

GI JOE? COFFEE, LOCATION, AND REGULATORY ACCOUNTABILITY

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Geographical Indications (GIs)—product labels indicating places of origin when the quality of products are linked to their geographic origin—have long been a hotly-contested domain of international trade among nations in the developed West. Recently, a literature has emerged evaluating the prospects for developing countries' use of GIs to bolster their agricultural sectors, but the empirical economics of GIs remain poorly understood. This Note approaches the issue from a different angle. The rhetoric that attends discussion of the economics of developing-nation GI implementations often makes reference to nonpecuniary, "softer" benefits of the GI phenomenon—in particular, its pro-local counterbalance to the multinational forces commonly perceived to dominate the global marketplace. This Note seeks to scrutinize this aspect of GIs' impact on developing-world producers by assessing the political, institutional, and cultural dynamics that the international GI regime fosters. To ground my inquiry in an analytic framework, this Note employs metrics derived from the Global Administrative Law (GAL) project spearheaded by Benedict Kingsbury and Richard Stewart. Specifically, this Note asks whether the institutional dynamics that GI protection fosters among developing-world coffee farmers have the effect of promoting or obstructing regulatory accountability as measured by GAL's three main principles: participation, transparency, and review. In theory, the implementation of a GI product specification should empower developing-world coffee producers by fostering their regulatory involvement and civic organization, facilitating collective management of their joint reputation, and offering access to mechanisms by which they might hold opportunistic actors accountable. This Note concludes, however, that the practical realities are unencouraging because states without preexisting and well-developed institutional infrastructures have difficulty corralling powerful actors seeking to exploit GIs for private benefit.

INTRODUCTION

A few blocks from New York University School of Law, the Porto Rico Importing Co. has outfitted the center of its shop with a cluster of barrels, each topped with a mound of coffee beans from a different tropical locale. On one end of the display are Costa Rican beans going

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for \$6.99 per pound;¹ just behind that, “Colombian Supremo” for \$7.99.² A few barrels down is the organic stuff: “Yirgacheffe,” from Ethiopia—but you will have to pay \$8.99 for beans without pesticides.³ Just to the left of that, “Blue Mountain” from Jamaica, which goes for . . . \$49.00?⁴ Can that be right? Why such a dramatic disparity?

Price discontinuities such as these are one consequence of the international intellectual property law of geographical indications (GIs). GIs are trademark-like words, symbols, or signs used on product labeling to indicate a product’s origin when some quality or reputation of the product is linked to a particular geographical location.⁵ While “geographical indication” is hardly a household term, common GIs are: Champagne, Gorgonzola cheese, and Idaho potatoes, for example. GIs formally entered the international intellectual property regime via the 1994 Agreement on Trade-Related Intellectual Property Rights Agreement (TRIPS) of the World Trade Organization (WTO).⁶ They were then, and have remained, a hotly contested domain of international trade.⁷

GIs’ leading proponents have historically been European.⁸ “Old-world” Western nations such as France, Italy, and Spain have rich,

¹ See *Our Coffee by Origin: Central America*, PORTO RICO IMPORTING CO., <http://portorico.com/store/page9.html> (last visited Oct. 25, 2010) (listing prices for Central American coffee).

² See *Our Coffee by Origin: South America*, PORTO RICO IMPORTING CO., <http://portorico.com/store/page55.html> (last visited Oct. 25, 2010) (listing prices for South American coffee).

³ See *Our Coffee by Origin: Africa*, PORTO RICO IMPORTING CO., <http://portorico.com/store/page9.html> (last visited Oct. 25, 2010) (listing prices for African coffee).

⁴ See *Our Coffee by Origin: Carribean*, PORTO RICO IMPORTING CO., <http://portorico.com/store/page58.html> (last visited Oct. 25, 2010) (listing prices for Carribean coffee).

⁵ See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 22(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 308 [hereinafter TRIPS] (defining geographical indications as “indications which identify a good as originating in . . . a region or locality . . . where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin”).

⁶ See *id.* arts. 22–24 (delineating Geographic Indications (GI) doctrine); Irene Calboli, *Expanding the Protection of Geographical Indications of Origin Under TRIPS: “Old” Debate or “New” Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181, 184–90 (2006) (describing local protection of GIs pre-TRIPS and international protection of GIs in TRIPS agreement).

⁷ See William A. Kerr, *Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development*, 7 ESTEY CENTRE J. INT’L L. & TRADE POL. 1, 5 (2006), <http://esteyjournal.com/j-pdfs/kerr7-1.pdf> (“[O]ver the last 20 years the status of geographic indicators has moved from being a relatively obscure clause in the GATT 1947 to the forefront of WTO trade negotiations.”).

⁸ See Calboli, *supra* note 6, at 184 (describing European countries as traditional proponents of GI protections); Dwijen Rangnekar, *The Socio-economics of Geographical*

pedigreed GI traditions reaching back centuries. Today, the European Union (EU) has the world's most advanced infrastructure for GI administration, and the canonical GI-protected foodstuffs are French wines and Italian cheeses.⁹

Recently, however, in the wake of a landmark 2005 WTO Panel ruling making EU markets more hospitable to foreign GIs,¹⁰ a number of nations from the developing world¹¹ have begun formulating strategies to take advantage of GI protections as well.¹² As a result, legal scholarship on GIs is in a state of flux. Experts have typically approached the subject by way of the developed West's ongoing transatlantic squabble over the appropriate level of GI protection.¹³

Indications: A Review of Empirical Evidence from Europe 1 (Int'l Ctr. for Trade & Sustainable Dev. Project on Intellectual Prop. Rights & Sustainable Dev., Issue Paper No. 8, 2004), available at <http://ictsd.net/downloads/2008/07/a.pdf> (explaining that inclusion of GIs in TRIPS was widely considered as negotiating victory for European Union (EU)).

⁹ By late 2005, the EU had publicly identified some 700 GIs for foodstuffs and agricultural products. By contrast, at that time African countries, in aggregate, had identified only two. CATHERINE GRANT, *GEOGRAPHICAL INDICATIONS: IMPLICATIONS FOR AFRICA* 6 (2005), available at https://www.givengain.com/unique/tralac/pdf/20051108_TB6_2005_Geographical_Indications.pdf.

¹⁰ See Stéphan Marette, *Can Foreign Producers Benefit from Geographical Indications Under the New European Regulation?*, 10 *ESTEY CENTRE J. INT'L L. & TRADE POL.* 65, 67, 69 (2009), <http://ageconsearch.umn.edu/bitstream/48793/2/marette10-1.pdf> (describing "new European regulation" implemented in response to WTO ruling as "mainly an opportunity for producers from developing countries that have experienced difficulties entering western markets"). For a discussion of the WTO panel ruling, see *infra* Parts II.C and III.C.

¹¹ I use "the developing world," "developing nations," and similar phrases to refer to countries designated "Emerging and Developing Economies" by the International Monetary Fund (IMF). See INT'L MONETARY FUND, *WORLD ECONOMIC OUTLOOK: RECOVERY, RISK, AND REBALANCING* tbl. E (2010).

¹² See Chidi Oguamanam, *Patents and Traditional Medicine: Digital Capture, Creative Legal Interventions, and the Dialectics of Knowledge Transformation*, 15 *IND. J. GLOBAL LEGAL STUD.* 489, 523 (2008) (describing "a coalescing of developing countries and European interests in strong protection of GIs"). Indeed, many developing nations have lined up behind the EU in pushing for the strengthening of GI protection at the WTO level. The Organization for an International Geographical Indications Network ("oriGIN") claims that more than 100 countries are in favor of extending GI protections. Luis F. Samper, *President's Message*, ORIGIN NEWSL. (Org. for an Int'l Geographic Indications Network), Dec. 22, 2008, at 2, available at http://www.origin-gi.com/images/stories/PDFs/English/OriGIN_publications/Newsletters/origIn_Newsletter_9_December_2008_EN_FINAL.pdf.

¹³ E.g., Tim Josling, *The War on Terroir: Geographical Indications as a Transatlantic Trade Conflict*, 57 *J. AGRIC. ECON.* 337 (2006); see also Tomer Broude, *Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Projection in WTO Law*, 26 *U. PA. J. INT'L ECON. L.* 623, 627-29 (2005) (investigating how cultural conflicts influence debate over GI protection); Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 *HASTINGS L.J.* 299, 301 (2006) (characterizing TRIPS agreement as compromise between European and New World interests); Kal Raustiala & Stephen R. Munzer, *The Global Struggle over Geographical Indications*, 18

But with that debate at an impasse,¹⁴ a distinct literature has emerged evaluating the prospects for developing countries' use of GIs to bolster sagging agricultural sectors.¹⁵ Most notably, Justin Hughes has recently written a comprehensive and nuanced analysis of the potential for GIs to financially benefit farmers in developing countries.¹⁶ As might be expected, these analyses have tended to focus on the economics: Can GI implementations bring more income to poor farmers in the developing world? As Hughes puts it: "Our question—our only question—is how to arrange GI law . . . to leverage present and future GI-based marketing to produce higher, long-term incomes for coffee and cocoa farmers."¹⁷

Yet, as Hughes himself recognizes, the empirical economics of GIs remain poorly understood.¹⁸ This is the case with European GIs, where it is difficult to separate the effects of pre-GI reputation from the effects directly due to GI protection;¹⁹ it is an even bigger problem in the context of developing-world GIs, given the scarcity of examples

EUR. J. INT'L L. 337, 339 (2007) (arguing that European Union member states have used inclusion of GIs in TRIPS accord to protect domestic industries).

¹⁴ See, e.g., Molly Torsen, *Apples and Oranges (and Wine): Why the International Conversation Regarding Geographic Indications Is at a Standstill*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 31 (2005) (discussing stalling of debates over GIs).

