

# Real Problems with Fake Antiquities and How Geographical Indications May Help

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Anne Horn Baroody  
155 International Drive, Apt. 603  
Athens, GA 30605  
(708) 373-0928

University of Georgia School of Law  
J.D. Candidate, May 2014

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## I. Introduction

Egypt and Cambodia have both made headlines recently in connection to their on-going endeavors to protect their cultural heritage.<sup>1</sup> Perhaps unexpectedly, the controversial protection efforts do not focus on the problem of archaeological looting, but on the less-discussed practice of *copying*. Egypt vehemently protects its right to make reproductions and photographic images of the Pyramids of Giza<sup>2</sup>—a monument central to the image of both Pharaonic and modern Egypt. Cambodia, similarly, challenges an Indian project to create a full-size replica of the Temple of Angkor Wat<sup>3</sup>—a national symbol of Cambodia.<sup>4</sup>

This focus on protection from replication adds new depth to a problem that scholars and archaeologists have cited of for years—the international trade in cultural objects.<sup>5</sup> Scholars in

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<sup>1</sup> See Steven Stanek, *Can Egypt Copyright the Pyramids?*, NAT'L GEOGRAPHIC, Jan. 15, 2008, available at <http://news.nationalgeographic.com/news/2008/01/080115-egypt-copyright.html> (discussing Egypt's amended patrimony law that vests intellectual property rights to heritage monuments in the Supreme Council of Antiquities); Kun Makara, *IP Rights Discussed for Angkor Wat*, THE PHNOM PENH POST, Aug. 29, 2012, available at <http://www.phnompenhpost.com/business/ip-rights-discussed-angkor-wat> (discussing Cambodia's intent to trademark its heritage monuments).

<sup>2</sup> See Nada Alnajafi, *Protecting the past in the Future: How Copyright Is Wrong for Egypt and Why Other Sui Generis Laws May Help Protect the Pyramids and Other Cultural Antiquities*, 56 J. COPYRIGHT SOC'Y U.S.A. 243, 244 (2008-2009) (“Egypt is trying to develop the idea that ‘a nation has the right to defend how its folklore and intangible heritage is used internationally,’ and the right to defend the ‘integrity of the nation.’”).

<sup>3</sup> Makara, *supra* note 1.

<sup>4</sup> The image of Angkor Wat appears prominently on the national flag of Cambodia.

<sup>5</sup> See, e.g., Neil Brodie, *An Archaeologist's View of the Trade in Unprovenanced Antiquities*, in ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 52 (Barbara T. Hoffman ed., 2006) (discussing the connection between the international trade in antiquities and looting).

favor of curtailing the antiquities trade argue that the market for antiquities leads to the looting of archaeological sites, which impoverishes the historical record.<sup>6</sup> The current structure of the trade—in which the low supply of legal antiquities cannot meet the market’s demand—incentivizes enterprising persons to either loot archaeological sites or manufacture fakes.<sup>7</sup>

Although relatively less scholarly attention is devoted to the problem of fakes, Egypt and Cambodia have addressed the problem by drawing from intellectual property law doctrines to regulate the production of replicas. Egyptian law 117 vests all IP rights to its heritage monuments in the Supreme Council for Antiquities<sup>8</sup>—what commentators have called “copyrighting the Pyramids.”<sup>9</sup> Cambodia likewise indicates that it will pursue trademark protection for Angkor Wat.<sup>10</sup> Both copyright and trademark protection are available under the current regime for international intellectual property.<sup>11</sup> But the use of copyright in the context of heritage monuments is highly criticized, and trademark law does not adequately protect the interests of a nation in safeguarding its national monuments. Copyright is inappropriate for the Pyramids because the doctrine requires an *author* and its duration is limited.<sup>12</sup> Trademark may

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<sup>6</sup> Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 170-71 (2007) [hereinafter “*Reducing the Harm*”].

<sup>7</sup> THE CULTURAL HERITAGE OF MANKIND 153-54 (James A. R. Nafziger & Tullio Scovazzi eds. 2008).

<sup>8</sup> Law No. 117 of 1983, *as amended by* Law No. 3 of 2010 (Promulgating the Antiquities’ Protection Law), *Al-Jarida Al-Rasmiyya*, 14 Feb., 2010 (Egypt), Art. 36.

<sup>9</sup> *See, e.g.*, Stanek, *supra* note 1.

<sup>10</sup> Makara, *supra* note 1.

<sup>11</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (entered into force Jan. 1, 1995) [hereinafter TRIPS Agreement].

