A few drops of law in an ocean of wine: a (very) forward-looking example of the agreement called for in articles 22 to 24 trips on Geographical Indications.

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INTRODUCTION

- article 22§2 of the TRIPS: an obligation imposed on States to reach internal “legal means”. Articles 23§4 (wine) and 24§1 (for other products) call the international community for a real qualitative leap, a multilateral order.

- In a first version of this article, in August 2009, it was therefore questioned where they could lead if they were to move (we heard: ah!ah!)

- recent events have given a serious boost to our work of Prophet (in the desert):
  
  ⇒ In 2010, the pure case of the Swiss AOC Gruyère (surprisingly, not wine)
  ⇒ the strong commitment of the European Parliament for the GI in the resolution 16/06/2010 and against in the same time, with the compulsory mention of the geographical origin of products to improve consumer information
  ⇒ and especially during the few last months, the frenzied agitation of the WTO:
INTRODUCTION

But we can rest: it is only a frenzied trampling, for the moment! WTO has just compiled the 3 (or 2.5, perhaps) versions derived from the packages of 2005 and 2008; now, they say that because that is all we have on the table, it only remains to complete the options in square brackets, and finished. However, there are only 208 left, including the hard core of the problem.

- The first part of this paper will be dedicated to a survey of the multilateral system called for by 23§4 stricto sensu, introducing to the sole satisfactory synthesis: the International Bureau of Opposability or IBOPP,

- In the second part, we see that there is indeed an interest in the GI but we must conceive a more global autonomous right to the geographical names, to avoid strong contradictions in the various uses that one would like to see for these names, ultimately damaging to all.
I - The question of opposability, the BIOPP or IBOPP.

A /-. The question of opposability.

➢ The central issue to get rid of bi- or multi-lateral retaliation (foie gras, camembert…) and favor reciprocal treatment,
   ⇒ the evidence that the proposed name genuinely possesses the three qualities of 22 §1,
   ⇒ the internal legal means of 22§2 are intimately related to the multilateral "system" of 23§4, only able to manage this issue of the legitimacy of the GI.

➢ opposability should NOT hide a right to interference: the registration should result only from the admission of the IG in national rank; add “exclusively” and we have the first concept for a multilateral system, as a simple database, on a consultative basis

➢ a system where other members can demonstrate their opposition or reservations,
   ⇒ hence the second concept: EC and many others, applicable to all the member states,
   ⇒ China compromise attempt, the “prima facie” evidence might be rebuttable and the participation to the “system” on a voluntary basis.
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- **And that's all.** The States have expressed the constraints but no practical solution to arrive to a rich though realistic solution, not leaving regrets in sealing off the Doha round.

- What is missing? To avoid multilateral retaliation, we need (a) - a filter for unfair practice, (b) - the filter itself is fair (c) - the filter has sufficient authority to impose the result of its decisions, to refuse or to admit.

  - **Unfair GI**
    - ⇒ Non compliance with 22§1: the origin, the quality/reputation, the relation between both,
    - ⇒ granting an excessive monopoly upon a name, creating “reservations” harming the territorial development, limiting artificially the competition between producers

  - **A fair filter:** means a treaty ruling the procedures, nothing less,

  - **Sufficient authority** to impose fair GI, i.e.
    - ⇒ To control that the internal procedure granting the GI has been fair,
    - ⇒ To control that the fair internal procedure is still not harming foreign prior rights

Hence, an independent international bureau, the IBOPP, a draft of which is presented in annex to the written paper, for the fun.
Main features of the IBOPP may be:

- a unique application form: homogeneous examination, non discriminatory basis,

- The focus of the procedure should be the territorial authorities - the TA- of which the name is used (OR which is financially responsible for the reputation of a name, like Perigord) to apply and receive the IBOPP actions “ex officio” and the foreign oppositions,
  ⇒ an ad hoc legal mechanism to represent the beneficiaries of the GI, producers + TA,
  ⇒ Contrary to the WTO “all state” policy, but who would trust a State to manage an opposition against a foreign trademark in the foreign state?

- The form should detail the duties imposed on the TA to grant « fair » GI which will in turn be eligible to opposability
  ⇒ Including where the IG generates excessive burden to the TA increasing the benefits for the producers: a compensation in favor of the TA?

- foreign oppositions should be based on (a)- prior IP rights, (b)- challenging compliance with 22§1 and/or (c)- unfair advantages to the producers.
I - The question of opposability, the BIOPP or IBOPP.

Thus, the IBOPP would appear as a “sui generis” body between

⇒ **OHIM**: a warranty for a unified and non discriminatory examination,

⇒ **WIPO**: the members of the IBOPP are the States but the actors are the parties having interest in the GI, the TA and the producers, i.e. the State is not the proper level for defending local interests,

⇒ **ICANN**: with respect to the resolution of disputes based on conflicting uses of the same or similar geographical names.

And thanks to this strictly legal background, IBOPP provides a clear answer to the two debated question:

⇒ **Yes**, it is *fit for all products*, in the spirit of 24§1.