¹⁵ E.g., Cerkia Bramley, Estelle Biénabe & Johann Kirsten, *The Economics of Geographical Indications: Toward a Conceptual Framework for Geographical Indication Research in Developing Countries*, in *THE ECONOMICS OF INTELLECTUAL PROPERTY: SUGGESTIONS FOR FURTHER RESEARCH IN DEVELOPING COUNTRIES AND COUNTRIES WITH ECONOMIES IN TRANSITION* 109 (World Intellectual Prop. Org. 2009), available at http://www.wipo.int/export/sites/www/ip-development/en/economics/pdf/wo_1012_e.pdf; Franck Galtier et al., *Are Geographical Indications a Way To "Decommodify" the Coffee Market?* (Aug. 26, 2008) (unpublished manuscript), available at <http://ageconsearch.umn.edu/bitstream/43834/2/508.pdf>; U. Grote, *Environmental Labeling, Protected Geographical Indications and the Interests of Developing Countries*, 10 ESTEY J. INT'L L. & TRADE POL. 94 (2009), <http://esteyjournal.com/j-pdfs/grote10-1.pdf>; Kerr, *supra* note 7; Marette, *supra* note 10.

¹⁶ See Justin Hughes, *Coffee and Chocolate—Can We Help Developing Country Farmers Through Geographical Indications?* (2009) (unpublished manuscript) (on file with the *New York University Law Review*) (exploring potential to promote developing country agriculture in coffee and chocolate through use of marketing based on geographical indicators).

¹⁷ *Id.* (manuscript at 10).

¹⁸ See *id.* at 28–37 (discussing problems with and gaps in current empirical evidence on economic impacts of GIs); see also Grote, *supra* note 15, at 102 ("Evidence on costs and benefits with respect to . . . GI protection is still scarce.").

¹⁹ See Hughes, *supra* note 16 (manuscript at 62–63) (distinguishing between legal protection and successful marketing and emphasizing that "we may never be able to distinctly measure the GI effect"); cf. Kerr, *supra* note 7, at 8 ("It has been long known that the efficacy of marketing campaigns for products such as Washington apples or Florida grapefruit is notoriously difficult to prove." (citing A.F. Wolf, *Measuring the Effect of Agricultural Advertising*, 26 J. FARM ECON. 327 (1944))).

or data points to draw on.²⁰ Much of this analysis has thus concluded, in effect, that it is too early to draw a conclusion.²¹

This Note approaches the question from a different angle. Economics-centered discussions of developing-nation GI implementations are often accompanied by rhetorical reference to non-pecuniary, “softer” benefits of the GI phenomenon—e.g., the preservation of local knowledge, revitalization of rural communities, and empowerment of small-scale farmers otherwise marginalized by the powerful multinational forces commonly perceived to dominate much of the global marketplace.²² This Note scrutinizes this aspect of GIs’ impact on developing-world producers by assessing the political, institutional, and cultural dynamics that the international GI regime fosters in the developing world.

I focus the inquiry in two ways. First, tracking the shift in perspective from the developed to the developing world, I focus not on wine or cheese, but on coffee—“Joe”.²³ Second, seeking to ground the inquiry in a structured and content-neutral analytic framework, I

²⁰ See, e.g., Hughes, *supra* note 16 (manuscript at 32) (“[W]hat empirical data there is has focused on sale of GI products from *developed countries* to consumers in *developed countries* . . .”).

²¹ See, e.g., Grote, *supra* note 15, at 106 (“It is difficult to expand on these arguments, as the evidence on costs for labeling and GIs is even scarcer than that on benefits.”); Hughes, *supra* note 16 (manuscript at 35) (“Given our very limited knowledge, we should be cautious in what we claim GI protection can do for developing countries and their farmers.”).

²² See, e.g., C. Bramley & J.F. Kirsten, *Exploring the Economic Rationale for Protecting Geographic Indicators in Agriculture*, 46 *AGREKON* 69, 83–85 (2007) (discussing “the rural development potential of origin labeled products”); Grote, *supra* note 15, at 101 (2009) (“[GIs] are assumed to play additional roles as . . . protectors of traditional and indigenous knowledge . . . [and] to be conservation tools for biodiversity and promoters for tourism.”); Kerr, *supra* note 7, at 7–8 (discussing “the emphasis on local production, traditional production methods and community values that are often bundled with geographic indicators”); Madhavi Sunder, *IP*³, 59 *STAN. L. REV.* 257, 299–300 (2006) (“There is also hope that GI protection will allow cultural diversity to thrive and artisans to remain in their villages, resisting the pull of city industry.”); Blaine Harden, *S. Dakota Is Bullish on Idea of Carving Luxury Beef Niche*, *WASH. POST*, May 7, 2005, at A1 (describing South Dakota’s attempts to use GIs to counteract “the decades-long decline of the small family farms and the depopulation of rural areas”).

²³ Coffee is widely—albeit only anecdotally—spoken of as the second most traded commodity in the world after oil. See, e.g., Elizabeth March, *Making the Origin Count: Two Coffees*, *WIPO MAGAZINE*, Oct. 2007, at 2, available at http://www.wipo.int/wipo_magazine/en/pdf/2007/wipo_pub_121_2007_05.pdf. But see Mark Pendergrast, *Coffee Second Only to Oil? Is Coffee Really the Second Largest Commodity?*, *TEA & COFFEE TRADE J.*, Apr. 2009, available at http://entrepreneur.com/tradejournals/article/198849799_1.html (casting doubt on claim, which author had helped to popularize ten years prior). Like the other “black gold,” its production and distribution has historically been structured to enrich few at the expense of many. See generally MARK PENDERGRAST, *UNCOMMON GROUNDS: THE HISTORY OF COFFEE AND HOW IT TRANSFORMED OUR WORLD* (1999); OXFAM INT’L, *MUGGED* (2002), available at

employ metrics derived from the Global Administrative Law (GAL) project spearheaded by Benedict Kingsbury and Richard B. Stewart.²⁴ This project seeks to shift global governance studies from the substantive evaluation of particular policies to the procedural evaluation of the accountability mechanisms used systematically in transnational policymaking contexts.²⁵ Accordingly, I ask whether the institutional dynamics that GI protection fosters among developing-world coffee farmers have the effect of promoting regulatory accountability as measured in terms of GAL's three central principles: participation, transparency, and review.²⁶

Thus, while this Note primarily sets out to analyze the legitimacy of conceptualizing GI protection as a strategic means of empowering of developing-world producers, it also considers the international GI regime as a test case for its unusual model of transnational administrative enterprise, which converts local, idiosyncratic practice into international regulation via a network of independent domestic regulatory systems.²⁷ Viewed more broadly, this Note asks what the experience of developing-world coffee producers reveals about the prospects for such a model of global governance.

Part I provides backstory by identifying basic GI doctrine, characterizing the circumstances of contemporary coffee production, and introducing the GAL project. Part II describes how GI protection would appear on its face to promote participation, transparency, and review for developing-world coffee producers. The formulation of regulations governing the production of GI coffees should, in theory, both require and reinforce the organized involvement of local producers. Such regulations should transparently indicate their content and the rationales and interests that gave rise to such content. The multi-staged process through which GIs gain international protection should provide several opportunities for review.

Part III, however, presents empirical evidence of the failure of observed GI implementations to live up to these optimistic expecta-

full-report.pdf; BLACK GOLD (Fulcrum Productions, Speak-It Productions 2006); *see also infra* Part I.B (characterizing contemporary coffee production).

²⁴ *See infra* Part I.C (discussing GAL mission and methodology). *See generally* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15 (2005) (providing overview of GAL project).

²⁵ *See* Kingsbury, Krisch & Stewart, *supra* note 24, at 29 ("The focus of the field of global administrative law is not, therefore, the specific content of substantive rules, but rather the operation of existing or possible principles, procedural rules, review mechanisms, and other mechanisms.").

²⁶ *See id.* at 37–39 (identifying participation, transparency, and review as central principles).

²⁷ *See infra* Part I.A.3.

tions. Dominant local producers, nonproducer local actors, powerful upstream actors, and market dynamics undermine the participation process, rendering any participatory role for the majority of local producers arbitrary at best and illusory at worst. In many coffee-producing nations, a weak institutional infrastructure inhibits the robust administration and enforcement required to safeguard GI transparency. The lack of incentives for scrutinizing domestic GIs and the 2005 WTO panel ruling have foreclosed much meaningful review of GI product specifications. I conclude that the international GI regime is an unlikely means of local producer empowerment, and that its governance model is notably flawed.

I

SETTING THE STAGE: GIS, JOE, AND GAL

This Part offers an overview of GI doctrine, an account of why coffee farmers in particular might benefit from GIs' putative sociopolitical benefits, and an introduction to the GAL project.

A. *GI: Definition and Doctrine*

1. *GIs Defined*

As stipulated by Article 22(1) of the TRIPS Agreement, a GI is an intellectual property right granted when some quality or reputation of a good is essentially linked to a particular geographical location.²⁸ Like trademarks—the traditional intellectual property rights that GIs

²⁸ See TRIPS, *supra* note 5, art. 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 geographic origin.”).

The TRIPS Agreement's definition of GIs built on over a century's worth of ancestral international intellectual property concepts and terminology. The Paris Convention for the Protection of Industrial Property arts. 9–10, Mar. 20, 1883, as revised at Stockholm on July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305, provided for the seizure of imported goods bearing false “indications of source” or “appellations of origin.” “Indications of source” simply provide a product's place of origin (e.g., “Made in the USA,” “Product of China”), whereas appellations of origin indicate both place of origin and, furthermore, that “the characteristic qualities of the product are due to the geographical environment, including natural and human factors, of that region” (e.g., Gorgonzola cheese, Habana cigars). BERNARD O'CONNOR, *THE LAW OF GEOGRAPHICAL INDICATIONS* 22–23 (2004). The Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 163, had few signatories but introduced the expansion of protection to permit seizure of products bearing indications of origin which, although true, are deceptive (e.g., Havana cigars from Havana, Florida). The 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, 923 U.N.T.S. 205, expanded protection still further, reaching not only deceptive labeling but also “any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind,’ ‘type,’ ‘make,’

most resemble—a GI is a protected word, phrase, symbol, or iconic emblem used to label or advertise a particular product (e.g., Florida oranges, Darjeeling tea, Swiss watch).²⁹ Like trademarks, GIs have two primary justifications: They provide buyers with efficient indicia of particular information about products, and they provide sellers with increased control over the reputation of their goods. Like trademarks, GIs do not expire. The seller is protected as long as the link between the sign and the underlying quality or reputation of the good remains.

