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Geographical Indications:
A result of European
protectionism?

Master thesis
30 credits

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European Community Law
Intellectual Property Law

Spring 2009

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Summary

This thesis addresses the legal protection afforded to a new separate branch of intellectual property law commonly referred to as geographical indications.

Simply put a geographical indication is a label of origin designed to protect goods originating from a particular area with specific qualities connected to the region in question. Protection is granted for the whole region letting any company within the area make use of the protected name as long as it fulfils the stipulated criteria.

A great deal of controversy surrounds this type of intellectual property. Although the TRIPs Agreement has solved some issues by defining the concept and trying to establish some common standards, much is yet left unresolved.

Countries differ in their attitudes towards geographical indications depending to a large degree on their economic interests. The European Union has proved to be a strong force in promoting geographical indications, with countries such as France and Spain in the forefront. Countries with less strong cultural traditions in the agricultural sector are sceptical to the concept of geographical indications. The United States claim that the European Union's behaviour is protectionistic and has the effect of hindering free trade.

The thesis focuses on the European Union and its attitude towards geographical indications. A geographical indication creates a right capable of restricting a country's exports and imports. This goes against the concept of "*free movement of goods*", one of the four freedoms establishing the internal market. Through analysing adopted regulations and the European Court of Justice's rulings, the conflict between the creation of internal market and geographical indications becomes apparent.

The European Union has, through various regulations and directives created a strong form of protection for geographical indications. When interpreting the legal scope of the protection the ECJ has proved to be supportive of this intellectual property, choosing to protect it, thereby effectively restricting the free movement of goods.

As discussed during the analysis, it can be argued that the ECJ is being overly protective, extending the scope of geographical indication protection too far. It has overstepped the boundaries by including translated names, non-essential stages of production and names that have become generic. In order to be successful in establishing a global system of protection, the EU will have to retrace some steps realising the importance of free movement of goods and accept that countries around the world have varying incentives.

Sammanfattning

Den här uppsatsen handlar om det legala rättsskydd som givits till en ny form av immaterialrätt vanligen kallad geografiska ursprungsbeteckningar. Enkelt uttryckt är en geografisk ursprungsbeteckning en markering av ursprung utvecklat för att skydda varor som härstammar från ett specificerat område med särskilda kvaliteter knutna till det skyddade området. Skyddet ges för hela regionen och gör det möjligt för alla företag inom området att använda det skyddade namnet så länge de uppfyller de angivna kraven.

Geografiska ursprungsbeteckningar är långt ifrån globalt accepterade och har under en längre tid varit föremål för internationell debatt. Trots att TRIPs-avtalet har definierat konceptet och försökt etablera några gemensamma standarder, kvarstår många olösta frågor.

Länders attityd gentemot geografiska ursprungsbeteckningar skiljer sig åt till en hög grad beroende på deras ekonomiska intressen. Den Europeiska Unionen har visat sig vara en stark drivkraft i arbetet för ett utökat skydd, med länder som Frankrike och Spanien i förgrunden. Länder med färre kulturella traditioner inom agrikultorsektorn är skeptiska gentemot det geografiska ursprungsbeteckningsskyddet. De Förenade Staterna hävdar att den Europeiska Unionen uppvisar ett protektionistiskt beteende som kan hindra den fria rörligheten av varor.

Den här uppsatsen lägger tonvikt på den Europeiska Unionen och dess inställning gentemot geografiska ursprungsbeteckningar. En geografisk ursprungsbeteckning skapar en rättighet med förmågan att begränsa ett lands export- och importmöjligheter. Detta krockar med den Europeiska Unionens grundläggande målsättning: att upprätta en inre marknad där bland annat *"fri rörlighet för varor"* kan säkerställas. Genom att analysera antagna förordningar och EG-domstolens domar, blir konflikten mellan upprättandet av en inre marknad och skyddet för geografiska ursprungsbeteckningar synbar.

Den Europeiska Unionen har, genom åtskilliga förordningar och direktiv skapat ett starkt skydd för geografiska ursprungsbeteckningar. Vid tolkning av den legala omfattningen av skyddet har EG-domstolen visat sitt tydliga stöd för denna form av immaterialrätt och därigenom begränsat den fria rörligheten av varor.

Som framkommer av analysen, synes EG-domstolen gå för långt i sitt skydd av geografiska ursprungsbeteckningar. Den har överskridit gränserna genom att inkludera översatta namn, icke-väsentliga produktionsstadier och namn som har blivit generiska till sin natur. För att kunna lyckas med sin målsättning att skapa ett globalt rättsskyddssystem, behöver EU ta några steg tillbaka, inse vikten av fri rörlighet av varor och acceptera att länder runt om i världen har olika agendor.

Preface

I would like to start by thanking my supervisor Henrik Norinder for both inspiration and guidance during this long process. It is amazing what an encouraging word at the right time can achieve.

Thanks to my favourite classmates Selma, Micke R and Micke S. It is hard to imagine sitting through all those lectures without you there to liven things up. I will always be grateful to the three of you for challenging my prejudices about law students!

I would also like to thank my supportive and loving family. It gives me great comfort in knowing that wherever I may be in the future, you will always be just a phone call away.

Last, but definitely not least, I want to thank Mikael for his love and patience throughout the writing of this thesis realising that I have - at times - been quite a handful!

Lund, 25 May 2009

Ingrid Lidgard

Abbreviations

EC	European Community
ECJ	European Court of Justice
EC Treaty	European Community Treaty
EU	European Union
GI	Geographical Indication
IP	Intellectual Property
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
TRIPs Agreement	Trade-Related Aspects of Intellectual Property Rights Agreement
UK	United Kingdom
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

1 Introduction

*“What’s in a name? That which we call a rose,
By any other name would smell as sweet.”*
– Romeo and Juliet (II, ii, 1-2)

During the last few years, an increasing number of countries have begun to realise the value of protecting a product through indicating its origin. Consumers grow accustomed to goods from a specific region, expecting a certain standard and perhaps even a mode of production that is unique to that particular area. There is a high economic value in marking these goods with a distinctive sign.

For a long time, trademarks have been the optimal way for companies to protect their products and through their trademark build a good and solid reputation. This specific intellectual property right is well established throughout the world and its existence is not disputed.

When dealing with indications of origin, one discovers many similarities to trademarks, but it is in fact its own type of intellectual property. Its existence dates back to the Middle Ages, but the first international conventions linking products to place of origin were negotiated during the industrial revolution.

In no other area of intellectual property law are the definitions as diverse as when dealing with indication of origin. Several different conventions throughout the years have established their own frameworks, both when it comes to scope and when dealing with enforcement measures.

Today the TRIPs Agreement has solved some of these issues by defining the concept of a geographical indication. This agreement is one of the largest multilateral treaties with over 150 signatories. Despite this, a great deal of controversy still surrounds indications of origin.

Different countries have different approaches to this type of intellectual property right depending to a large degree on their economic interests. The European Union has proved to be a strong force in promoting geographical indications, with countries such as France and Spain at the forefront. It is no surprise that countries with strong traditions in both wine and cheese making approve of the protection indications of origin provide. Other parts of the world are less convinced. The United States regards geographical indications with a considerable amount of scepticism, claiming that the European Union is hindering free trade and acting in such a way as to protect itself, not looking at the effect on the rest of the world.

The European Union is a strong advocate of free movement of goods. It is one of the four freedoms enshrined in Article 14 EC establishing the internal

market. The European Court of Justice has been active in regulating the internal market through case law. Without going into detail, it can suffice to say that the ECJ has been very strict in allowing countries to have national legislation that amounts to quantitative restrictions hindering the free flow of goods or measures having equivalent effect.

It would seem that the Union's aim to establish an internal market with a free flow of goods and the promotion of indications of geographical origin are at odds. This thesis will examine this presumable conflict, analyse relevant case law and present a possible conclusion ascertaining whether a proper balance between the two has been struck.

1.1 Subject and Purpose

This thesis sets out to discover how the European Union, with the ECJ leading the way, regards geographical indications when comparing this type of protection against the wish to create an internal market free from trade restrictions. To create a fuller picture, EU's approach will then be applied to the global market in order to determine the international effects. This requires a review of three particular areas:

- What international and European legislation exists relating to geographical indications (GIs) and how has it evolved?
- Does the ECJ disregard the principle of free movement of goods when trying to protect GIs? Are other countries around the world right in suggesting that the EU is protecting itself, creating a barrier to trade towards countries outside the EU?
- Will the Doha Round be concluded in the near future, bringing about changes in the attitude towards GIs? Should the protection be altered?

1.2 Method and Materials

This thesis is written using a traditional, dogmatic method. The method involves a review of international law and conventions concerning geographical indications, relevant European Community law and case law from the European Court of Justice. Doctrine and articles published in reliable, scholarly periodicals have been used for further information and guidance on how to analyse the current legal situation.

Due to the controversy surrounding the existence of geographical indications there are a limited number of textbooks dedicated to this particular area. There are, in return, numerous articles discussing this form of intellectual property. When selecting the material, it was necessary to make delimitations, not only to relevance, but also to the date of publication. The legislation concerning geographical indications is continuously changing and articles written before 2000 run the risk of being outdated.

1.3 Delimitations

The focus of this thesis is the European Union and its attitude towards geographical indications. To get a more complete background it is however necessary to describe the international climate. The international treaties on this subject will therefore be introduced, giving a brief summary of their aim and scope. In addition, the international debate surrounding geographical indications and the current Doha Round will be mentioned.

The European Union has several regulations and directives establishing GI protection. For the purpose of this thesis, Regulation 2081/92 on agricultural products and foodstuffs will be used to describe the correlation between free movement of goods and geographical indications. Laws immediately associated with this Regulation will also appear throughout the thesis. All other systems in place providing protection for remaining goods, like wine and spirits, are irrelevant for the purpose of this thesis, and are therefore omitted to avoid confusion.

When researching geographical indications one notices the similarity to trademarks. Due to the many traits they have in common, some advocate protecting GIs through a trademark system. This idea will not be discussed in any detail, although it is an interesting approach and merits further research.

Regulation 2081/92 describes the relationship between geographical indications and trademarks in Article 14¹. It bars a trademark from being registered if the name is already protected by the Regulation. If a trademark using a geographical name already exists and it is subsequently afforded protection as a geographical indication, the main rule is to allow the two to co-exist. This approach is not accepted in other parts of the world. The United States for example, applies the “*first in time, first in right*” principle. The conflict between trademarks and geographical indications, including the discussion regarding if a trademark can negatively affect or destroy a geographical indication, will not be touched upon.

In order to keep the thesis within prescribed limits, detailed accounts on both procedural and enforcement measures will be excluded. From an international perspective, it is remarkable that disagreements over TRIPs can be solved through a dispute resolution mechanism. However, the aim of this thesis is to analyse the GI debate, not to discuss through what means a compromise might be reached.

Economical and political aspects play a considerable part in countries approach to geographical indications. Reasoning along this line will appear in the analysis, but are excluded from the main part allowing the thesis to focus on the legal ramifications.

¹ Now Regulation 510/2006, Article 14

1.4 Disposition

The introductory chapter gives the reader a first insight into the topic of this thesis, explaining the subject and purpose, as well as the method and material used during the writing process.

Chapter 2 consists of a brief overview of the concept of geographical indications, its history and development focusing on the international aspect. The ongoing Doha Round will be discussed, highlighting the different opinions.

Chapters 3 through 5 outline the European situation.

Chapter 3 delineates the scope of the European protection surrounding geographical indications and designations of origin.

The following chapter focuses on the European Union's notion of free movement of goods describing its evolution by pointing at relevant legislation and case law.

In Chapter 5, important cases involving geographical indications in relationship with free movement of goods will be studied and discussed.

An analysis of the present legal situation follows in chapter 6, assessing the questions posed at the beginning of the thesis.

In the seventh and final chapter a conclusion will be drawn, pointing to possible future developments in the field of intellectual property rights as regards to geographical indications.