<sup>12</sup> Alnajafi, *supra* note 2, at 252-53.

not sufficiently safeguard Cambodia's interest in Angkor Wat because it is generally an *individual right*, rather than a collective right available to a nation as a whole.<sup>13</sup>

The doctrine of Geographical Indications (GIs) may be a more appropriate vehicle for regulating replicas. Also protected under the international trade regime, GIs protect a group's right to regulate the production of goods that are unique to a region.<sup>14</sup> Commonly associated with food and wine, the right is rooted in both economic and cultural justifications.<sup>15</sup> And unlike copyright protection, the term lasts indefinitely.<sup>16</sup> GI protection appropriately matches the objectives nations have in regulating unmarked replicas. Specifically, three discernable interests motivate regulation: First, replicas can impair our understanding of how art and culture developed.<sup>17</sup> Second, unmarked replicas impair the nation's ability to efficiently enforce laws that restrict the export of authentic antiquities. Third, many nations feel they have the exclusive right to capitalize on their cultural monuments through the manufacture and sale of replicas.<sup>18</sup> A GI regime would address these concerns by requiring that all replicas and reproductions be explicitly marked as imitative works, to distinguish them readily from authentic antiquities.

Before discussing the use of GIs for antiquities, this paper provides a brief overview of the antiquities market and the forces that lead to replicas and fakes. Part III then identifies specific concerns that motivate the regulation of unmarked replicas. To support the conclusion

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<sup>13</sup> See DEV GANGJEE, *RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS* 255 (contrasting Geographical Indications—which it labels “collective” marks—and trademarks).

<sup>14</sup> The Trips Agreement, Arts. 22-24.

<sup>15</sup> See generally Dev S. Gangjee, *Geographic Indications and Cultural Heritage*, 4 W.I.P.O.J. 85 (2012).

<sup>16</sup> The Trips Agreement, Arts. 22-24 (not providing for a limited duration).

<sup>17</sup> *Reducing the Harm*, *supra* note 6, at 172.

<sup>18</sup> See *supra* notes 2-3 and accompanying text.

that unmarked replicas pose a real concern for source nations, Part IV examines several nations' legislative attempts to regulate replicas. Part V then provides an overview of international intellectual property law, including the underlying goals of IP protection and the current regime under the TRIPS Agreement. This paper ultimately argues that the concerns identified in Part III can be properly addressed through the registration of a Geographical Indication for antiquities and illustrates this approach by describing how such protection would work in Cambodia.

## **II. The International Trade in Antiquities**

Since World War II, international trade policy and the international trade in antiquities have taken divergent paths. While the world has become increasingly committed to tearing down trade barriers in order to promote free trade of goods in most contexts,<sup>19</sup> many nations rich in cultural heritage have developed patrimony laws that severely restrict the international trade of antiquities by prohibiting antiquities from leaving the country.<sup>20</sup>

The opposing interests of “source nations” and “market nations” in the international market for antiquities drive this unique position.<sup>21</sup> Source nations are those that are rich in cultural history: These countries often have developing economies and relatively lower gross domestic products.<sup>22</sup> Market nations, by contrast, are relatively more developed countries that

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<sup>19</sup> William Davey, *The World Trade Organization: A Brief Introduction*, in ANDREW T. GUZMAN & JOOST H. B. PAUWELYN, *INTERNATIONAL TRADE LAW* 87 (2d ed. 2012); JOHN HENRY MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 113 (5th ed. 2007).

<sup>20</sup> MERRYMAN, *supra* note 19, at 114.

<sup>21</sup> *See id.* (discussing the opposing views of source nations and market nations).

<sup>22</sup> John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986) [hereinafter “*Two Ways of Thinking*”]; Simon R. M. Mackenzie, *Dig A Bit Deeper: Law, Regulation and the Illicit Antiquities Market*, 45 BRIT. J. CRIMINOLOGY 249, 252 (2004).

“consume” the antiquities originating from source nations.<sup>23</sup> Source nations are generally motivated by cultural nationalism—the sentiment that cultural patrimony should be retained in order to enrich the nation and its citizens.<sup>24</sup> As a result, many source nations have enacted patrimony laws that restrict or completely prohibit the export of cultural property.<sup>25</sup> For source nations with developing economies in particular, the value of their patrimony is significant for bolstering a strong tourist economy.<sup>26</sup> This nationalist view gains support from the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property,<sup>27</sup> which illustrates an international commitment towards protecting cultural property and enforcing export restrictions.<sup>28</sup>

Market nations and those who disagree with cultural nationalism argue that this policy leads to counterintuitive results.<sup>29</sup> The basic forces of supply and demand govern the market for antiquities like any other free market: although restricted export of antiquities suppresses the

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<sup>23</sup> *Two Ways of Thinking*, *supra* note 22, at 832; Mackenzie, *supra* note 22, at 252.