GIs diverge from the traditional intellectual property rights model in three important ways, however. Traditional intellectual property rights are endowed upon particular agents (whether individual or corporate) who have performed acts of innovation.³⁰ In contrast, GIs endow *collective* rights that attach to a geographical region rather than to a particular individual, entity, or group. An agent's right to use a GI, therefore, is not owned and cannot be sold or licensed; any product that meets the qualifications of a particular GI may benefit from its protection.³¹ A second contrasting feature of GIs is that they typically protect the “old” as opposed to the “new.” A GI's basis is not an innovative creation but an established practice combined with an established reputation.

Third, whereas traditional intellectual property rights are granted to the products of human creativity and industry alone, GIs are granted only when a certain nexus has been established between human craft and a particular geographical location. The French call this nexus *terroir*; it may result from the relationship between human activity and local soil, topography, climate, or geology. What is essential is that a particular quality of a good has come to be associated with the geographical location of such a man-nature interaction.³²

‘imitation,’ or the like.” *Id.* art. 3. GI protection under the TRIPS Agreement incorporates each of the above classes of signifier and standards of protection.

²⁹ As in the case of these examples, GIs are often geographical terms (Florida, Darjeeling, Swiss)—yet they need not be. Feta, for example, is a protected cheese GI in the EU despite the fact that the word “Feta” comes from the Italian word for “slice.” See WEBSTER'S II: NEW COLLEGE DICTIONARY 422 (3d ed. 2005).

³⁰ In the case of trademarks, that act is the creation of a source of a good or service (e.g., a business enterprise), along with a sign (the trademark) indicating affiliation with that source.

³¹ O'CONNOR, *supra* note 28, at 112–14. Note that while in the American system, certification marks may be owned, sold, and licensed by private certifiers, a certifier may not use its certification mark on goods. Rather, he may only license to other agents the (inalienable) right to do so. See 15 U.S.C. § 1127 (stipulating requirement that certification marks be “used by a person other than its owner”). See generally MARSHA A. ECHOLS, GEOGRAPHICAL INDICATIONS FOR FOOD PRODUCTS: INTERNATIONAL LEGAL AND REGULATORY PERSPECTIVES 137–44 (2008) (discussing U.S. certification mark system).

³² One apt characterization of an example of *terroir* was presented to the European Court of Justice (ECJ) in the 2005 *Feta Case*:

2. *The Protections GIs Are Afforded*

The TRIPS Agreement provides for the protection of GIs through a two-tiered regime of negative rights.³³ The baseline protection, available to GIs corresponding to any type of good, is based on a “confusion” standard: Member States are required to provide a legal mechanism by which interested parties may block the “mislead[ing]” use of a protected sign “that indicates or suggests that [a] good . . . originates in a geographical area other than [its] true place of origin.”³⁴ Thus, for example, Member States must provide a legal means by which a farmer from Darjeeling could prevent another farmer from marketing tea grown in Calcutta under the name Darjeeling tea. Notably, the particularities of that legal mechanism are left to each Member State to determine for itself.³⁵

The TRIPS Agreement calls for a heightened level of protection for GIs corresponding to wines and spirits. For these products the confusion standard is irrelevant: TRIPS simply establishes a per se ban on using a GI on the labeling of a nonqualifying good.³⁶ In other words,

Extensive grazing and [seasonal movement], . . . the result of an ancestral tradition[,] . . . has led to the development of small native breeds of sheep and goats which are extremely tough and resistant, fitted for survival in an environment that offers little food in quantitative terms but, in terms of quality, is endowed with an extremely diversified flora, thus giving the finished product its own specific aroma and flavour. The interplay between the above natural factors and the specific human factors, in particular the traditional production method . . . has thus given “Feta” cheese its remarkable international reputation.

Joined Cases C-465 & C-466/02, *Fed. Republic of Germany & Kingdom of Denmark v. Comm’n*, 2005 E.C.R. I-9115 ¶ 22 (quoting Commission Regulation 1829/2002, Amending the Annex to Regulation 1107/96 with Regard to the Name ‘Feta,’ 2002 O.J. (L 277) 10, 14, available at <http://oami.europa.eu/en/mark/aspects/pdf/jc020465.pdf>). In this case, the ECJ rejected German and Danish petitions to annul the registration of Feta as referring to cheese from certain parts of Greece.

It is worth noting that, because of the importance of geographic nexus, GIs—unlike copyrights, patents, and trademarks—cannot “travel” with persons. In other words, to use a counterfactual example, even if one farmer had been singlehandedly responsible—by, say, discovering a critical production technique—for giving rise to the consumer perception that a particular sort of cheese (Feta) hailing from a particular region of Greece was delicious, that farmer would be barred from using the “Feta” label on cheese that he cultivated in Italy using the exact same technique.

³³ In this context, a “negative right” is the right to prevent others from interfering, as opposed to a positive right of, for example, guaranteed access to foreign markets.

³⁴ TRIPS, *supra* note 5, art. 22(2)(a). Additionally, TRIPS Article 22(3) requires Member States to refuse or invalidate the registration of any trademark that contains or consists of a misleading GI. *Id.* art. 22(3).

³⁵ See *infra* Part I.A.3 (discussing leading models of domestic GI regimes).

³⁶ TRIPS, *supra* note 5, art. 23(1) (“Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines [or spirits] for wines [or spirits] not originating in the place indicated by the geographical indication in question . . . even where the true origin of the goods is indicated or the geographical indica-

because Champagne is a French GI, a Californian winemaker may be prevented from labeling his product “Champagne-like wine from Sonoma Valley.” The fact that no consumer would think that this wine comes from the Champagne province of France is inapposite.³⁷ This heightened standard is particularly controversial and lies at the heart of the ongoing international GI debate.³⁸

tion is used in translation or accompanied by expressions such as ‘kind,’ ‘type,’ ‘style,’ ‘imitation’ or the like.”). However, Article 24 contains a grandfather clause allowing for exceptions to Article 23 to be made in the case of terms that had been in use for ten years prior to April 15, 1994. *Id.* art. 24(4).

³⁷ Article 23(2), as an analog to Article 22(3), requires the denial or cancellation of any wine or spirit trademark that includes or consists of an inaccurate GI—whether or not a customer would be in any way confused by the inaccuracy. TRIPS *supra* note 5, art. 23(2)–(3). Those familiar with U.S. trademark law may note a resemblance between this “heightened” Article 23 standard and the doctrine of trademark dilution, which prohibits unauthorized uses of a famous mark that would undermine the distinctiveness of that mark. *See generally* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:86 (4th ed. 2007).

³⁸ *See supra* notes 7, 12–14 and accompanying text (contextualizing this debate). The debate centers on whether or not this latter “per se” standard should be extended to apply to all GIs rather than merely to GIs pertaining to wine and spirits. The EU, alongside allies such as Cuba, India, Morocco, Nigeria, Switzerland, Turkey, and Venezuela, argues in favor of such an extension, asserting that the existing two-tiered system “discriminat[es]” by giving strong protection exclusively to goods that are predominantly produced by wealthy states. *See Why Do Geographical Indications Matter to Us?*, EUR. COMMISSION (July 30, 2003), http://www.deljpn.ec.europa.eu/home/news_en_newsobj553.php. They also call attention to the indirect benefits that the use of GIs would theoretically foster: sustainable agricultural practices, revitalized rural communities, and the disincentive to raise illegal drugs, for example. *See id.*; *see also* Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labeling*, 19 J. RURAL STUD. 127, 135 (2003) (noting instances where “the preservation of traditional methods of production result[s] in a clear environmental gain”); *supra* note 22 and accompanying text (discussing GIs’ putative rural revitalization effects); *cf.* OXFAM INT’L, *supra* note 23, at 12 (describing how drop in coffee price threatens programs encouraging farmers to replace coca crop with coffee).

On the other side of the debate, countries such as Argentina, Australia, Canada, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, New Zealand, Panama, Paraguay, the Philippines, Chinese Taipei, and the United States consider GI protection to be outright protectionism: a subsidy by a different name. *See* ECHOLS, *supra* note 31, at 287 (listing countries). They point out that the bulk of the benefit of expanded GI protection would likely accrue only to those nations with a substantial number of GIs or GI-potential. In contrast, to net-importers of GIs, increased GI protection would place (1) a substantial administrative burden on domestic governments, which would be required to police their GI-space to prevent infringements, and (2) substantial operational burdens on established commercial interests, which might be forced to rename and/or rebrand successful products. Because nations with high numbers of GIs are currently clustered in southern Europe, *see supra* note 9, this side of the debate counters the rhetoric of “discrimination” with its own accusations of a “new form of neo-colonialism.” Raustiala & Munzer, *supra* note 13, at 351 (quoting David Spencer, Ambassador & Permanent Representative of Austl. to the World Trade Org., A Way Forward for Geographic Indications, Address at World Symposium on Geographic Indications (July 9, 2003)).

3. *The Mechanisms of GI Protection*

The first step for any state wishing to promote GIs abroad is implementing a domestic GI regulatory framework, as under the TRIPS Agreement, states have no obligation to protect GIs that “are not . . . protected in their country of origin.”³⁹ TRIPS allows Member Parties substantial leeway in devising the GI regulatory framework that best suits their needs.⁴⁰ Despite this freedom, the European and American models of domestic GI protection predominate.⁴¹

The EU offers a two-tiered *sui generis* system of public rights granted and administered by governmental agencies. The system consists of two instruments—Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI) that each confer expansive protection.⁴² EU GI applications, entailing detailed product specifications and proof that the GI is protected in its home country, are sent to the European Commission either by a group of producers or processors or by the authorities of the GI’s home state.⁴³ If the GI is registered, products bearing the GI may enter the marketplace once their compliance with the GI’s specifications has been validated, typically by a designated public authority of its home state.⁴⁴

³⁹ TRIPS, *supra* note 5, art. 24(9).

⁴⁰ *See id.* art. 22(3) (requiring only that each Member Party “provide the legal means for interested parties to prevent” use of GIs that mislead as to geographical origin or constitute unfair competition under Paris Convention); *see also supra* text accompanying notes 34–35. An additional requirement established by a later WTO panel adjudication is that each Member Party must provide GI application procedures that apply to foreign and domestic parties equally. *See infra* Parts II.C, III.C (discussing WTO panel ruling). To compare domestic GI regimes see O’CONNOR, *supra* note 28, at 165–340.