1.5 Definitions

In the following chapter, the protection given to indications of origin will be examined. It is important to clarify that the legal terminology surrounding this specific type of protection varies depending on which multilateral agreement is used. Despite this, there is a need to choose a term that will cover them all, a name often used in discussions on international trade and intellectual property law – **geographical indications**.

When discussing specific agreements, laws and regulations the terminology used in the respective intellectual property law instruments will of course appear, to give a more accurate picture of the legal landscape. In all other situations, during the legal analysis and conclusion, the term geographical indications will suffice.

2 Geographical indications: international development

When hearing the term intellectual property the first things that usually come to mind are trademarks, patents and copyright. There is, however, a special, interesting area of intellectual property law that protects what is commonly known as a **geographical indication**. It is a label of origin² designed to protect goods originating from a particular area with certain specific qualities connected to the region in question.

Protection is granted for the whole region, all producers within the area are free to make use of the geographical indication as long as they fulfil the criteria stipulated. This makes geographical indications differ from other intellectual property rights.

At first glance, a GI seems to have a lot in common with trademarks. They are both concerned with goodwill and they both indicate origin, albeit trademarks describe the commercial origin of goods instead of the geographical origin. This is where the similarities end, however. A trademark distinguishes products or services from other competitors. It has a clear distinguishable rights holder and it can be licensed to third parties. Geographical indications on the other hand describe real places and can be used by all traders in the particular region for products originating from that location. It is not owned by an individual – instead it is connected to the geographical region.³

2.1 Historical background

The concept of geographical indications is not a novel one. During the Middle Ages tradesmen such as carpenters, boat builders and potters marked their goods with signs to distinguish from other similar products.⁴ This not only served to avoid confusion but was also a good way to protect and enhance their reputations as skilled workers. An example is the tapestry manufacturers from central Europe that marked their products with indications of city-origin during the 12th century.⁵

² Posa, Ivan Mark, *Extended Protection of Geographical Indications Beyond Wines and Spirits: the TRIPs Council Negotiations*, part of *Skyddade geografiska beteckningar - aktuella utvecklingar och konflikter*, Stockholm, 2004, p 3

³ Resinek, Nina, *Geographical indications and trademarks: coexistence or "first in time, first in right" principle*, *European Intellectual Property Review*, 2007, p 448

⁴ Posa, Ivan Mark, *fn 2*, p 5

⁵ Agdomar, Michelle, *Removing the Greek from Feta and adding Korbel to Champagne: the paradox of Geographical Indications in International Law*, *Fordham Intellectual Property, Media and Entertainment Law Journal*, 2008, p 563

In no other area of IP law is the scope of protection so varied as when dealing with GIs. In addition, different conventions and agreements use different legal terminology that adds to the confusion. It is important to understand these different approaches in order to fully understand the system in place today. In the following section, the various agreements will be discussed.

2.2 International Treaties

The first multilateral agreement on intellectual property rights that connected products with their place of origin was the *Paris Convention of 1883 for the Protection of Industrial Property*.⁶ It introduced the concept of **indications of source** as a way to protect certain goods from misuse. Its scope is fairly limited, focusing mainly on consumer protection leaving out other considerations, such as the producer's rights and reputation.

A second agreement followed within a decade, mirroring the Paris Convention to a large extent. It was named the *Madrid Agreement of 1891 for the repression of false or deceptive indications of source on goods*.⁷ It was a result of several signatories to the Paris Convention joining forces with the aim to enhance the protection of goods with an indication of source. A significant improvement was that the Madrid Agreement extended the scope to include deceptive indications. This made indications that are literally true but nevertheless misleading, subject to the same rules as false indications.

There is no definition of the term **indications of source** in either agreement. Article 1(1) of the Madrid Agreement contains a section that helps explain what is meant:

All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.

For further clarification, it is necessary to look at how the WIPO, the organization in charge of administering both agreements, have interpreted the term. Indications of source only require that the indication is used to give information about the geographic location the product originates from. There are no further criteria, demanding particular quality, reputation or characteristic of the product itself. Examples of indications of source

⁶ Paris Convention for the Protection of Industrial Property, March 20, 1883, available at http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf (090511)

⁷ Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, April 14, 1891, available at http://www.wipo.int/export/sites/www/treaties/en/ip/madrid/pdf/trtdocs_wo032.pdf (090511)

include the mention, on a product, the name of a country, or indications such as “made in France” or “produced in Denmark”.⁸

Both agreements focused on border controls, seizures on imports, as enforcement measures to prevent improper use of indication of source on goods.⁹

When it comes to the question of indications that have become generic, this decision was up to the national courts in each country. This made the Madrid Agreement less potent due to the fact that countries could come to different conclusions based on their own specific interests. Article 4 of the Madrid Agreement excluded wine from this general rule making it a noteworthy exception.

Despite the limited success of these early treaties, they represent significant steps towards a protection for products with a reputation based on their origin. They are both still in force and the Paris Convention is open to all states.¹⁰ To this date, it has 173 contracting parties. The Madrid Agreement is, in comparison, only open to states already party to the Paris Convention, which has resulted in no more than 35 contracting parties.¹¹

It would take another seventy years before a new treaty protecting indications of origin was drafted. The *Lisbon Agreement of 31 October 1958 for the protection of Appellations of Origin and their International Registration*¹² introduced a special category of indications of source, namely **appellations of origin**. The framework was based on the existing French national system that dealt with cheese, wines and spirits.¹³

Appellation of origin is defined in Article 2:

(1) In this Agreement, "appellation of origin" means the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

(2) The country of origin is the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation.

⁸ Posa, Ivan Mark, *fn 2*, p 6

⁹ See Article 10(1) Paris Convention and Article 1(1) Madrid Agreement

¹⁰ http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (090515)

¹¹ http://www.wipo.int/treaties/en/ip/madrid/summary_madrid_source.html (090515)

¹² Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, October 31, 1958, available at

http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.htm (090515)

¹³ E.g. Article L.115-1 of the French Consumer Code, Posa, Mark Ivan, *fn 2*, p 7

As can be seen from the legal text above, appellations must have certain qualities and characteristics resulting exclusively from its geographical environment. This made it a more sophisticated law instrument than the previous indication of source as it gave the manufacturers more effective protection while at the same time giving consumers more reliable information about the product. A problem is that the scope is limited to products that use the name of the geographical location such as Bordeaux for the famous wine or Tequila for the strong spirit. It excludes the Indian rice known as Basmati since, even though it is a well known mark with a good reputation, Basmati does not, with its name, indicate the region in which it is produced.¹⁴

Another shortcoming of the Lisbon Agreement is that it could only provide enforcement measures to appellations already protected as such under the national law of the country of origin. If a product had been afforded another kind of protection, through competition law for example, it would be disqualified from the Lisbon enforcement system.¹⁵

Despite all this, the Lisbon Agreement is still in force and has registered over 844 appellations of origin since it entered into force on November 25th 1966. Up to this date, there are 26 contracting parties to the Lisbon Agreement.¹⁶

All three abovementioned treaties are administered by the World Intellectual Property Organization, (the WIPO) which is a specialised agency of the United Nations. Its aim is to promote the protection of intellectual property rights throughout the world and establish a functioning and balanced international intellectual property rights system.¹⁷

2.3 TRIPs

The most important international agreement is known as TRIPs, which is short for the *Trade-Related Aspects of Intellectual Property Rights Agreement*.¹⁸ It was a result of extensive multinational negotiations at the Uruguay Round¹⁹ and signed by 110 world-trade organisation members in Marrakech on April 15th 1994.

TRIPs came into force on January 1st 1995 and is to date the most comprehensive multilateral agreement on intellectual property. The signatories all strived to create a harmonised international approach to

¹⁴ Posa, Ivan Mark, *fn 2*, p 8

¹⁵ *Id.*, p 8

¹⁶ http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=10&lang=en (090515)

¹⁷ http://www.wipo.int/about-wipo/en/what_is_wipo.html (090515)

¹⁸ The Agreement on trade related aspects of intellectual property right (TRIPs), Part II, Section 3, available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (090515)

¹⁹ The Uruguay Round lasted from 1986-1994 focusing on trade liberalisation

combat IPR abuses in a world where cross-border trade and commercial activity was increasing rapidly.

With regards to **geographical indications**, the agreement was a remarkable breakthrough considering it was the first time the world had agreed upon a definition of the term.

A definition of the concept is provided in Article 22.1:

Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

TRIPs allows for two types of geographical indication protection, one for wines and spirits and one for all remaining products. Article 23 of TRIPs gives wines and spirits a higher level of protection explicitly prohibiting the registration of a wine or spirit name with a false or inaccurate geographical indication. There is no need to establish that the name or sign actually misleads the public in order for it to be invalidated.

In comparison, Article 22 of TRIPs requires national courts and administrative authorities to decide whether the public is being misled by the use of a particular geographical indication. This opens up for a great deal of uncertainty, as the interpretation may vary from one country to another.²⁰

The European Union is therefore in favour of extending the scope of protection afforded to wine and spirits to include all products. This would eliminate the legal uncertainty creating a uniform, effective mode of protection. It is far from a globally accepted view and has become the focus of many debates between WTO members with opposing economic interests.²¹ In the following section, concerning the Doha Round, this conflict will be described in more detail.

Article 24 of TRIPs deals with exceptions to the protection provided for in Articles 22 and 23. The most important exceptions deal with similar GIs, prior trademarks and generic designations as explained below.

Geographical indications for wines and spirits used in a continuous manner in another country either (1) for at least 10 years prior to the conclusion of TRIPs or (2) in good faith prior to the same date are allowed to continue to exist in line with Article 24(4). This exception has not yet been put to the

²⁰ Göransson Norrsjö, Lena, *Indications of Geographical Origin as part of the Intellectual Property Law*, part of *Skyddade geografiska beteckningar - aktuella utvecklingar och konflikter*, Stockholm, 2004, p 69

²¹ Posa, Ivan Mark, *fn 2*, p 9

test and it is unlikely that it would be sanctioned by countries supporting GIs due to the risk of market confusion and dilution.²²

Article 24(5) lets a trademark comprising of a geographical indication escape invalidation as long as it was registered in good faith in the country concerned before TRIPs entered into force or before the GI was registered in its country of origin. This ensures that the new legal approach in TRIPs will not automatically take away prior and good faith trademark rights held by individuals. It aims to strike a necessary balance between geographical indications and trademarks.²³

A powerful exception relates to geographical indications that have become generic. If a geographical term has become associated with a particular product instead of with a geographical area, it cannot be afforded GI protection since consumers no longer perceive a link between the product and the identified region. It is up to each member country to determine if a term is generic based on how it is used and perceived within that country. This severely undermines the scope of Articles 22 and 23. The exception in Article 24(6) has often been cited by the United States in order to deny GI protection, especially when dealing with Article 23 relating to wines and spirits.²⁴ Examples of this include American-produced Champagne, Chablis and Burgundy, all hotly disputed by French winemakers.²⁵

It should be noted that TRIPs does not require members to protect geographical indications that are not protected in their country of origin. This can create problems for developing countries without legal systems that recognise local GIs that are in use within their own countries.²⁶ Any protection afforded by other countries is optional.²⁷

An important part of the TRIPs Agreement is the fact that disputes and conflicts of interest can be settled through the WTO's Dispute Settlement Body. This is a forum available to all WTO members locked in a dispute over geographical indications and their implementation.²⁸ This system has been used on several occasions and provides an excellent opportunity for countries all over the world to settle their differences.