<sup>24</sup> See MERRYMAN, *supra* note 19, at 114 (linking cultural nationalism to source nations’ interests).

<sup>25</sup> *Id.*

<sup>26</sup> See Brodie, *supra* note 5, at 60 (discussing the tourism value that heritage assets have for developing countries).

<sup>27</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

<sup>28</sup> *Id.*; see also *Reducing the Harm*, *supra* note 6, at 176 (discussing the UNESCO Convention’s as a means to control the international market for art and cultural objects).

<sup>29</sup> See Patrick J. O’Keefe, *Trade in Antiquities: Reducing Destruction and Theft*, in JOHN HENRY MERRYMAN ET AL., LAW, ETHICS AND THE VISUAL ARTS 219 (5th ed. 2007) (“Market demand leads to breaches of the law designed to protect the rights of individuals and the public.”).

supply of antiquities flowing to market nations, the demand for antiquities has not ebbed.<sup>30</sup>

When the restricted supply of legally exported antiquities cannot satisfy the demand from market nations, opportunists will try to meet the demand by other means.<sup>31</sup>

One argument is that strict export controls lead to criminal behavior:<sup>32</sup> the gap between supply and demand will be filled with looted and fake antiquities.<sup>33</sup> While the lucrative nature of the antiquities trade creates an economic incentive to loot archaeological sites,<sup>34</sup> fakes, forgeries and replicas can also meet the same demand.<sup>35</sup> Counterfeit objects artificially bolster supply just as looted antiquities can, and the low cost of counterfeiting art objects attracts those who are interested in capitalizing on the demand for prized works of art.<sup>36</sup> Of the two issues, scholars give relatively more attention to the problem of looting, which more directly threatens cultural

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<sup>30</sup> See *Reducing the Harm*, *supra* note 6, at 173 (noting that the supply cannot keep up with mounting demand for antiquities).

<sup>31</sup> See John Henry Merryman, *The Antiquities Problem*, 3 PUB. ARCHAEOLOGY R. 10 (1995), in JOHN HENRY MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 227 (5th ed. 2007) (noting that the export restrictions enacted by source nations lead to a black market for antiquities).

<sup>32</sup> Brodie, *supra* note 5, at 52-53; Nafziger & Tullio, *supra* note 7, at 153-54.

<sup>33</sup> See *Reducing the Harm*, *supra* note 6, at 173 (noting that market demand for antiquities can only be met by fake or looted objects).

<sup>34</sup> See generally Brodie, *supra* note 5 (discussing the structure of the antiquities trade and the problem of looting).

<sup>35</sup> See, e.g., David W.J. Gill & Christopher Chippindale, *Material and Intellectual Consequences of Esteem for Cycladic Figurines*, 97 AM. J. ARCHAEOLOGY 601, 617 (1993) (discussing forgeries in the field of Cycladic figurines and noting that “workshops in Athens and Naxos” were happy to meet rising demand by producing fakes made of “the same island marble” historically used to produce authentic figurines).

<sup>36</sup> Joseph Gioconda, Comment, *Can Intellectual Property Laws Stem the Rising Tide of Art Forgeries?*, 31 HASTING COMM. & ENT. L.J. 47, 53 (2008).



heritage, than to the problem of fakes. Therefore, this paper first examines what, if any, concerns counterfeit antiquities raise for players in the antiquities trade before considering what international doctrines may help to stem the tide of replicas on the market.

### **III. Three Concerns Associated With Unmarked Replicas**

As a market nation, our concern with counterfeit art focuses on its ability to disrupt the consumer market for art and antiquities: it has been noted that “forgers defraud consumers, threaten integrity and trust in the marketplace, increase transaction costs, and decrease the value of authentic art.”<sup>37</sup> Scholarship and news media draw our attention to “high-profile, multi-million dollar forgeries”<sup>38</sup> which defraud dealers and consumers into paying premium prices for a luxury good that turns out to be fake.<sup>39</sup> These headline-worthy forgeries, however, are not nearly as common as “mass market fakes,” which are generally subject to less scrutiny than big-ticket items.<sup>40</sup> As a result, the forger who mass-produces counterfeits of less attention-grabbing art works can more effectively infiltrate the market of less-discerning consumers.

Setting aside the phenomenon of headline-worthy, high-priced forgeries, this paper examines the concerns source nations might have in regulating the less-noticed—but more

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<sup>37</sup> *Id.* at 53-54.

<sup>38</sup> *Id.* at 56.

