Both governments have listed as a main priority the elimination of regulatory policies that the other government is highly unlikely to reform through trade negotiations.

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“It’s important that U.S. negotiators not be tempted by apparent compromise offers.”

Geographical indications fit into this category as a key offensive priority of the European Union that has received stiff opposition from the United States. As they have in all other recent bilateral negotiations, the EU wants to use TTIP to secure protection for certain specific GIs in the wine, spirits, meat, and cheese sectors. In addition to their list, the EU contends that the current U.S. system of protecting GIs through trademark law is inadequate. They claim the system is too costly for foreign producers to use, ineffective at enforcing existing rights, and, of course, that it only protects terms that are not generic.

The rhetoric on both sides has become quite heated. Cecilia Malmström, the European Commissioner for Trade, has lamented that Italian cheeses are being “undermined by inferior domestic imitations” in the United States and vowed to solve the problem through TTIP by “getting a strong agreement on geographical indications.”<sup>36</sup> On the opposite side, Rep. Paul Ryan (R-WI), current speaker of the U.S. House of Representatives and, before that, chairman of the House Ways and Means Committee that oversees trade matters, has condemned European GIs as trade barriers and vowed that “for generations to come, we’re going to keep making gouda in Wisconsin. And feta, and cheddar and everything else.”<sup>37</sup> It’s difficult to see a path forward on the issue that will satisfy both sides.

There is much more at stake for the United States in the TTIP negotiations than in the TPP, because TTIP rules will directly affect American consumers. Even advocates of strong GI protection recognize that taking common food names off the shelf will initially cause consumer confusion as companies try to figure out what to call their wines and cheeses. It may be difficult to convince the American public that the TTIP is worthwhile if it involves controlling the use of language for the express purpose of furthering the economic interests of inefficient foreign producers of high-class products.

It’s worth remembering that, assuming it becomes a member of the TPP, the United States will be bound to deny or cancel protection for any GI that is a common name, even if that GI is added pursuant to an international agreement.

Despite the legal and political impossibility of securing its GIs in the United States, EU negotiators still consider GI protection a priority for the TTIP. It’s important that U.S. negotiators not be tempted by apparent compromise offers.

### Going through the Food and Drug Administration

One early proposal the EU came up with was to protect GIs through existing U.S. regulatory structures.<sup>38</sup> In particular, they’ve offered the idea of including geographic criteria within “standards of identity” enforced by the U.S. Food and Drug Administration. Standards of identity are a form of regulation that dictates what qualities a product must have in order to be called something. For example, the FDA recently told a vegan mayonnaise maker that it could not label its product “mayonnaise” because it lacked eggs, and under federal rules a product isn’t mayonnaise if it doesn’t have eggs.<sup>39</sup>

Standards of identity are a reasonable fit for GI protection, which as explained above is as much about regulating product characteristics as it is about truth in labeling. As with GI rules, standards of identity are a common avenue for rent-seeking businesses to disadvantage competitors through lobbying and legal tactics. The FDA’s mayonnaise decision came not long after Hellmann’s filed a lawsuit against a vegan competitor over the same issue.<sup>40</sup> In another pertinent example, PepsiCo has lobbied for standards of identity for hummus that correspond to the traditional products it offers under its Sabra brand in order to reduce competition from other, more creative, companies.<sup>41</sup>

Making it easier to use existing regulatory mechanisms to enact GI regulations would have the same effect as a direct GI protection scheme. The United States should reject this sort of approach with the same conviction as it would reject adopting Europe’s GI regime outright.

### Tinkering with the List

It may be tempting for U.S. TTIP negotiators to follow the model used in the Canada-EU Comprehensive Economic and Trade



Agreement (CETA). In CETA, Canada accepted an obligation to protect the EU's list of GIs, but with limitations on some of the more onerous ones. In particular, five generic cheese names—asiago, feta, fontina, gorgonzola, and muenster—are still allowed “when the use of such terms is accompanied by expressions such as ‘kind,’ ‘type,’ ‘style,’ ‘imitation,’ or the like, and is in combination with a legible and visible indication of the geographical origin of the product concerned.”<sup>42</sup> Those modifiers are not permitted for any other GIs included in the agreement. The agreement also allows Canadian companies that have used those and three other generic names for a certain number of years to continue using them under a series of complex grandfather clauses.

The reason the United States might be willing to accept this approach in the TTIP is that it enables the U.S. dairy industry to secure carve-outs that will reduce its self-interested opposition to the entire GI agenda. That is, if the main commercial opponents of GI protection are bought off with complex exceptions, the rest of the agenda can squeak through. This is a common tactic in trade negotiations.

The Europeans might also find this approach palatable because, although it leaves some prominent GIs unprotected, it still moves policy in their preferred direction. A similar outcome was reached in the 2006 wine agreement between the United States and the European Union that established semi-generic wine categories with rules very similar to CETA's cheese exceptions.<sup>43</sup> Rather than settle the dispute over wine names, that agreement merely emboldened Europeans to demand more restrictions in future negotiations. Some American wine makers have even decided that a European-style GI system would benefit them.<sup>44</sup>

U.S. negotiators should be very wary of this tactic. Opposition to Europe's GI agenda should not hinge solely on the interests of one or two industry groups. Even if American producers across the board wanted strong GI protection, the interests of consumers, free trade, and economic dynamism would demand that the United States avoid giving in to European

demands. Importing the culture of privilege and cartel status enjoyed by Europe's traditional food and wine producers is not something the United States should do even if some businesses would find it appealing.

## CONCLUSION

The protection of GIs beyond what is needed to prevent consumer confusion does not serve the public interest. Europe's strong GI regime works to reduce innovation and economic growth while insulating traditional producers from competition among themselves and with the rest of the world. U.S. policymakers should avoid adopting the European model for any industry or product group. Instead, they should continue to rely on trademark law as a well-balanced approach to protecting consumers and producer interests in a competitive market.

It is not enough, however, that the United States avoid the European model. It must also actively fight against European efforts to spread its model around the world. Multilateral, regional, and bilateral trade agreements are fronts in a battle that pits protection of traditional production patterns against competitive innovation and consumer choice. The United States is on the right side of this conflict and should continue its efforts.

## NOTE

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