One important complaint, which will be described in more detail later, was filed by the United States claiming that Regulation 2081/92 of the European Union was discriminatory and in violation of TRIPs. This allegation was based on the fact that the Regulation imposed more burdensome

²² *Id.*, p 17

²³ *Id.*, p 18

²⁴ Waggoner, Justin M., *Acquiring a European taste for Geographical Indications*, Brooklyn Journal of International Law, 2008, p 577

²⁵ Posa, Ivan Mark, *fn 2*, p 19

²⁶ *Id.*, p 19

²⁷ Waggoner, Justin M., *fn 24*, p 578

²⁸ Rules available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (090515)

requirements on foreign GIs seeking protection than it did for local European products.²⁹

Although the TRIPs Agreement sets out minimum standards it does not dictate the system that WTO members have to implement. This has resulted in a lack of uniformity and a variety of different frameworks.³⁰ Some countries protect GIs through separate sui generis systems, others use existing legal tools such as trademark laws and unfair competition rules to deal with GIs.³¹

2.4 The Doha Round: future negotiations

The geographical indication provisions in TRIPs represent a hard-fought compromise leaving several issues unresolved. In order to conclude TRIPs, the parties involved agreed to add statements in the relevant provisions that obligate the members to negotiate unresolved matters in the future.³²

There are three provisions in TRIPs that require future negotiations on geographical indications. First, in Article 23(4) member states are required to negotiate:

“the establishment of a multilateral system of notification and registration of geographical indications for wines”.

Secondly, Article 24(1) obligates member states to:

“enter into negotiations aimed at increasing the protection of individual geographical indications under article 23”.

Article 24 contains a number of paragraphs excluding certain matters from protection as geographical indications; these may not be used as a pretext for refusing to conduct negotiations.³³ Lastly, Article 24(2) demands ongoing reviews, conducted by the Council, regarding the implementation of the TRIPs provisions on geographical indications, including the abovementioned issues up for negotiation.

At the Fourth Ministerial Conference, held in Doha, Qatar in November 2001, the negotiations for a multilateral registration system for geographical indications for wines and spirits began. The Doha Declaration set a deadline for completing the discussions: the Fifth Ministerial Conference in 2003.

²⁹ Posa, Ivan Mark, *fn 2*, p 20, *See Panel Report, European Communities--Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/R (March 15, 2005)*

³⁰ Gutierrez, Eva, *Geographical Indicators: A unique European perspective on Intellectual Property*, Hastings International and Comparative Law Review, 2005, p 30

³¹ Göransson Norrsjö, Lena, *fn 20*, p 58

³² Waggoner, Justin M., *fn 24*, p 578

³³ Blakeney, Michael, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement*, Bath, 1997, p 73

The negotiations in Cancun, in 2003, did not conclude in a definitive result.³⁴ There have been several negotiating rounds since then, making little progress. The latest round of negotiations, in July 2008, broke down when the members failed to reach a compromise on agricultural import rules.

Apart from the discussion regarding the creation of a multilateral registration system, there is one other highly debated topic concerning geographical indications and TRIPs. Member states do not agree on whether to extend the heightened protection of wine and spirits to other goods.³⁵ As explained previously, the TRIPs Agreement affords a higher level of protection to geographical indications for wines and spirits compared to other products. This means they are protected even if there is no risk of misleading consumers or unfair competition.

The extension of protection for geographical indications is led by the European Union. Other countries oppose the move, like the United States, that considers the extension to be a display of European protectionism. It is afraid the regime will encourage monopolistic behaviour and hinder free trade. The battle is not between developed countries and developing countries, instead a line is drawn between “new world” countries such as the United States, Canada, Australia and several Latin American countries on one side and “old world” countries from Europe on the other side.³⁶

Discussions related to the extension of protection to other products besides wines and spirits is handled by the TRIPs Council in accordance with the Doha Declaration’s paragraph 12 on implementation issues. The negotiations themselves take place in the Trade Negotiations Committee and its subsidiaries and should have been concluded no later than January 1st 2005. Since this was not achieved, the negotiations are now taking place within the overall timetable for the Doha Round.³⁷

The debate on extension has focused on two different aspects, the merits of extension on the one hand and the procedure and mandate on the other.³⁸ The discussion in the TRIPs Council has also included the question of whether the relevant provisions of the TRIPs Agreement provide a mandate for extending coverage beyond wines and spirits. Although Article 23(4) stipulates a negotiations agenda, it does require discussions on the expansion of protection to other goods besides wines and spirits.³⁹ In papers circulated at the Ministerial Conference, member states have expressed different views. Countries such as Argentina, Australia, Canada and the United States hold that an extension could only be negotiated in the context

³⁴ Gutierrez, Eva, *fn 30*, p 37

³⁵ Waggoner, Justin M., *fn 24*, p 578

³⁶ *Id.*, p 574

³⁷ Wager, H., *Introduction to Geographical Indications and Recent Developments in the World Intellectual Property Organization and the World Trade Organization*, World Wide Symposium on Geographical Indications, 2003, WIPO/GEO/SFO/03/2 Rev. p 2

³⁸ Göransson Norrsjö, Lena, *fn 20*, p 72

³⁹ Waggoner, Justin M., *fn 24*, p 580

of a new Round. In contrast, countries mainly from Asia, Europe and Africa argue that there is a clear mandate to negotiate immediately.⁴⁰

It is clear that the European Union favour geographical indications and will go to lengths in order to support their existence. The countries in Europe have existed for a long time developing specific traditions that the EU have deemed worthy of protection. Countries such as France, with a variety of well-known wines and cheeses, have been the driving force behind GI legislation.⁴¹

The European Union would like to re-write parts of TRIPs creating stronger protection. The result of such an alteration would according to critics create:

*“a new sui generis form of protecting intellectual property rights which goes well beyond anything that has been done in other comparable intellectual property rights areas”.*⁴²

It would have an adverse effect on trademark owners, diminishing their rights. It would also lead to a new form of neo-colonialism by preventing Europe’s former territories from using terms that, within their region, have become generic. Another argument against changing TRIPs is that it would demand all WTO members to adopt a cumbersome, costly and bureaucratic system of GI protection, a system where the European Union are the obvious beneficiaries.⁴³

Advocates of an altered TRIPs suggest that their proposal would, among other things, be an instrument to stimulate quality and strengthen competitiveness, encouraging a more balanced distribution of added value and enhancing the wealth of right holders.⁴⁴

In 2003, just prior to the Cancun Ministerial Conference, the European Union produced a list of forty-one geographical names for which it sought protection under TRIPs as non-generic geographical indications. The list contained many famous names of wines and cheeses such as Champagne and Gorgonzola, names the EU wanted to recuperate. It is informally known as the “*claw-back list*”, heavily criticized by, among other countries, the United States.⁴⁵ As the negotiations during the Cancun Conference collapsed due to other matters, no progress was made on the topic of geographical indications; it is however unlikely that claw-back list would have been accepted.⁴⁶

⁴⁰ Göransson Norrsjö, Lena, *fn 20*, p 71-72

⁴¹ Posa, Ivan Mark, *fn 2*, p 7

⁴² Spencer, D., *A way forward for geographical indications, World Wide Symposium on Geographical indications*, San Francisco, 2003, WIPO/GEO/SFO/03/25, p 3

⁴³ *Id.*, p 3

⁴⁴ *Id.*, p 3

⁴⁵ Waggoner, Justin M., *fn 24*, pp 580-581

⁴⁶ See Torsen, Molly, *Apples and Oranges (and Wine): Why the International Conversation Regarding Geographical Indications is at a Standstill*, *Journal of the Patent and Trademark Society*, 2005, p 52

3 Geographical indications: European protection

The previous chapter outlined the scope of protection afforded geographical indications internationally and the issues that are currently debated on a global level. It is now time to turn to the European Union and examine how the GI legislation has evolved.

The EC Treaty⁴⁷ contains no provisions governing geographical indications. Before 1992, Member States provided different systems of protection. The existence of these systems was, in fact, incompatible with the fundamental freedoms, since the exclusive rights conferred affected the free movement of goods. Despite this, Article 30 of the EC Treaty allowed Member States to set their own limits resulting in quantitative restrictions, if the aim was to protect industrial and commercial property.

Today the Member States competence to set their own limits has ceased, as the European Union has introduced harmonising measures to guarantee protection. There are several regulations and directives dealing with GIs.

3.1 Secondary legislation

*Council Directive 79/112/EEC*⁴⁸ entitled the authorities of each Member State to prohibit trade in the mentioned products in order to protect industrial and commercial property rights, indications of source, designations of origin and to prevent unfair competition.

Although the Directive was designed to combat fraud, it did not properly protect geographical indications or safeguard consumers. Therefore, in 1992, the European Union established a unitary regulatory framework for dealing with geographical indications. *Council Regulation (EEC) No. 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs*⁴⁹ became binding for all Member States, harmonising the rules in an attempt to minimize unfair competition and enhance consumer protection.⁵⁰

⁴⁷ *European Union Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community*, Official Journal C 321 E/1

⁴⁸ COUNCIL DIRECTIVE 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer

⁴⁹ Hereinafter Regulation 2081/92

⁵⁰ Göransson Norrsjö, Lena, *fn 20*, p 61

Regulation 2081/92 has recently been replaced by Regulation 510/2006⁵¹, but due to the limited amount of alterations made, the old Regulation can still, and will, be used to describe the scope of protection.

Regulation 2081/92 offers far-reaching protection for a geographical name as it confers a collective monopoly over its commercial use upon a particular group of producers by reference to their geographical location.⁵²

The Regulation protects **designations of origin** as well as **geographical indications**, two concepts defined in Article 2:

(a) ‘designation of origin’ means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- *originating in that region, specific place or country,*
- *the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and*
- *the production, processing and preparation of which take place in the defined geographical area;*

(b) ‘geographical indication’ means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- *originating in that region, specific place or country, and*
- *which possesses a specific quality, reputation or other characteristics attributable to that geographical origin, and*
- *the production and/or processing and/or preparation of which take place in the defined geographical area.*

In order to register a geographical name the European Union first requires national recognition of the name and subsequent verification by the Commission. Rules on how to obtain a registration can be found in Articles 5 - 7.

In order to be eligible for protection the agricultural product or foodstuff must comply with a specification. Article 4(2) contains a list of features that need to be included in a product specification.

Once the competent authority in the relevant Member State has judged the application valid, it forwards it to the Commission. If all the requirements are fulfilled, the name along with the product specifications will be published in the *Official Journal of the European Communities*.

⁵¹ COUNCIL REGULATION (EC) No. 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs

⁵² Joined Cases C-465/02 and C-466/02, *Germany and Denmark v Commission (Feta)*, [2005] ECR I-09115, Opinion of Mr Advocate General Ruiz-Jarabo Colomer, paragraph 27

There is a period of six months following the date of publication where any national or legal person legitimately concerned may object to the proposed name. If it survives the examination and objection period, the Commission will register the geographical name as a **Protected Designation of Origin** or a **Protected Geographical Indication**. This registration allows producers in the newly protected region to mark their products with the appropriate acronym – PDO or PGI.

Perhaps more important than the marketing aspect is the protection this registration affords⁵³. It prohibits any direct or indirect commercial use of the protected name that exploits the reputation of the true GI. It hinders any misuse, imitation or evocation even if the unprotected product indicates its true origin, or where the name of the unprotected product is accompanied by an expression such “method”, “style” and “imitation”.⁵⁴ In addition to all this the Regulation covers a wide area by prohibiting any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product as well as any other practice liable to mislead the public as to the true origin of the product. This means that packaging, advertising material and imitation of a distinct smell can be proscribed.⁵⁵

Article 3 contains a negative delimitation, precluding the registration of certain names, such generic names and names that are likely to create confusion as to the actual place of origin of the product.

Generic names cannot be registered as they have lost their basic function, the link between the product and its origin have been lost, in other words the product is no longer identified as originating from a particular place. In order to judge whether a name has become generic, the Regulation offers certain guidelines, including the need to consider all factors. It is for instance important to examine the existing situation in several Member States – not just the one from where the name originates.