<sup>39</sup> See, e.g., Patricia Cohen & William K. Rashbaum, *One Queens Painter Created Forgeries That Sold for Millions, U.S. Says*, N.Y. TIMES, Aug. 15, 2013, at A16, available at <http://www.nytimes.com/2013/08/16/nyregion/one-queens-painter-created-forgeries-that-sold-for-millions-us-says.html> (noting that many works in a group of several dozen newly discovered paintings attributed to great Modernist painters were fake); Priscilla Frank, “*Caveat Emptor*”: *An Art Exhibit Made Entirely of Forgeries Confiscated by the FBI (PHOTOS)*, HUFFINGTON POST, Aug. 5, 2013, [http://www.huffingtonpost.com/2013/08/05/art-forgery-exhibit\\_n\\_3696341.html](http://www.huffingtonpost.com/2013/08/05/art-forgery-exhibit_n_3696341.html) (previewing an exhibit exclusively displaying forgeries of great painters like Chagall, Warhol, Gauguin, and De Kooning).

<sup>40</sup> Gioconda, *supra* note 36, at 56.

common—mass production of unmarked replicas. Because an understanding of what motivates source nations to regulate replicas is critical to determining whether regulating in this area is necessary, and if so, what mechanism is most appropriate, this section sets out three major concerns source nations may face with regards to unmarked replicas. First, replicas adversely impact historians’ ability to decipher the historical record of artistic and cultural development. Second, replicas increase costs for nations that strictly regulate the export of authentic antiquities. Third, authentic antiquities and heritage monuments are an important asset for many source nations’ economies; the unregulated production of replicas impairs those nations’ ability to exclusively reproduce antiquities for sale as souvenirs and other tourist items.

**A. Integrity of the Historical Record**

For both source and market nations, the mass production of replicas is problematic because it impairs our ability to recreate and understand the artistic and cultural development of ancient civilizations.<sup>41</sup> This concern focuses on a different “consumer” than the consumer often cited as the victim of art forgery in market nations: it addresses the consumer not as buyer, but as historian and archaeologist. This audience of scholarly consumers is commonly considered when discussing general concerns associated with the trade—free or regulated—in antiquities. In fact, a common argument against the trade of antiquities is that high demand encourages looting, which deprives archaeological objects of important “context.”<sup>42</sup> Scholars contend that

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<sup>41</sup> See Patty Gerstenblith, *Keynote 1: Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works*, 35 COLUM. J.L. & ARTS 321, 325-26 (2012) [hereinafter “*Getting Real*”] (refuting suggestions that authenticity does not matter by arguing that authenticity is important both for economic reasons and for the integrity of the historical record).

<sup>42</sup> See *Reducing the Harm*, *supra* note 6, at 172-73 (arguing that looting “imposes negative externalities” by taking antiquities out of their original context).

context provides as much historical information as the object itself, and that a looted object impoverishes the historical record because it robs scholars of important contextual information.<sup>43</sup>

Forgeries on the market frustrate the historical record as certainly as looted objects do. Just as historians depend on context to glean as much information from an object as possible, scholars rely on authenticity of artistic and cultural finds in order to properly integrate those objects into an accurate historical record. Importantly, archaeologists and art historians often group artifacts together to form classes, styles, and periods. For example, the Greek pottery scholar John D. Beazley categorized Greek pots by the details in small features—looking particularly at “forms in shape, design, patterns, figures and execution of technique”—in order to attribute groups of pottery to specific artists.<sup>44</sup> Similarly, experts in Khmer antiquities categorize statues into styles by period and the temple on which the style is prominently featured.<sup>45</sup>

The problem occurs when the objects that historians incorporate into their understanding of the development of the art—that may form the very basis for their understanding—are actually fakes. As discussed above, the market demand spurs forgers to produce fakes that will pass as authentic on the market. These replica manufacturers convince buyers and scholars that

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<sup>43</sup> See *id.* at 172-73 (noting that, because “excavation of archaeological sites relies on an understanding of stratigraphy,” the “looting of archaeological sites destroys [the knowledge archaeologists can glean from context] and forever impairs our ability to understand our past and ourselves”).

<sup>44</sup> *Sir John Beazley*, CLASSICAL ART RES. CENTER: BEAZLEY ARCHIVE (last updated Oct. 22, 2012), <http://www.beazley.ox.ac.uk/tools/pottery/collection/johnbeazley1.htm>.

