

From Geography to History: Geographical Indications and the Reputational Link

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1 INTRODUCTION

For much of its history, the notion of a distinctive link between regional products and their places of origin has been articulated in the language of *terroir*. This polysemous term acts as a cipher for the influence of geographical origin on the end product's quality.¹ As one leading scholar of the concept describes it: 'Historically, *terroir* refers to an area or terrain, usually rather small, whose soil and micro-climate impart distinctive qualities to food products. The word is particularly closely associated with the production of wine.'² This type of causal relationship – where the physical geography factors within a region leave their distinctive traces upon the end product – is reflected in the definition of a geographical indication (GI) found in Article 22.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).³

According to Article 22.1, a GI is a sign that identifies 'a good as originating in the territory of a [WTO] Member, or a region or locality in that territory, where a given *quality*, reputation or *other characteristic* of the good is

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¹ See Daniel W. Gade, *Tradition, Territory, and Terroir in French Viniculture: Cassis, France, and Appellation Contrôlée*, 94(4) ANNALS ASS'N AM. GEOGRAPHERS 848 (2004); Cornelis Van Leeuwen & Gerard Seguin, *The Concept of Terroir in Viticulture*, 17 J. WINE RES. 1 (2006); Marion Demossier, *Beyond Terroir: Territorial Construction, Hegemonic Discourses, and French Wine Culture*, 17 J. ROYAL ANTHROPOLOGICAL INST. 685 (2011).

² Elizabeth Barham, 'Translating Terroir' Revisited: *The Global Challenge of French AOC Labeling*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND GEOGRAPHICAL INDICATIONS 57 (Dev Gangjee ed., 2016).

³ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUNDS vol. 31, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPS].

essentially attributable to its geographical origin' (emphasis added). However, this chapter will focus on the relatively ignored option bracketed between qualities and characteristics – reputation. Ironically, reputation is the least talked about form of linkage between product and place. The analysis which follows considers the question of when a product's reputation can be said to be essentially attributable to its geographical origin.

This is a question worth investigating because it relates to the very foundation of GI protection. The basis for treating GIs as a distinct intellectual property (IP) regime rests on the notion of a verifiable link between a product and its place of origin.⁴ In the words of the World Intellectual Property Organization (WIPO):

It is important for the justification of the elements of the definition to be made in the most objective manner possible with a view to giving the link a precise and specific form, since this constitutes the basis for the protection of a [GI]. The grant of an exclusive right to a denomination is made only insofar as this right is justified by objective elements and forms of proof. These elements and proof help to make the subject matter for which protection is sought and the reason for such protection understandable, while using, for example, specifications containing these elements in methodological and concrete terms.⁵

The necessity for a causal and objectively verifiable link was also endorsed by the Institut National de l'Origine et de la Qualité (INAO), which has regulated GIs in France since its inception in 1935.⁶ When registering a protected designation of origin (PDO) or protected geographic indication (PGI), a demonstration of the causal interaction between the specificities or characteristics of the area and the characteristics of the product is expected to be provided.⁷

Yet despite the justificatory significance of the link, scholars working in this field have noticed a countervailing trend – a general loosening of the link

⁴ For the origins of this link and its justificatory functions in GI regimes, see DEV GANGJEE, *RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS* (2012) [hereinafter GANGJEE, *RELOCATING GIs*].

⁵ WIPO, *Geographical Indications*, at 32, WIPO Doc. SCT/10/4 (23 March 2003).

⁶ On the institutional mission of the Institut National de l'Origine et de la Qualité (INAO), see Delphine Marie-Vivien, Laurence Bérard, Jean-Pierre Boutonnet & François Casabianca, *Are French Geographical Indications Losing Their Soul? Analyzing Recent Developments in the Governance of the Link to the Origin in France*, *WORLD DEVELOPMENT* (forthcoming 2016).

⁷ INAO, *GUIDE DU DEMANDEUR D'UNE APPELLATION D'ORIGINE PROTÉGÉE (AOP) OU D'UNE INDICATION GÉOGRAPHIQUE PROTÉGÉE (IGP) À L'EXCEPTION DES VINS ET DES BOISSONS SPIRITUEUSES* (April 2015) 23 ('*La démonstration d'une interaction causale entre les spécificités de l'aire et les spécificités du produit est attendue*') (April 2015).

requirement accompanied by less demanding scrutiny. Driven by the desire to reach strategic multilateral compromises and develop an international consensus in favour of GI protection, proponents of GIs have been relaxing definitional criteria and overlooking enduring ambiguity for decades. In recent work, Irene Calboli has argued for a return to a more rigorous GI definition, which does not stray too far from *terroir*.⁸ The PGI⁹ is cast as the culprit for the lowering of standards, with its permissive approach to a reputational link and its relatively undemanding requirement that only one stage of the product's life cycle (its production, or processing, or preparation) take place within the defined region of origin.

In recent work, I have explored the flexibilities and blind spots contained within the European Union's (EU) GI registration system for agricultural products and foodstuffs, including the limitations of a public certification process when verifying the link between product and place. Within this two-stage process, both the national registrar and the European Commission ultimately work with, and are constrained by, the product specification that is submitted.¹⁰ A registrar can be provided with a PGI specification that is entirely silent on certain aspects of production, that permits the sourcing of raw materials for a PGI from outside the specified region or that describes the reputation link by merely referring to a few historical sources. Despite this being a unitary EU-wide system operating according to harmonised standards, there is very limited guidance provided by the Commission in terms of the criteria to be satisfied.¹¹

Delphine Marie-Vivien is also interested in the apparent attenuation of the link requirement for PGIs, but she explores the potential to accommodate

⁸ Irene Calboli, *In Territorio Veritas: Bringing Geographical Coherence in the Definition of Geographical Indications of Origin under TRIPS*, 6(1) WIPO J. 57 (2014); Irene Calboli, *Geographical Indications of Origin at the Crossroads of Local Development, Consumer Protection and Marketing Strategies*, 46 IIC 760 (2015); Irene Calboli, *Of Markets, Culture and Terroir: The Unique Economic and Culture-Related Benefits of Geographical Indications of Origin*, in INTERNATIONAL INTELLECTUAL PROPERTY LAW: A HANDBOOK OF CONTEMPORARY RESEARCH 433 (Daniel Gervais ed., 2015).

⁹ See *infra* Section 3.

¹⁰ Dev Gangjee, *Proving Provenance? Geographical Indications Certification and Its Ambiguities*, WORLD DEVELOPMENT (forthcoming 2017).

¹¹ In the European Union (EU), a modest seven-page guide for GI applicants exists. See European Commission, *Guide to Applicants: How to Complete the Single Document*, http://ec.europa.eu/agriculture/quality/schemes/guides/guide-for-applicants_en.pdf (last visited 23 April 2016). In contrast, the guidelines for registry examiners for the unitary Community Trade Mark (the EU Trade Mark from 2016) run into thousands of pages. See European Union Intellectual Property Office, *Trademark Guidelines*, <https://oami.europa.eu/ohimportal/en/trade-mark-guidelines> (last visited 23 March 2016).

human factors within this less deterministic (in a physical geography sense) form of link. The PGI model has the flexibility to incorporate traditional crafts and textiles within the present EU approach towards GI protection. Therefore, for Marie-Vivien, reputation is the potential vector for admitting such products into the EU's conceptual framework of GIs.¹² Crafts, textiles and non-agricultural GIs in general are of interest not just for the EU but for countries in Asia and Africa as well. Thus, reputation as a form of linkage between product and place is presently both a cause for concern – because its loose application undermines the justifications for GI protection – and a potentially flexible option to incorporate non-agricultural products, which demonstrate an appropriate historic connection with a place. Both its peril and potential make this an opportune moment to study the question taken up by this chapter.