⁴¹ These models, which reflect different historical approaches to the protection of geographical terms, epitomize the philosophical clash that has given rise to the GI debate discussed *supra* note 38.

⁴² Both PDO and PGI doctrine prohibit any direct or indirect commercial use, imitation, or evocation of the protected name, even if the true origin of a product is indicated (e.g., “Feta-like Cheese from Spain” would be barred). Council Regulation 510/2006, art. 13(1), 2006 O.J. (L 93) 12, 19 (EC) [hereinafter CR 510/2006]. PDOs have stricter requirements than PDIs. PDOs are granted to products which are produced, processed, and prepared within a certain region and which have qualities that are “*essentially or exclusively due to a particular geographical environment with its inherent natural and human factors.*” *Id.* art. 2(1)(a) (emphasis added). PGIs apply to products which need only be produced, processed, or prepared in a region and which have a “*quality, reputation, or other characteristics*” that is merely “attributable” to that region. *Id.* art. 2(1)(b) (emphasis added). PGIs must be geographical terms, but PDOs need not be. *Cf. supra* note 29 (explaining that GIs are often—but not always—geographic terms).

⁴³ CR 510/2006, *supra* note 42, art. 5(9). After scrutinizing the application, the Commission publishes the GI in the *Official Journal of the European Union*; if six months pass without the filing of an objection, the Commission registers the name as an EU GI. *Id.* arts. 6–7.

⁴⁴ Often, a ministry of agriculture or regulatory council will oversee compliance with GI specifications. *See* O’CONNOR, *supra* note 28, at 254.

The United States, on the other hand, protects GIs through certification marks, a part of the trademarks system.⁴⁵ Certification marks are owned by private certifying organizations, which license their use to other entities (i.e., the owning organization cannot itself use the mark).⁴⁶ The certifier is responsible for submitting an application to the U.S. Patent and Trademark Office and auditing the practices of users of the mark to ensure compliance with the certification mark's standards.⁴⁷

B. Joe: Coffee and Commodification

Coffee has been farmed for centuries; today it is one of the world's most valuable agricultural commodities.⁴⁸ Yet, for a variety of reasons, coffee farmers have long been notably "voiceless." First, coffee is produced almost exclusively in the developing world, including many of the world's poorest countries.⁴⁹ Second, because coffee is primarily produced on smallholdings farmed by single households,⁵⁰ coffee farmers seeking to speak or act in coordination with one another face significant collective action challenges. Third, coffee farmers' bargaining power has been eroded by decades of excess supply.⁵¹

⁴⁵ See *Geographical Indications (GIs) Questions and Answers*, U.S. PATENT & TRADEMARK OFF., http://www.uspto.gov/web/offices/dcom/olia/globalip/gi_faq.htm (last visited Oct. 25, 2010) (explaining that certification marks have protected geographical terms since "long before the term 'geographical indications' came into use"). Examples of U.S. certification marks include "Vidalia" for onions, "Washington" for apples, and "Pride of New York" for various agricultural products. MICHAEL BLAKENEY, INTELLECTUAL PROPERTY RIGHTS AND FOOD SECURITY 206 (2009).

⁴⁶ See *supra* note 31 (discussing role of American certifiers).

⁴⁷ See *Geographic Indications (GIs) Questions and Answers*, *supra* note 45 (describing responsibilities of GI certifier under U.S. regime).

⁴⁸ See *The Story of Coffee*, INT'L COFFEE ORG., http://www.ico.org/coffee_story.asp (last visited Oct. 25, 2010) ("The importance of coffee to the world economy cannot be overstated. It is one of the most valuable primary products in world trade, in many years second in value only to oil as a source of foreign exchange to producing countries.").

⁴⁹ OXFAM INT'L, *supra* note 23, at 7–8.

⁵⁰ *Id.* at 6. While there is no single definition, "smallholdings" are typically family farms of less than twenty-five acres. See *id.* at 6–7 (stating that 70% of world's coffee is grown on "smallholdings"—farms smaller than twenty-five acres). In contrast, most other internationally traded agricultural commodities are produced on large, corporate-controlled plantations. *Id.*

⁵¹ In particular, coffee producers' negotiating leverage was dealt a devastating blow in 1989 by the collapse of the International Coffee Agreement (ICA). From 1963 through 1989, against the backdrop of the Cold War, the ICA regulated a managed coffee market in which "[g]overnments in both producing and consuming nations sought to agree to pre-determined supply levels" with the "aim [of] . . . keep[ing] the price of coffee relatively high and relatively stable." OXFAM INT'L, *supra* note 23, at 17. Disagreement between members led to the ICA's effective breakdown in 1989. Although the ICA continues to exist and is now administered by the International Coffee Organization, it is no longer

Fourth, and of particular relevance, coffee beans are highly fungible—especially since the coffee that reaches consumers typically is a blend of beans of various origins.⁵² Such high “commodification”⁵³ gives actors downstream of coffee farmers—e.g., roasting or retailing firms—a purchasing flexibility that increases their leverage over producers. If, for example, Vietnamese farmers tried to alter the terms on which their coffee reaches the market, roasting and retailing firms could simply buy from Brazilian or Kenyan farmers.⁵⁴

GIs are thus promising because they could decommodify markets by linking value to place. If coffee from a particular region gains a positive reputation in the minds of consumers, a GI could help that region’s farmers obtain higher prices for their coffee because downstream firms would have no alternative source of the value-adding cachet associated with that region.

C. GAL: Globalism and Governance

In order to determine whether GIs are able to live up to the promise of decommodification, we must be able to objectively measure their effects. While purely economic assessments of the consequences of GIs have proven inconclusive,⁵⁵ the regulatory-accountability metrics derived from the Global Administrative Law (GAL) project are powerful tools for analyzing GIs’ impact. This Section provides some background to the project.

In 2004, the New York University School of Law Institute for International Law and Justice⁵⁶ launched the Research Project on

capable of regulating coffee supply or price. *Id.* For more on the ICA, see generally PENDERGRAST, *supra* note 23.

Meanwhile, some have predicted that global coffee demand may soon outstrip supply. See, e.g., Clair Leow, *World Coffee Deficit May Be 8 Million Bags in 2009–10 (Update 2)*, BLOOMBERG (Dec. 9, 2008, 1:42PM), <http://www.bloomberg.com/apps/news?pid=20601087&sid=aldoJwmeyNec> (discussing anticipated drop in Brazilian production).

⁵² Galtier et al., *supra* note 15, at 4 (characterizing dynamics of coffee production systems).

⁵³ “A commodity is a standardized good with a homogenous quality.” Galtier et al., *supra* note 15, at 1. Generic coffee today is differentiated only by country of origin and classification into one of three types: washed Arabica, unwashed Arabica, and Robusta. *Id.*

⁵⁴ See *id.* at 1 (“Firms in downstream stages of the supply chain (normally operating in big consumer countries) are able to satisfy the changing consumer needs (adding value to the final product) without involving upstream firms.”); see also OXFAM INT’L, *supra* note 23, at 27 (“[B]ecause contracts with international traders now guarantee them a ready supply of large volumes of different coffee types at relatively short notice[,] [coffee roasters are able] to mix and match their coffees and adjust their blends with increasing flexibility.”).

⁵⁵ See *supra* notes 18–21 and accompanying text (discussing lack of data demonstrating economic impact of GIs).

⁵⁶ GAL Home, INST. FOR INT’L L. & JUST., <http://iilj.org/GAL/> (last visited Oct. 25, 2010).

Global Administrative Law. The project began as an effort to develop an analytical framework capable of systematizing the present diversity of global governance mechanisms.⁵⁷ Professors Benedict Kingsbury and Richard Stewart identified as a catalyst of the project the “accountability deficit” resulting from the evolution of global governance away from interactions between discrete and centralized state actors and toward the more complex interrelation among state, parastatal, international, nongovernmental, and private actors—many of which operate out of the public eye.⁵⁸ While largely descriptive—and by design apolitical⁵⁹—the emerging GAL literature is normatively oriented toward procedural integrity in this “global administrative space.”⁶⁰ GAL seeks to identify, articulate, and promote accountability-enhancing principles that might help regulate this panoply of regulators.⁶¹ This Note will focus on three central principles that recur in the GAL literature: participation, transparency, and review.⁶²

⁵⁷ See Kingsbury et al., *supra* note 24, at 15 (presenting overview of GAL project).

⁵⁸ *Id.* at 16; see also Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 114 *YALE L.J.* 1490, 1528–29 (2006) (providing examples of supranational regulation contexts in which “international civil servants operating behind the scenes may drive the process”).

⁵⁹ See *supra* note 25 and accompanying text (noting that GAL does not assess substantive law). But see B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 *N.Y.U. J. INT’L. L. & POL.* 799, 800 (2005) (arguing that this substance-agnosticism may have political—indeed imperial—repercussions, because “without a concurrent concern with substantive law, GAL may only legitimize unjust laws and institutions”).

⁶⁰ Kingsbury et al., *supra* note 24, at 18; see also Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 *GLOBAL GOVERNANCE* 39, 40 (2008) (“[GAL] aim[s] to make [global governance] more reasoned.”).

⁶¹ Kingsbury et al., *supra* note 24, at 28 (“In our approach, global administrative law effectively covers all the rules and procedures that help ensure the accountability of global administration . . .”).

⁶² See, e.g., Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 *INT’L ORG. L. REV.* 319, 345 (2009) (“A GAL methodology . . . integrates accountability with principles and mechanisms of transparency, participation, and review . . .”); see also Esty, *supra* note 58, at 1530 (writing of both transparency and participation that “[o]pportuness and some opportunity for public participation have thus emerged as nearly universal principles of good governance”); Kingsbury et al., *supra* note 24, at 39–40 (discussing entitlement to review and observing it to be “among the most widely accepted features of domestic administrative law”).