<sup>45</sup> See MASTERPIECES OF THE NATIONAL MUSEUM OF CAMBODIA 10 (2012) (providing a timeline of historical and artistic periods and styles of the Khmer Empire).

the pieces are genuine.<sup>46</sup> When newly discovered pieces appear on the market, historians and archaeologists assimilate the objects into their overall picture of the development of the art. Thus, when the scholarly consumer accepts newly discovered objects that are in fact forgeries, the resulting incorporation of those forgeries into the historical record impairs our ability to properly understand the development of the art form, the culture, and the civilization.<sup>47</sup>

Cycladic archaeology provides a powerful illustration of this phenomenon. Scholars now estimate that a substantial portion of the extant body of Cycladic figurines is likely comprised of forgeries.<sup>48</sup> The story of Cycladic archaeology illustrates how the growing demand for figurines encouraged expert forgers to introduce new pieces into the market, hoping to capitalize on the surge in the popularity of Cycladic art.<sup>49</sup> At first, forgers introduced pieces that did not depart from already-identified classes of figurines.<sup>50</sup> But the promise of lucrative rewards encouraged some forgers to produce more audacious figurines of a quality and size never yet seen.<sup>51</sup> These pieces convinced historians to recognize new classes of objects and to develop a more nuanced

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<sup>46</sup> See *Reducing the Harm*, *supra* note 6, at 172 (“The willingness of buyers to accept undocumented antiquities permits the proliferation of forged artifacts on the market.”).

<sup>47</sup> *Id.* at 172; see also Gill & Chippindale, *supra* note 35, at 618-19 (noting that number of fake Cycladic figurines has shaped and detrimentally affected historians’ understanding of the extant body of Cycladic art).

<sup>48</sup> Gill & Chippindale, *supra* note 35, at 617-21; see also *Reducing the Harm*, *supra* note 6, at 172 (“Entire categories of ancient artifacts, such as Cycladic figurines, are represented almost completely by looted examples.”).

<sup>49</sup> Gill & Chippindale, *supra* note 35, at 617.

<sup>50</sup> *Id.* at 619 (suggesting that, before pushing the envelope on larger and bolder fakes, forgeries will begin with smaller, more “routine piece[s]”). A cautious forger would likely succeed in slipping such routine pieces into the market because historians may assimilate them as redundant examples of an already-identified class of objects.

<sup>51</sup> *Id.* at 620.

understanding of the art form.<sup>52</sup> Although the inability to disguise these objects as redundant pieces within a known class of figurines led to an increased risk of discovery by scrutinizing critics, it also brought a substantial bonus of extremely high prices on the market. When these pieces were not initially exposed as fakes, they were “taken into the corpus of accepted figures,” opening the door for forgers to make more pieces that fit into the new class of objects.<sup>53</sup>

As a result of unmarked fakes, the historical record becomes riddled with classes or styles of objects that may not be rooted in any authentic examples at all. Thus, mirroring the problem of looted artifacts and lost context, unmarked fakes rob the historical record by misleading the scholarly consumer to recognize a development of the art form that likely never occurred.

## **B. Added Costs in Implementing Export Controls**

Unmarked replicas not only confuse and mislead scholarly consumers, but also increase the costs of enforcing export restrictions on authentic antiquities. As discussed above, many nations—source and market alike—have enacted patrimony laws that regulate the export of antiquities.<sup>54</sup> These laws vary in levels of protection from strict prohibition of trade and export to fairly permissive regulations.<sup>55</sup> Of course, export laws only regulate authentic antiquities:

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<sup>52</sup> *Id.* at 619-20 (noting that forgers will “push at the edge of the envelope to make a figure that is special enough to push up the market price, but not so special to be scrutinized with suspicious care”).

<sup>53</sup> *Id.* at 620.

<sup>54</sup> *See supra* note 25 and accompanying text.

<sup>55</sup> The United States, for example, has no general patrimony law; rather, the United States has regulated only specific categories of artifacts and does not appear to prohibit the export of any legally owned cultural object. *See* The Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013. By contrast, Egypt prohibits wholesale the export of protected cultural objects. Law No. 117 of 1983, *as amended by* Law No. 3 of 2010 (Promulgating the Antiquities’ Protection Law), *Al-Jarida Al-Rasmiyya*, 14 Feb. 2010, Art. 8 (Egypt).

nations likely have little interest in retaining forgeries or fakes. In other words, enforcement of export regimes requires customs experts to distinguish between fakes, which can leave the country, and authentic antiquities, which, depending on the law, must be seized or accompanied by an export license. But this initial distinction between authentic and fake is difficult and often requires significant resources.<sup>56</sup> The added cost of sorting out authentic antiquities from forgeries impairs nations' ability to efficiently enforce their export regimes.