Section 2 will identify five reasons why we need to think about the content of the reputation link more closely. While reputation is increasingly being relied upon in GI legislation as well as registration systems, there is a curious absence of criteria that would help to establish this type of link. Section 3 will establish that assistance cannot be found in the drafting history of TRIPS or other contemporaneous legal instruments. It will review the circumstances under which the reputation link was introduced and show that it is normatively hollow. This history suggests that it was incorporated into the draft text of TRIPS as an acceptable compromise, not only between New World opponents and Old World proponents at the General Agreement on Tariffs and Trade (GATT) negotiations leading up to TRIPS, but also as a viable solution for members of the European Community (EC), who were divided over which types of GIs ought to be recognised within Europe. Indeed, reputation was rather hastily incorporated within a framework otherwise premised upon *terroir*. Therefore, if we are to make meaningful sense of a reputation, which is essentially attributable to origin, then this type of link should be informed by the overall purpose and objectives of *sui generis* GI protection. The potential components of the reputation link are unpacked in Section 4, which will also relate these criteria back to the foundations for GI protection. Section 5 concludes.

¹² Delphine Marie-Vivien, *The Protection of Geographical Indications for Handicrafts: How to Apply the Concepts of Natural and Human Factors to All Products*, 4 WIPO J. 191 (2013); Delphine Marie-Vivien, *A Comparative Analysis of GIs for Handicrafts: The Link to Origin in Culture as Well as Nature?* in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND GEOGRAPHICAL INDICATIONS 292 (Dev Gangjee ed., 2016).

2 WHY WE NEED TO TALK ABOUT REPUTATION

There are at least five compelling reasons why we should think more carefully about reputation as the basis for the link between product and place. First, the GI definition in Article 22.1 of TRIPS is by now well established as the international reference point. This is evident in national or multilateral definitions that map on to Article 22.1.¹³ Reputation is therefore an independent and sufficient basis for satisfying the definition of a GI. However, it is a form of linkage that will inevitably be subjected to testing. The ongoing TRIPS negotiations regarding the establishment of a multilateral register for wine and spirit GIs have witnessed deliberations on whether registration notifications should include ‘details of the quality, reputation or other characteristics of the wine or spirit essentially attributable to its geographical origin’.¹⁴ The requirement for such details at the time of international registration is also reflected in the ‘work-in-progress’ composite text of the multilateral register.¹⁵ A notification could include a declaration of conformity with the definition of a GI in Article 22.1 of TRIPS. Not satisfying Article 22.1 could potentially be a basis for refusing protection within the territory of a participating member.¹⁶ Yet, the reputation link in Article 22.1 remains poorly understood.

Second, the TRIPS definition of GIs has recently been accommodated within Article 2(1)(ii) of the Geneva Act of the Lisbon Agreement 2015.¹⁷ The Lisbon system has established an international registration system for qualifying geographical designations, which are recognised at the national level. Scrutinising international registrations for compliance with the

¹³ A review by the WTO of the existing legislation in 2003 confirmed that the notion of GI, as defined by TRIPS, formed the basis for several national definitions. See WTO, Review under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications, at 42, WTO Doc. IP/C/W/253/Rev.1 (24 November 2003) (‘many but not all of the definitions include reputation as a specific characteristic related to the geographical origin of a product that might justify protection of the [Indication of Geographical Origin] designating that product’).

¹⁴ World Trade Organization (WTO), Chairman’s Report, TRIPS Council Special Session: Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits, WTO Doc. TN/IP/18, at 15 (9 June 2008).

¹⁵ See WTO, Chairman’s Report, Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits: Report to the Trade Negotiations Committee, WTO Doc. TN/IP/21, at B.2 (21 April 2011).

¹⁶ *Id.* at E.2.

¹⁷ WIPO, Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, WIPO Doc. LI/DC/19 (20 May 2015) [hereafter Geneva Act].

definition of a GI is once again a concern here, but a more immediate one. Where the ‘reputation . . . of the good is essentially attributable to its geographical origin’, it will now qualify for international registration. The Geneva Act provides for both the initial refusal of the effects of international registration by a Contracting Party (Article 15) and the possibility of subsequent invalidation (Article 19). Both refusal and invalidation proceedings require the grounds to be stated.¹⁸ During the deliberations leading up to the adoption of the Geneva Act, ‘grounds based on failure to meet the definition of an appellation of origin or a geographical indication’ were specifically envisioned as a reason for invalidation.¹⁹ Similarly, a refusal to recognise a GI can be based on any ground, including failure to satisfy the definitional provisions.²⁰ Thus, a more developed sense of when a reputation is ‘essentially attributable’ to the product’s geographical origin is a necessary prelude to any such challenges.

If the first two reasons relate to multilateral obligations and international norms, the next three draw upon developments within the EU context, but the insights are more broadly applicable. The third reason is conveyed most conveniently by statistics. As of 29 February 2016, the Database of Origin and Registration (DOOR) indicated that PGI registrations were maintaining their lead over PDO registrations in the EU²¹ – there were 671 registered PGIs and 604 registered PDOs.²² One principal difference between the two types of GI is that for a PGI to be registered a product’s ‘given quality, reputation or other characteristic is essentially attributable to its geographical origin’, whereas for a PDO, the product’s ‘quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors’.²³ It is evident that the reputational basis for registration, with its attendant flexibility, is proving to be popular.

¹⁸ See respectively Geneva Act, *supra* note 17, at art. 15(1)(b); Regulations under the Geneva Act, *supra* note 17, at 9(2)(iii), 10(1)(ii); Regulations under the Geneva Act, *supra* note 17, at 13(1)(v).

¹⁹ WIPO, *Notes on the Basic Proposal for the New Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications*, at 19.01, WIPO Doc. LI/DC/5 (22 December 2014).

²⁰ *Id.* at 15.03.

²¹ The definition and difference between protected denominations of origin (PDOs) and protected geographical indications (PGIs) are elaborated upon in Part III.

²² See European Commission, *Agriculture and Rural Development*, <http://ec.europa.eu/agriculture/quality/door/list.html> (last visited 21 April 2016).

²³ See Council Regulation 1151/2012, art. 5, 2012 O.J. (L323/1).

Fourth, recent pronouncements from the Court of Justice of the European Union (CJEU)²⁴ have confirmed that the EU's harmonised regime for GI protection, set out in Regulation 1151/2012 and its predecessors, is exhaustive and pre-empts national GI registration systems *to the extent that they regulate the same subject matter*.²⁵ Therefore, where a regional product's reputation is causally attributable to its geographical origin, it can no longer be protected by national protection systems, such as passing off or unfair competition law, which have historically protected GIs.²⁶ As a recent dispute concerning *Greek Yoghurt* highlights, such a geographical designation has to be registered at the EU level, failing which it is apparently left vulnerable, without any legal protection at the national level.²⁷ The objective is to channel all suitably qualified subject matter into the unitary EU regime in order to achieve complete harmonisation. However, the CJEU case law suggests that simple geographical designations can continue to be protected at the national level, for instance, under unfair competition law. The court has recently summarised the position as follows:

[It] is apparent from the case-law that whilst the aim of Regulation No 2081/92 [which previously regulated GIs for agricultural products and foodstuffs] is to provide a uniform and exhaustive system of protection . . . that exclusivity does not preclude, however, the application of rules governing the protection of geographical designations which fall outside its scope . . . It is apparent [both from the preamble to the Regulation and the PGI definition] that the rules on protection laid down by that provision cover only designations relating to products for which there is a specific link between their characteristics and their geographical origin.²⁸

²⁴ Formerly the European Court of Justice (ECJ).

