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The Limited Promise of Geographical Indications for Farmers in Developing Countries

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1 INTRODUCTION

Among the various fields of intellectual property, geographical indications (GIs) law is arguably the smallest in terms of economic importance and the most complex in terms of principles and justification. To get a sense of the relative importance of GIs, in 2012–2013, India had over 43,000 patent applications, over 8,000 design registration applications, over 194,000 applications for trademark registration, but only 24 applications for protection of GIs.[1]

While GI law is rooted in the idea of *terroir* (a concept we consider below), discussions about GI protection can bring in strands of trademark law, unfair competition, agriculture policies, rural development, environmental protection, and – more distantly – protection of traditional cultural expression and traditional knowledge. These connections can easily lead to simplistic and sometimes false narratives about the potential benefits from different sorts of legal protection of GIs. This chapter describes some of the forces benefiting and burdening effective GI labeling with today's consumers.

Because those consumers *do* show an interest in geographic origins, despite the occasional hype, GIs can be – in many circumstances – a useful tool in raising rural incomes in developing countries. Because GI-based marketing

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[1] The actual numbers are 43,674 (patents), 8,337 (designs), and 194,216 (trademarks). United Nations Economic Commission for Africa, Innovation, Competition, and Regional Integration: Assessing Regional Integration in Africa VII, Table 6.4 at 110 (2016) [hereinafter UNECA, Innovation, Competition, and Regional Integration]. Information obtained by the report authors from Office of Controller General of Patents, Designs and Trademarks of India, 2012–13.

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can help developing farmers, *properly calibrated* legal protection of GIs should be part of a "development agenda" for jurisdictions with significant rural economies. In that spirit, this chapter lays out some of the factors determining whether and how GI marketing (and GI legal protection) can help any particular rural region. With those issues in mind, we will consider a few specific examples.

2 GEOGRAPHICAL INDICATIONS AND *TERROIR*

"Geographical indications" is an umbrella term for the various legal mechanisms used to protect geographical designators that tell consumers both the geographic origin of a product *and* something about the product's quality and characteristics. The legal standards of protection vary as does the moniker used to designate the protected name ("appellations of origin," "protected geographical indication," "protected designation of origin," "collective mark,"[2] etc.). Whatever the name used, true appellation laws – and now geographical indications laws – have been traditionally justified by the idea of *terroir*: that a particular land is a key input for a particular product. The *terroir* idea is that the product's qualities "come with the territory" and that there is, as I have described elsewhere, an "essential land/product qualities nexus."[3]

For example, the French government's Institut national de l'origine et de la qualité (formerly the Institut national des appellations d'origine) explains an appellation d'origine contrôlée (AOC) this way:

> [It] guarantees a close link between the product and the terroir, which is a clearly defined geographical area with its own geological, agronomical, climatic, etc. characteristics, as well as particular disciplines self-imposed by the people in order to get the best out of the land. This notion of terroir encapsulates both natural and human factors, and means that the resulting product may not be reproduced outside its territory.[4]

In the context of wine (but in concepts that apply broadly), terroir can be understood as "the environmental conditions, especially soil and climate, in

[2] Justin Hughes, *Champagne, Feta, and Bourbon: the Spirited Debate about Geographical Indications*, 58 Hastings L. J. 299, 301 (2006). A term used not just in jurisdictions that protect GIs through trademark law regimes but also in some scholarly commentary. *See, e.g.* Alessandro Stanziani, *Wine Reputation and Quality Controls: The Origin of the AOCs in 19th Century France*, 18 European J of L. & Econ. 149 (2004).

[3] Hughes, *supra* note 2, at 301.

[4] Institute National de Appellations d'Origine, *History and Genesis of the* AOC www.inao.gouv.fr/public/textesPages/History_and_concepts350.php?mnu=350 (last visited May 4, 2016).

which grapes are grown and that give a wine its unique flavor and aroma."[5] As one Australian wine critic has written: "terroir . . . translates roughly as 'the vine's environment[,]' but has connotations that extend right into the glass: in other words, if a wine tastes of somewhere, if the flavours distinctly make you think of a particular place on the surface of this globe, then that wine is expressing its terroir."[6]

The *terroir* theory in this classic form has always been somewhat "cultural" and largely ignored in many quarters of the agricultural sciences. In his seminal 1947 *The Soil and Health*, Sir Albert Howard – one of the fathers of modern organic farming – does not mention any such concepts.[7] In 302 pages detailing how to produce better crops of coffee, tea, cotton, cocoa, wheat, tomatoes, and various fruit, Howard's concern is the general *quality* of soil and maintaining soil fertility through natural means, but he never takes up the question of whether enduring variations in soils and climate would produce enduring variations in foodstuffs.[8] It simply wasn't an issue for the science-minded but contrarian Howard.

More and more, we understand that the most factually sound "*terroir*" is microclimatic, i.e., that each field (or small cultivated block) is its own *terroir* based on particular soil composition, relationship to sunshine, wind, rainfall, and drainage. In other words, *single appellations are rarely consistent in key geology, flora, and climate*. In fact, the larger the appellation, the more the variation. Geological studies have shown between ten and sixty soil types for the AOC *Alsace grand cru*.[9] Discussing "Bordeaux" as an appellation, Thierry Desseauve has noted that it "represents all forms of *terroir*, all kinds of microclimates, all situations, and finally all kinds of wines and prices."[10]

5 www.dictionary.com/browse/terroir (last visited May 4, 2016). The Oxford dictionaries offer as definitions of *terroir* both "The complete natural environment in which a particular wine is produced, including factors such as the soil, topography, and climate" and "The characteristic taste and flavor imparted to a wine by the environment in which it is produced." www.oxforddictionaries.com/us/definition/american_english/terroir (last visited May 4, 2016).

6 Max Allen, Sniff Swirl & Slurp: How to Get More Pleasure Out of Every Glass of Wine 24 (2002).

7 Sir Albert Howard, The Soil and Health (Devin-Adair, 1947). The book was republished by the University of Kentucky Press in 2006.

8 The closest thing to a discussion of *terroir* comes from a correspondent, Friend Sykes, in one of the appendices to The Soil and health in which Sykes proposes that "the best thoroughbreds are all bred on land with high lime content – either limestone or chalk." *Id.* at 292.

9 B. Burtschy, *Dix terroirs, quatre cépages, cinquante grand crus. L'équation enfin résolue*, Revue du Vin de France, March 2000, at 54.

10 Yves Rousset-Rouard & Thierry Desseauve, La France face aux vins du Nouveau Monde 120–21 (2002).

Similarly, the United States' designated "American Viticultural Areas" (AVAs) are probably just "too big . . . to have real viticultural meaning."[11] But this is genuinely a problem for appellations of *all* sizes. One French wine guide notes that *within* the *Le Minervois* AOC (a small region) there are four regions that are differentiated from each other by their *terroir* and climate.[12] Many northern California vintners have studied soil and slope characteristics to the point of dividing individual *vineyards* into "flavor blocks," i.e., miniature *terroirs* that are viticulted differently.[13] Even in the case of salmon, writer Rowan Jacobsen observes that each particular stream may be its own *terroir*,[14] undermining any *terroir* meaning to "Alaskan" or "Norwegian" salmon.

But if this is the reality of *terroir*, appellations like "Bordeaux," "Napa Valley," or "Burgundy" make little sense from a *terroir* perspective. Nation-wide appellations like "Feta" or "Irish whiskey" make no sense at all. Large (but not too large) geographic areas like "Idaho potatoes," "Parma ham," and "Melton Mowbray Pork Pies" may make sense from the perspective of consistent cultural traditions, but the problem is that those traditions are *transportable* – a contentious point underlying the Europe/New World feud over GIs.