This increased cost of administration is felt particularly acutely in source nations with developing economies. The Kingdom of Cambodia provides a helpful example.<sup>57</sup> Cambodia regulates the export of protected cultural objects,<sup>58</sup> but the customs agents charged with enforcing these regulations at the border are not art experts. Customs officials are not currently

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<sup>56</sup> See Michael J. Clark, *The Perfect Fake: Creativity, Forgery, Art and the Law*, 15 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 25 (2004) (noting that authentication of a work of art is "expensive and logistically difficult to undertake"); *Getting Real*, *supra* note 41, at 338-40 (describing various methods of authentication and the difficulties that accompany each).

<sup>57</sup> Much thanks to the officials at the Cambodian Ministry of Cultural and Fine Arts for explaining to me the problematic role that forgeries play in the enforcement of Cambodia's export controls.

<sup>58</sup> Royal Decree 0199/26, Concerning the Law on the Protection of Cultural Heritage, 25 January, 1996, *available at* <http://www.unesco.org/culture/natlaws/>. Cambodia's regime for export regulation is not particularly clear, as its patrimony law appears to anticipate some legal private ownership of antiquities, the export of which is regulated, while its land use law appears to prohibit the private ownership of cultural patrimony altogether. *Compare id.* at Art. 31-36 (permitting a regulated trade in antiquities) *with* Law Dated October 13, 1992 "On the Land," 13 October, 1992, Art. 5, *available at* [http://www.bigpond.com.kh/Council\\_of\\_Jurists/Foncier\\_/fon001g.htm](http://www.bigpond.com.kh/Council_of_Jurists/Foncier_/fon001g.htm) ("Private right is not given in . . . cultural and historical patrimonies . . .").

trained to identify fake or forged antiquities.<sup>59</sup> When authorities seize a suspected antiquity at the border, they must send the object to the Ministry of Culture and Fine Arts in Phnom Penh for art experts at the National Museum to authenticate the piece.<sup>60</sup> The authentication process is time-consuming: as with any expenditure of resources, the time and man-power spent on authenticating objects seized at the border detracts from other preservation efforts. In Cambodia, where cultural heritage tourism comprises a significant portion of the national economy,<sup>61</sup> the time spent authenticating an object poses an inconvenience for tourists, who must either wait for months in the country to learn the results of the authentication process, or leave empty-handed.<sup>62</sup>

Of course, authentication is expensive and time-consuming for any nation. The high cost is due in part to the complex nature of the process itself. There are three available methods of authentication: “connoisseurship, scientific analysis and provenance.”<sup>63</sup> The first method requires an expert in the particular artistic style to conduct a comparative analysis of the object using the extant body of similar objects as a base line for comparison.<sup>64</sup> Notably, as discussed above, the number of undetected fakes on the market can itself affect the accuracy of a stylistic

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<sup>59</sup> Interview with Hab Touch, Director-General in charge of the Department General of Cultural Affairs, Ministry of Culture and Fine Arts, in Phnom Penh, Cambodia (July, 2012).

<sup>60</sup> *Id.*

<sup>61</sup> See Vannarith Chheang, *State and Tourism Planning: A Case Study of Cambodia*, 4 TOURISMOS: AN INT’L MULTIDISCIPLINARY J. OF TOURISM 63, 68 (“Tourism is the third largest contributor to the Cambodian economy after agriculture and textile industry and second biggest income generation after the textile industry.”).

<sup>62</sup> Interview with Hab Touch, *supra* note 60. One proposed solution would require customs officials to be educated to a certain level of ability to discern authentic antiquities from fakes. *Id.* The resources required to educate customs officials, however, would make this solution a costly one.

<sup>63</sup> *Getting Real*, *supra* note 41, at 338; accord Clark, *supra* note 57, at 24-25.

<sup>64</sup> *Getting Real*, *supra* note 41, at 338; Clark, *supra* note 57, at 24.

analysis, as the fakes alter the base line of our understanding of the art form.<sup>65</sup> The second method uses scientific tests to determine the age and authenticity of the materials used to create the object.<sup>66</sup> The third method focuses on the documentation—or lack of documentation—that accompanies the object.<sup>67</sup> Each of these means of authentication requires significant resources and would substantially impair a nation’s attempt to efficiently administer its export controls.

As a result of unmarked fakes on the market, the cost of enforcing patrimony laws and export controls is higher than it would otherwise be. Source nations are required to either spend the time and resources in authenticating individual objects before determining whether they are allowed export or invest in a program to educate customs officials to make this distinction.