²⁵ This was emphatically confirmed by the CJEU Grand Chamber. See Case C-478/07 *Budějovický Budvar National Corporation v. Rudolf Ammersin GmbH* (C-478/07) [2009] E.C.R. I-7721; 2009 E.T.M.R. 65, at 106–29 (*Budweiser II*).

²⁶ WIPO, *Document SCT/6/3 Rev. on Geographical Indications: Historical Background, Nature of Rights, Existing Systems for Protection and Obtaining Protection in Other Countries*, at 16, WIPO Doc. SCT/8/4 (2 April 2002).

²⁷ This was argued before the UK Court of Appeals. See *Fage UK Ltd. v. Chobani UK Ltd.* [2014] EWCA (Civ) 5. The issue was whether 'Greek Yoghurt' could potentially be registered as a GI at the EU level as a PGI. If it could, in principle, then there would be no other form of protection available at the national level. The tort of passing off had already been established at trial and the appellants, Chobani, attempted to escape its consequences by arguing, ultimately unsuccessfully, that Greek Yoghurt had a PGI-type reputation and would qualify in principle under the harmonized EU regime, so passing off protection was pre-empted at the national level. The author must declare that he acted as a consultant for the respondent, Fage, in this matter.

²⁸ Case C-35/13, *Kraft Foods Italia v. Associazione fra produttori per la tutela del 'Salame Felino' and Others*, 2014 [Unreported] at 28–29.

Consequently, it seems that the CJEU endorses a distinction between a PGI-type reputation that is objectively or causally attributable to origin and a non-PGI type reputation, where a product may be subjectively or 'romantically' connected to its region of origin in the eyes of consumers but for which there is no objective basis. The latter may still be protected under national unfair competition law, provided it does not unjustifiably impede the free movement of goods within the internal market. In the United Kingdom (UK), this distinction was at issue in *Greek Yoghurt*, where subjective reputation was described in the following manner:

It is impossible to do much more than speculate as to why that substantial proportion of the relevant public think that [thick and creamy] Greek yoghurt is special. Some may . . . make a romantic association between Greek yoghurt and a Greek holiday. Some may think that Greeks use manufacturing methods that give it its special thick and creamy texture. Few would probably know how or why.²⁹

Ultimately, what mattered for the requirements of the tort of passing off was that a subjectively held and commercially valuable reputation contingent upon Greek origin existed which could be protected against misrepresentation. We therefore need clearly identified and workable criteria in order to distinguish between these two types of reputation associated with geographical origin, because only subjective reputation will continue to be protected at the national level within the EU.

The fifth reason for seeking greater clarity is that the European Commission is proposing to extend the EU's GI regime to non-agricultural products and handicrafts. Its interest was signalled in a Green Paper in 2014,³⁰ which drew upon a prior study exploring the potential to register crafts and textile products from across the EU.³¹ The Commission's proposal recognises that non-agricultural products may also possess a link to a region, which can either be a *terroir* or reputation-based link:

This link to a geographical location can also apply to non-agricultural products. In some cases, such as marble and stone, the strength of the link

²⁹ *Fage UK Ltd. v. Chobani UK Ltd.* [2013] EWHC (Ch) 630 [115]. The issue of whether passing off was pre-empted was only raised on appeal, see [2014] EWCA Civ 5.

³⁰ *Commission Green Paper Making the Most Out of Europe's Traditional Know-How: A Possible Extension of Geographical Indication Protection of the European Union to Non-Agricultural Products*, COM (2014) 469 final (15 July 2014) [hereinafter *Green Paper*].

³¹ See INSIGHT CONSULTING ET AL., *STUDY ON GEOGRAPHICAL INDICATION PROTECTION FOR NON-AGRICULTURAL PRODUCTS IN THE INTERNAL MARKET FINAL REPORT* (2013), http://ec.europa.eu/internal_market/indprop/docs/geo-indications/130322_geo-indications-non-agri-study_en.pdf.

is comparable to that for agricultural products . . . In principle, the stronger the link, the more credible and authentic a product will be in the eyes of the consumer. However, certain GIs may be based entirely on human rather than natural inputs, or on reputation.³²

Reputation attributable to geographical origin could be used as a criterion in addition to, or as an alternative to, a particular quality or inherent characteristic of the product. This would allow GI protection to be extended only to products that have already developed a recognised reputation among consumers.³³

If reputation is to be put to work in this context, then we need to better understand how it can be anchored in or ‘essentially attributable’ to the place of origin.

3 REPUTATION: A COMPROMISE OR COMPROMISED?

Historical research confirms that we are unlikely to find the answers we seek within the text or *travaux* of TRIPS. This section documents (a) how reputation was included within the TRIPS definition as a compromise; and (b) how it was an incompletely conceived compromise, because reputation was hastily amalgamated within a paradigm otherwise dominated by a *terroir*-based approach to GI protection. This compromise unfolded in two broad stages. To fully account for the presence of the reputation link in TRIPS, we have to first acknowledge a prior reconciliation within Europe as part of the historical backdrop to the EU’s own harmonised GI regime for agricultural products and foodstuffs.

3.1 *Two Paradigms of Geographical Indication Protection*

Wine is the archetypal GI product. Since the latter part of the nineteenth century, successive legislative experiments directed at regulating wine appellations in France showcase the extent to which *terroir*-thinking gradually characterised the nature of the link between product and place.³⁴ The transition from the *appellation d’origine* (AO) to the *appellation d’origine contrôlée* (AOC) reveals that a naturally deterministic understanding of *terroir*, which was reliant on physical geography factors such as soil, sunlight,

³² *Green Paper*, *supra* note 30, at 16–17. ³³ *Id.* at 18.

³⁴ This transition is comprehensively documented in Chapter 3 of GANGJEE, *RELOCATING GIS*, *supra* note 4; See also Alessandro Stanziani, *French Collective Wine Branding in the Nineteenth–Twentieth Centuries*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND GEOGRAPHICAL INDICATIONS 13 (Dev Gangjee ed., 2016).

orientation and elevation, gave way to a more holistic understanding which also included production techniques and human influences.³⁵ The *terroir* approach was adopted by Southern European countries with a wine-growing tradition, including Italy, Spain and Portugal. Within this paradigm, *reputation was an additional factor* to be considered cumulatively, after an objectively verifiable causal connection was established between a product's qualities and its region of origin.

The paradigm is perhaps best exemplified by Article 2 of the Lisbon Agreement of 1958.³⁶ Article 2(1) requires that the 'quality or characteristics of [the product] are due exclusively or essentially to the geographical environment', while Article 2(2) additionally stipulates that when identifying the country of origin we have to look for the country containing the place 'which has given the product its reputation'. This is made explicit in Lisbon's Geneva Act of 2015, where Article 2(1)(i) defines an appellation of origin as 'any denomination . . . consisting of or containing the name of a geographical area, or another denomination known as referring to such area, which serves to designate a good as originating in that geographical area, where the quality or characteristics of the good are due exclusively or essentially to the geographical environment, including natural and human factors, *and which has given the good its reputation*' (emphasis added).