Not surprisingly, over time, there has been a loosening of the connection between *terroir* and GI law. The 1958 Lisbon Agreement requires that a product's "quality and characteristics" be "due exclusively or essentially to the geographical environment" while recognizing that "human factors" could contribute to this equation.[15] In contrast, the definition of "geographical indications" in the TRIPS Agreement requires that the "given quality,

[11] Rod Smith, *Savoring Sonoma/The Wines*, L.A. Times, June 1, 2005, at F5 ("The Sonoma Coast AVA was created primarily as a marketing tool for large wineries and is too big (nearly half of the county) to have real viticultural meaning.").

[12] Jacqueline Gardan, Livre de Cave: Précis a l'usage de l'amateur éclairé 77 (Porphyre ed., 1991) ("Quatre regions se différencient par leur terroir et leur climat.").

[13] W.H. Terry Wright, *Diverse Geology/Soils Impact Wine Quality*, *Practical Winery & Vineyard*, September/October 2001, at Vol. XXIII, No. 2, www.sonomagrapevine.org/pages/growerstoolbox/gtgeology_soils.html (noting this about Benziger Family Winery and describing "a rich smorgasbord of rock types and a complicated geological history" producing a "high diversity of soil types, each a niche with its own conditions of texture, structure, and nutrients" in Sonoma County). *See also World-Class Vineyard Uses GIS to Fine-Tune All Its Operations*, ArcNews, Fall 2013 (describing operations at Scheid Vineyards in Monetrey; here "GIS" means "geographical information systems") available at www.esri.com/esri-news/arcnews/fall13articles/world-class-vineyard-uses-gis-to-finetune-all-its-operations.

[14] As in Rowan Jacobsen's view "that every stream's salmon are genetically distinct, having conformed to their terroir." Rowan Jacobsen, American Terroir 172 (2010).

[15] Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, art. 2(1), October 31, 1958, 923 U.N.T.S. 189 (English text of Stockholm revision

reputation, or other characteristic of the good is essentially attributable to its geographical origin."[16] The 2015 Geneva Act revising the Lisbon Agreement offers two different definitions of a protectable GI: one mimics the TRIPS "geographical indication" definition while the other recites the 1958 Lisbon formulation *but adds* "and which has given the good its reputation."[17]

No one knows whether there is any difference between product qualities being "essentially" or "exclusively" due to the land, so it is unclear what the loss of "exclusively" means. What is clear is that the addition of "reputation" to the legal definitions could, broadly read, obviate any land/qualities connection of the sort that has been fundamental to the notion of appellations.[18] As Irene Calboli writes, this "allows GI producers to partially 'de-territorialize' the production of GI-denominated products" and "this partial 'delocalization' runs against the very rationale for GI protection – the linkage between the products and the *terroir*."[19] And this is exactly the case with some GIs, such as the United Kingdom's "Melton Mowbray Pork Pies" and India's "Feni" liquor.

3 GEOGRAPHICAL INDICATIONS PROTECTION – MAGIC-LIKE CLAIMS, UNPROVEN RESULTS

If the justification for legal protection of GIs has shifted in recent years, the strength of the European Union's advocacy for GIs – mainly on behalf of France and Mediterranean Member States – has not. Here is an example of the European Commission's claims about GIs in a more somber moment:

begins at 215), available at www.wipo.int/wipolex/en/details.jsp?id=12586 (revised at Stockholm on July 14, 1967, and as amended on September 28, 1979) [hereinafter 1958 Lisbon Agreement].

16 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 22(1), April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197 [hereinafter TRIPS].

17 Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, WIPO Document LI/DC/19 (May 20, 2015) [hereinafter Geneva Act], www.wipo.int/meetings/en/details.jsp?meeting_id=35202.

18 Bernard O'Connor, *The Legal Protection of Geographical Indications*, 2004 INTELL. PROP. Q. 1, 52 ("This definition expands the concept of appellation of origin contained in Art. 2 of the Lisbon Agreement to protect goods which merely derive a reputation from their place of origin without possessing a given quality or other characteristics which are due to that place."); Hughes, *supra* note 2, at 315–16 (same).

19 Irene Calboli, *Time to Say Local Cheese and Smile as Geographical Indications of Origin? International Trade and Local Development in the United States*, 53 HOUS. L. REV. 373, 387 (2015).

> The protection of geographical indications matters economically and culturally. They 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.[20]

This statement is unimpeachable: GIs do "matter," "can" do the things claimed, and appear to "support" rural development.

But at other times the Commission takes a more rhetorical tack. For example, a 2012 study commissioned by the European Union found that for 2,768 GI products from 27 EU countries in 2010 "[t]he average price premium for GI products was found to be 2.23, which means that GI products were sold 2.23 times as high as the same quantity of non-GI products, *which shows that using GIs can achieve a higher market price*."[21]

Of course, the evidence does not "show" that. Even if all the data are correct, what we have is a *correlation* (not *causation*) between GI protection and higher prices for GI products as compared to non-GI products in the same categories. Perhaps products bearing GIs command a price premium because they simply are, on the whole, *better* – with or without the GI labeling; or perhaps the products bearing GIs command a price premium because they are simply more famous, with or without the GI labeling; or perhaps they are better advertised. Ironically, the higher average price may even be because of non-EU demand for the GI-labeled products in jurisdictions that do not provide the heightened level of legal protection that the European Union claims is necessary (i.e., demand in the United States, Japan, China, etc.).

A more extreme claim is found in the 2009 "Teruel Declaration" of OriGin, an NGO dedicated to promoting GIs:

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

[20] http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/geographical-indications/.

[21] Catherine Saez, *GIs The "Darling" of Europe, But Protection a Challenge for All, Producers Say*, IP WATCH, May 28, 2013 (describing report of Michael Erhart, head of agricultural product quality policy at the European Commission, emphasis added), available at www.ip-watch.org/2013/05/28/gis-the-darling-of-europe-but-protection-a-challenge-for-all-producers-say/.

increasingly rely on GIs for the sustainable development of their communities.[22]

This passage is well beyond the usual overstatements from trade associations or nonprofits. Instead of focusing on increased price premiums (even without a causal analysis), OriGin makes a blanket statement that GIs "provid[e] jobs for millions of individuals" – as if the underlying products themselves would not sell *at all* without the GI protection. Unfortunately, some otherwise intelligent people buy into this kind of rhetoric. In a 2005 paper presented at a World Intellectual Property Organization (WIPO) meeting, a Kenyan government official reasoned that "GI protection would transform African farmers from raw material producers to exporters of differentiated products easily identifiable in the global marketplace"[23] and argued that GI protection against usurpation or dilution would "benefit" dozens of local Kenyan products – even though these products are *generally unknown* in developed economies.[24]

3.1 *No Across-the-Board Effects*

But thoughtful people concerned about rural development know that strong legal protection of GIs is not such magic. Laws *by themselves* do not create commercial or reputational value: EU-level GI protection globally would not suddenly make "Asembo mangoes" or "Muruanga bananas" into premium-price products. As Carlos Correa has said, "geographical indications, like trademark, may in some cases play a decisive role in generating a premium over and above the price of equivalent goods, while in other cases their contribution cannot be distinguished from that attributable to the product itself."[25] Bald claims about the economic value of GIs ignore the fact, as Carlos Correa has wisely observed, that "the final price of the product that incorporates an intellectual property component is a poor indicator of the

[22] Organization for an International Geographical Indications Network, TERUEL DECLARATION (Teruel, June 26, 2009) at 1.

[23] James Otieno-Odek, *The Way Ahead – What Future for Geographical Indications?* WIPO – ITALIAN GOVERNMENT, WORLDWIDE SYMPOSIUM ON GEOGRAPHICAL INDICATIONS, Parma, Italy, June 27–29, 2005, at 5.

[24] While Otieno-Odek mentioned some products that might have reputations in OECD countries (like Mt. Kenya coffee), his list included "Kisii tea, Kericho tea, kangeta, miraa, meru potato, kikuyu grass, Mombasa mango, Machakos mango, Asembo mango, Muranga bananas and Kisii bananas" as well as "Molo lamb, Kitengela ostrich meat, Omena fish and Mursik milk," *Id.* at 3.