For clarity, a few definitions are in order. By “participation,” I mean, following Kingsbury and Stewart, “the right of affected individuals to have their views and relevant information considered before a decision is taken . . .” Kingsbury et al., *supra* note 24, at 37. Regarding “transparency,” I follow Thomas Hale’s maxim that “[a]n institution is transparent if it makes its behavior and motives readily knowable to interested parties.” Thomas N. Hale, *Transparency, Accountability, and Global Governance*, 14 *GLOBAL GOVERNANCE* 73, 75 (2008). Returning to Kingsbury and Stewart, I take “review” to refer to the “entitlement to have a decision of a[n] . . . administrative body affecting one’s rights reviewed by a[n] . . . independent tribunal.” Kingsbury et al., *supra* note 24, at 39.

The GAL literature contains many in-depth case studies of the transnational mechanisms that govern specific global industries or concerns. Recent examples include analyses of the regimes regulating ocean-floor exploration rights, emissions trading initiatives, and forestry certification programs.⁶³ In each, scholars apply GAL's principles to a particular institutional dynamic to assess a regulatory regime's soundness and legitimacy.

Similarly, this Note closely parses one particular transnational regulatory regime. The GI system has an unusual and complex public-private hybrid structure that is ripe for analysis. GI product specifications are developed by private, local collectives of producers and submitted to a domestic governmental body; if ratified, they are then submitted to foreign governmental bodies along with evidence that the home state has in place a framework for protecting foreign GIs; if again ratified, they are at last protected abroad.⁶⁴ Translating the GAL principles—participation, transparency, and review—to this context, I propose the following three benchmarks for determining whether the process responsible for generating and maintaining a given GI product specification has promoted regulatory accountability.⁶⁵ First, do those whose lives will be most intimately impacted by the specification have the opportunity to meaningfully participate in its formulation and administration? Second, are the regulatory process and the resultant regulations transparent? That is, does the product specification held out to the international community correspond with fidelity to the actual practices and traditions “on the ground” in its home state, or has it been surreptitiously distorted before reaching the international stage? Third, is there sufficient and meaningful opportunity for review of the product specification by any impartial body?

Thus analyzed, the intersection of GI and “Joe” may serve as a test case for one particular mode of arranging public and private, local and global, and actors and institutions into a transnational administra-

⁶³ See Anna Cavnar, *Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor*, 42 CORNELL INT'L L.J. 387 (2009) (using GAL principles to assess whether expert commission is held sufficiently accountable to states in whose interest it is meant to act); Jessica F. Green, *Delegation and Accountability in the Clean Development Mechanism: The New Authority of Non-state Actors*, 4 J. INT'L L. & INT'L REL. 21 (2008) (using economic delegation theory and GAL to assess accountability of private agents in context of Kyoto Protocol's Clean Development Mechanism); Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47 (2006) (assessing extent to which global forest regulatory system's certification programs are transparent and participatory).

⁶⁴ See *supra* Part I.A.3 (discussing institutional frameworks via which GIs are protected).

⁶⁵ For discussion of participation, transparency, and review as principles central to GAL, see *supra* note 62.

tive enterprise. The next Part discusses how this arrangement should in theory support regulatory accountability.

II

GIs' PUTATIVE PROMISE

GIs initially appear to have tremendous potential to foster a highly participatory, transparent, and review-enabled regulatory environment for developing-world coffee producers. In this Part, I unpack the institutional and cultural dynamics that accompany GI protection. I explain why GI implementation should boost agricultural producers' political participation, discuss how the unique structure of GIs should enhance transparency in the corresponding regulation, and identify the system's many opportunities for review.⁶⁶

A. *GI Implementations as Fostering Participation*

GI protections would appear to promote coffee producers' participation in the formation and administration of regulations that intimately structure their lives. By eliciting the input of local voices in the creation of certification schemes, spurring the organization of producer communities, and increasing the density of local and regional institutions, GIs should "enhance a rural community's recognition and political inclusion in the nation."⁶⁷

1. *Eliciting Localized Input*

Local voices do not have a meaningful role to play in the formulation and administration of agricultural policy under either the standard agricultural paradigm of commodified foodstuffs or the growing paradigm of specialty foodstuffs. Under the former, the interchangeability of produce from different places undercuts any incentive to fund the development and maintenance of a regulatory scheme granular enough to meaningfully differentiate between producers.⁶⁸ Under the latter, some industry monitors have interpreted the recent increase in marketing of specialty coffees—such as Organic, Fair Trade, and

⁶⁶ For this Note's definitions of participation, transparency, and review, see *supra* note 62.

⁶⁷ Rosemary J. Coombe et al., *Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property*, 40 U.C. DAVIS L. REV. 891, 902 (2007) (stating need to understand how place-branding strategies enhance these facets of rural communities). See generally Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM 25 (Amy Gutmann ed., 1994) (stressing importance of public recognition to sense of dignity).

⁶⁸ See *supra* notes 53–54 and accompanying text (discussing coffee's high level of commodification).

Shade-Grown—as encouraging decommodification.⁶⁹ Yet while consumer willingness to pay premiums for these specialty goods may justify the cost of their certification schemes, there is no need for local input into the design or administration of those schemes because there is nothing place-specific to these specialty foodstuffs.⁷⁰ Instead, these certification schemes are likely dictated by downstream players who are more knowledgeable of the preferences and perceptions of the end consumer and better able to take advantage of the competition between producing regions. As a result, no one region will be in a position to challenge the terms of a given certification scheme.⁷¹

GI rights, however, appear to put local voices on par with the multinational voices that otherwise dominate the agricultural trade conversation.⁷² GI regulation must be sensitive to what it is about *this* place and *this* people's practice that has given rise to *this* particular quality or reputation. Because this is knowledge to which "locals" are most privy, GI product specifications depend on local producers' input for their legitimacy.⁷³

2. *Catalyzing Community Organization*

A second way that the implementation of a domestic GI regime should induce regulatory participation is through spurring producers' community mobilization and involvement with local and regional administrative institutions. Formulating the specifications for a GI requires the intensive coordination of a broad swath of stakeholders. As a first step, "[l]ocal communities have to start to communicate and map the special products and their very own characteristics in their region."⁷⁴ Further tasks that must be undertaken in coordinated fashion include agreeing on "codes of practice and defining the GI-

⁶⁹ See, e.g., OXFAM INT'L, *supra* note 23, at 40–42 (explaining how Fair Trade allows coffee farmers to sell at "prices that meet their basic needs").

⁷⁰ See Galtier et al., *supra* note 15, at 2 ("Indeed, the Code of practices (standards) of all these certification schemes have been designed by the downstream part of the coffee chain . . . and are the same all over the world.").

⁷¹ See Jeff Neilson, *Institutions, the Governance of Quality and On-Farm Retention for Indonesian Specialty Coffee*, 28 SING. J. TROPICAL GEOGRAPHY 188, 190–92 (2007) ("[T]his information asymmetry is at the core of ensuring roasters maintain their dominant position in the mainstream coffee commodity chain.").

⁷² See Oguamanam, *supra* note 12, at 523 ("GIs are increasingly becoming an important asset for developing countries in the projection and protection of their unique cultural products in an increasingly globalized marketplace.").

⁷³ See Galtier et al., *supra* note 15, at 2 (explaining that product specifications are "normally elaborated by the actors belonging to the local production system").

⁷⁴ Claudia Sardi, *Kintamani Coffee Gets Certification*, JAKARTA POST, Dec. 13, 2008, at 5 (quoting Surip Mawardi, head of research institute responsible for Indonesia's first GI, on first steps in certification process).

product, developing certification schemes and methods of governance, formulating written and/or unwritten contracts to mediate the transfer of intermediate goods within the supply chain, managing production at various stages of the supply chain, [and] promoting and protecting the product, among others.”⁷⁵

While managing so much coordination would be daunting enough on its own, the various groups involved often remain in a competitive relationship with one another throughout the process. Public or “[q]uasi-public” institutions, capable of impartially balancing the interests of all parties in a supply chain, thus become crucial aids.⁷⁶ In addition to neutrality, such institutions bring cosmopolitanism and institutional knowledge to small farmers and traders often unfamiliar with “many other determinants of quality . . . [such as] good processing practices, . . . technical and marketing skills, and improved negotiating clout through producer organizations.”⁷⁷

The mobilizing effects of GI registration are illustrated well by rural sociologist Elizabeth Barham’s account of the “long,” “arduous,” and highly collaborative process by which producers register and retain an *appellation d’origine contrôlée* (AOC), a type of French GI.⁷⁸ This registration process typically begins with producers forming a union.⁷⁹ The union then spends up to a year preparing a “detailed dossier,” which it then sends to the *Institut National des Appellations d’Origine* (INAO).⁸⁰ INAO forwards the dossier to a Regional Committee made up of representatives from affected production, processing, and distribution sectors. If the dossier passes Regional Committee review, it is forwarded to the appropriate National Committee. If the National Committee approves of the registration, it names an expert commission to establish the definitive delimitation of the relevant geographical region. Once the National Committee approves this delimitation and the draft legal text estab-

⁷⁵ Rangnekar, *supra* note 8, at 23.

⁷⁶ *Id.* at 3.

⁷⁷ OXFAM INT’L, *supra* note 23, at 47.

⁷⁸ Barham, *supra* note 38, at 133. The French procedure is of particular interest given that a number of developing nations, including Indonesia and Laos, are receiving assistance from the French government in setting up their own GI systems.

⁷⁹ *Id.* at 133; *see also* CR 510/2006, *supra* note 42, art. 5(1) (stating that “only a group . . . of producers or processors working with the same agricultural product or foodstuff” may apply for registration).

⁸⁰ Barham, *supra* note 38, at 133. The dossier must specify (1) the area of production, (2) the exact procedures involved in production and/or processing, (3) an explanation of the product’s close ties to the region in question, (4) evidence of a historical reputation, (5) means for evaluating how well the product distinguishes itself from other similar products on the market, and (6) the reasons motivating the request. *Id.* at 133–34.

lishing the appellation, the text is sent to the Ministry of Agriculture, which signs the appellation into law.⁸¹

Barham concludes that the redeeming aspect of this lengthy and complex process is that by the time an AOC label has been affixed upon a product, it “reflects the completion of a multi-level process of negotiation from the local to the state level,” which, when successful, “results in a product that is strongly embedded in the natural, social, cultural and political dimensions of its territory.”⁸² Moreover, once a French AOC is awarded, its legitimacy is rarely questioned at the EU level. Barham thus underscores how “a very culturally defined and locally grounded concept such as *terroir* is connected to more macro levels of decision making[,] . . . creating potential openings for local voice at these higher levels.”⁸³

The participatory benefits of producer organization, meanwhile, are not limited to its influence on the management of GI regulations. Once established, the relationships with peers as well as with local, regional, state, and international organizations provide producers with a counterweight to collective action problems and enable producer groups to assert their political will more efficiently. One study has concluded that the indirect benefits of farmer organization may be even more important than any resultant price increase.⁸⁴

B. *GI Specifications as Models of Transparency*

GI product specifications appear to transparently reveal to any interested party both their content and the motivating interests behind

⁸¹ *Id.* at 134.