By contrast, in other European jurisdictions, GIs were protected under unfair competition law.³⁷ Historically, unfair competition has been used in different senses. It is variously an umbrella term for a cluster of tortious actions (or their equivalents in *delict*), an individual tort by itself or the basis for a specific statutory regime. What unites the different approaches is their emphasis on misconduct. All of these iterations seek to regulate the activities of traders in the marketplace and enable courts to cry foul when business practices overstep their limits. For example, while it may be permissible for a trader to claim her goods are better than those of a rival, or even to claim that those of her rival are objectively inferior, it will not be permissible to lie to customers about the source or quality of her goods, or unjustifiably

³⁵ For the origins and competing accounts of *terroir*, see Laurence Bérard, *Terroir and the Sense of Place*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND GEOGRAPHICAL INDICATIONS 72 (Dev Gangjee ed., 2016).

³⁶ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 31 October 1958, *as revised* 14 July 1967, 923 U.N.T.S. 205. For a comparison between TRIPS and Lisbon definitions, including the approach to reputation, see Daniel Gervais, *The Lisbon Agreement's Misunderstood Potential*, 1 WIPO J. 87 (2009).

³⁷ See HERMAN COHEN JEHOAM, PROTECTION OF GEOGRAPHIC DENOMINATIONS OF GOODS AND SERVICES (1980); WIPO, *supra* note 26, at 11–17.

disparage the products of her rival.³⁸ Consequently, WIPO identifies ‘at least one objective that is common to all different approaches, and that is to provide those in trade with an effective remedy against unlawful and dishonest business practices of their competitors’.³⁹ Germany and the UK are two prominent jurisdictions that favoured such an approach to GI protection.⁴⁰

As opposed to the information being specified *ex ante*, in a *cahier des charges* or product specification required by registration-based systems under the *terroir* paradigm, the unfair competition approach adopted a different methodology for identifying a regional product, determining its region of production and legally recognizing those entitled to use the geographical name on their products. These answers would only crystallise within the context of an individual dispute, on a case-by-case basis. Furthermore, recognition and protection were dependent upon the communicative content of the sign. The designation would inevitably be protected against deceptive uses or misrepresentations and, depending on the national regime in question, potentially against misappropriating or free-riding uses as well. Protection in turn was contingent upon consumer perception. From the consumers’ perspective (and that of the trade), did a geographical designation used on certain products have a reputation in the market? Would the relevant public expect the product to come from a specific region? Would they expect it to be made in accordance with certain techniques and processes (for example, a minimum ageing requirement for whisky) even if they were unclear on the precise details? If so, consumer expectations would be protected together with the reputation of the product.

It is crucial to point out that within the unfair competition paradigm the paramount consideration is whether a valuable reputation exists in the marketplace for a regional product. Its existence could be established through direct and indirect evidence such as sales figures, mentions in the media or consumer surveys. That reputation *did not have to be essentially or causally attributable to geographical origin* in the manner that the *terroir* approach requires.⁴¹ Reputed geographical designations were treated in the same way as

³⁸ WIPO INTERNATIONAL BUREAU, PROTECTION AGAINST UNFAIR COMPETITION: ANALYSIS OF THE PRESENT WORLD SITUATION 48, 54–60 (1994).

³⁹ WIPO, *supra* note 26, at 12.

⁴⁰ See GANGJEE, RELOCATING GIs, *supra* note 4, at 115–124; Dev Gangjee, *Spanish Champagne: An Unfair Competition Approach to GI Protection*, in INTELLECTUAL PROPERTY AT THE EDGE 105 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014).

⁴¹ See Friedrich-Karl Beier & Roland Knaak, *The Protection of Direct and Indirect Geographical Indications of Source in Germany and the European Community*, 25 INT’L REV. INTELL. PROP. & COMPETITION L. 1, 2 (1994).

trade names or unregistered (trade) marks, which also had reputations worth protecting. Given this detachment from any *terroir*, i.e. causal connection requirement, an unfair competition approach to GIs can range beyond agricultural products to accommodate reputed manufactured as well as artisanal products, such as Solingen steel, Brussels lace and Swiss clocks. It can also scale up to protect national-level reputations for products such as Jamaican rum, which would otherwise be impermissible under a *terroir* approach where homogenous geographical features need to be identifiable within a region.

3.2 *Accommodating Reputation within a Terroir* *Paradigm: The EU Compromise*

The extent to which the *terroir* and unfair competition approaches to GI protection were equally legitimate was directly tested before the CJEU in the decades preceding the adoption of a harmonised EU-wide system of protection. Throughout the 1970s and 1980s, only the former was recognised as a legitimate category. During this period, the case law was characterised by suspicion towards national labelling regimes that protected simple or quality-neutral GIs of source, which could potentially have operated as disguised restrictions on the free movement of goods within the common market.⁴² The French AO concept, with its purportedly objective link between origin and quality, provided an acceptable basis for prohibiting the use of appellations by those outside the designated regions. It would take several years before the Court acknowledged the protection of a valuable reputation, alongside the prevention of unfair competition, as an alternative basis for restricting the use of geographical designations. Two prominent decisions of the CJEU bracket this transition.

In the *Sekt/Weinbrand* decision,⁴³ the validity of German legislation, which restricted the use of certain wine designations, was challenged. It reserved the designations ‘Sekt’ and ‘Weinbrand’ to domestic products and the appellation ‘Prädikatssekt’ to wines produced in Germany from a fixed minimum proportion of German grapes. The German law further prescribed that imported sparkling wine and wine brandy not in compliance with these conditions had

⁴² Geographical designations indicating national territories, but without any objectively verifiable link associated with the territory, could be disguised campaigns to appeal to patriotic buying. For a convenient summary of the free movements backdrop, see VADIM MANTROV, *EU LAW ON INDICATIONS OF GEOGRAPHICAL ORIGIN: THEORY AND PRACTICE* 113–118 (2014).

⁴³ Case C-12/74, *Commission v. Germany*, 1975 E.C.R 181.

to use different terminology ('Schaumwein' and 'Branntwein aus Wein').⁴⁴ The European Commission queried the German legislation's compatibility with the former Article 28 (now Article 34 of the Treaty on the Functioning of the European Union (TFEU)) on the basis that by claiming generic terms as indirect geographical designations, it favoured domestic production and operated as a measure equivalent to a quantitative restriction on imports. Germany responded that while it might be a restriction, it was justified on the basis of protecting consumers and legitimate producers against unfair competition. Therefore, it was a permissible exception to Article 28 contained in Article 30 (now Article 36 TFEU). In dismissing the German argument, the CJEU made the following observation:

These [wine] appellations only fulfil their specific purpose [i.e. to safeguard producers against unfair competition and prevent consumers being misled] if the product which they describe does in fact possess qualities and characteristics which are due to the fact that it originated in a specific geographical area.

As regards indications of origin in particular, *the geographical area of origin* of a product *must confer on it a specific quality and specific characteristics* of such a nature as to *distinguish it from all other products* (emphasis added).⁴⁵

Since this qualitative link was not invoked, restrictions on these terms were found to be unjustified. It should be noted that the outcome of the decision was not considered objectionable. Such expressions were arguably generic at the time, so in trying to artificially impose a specific geographical limitation, the contested legislation was vulnerable on this ground alone. However, the reasoning that was applied proved divisive.