3.2 Updated legislation: Regulation 510/2006

As mentioned in the previous chapter, the United States initiated dispute settlement proceedings against the European Union at WTO level claiming that Regulation 2081/92 was biased. It contended that the regulatory regime established by the Regulation favoured geographical indications from Member States at the expense of GIs from other countries. It also maintained that the Regulation was unjust in its treatment of trademarks following registration of subsequent conflicting GIs.⁵⁶

⁵³ Article 13 of Regulation 2081/92, now replaced by Article 13 of Regulation 510/2006

⁵⁴ Kur, Annette, *Nothing but a GI thing: Geographical Indications under EU law*, Fordham Intellectual Property, Media and Entertainment Law Journal, 2007, p 1002

⁵⁵ O'Connor, Bernard, *Overview of the EC case law protecting Geographical Indications: the slicing of Parma ham and the grating of Grana Padano cheese*, European Intellectual Property Review, 2004, p 313

⁵⁶ Kur, Annette, *fn 54*, p 1002

The WTO panel responsible for settling the dispute concluded that the registration provisions in Regulation 2081/92 dealing with GIs originating from countries outside the EU were in violation of the national treatment principle of the TRIPs Agreement (Article 3) because they denied equal access to protection. As regards to the other part of the complaint, the panel rejected the notion of unjust treatment stating that the Regulation's requirement that names previously registered as trademarks must coexist with identical terms newly registered as GIs complied with the fair use provisions of the TRIPs Agreement.⁵⁷

In response to the WTO ruling, the EU adopted Regulation 510/2006⁵⁸ replacing the Regulation from 1992. The new Regulation does not differ much from its predecessor but it does introduce some new requirements concerning registration procedures for non-member states, effectively removing the hindrances to registration that existed in the previous Regulation. This means that Regulation 510/2006 now affords all geographical indications equal protection, regardless of their national origin.

Although the European Union had to change some parts of the Regulation, the ruling is still regarded as a victory. It proved that the WTO accepted the other parts of the Regulation, deeming the rules legitimate. This was an important recognition for the EU, as countries had previously rejected the Regulation claiming it to be contrary to TRIPs and therefore invalid.⁵⁹

Since Regulation 510/2006 has only been in force for a few years, the ECJ has not had many opportunities to rule on it. Nevertheless, case law originating from the previous Regulation is still valid, due to the similarities between the two Regulations. Such cases will appear throughout the thesis creating a picture of the legal situation today. They are, in addition, useful for the interpretation of Regulation 510/2006.

In addition to the mentioned Regulations on foodstuffs, the EU has also established separate protection for GIs relating to wine⁶⁰, spirits⁶¹ and mineral water⁶².

⁵⁷ See Panel Report, European Communities--Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/R (March 15, 2005) and Kur, Annette, *fn 54*, p 1004

⁵⁸ COUNCIL REGULATION (EC) No. 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs
⁵⁹ Agdomar, Michelle, *fn 5*, p 570

⁶⁰ COUNCIL REGULATION (EC) No. 1493/1999, of 17 May 1999 on the common organisation of the market in wine

⁶¹ REGULATION (EC) No. 110/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No. 1576/89

⁶² DIRECTIVE 96/70/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 October 1996 amending Council Directive 80/777/EEC on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters

4 EU: free movement of goods

In order to better understand EU case law defining the scope of geographical indications, it is first necessary to give a brief explanation of how the European Union is structured, clarifying its fundamental objectives.

The European Union is an economic and political union established by the Treaty of Maastricht in 1993. Although the Union itself is recent, it did not develop out of thin air, instead it evolved during several decades through various Communities and Treaties established in the aftermath of the Second World War. During this time period there was a strong desire to secure a lasting peace between all European nations and the origin of the Union is most often traced to the European Coal and Steel Community formed among six countries in 1951.⁶³

One of the most interesting features of the EU is the single market created through a standardised system of laws, applicable in all Member States, guaranteeing the “*four freedoms*”. The four freedoms include the free movement of goods, people, services and capital. Free movement of people includes both workers and establishment.⁶⁴

The goal is to create one market out of 27 Member States, facilitating trade by taking away barriers. Article 14 EC states that the Community shall adopt measures with the aim of progressively establishing the internal market, an area without internal frontiers.

4.1 The internal market: goods

The provisions on free movement of goods are designed to establish the basic principles of a customs union – where tariffs and quotas on trade between members are removed and a common tariff on goods coming from outside the union is agreed upon. This will allow the goods themselves to move freely within the Union and make sure that the most popular product will be successful irrespective of the country of origin.⁶⁵

Article 12 of the EC Treaty deals with the principle of non-discrimination. This is mainly used for people but it is also applicable to goods. It prohibits any discrimination on grounds of nationality.

A problem with creating the internal market is the Member States’ different economic and cultural backgrounds. All Member States have developed different mechanisms to protect and promote their local goods making it hard for neighbouring countries to get into their markets. Legislation on a

⁶³ Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases and Materials*, 4th ed., Oxford University Press, New York, 2008, pp 3-7

⁶⁴ *Id.*, pp 612-613

⁶⁵ *Id.*, p 637

European level through regulations and directives tries to solve this issue. Due to historical reasons, directives have proven to be the most successful and least obtrusive way to legislate in this field of law.⁶⁶ In addition, a substantial number of cases have been settled throughout the years, to regulate the specific areas without community legislation.

The issue of “*free movement of goods*” is dealt with in Articles 28-31 EC. Article 28 EC is one of the central provisions stating that:

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Quantitative restrictions are restrictions that hinder intra-state trade such as bans and quotas. Measures having an effect equivalent of quantitative restrictions are also prohibited which is important as it prevents Member States from using other innovative ways to restrict trade.

In an early case from the 1970s known as the *Dassonville*⁶⁷ case the Court decided on the interpretation of “*measures having equivalent effect*”. *Dassonville* imported Scotch whiskey into Belgium from France. The country of origin was UK but the goods had been placed legitimately on the French market. Belgium would not allow the whiskey to be imported without a certification from the UK authorities, a certification hard to get if the product had already been put in free circulation, as in this case. *Dassonville* argued that this constituted a measure having an effect equivalent to a quantitative restriction and the ECJ ruled in paragraph 5 of the judgment:

“All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”

This judgment demonstrates the Court’s wish to encourage and promote parallel import.

The same conclusion was drawn in the famous *Consten and Grundig*⁶⁸ that deals with competition law. In this case, Grundig had granted to Consten a sole distributorship for its electronic products in France, giving Consten absolute territorial protection. The ECJ found that this agreement had as its object the prevention, restriction or distortion of competition, making it incompatible with the common market according to Article 81 EC.

⁶⁶ *Id.*, p 629 ff

⁶⁷ Case 8/74, *Procureur du Roi v. Dassonville (Dassonville)*, [1974] ECR 837

⁶⁸ Cases 56 and 58/64, *Etablissements Consten SARL and Grundig-Verkaufs-Gmb v. Commission (Consten and Grundig)*, [1966] ECR 299

The ECJ has proved to take a very broad view of measures that are likely to hinder the free flow of goods – it has even decided that Article 28 EC can apply to rules that are not in themselves discriminatory.⁶⁹

Another landmark case is *Cassis de Dijon*⁷⁰ in which Germany would not allow the import of a consignment of Cassis de Dijon on the grounds that its insufficient alcoholic strength would confuse German consumers. The ECJ found that this constituted a restriction on the free movement of goods because of the high transaction costs involved in order to comply with the German legislation.

If it is lawfully produced and marketed in one Member State then the main rule is to allow it in all other Member States. This is known as mutual recognition. The ECJ has however established an exception to this rule. In the absence of common rules the Member State is allowed certain deviating rules relating to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. These are referred to as mandatory requirements and in order to be accepted they have to be non-discriminatory and proportionate. This requires the Member State to choose the least restrictive means as it will be judged using a rule of reason approach where the Member State has the burden of proof.

If a trade rule or policy is found to be within the prohibition of Article 28 EC it can sometimes escape through Article 30 EC:

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

When evaluating whether or not a trade rule can be saved by Article 30 it is important to start by making sure that it is not a disguised restriction or a means of arbitrary discrimination as stated in the second sentence. Once this is established, it will then be up to the Court to decide whether or not the challenged rule falls within one of the listed categories. The ECJ has over the years been very strict in its application of Article 30 and national rules will be heavily scrutinized before they are accepted.⁷¹

⁶⁹ Craig, de Búrca, *fn* 63, p 677

⁷⁰ Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649

⁷¹ Craig, de Búrca, *fn* 63, p 696

Two of the abovementioned cases, *Dassonville* and *Cassis de Dijon* will appear in chapter five describing how the protection on geographical indications has evolved. It is interesting to see how the ECJ has used parts of these older judgments to develop and establish a new system of protection.

4.2 Promotion of domestic products

There are several cases where the ECJ has ruled against actions of a State that promotes or favours domestic products to the detriment of competing importers.

*Buy Irish*⁷² is a case where the Irish government engaged itself in a campaign to promote the sale of domestic goods. It encouraged the use of “Buy Irish” symbols for goods manufactured in Ireland and organized a publicity campaign in favour of Irish goods. The Commission brought proceedings against Ireland, claiming that the campaign was caught by Article 28 EC as a measure having the equivalent effect of a quantitative restriction on import. The Irish government argued that it was not responsible for the campaign as it was conducted by a private entity; the Irish Goods Council and that the measures taken were not formally binding and therefore not within the scope of Article 28 EC.

The ECJ rebutted the arguments, looking to substance, not form. It considered the link between the Irish Goods Council and the government to be strong enough as to hold the government liable. It continued by stating that the measures taken were, regardless of the means used to implement them, intended to check the flow of import through promoting local goods. The fact that the campaign did not have the desired effect did not alter the outcome of the case.⁷³

*Commission v. United Kingdom*⁷⁴, a case following shortly after, dealt with a Member State’s rules on origin-marking of goods. The United Kingdom had national legislation requiring certain goods to be labelled with their country of origin in order to get access to the retail market. The Commission brought action against the United Kingdom claiming that this legislation constituted a measure having equivalent effect prohibited according to Article 28 EC. The UK government had two main arguments. First, it stated that the rule applied to imported and national products equally without distinction. Second, it maintained that the information relating to the indication of origin was a type of consumer protection justified in order to indicate the products quality.⁷⁵

⁷² Case 249/81, *Commission v. Ireland (Buy Irish)*, [1982] ECR 4005

⁷³ Craig, de Búrca, *fn* 63, p 672

⁷⁴ Case 207/83, *Commission v. United Kingdom*, [1985] ECR 1201

⁷⁵ Craig, de Búrca, *fn* 63, p 672

The ECJ rejected all the arguments considering it to be a measure having an effect equivalent to a quantitative restriction prohibited by Article 28 EC. It stated that the requirement of a label would increase production costs of imported goods making them more difficult to sell. The fact that the legislation also enabled the consumers to distinguish between imported and domestic goods would increase the likelihood that domestic goods would be preferred over imported ones. There were other rules prohibiting false indications of origin and they were considered sufficient to protect consumers, making this legislation of labelling unjustified.⁷⁶

The ECJ has accepted Member State legislation that contains rules on origin marking of goods only if they comply with certain conditions. According to a case named *Sekt-Weinbrand*⁷⁷ the goods have to possess certain qualities and characteristics which are due to their specific geographical origin.

In a more recent case from 2000, *Commission v. Germany*⁷⁸, the issue was a quality label reserved for products made in Germany (Markenqualität aus deutschen Landen). The German government sought to justify the restriction on free movement of goods on the grounds that the quality label was a geographical indication of source and would fall under the exception in Article 30 EC relating to “*the protection of industrial and commercial property*”.⁷⁹

Advocate General Jacobs considered the quality label capable of creating restrictions on intra-community trade prohibited by Article 28.⁸⁰ In paragraph 33 of the opinion, he explained that by linking the quality of the products with their German origin, this positive characterization might encourage consumers to purchase these products to the detriment of imported goods. His conclusion was not altered by the fact that the quality label had the aim, not only of endorsing national products, but also of improving their quality.

A justification under Article 30 EC was not accepted, as the quality label defined the area of origin as the whole of Germany and applied to a vast range of products. It could not be regarded as an indication of source falling within the scope of industrial and commercial property.