⁸² *Id.* at 133.

⁸³ *Id.* at 131 n.7 (emphasis omitted).

⁸⁴ OXFAM INT’L, *supra* note 23, at 41. Although the study was referring to producer organization as the result of a Fair Trade campaign, the conclusion should apply in the context of GIs as well. At the least, a thickened infrastructure of producer organizations should theoretically increase negotiating leverage, improve quality control (thanks to improved product tracing), and enhance operations (by facilitating the sharing of best practices). *See, e.g.,* Javier Sanz Cañada & Alfredo Macias Vázquez, *Quality Certification, Institutions and Innovation in Local Agrofood Systems: Protected Designations of Origin of Olive Oil in Spain*, 21 J. RURAL STUD. 475 (2005) (finding that GI-catalyzed producer coordination enhances competitiveness); Surip Mawardi, *Use of Geographical Indications for Coffee: Experiences of Indonesia*, Presentation at the International Coffee Organization Seminar on Geographical Indication for Coffee 4 (May 20, 2006), *transcript available at* http://dev.ico.org/event_pdfs/gi/presentations/Mawarditxt.pdf (discussing post-GI improvement of product traceability); OXFAM INT’L, *supra* note 23, at 35 (describing setbacks due to information and communication deficits). For the further argument that joint possession of a reputation positively feeds back on the incentive to invest in building up that reputation, see Ramona Teuber, *Café de Marcala—Honduras’ GI Approach to Achieving Reputation in the Coffee Market*, 10 ESTEY CENTRE J. INT’L L. & TRADE POL. 131, 142 (2009), http://www.esteycentre.ca/journal/j_pdfs/teuber10-1.pdf.

their content. GI specifications are developed not in secret by technocrats but rather via the highly collaborative participation of a broad swath of local, regional, national, and transnational actors.⁸⁵ Local producers—whose traditional practices GIs purport to represent—initiate and drive the specification process. While these producers often benefit from the advice of experienced international organizations and the objective input of scientific data, the process nevertheless appears to be far more self-determined than, for example, the wholesale adoption of externally generated criteria whose ultimate purpose might be predominantly other-serving.⁸⁶ The final requirements are publicly and straightforwardly captured in a product specification.⁸⁷ Certified organizations formally verify product compliance.⁸⁸ In short, the entire implementation process appears the very model of transparency.

Moreover, once a GI has been implemented, the GI should help the marketplace hold producer communities accountable for both their regulatory decisions (i.e., their choice of criteria captured in the product specification) and their operational performance (i.e., the quality of the GI-protected goods they produce).⁸⁹ It is reported that fifty million pounds of “Antiguan coffee” is traded internationally each year—despite the fact that Antigua’s annual production is only six million pounds.⁹⁰ Such reputation-undermining fraud is precisely what GIs, like trademarks, are designed to prevent. By transparently assuring a genuine connection between product and place, GIs prevent distortions in consumer perception of the quality of protected goods.⁹¹ This allows for clear market feedback from the consumer, which in turn allows for informed, responsive adjustment by producers. The use of GIs should thus enhance a regional community’s

⁸⁵ See text accompanying *supra* notes 64, 74–77.

⁸⁶ Compare *supra* notes 72–73 and accompanying text (discussing reliance of GI product specifications on local input), with *supra* notes 70–71 and accompanying text (discussing genericness and external origin of specialty goods specifications).

⁸⁷ See *supra* notes 43, 47 and accompanying text (noting European and American models of product specifications).

⁸⁸ See *supra* notes 44, 47 and accompanying text (noting European and American compliance verification methods).

⁸⁹ Cf. Hale, *supra* note 62, at 74, 76–78 (identifying and discussing “market pressure” as one of three “informal enforcement ‘tools’” through which “transparency is able to change behavior of global actors”).

⁹⁰ Grote, *supra* note 15, at 105. Similarly, thirty million kilograms of “Darjeeling tea” are traded annually, even though only ten million kilograms are actually produced in Darjeeling. *Id.*

⁹¹ Meanwhile, by enabling improved product tracing, see *supra* note 84, GI protection should increase transparency of the source by reducing not only deceptive mislabeling, see *infra* text accompanying notes 119 and 133, but also erroneous mislabeling—with the same positive consequences for customer and producer alike.

collective ability to build up, manage, and ultimately benefit from, a reputation.

C. *The GI Regime as Review-Enabled*

Finally, the GI implementation process seems well equipped with mechanisms of review. Both the EU and the U.S. domestic systems publish prospective GIs and allow substantial time for objection before official registration.⁹² Furthermore, even if a GI has been registered within its own country, an additional application must be sent to each foreign state in which protection is sought. Each foreign state reexamines the application and may reject it. Interested parties concerned about a domestically registered product specification may voice concerns when that specification comes up for renewal and when the specification is submitted for protection abroad.

Meanwhile, the WTO Dispute Settlement Body is available as an ultimate arbiter. In April 2005, a WTO panel made its first GI-related ruling, striking down European Community Regulation 2081/92 for violating the national treatment obligation of TRIPS Article 3(1).⁹³ The United States had challenged the EU regulation because it both discriminated against foreign GI applicants and failed to protect foreign trademarks.⁹⁴ Thus, the international GI regime incorporates opportunities for review at not only a granular level—where individual product specifications may be scrutinized and rescruinized—but also a macro level—where corrective action may be taken to address large-scale structural features of the GI regime causing systemic rights violations.

III

POOR PERFORMANCE OF GIs

In this Part, I turn a critical eye to the theoretical account presented above. Relying on the empirical results of a number of case studies, I argue that numerous obstacles thwart the potential for GI implementations to foster participation, transparency, and review. I assess each principle in turn.

⁹² See *supra* note 43 (noting six-month objection period in EU).

⁹³ See Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, ¶ 8.1(h)(i), WT/DS174/R (Mar. 15, 2005) [hereinafter WTO Report]. See generally ECHOLS, *supra* note 31, at 203–56 (discussing WTO Panel’s ruling). EC Council Regulation 2081/92 was the predecessor to EC Council Regulation 510/2006, which currently governs EU GIs. For further discussion of the WTO ruling, see *infra* Part III.C.

⁹⁴ Marette, *supra* note 10, at 67.

A. Participation Breakdown

The participation enabled by a GI implementation is a double-edged sword. While an intellectual property right linked to place rather than agent may amplify “voices” that would not otherwise be heard, it provides no guarantee of equal influence or access. Disproportionately loud voices are likely to drown out others, barring some from influencing the policies that will intimately affect them. In this Section, I identify and discuss four variations on this theme. First, prominent local producers may dominate smaller, less powerful producers. Second, nonproducer local agents may commandeer the GI implementation process, tailoring product specifications to interests contrary to those of producers. Third, downstream players in the supply chain, taking advantage of meager institutional support for producer mobilization, may assume control of the management of any value added to a product based on its origin. Finally, producer participation may be limited and arbitrary, further disempowering those left out.

1. Dominant Participants

First, within a given producer community, certain actors may participate so aggressively as to shut other actors out of any meaningful participatory role.⁹⁵ Agricultural economist Franck Galtier documents an example of this phenomenon in his in-depth study of the process by which the Jarabacoa region of the Dominican Republic established the product specification (Code of Practices) for its Pico Duarte coffee GI.⁹⁶ Galtier finds that a single firm—by far the region’s largest—exerted inordinate sway in the negotiations at which the boundaries, production criteria, and quality classification criteria of Pico Duarte coffee were determined. Due to its wealth, that firm owned much of the high-altitude plots in the region (i.e., those most conducive to producing high-quality coffee). Seeking to maximize its share of coffee included within the GI’s purview, the firm rationally preferred to limit the GI to the high-altitude subregion it principally

⁹⁵ See Rangnekar, *supra* note 8, at 22 (“[F]irms with superior bargaining positions may be tempted to appropriate a disproportionate share of the economic value generated from securing protection.”).

⁹⁶ Galtier et al., *supra* note 15. The process received support from the Dominican Government, the United States Agency for International Development (USAID), and USAID’s French counterpart, *Agence Française pour le Développement*, as well as scientific data and expert advice from Dominican and French agricultural research institutes. *Id.* at 3–6. But these organizations intended their role to be “simple and neutral,” and the critical decisionmaking was left to local players. *Id.* at 6.

controlled⁹⁷ and to implement restrictive qualifying criteria. With no comparably powerful participant in opposition, the negotiations resembled decision by fiat.⁹⁸

The Pico Duarte code cut out three swathes of poorer, less powerful producers, such that those on lower-altitude plots were denied benefits.⁹⁹ Moreover, because of the aggressively heightened production and quality criteria, even some producers located within the geographical limits of the designated production zone were financially unable to conform their practices to the product specification requirements.¹⁰⁰

2. *Nonproducer Participants*

A second type of problematic participation enabled by the structure of GI protection is that of regional players who are not directly involved in the production or processing of the product in question. Barham contrasts the traditional French AOC negotiation process, which takes place exclusively between producers and various public entities, with a contemporary scenario in which “other actors”—including regional tourism bureaus, agents of nearby parks, and representatives of local hotels and restaurants—pursue “objectives linked to the cachet and consumer draw of specialty products in their area.”¹⁰¹

⁹⁷ Because the region was limited by altitude, it would be more difficult for neighboring sub-regions to produce coffee of equivalent quality; however, tests demonstrated that they were *capable* of doing so. *See id.* at 11.