The controversy stemmed from the implication that reputation-based geographical designations did not fall within the limited exceptions to the free movement of goods principle. As the AO appeared to be the only legitimate category of GI worthy of being exempted from a free movements challenge, the decision provoked forceful critiques.⁴⁶ A measure of their potency is the

⁴⁴ As required by WEINGESETZ 1971 [LAW ON VINE PRODUCTS] Bundesgesetzblatt I [BGBl] No. 63/1971 and WEINGESETZ 1971 [SPARKLING WINES AND SPIRITS OBTAINED BY DISTILLING WINE] Bundesgesetzblatt I [BGBl] No. 64/1971.

⁴⁵ Case C-12/74, Commission v. Germany, 1975 E.C.R. 181, at 7.

⁴⁶ See, e.g., Derrick Wyatt, *Free Movement of Goods and Indications of Origin*, 38 MOD. L. REV. 679 (1975); Friedrich-Karl Beier, *The Need for Protection of Indications of Source and Appellations of Origin in the Common Market: The Sekt/Weinbrand Decision of the ECJ*, 16 INDUS. PROP. 152 (1977).

outcome in the CJEU's subsequent *Exportur* decision.⁴⁷ Here, the issue was whether the Spanish geographical designations 'Touron Alicante' and 'Touron Jijona' could be used on nougat confectionery produced in France. These were protected designations under a Franco-Spanish Treaty,⁴⁸ notwithstanding the absence of an objective or *terroir*-based link. The Court held that despite this, such designations 'may nevertheless enjoy a high reputation amongst consumers and constitute for producers established in the places to which they refer an essential means of attracting custom. They are therefore entitled to protection.'⁴⁹ Celebrating this vindication of the reputational basis for GI protection, Professor Beier argued that any harmonised EU regime which represented the AO ideal alone would have been a 'monstrosity'.⁵⁰

With this eventual judicial recognition of both the *terroir* and reputation approaches, there is ample evidence that the EU's harmonised regime for agricultural products and foodstuffs, introduced by Regulation 2081/92,⁵¹ institutionalised this compromise. It fused these two distinct approaches together within a common framework premised upon registration-based legal recognition. The Regulation begins with the concession that 'existing practices make it appropriate to define two different types of geographical description, namely protected geographical indications and protected designations of origin'.⁵² The solution was therefore to create two 'doorways' into the GI registration system in Article 2. PDOs could be applied to products of which 'the *quality or characteristics . . . are essentially or exclusively due* to a particular geographical environment with its inherent natural and human factors' (emphasis added). In contrast, PGIs envisioned a looser form of link and were available for products 'which [possess] 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' (emphasis added). However, both

⁴⁷ Case C-3/91, *Exportur SA v. LOR SA and Confiserie du Tech SA*, 1992 E.C.R. I-5529.

⁴⁸ See Convention between the French Republic and the Spanish State on the Protection of Designations of Origin, Indications of Provenance, and Names of Certain Products, 27 June 1973, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], 18 April 1973, p. 4011.

⁴⁹ Case C-3/91, *Exportur SA v. LOR SA and Confiserie du Tech SA*, 1992 E.C.R. I-5529, at 28.

⁵⁰ Friedrich-Karl Beier, *Case Comment: Court of Justice – Case No. C-3/91 'Turon'*, 25 INT'L REV. INTELL. PROP. & COMPETITION L. 73, 81 (1994).

⁵¹ Council Regulation 2081/92 of 14 July 1992, Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 1992 O.J. (L 208/1).

⁵² *Id.* at 10.

types of GIs would be granted equal protection. This ‘two doorways’ compromise has been maintained in the successors to Regulation 2081/92, namely Regulation 510/2006 and Regulation 1151/2012.⁵³

The existence of two different types of GIs attests to the underlying fissures and factionalism in the lead up to the original Regulation. Writing at the time of its enactment, one commentator noted that on ‘14 July 1992, contrary to common belief and indeed much to general amazement, the EC Regulations on the “protection of designations of geographical origin” . . . were passed by the European Council despite the number of disputed issues which remained unresolved until the last moment’.⁵⁴ The initial French memorandum submitted in 1988 was restricted to designations of origin, along the lines of the AO, which was subsequently supported by Italy and Spain.⁵⁵ However, the draft text of the Commission’s proposed Regulation contained references to both PGIs and PDOs.⁵⁶ The influence of the AO model remains visible in the Opinion of the Economic and Social Committee, which reveals glimpses of *terroir*-thinking at crucial junctures. Thus, while acknowledging the importance of protecting a product’s reputation, the Committee noted that the ‘special characteristics of the food involved derive from their origin, soil conditions, geographical and climatic environment, the varieties and species used, and the way they are prepared or produced. It is these factors which give the product its name and reputation in the marketplace.’⁵⁷

During this phase, the drafting process involved negotiations between two competing Northern and Southern groups. Marina Kolia observed that when the proposals reached the European Parliament in September of 1991, GI

⁵³ See respectively Council Regulation No 510/2006 of 20 March 2006, Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 2006 O.J. (L 93/12) art. 2; Council Regulation No 1151/2012 of 21 November 2012, Quality Schemes for Agricultural Products and Foodstuffs, 2012 O.J. (L 343/1).

⁵⁴ Marina Kolia, *Monopolizing Names of Foodstuffs: The New Legislation*, 4 EUR. INTELL. PROP. REV. 333, 333 (1992).

⁵⁵ Francois Vital, *Protection of Geographical Indications: The Approach of the European Union*, in SYMPOSIUM ON THE INTERNATIONAL PROTECTION OF GEOGRAPHICAL INDICATIONS (1999). For an excellent general background, see Onno Brouwer, *Community Protection of Geographical Indications and Specific Character as a Means of Enhancing Foodstuff Quality*, 28 COMMON MKT. L. REV. 615 (1991).

⁵⁶ See *Council Proposal on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs*, at 90 SEC (1991) 2415 final (21 January 1991), and as amended by COM (1992) 32 final (18 March 1992).

⁵⁷ See *Opinion of the Socio Economic Committee on the ‘Proposal for a Council Regulation (EEC) on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs’*, 1991 O.J. (C 269/62) 1.2.

protection was again restricted to PDOs and ‘the applicants were required to produce convincing evidence that the product’s characteristics were essentially due to the geographical origin’.⁵⁸ The European Parliament did not accept the proposal in this form and the draft Regulation returned to the Commission, where it was further debated. At this stage, Germany began ‘to promote the idea of a very broad category under which all geographical names would be mutually recognised’.⁵⁹ When faced with the option of a single broad definition, which would have diluted the cachet of the AO concept, negotiators revived the PGI as an alternative option. Eventually, an acceptable compromise was arrived at in the form of two distinct pathways into registration and the crisis was averted.

3.3 *The EU Compromise as the Multilateral Template*

There is a convincing documentary trail which reveals that the internal compromise between the German (unfair competition prevention by emphasising reputation) and French (*terroir* logic premised on a qualitative link) approaches went on to inform the EC’s position in multilateral negotiations. The EC’s recognition of a reputation-based link was visible in its proposal during – the ultimately unsuccessful – WIPO negotiations for the revision of the Paris Convention⁶⁰ in 1990. The issue under discussion was whether there was an alternative to the existing categories of a simple, quality-neutral indication of source (IS) (e.g., Made in China) and the more demanding AO (e.g., Bordeaux).