**C. Replicas have Commercial Value for Source Nations**

In copyrighting the Pyramids at Giza and asserting protection against other nations that might reproduce the Temple of Angkor Wat,<sup>68</sup> Egypt and Cambodia do not appear to address the concerns discussed above: the reproduction of such large-scale monuments (even if done on a smaller scale) likely does not implicate scholarly understanding of the historical record or the nation’s ability to sort objects for export regulation. Rather, these attempts to protect cultural monuments from reproduction implicate a third concern—that production of replicas by outside parties<sup>69</sup> impairs the source nation’s right to exploit its heritage for commercial value.

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<sup>65</sup> See *supra* Part III.A.; see also *Reducing the Harm*, *supra* note 6, at 172 (discussing looted and fake art works in the context of authentication).

<sup>66</sup> *Getting Real*, *supra* note 41, at 339; Clark, *supra* note 57, at 25.

<sup>67</sup> *Getting Real*, *supra* note 41, at 339-40; Clark, *supra* note 57, at 24.

<sup>68</sup> See *supra* notes 1-3 and accompanying text.

<sup>69</sup> For purposes of our discussion, “outside parties” includes private producers within the source nation as well as foreign producers.



Egypt and Cambodia's attempts to control intellectual property rights to their heritage monuments illustrate that these source nations claim an exclusive right to reproduce their cultural heritage. For Egypt, the right to reproduce heritage monuments rests exclusively with the Supreme Council of Antiquities.<sup>70</sup> The exploitation of such monuments "for the Council's benefit" is subject to Egypt's laws governing intellectual property rights.<sup>71</sup> Similarly, Cambodia seeks to claim an exclusive right to replicate national heritage monuments.<sup>72</sup> The director general of the World Intellectual Property Organization ("WIPO") appears to support Cambodia's claim, stating that, "What intellectual property should try to do is enable that rich cultural heritage to be translated into a commercial asset. But not a commercial asset for all people. A commercial asset of Cambodia."<sup>73</sup>

Both economic motivations and a—perhaps less familiar—"property for grouphood" motivation support the quest for an exclusive right to reproduce heritage monuments. The economic rationale is abundantly evident in the statement given by WIPO's director general—when unlicensed individuals produce replicas, they infringe upon a nation's right to exploit the monument for commercial value. National heritage monuments are economically valuable assets for source nations.<sup>74</sup> Tourists generate a market for miniature models and souvenirs or photographs and post-cards to send to friends. The source nation also generates revenue in ticket

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<sup>70</sup> Law No. 117 of 1983, as amended by Law No. 3 of 2010 (Promulgating the Antiquities' Protection Law), Al-Jarida Al-Rasmiyya, 14 Feb., 2010, Art. 36 (Egypt).

<sup>71</sup> *Id.*

<sup>72</sup> Makara, *supra* note 1.

<sup>73</sup> *Id.*

<sup>74</sup> See Brodie, *supra* note 5, at 60 (noting that preserved monuments and archaeological sites are economically lucrative for source nations).

sales to visit the monument, which may be diminished by full-scale replicas available to visit in other nations. Although it is certainly debatable whether a full-size model would be a market substitute for visiting the original heritage site, source nations at least appear to feel a threat of lost revenue. For this reason, Egypt and Cambodia both express a sense of outrage that unlicensed entities might generate revenue by copying national monuments.

The exclusive rights concern also has a property for personhood—or here, grouphood—component.<sup>75</sup> Under this theory, the nation enjoys an inalienable property right in objects intrinsically linked to its identity, such as major cultural heritage sites.<sup>76</sup> This argument is particularly strong, for instance, in Cambodia’s case, where the image of Angkor Wat is prominently featured on the national flag. Under this view, the unlicensed reproduction of national monuments violates the nation’s right to control its image and identity.<sup>77</sup>

In sum, the proliferation of unmarked replicas implicates real concerns for source nations. Fakes and replicas threaten the historical record, add costs to the administration of export controls, and rob source nations of a valuable commercial source of revenue. As discussed below, several nations currently address these concerns through legislative means. Further tools may be necessary, however, to address these concerns on an international level.

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<sup>75</sup> See generally John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

<sup>76</sup> See *id.* at 1188-89 (discussing Radin’s theory that property that is “bound up with its holder’s personhood” enjoys special protection).

<sup>77</sup> See, e.g., Alnajafi, *supra* note 2, at 244 (“Egypt is trying to develop the idea that a nation has the right to defend how its folklore and intangible heritage is used internationally, and the right to defend the integrity of the nation.” (internal quotation marks removed)).