[25] Carlos Correa, *Protection of Geographical Indications in Caricom Countries* (September 2002) at 18, available at http://ctrc.sice.oas.org/geograph/crnm/Geographical.pdf.

value of the intellectual property itself"[26] and that "[s]eeking to quantify the current and, particularly, the potential, value generated by the use of a geographical indication is an extremely difficult task."[27]

In the words of a 2008 study commissioned by the European Commission to study the effect of "protected designation of origin" (PDO) and "protected geographical indication" (PGI) status:

> A key limitation of the evaluation of the scheme is that, at the present time, data on the administrative implementation of the PDO and PGI scheme and on the PDO/PGI products are scant as, typically, Member States do not monitor the administrative and statistical aspects of the scheme such as the value or volume of production, sales, and prices of PDO and PGI products.[28]

As that 2008 study further explained, although there are case studies claiming positive relationships between PDO/PGI status and improved prices, "[t]he limited number of case studies does not allow one to draw firm conclusions for the overall population of PDOs and PGIs."[29]

There are a number of good reasons why it is extremely difficult to figure out what impact GI legal protection has on the price of GI-labeled products, let alone whether *different levels of legal protection* might have different impacts on those prices:

[1] For some products, it is difficult if not impossible to disentangle premiums produced by trademark-protected *brands* and any premium produced by the GI. Scotch whisky would be a prime example.

[2] For some products, the price premium apparently *preceded* the formal GI status. For example, this is clear from the *application* for PGI status made by the Melton Mowbray Pork Pie Association:

> Melton Mowbray Pork Pies are clearly distinct from other pork pies in their packaging, design and marketing at point of sale. They carry a price premium compared to other pork pies on the market place of 10–15 percent because they have a specific reputation that sets them apart as different and worth paying for.[30]

[26] *Id.* at 19. [27] *Id.* at 18.

[28] London Economics, *Executive Summary, Evaluation of the CAP Policy on Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI)* 3 (November 2008) [hereinafter 2008 London Economists Study].

[29] *Id.* at 6.

[30] EC No: UK/PGI/005/0335/13.02.2004, Official Journal of the European Union, April 4, 2008, section 4.6 at C 85/20, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:085:0017:0020:EN:PDF.

[3] Studies and reports showing that *local* citizens place a premium on *local* GIs simply do not help us understand the mechanisms by which we could induce developed world consumers to pay more for products from *distant* developing locales.

[4] Even where a protected GI appears to command a price premium, the GI labeling and marketing often imposes higher production costs so the *net* price premium is unknown. In its 2008 review of eighteen case studies of EU-protected GIs, a consulting firm hired by the European Commission found that "[i]n 14 out of 18 cases, the price of a PDO/PGI product is higher than the price of the comparator product" but that "[i]n 10 cases, the costs of producing a PDO/PGI is higher than the cost of producing its comparator."[31]

One serious attempt to measure the effect of a legally protected GI is Dwijen Rangnekar's study of "Darjeeling" tea in the WTO's 2004 World Trade Report.[32] "Darjeeling" received GI protection as a certification mark in a number of jurisdictions in the 1980s – the United Kingdom, the United States, Canada, Japan, Egypt, and a number of European countries;[33] it has also been protected as a certification mark in India for decades.[34] Rangnekar and his colleagues found that (at least this level of) legal protection of the *Darjeeling* GI has had no noticeable effect on price over a twenty-year period. According to the report, "[t]he results obtained suggest that GI protection has increased the price of Darjeeling tea in total by less than 1 per cent in real terms over the 1986–2002 period. This result is suggestive of only a very modest price premium effect of GI protection."[35] Of course Darjeeling is a very famous kind of tea, suggesting dimmer outcomes for less known GIs.

3.2 *Why People Believe in Geographical Indications Magic*

If the evidence is so mixed, what is the attractive power of stronger GI protection? How does the GI rhetoric take hold with people who do not come from privileged and famous agricultural locales like Champagne, Napa, or Parma? Developing countries are surely not looking to guarantee that they will pay *more* to producers of Champagne, Bourbon, Roquefort, and Feta.

[31] 2008 London Economists Study, *supra* note 28, at 9.

[32] Dwijen Rangnekar, *The International Protection of Geographical Indications: The Asian Experience*, paper presented at UNCTAD/ICTSC Regional Dialogue on IPRs, Innovation, and Sustainable Development, Hong Kong, November 8–10, 2004.

[33] *Id.* at 28. [34] *Id.* at 8–9. [35] 2008 London Economists Study, *supra* note 28, at 9.

The answer is pretty straightforward: there is something quite appealing about a law that will protect the name and integrity of one's local products and supposedly propel those products into international recognition. Most people have some points of pride for their geographic homes and that local pride is often centered on food. The European Commission's message is simple: *your home probably has a unique and special local product and it would command respect and price premiums globally if only it had stronger legal protection.*

That is an understandably seductive message, whether for people in Bergamo, Italy, who take "pleasure in consuming local products" and "regularly choose their own lard, salami and cheeses over other, even more prestigious, varieties"[36] or, half way around the world, for coffee farmers in the Highlands of Papua New Guinea who "think they are constantly being underpaid for their coffee, because it is better than all other coffee"[37] (even though Papua New Guineans generally *do not drink coffee*[38]). In this sense, strong GI protection becomes a matter of "respect" for their local products.[39]

4 THE GOOD AND BAD OF GEOGRAPHIC ORIGINS MARKETING

We should also recognize that GI-based marketing must respond to changing consumer tastes and concerns, only some of which benefit GIs.

4.1 *The Appeal of Geographic Origin Marketing*

A GI label can be, for a wide range of consumers, *at least* an indicator of the geographic origin of the product. In other words, geographic origin information may be important to the consumer for reasons completely separate from quality or characteristics (the *terroir*); in that context the GI label will serve a market and marketing function broader than the function attributed to it by GI theory. For example, interest in geographic origin of foodstuffs may be rooted in any of the following:

[36] Jillian R. Cavanaugh, *Making Salami, Producing Bergamo: The Transformation of Value*, 72:2 ETHNOS: JOURNAL OF ANTHROPOLOGY 155 (2007).

[37] PAIGE WEST, FROM MODERN PRODUCTION TO IMAGINED PRIMITIVE: THE SOCIAL WORLD OF COFFEE FROM PAPUA NEW GUINEA 148 (2012).

[38] Most Papua New Guineans are Seventh Day Adventists who do not drink coffee.

[39] *See generally* Daniel Gervais, *Traditional Innovation and the Ongoing Debate on the Protection of Geographical Indications*, in INDIGENOUS PEOPLES' INNOVATION 121 (Peter Drahos & Susy Frankel eds., 2012) (suggesting that developing countries may be attracted to GI protection of indigenous products because of GI's potential ability to promote respect).

- a desire to lessen transportation effects on the planet, e.g., a Californian consumer might prefer Guatemalan or Costa Rican coffee over Ethiopian coffee;
- a desire to support countries with better human rights, worker rights, or democracy records, e.g., a preference for Costa Rican over Guatemalan coffee;
- a desire to support fellow countrymen, whether patriotic or nationalistic, e.g., a preference for Hawaiian Kona coffee over Sulawesi or Jamaican Blue Mountain coffee;
- a simple desire for a more specific, nonindustrial (or less industrial) narrative.

It is not hard to see strands of evidence supporting these different consumer interests – and how this connects or does not connect with protection of GIs.