[The EC Representative suggested that] in order for a geographical indication to be ‘protectable’, some kind of link must exist between the geographical area to which the indication refers and the goods which originate from that area. [The EC further suggested that] protectable geographical indications should be those which ‘designate a product as originating from a country, region, or locality where a given quality, reputation or other characteristic of the product is attributable to its geographical origin, including natural and human factors’. It was explained that this ‘quality link’ was broader than the

⁵⁸ Marina Kolia, *Monopolising Names: EEC Proposals on the Protection of Trade Descriptions of Foodstuffs*, 14 EUR. INTELL. PROP. REV. 233, 235 (1992).

⁵⁹ *Id.* at 235–36.

⁶⁰ Paris Convention for the Protection of Industrial Property, *opened for signature* 20 March 1883, 21 U.S.T. 1583, 828 UNTS 305 (revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925, at London on 2 June 1934, at Lisbon on 31 October 1958, and at Stockholm on 14 July 1967, and as amended on 28 September 1979).

restrictive definition of ‘appellation of origin’ under the Lisbon Agreement . . . [According to the EC proposal] the link need not consist of a given quality but may consist of a given ‘reputation or other characteristic’ and such characteristic need not be ‘exclusively or essentially’ attributable to its geographical origin.⁶¹

Two important ingredients of the TRIPS definition – the stand-alone reputation option to establish the link and the relative loosening of this link – were introduced at this stage.⁶² The EC was also very clearly drafting its own harmonised GI regime in accordance with its position during the Uruguay Round negotiations. The Commission’s draft for Regulation 2081 specifically notes:

[The draft Regulation] also broadly reflects the position which the Community has defended in the international negotiations on intellectual property in GATT.

In the Uruguay Round negotiating group on intellectual property, the Community proposed a definition of, and appropriate protection for, geographical indications, including designations of origin, which the Commission has taken into account.⁶³

During the Uruguay Round negotiations, it is widely acknowledged that the EC was the driving force behind the TRIPS GI provisions.⁶⁴ As for the drafting of Article 22.1, a helpful resource was the Secretariat’s synoptic table of proposals accumulated by early 1990.⁶⁵ The EC’s proposed definition closely resembled the final TRIPS version with its reputation link option, save for the addition of ‘geographical origin, including natural and human factors’. The core of this definition remained stable until the final TRIPS text was adopted, presumably because it was acceptable to those countries which protected GIs either under unfair competition or trademark law.⁶⁶

⁶¹ WIPO Secretariat, *Report Adopted by the Committee of Experts*, WIPO Doc. GEO/CE/II/3, at 49 (1 June 1990).

⁶² For the drafting history of the TRIPS GI provisions, see GANGJEE, *RELOCATING GIs*, *supra* note 4, at 191–236.

⁶³ Proposal for a Council Regulation, *supra* note 56, at 9–10.

⁶⁴ Most recently acknowledged by the negotiators themselves; see JAYASHREE WATAL & ANTONY TAUBMAN, *THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS* 28, 98, 116, 147, 178, 194, 197 (2015).

⁶⁵ See Group of Negotiations of Goods (GATT), *Synoptic Tables Setting Out Existing International Standards and Proposed Standards and Principles*, GATT Doc. MTN.GNG/NG11/W/32/Rev.2, at 68–69 (2 February 1990) (The only other proposed definition is a much broader Swiss one, similar to the simple indication of source).

⁶⁶ The differences between the trademark approach and the appellation approach have been explored in Daniel Gervais, *A Cognac after Spanish Champagne? Geographical Indications as*

Countries that were opposed to *sui generis* GI protection, including the US and Australia, found the relatively broad definition with its acknowledgement of reputation acceptable. This definition established common ground by including certification and collective marks within the GI definition. After all, these were established categories of marks and potential vectors for the protection of a collectively sustained reputation.

Therefore, while the TRIPS definition was ultimately acceptable as a bridge to span the – primarily trans-Atlantic – divide over GIs, the origins of this European proposal can be traced to an internecine dispute between European neighbours. However, the compromise superficially glosses over a fundamental distinction: the unfair competition or trademark approach was amenable to protecting a regional product's reputation *without any necessity for a causal link requirement*. The very existence and commercial value of the reputation was a sufficient basis for protection. This proves to be an awkward fit within a GI definition, which originated in a *terroir* paradigm and saw reputation, as an additional factor, dependent upon the existence of a causal connection between a product's desirable qualities or characteristics and its geographical origin.

Once this history is retrieved, there are clear traces that the two paradigms of *terroir* and unfair competition have been inelegantly fused together within TRIPS. Clashing styles of conceptual architecture remain obvious. For a start, there is the central puzzle of having to prove that a product's commercially valuable reputation is also essentially attributable to geographical origin in a causally verifiable manner. Section 4 considers how we might best make sense of this. Furthermore, how are we to define the boundaries of the region of origin for a product which has a reputation-based link? A study by WIPO observed that the standard criterion for delimiting a region of origin includes natural features (rivers, contour lines); geographical characteristics (soil drainage, climate, elevation); human influences (choice of plant variety, method of production); historical associations; and economic considerations (equivalence of yield).⁶⁷ Several of these criteria are more relevant for a *terroir* link and will be inapplicable for reputation-based products.

Moreover, TRIPS suggests that the name of an entire country could qualify as a GI. While this is acceptable under a reputation-based approach, it is unlikely under a *terroir* one, which requires a geographical region to be both

Certification Marks, in INTELLECTUAL PROPERTY AT THE EDGE 105 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014).

⁶⁷ WIPO Secretariat, *The Definition of Geographical Indications*, WIPO Doc. SCT/9/4 at 20 (1 October 2002).

relatively homogenous and distinctive in order to influence the product.⁶⁸ Finally, while TRIPS applies to goods, it does not prohibit GIs being recognised for services. Switzerland, Estonia, Uruguay, Peru, Korea and Morocco are some countries that recognise GIs for services in the hospitality, banking, financial, or health and traditional healing sectors.⁶⁹ While a well-regarded local service may give rise to a valuable reputation – perhaps solely based on human factors with their attendant mobility – and qualify for protection under the unfair competition paradigm, how is this essentially attributable to geographical origin? These are just some of the unresolved questions that have arisen from the fusion of two previously distinct paradigms.

4 FROM GEOGRAPHY TO HISTORY: AN ‘ESSENTIALLY ATTRIBUTABLE’ REPUTATION

Now for the difficult question: what kind of reputation ought to be ‘essentially attributable’ to geographical origin? Without clear guidance, there is a very real risk that the established unfair competition or trademark approach to measuring reputation will be inappropriately transplanted into the *sui generis* GI context. For these regimes, establishing a sign’s reputation is relevant primarily in two situations:

- (a) Does the trademark applicant’s or unfair competition claimant’s sign qualify for protection? Here, a sign may initially be a descriptive or otherwise unsuitable term (e.g., STAPLES for office supplies),⁷⁰ but over time and through marketing efforts, the relevant public can be taught that the sign indicates a specific commercial source. The success of this process of education is measured via the doctrines of acquired distinctiveness or secondary meaning.⁷¹
- (b) What is the scope of protection available? Reputed or famous trademarks are granted a broader penumbra of protection both under the likelihood of confusion test (which prevents use of the trademark on dissimilar goods or services, or even in the absence of registration) and via causes of action

⁶⁸ GANGJEE, RELOCATING GIs, *supra* note 4, at 218–20.