The Advocate General goes so far as to say in paragraph 43 of the Opinion:

“... in the absence of an allocation of the indication of source to a specified exclusive holder, it is ... inappropriate to speak in terms of intellectual property rights. In my view, the principles

⁷⁶ Case 207/83, *Commission v. United Kingdom*, [1985] ECR 1201, paragraphs 18-21

⁷⁷ Case 12/74, *Commission v. Germany (Sekt-Weinbrand)*, [1975] ECR 181

⁷⁸ Case C-325/00, *Commission v. Germany*, [2002] ECR I-09977

⁷⁹ Malcom, Jarvis, *Case C-325/00, Commission v. Germany, judgment of the Court of Justice of 5 November 2002, Full Court*, Common Market Law Review, 2003, p 718

⁸⁰ Case C-325/00, *Commission v. Germany*, ECR [2002] I-09977, Opinion of Mr Advocate General Jacobs

developed by the Court in the context of industrial and commercial property in the strict sense of alienable rights such as patents, trademarks and copyright are thus an inherently inappropriate framework for assessing the lawfulness of national legislation on simple geographical indications of source.”

The ECJ refrained from the intellectual property right discussion but in all other aspects it agreed with the Advocate General. It concluded that since the quality label applied to all agricultural and foodstuffs fulfilling certain quality demands originating from within the whole of the German territory, it could not be considered as a geographical indication capable of justification under Article 30.

The abovementioned cases all clearly illustrate that Member States seeking to protect their own goods will not escape the Commission’s scrutiny. All such actions will be stopped by the Commission or, as a last resort, through “Article 226”-proceedings, letting the ECJ decide the outcome.

It is evident that the ECJ will frown upon protectionism when used by single countries but its reasoning differs when the legal rules are designed to affect all Member States alike. When ruling on the scope of geographical indications, the ECJ will not be as eager to find them in opposition of free movement of goods. Critics mean that this creates a barrier to free trade, not so much within the European Union, but as regards to Member States and the rest of the world.⁸¹

The next chapter will focus on a few important cases, highlighting the conflict between geographical indications and free movement of goods. An analysis follows this, comparing the cases discussed in this chapter to the ones focusing on geographical indications.

⁸¹ Raustiala, Kal, Munzer, Stephen R., *The global struggle over Geographical Indications*, European Journal of International Law, 2007, p 351

5 EU case law: geographical indications

The task of defining the extent to which geographical indications take precedence over freedom of movement has fallen to the ECJ through various rulings.

5.1 Earlier case law: *Dassonville* to *Exportur*

In *Dassonville*⁸², the Court dealt with designations of origin for the first time. As mentioned above, the Belgium government required an official document issued by the government of the exporting country for products bearing a designation of origin, in order for them to be sold in the country. This constituted a measure having an equivalent effect to a quantitative restriction and was therefore prohibited. More interesting was that the ECJ, in paragraph 6 of the judgment, empowered Member States, in absence of a community system, to adopt reasonable, non-discriminatory, non-restrictive measures to prevent unfair practices.

This new right did not allow a Member State to introduce new arbitrary and unjustified measures amounting to quantitative restrictions, which was clarified in *Sekt-Weinbrand*⁸³. Germany reserved the names “Sekt” and “Weinbrand” to domestic wines and brandies, effectively breaching the rule on free movement of goods. The names were not considered to be indications of origin as they were generic in nature.

In paragraph 7 of the judgment the ECJ held that the need to safeguard the interests of producers against unfair competition and the need to protect consumers against misleading information could justify the restriction of freedom of movement caused by the protected designations of origin.

In *Cassis de Dijon*⁸⁴, the ECJ held that in absence of common rules Member States were allowed rules effectively restricting free movement of goods in order to satisfy mandatory requirements such as “*fairness of commercial transactions*” and the “*defence of the consumer*”.⁸⁵

Although protection against unfair competition and the need to safeguard consumers are valid arguments they are not included in the list of

⁸² Case 8/74, *Dassonville*, [1974] ECR 837

⁸³ Case 12/74, *Commission v. Germany (Sekt-Weinbrand)*, [1975] ECR 181

⁸⁴ Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649

⁸⁵ *Id.*, paragraph 8

derogations accepted in Article 30 of the EC Treaty. This list is exhaustive and is not to be extended to include other cases than the ones mentioned.⁸⁶

In order to clarify the legal situation the ECJ argued in later cases that indications of origin should be included in the concept of “*protection of industrial and commercial property*” mentioned in Article 30 EC. One of these cases is known as the *Exportur*⁸⁷ case.

A Spanish company established in Jijona, in the province of Alicante, wished to prevent two French companies situated in Perpignon from using the names “Alicante” and “Jijona” on their confectionary made in France. At the time, there was a Convention on geographical indications in place between the two countries.⁸⁸ It stipulated that the names “Turrón de Alicante” and “Turrón de Jijona” were, in the territory of the French Republic, to be reserved exclusively to Spanish products or goods.

The ECJ held that Article 28 and 30 EC did not preclude the application of rules established by a bilateral convention between Member States on the protection of designations of origin and indications of provenance as long as the names afforded protection have not become generic in the country of origin.⁸⁹

The ECJ clarified that prohibitions or restrictions on imports resulting from the bilateral convention can be justified on the grounds of the protection of industrial and commercial property in accordance with Article 30. However, since it results in an exception to one of the fundamental principles of the common market, derogations from the free movement of goods are allowed only in so far as they can be justified in order to safeguard rights which constitute the specific subject-matter of the property.⁹⁰

5.2 Scope of protection

In 1992, Regulation 2081/92 came into force, creating a community-wide system of protection for geographical indications in the field of agriculture and foodstuffs.

In the *Gorgonzola*⁹¹ judgment the ECJ compared the situation in *Exportur* and concluded that Articles 28 and 30 do not preclude Member States from taking necessary measures to protect names registered in accordance with

⁸⁶ Craig, de Búrca, *fn* 63, p 698

⁸⁷ Case C-3/91, *Exportur v. LOR and Confiserie du Tech (Exportur)*, [1992] ECR I-5529

⁸⁸ Convention between the French Republic and the Spanish State of 27 June 1973 on the protection of designations of origin, indications of provenance and names of certain products

⁸⁹ Case C-3/91, *Exportur*, paragraph 39

⁹⁰ Case C-3/91, *Exportur*, paragraph 24 – citing an older case: Case 16/74, *Centrafarm BV and Adriaan de Peijper v. Winthrop BV*, [1974] ECR 01183

⁹¹ Case C-87/97, *Consorzio per la tutela del formaggio Gorgonzola v. Käserei Champignon Hofmeister GmbH & Co. KG and Eduard Bracharz GmbH (Gorgonzola)*, [1999] ECR I-01301

the Regulation, in the same way as they had not precluded the use of similar bilateral conventions prior to the Regulations existence.⁹²

The Regulation, as described in chapter 2.3, gives protected names a considerable defence against competitors, effectively keeping them from alluding in any way to the protected geographical indication. It confers a monopoly of usage.⁹³

To make sure that the protection is not misused, the ECJ clarified in *Budějovický Budvar*⁹⁴ that the application of the Regulation “*depends essentially on the nature of the designation*”. In paragraph 76 it explained that the Regulation only covers designations of products for which there is a specific link between their characteristics and their geographic origin.

A good example is demonstrated by *Pistre and Others*⁹⁵, concerning the use of the word “montagne” in respect of agricultural products and foodstuffs. The word “montagne” may describe the physical surroundings, but although it gives the product an abstract connection to mountain areas, it does not lead the consumer to associate the name with a specific region or country.

The issue of determining the geographical area is also of great importance. The ECJ has ruled, in the *Carl Kühne and others* case⁹⁶, that in order to define the territory of the geographical area, it is necessary to rely on the checks carried out by the competent national authorities in each Member State. The Commission can then properly register the name linked to the specified area if the decision does not appear to be tainted by a manifest error.⁹⁷ This meant that “Spreewälder Gurken”, although the raw materials were produced in another area, could be registered as a PGI since the competent German authorities considered that the product, by its nature, came within that category.⁹⁸

The ECJ has established that Member States retain the right to legislate on the use of geographical indications that fall outside the scope of the Regulation. This is the case regarding simple indications where no link between the characteristics between the product and the geographical origin exists.⁹⁹

⁹² Case C-87/97, *Gorgonzola*, paragraph 20

⁹³ Joined Cases C-465/02 and C-466/02, *Germany and Denmark v. Commission (Feta II)*, [2005] ECR I-09115, Opinion of Advocate General Ruiz-Jarabo Colomer, paragraph 59

⁹⁴ Case C-216/01, *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH (Budějovický Budvar)*, [2003] ECR I-13617

⁹⁵ Joined Cases C-321/94 to C-324/94, *Pistre and Others*, [1997] ECR I-2343, paragraph 52

⁹⁶ C-269/99, *Carl Kühne GmbH & Co. KG, Rich. Hengstenberg GmbH & Co., Ernst Nowka GmbH & Co. KG v Jütro Konservenfabrik GmbH & Co. KG (Spreewälder Gurken)*, [2001], ECR I-9517

⁹⁷ O'Connor, Bernard, *The Law of Geographical Indications*, Cameron May Ltd., International Law Publishers, London, England; 2004, p 135

⁹⁸ C-269/99, *Spreewälder Gurken*, [2001], ECR I-9517, paragraph 62

⁹⁹ Case C-216/01, *Budějovický Budvar*, [2003] ECR I-13617

In all other cases the Regulation must be adhered to, giving the protected names all the rights conferred to them by this legal regulatory regime. The ECJ has shed light on the extent of protection in a number of recent cases, continuously widening its scope.

5.3 Extending the scope of protection

In the first case the term **evocation** in Article 13(1)(b) of the Regulation is explained. The dispute in *Gorgonzola*¹⁰⁰ involved two cheeses with similar names. The first was Gorgonzola, a designation of origin registered for cheese pursuant to the Regulation and the second Cambozola, a trademark used to indicate a type of blue cheese.

In paragraphs 25 and 26 of the judgment the ECJ explained that the term evocation in Article 13(1)(b) of the Regulation extends to a situation where part of the protected designation is used to imply a connection between the two products, as with the two cheeses Cambozola and Gorgonzola. It makes no difference if the true origin is indicated on the product. The ECJ added that the protection given can be evoked even when there is no likelihood of confusion, widening the scope of protection.

Cambozola was therefore deemed to evoke the protected designation of origin Gorgonzola. The ECJ however continued by stating that it was up to the national court to decide whether the conditions laid down in Article 14(2) of Regulation 2081/92, allowing for the continued use of an earlier trademark (Cambozola), were fulfilled. This would for example be the case if Cambozola had been registered in good faith without constituting an attempt to deceive the consumer.¹⁰¹

Another important case describes the situation of **translated geographical indications**. In *Parmesan*¹⁰² a company known as Nuova Castelli SpA produced several types of cheese in Italy. As well as producing a cheese which conformed to the specification for the PDO Parmigiano Reggiano, it produced a cheese in powder form, made from a mixture of several types of cheese of various origins, which does not comply with the PDO specification. This second type of cheese is labelled with the word Parmesan and is marketed exclusively outside Italy.

The German government argued that the designation Parmesan was a generic name and not a PDO within the meaning of Regulation 2081/92. It was generic because it had become a name referring to all types of grated cheese or cheese intended for grating. In addition, as only the name Parmigiano Reggiano had been registered, protection was confined to that name covering that precise formulation of the name registered.¹⁰³

¹⁰⁰ Case C-87/97, *Gorgonzola*

¹⁰¹ Case C-87/97, *Gorgonzola*, paragraph 43

¹⁰² Case C-66/00, *Criminal proceedings against Dante Bigi, third party: Consorzio del Formaggio Parmigiano Reggiano (Parmesan)*, [2002], ECR I-05917

¹⁰³ *Id.*, paragraphs 16-17

The ECJ rejected these arguments stating that it was far from clear whether the designation Parmesan had become generic. Out of all the governments that submitted written observations it was only the German government that deemed Parmesan to have become generic. All others considered Parmesan to be the correct translation to Parmigiano Reggiano. This means that in accordance with Article 13(3) of Regulation 2081/92, the translated name Parmesan is also protected from becoming generic.