Consider the first of these: the trend toward "localization." As Daniel Gervais notes, some consumers' insistence on geographic origin labeling "partly stems from a desire to buy more locally produced products and to reduce the carbon footprint of their consumption patterns."[40] We see this trend not only in the rise of farmers' markets and farm-to-table restaurants but in industrial producers informing customers of local sourcing – as when McDonald's in Switzerland assures its customers that they work with Swiss agricultural partners.[41]

This trend toward geographic identification can rely on – and strengthen – GI-based marketing, but it does not require full-fledged GI laws.[42] More importantly, to the degree consumers show preferences for local production, this does not bode well for *developing* country farmers using GIs to extract economic rents from *developed* country consumers. On the other hand, as a growing middle and upper middle class emerges in cities like Mumbai, Chengdu, Johannesburg, Kuala Lumpur, and Sao Paulo, this trend might

40 Daniel Gervais, *Irreconcilable Differences? The Geneva Act of the Lisbon Agreement and the Common Law*, 53 Hous. L. Rev. 339, 346 (2015).

41 Brochure, McDonald's: Une excellente qualité, garantie par des partenaires suisses et européens (undated, but from 2009 to 2013) (on file with the author). Actually, the brochure is obliquely worded, naming many Swiss food sector partners but not directly saying what comes from Swiss agricultural production.

42 David A. Wirth, *Geographical Indications, Food Safety, and Sustainability Challenges and Opportunities*, paper presented at 145th EAAE Seminar "Intellectual Property Rights for Geographical Indications: What is at Stake in the TTIP?", April 14–15, 2015, Parma, Italy ("Some consumers also seem to be particularly interested in purchasing locally-produced food, lending greater importance to non-GI indications of the locality of origin") (on file with the author).

produce parallel "local" substitution – if, for example, Mumbai residents increasingly prefer Goan Feni over "western" liquors.

4.2 *Geographical Indications Marketing Amid an Abundance of Labels*

In a broader perspective, today the geographic source information that is provided by GI labeling competes with a growing array of labels conveying information about (a) the product, and (b) what in international trade is called "process and production methods." The former include "organic," "non-GMO," and "gluten-free"; the latter include "shade-grown," "sustainable," and "fair trade."

We do not have any meaningful empirical evidence on how consumers – consumers in different places and different socioeconomic groups – respond relative to these different labels. There is no question that consumers are paying and expect to pay price premiums for products that are guaranteed to have many of these characteristics. But we do not know if consumers will pay *more* for geographic origin labeling than for organic, more for GI certified labeling than fair trade certified labeling, etc. For example, imagine a study that showed us the different price points that Australian or Japanese, Singaporean or American consumers would pay for the following different labeling/certifications:

"Organic French Roast coffee"
"Papua New Guinea coffee"
"Organic Papua New Guinea coffee"
"Fair trade certified Dark Roast coffee"
"Fair trade certified Papua New Guinea coffee"

That kind of empirical evidence would more meaningfully guide policy makers for at least three reasons: first, whether for Papua New Guinea coffee growers or Colorado iced tea bottlers, *each* of these certification processes costs time, effort, and money;[43] second, some retail outlets are available or foreclosed based on different labeling and rural practices;[44] and, third, there is

[43] Annie Gasparro and Leslie Josephs, *The Gatekeeper to Organic Heaven*, Wall Street Journal, May 7, 2015, at B1 (describing how one small vegan cheese producer spent $3,000 getting certified organic and a bottled ice tea producer saying "grueling certification processes are worth the money to get its iced tea on Whole Foods shelves").

[44] *Id.* (for example, Whole Foods – one of the United States' premier retailers to high-income food consumers – is much more likely to carry products with fair trade or organic labeling).

good reason to think that consumers are or at some point *will* start suffering "label fatigue."[45]

While not the subject of this chapter, there is also a real danger that GI labeling will be misunderstood by consumers as signifying some guarantee of organic, natural, non-GMO, or fair trade production.[46] That connection is implied by comments about GIs enhancing "sustainability," but sustainability of rural *economies* and "sustainable" farming are quite different. For example, according to one French consumer group study, French wine producers only use 3.7 percent of France's farmland but account for 20 percent of that country's pesticide use.[47] Indeed, *organic* winemakers in Burgundy have been fined and threatened with prosecution for *refusing* to use pesticides.[48] The confusion of GI labeling with production guarantees ("organic") could accrue to benefit developing countries' farmers, but price premiums through consumer confusion is surely not an acceptable policy objective.

5 A COMPLEX DECISION, HOPEFULLY FOR FARMERS

All of this produces a complex picture for policy makers who would help farmers in developing countries. One must assess the relative costs and benefits of different production and labeling practices that "de-commodify"

[45] Ulrike Grote, *Environmental Labeling, Protected Geographical Indications, and the Interests of Developing Countries*, 10 Estrey Centre J. Int'l L. & Trade Pol. 94, 96 (2009) ("A proliferation and multiplication process for labels in different markets is on-going, and it has resulted in decreased transparency and labeling fatigue from the perspective of consumers"). Or as anthropologist Paige West asks us about origin and fair trade labeling, "[w]hat happens when people get tired of hearing about people from the global South?" West, *supra* note 37, at 255.

[46] Gervais, *Irreconcilable Differences*, *supra* note 40, at 345 (noting that GI labeling "ties into – or may be confused with – 'fair trade' labels and certification processes concerning the sourcing of an increasingly wide range of products, many of which come from the developing world"); *see* Daniel Jaffee, Brewing Justice: Fair Trade Coffee, Sustainability, and Survival 92 (2014) (noting that in rural Oaxaca coffee "producers understandably conflate the tangible requirements of organic production with the less familiar concept of fair trade").

[47] Elaine Sciolino, *In France, Pesticides Get in Way of Natural Wines*, N.Y. Times, March 2, 2015, available at www.nytimes.com/2015/03/04/dining/in-france-pesticides-get-in-way-of-natural-wines.html?_r=0; *Lab Tests on French Wines Find Pesticide Residue in Every Bottle*, Food Safety News, September 30, 2013 (reporting that even organic wine contained pesticide residues); *see also* UFC-Que Choisir, *Vins: La peste soit des pesticides*, September 24, 2013, available at www.quechoisir.org/alimentation/production-agricole/cultures/enquete-vins-la-peste-soit-des-pesticides.

[48] *Pesticides in French Wine*, N.Y. Times, March 2, 2015, available at www.nytimes.com/2014/01/03/opinion/pesticides-in-french-wine.html?_r=0.

local production. And that assessment has to be in the context of *what is possible in that locale*.

In the case of GIs – whether a *sui generis* system or a certification marks approach – one will need to define the geographic area for eligible production. This process can easily become highly politicized. Ironically, drawing the geographic boundaries should be easier when the GI seems to have little prospective reputational value. The next element is defining the production standards: ingredients, from where raw ingredients can be sourced, recipes, aging and fermentation practices, permissible technologies for distillation and/or storage, etc. As Dwijen Rangnekar notes:

> A GI requires documentation of the production rules, thus the need for the relevant group of producers in the region and across the supply chain to arrive at some consensus. All this raises questions of participation, debate, disagreement, cooperation and all the messiness of politics and economics of who is involved, who is excluded, and who is leading the process of rule-making.[49]

In the case of certification marks, a private leadership group can pretty much establish their own production standards; in the case of *sui generis* GI law, the producers will have to work with government agencies in what will be extended, detailed public–private sector collaboration.

Central government involvement also raises two other very important issues: capacity and extraction of economic rents. Simply put, the central government may try to extract economic rents by controlling when the GI designation can be used and by whom. There is always a danger that the GI will be used to strengthen a government's role in the market – and that may or may not help rural citizens. The capacity issue is also a serious one. For example, economist Tyler Cowen has observed that "[m]ost African nations simply cannot afford the requirements for safety, labeling, and control that European-style regulation imposes on them."[50]

Fair trade and organic production and certification practices also impose a substantial burden in terms of training, labor, and community disciplines.[51] It

[49] Dwijen Rangnekar, *Geographical Indications and Localisation: A Case Study of Feni* (UK Economic and Social Research Council, 2009), version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564624##.