⁶⁹ Irina Kireeva & Bernard O’Connor, *Geographical Indications and the TRIPS Agreement: What Protection Is Provided to Geographical Indications in WTO Members?* 13 J. WORLD INTELL. PROP. 275, 282 (2010).

⁷⁰ See STAPLES, <http://www.staples.co.uk> (last visited 22 April 2016).

⁷¹ For US recognition, *see* 15 U.S.C. § 1052(f); for EU recognition, *see* Council Directive 2008/95/EC, art. 3(3) 2008 O.J. (L299/25) (A trademark which is non-distinctive to begin with can be registered ‘if, before the date of application for registration and following the use which has been made of it, it has acquired a distinctive character’).

collectively referred to as ‘dilution’ which all rely on a non-confusing but otherwise wrongful association being made between the claimant and defendant’s signs.⁷²

These approaches seek to determine (a) what percentage of the relevant public are familiar with the sign; and (b) for certain types of claims such as tarnishment, what do the public think about the sign to begin with? Therefore, reputation has a quantitative as well as a qualitative dimension, but it is concerned with contemporary consumer perception. This is reflected in the direct, as well as circumstantial, categories of evidence that are admissible to establish its existence. Therefore, in both the EU and the US, courts will consider factors such as the market share of the product sold under the sign; the intensity, geographical extent and duration of use; the investment in advertising and promotion; the extent of consumer recognition via survey evidence; trade recognition; and unprompted media coverage.⁷³ However, the trademark and unfair competition approaches focus on *whether the reputation exists* at the relevant time and *not how it came about*, let alone why it *arose in a particular place*.

So when is a reputation ‘essentially attributable’ to its geographical origin? The answer to this is a work in progress, but presently cumulative evidence relating to three aspects is required:⁷⁴

- (a) contemporary reputation;
- (b) historic reputation; and
- (c) the history of the product, including the specific production techniques which gave rise to the distinctive product within that region.

The three aspects are interrelated and overlap with each other. Therefore, contemporary reputation can be gauged by resorting to familiar categories of evidence (consumer surveys, sales figures, trade opinion, etc.) that are similar to the trademark or unfair competition approach. However, there is an important difference. The purpose here seems to be to measure continuity, or

⁷² See generally FREDERICK W. MOSTERT, *FAMOUS AND WELL-KNOWN MARKS: AN INTERNATIONAL ANALYSIS* (2nd edn., 2004).

⁷³ The US factors, which vary across circuits, are conveniently summarized in BARTON BEEBE, *TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK Part I*, 41–54 (2nd edn., 2015). For the EU, see Cases C-108/97 & 109/97, *Windsurfing Chiemsee v. Boots*, 1999 E.C.R. I-2779, at 49–51 (acquired distinctiveness); Case C-375/97, *General Motors v. Yplon*, 1999 E.C.R. I-5421, at 27 (establishing reputation for dilution protection).

⁷⁴ INAO Guide, *supra* note 7; European Commission, *supra* note 11, at 6–7; World Intellectual Property Organization (WIPO), *Geographical Indications*, WIPO Doc. SCT/10/4, at 23–26 (25 March 2003).

ongoing vitality, as opposed to the extent of the product's fame or renown. Thus, it should be proved that the designation continues to function as a GI for consumers in at least the country of origin. In turn, continuity suggests that the present reputation rests on the product's historic reputation. One of the central tasks here is to identify the characteristic features which set this product apart – characteristics which have made it distinctive when compared with similar cheeses or textiles or crafts. These characteristic features have sustained the product's historic reputation over time. The purpose of the historical analysis is therefore to establish a basis for the product's reputation – which is attributable to its distinctive features. Finally, regarding the product's history, the aim is to identify a causal connection between the product's distinctive or characteristic features, which have sustained the historic as well as contemporary reputation, and the natural and/or human factors within the geographical region of origin.

For reputation-based GIs, this often involves the identification of specific production techniques (human factors) and an explanation for why they historically developed within that region, in response to environmental, socio-economic or cultural conditions specific to a place. The reputation link can be restated as follows: *(a) contemporary reputation builds upon (b) historic reputation, which accreted over time around the specific or distinctive features of the product, and (c) these features of the product in turn were causally attributable to natural/human factors specific – but not necessarily unique – to the region of origin.*

This is the 'turn to history' alluded to in this chapter's title. The historical evidence required by stages (b) and (c) is directed towards identifying the 'first uses of the name, accompanied as far as possible by the first descriptions of the product'.⁷⁵ The historical evidence should link the name of the product to a specific geographical region through the context surrounding the uses of the name. It should also identify the distinctive features of the product, which give the product a stable core of identity over time, and this provides the foundation for developing a reputation. Bérard and Marchenay identify some of the sources that can substantiate this.⁷⁶ While documentary sources are helpful, a local product may have only been known in the region of origin or have been produced primarily for domestic consumption, thereby leaving few textual traces. Oral history can therefore fill in the gaps or even provide much of the basic data.

⁷⁵ *Id.* at 23.

⁷⁶ LAURENCE BÉRARD & PHILIPPE MARCHENAY, FROM LOCALIZED PRODUCTS TO GEOGRAPHICAL INDICATIONS: AWARENESS AND ACTION 23–25 (2008).

The oral history of a product can be compiled through multiple interviews across the product's supply chain and with members of the local community. In terms of documentary sources, of

particular interest are various works by an increasing number of learned societies [in the 19th and 20th centuries] that relied on the testimony of local experts. Other sources of information range from administrative and technical reports to agricultural journals, treaties and statistics. Food and gastronomic history can also help to shed light on these products ... [Sources] range from administrative documents (surveys, censuses, statistics, decrees, legal cases, regional commodity prices), travel logs and food guides to directories of regional specialities and motoring and touring guides [as well as] local archives.⁷⁷

These sources should be cross-referenced with local-level economic data relating to production where possible. There is of course a difference between a rigorous historical approach, which adopts valid historiographical and methodological techniques, and an instrumental account, which selectively dips into historical materials to tell a partial story or which embraces mythological origins.⁷⁸

This approach to 'essentially attributable' reputation is evident for PGIs in the EU, as some recent registrations have illustrated. Take the example of the 'Polvorones de Estepa', a soft and crumbly Spanish Christmas confection (shortbread) made from flour, sugar, milk and nuts from the city of Estepa in Andalucia.⁷⁹ Its product specification states that the 'link between "Polvorones de Estepa" and the geographical area is based on the product's reputation. That reputation is over a century old. In that time, the confections have been made to the same recipe.'⁸⁰ Historical materials are used to establish that (i) an identifiable or stable product recipe has existed for some time; (ii) the product has enjoyed a reputation for some centuries; and (iii) confectioners were

⁷⁷ *Id.* at 24–25.

⁷⁸ The conflict between instrumental accounts drawing selectively on historical materials or taking them out of context (i.e. advocacy) and the more objective approach of professional historians is familiar to legal historians. See e.g., Mathew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008); Jonathan Rose, *Studying the Past: The Nature and Development of Legal History as an Academic Discipline*, 31 J. LEGAL HIST. 101 (2010).

⁷⁹ Dossier No. ES/PGI/0005/01218. The description is available at <http://ec.europa.eu/agriculture/quality/door/list.html> (last visited 2 April 2016).