⁹⁸ Galtier writes:

Many institutions expressed a position in favour of the large area whereas the director of the main coffee firm of the Jarabacoa region was clearly against the inclusion of the neighboring zones. The discussion was not followed by a formal decision (no vote occurred). The director [of the main firm] . . . summed up the discussion by the proposal to include neither the neighboring zones of Juncalito and Constanza nor the farms of the Jarabacoa below 700 m, and to adopt restrictive norms. . . . Nobody opposed and this has been interpreted as a decision of the Cluster by consensus.

Id. at 8–9.

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 14 (describing high costs in adapting to strict GI norms on production and processing that smallholders cannot bear).

¹⁰¹ Barham, *supra* note 38, at 136. Given that these stakeholders too would be affected by the implementation of a GI, it is arguably appropriate that they participate in some capacity in specification negotiations. Yet, while product specifications strictly regulate how producers must go about earning their livelihood, a nonproducer is interested merely in the indirect consequences of a GI, and thus heightened scrutiny is warranted when the nonproducer exerts undue influence over the particularities of product specifications. For an old-world example of such a dynamic, see *id.* at 132, which describes an account given by anthropologist Muriel Faure of “the ‘refinement’ of [Beaufort cheese] into a cultural object, assisted along the way by a host of local actors not directly implicated in production

Of particular concern is that such nonproducer actors may seek to tailor GI codes to enhance that which makes—or once made—a particular place-specific community of producers unique or noteworthy to outsiders, at the expense of those communities' contemporary preferences and evolving traditions.¹⁰² Rosemary Coombe offers the example of overzealous marketing in the Basque region of France, wherein “people in the region felt that they were being deliberately kept in an under-developed state” in order to enhance their marketability in the international cultural tourism market.¹⁰³

There is further anecdotal evidence that this concern may be more than academic. At the International Coffee Organization's Seminar on GI for Coffee in 2008, Surip Mawardi characterized *terroir* as “a multifactor system in which the cultivated plant, the grower[s] practices and the environment interact together to obtain an original product” and went on to describe coffee farmers from the Kintamani region of Indonesia:

Coffee farmers at Kintamani work in groups . . . traditionally called . . . “Subak Abian,” meaning farmer group on upland area. The “Subak Abian” works upon Hinduism philosophy of “Tri Hira Karena,” meaning “Three Happiness Causes,” consists of dedicate to the God almighty, maintaining good relation to other men and environment protection. Let me say . . . Kintamani Bali [is] not just a good coffee, but it [is] also a philosophy coffee!¹⁰⁴

Although the language barrier may be a factor, this description would appear to stray from the traditional sense of *terroir*, wherein the relevant traditional practice has a causal connection to the unique quality of the product in question. By instead calling attention to the

of the cheese, but very concerned with the tourist and development value of claiming such an ‘authentic’ element of national heritage in their region.”

¹⁰² See Broude, *supra* note 13, at 677 (“[C]ommunities must emphasize what makes them special, and of course, agreeable from an external, market perspective, not in terms of their own self-determination of identity and aspiration.”). The concern is underscored by the fact that agritourism is often explicitly mentioned as a motivating factor in certain regions' quest for GIs. See, e.g., Josling, *supra* note 13, at 360 (discussing agritourism); Oguamanam, *supra* note 12, at 525 (“In today's postmodern environment, there is, on a global scale, a voracious appetitive for exoticism and romanticism around cultural products from ‘pristine’ communities.”).

¹⁰³ Coombe et al., *supra* note 67, at 910. Coombe discusses social critics who raise this concern another notch by identifying a false consciousness that may be induced in rural populations: “[T]he features of an authentic indigenous identity may hereafter be dictated by foreign market perceptions with pernicious effects on people's self-perceptions.” *Id.*

¹⁰⁴ Mawardi, *supra* note 84, at 3.

non-sequitur of the farmers' spiritual lives, Mawardi comes across as selling exoticness *qua* exoticness.¹⁰⁵

The concern in question is *not* simply with farmers in France and Indonesia being represented as caricatures. Rather, the pertinent concern is that a GI implementation gives outsiders both the means to influence regulation capable of externalizing that caricature on others and the financial temptation to do so. Therefore, GI implementations may provide the perverse incentive to marginalize participatory input from precisely those whom the GI will most intimately affect.

3. *Upstream Participants*

A third, and related, limitation on producer participation enabled by GIs results from the fact that developing countries often lack the critical mass of institutional support necessary to make independent implementation of a GI logistically feasible. In such instances, powerful upstream agents may step in to assert control over the management of location-based product identity.

Geographer Jeff Neilson documented such a situation on the Indonesian island of Sulawesi.¹⁰⁶ The Indonesian Trademark Act of 2001 recognizes GIs, but in 2007 the country was still struggling to operationalize its first pilot GI, Kintamani.¹⁰⁷ Based on Neilson's account, this was primarily due to "the unsupportive nature of the local institutional environment and the inherent complexity and cost associated with GIs."¹⁰⁸ Sulawesi had neither an extension service¹⁰⁹ for coffee farmers nor any mechanism for translating research findings into farmer knowledge. Smallholders, hardly any of whom were organized into producer associations, grew ninety percent of Indonesian coffee.¹¹⁰ Neilson found that the absence of indigenous agents capable of quality governance attracted sophisticated corporate actors who "assume[d] control of geographically informed quality construction and regulation."¹¹¹ He concludes:

¹⁰⁵ Cf. Neilson, *supra* note 71, at 196–97 ("Sulawesi coffee is commonly marketed . . . as possessing distinctive quality attributes associated with the cultural embeddedness of production in an exoticized Torajan society . . .").

¹⁰⁶ Neilson, *supra* note 71.

¹⁰⁷ Note however that Indonesia did certify the Kintamani GI in December 2008. Sardi, *supra* note 74. It is too early to characterize that GI's success.

¹⁰⁸ Neilson, *supra* note 71, at 195.

¹⁰⁹ "Extension . . . services provide critical access to the knowledge and information that rural people need to increase the productivity and sustainability of their production systems, and thus improve the quality of their lives and livelihoods." *Agricultural Extension*, WORLD BANK, <http://go.worldbank.org/05Z1613AQ0> (last visited Oct. 25, 2010).

¹¹⁰ Neilson, *supra* note 71, at 195.

¹¹¹ *Id.*

In the absence of third-party or producer-driven certification in Sulawesi, powerful industry actors have assumed a self-regulatory role in the authentication of geographical attributes. . . . The sum effect of remote-control quality management strategies appears to be [to] further the economic marginalization of growers, as they are removed from the critical processes of quality management.¹¹²

In short, without sufficient institutional support, producers may find not only that the complexities and costs necessary to implement and maintain GI protection are prohibitive, but also that the corporate actors who fill the participatory vacuum contribute to their marginalization and disempowerment.

4. *Consumer Fatigue*

A fourth and final critique of the participatory benefits of GIs highlights the problems GIs create across different producer communities rather than within a single community. This line of critique calls attention to the *arbitrariness* of the producer participation that GIs enable. Elizabeth Barham points out how, in France, “[d]efining the exact boundaries and definition of an AOC can be controversial among producers.”¹¹³ Some participants in the initial request ultimately may be ruled to be outside the boundaries, free riders within the zone may get lucky, and “[n]eighbors who follow slightly different processing methods may find that one of them is included while the other is not.”¹¹⁴ Galtier’s study of Dominican coffee shows the same dynamic at work.¹¹⁵ There, the power play of a single dominant producer cut out producers from neighboring regions who had an equivalent claim not only to coffee quality (as determined by scientific study), but also to the geographic term “Pico Duarte” (which refers to a mountain peak looming above all regions in question).¹¹⁶ Moreover, because price increases for GI-protected coffee further depress generic coffee prices, those cut out of a GI not only fail to see any gains but are incrementally worse off than they were before the GI. In short, to the extent a particular producer’s inclusion in a GI regime comes down to arbitrary distinctions, it is difficult to maintain that the aggregate effect of GI implementation is one of increased participation on the part of producers.

¹¹² *Id.* at 201.

¹¹³ Barham, *supra* note 38, at 136.

¹¹⁴ *Id.*

¹¹⁵ See *supra* Part III.A.1 (describing process that led to issuance of Pico Duarte coffee GI).

¹¹⁶ See Galtier et al., *supra* note 15, at 11 (examining dynamics of GI decisionmaking process).

This concern is particularly pronounced given that GI protection is inherently bound to be afforded to few rather than many. Oxfam implores governments to “appreciate the danger of encouraging everyone to run for the same exit. A niche market will lose its special status and its ability to pay high prices if it is swamped and if its consumer market does not grow with it.”¹¹⁷ That the benefits of GI protection *must* be reserved for a select few seems even more reason to minimize the discrepancy between the benefits afforded those with and those without.

The experience of Café de Marcala, a Honduran coffee GI, may be telling in this regard. Marcala was granted a Honduran GI in 2005, but two years later, agricultural economist Ramona Teuber found that Café de Marcala had yet to garner higher auction prices.¹¹⁸ She reports a dispiriting image of GI failure—Honduran coffee smuggled across the Guatemalan border in search of a Guatemalan imprimatur and the resultant higher price.¹¹⁹

An old-world example of the impact of GI labeling on consumers is Tomer Broude’s account of information overload due to the proliferation of French wine GIs, of which there are more than five hundred.¹²⁰ Broude characterizes the challenge to the consumer thus:

It has simply become too difficult for the casual, nonexpert consumer to maintain a working knowledge of French appellations and their association with the kinds of wine he or she wants most. . . . If the consumer wants a Chardonnay, should she order a Pouilly-Fuisse or a Pouilly-Fume? . . . Is a Montrachet really so much better than a Puligny-Montrachet? . . . [A] Côtes du Rhone or a Cote Rôtie?¹²¹

Broude suggests that the contrast between this elaborate labeling and the far simpler labeling standards of North American and Australian wines is a factor in the ascendance of New World wines amongst British consumers.¹²² The concern for developing nation coffee producers, then, would be that consumers will eventually reach a similar exhaustion point, beyond which keeping track of the multi-

¹¹⁷ OXFAM INT’L, *supra* note 23, at 40.