In a later case from 2005, the ECJ reconfirmed its standpoint. In *Commission v. Germany*¹⁰⁴ the Commission sued Germany after the government refused to prosecute its cheese producers for using the name, arguing it was generic in nature. The Commission held that Parmesan was the translation of the protected term Parmigiano Reggiano.

In this ruling the Court did not assess whether Parmesan was a translation, instead it considered Parmesan to be an evocation of the PDO. It did, however, disregard Germany's arguments that Parmesan constituted a generic name.¹⁰⁵

While rejecting Germany's arguments that Parmesan was generic, the Court ruled that the government was not obliged under EU law to prosecute national cheese makers for using the name. This task is given to the inspection structures in place in the Member State from which the PDO in question comes.¹⁰⁶

A controversial case dealing with **generic names** concerns the name Feta. Feta is, for most people, the name of a particular type of cheese that originates from Greece. It is a designation that does not describe a geographical area; the word derives from the Italian word "fette" meaning a slice of food.¹⁰⁷

In 1996, Feta was protected as a PDO. Following a successful challenge by Denmark, Germany and France in a case referred to as *Feta I*¹⁰⁸, the ECJ removed the protection three years later stating that given the extensive production outside Greece, the term Feta was generic in nature. It held that, just as with trademarks, protection for geographical indications and designations of origin should not be granted if there is a legitimate interest in free use in some Member States. Lawfully marketed products, not

¹⁰⁴ Case C-132/05, *Commission v. Germany*, [2008] ECR I-00957

¹⁰⁵ *Id.*, paragraphs 49-50

¹⁰⁶ *Id.*, paragraph 76

¹⁰⁷ Byrne, Joanne, *Feta Cheese and Pork Pies: PDOs and PGIs!*, Journal of Brand Management, 2006, p 366

¹⁰⁸ Joined cases C-289/96, C-293/96 and C-299/96, *Denmark, Germany and France v. Commission (Feta I)*, [1999], ECR I-01541

conflicting with criteria relating to honest, traditional practices and actual likelihood of confusion, should not be prevented by Regulation 2081/92.¹⁰⁹

The Commission responded by conducting a survey, asking Member States their opinion on the subject of Feta's generic status. The answers were then collected and compiled by the scientific committee. They unanimously concluded that the term Feta was not generic and Feta was subsequently restored to the register as a PDO.

The reason for the dispute is that there are countries that have, for a long time period, allowed the use of Feta as a generic name for certain types of cheese. Denmark has had legislation in place permitting the generic use of the term Feta since 1963. Similar provisions exist in Germany since 1985.¹¹⁰

These two countries did not accept Feta's renewed protected status and sought to annul the decision in the *Feta II*¹¹¹ case. Advocate General Colomer and the ECJ both rejected the arguments that the name Feta had become generic.

They began by concluding that although Feta does not describe a geographical location, it is a traditional non-geographical name within the meaning of Article 2(3) of the Regulation eligible for protection if it designates an agricultural product or a foodstuff "*originating in a region or a specific place*".

In order for it to be protected, it also needs to have specific characteristics emanating from production, processing and preparation that take place within the defined geographical area. The ECJ first noted that Feta is the name for a white cheese soaked in brine traditionally produced in Greece from ewes' milk or a mixture of ewes' milk and goats' milk. It then explained that the milk used for the manufacture of "feta" must come exclusively from the regions of Macedonia, Thrace, Epirus, Thessaly, Central Greece, Peloponnese and the department (Nomos) of Lesbos.¹¹²

In other words, the ECJ held that Feta had the specific characteristics needed and the geographical area was clearly defined, covering only the mainland of Greece and the department of Lesbos. As it satisfied the requirements for it to be considered a designation of origin, the ECJ dismissed the pleas for annulment, determining that the name Feta was not generic in nature.

¹⁰⁹ Knaak, Roland, *Case law of the European Court of Justice on the Protection of Geographical Indications and Designations of Origin pursuant to EC Regulation 2081/92*, International Review of Intellectual Property and Competition Law, 2001, p 381

¹¹⁰ *Id.*, p 380

¹¹¹ Joined Cases C-465/02 and C-466/02, *Feta II*, [2005] ECR I-09115

¹¹² *Id.*, paragraph 52

5.4 Final stage of production

Two similar cases concerned the **final stage of production**, assessing whether it is part of the product specification requiring it to be carried out within the region in order to guarantee the GIs characteristics.

The *Grana Padano*¹¹³ case involved the grating and packaging of a cheese called Grana Padano. The name was registered as a PDO, and the specification defined in detail the conditions that must be fulfilled by cheese marketed under this protection. One of these conditions included the obligation of grating and immediate packaging in the region.

Since 1990, Ravil, a business established in France, had imported whole Grana Padano cheeses, subsequently grating them in France and selling them under the designation “Grana Padano râpé frais”. Biraghi, a company producing Grana Padano in Italy, brought proceedings against Ravil wishing to prevent it from placing cheese grated in France on the market.

The Cour de Cassation referred a question on the interpretation of Article 29 EC to the ECJ. It essentially wanted to know if Article 29 EC could be interpreted as precluding national legislation that reserves the PDO Grana Padano for cheese grated in the same region as it is produced since this obligation is not essential in order to preserve the product’s specific characteristics.

Advocate General Alber started by concluding that the requirement for grating and packaging in the region of production makes export more difficult and expensive. It therefore constituted a measure having an equivalent effect to a quantitative restriction on exports within the meaning of Article 29 EC.¹¹⁴

He continued by discussing possible justifications to this restriction. He stated that the requirement would be justified if one of the following conditions were met: (a) if it gave the cheese from that region particular characteristics apt to distinguish it from other cheese, or (b) if grating in the region of production were essential in order to preserve specific characteristics acquired by the cheese during its production.¹¹⁵ He also deemed it important that the restriction created satisfied the principle of proportionality.

Alber reflected that although special knowledge is required to grate the cheese there is no indication that this could not be performed outside the region of production. People who assist in the production and processing of the product will gain the knowledge and necessary skills. This part of

¹¹³ Case C-469/00, *Ravil SARL v. Bellon import SARL and Biraghi SpA (Grana Padano)*, [2003] I-05053

¹¹⁴ *Id.*, Opinion of Mr Advocate General Alber

¹¹⁵ O’Connor, Bernard, *fn 55*, p 315

production can then be performed in other parts of the world without losing the specific characteristic of the cheese.¹¹⁶

He concluded that labeling the product with the country of grating will suffice to protect consumers. In other words there exists less restrictive means than limiting use of the PDO Grana Padano to Grana Padano grated and packaged in the region of production. The national legislation therefore goes beyond what is necessary and is incompatible with Community Law.¹¹⁷

The ECJ did not arrive to the same conclusion put forward by the Advocate General. It started off by agreeing that this was indeed a requirement constituting a measure having equivalent effect to a quantitative restriction on exports within the meaning of Article 29 EC. It then proceeded to evaluate the processes of grating and packaging concluding that these were important factors and that if they were not carried out in appropriate conditions the cheese would not possess the organoleptic qualities¹¹⁸ expected. This would harm the quality and hence the reputation of the designation of origin.¹¹⁹

It is not uncommon for there to be a number of stages between manufacture and marketing and a second case, decided shortly after Grana Padano, dealt with the slicing of ham. In the *Prosciutto di Parma*¹²⁰ case a British company, Asda Stores Ltd, sold ham bearing the name ‘Parma Ham’ that it purchased pre-sliced from Hygrade Foods Ltd, another British company. Hygrade itself purchased boned ham from an Italian producer, Cesare Fiorucci SpA. Hygrade then took the boned ham, sliced it and hermetically sealed it. The packets bore the wording “Asda—A taste of Italy – Parma Ham – Genuine Italian Parma Ham” and on the back they were clearly marked with a label identifying both production country and place of packaging.

Consorzio del Prosciutto di Parma, of which Cesare Fiorucci was a member, brought proceedings by writ against the two British companies essentially requiring them to cease with their activities as they were contrary to the rules applicable to the PDO for Parma ham. The House of Lords decided to stay the proceedings and refer a question to the ECJ for a preliminary ruling. It wanted to know if Regulation 2081/92, read in conjunction with Regulation 1107/96¹²¹ and the specification provisions for PDOs, created a

¹¹⁶ Case C-469/00, *Grana Padano*, Opinion of Mr Advocate General Alber, paragraph 61

¹¹⁷ *Id.*, paragraph 80

¹¹⁸ An organoleptic quality refers to any sensory properties of a product, involving taste, colour, odour and feel

¹¹⁹ Case C-469/00, *Grana Padano*, paragraph 53

¹²⁰ Case C-108/01, *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v. Asda Stores Ltd and Hygrade Foods Ltd. (Prosciutto di Parma)*, [2003], ECR I-05121

¹²¹ The Regulation contained the Annex where all the protected PDO and PGI were registered. Since the new Regulation 510/2006 entered into force this register is maintained by the Commission.

valid Community right, directly enforceable in the national courts of Member States.¹²²

The plaintiffs' main arguments were that the slicing and packaging of the ham is an important and complex part of the production process that cannot be done separately and by unqualified personnel. The high quality of the ham cannot be guaranteed unless the same company both processes and slices the ham, since checks for "hidden defects" cannot be carried out until it has reached the slicing stage. According to the plaintiffs, the specific knowledge acquired by the Consorzio's inspectors did not exist outside the region of production.¹²³

Advocate General Alber, who also wrote the opinion in the Grana Padano case, came to the same conclusion as he had in the former case. The specification provisions in Regulation 1107/96 create an obstacle to free trade, hindering export, and are therefore caught by Article 29 EC.¹²⁴

Alber did not think that Consorzio had put forth convincing arguments in support of their claims that the slicing of the ham was a process that conferred specific characteristics on that ham and that it was necessary to perform the slicing in the region of production in order to preserve these characteristics. Alber was of the strong opinion that the place the slicing was done would have no influence on consumer choice and therefore not a commercially material characteristic.¹²⁵

He proposed that the ECJ should find that the Regulations did not create a directly enforceable right to prevent Prosciutto di Parma, a PDO, from being used for Parma ham that has not been sliced and packaged in the region of production and the declare the part of the Regulation, reserving the PDO these rights, invalid.

As in the previous judgment, the ECJ took the opposite view from the Advocate General. After establishing that rules on packaging and slicing in the region of production have the effect of restricting exports as they establish a difference in treatment between domestic trade and export trade, the ECJ went on to evaluate whether the rules could be justified.¹²⁶

It maintained that the rules are intended to guarantee that the product bearing the PDO really does originate from the specified geographical area and that it has the well-known, described characteristics. In order for the protected product to retain its reputation it is important that the quality is not jeopardized in any way. Slicing and packaging are considered to be important operations that may harm the quality if they are not performed in a certain way. This knowledge exists within the region of production and

¹²² Case C-108/01, *Prosciutto di Parma*, paragraph 31

¹²³ *Id.*, paragraph 60 ff

¹²⁴ *Id.*, Opinion of Mr Advocate General Alber

¹²⁵ *Id.*, Opinion of Mr Advocate General Alber, paragraph 80

¹²⁶ Case C- 108/01, *Prosciutto di Parma*, paragraph 59

taking into account that the risk of a lower quality ham is greater if it is sliced outside the region; the Court concluded that the rules were justified.¹²⁷

In both judgments, the ECJ held that it did not make a difference if the companies had been obligated to inform consumers that the final stages of production occurred elsewhere or if extra controls were carried out away from the region of production. It would still be insufficient to ensure fulfilment of the objective pursued by geographical indications.¹²⁸

All of these cases reflect the trend towards increasing the quality of products, thereby promoting their reputation. According to Advocate General Colomer in the *Feta* case, geographical indications have a dual aim described in *Prosciutto di Parma*:

*“...to guarantee the source of the designated product and to prevent fraudulent use of the name, while at the same time protecting industrial and commercial property, which, in conjunction with the principle of free movement of goods, is becoming increasingly important.”*¹²⁹

¹²⁷ *Id.*, paragraph 78

¹²⁸ *Id.*, paragraph 80

¹²⁹ Joined Cases C-465/02 and C-466/02, *Feta II*, Opinion of Mr Advocate General Ruiz-Jarabo Colomer, paragraph 82

6 Analysis

Back in the beginning of the 1980s the Commission submitted a proposal for a directive relating to the indication of origin on certain textile and clothing products.¹³⁰ It contained rules allowing products to be marked with a “made in the European Community” sign. The proposal was later withdrawn but it can still be seen as a sign of the European Union’s positive attitude towards geographical indications and the goal to create a strong, powerful tool, promoting European products.