⁸⁰ See European Commission, Publication of An Amendment Application Pursuant to Article 50(2)(a) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on Quality Schemes for Agricultural Products and Foodstuffs ('Polvorones de Estepa') 2015 O.J. (C 338/10), at 5 (13 October 2015).

employed in that region to meet the demand from Seville and Madrid (making this a socio-economic origin story).⁸¹ Documentary sources draw on the archives of a convent, which includes old recipes; the contributions of an individual confectioner (e.g. a method of baking and a process of refining and toasting the flour) who provided what would become the modern template; evidence of product sales dating back to 1959; and more recent (1980s and 1990s) references from the press, especially around the time of Christmas, as well as the product's inclusion within inventories of traditional foods.⁸²

Another product that illustrates the historical approach to reputation is 'Carnikavas nēģi' for fresh or cooked Latvian river lampreys.⁸³ The specification states that the 'link between the product and the geographical area is based on the reputation of "Carnikavas nēģi" and the skills of the local fishermen and fish processors who preserve ancient traditions and methods'. Since fishing was a major source of income for the region, special techniques were developed to discover optimum fishing spots based on knowledge of the habits of the fish, influence of weather conditions and the need to adapt to the river changing its course. Ensuring that fishing practices favour sustainable fish stocks is also recorded in the specification. The specification very clearly claims that the product's reputation, which can be traced back to the seventeenth century, is attributed to the human skills – relating to both fishing and processing – which have been passed down through the generations: "The taste characteristics of "Carnikavas nēģi" are connected with the skills of the residents of Carnikava in catching and preparing them; these skills have been preserved since the 17th century and are based on manual work and experience."⁸⁴

Therefore, this more overtly historical approach to the product emphasises the human contribution. Bérard and Marchenay underscore this by saying that

historical rooting entails an identification of the skills and practices that have been developed and transmitted by successive generations. Historical depth must be linked to the collective know-how that has been passed down to the present generation, while bearing in mind that the transmission of know-how does not rule out evolution. Otherwise, history threatens to serve as a means of justifying would-be heritage products on the basis of a place's reputation – not on the specific qualities of the product concerned.⁸⁵

⁸¹ *Id.* ⁸² *Id.* ⁸³ Dossier No. LV/PGI/0005/01153.

⁸⁴ Publication of an application pursuant to Article 50(2)(a) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on Quality Schemes for Agricultural Products and Foodstuffs ('Carnikavas nēģi') [2014] O.J. C 336, p. 27 (26 September 2014) at 5.1–5.3.

⁸⁵ Bérard & Marchenay, *supra* note 76, at 21–22.

Bringing human skills into the frame – via the link requirement, where the natural and human factors in a region have a causal influence on the distinctive features of the product – implies that we should be concerned with ‘living history’. Mere long-standing production in a region is not sufficient; it is the human skills and techniques which give the product its distinctive features over time, and there is often a place-based explanation for how and why these skills and techniques arose and have adapted. Consequently, the human contribution has a normative dimension. Such products deserve protection because of the collective, inter-generational transmission of *savoir faire*, or potentially because local products help to actively make the place itself.⁸⁶

5 CONCLUSION

For a legal regime initially founded upon a causation narrative drawn from physical geography, the turn to history is admittedly difficult but also contains intriguing possibilities. The purpose of this chapter was to set out a more GI-specific approach to reputation, by asking when it ought to be essentially attributable to the place of origin. This historical turn is worth engaging with because in the absence of a more appropriate reputational link between product and place, *sui generis* GI protection becomes unjustifiable. If contemporary commercial reputation becomes the benchmark, the boundary with trademark or unfair competition law breaks down and the justification for GIs, as a separate regime based on the causal connection between product and place, collapses.

Two concluding case studies illustrate the danger of adopting a simplified notion of reputation. In 2006, JAM NAGAR⁸⁷ was applied for as a GI for petrol, fuel, liquefied petroleum gas and diesel-related goods before the Indian GI registry. The applicant, Reliance, had established what it claims is the world’s largest fuel refinery complex at Jamnagar in Gujarat, in western India.⁸⁸ The refinery complex had won awards and the applicant alluded to the superior (technological) quality of its refinery processes, which it claimed

⁸⁶ Bérard, *supra* note 35, at 86–87 (‘People construct their spatial spheres of action by setting boundaries, by occupation and by transformation, designating and distinguishing a given place . . . Localised agri-food production is a part of that process, helping to foster a sense of place through a wealth of specialised products that engage with local society in all sorts of ways and on all sorts of production levels’).

⁸⁷ GOVERNMENT OF INDIA, GEOGRAPHICAL INDICATIONS JOURNAL VOL. 12, Application Nos. 38, 39, 41 & 42 (1 January 2006) (the author must disclose that he filed an opposition to the application, which was eventually withdrawn).

⁸⁸ See Reliance Industries Limited, *Petroleum Refining & Marketing*, www.ril.com/OurBusinesses/PetroleumRefiningAndMarketing.aspx (last visited 23 April 2016).

had earned the refinery complex a positive contemporary reputation. However, nowhere did it explain why a sign designating a relatively new and highly industrial complex could satisfy the ‘essentially attributable’ requirement on the basis of quality, characteristics or reputation. This seems to be a clear case of contemporary commercial reputation being a sufficient basis for GI registration.

The second case study relates to an ongoing dispute at the time of writing, concerning the PGI ‘Piadina Romagnola’, a flat bread made in the area around the Italian Adriatic coast of the Romagna Riviera.⁸⁹ The dispute is complicated and involved a challenge both to the definition of the geographical region by a producer excluded from it and by small-scale ‘kiosk’ producers of piadene sold in side-street outlets.⁹⁰ In an appeal to the CJEU seeking to cancel the PGI, it was noted that ‘these organisations disputed the fact that, for the purposes of the envisaged PGI, industrially-produced piadine were being treated as equivalent to piadine produced on a small-scale basis and sold in street-side outlets’.⁹¹ Despite these objections, the Italian authorities registered the application, which allowed the industrially produced flat bread to use the PGI, thus ignoring the history in the product specification which records that small-scale, artisanal production is what gave rise to the reputation in the first place.⁹² The historic basis for reputation should inform the definition of acceptable production techniques, whereas in this case the reputation is instead viewed as an autonomous, commercially valuable intangible. Such a reputation can certainly be protected as certification marks or against unfair commercial practices, but not as a GI insofar as a meaningful link to the region of origin is required. The proposal considered in this chapter is suggested as one plausible method of satisfying that link to origin for products with a reputation.

⁸⁹ Dossier No. IT/PGI/0005/01067. I am grateful to Andrea Zappalaglio for bringing this controversy to my attention.

⁹⁰ For an overview, see LINDA BRUGIONI, *The Strange Case of the Protection of Piadina Romagnola PGI*, in BIRD & BIRD FOOD LAW DIGEST (3rd edn., 2015), www.twobirds.com/en/news/articles/2015/global/food-law-digest--3rd-edition--2015/food-law-digest-3rd-edition-2015.

⁹¹ As noted in an appeal to the CJEU seeking to cancel the PGI, see Case T-43/15 R, CRM Srl v. Comm’n, 2015 Order of the President of the General Court, at 5.

⁹² As the specification records: ‘The consolidation over the centuries of this tradition and the specific production techniques were the basis for the birth, in the 1970s, of the small-scale commercial production of “Piadina Romagnola”/“Piada Romagnola” at small outlets (kiosks) for immediate serving. The widespread and visible presence in Romagna of kiosks producing and selling “piadine” for immediate consumption is a characteristic feature of the territory, well-known to locals and tourists alike.’