[50] Tyler Cowen, An Economist Gets Lunch 163 (2012).

[51] *Coffee: A Major PNG Export*, Business Advantage PNG, September 1, 2012 (noting that in Papua New Guinea "the requirements of organic certification can often be beyond the capacity of smallholders") at www.businessadvantagepng.com/coffee-a-major-png-export/. *See generally* Jaffee, *supra* note 46 (detailing difficulties coffee growers in rural Oaxaca, Mexico face in meeting and maintaining both fair trade and organic standards).

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may be that there is a broader international community of NGOs that can bring "off-the-shelf" organic, fair trade, and environmentally friendly production systems to rural communities, bypassing central governments. But there are also substantial efforts from the NGO community to help those who would pursue GI labeling.

Farmers, activists, and policy makers should also consider carefully the price differentials that different labeling produces. Discussions of organic, fair trade, and GI labeling are replete with claims about the higher prices that de-commodification brings, but we must focus on (a) whether farmers, rural workers, and rural communities are actually receiving the economic premiums, and (b) if and when higher production costs wipe out the value of those premiums.

With these issues in mind, let's briefly consider three parables of de-commodification of developing country foodstuffs – Ethiopian coffee, Goan "Feni" liquor, and Papua New Guinea coffee.

5.1 *Ethiopian Coffee and the Problem of Quality Control*

Humanity's consumption of coffee began in Ethiopia; the modern, high-end global coffee market is closely identified with Starbucks. So the feud that erupted in 2006 between Ethiopia and Starbucks over Ethiopian coffee names had all the makings of a good news story.

In the past few decades, Ethiopia has taken varied approaches to coffee production, but despite these shifts there seems to be agreement that "[t]he coffee value chain in Ethiopia involves a large number of intermediaries and is largely state-controlled."[52] Beginning in March 2005 – during a period of relative liberalization – the Ethiopian government sought US trademark registration for three geographic names used for Ethiopian coffees: HARRAR, YIRGACHEFFE, and SIDAMO. The Ethiopians sought to register the names as *regular* trademarks. The United States Patent and Trademark Office (USPTO) quickly granted the registration application for YIRGACHEFFE.[53] But the HARRAR and SIDAMO applications were held up.[54]

52 Till Stellmacher, *Prospects and Challenges of Forest Coffee Certification in Ethiopia: The Need to Effectively Link Economic Benefits and Biodiversity Conservation*, 2008 paper at 4, available at http://userpage.fu-berlin.de/~ffu/akumwelt/bc2008/papers/bc2008_9_Stellmacher.pdf.

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

54 *Making the Origin Count – Two Coffees: Ethiopia and the Starbucks Story*, 5 WIPO Magazine, October 2007 at 2, 3 (reporting that USPTO initially denied the HARRAR application in October 2005 and the SIDAMO application in August 2006).

Starbucks had already applied for a trademark that *included* "Sidamo"; its application was for SHIRKINA SUN-DRIED SIDAMO.[55] More broadly, Starbucks publicly argued that it was a bad idea to grant regular trademarks to these Ethiopian place names, arguing that they are "geographically descriptive terms" and urging "a geographic certification program" to ensure that the names were used to "represent quality products that come from a specific region."[56] For their part, the Ethiopians recognized that seeking trademarks for the names was a "new approach," but said it was justified by the situation of small coffee farmers and traders in the country.[57]

After receiving a blitz of bad publicity – much of it fomented by Oxfam – Starbucks softened its position, and in November 2006, Starbucks and Ethiopia reached an entente.[58] Eventually, SIDAMO and HARRAR obtained USPTO trademark registration.[59] Starbucks made some sort of promise to help promote the Ethiopian coffees, and Ethiopia gave Starbucks royalty-free licenses to use the three trademarks in conjunction

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

56 Starbucks Press Release, *Starbucks Sets the Record Straight on Press Coverage Regarding Starbucks, the Ethiopian Government, and Oxfam*, October 26, 2006, available at www.starbucks.com/aboutus/pressdesc.asp?id=714.

57 *Starbucks and EIPO Reach Agreement*, Tea and Coffee Trade Journal, June 1, 2007 at 62 (Ethiopian government offices "[w]e realize our approach to trademarking and licensing these coffees brands that originate in and represent the best of Ethiopia's coffee heritage is a new approach").

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

59 SIDAMO – USPTO registration number 3381739; application dated March 17, 2005; published for opposition on November 27, 2007; and registered on February 12, 2008. HARRAR – USPTO registration number 3457979; application dated March 17, 2005; published for opposition on April 15, 2008; and registered on July 1, 2008.

with its sales of Ethiopian coffees – the same as Ethiopia had done for other coffee retailers.[60]

There are different ways to interpret the Ethiopia/Starbucks dispute. In the dominant public interpretation, Starbucks was already using these geographic names in conjunction with Ethiopian coffees (as the result of buying bona fide Ethiopian beans at auction), and Starbucks did not want to start paying additional trademark-licensing fees to the Ethiopian government. In this narrative – according to Oxfam – Starbucks was trying to avoid paying $US 88–90 million a year to Ethiopia.[61] It is anyone's guess how Oxfam got these numbers, and clearly those numbers were false in the sense that Ethiopia soon granted Starbucks royalty-free licenses for the trademarks.

The idea that Starbucks was not paying enough for the geographically labeled product certainly feeds into the GI advocates' narrative, fueling further misunderstandings. For example, in 2009, a University of Hannover professor characterized the dispute as one in which "[t]he Ethiopian government wants to protect coffee originating in those specific regions by using GIs as opposed to labeling as proposed by Starbucks."[62] Of course, that is just the *opposite* of what happened: Starbucks had proposed the traditional GI mechanism in the United States (certification marks) and Ethiopia has insisted on regular trademarks (i.e., just "labeling").

As both sides tried to provide popular explanations of their positions, the story did not become much clearer. In a YouTube video, counsel for Ethiopia argued that "[a] certification mark provides much weaker control in the holder of the certification mark."[63] Given that certification marks get the same level of protection under US trademark law (Lanham sections 32 and 43), what was Ethiopia's lawyer trying to say in asserting that a certification mark gives less "*control*?" The point he may have been trying to make is that once a coffee roaster/retailer purchases coffee beans genuinely produced in the applicable region (and pursuant to any quality controls the certification mark requires), the coffee roaster/retailer would be free to use the appropriate mark

60 *See, e.g.*, *ETHIOPIAN COFFEE: Every Bean Counts*, Brands Strategy, September 14, 2007 at 48; *Ethiopia: Starbucks to Sign Licence Agreement with EIPO*, 34 Coffee & Cocoa International 4 (June/July 2007); *see* Janet Adamy, *Starbucks, Ethiopia Agree on Licensing*, Wall St. J., June 21, 2007, at B6.

61 *Ethiopia is Now Trademarking its Specialty Coffees*, The Food Institute Report, November 19, 2007 at 5 (Oxfam America reporting that trademarks would bring Ethiopia an additional $US 88 million).

62 U. Grote, *Environmental Labeling, Protected Geographical Indications and the Interests of Developing Countries*, 10 Estey Centre Journal of International Law and Trade Policy, volume 1, 94, 95 (2009).

63 Robert Winter, Arnold & Porter, January 29, 2007: www.youtube.com/watch?v=2DiWK81j7fg.

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(HARRAR, SIDAMO, or YIRGACHEFFE). He may have also meant that certification marks would give the Ethiopian government less leverage over its own farmers – again, as long as the farmer meets the certification mark standards, the farmer cannot be denied the right to sell his coffee as HARRAR, SIDAMO, or YIRGACHEFFE. In contrast, with regular trademarks the Ethiopian government is not required to be even-handed either with Starbucks or its farmers; that really does give it more "control," particularly if the country's farmers are increasingly selling directly to coffee roasters/retailers.