Just a decade later, the Regulation on geographical indications¹³¹ was established, creating a strong form of protection. It has now been in force for more than 15 years, during this time a number of decisions of the ECJ have been rendered, outlining and explaining the legal ramifications associated with this Regulation.

As can be seen from previously discussed cases, the ECJ will favour geographical indications over free movement of goods. It has ruled that slicing, packaging and grating are all stages of production linked to the quality and authenticity of the geographical indication and should therefore take place within the specified region connected to the geographical indication. Although they can be seen as measures having equivalent effect to quantitative restrictions, they are justified under Article 30 EC as they are designed to protect the quality of the product in question.¹³²

The ECJ’s rulings come as no real surprise since Europe has a strong incentive to protect GIs. It is a resourceful way for the EU to benefit both economically and socially from intellectual property. It is a way for Member States to preserve their trade alliances while maintaining separate and distinct national identities.¹³³ Unlike the United States the European Union is a collection of countries with differing cultural backgrounds. In order to compete on the global market the nations have joined forces and created a Union. This does not mean that they wish to give up the traits that separate them from the whole. GIs give nations a way to promote their local industries and maintain their distinct identities. Without their unique regional reputations, Member States would lose both market power and tourist attraction.¹³⁴

¹³⁰ Official Journal 1980, C 294, *see* Case 207/83, *Commission v. UK*, [1985] ECR 01201

¹³¹ Regulation 2081/92, now Regulation 510/2006

¹³² O’Connor, Bernard, *fn* 55, p 318

¹³³ Gutierrez, Eva, *fn* 30, p 30

¹³⁴ *Id.*, p 50

6.1 Analysis of the European protection

Setting the reasoning behind supporting geographical indications aside, it is time to look at the case law and analyse whether the afforded protection of geographical indications is justified.

It is interesting to start by examining the historical development. Looking at the *Dassonville*¹³⁵ case it is evident that the creation of an internal market free from restrictions was highly prioritized, taking precedence over designations of origin. Despite this, the Court left an opening for Member States to adopt their own non-discriminatory measures to prevent unfair practices.

The ECJ has since then created a system of protection for geographical indications that accepts the trade restrictions caused by this form of intellectual property. It did this by including geographical indications as one of the acceptable derogations in Article 30 known as “*protection of industrial and commercial property*”.

After Regulation 2081/92, now Regulation 510/2006, entered into force, the position of geographical indications as an intellectual property within the European Union continued to strengthen. Today the ECJ has firmly established, through a number of important cases, its positive view on geographical indications, creating a strong form of protection.

All intellectual property rights have real economic and social costs, geographical indications included. They are collective, government-granted monopolies capable of restraining free economic competition. Innovation can also come to suffer and wasteful rent-seeking behaviour can become preferred by producers more interested in securing a property right than in creating first-rate products.¹³⁶

In all other areas of intellectual property law, the ECJ has fought to preserve freedom of competition and consumer choice. When dealing with geographical indications the ECJ has proved surprisingly tolerant of demands for vigorous GI protection.¹³⁷

Looking first at the *Gorgonzola*¹³⁸ case concerning the issue of evocation, it seems reasonable to prohibit names that are too similar to the protected name and thus confuses consumers. To extend this protection to include situations where there is no likelihood of confusion can be seen as too extensive and overly protectionistic.

¹³⁵ Case 8/74, *Dassonville*, [1974] ECR 837

¹³⁶ Raustiala, Kal, Munzer, Stephen R., *fn 81*, p 364

¹³⁷ Kur, Annette, *fn 54*, p 1007

¹³⁸ Case C-87/97, *Gorgonzola*, [1999] ECR I-01301

The fact that translated names are incorporated in the protection afforded by the Regulation, as confirmed by the *Parmesan*¹³⁹ case, is yet another sign of the ECJ's protectionistic tendency. The Court's standpoint is not supported in the rest of the world and the WTO panel concluded in 2005 that the Regulation could only protect geographical indications as registered and not linguistic variations. This was an important recognition for trademark owners around the world because it meant that trademark owners, although they could not stop the protected name, they could prevent linguistic variations.¹⁴⁰ However, within Europe, when dealing with a name which is not a protected trademark, the ECJ still maintains that the word Parmesan is too closely linked to the protected Parmigiano Reggiano to be permitted.¹⁴¹

The generic nature of traditional names is another controversial issue. It is argued that Europe has a claw-back agenda trying to protect words that have become generic such as champagne and feta. This view is supported if one studies the discussion surrounding the Feta dispute. In its first ruling the ECJ concluded that the term Feta had become generic and stated that protection should not be granted where there already exists a lawful market of the products in question within the Community.¹⁴² In a later case, the ECJ went against this line of reasoning, reintroducing Feta as a PDO. This has stirred up debate within the Union, as it affects Member States like Denmark and Germany, effectively preventing producers from selling their variety of Feta cheese.

When reviewing the next two cases it becomes evident that the EU, through the ECJ, is extending the scope of protection further to include more aspects of the geographical indication. *Grana Padano*¹⁴³ and *Prosciutto di Parma*¹⁴⁴ both illustrate how the ECJ is willing to include the specific mode of grating and slicing into the protected scope.

According to some analysts, the ECJ is too eager to protect all GIs regardless of whether or not "*the specifications attached to them actually affect the quality or regional nature of the product.*"¹⁴⁵ Advocate General Alber, who gave his opinion in these two cases, argues that the principle of proportionality has been overlooked. There is no need to extend protection to include the mode of production in order to guarantee the quality of the product.

In evaluating whether or not the United States is correct in accusing Europe of protectionism it is interesting to study European case law concerning specific Member States that promote their own domestic products to see if there is a difference in the ECJ's reasoning.

¹³⁹ Case C-66/00, *Parmesan*, [2002], ECR I-05917

¹⁴⁰ Agdomar, Michelle, *fn 5*, p 569

¹⁴¹ Case C-132/05, *Commission v. Germany*, [2008] ECR I-00957

¹⁴² Knaak, Roland, *fn 109*, p 381, referring to paragraph 97 of Joined cases C-289/96, C-293/96 and C-299/96, *Feta I*, [1999], ECR I-01541

¹⁴³ Case C-469/00, *Grana Padano*, [2003] I-05053

¹⁴⁴ Case C-108/01, *Prosciutto di Parma*, [2003], ECR I-05121

¹⁴⁵ Gutierrez, Eva, *fn 30*, p 43

There is an apparent difference in attitude towards separate countries trying to promote their national products as opposed to the European Union as a whole protecting and promoting goods they refer to as geographical indications. The case *Commission v. Germany*¹⁴⁶ from 2000 clearly establishes that national rules, resembling the protection afforded to geographical indications, will not be accepted. It makes no difference if the label is intended to improve the quality of the product.

Considering that the European Union has the most to gain from a worldwide recognition of geographical indications, it is understandable that the rest of the world views European legislation with some amount of scepticism. If one imagines the EU as one single country, the same reasoning for denying protection as given in the *Commission v. Germany* case, could be applied to the entire European Union. Thus, the EU can be argued to have created unacceptable rules, protecting geographical indications and effectively hindering trade.

In the same way customers choose a product because its brand represents a way of life or set of ideas, it is possible to choose a product with a geographical indication because of the reputation connected with this product. It creates an elitist image preferred by many consumers who will accordingly choose champagne over sparkling wine.¹⁴⁷

As WIPO points out: “*regional specialities may have their stature enhanced in the eyes of the consumer when a regional collective and its members enjoy the exclusive right to use the particular geographical indication*”. Since Europe is largely known for its fashionable products and well-known delicacies, the economic advantages in establishing a global protection system are considerable.¹⁴⁸

Not all scholars support this point of view. Professor Annette Kur considers the gain to be modest at best. The protected names that perform well on the market, like Champagne, Prosciutto di Parma and Roquefort cheese, were all recognised as the finest on the market before the introduction of the European Regulation.¹⁴⁹ She continues, adding that although the Regulation might not increase sales, it does have the ability to squash all competition trying to challenge a protected geographical indication.

There are other objections against the European system. There are those that hold the European protection system to be biased since its Member States play an important role in approving their own geographical indications. Seeing that they wish to protect their own domestic products, they will register as many as possible to protect them from the free market.¹⁵⁰

¹⁴⁶ Case C-325/00, *Commission v. Germany*, [2002] ECR I-09977

¹⁴⁷ Gutierrez, Eva, *fn 30*, p 30

¹⁴⁸ *Id.*, p 38

¹⁴⁹ Kur, Annette, *fn 54*, p 1007

¹⁵⁰ Gutierrez, Eva, *fn 30*, pp 43-44

Other critics talk of unclear protection saying that it is hard to determine the boundaries of the region allowed to use a certain geographical indication. Considering that the PDO or PGI cannot be accepted without a specification determining, among other things, the boundaries, this objection seems unsubstantiated.¹⁵¹

Even though geographical indication protection is one of the more effective forms of competitive protection a producer can obtain, it is only true within the European Union. The level of protection is limited in other parts of the world.¹⁵² It is when foreign producers, using a protected name, wish to sell their products on the European market that the barrier becomes evident.

It should however be noted that the regulations and directives have the same impact on Member States as they have on non-member countries when they wish to conduct business within the European Union. This is demonstrated by the *Feta II*¹⁵³ case where Denmark and Germany were forced to stop using the term Feta on their national products. The European Union is, in other words, consistent in its aim to stop unfair use of GIs and it wants, through TRIPs, to establish a system that will protect GIs worldwide.

6.2 Analysis of the International debate

Regulation 2081/92 has been heavily criticized by countries such as the United States and Australia. These countries have even gone as far as to resort to international litigation requesting that a WTO dispute settlement panel be established to hear their claims. Although parts of the Regulation were deemed incompatible with TRIPs, the remaining parts were accepted.¹⁵⁴ After changing the incompatible rules, by replacing Regulation 2081/92 with Regulation 510/2006, the European Union now feels confident with its approach towards geographical indications. The then European Union Trade Commissioner, Peter Mandelson, stated shortly after the ruling:

*“By confirming that geographical indications are both legal and compatible with existing trademark systems, this WTO decision will help the EU ensure wider recognition of geographical indications and protection of regional and local product identities which is one of our goals in the Doha Round of multilateral trade negotiations.”*¹⁵⁵

The European Union want to achieve two things on the global arena. First, it wishes to create a multilateral registration system for geographical

¹⁵¹ *Id.*, p 46

¹⁵² Curtis, James, *Provenance or Protectionism?*, Marketing, London, 2005, p 16

¹⁵³ Joined Cases C-465/02 and C-466/02, *Feta II*, [2005] ECR I-09115

¹⁵⁴ Panel Report, European Communities--Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/R (March 15, 2005)

¹⁵⁵ Agdomar, Michelle, *fn 5*, pp 570-571

indications. Second, it hopes to extend the increased protection of wine and spirits to other goods. The struggle for extension has stirred up the most debate. Arguments for and against an extension will therefore be presented below.