¹¹⁸ Teuber, *supra* note 84, at 142. This is despite the fact that Honduran coffees “have the same quality as [higher priced] coffees from their more famous neighbours Guatemala, Nicaragua, and El Salvador.” *Id.* at 135. Teuber attributes her observation that establishing a label of origin does “not automatically lead to consumer awareness” to “the efforts many countries have already undertaken to establish labels of origin for their coffees.” *Id.* at 142.

¹¹⁹ *Id.* at 135.

¹²⁰ Broude, *supra* note 13, at 669–73.

¹²¹ *Id.* at 672.

¹²² See *id.* at 669–73 (arguing that French labeling “considerably obscures the consumer’s view of her purchasing options and decisions”).

tude of coffee GIs would be perceived as requiring more effort than it is worth.¹²³

B. Transparency Deficits

As an empirical matter, GI implementations have proven far less transparent than they appear, as input to the product specification process is considerably less producer-driven and site-specific in practice than it is in theory. In addition, the lack of a robust institutional infrastructure makes for poor product tracing and GI auditing, which undermines confidence in the “transparent” connection between product and place.

1. Standardized Standards

Galtier’s study of the Dominican GI implementation process makes the troubling observation that instead of originating from local input, most of the Pico Duarte GI code of practices was imported full cloth from external sources.¹²⁴ Although the foreign research organizations present during the specification process sought to remain neutral advisors, the scientific instruments, best practices, and quality norms they presented were in fact adopted with hardly any customization to local conditions.¹²⁵ Moreover, Galtier believes that the result cannot be written off as a function of the presence of foreign advisory groups; rather, it is endemic to the nature of a decisionmaking process that relies so heavily on “data [centralized and accumulated] from all over the world.”¹²⁶ Neilson observes a related phenomenon in Sulawesi, where a lack of institutional infrastructure has led to the inability to trace coffee beans to their origin. Neilson notes how this leads in turn to international buyers authenticating GI-marked goods using their own “[i]nternal verification systems,” rather than codes specific to any particular locale.¹²⁷ He concludes that “[i]n this context, the use of social, environmental or geographic associations of

¹²³ Cf. Daniele Giovannucci, Combining Efforts, Address at the Tea Coffee Cocoa Combining Efforts Conference 4 (Oct. 1, 2009), available at <http://www.teacoffeecocoa.org/tcc/content/download/385/2714> (discussing “consumer fatigue” of “the average consumer”); Grote, *supra* note 15, at 96 (discussing “labeling fatigue”); Marette, *supra* note 10, at 72 (discussing flaws of “label proliferation”).

¹²⁴ Galtier et al., *supra* note 15, at 11–12.

¹²⁵ See *id.* at 12 (“All production norms . . . were copied from [other] certifications without adaptation to local specificities,” leading to a result that is “a very classical and generic code of practice, which does not incorporate elements of local culture and knowledge.”).

¹²⁶ *Id.*

¹²⁷ Neilson, *supra* note 71, at 197.

quality are indistinguishable from wider processes of product branding.”¹²⁸

2. *Opaque Authenticity of Origin*

A weak institutional infrastructure calls into question not only the fidelity of a GI’s specifications to the delineated region,¹²⁹ but also the authenticity of connection between a GI-labeled product and that region. Poorer states with little institutional infrastructure struggle to maintain the complex product-traceability and geographic-authentication systems needed to ensure the veracity of these connections.¹³⁰ The weaker the policing systems, and the higher the GI premiums that consumers are willing to pay, the greater the risk of fraud.¹³¹

This phenomenon is illustrated in Teuber’s depiction of Honduran coffee smuggled across the border into Guatemala.¹³² Neilson’s account of the Indonesian coffee industry’s pursuit of location-based pricing premiums depicts another variation of commonplace geographical fraud, as warehoused coffee bags of uncertain origin are simply marked with geographical identities corresponding to global buyers’ requests.¹³³ Such falsely-labeled goods blur the connection between place and product, thus undercutting producers’ ability to efficiently manage a reputation. This, in turn, undercuts the ability of the market to hold producers accountable for their regulatory and operational decisions.

C. *Lack of Meaningful Review*

Finally, the GI regime’s review mechanisms fail to meaningfully hold opportunistic actors accountable in the context of developing-world GI implementations. One would hope, for example, that flaws in the Pico Duarte product specification¹³⁴ might be noticed, and the

¹²⁸ *Id.*

¹²⁹ See *supra* Part III.A.3 (describing negative impact of institutional vacuum on producer participation).

¹³⁰ See, e.g., Grote, *supra* note 15, at 106 (discussing costs of GI protection and labeling); Hughes, *supra* note 16 (manuscript at 49) (“Simply put, we must ask if any state too weak to provide a reasonable transportation and communications infrastructure . . . is . . . capable of putting in place the kind of GI system seen for GI products in Europe or the viticulture sectors in Australia, South Africa, and the US.”); see also *supra* note 38 (identifying burdensome administrative costs as argument against GI expansion).

¹³¹ See Grote, *supra* note 15, at 106 (“Without appropriate legal protection systems and their enforcement, the free-riding incentive is quite high.”).

¹³² See *supra* notes 118–19 and accompanying text; cf. *supra* note 90 and accompanying text (describing Antiguan coffee and Darjeeling tea surpluses).

¹³³ Neilson, *supra* note 71, at 197.

¹³⁴ See Galtier et al., *supra* note 15, at 11–13 (describing flaws in GI specification process).

specification rejected and returned to the producers for improvement, either by a domestic certification body or by a foreign certification body if the GI is submitted for registration abroad. The odds of this occurring, however, are slim. First, it is unlikely that a domestic regulatory body would meaningfully scrutinize a product specification coming from one of its own producer communities. Because a home-grown GI is, in theory, a future income stream for the country, such internal scrutiny may be a low priority for a developing nation with limited funds to devote to the administration of a GI program. Rejection by EU or U.S. officials is also unlikely. In the case of Pico Duarte and many other GI implementations, both EU and U.S. organizations helped to guide the specification process and raised no objection to its results.¹³⁵

The WTO Dispute Settlement Body's panel ruling of March 2005 struck the deepest blow to meaningful review.¹³⁶ The panel held that the EU's imposition of "reciprocity" and "equivalence" requirements on foreign applications violated the national treatment obligation of TRIPS Article 3.¹³⁷ The upshot of this ruling is that one state cannot use the threat of withholding protection of foreign GIs to influence the GI policy of another state.¹³⁸ The panel thus effectively eliminated the ability of one state to meaningfully review the soundness of another state's GI programs.¹³⁹

CONCLUSION

In theory, the implementation of a GI product specification might empower developing-world coffee producers by fostering their regulatory involvement and civic organization via participation, facilitating collective management of a joint reputation through transparency,

¹³⁵ See *supra* note 96 (discussing involvement of USAID, *Agence Française pour le Développement*, and several French agricultural research institutes in process of establishing Pico Duarte product specification); see also Barham, *supra* note 38, at 131 (discussing increase in requests received by French government for assistance in setting up other countries' GI systems).

¹³⁶ See *supra* notes 93–94 and accompanying text (describing first WTO panel GI-related ruling).

¹³⁷ WTO Report, *supra* note 93, ¶ 8.1(h)(i).

¹³⁸ *Id.* In other words, the EU could not require, as a prerequisite to its registration of a GI from a particular foreign state, that the state adopt a GI protection system equivalent to that of the EU or provide reciprocal protection to products from the EU. The United States had argued that the Regulation was in conflict with the most-favored-nation obligations in Article 4 of the TRIPS Agreement principles because it did not "immediately and unconditionally accord to nationals of all WTO Members the advantages accorded to EC nationals." *Id.* ¶ 7.717.

¹³⁹ See Marette, *supra* note 10, at 67 ("[F]oreign producers should be guaranteed the same access that EU producers have to the EU system for protecting GIs.").

and offering access to mechanisms by which they might hold opportunistic actors accountable by means of meaningful review. In practice, however, states without preexisting, well-developed institutional infrastructures tend to be unable to corral the powerful actors who seek to exploit GI implementation for their own benefit. These actors may be dominant local producers, nonproducer regional or national stakeholders, or wealthy multinational corporate interests. In each case, an idealized implementation is undercut by interests that are better informed than local farmers both about the end consumer and about the intricacies of GI administration.

The problem is exacerbated by the fact that consumer attentiveness to GIs is likely to be limited. One could conceive of the problems encountered in the registration of the Pico Duarte and Kintamani GIs as mere growing pains of their respective domestic GI regimes. One could further argue that the institutions necessary to oppose powerful private interests could only be expected to develop gradually, in part through the producer-mobilizing effects of GI implementations, however imperfect they may be. According to this theory, the fact that the first GIs to emerge from various developing states are compromised can be understood as the price paid for the laying of groundwork for future GIs. Unfortunately, such an argument is dependent upon there being an appetite for additional GIs in the future. The findings of Broude, Oxfam, and Teuber do not bode well;¹⁴⁰ perhaps only those early to the table can eat a full meal.

More generally, the coffee producers' experience with the international GI regime suggests underlying structural flaws in the regime's governance model. That model creates a conduit between traditional local communities and the global marketplace without shielding the former from the massive concentrations of power and financial incentives endemic to the latter. Critical rulemaking is delegated to those least likely to be capable of individual resistance or collective mobilization in the face of powerful outside influence. Moreover, by effectively preventing states from providing oversight of each other's domestic GI programs, the WTO's 2005 panel ruling ensures that there is minimal leverage for any review of the rules made under these suspect conditions. The lesson of GI Joe may be that regulatory programs seeking to provide voices to the historically mute must ensure the implementation of mechanisms capable of either policing the process of expression or reviewing the expression that results before it becomes a multinational standard.

¹⁴⁰ See *supra* notes 113–18 and accompanying text (examining problem of consumer fatigue regarding GI protections and its effect on developing countries).

A final observation: A striking constant across many GI implementation sites throughout the developing world is the presence of European—typically French—agencies and NGOs in advisory roles.¹⁴¹ Given the various obstacles the developing world faces in order to benefit from GI protection, an observer is left wondering about the extent to which European agencies' promotion of developing-nation GI implementation might represent, first and foremost, an alliance-building strategy during a *détente* phase of the war on *terroir*.

¹⁴¹ See *supra* note 96 (describing organizations involved in Pico Duarte GI process).