⇒ **No**, there is no need for a system compulsory for all WTO member states, WIPO provides the answer: *they become members when recognizing their interest.*
II – An autonomous right to the geographical names.

A /-. There is a real interest for multilateral GI but the signal is blurred.

- “Swiss gruyère wins the exclusivity of the AOC” LE MONDE, August 2010 quotes: “What actually want the Swiss, is a protection identical to that which exists in the WTO for wine products” … which protection?

- European Parliament “Resolution of March 25, 2010, on agricultural product quality policy: what strategy to adopt?” argues for stronger protection of GI in the WTO, both by the extension of the protection of article 23 of the trips to all IG and the establishment of a multilateral register legally binding IG "

BUT

- Also “considers appropriate, in the case of …/… processed products containing only a single ingredient, to indicate the place of origin of the agricultural raw material used in the finished product, to ensure greater transparency and better traceability etc.”

What is the "place of origin“ if not the GI, the case occuring?

⇒ Contradiction?
⇒ The stock of such names –notably with reputation - is not extensible
II – An autonomous right to the geographical names.

• European Union "considers that, in a more open market, it is essential that the Union defend in the world trade (WTO) negotiations, the idea that quality products must be effectively protected by the defense of an intellectual property regime;"
  ⇒ certainly means a IP regime for the geographical names
  ⇒ based on a concept of collective ownership of the associated reputation,
  ⇒ do we mean a right of the territorial collectivities to dispose of their name?

• A significant economic impact?
  ⇒ To add up the annual budget of all European local communities to promote their reputation to attract economic activities, and objectively, the taxpayer pays for it;
  ⇒ consider this right not only a possibility to control the use but also, as the basis for a patrimonial consideration, for instance through license to use (exclusive or not)?

• Yet, at least in France, it is said that the need for a coordinated approach to the right for local and regional authorities is not yet directly perceived by stakeholders themselves.
II – An autonomous right to the geographical names.

- B/- One cannot expect much from the trademarks.
- The Community position is simple, as "opposed to the idea that geographical indications could be replaced by trademarks, because it's fundamentally different instruments from the legal point of view": this is common sense;

  ⇒ **generic** If a geographical name must be left to the free use of all producers of all products in this same territorial community, then it becomes, a GI may be generic,
  ⇒ **distinctive character**: the attempt to by-pass the problem with a design ("Parma ham" as a Community trade mark represented by a five-point Crown) is likely to end with the sole protection of the design which "saves " the trademark,
  ⇒ **Criteria of Confusion**: The classical assessment of the risk of confusion may be very detrimental to the GI: different commercial channels, different prices, different public etc.
  ⇒ **Collective Trademarks** do not ensure of a link between a given skill (not required) and a given geographical name due precisely to the lack of control by the TA of its own name i.e. the third criterion of 22§ 1 which indeed proves essential.
CONCLUSION:

- **Admitting** with the European Parliament (Resolution March 25, 2010, supra) that "geographical indications are systematically infringed in third countries", "this harms the reputation and the image of products with a geographical indication and misled consumers; stresses that the protection of a geographical indication in a third country is a long and difficult procedure for producers, since each third country may have developed its own system of specific protection... »;

- **Admitting** that up to now, the Doha packages have set forth the bases for the future, mainly “some” non interference in granting the GI and “some” right to oppose,

- **Acknowledging** that we have the floor but there are no common comprehensive concepts of what could be the walls and the roof,

**Staying on the present road**, reasonable prospects are that:

⇒ If the GI’s do not express their genuine needs, the diplomats will close the Round in their own manner to comply with TRIPS, which may or may not suit the interests of the GI’s,

⇒ Distinct risk to end with an ambiguous register where GI’s of very unequal quality will arise many oppositions and disputes than can not be solved as nobody will have received sufficient authority, **the use of GI will be unsafe** for a long time,

**THEN BETTER AVOID A “MACHIN”** (quoting Gal de Gaulle).
CONCLUSION:

• IF one admits that there is a need for an efficient multilateral protection, (even taking a risk, the ad hoc protection of topographies of semi-conductors proved useless and has been forgotten) then there is a need:

⇒ For a strong involvement of the parties having interest in the GI’s, under the leadership of the TA’s in an ad hoc association in coordination with the Commission prior to the launch of trade negotiations and during the negotiating process (Resolution March 25, 2010, supra);

⇒ For all GI’s, food at large of course but also anything which qualifies under the 3 criteria of 22§1, a specified skill related to a reputed geographical name: cutlery (swords), china, glass or crystal ware, jewelry, wood or stone carvings, carpets (dye, knots), clothes (lace, knitting etc.), why not cooking styles …

⇒ To provide practical guidance to the diplomats, and in our views,

To promote the only satisfactory synthesis, the IBOPP

⇒ And for the lawyers, a need to organize a control of the use of geographical names, and the best perspective is a clear ad hoc IP of the TA to avoid disorder in contradictory objectives and to allow economical counterparts.

Thank you.