But is that the sort of control we want to give an undemocratic, non-transparent central government over its farmers? One trade industry report ominously characterized the Ethiopian government's efforts this way: "[w]hile certification marks are commonly used as a means of identifying products associated with a particular geographic region, *the Ethiopian government elected to assert traditional trademark rights to identify itself as the ultimate source of the country's specialty coffees*."[64] In other words, Oxfam's intervention was clearly helpful to the central government in Addis Ababa but not to the provincial farmers. The effort to obtain regular trademarks may manifest the central government's fear that, over time, they will not be able to stop direct sales between farmers and foreign buyers – and, therefore, will be cut out of the usual middleman rents that African governments have extracted.[65]

In another interpretative variation, does the quest for regular trademarks manifest an admission by the Addis Ababa government that practically speaking *it cannot police even minimal certification standards*? This was the suggestion made implicitly by Ron Layton, the head of "Light Years," an NGO trying to help African countries capitalize on their intellectual property:

> So what's wrong with the regional [certification] model? Layton argues that certification – while it works well for a smaller country like Jamaica – would be too difficult to implement in Ethiopia. There are literally millions of Ethiopians moving coffee beans to only a handful of distributors like Starbucks.[66]

[64] *ETHIOPIAN COFFEE; Trademark versus geographical certification*, Brand Strategy, September 14, 2007 at 49 (emphasis added).

[65] *See generally*, Justin Hughes, *Coffee and Chocolate – Can We Help Developing Country Farmers through Geographical Indications?* September 29, 2010 (describing how African governments and capital elites have historically extracted economic rents from rural cocoa and coffee producing areas), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684370&rec=1&srcabs=1671676&alg=5&pos=4 (last visited May 4, 2016).

[66] Joshua Gallu, *Starbucks, Ethiopia, and the Coffee Branding Wars*, Der Speigel Online (English), November 16, 2006, available at www.spiegel.de/international/0,1518,448191,00.html. One Ethiopian official has said the same thing: "[o]ur coffee is grown on four million very

A 2007 report on Ethiopia's efforts similarly commented that "geographic certification" is valuable, but "it can be a costly mark to maintain" and that "[a]s the majority of Ethiopian farmers still live in extremely basic conditions, it is not a cost they can afford to absorb."[67] And Ethiopian officials have been very blunt in their claim that the Harrar, Sidamo, and Yirgacheffe names "refer[red] not to geographical locations, but to distinctive coffee types"[68] and that "[t]he coffee varieties *were not strictly regional* ... so wine-style designations would have made no sense."[69] A benign interpretation of all these statements is that officials in Addis Ababa realize that they cannot establish an effective, dependable system for geographical certification, let alone additional quality controls that EU officials associate with true GIs.

Finally, the denouement of this story also warrants our attention. Did the increased control of the three important Ethiopian geographic coffee labels in the world's biggest coffee-consuming market help? My own site visits to Starbucks in different cities and review of Starbucks coffee guides show a general *absence* of Ethiopian coffees in Starbucks stores *for years* following the dispute. For example, a 2010 brochure for Starbucks in China shows eighteen different coffee offerings; of these, seven are single-source country or region coffees, none of which are Ethiopian GIs.[70]

Indeed, in September 2013, Starbucks introduced into its US stores "a new single-origin coffee from the birthplace of coffee, Ethiopia."[71] The coffee is called "Ethiopia" and the words "Sidamo," "Harrar," and "Yirgacheffe" do not appear *anywhere* in the packaging or promotional materials.[72] This "Ethiopia"

small plots of land. Setting up a certification system would have been impracticable and too expensive. Trademarking was more appropriate to our needs. It was a more direct route offering more control." *Making the Origin Count – Two Coffees: Colombia – 50 Years of Evolving Strategies*, 5 WIPO MAGAZINE, October 2007 at 3.

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

68 *Making the Origin Count – Two Coffees*, *supra* note 66, at 3.

69 *See Direct from the Source, Coffee in Ethiopia*, *supra* note 67 (quoting Getachew Mengistie, head of EIPO).

70 Starbucks, *Discover the Finest Coffee in the World* (2010) (on file with the author). The regional coffees offered in the brochure are Columbia Nariňo Supremo, Guatemala Antigua, Sulawesi, Sumatra, Sumatra Decaf, Kenya, and Rwanda.

71 Starbucks press release, September 23, 2013, available at https://news.starbucks.com/news/starbucks-honors-the-birthplace-of-coffee-with-ethiopia [hereinafter Starbucks Ethiopia Press Release].

72 Another page for the Ethiopia coffee says: "On the ancient slopes flanking Africa's Great Rift Valley, coffee trees first emerged from the rich, volcanic soil." But no mention of the three regions. http://store.starbucks.com/ethiopia-whole-bean-011028995.html (last visited May 4,

coffee "joins Starbucks selection of 20 core and 10 traditional and seasonal whole bean coffees offered at Starbucks retail stores nationwide";[73] it is also one of twelve single-origin coffees offered by Starbucks online.[74] As for Ethiopia's protected marks, Starbucks appears to offer online only "Starbucks® Ethiopia Yirgacheffe® Espresso Verismo® Pods" in their coffee pod section.[75] The internal search engine on the Starbucks site also brings up "Starbucks Reserve Sun-Dried Ethiopia Sidamo" and "Starbucks Reserve Sun-Dried Ethiopia Harrar," but neither of these can be found on the "reserve coffees" page as of May 4, 2016.[76]

From Oxfam's perspective, this might indicate bad faith on the part of Starbucks, but it might also be simply supply and quality issues;[77] or Starbucks' need to rotate among different single-origin coffees; or Starbucks' concern that "Sidamo" and "Harrar" coffees simply cannot be guaranteed to come from those places. Whatever the explanation, the Ethiopia coffee names saga is a sobering story on quality control and geographic guarantees, government relations to farmers, and the fact that promotion of developing country GIs will often rest with the goodwill of corporations in the developed world.

5.2 *Some Observations on Goa's Cashew Apple Feni*

In 2009, Dwijen Rangnekar published an extremely thorough and detailed case study of the development of GI status for "Feni" liquor from Goa, India.[78] Rangnekar's research is a case study on the successful establishment of a

2016). Starbucks also offers an "Ethiopia Gemadro" single-origin estate coffee. http://store.starbucks.com/ethiopia-gemadro-single-origin-estate-011040514.html (last visited May 4, 2016).

73 Starbucks Ethiopia Press Release, *supra* note 71.

74 See http://store.starbucks.com/coffee/whole-bean-and-ground/ (last visited May 4, 2016).

75 See http://store.starbucks.com/starbucks-ethiopia-yirgacheffe-espresso-verismo-pods-011030279.html?&srule=Featured&start=0&sz=12&cgid=starbucks-verismo-pods (last visited May 4, 2016).

76 Cowen, *supra* note 50, at 163.

77 Germany and Saudi Arabia each import far more Ethiopian coffee than the United States, the latter for obvious geographic reasons. *See Ethiopian Coffee Consumers Vote for Quality amid Rising Prices*, Ethiopian News, May 9, 2011 (showing the US as the third-largest market for Ethiopian coffee in 2009/10), www.ethiopian-news.com/ethiopian-coffee-consumers-vote-quality-rising-prices/; USDA Global Agricultural Information Network Annual Ethiopia Coffee Report, GAIN Report No.: ET-1302, May 14, 2013 (showing the US as the fifth-largest market for Ethiopian coffee in 2011/12 after Germany, Saudi Arabia, France, and Belgium).

78 Dwijen Rangnekar, *Geographical Indications and Localisation: A Case Study of Feni* (UK Economic and Social Research Council, 2009), version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564624## [hereinafter Rangnekar, *Case Study of Feni*].

protected GI: any local leader or NGO working on agricultural development and considering tools for de-commodifying farmers' production would profit from reading his report.