According to Professor Annette Kur, it should not be difficult to reach consensus on certain fundamental issues. She states that:

*“correct and complete indications of geographical origin on products benefit both producers and consumers, particularly when such indications convey a sense of the unique qualities that the region from which a product originates imparts on the product, as is typically the case with foodstuffs and other agricultural products.”*¹⁵⁶

At present, the current TRIPs regime allows inconsistent geographical indication protection among the WTO members. In Europe, basmati rice is protected limiting the use to rice produced in India or Pakistan whereas in the United States any manufacturer can use the term basmati to label its rice.¹⁵⁷

Developing countries are frequently forced to compete against wealthier developed nations whose agricultural products are often highly subsidized. When products are mass-produced with the name basmati, the poorer producers of the genuine rice cannot enjoy the benefits of the goodwill associated with their product.¹⁵⁸

Advocates for a heightened level of protection claim that mutual reciprocity is needed in order for right holders to gain a predictable level of protection. Without it, the flow of trade will be distorted and the benefits flowing from the TRIPs Agreement will be undermined.¹⁵⁹

The claimed benefits of harmonizing rules on geographical indications is that it will reduce disparities between national laws which in turn will lower the cost, time and uncertainty involved in determining and acquiring the rights. Harmonization will accordingly reduce the barrier to innovation and to global trade.¹⁶⁰ It will also help eliminate free-riding and dilution problems if protection is extended to cover all goods not only wines and spirits.¹⁶¹

The European Union claims that an extension of the current regime would benefit developing countries in particular.¹⁶² It asserts that the protection

¹⁵⁶ Kur, Annette, *fn 54*, p 1005

¹⁵⁷ Agdomar, Michelle, *fn 5*, pp 545-546

¹⁵⁸ *Id.*, p 548

¹⁵⁹ *Id.*, p 558

¹⁶⁰ Waggoner, Justin M., *fn 24*, p 575

¹⁶¹ Agdomar, Michelle, *fn 5*, p 581

¹⁶² *Id.*, p 555

would aid developing countries in expanding their economies by ensuring the maintenance of their knowledge bases and promoting the growth and the manufacture of traditional indigenous products.¹⁶³ Countries with famous products favour geographical indication protection, like Mexico, with tequila, and India with its basmati rice and Darjeeling tea.¹⁶⁴

Far from all developing countries stand behind the European Union's wish for extension. Some recognize that GI protection is intertwined with other policies that they oppose. In addition, according to Professor Annette Kur, a successful registration of a GI does not automatically mean that the demand for these products will rise. In order for that to happen, costly and time-consuming marketing efforts are needed.¹⁶⁵

There are no indications that bilateral trade and intellectual property agreements are in decline. According to legal scholar Michelle Agdomar, protection should not be construed through the patchwork of bilateralism. This is detrimental to developing countries, instead they should seize the opportunity to gain equal footing on the international intellectual property platform.¹⁶⁶

U.S Commissioner for trademarks, Lynne Beresford, finds it hard to accept the idea that GI protection in the country of origin should establish a right in all other WTO member states jurisdictions. She holds that it would be hard for national trademark offices to know of every geographic location in the world and every translation in order to prevent registration of conflicting marks.¹⁶⁷

Instead she suggests that domestic registration systems should be preferred. Especially systems that are cost-effective, efficient, open, transparent and fair for users of both domestic and foreign protected geographical indications.¹⁶⁸

Professors Kal Raustiala and Stephen R. Munzer argue that GI protection on a global scale is justifiable in order to protect consumers against confusion and to lower their search costs. They however contend the current protection afforded wines and spirits that prohibits any mention of a protected GI if the production occurs outside the region even if the place of production is clearly indicated, stating that it is "*unwarranted and goes beyond what any existing theory of property can support*".¹⁶⁹

¹⁶³ Kur, Annette, *fn 54*, p 1011

¹⁶⁴ Raustiala, Kal, Munzer, Stephen R., *fn 81*, pp 351-352

¹⁶⁵ *Id.*, p 1011

¹⁶⁶ Agdomar, Michelle, *fn 5*, p 603

¹⁶⁷ Beresford, Lynne, *Geographical Indications: the Current Landscape*, Fordham Intellectual Property, Media and Entertainment Law Journal, 2007, p 994

¹⁶⁸ *Id.*, p 997

¹⁶⁹ Raustiala, Kal, Munzer, Stephen R., *fn 81*, p 340

Others are concerned that a heightened level of protection will require unwarranted governmental intervention that is inconsistent with the principle that intellectual property rights are private rights.¹⁷⁰

Some mean that the EU agenda will result in a worldwide monopoly for European GIs.¹⁷¹ As a counterargument, legal scholar Justin M. Waggoner considers the monopoly concerns to be unreasonable. He argues that although “*a region’s producers would gain an oligopoly over the name embodied in a GI, non-regional producers could continue producing the same products they now offer*”.¹⁷² Low priced goods would still exist, giving consumers the possibility to make a choice.

Another concern is that the rules on geographical indications are anti-competitive. All similar products will be prohibited from using the protected name if they are produced outside the specified region. Although they are prohibited from using the same name, they are not prohibited from producing the same kind of product. This should, according to legal scholar Michelle Agdomar, stimulate competition and innovation as the producers will be forced to develop innovative techniques to improve the product.¹⁷³

When deciding whether European legislation on geographical indications should serve as a blueprint for the international GI protection scheme, it is important to look at implementation measures. Professor Annette Kur, is worried that, in order for such a scheme to be effective, there would need to be a huge bureaucracy in place, capable of carefully inspecting all applications, granting protection and monitoring the use of protected GIs. It is uncertain if the costs for maintaining this bureaucracy outweigh the benefits.¹⁷⁴

Legal scholar Michelle Agdomar, refutes these arguments stating that there is no empirical data detailing the cost. She also reflects that these concerns exist with the implementation of any new rule created in accordance with a multilateral trade agreement.¹⁷⁵

If the protection was extended to all goods, there are those who are worried about the high costs involved forcing companies to rename their products. In addition, opponents claim that re-labelling and re-packaging will confuse consumers. Legal scholar Justin M. Waggoner does not accept these arguments. He holds that, firstly, it would be a onetime cost and secondly, to help the companies adjust there would be a long transition period, allowing them adequate time to change the names of their GI-infringing products.¹⁷⁶ As a counterargument regarding consumer confusion, it can be said that

¹⁷⁰ Agdomar, Michelle, *fn 5*, p 577

¹⁷¹ Beresford, Lynne, *fn 167*, p 987

¹⁷² Waggoner, Justin M., *fn 24*, p 588

¹⁷³ Agdomar, Michelle, *fn 5*, p 591

¹⁷⁴ Kur, Annette, *fn 54*, p 1010

¹⁷⁵ *Id.*, p 592

¹⁷⁶ Waggoner, Justin M., *fn 24*, pp 586-587

misidentification is also expensive for the consumers, as they cannot trust that their selection is authentic.¹⁷⁷

Many scholars criticize the European protection of GIs because of the detrimental effect it has on other countries such as the United States. When examining other forms of IP protection it becomes clear that trademark systems and patent systems implemented around the world also disadvantage other countries in some way. This has not stopped these systems from becoming accepted.¹⁷⁸ Each country will invariably legislate in ways, seeking to formulate international property standards, which will benefit their own nationals.¹⁷⁹

Those in favour of geographical indication protection consider that the “new world” should embrace the EU standards believing that the benefits outweigh the costs. Most countries, even the ones who claim to have few products linked to geographical origin, do actually have products that would be eligible for protection. In the United States, Idaho potatoes, Vidalia onions and Washington State apples would be eligible for protection. In addition, countries would be able to create their own geographical indications and use them to as a marketing tool, generating considerable assets.¹⁸⁰

There is increasing pressure on the EU to reduce subsidies to farmers and this enhances the perceived positive aspects of using geographical indications to gain market shares on an international scale. Pascal Lamy, a former high EU trade official and at present Director-General of the WTO, has stated that:

*“the future of European agriculture lies not in quantity of exports but quality.. That is why we are fighting to stop appropriation of the image of our products and improve protection”.*¹⁸¹

An interesting thought would be for the “new world” countries to use Europe’s desire to create a global system of geographical indication protection as a bargaining chip. In order for them to agree to this kind of protection, they could for instance require the European Union to reduce its cultural tariffs and subsidies.¹⁸²

¹⁷⁷ Agdomar, Michelle, *fn 5*, p 589

¹⁷⁸ Gutierrez, Eva, *fn 30*, p 43

¹⁷⁹ Agdomar, Michelle, *fn 5*, p 600

¹⁸⁰ Waggoner, Justin M., *fn 24*, p 589

¹⁸¹ Raustiala, Kal, Munzer, Stephen R., *fn 81*, p 350

¹⁸² Waggoner, Justin M., *fn 24*, p 590

7 Conclusion

Since the introduction of TRIPs, geographical indications have been on the international agenda. Seeing that the idea of protecting this type of intellectual property originates from the European Union it was natural to start by examining EU rules and case law.

In my opinion, geographical indications and indications of origin are both worthy of protection. They are ingenious ways to afford protection to small local producers, more focused with quality and reputation than with large-scale production. Although this type of protection is mainly used on wines, spirits and cheese a country is allowed to apply for protection for many other types of products. Sweden has been slow in recognizing the value this kind of protection affords, and at the date of this thesis only Skånsk Spätkaka, a particular type of pastry, and Svecia, a distinct locally produced cheese, have been granted protection.

My objection lies with how the ECJ has ruled on the scope of protection. From where I stand they have taken it too far, including translated names, non-essential stages of production and names that have become generic. It is hard to accept that cheese grating and ham slicing are so closely connected to the reputation of the geographical indication that they can only be performed by the local producers within the specified region. In my opinion, the ECJ has focused excessively on creating a strong agricultural market power for the benefit of the European Union when competing on the global market. In doing so, the ECJ has disregarded the principle of proportionality.

The European Union runs the risk of creating resistance not only from other countries but also from within its borders. People are not willing to accept rules that go against their sense of justice, which means that ham will probably still be sliced outside the designated area and cheese will still be grated by foreign producers without the specific knowledge required.

When discussing names that have become generic as well as translated names I believe that it is important to tread with caution. Member States have, over time, attached different meanings to the same name. It therefore seems overly zealous to prevent a country, such as Denmark, from using the name Feta, a name they have used without problems for several decades. More credit should be given to consumers, who are more than capable to make the distinction themselves by reading a label. In addition, I believe that the protection afforded to a geographical indication should be limited to the name in question, translated names widen the scope of protection too far, creating unnecessary trade restrictions.

Looking at the global market and TRIPs, the WTO has accepted Regulation 510/2006 and therefore to some extent, the European position when it

comes to protecting geographical indications. This positive reinforcement will most likely encourage the European Union to be push further, and be persistent in their goal to establish an international registration system and heighten the protection on foodstuffs to match that of wine and spirits.

In order to be successful in establishing a global system of protection, the EU would be wise to retrace some steps, realising the importance of free movement of goods and accept that countries around the world have varying incentives.

I believe that countries would benefit from harmonizing the rules on geographical indications. Developing countries will have more to gain from a uniform system of protection than being excluded from bilateral trade and intellectual property agreements. This does not mean that I accept the European proposal without reservations. As I have pointed out, the European Union has extended the scope of protection too far within its own territory. It would be unwise to use the current European legislation, and subsequent interpretation, to serve as a blueprint for the international protection scheme.

Although the European Union, and especially the ECJ, might be taking the protection too far, the fact remains that geographical indications are here to stay. Countries opposed to this kind of protection will have to change their view, instead of looking at the possible side-effects they need to focus on what they stand to gain. Sadly, I do not think that this is an easy shift and I see no immediate resolution of the Doha Round. There is a considerable amount of money involved, making it hard to find an acceptable compromise.

Supplement A: Relevant EC Treaty Articles

Article 12 EC (ex Article 6)

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Article 14 EC (ex Article 7a)

1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

3. The Council, acting by a qualified majority on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Article 28 EC (ex Article 30)

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 29 EC (ex Article 34)

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 30 EC (ex Article 36)

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

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