"Feni" is the name of a liquor that has been produced for centuries in Goa state in India. There are two principal types of Feni: coconut Feni, which was probably first, and Feni made from cashew apples, a tree that was imported in the sixteenth century from Brazil when Goa was under Portuguese rule.[79] Cashew apple Feni is typically made from fruits that have been allowed to fall to the ground before they are collected.[80] The apples are crushed, traditionally by foot but then by "stone-mortar crusher[s] using draught animals" and now mechanical crushers.[81] The juice is fermented for two to four days and then distilled in pot-stills that are of local design.[82] Historically, Feni was a triple-distilled liquor, but Rangnekar reports that there is now "a certain consensus towards a double-distilled Feni."[83]

It is not clear how the effort at GI registration got started, but a group of Feni producers organized as the "Feni Association" and worked extensively with the Goa Chamber of Commerce and the Goa Government Department of Science and Technology in drafting an application for protected GI status under India's 1999 GI law. The application was submitted to the central Indian government in December 2007 and ultimately approved in February 2009.[84] This private-local government group rose to the bureaucratic challenge, "demonstrat[ing] a substantial effort in assembling the information for a GI application, coordinating the various interests and groups concerned with Feni, then responding to the examination process of the GI registry."[85]

Preparing that application required agreeing upon specifications. Rangnekar reports that research was undertaken by "an informal committee involving journalists and archivists, agronomists and scientists, and bottlers and distillers."[86] Armed with those results, "distillers, bottlers and retailers

[79] *Id.* at 24.
[80] *Id.* ("The apples are generally left to fall to the ground before being collected, as this is an indication that the kernel/nut is mature . . . The cultural wisdom against plucking apples from the tree is that the unripe apple will give the Feni a bitter taste.")
[81] *Id.* at 25.
[82] *Id.* at 26–27 (detailing evolution of different pot-still designs and construction).
[83] *Id.* at 28. [84] All these facts are recounted at *id.* at 30. [85] *Id.* at 6.
[86] *Id.* at 7 ("An informal committee involving journalists and archivists, agronomists and scientists, and bottlers and distillers, was assembled. Details of the distilling process were scripted, its history was researched and collected, and chemical analysis was conducted and documented.").

need[ed] to agree to some minimum standards related to Feni while not excluding or marginalising the rich diversity and tradition of Feni-distilling."[87]

The Feni narrative demonstrates many of the basic issues in establishing a protected GI to benefit rural farmers, workers, and families. For example, although the process for preparing the GI application was elaborate and *apparently* inclusive, at the end of the day most Feni *distillers* did not know about the application (as compared to most Feni *bottlers*, who consolidate supply from individual distillers).[88] The decision to use the name "Feni" but exclude coconut Feni from the GI definition means, as Rangnekar says, a "loss of history and practice [that] is not entirely easy."[89] It also likely means consumer confusion going forward.[90]

Aspects of the Feni GI definition exclude a substantial number of distillers[91] while the permissible sourcing of cashew apples from *anywhere*[92] may, over the long term, work to the benefit of Goan distillers and bottlers, but to the detriment of Goan farm labor. On the other hand, Feni distribution channels suggest that the benefits of the GI might accrue disproportionately to *bottlers* who can send Feni beyond Goa's borders instead of individual *distillers* who tend to supply bars, tavernas, and restaurants.[93] Indeed, this is implicit in the idea of Feni being "launched as a global liquor" like tequila.[94] The different interests and involvement of Feni

[87] *Id.* at 8.

[88] *Id.* at 35 ("most distillers were not involved in the GI debate in Goa. For that matter, a mere 2% confirmed knowledge about the GI application in comparison to over 80% of bottlers").

[89] *Id.* at 31.

[90] For example, one website currently describes coconut Feni in detail and says "Feni has got the status of Geographical Indication (GI)." In smaller print, the webpage mentions that the GI registration is only for cashew apple Feni and since that is the only time cashew apple Feni is mentioned, a reader might easily think all GI Feni is coconut. *See Goan Fenny/Feni*, Indian Mirror, www.indianmirror.com/culture/indian-specialties/Goanfeni.html (last visited May 12, 2016).

[91] For example, in his fieldwork Rangnekar concludes that "the most popular level" of alcoholic content for Feni "lies outside the GI specifications." Rangnekar, *Case Study of Feni*, *supra* note 78, at 49.

[92] *Id.* at 42 (noting that the "lack of clarity on the geographic origin of cashew apples" shows the "tacit acceptance of the practice of cashew apples being transported from beyond Goa's borders" and that this practice might already be necessary to meet local demand). *See also id.* at 9.

[93] *Id.* at 37. As a 2012 report says, "[a]round three-fourths of the distillers sell their produce to bars directly." Raunaq Sahu, *The Goan Feni Industry: Challenges*, The Centre for Civil Society, CCS Working Paper No. 261 at 4 (2012) available at http://ccs.in/internship_papers/2012/261_feni-industry_raunaq-sahu.pdf [Sahu's report appears to have been written under an internship program, i.e., the author may be a student].

[94] Rangnekar, *Case Study of Feni*, *supra* note 78, at 40. The Goa activists pursuing the GI protection referred to Tequila as "an example to emulate." Id. at 42.

distillers and Feni bottlers also reflect educational and socioeconomic differences: less than 8 percent of distillers completed their high school education but over 85 percent of bottlers did.[95]

Finally – as I have emphasized earlier in this chapter – the mere creation of the GI protection does not establish *demand* for the product: Rangnekar concludes that the export market is currently limited to "Goa's diaspora" and the reputation of Feni – promulgated in tourist books on Goa – as a local "fire water" means that "the tourist will be an unreliable and unlikely ambassador for a future export market."[96] This is a real challenge because Feni production had already been in decline prior to the GI registration – despite otherwise growing alcohol consumption in India.

The question is whether GI status can *help* reverse that decline over time. As one Indian observer asked in 2012, "[w]hy hasn't the Goan feni industry been able to grow, despite it being granted the GI status?"[97] As of 2013, Feni distiller Gurudatta Bhakta concluded, "[t]he GI has not helped much in the promotion of cashew feni."[98] One major reason appears to be other Indian regulations hampering Feni sales *in India* outside Goa state.[99] But the broader reason is that GI status itself only helps when there is a commitment to building the product's reputation through improvement of product quality, consistent production (both of which may undermine traditional practices and biodiversity), and promotion. As one person central to the Goan Feni industry said, "It is now up to us as to how we take this forward."[100]

95 Sahu, *supra* note 93, at 5. 96 Rangnekar, *Case Study of Feni*, *supra* note 78, at 50.

97 Sahu, *supra* note 93, at 1. Chandu Gopalakrishnan, *Hic! Feni Fights to Regain Turf in Goa*, Economic Times of India, July 1, 2010 ("But even after obtaining the GI status, production of feni continues to decline, putting in danger the already-meagre export prospects") available at http://articles.economictimes.indiatimes.com/2010–07-01/news/28392598_1_feni-gurudatta-bhakta-cashew-apple. But in fairness that comment is made only one year after GI status.

98 As quoted in Joseph Zuzarte, *The Rise of Cashew Feni*, Streets, March 14, 2013, available at http://goastreets.com/the-heady-rise-of-cashew-feni/.

99 Sahu, *supra* note 93, at 5. Joseph Zuzarte, *GI-certified Cashew Feni Still "Legal" only in Goa*, The Times of India, April 4, 2013 (reporting that because of Feni's "country liquor" classification "[f]our years after it received a geographical indication (GI) certificate cashew Feni can still not be sold legally in other parts of the country") available at http://timesofindia.indiatimes.com/city/goa/GI-certified-cashew-feni-still-legal-only-in-Goa/articleshow/19369766.cms. The Goan government was seeking such a reclassification as of 2016.

100 Zuzarte, *The Rise of Cashew Feni*, *supra* note 98 quoting Mac Vaz, a marketer of Feni. Vaz spoke of the need for "the industry [to] gain[s] the consumers' trust and for this we also need to protect ourselves from those few within the industry who consistently weaken and tamper with the quality of the beverage for fast and greater money."

5.3 *Some Observations on Papua New Guinea Coffee*

In her 2012 book, *From Modern Production to Imagined Primitive: The Social World of Coffee from Papua New Guinea*, anthropologist Paige West has provided us with a rich account of the socioeconomics of coffee in one of Asia's least developed regions.[101] In many ways, coffee production in the Highlands of Papua New Guinea is the opposite of Feni production in Goa. The Feni GI story happens in a comparatively rich and sophisticated polity (Goa state) in a mega-state with a sophisticated and robust legal system (India); as emblematic as Feni might be of Goa, the alcohol's production is not a dominant element of the local economy.

In contrast, coffee production in Papua New Guinea occurs in a country with a very small population and lacking a legal and policy infrastructure on par with that of the Indian subcontinent. More importantly, unlike Feni, coffee production *is the* economy for the Highlands of Papua New Guinea. While extractive industries are important to Papua New Guinea exports, "coffee is the only [Papua New Guinea] export commodity owned and operated by the local people,"[102] and coffee production is the most significant source of income for most people in the Highlands of Papua New Guinea.[103] According to West, "[b]etween 86 and 89 percent of coffee grown in PNG is 'smallholder' coffee, grown by landowners who live in relatively rural settings with small family-owned and family-operated coffee gardens."[104]

Not surprisingly, there have been efforts to de-commodify Papua New Guinea coffee along many of the marketing metrics identified above. Single-origin Papua New Guinea coffee is definitely present in the United States market: as of 2016, Peet's Coffee sells "New Guinea Highlands" coffee; the Coffee Bean and Tea Leaf chain offers both "organic Papua New Guinea" and "Papua New Guinea Sigri Estate" coffees; and Amazon carries Papua New Guinea coffees from at least half a dozen smaller roasters with many of these labeled as organic, fair trade, or "direct trade."[105] It would be much more

[101] West, *supra* note 37, at 148. [102] *Id.* at 10.

[103] *Id.* at 110–11. *See also, Coffee: A Major PNG Export*, *supra* note 51 ("[i]t is estimated that 2.5 million Papua New Guineans rely on coffee as their main source of income").

[104] West, *supra* note 37, at 7.

[105] In a May 15, 2016, survey of the Amazon website, companies marketing Papua New Guinea coffees included Camano Island Coffee Roasters, Clipper, CoffeeAM, Coffee Bean Direct, Heirloom Coffee LLC, Lavanta Coffee Roasters, and RhoadsRoast Coffees. The Camano Island, Clipper, and Heirloom companies offered organic Papua New Guinea coffees; Clipper and Lavanta offered fair trade or "direct trade" products. Another website, pngcoffee.com, offers "exclusive, rare organic coffees from Papua New Guinea." www.pngcoffee.com/about.html (last visited May 4, 2016).

difficult to determine what amounts, if any, of organic or fair trade Papua New Guinea coffees are going into blends like Starbucks "Estima" fair trade or "Yukon" organic coffees.

From her anthropologist's perspective, West sees these different labeling schemes as all aimed at giving Papua New Guinea coffee "a set of meanings that distinguish it from other coffees"[106] because "[c]onsumers are willing to pay more for coffee that has a particular story or a particular history."[107] West is direct in her conclusion about how both fair trade and geographic origin marketing work: "[w]ith certified and single-origin coffees the images used to sell the products are also manipulated to make consumers feel as if they are also making other people's lives better through the act of buying."[108]

Again, the situation with Papua New Guinea coffee reinforces some basic truths about the potential for GIs as against the spectrum of claims made by GI advocates. First, West concludes that while *most* Papua New Guinea coffee production comes from small individual farms, *better*-quality coffee comes from the larger, more industrial, less "traditional" sources of production.[109] In other words, whatever demand exists for Papua New Guinea coffee is *not* a function of small-batch, artisanal production. Second, any level of legal protection of the GI does not matter if the GI has no reputation with consumers – and it may be that Papua New Guinea is simply not that well known.[110] Third, even among those who know Papua New Guinea coffee, unless the coffee has a reputation for distinctiveness or excellence[111] the GI

106 West, *supra* note 37, at 13. 107 *Id.* at 17. 108 *Id.* at 25.

109 *Id.* at 142 ("Without the blending that coffee buyers and factories undertake, the coffee grown in villages would have no value on the market. According to factory owners in Goroka, village-processed coffee is too wet, and much of it has been stored improperly at airstrips waiting for planes, causing it to develop a musty smell and taste. The factories . . . mix the musty coffee with properly processed green bean from well-run plantations so that it can be sold."). *Id.* at 168–69 (details on factory-processed Papua New Guinea coffee being superior to what is partially processed by villagers). *See also* Wikipedia, *Coffee Production in Papua New Guinea* ("the coffee grown by the small farmers, which is organically grown, on occasions, do not match with the quality of the estate grown coffee"), available at https://en.wikipedia.org/wiki/Coffee_production_in_Papua_New_Guinea (last visited May 4, 2016).

110 West, *supra* note 37, at 230 (describing interviews of 100 Columbia University students born between 1983 and 1989 of which 48 percent "had no idea that Papua New Guinea produced coffee at all").

111 Coffee connoisseurs are often critical or unenthusiastic about Papua New Guinea coffees. *See, e.g.*, "Papua New Guinea," Sweet Maria's Coffee Library (offering many criticisms and that generally "[t]he main problems in PNG come with poor coffee processing and poor dry-milling"), available at http://legacy.sweetmarias.com/library/content/papua-new-guinea-1 (last visited May 4, 2016).

may not carry a significant price premium – in which case emphasis on marketing through organic and fair trade channels *may* produce better results.[112] Not surprisingly, in 250-plus pages describing Papua New Guinea Highlands coffee production, West devotes almost no words to origin certification for Papua New Guinea coffee; at the local level, enhanced legal protection of Papua New Guinea as a GI is simply not seen as a priority to increase economic rents for Papua New Guinea coffee farmers.

6 CONCLUSION

GIs are a policy tool that can, *in some circumstances*, improve conditions in rural areas through price premiums paid for GI-labeled products. But the most important word in that sentence is "can," not "will" or "do." Instead of the simplistic promotion one hears from GI advocates, the United Nations Economic Commission for Africa's 2016 study on IP policy struck the right tone:

> Geographical indication protection may be extended under collective trademarks, through a special geographical indication regime, or through disciplines on unfair competition. For some local agricultural products that have niche markets and high-value customers, geographical indication protection may add value and generate economic benefits in certain regions. However, increased geographical indication protection does not itself guarantee better market access unless quality is assured by, for example, producers' complying with importing countries' sanitary, phytosanitary and other quality regulations. Moreover, extended geographical indication protection could restrict local production of products that infringe foreign geographical indications. Therefore, a full cost-benefit analysis must inform the design of the national geographical indication regime.[113]

That conclusion for African countries applies with equal force to the rural areas of Asia, Oceania, and the Americas. Those seeking to help de-commodify foodstuffs produced in developing countries must carefully examine each situation, including looking at the comparative costs and benefits that might accrue from fair trade, organic, or other labeling schemes. In short, the promise of geographical indications may be real – but it is a limited promise, not a money-back guarantee.

112 *Coffee: A Major PNG Export*, *supra* note 51 ("Organic certification is considered the quickest and easiest way of adding value to [Papua New Guinea] coffee . . . This certification, plus the sale of coffee under the internationally recognised Fairtrade brand, has the potential to enable growers to achieve higher incomes.").

113 UNECA, Innovation, Competition, and Regional Integration, *supra* note 1, at 68.