#### **IV. Legislative Attempts to Regulate Replicas**

Foreign attempts to regulate unmarked replicas support the conclusion that source nations sense a real concern for fakes. But despite the concerns associated with unmarked replicas, the patrimony laws examined below also indicate that replicas are valuable to source nations.<sup>78</sup> Although there does not appear to be any empirical study addressing the value of replicas, these laws suggest that nations recognize sufficient value in replicas as to not prohibit them altogether. Not all source nations have addressed the issue, but among those nations that have regulated unmarked replicas, the particular concerns previously identified appear throughout their patrimony laws. These nations split into two camps: those that are more concerned with the first and second problem (which may be lumped together as the problem of market confusion),<sup>79</sup> and those that are more concerned with the third problem of exclusive rights.

##### **A. Several Nations Address the First and Second Concerns**

Concern for the historical record and concern for the administration of export controls are both rooted in the ultimate problem of sorting authentic antiquities from fakes. In other words, both concerns stem from market confusion. Of the nations that regulate fake antiquities, Greece

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<sup>78</sup> Some scholars even suggest that the presence of replicas on the market diminishes looting. *See Gill & Chippindale, supra* note 35, at 617 (suggesting, in the field of Cycladic archaeology, that the increased number of fakes on the market reduced the level of looting in the 1970's).

<sup>79</sup> Recall that the first and second concerns deal with confusion of scholars and customs officials, respectively. Both concerns ultimately stem from an inability of the market to sort authentic antiquities from fakes.

and Israel in particular address the problem from a market confusion standpoint. These nations regulate fakes at the merchant level, rather than at the producer level.<sup>80</sup>

Greece's law "On the Protection of Antiquities and Cultural Heritage in General" specifically regulates replicas and fakes. For items in a collector's possession, the law allows the collector to make reproductions or casts of the item only with permission and approval by a designated authority.<sup>81</sup> The law does not directly regulate how the collector disposes of these reproductions,<sup>82</sup> but it does prohibit dealers from trading in casts, representations or reproductions "in the same premises" where they sell authentic antiquities.<sup>83</sup> Dealers and merchants must obtain a license before trading in antiquities,<sup>84</sup> and this license may be revoked for a violation of any of the requirements set out in Article 32—including the sale of reproductions and casts in the same premises as authentic antiquities.<sup>85</sup> Further, the law specifically sanctions the "sale of forged works due to willful misconduct or gross negligence."<sup>86</sup>

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<sup>80</sup> See Nomos (2002:3028) On the Protection of Antiquities and Cultural Heritage in General, EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2002 (Greece); Antiquities Law, 5738-1978, 27 LSI 97 (1978) (Isr.).

<sup>81</sup> Nomos (2002:3028), Art. 31(7).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at Art. 32(7).

<sup>84</sup> *Id.* at Art. 32(1).

<sup>85</sup> *Id.* at Art. 32(10).

<sup>86</sup> *Id.*

Likewise, Israel's Antiquities Law of 1978<sup>87</sup> requires merchants to be licensed to deal in antiquities.<sup>88</sup> Israel's approach in regulating the authenticity of items on the market is two-fold.<sup>89</sup> First, the law places on licensed dealers a presumption of knowledge that the pieces they sell as authentic antiquities are in fact authentic.<sup>90</sup> Second, Israel's law appears to address all merchants when it prohibits "a person" from selling or offering for sale "a replica or imitation of an antiquity without indicating thereon . . . that it is not a genuine antiquity."<sup>91</sup> Thus, unlicensed dealers may not sell authentic antiquities, nor may they, by selling replicas and reproductions, confuse the public into thinking that they do sell authentic antiquities.

## **B. Other Nations Address the Third Concern**

The concern for exclusive rights to commercialize heritage assets, however, does not rest on an underlying "confusion" rationale. It is not surprising, then, that nations motivated by the exclusive rights concern do not aim to regulate merchants—the gatekeepers between fake antiquities and the consumers—but rather the *producers* of fakes and replicas. Further, these patrimony laws may vest rights to cultural heritage in the government in the form of intellectual property protections. In this vein, this section explores the laws enacted by Egypt and Mexico as examples of laws motivated by an exclusive rights concern.

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<sup>87</sup> Antiquities Law, 5738-1978, 27 LSI 97 (1978) (Isr.); *see also* Morag M. Kersel, *The Trade in Palestinian Antiquities*, JERUSALEM QUARTERLY, Winter 2008, at 29 (noting that Israel has been considered a "collector's paradise").

<sup>88</sup> *Id.* at Ch. 4, ¶ 15.

<sup>89</sup> *Id.* at Ch. 4 ¶ 20-21.

<sup>90</sup> *Id.* at Ch. 4, ¶ 20 ("Where a dealer in antiquities offers any article for sale as an antiquity, his plea that he did not know that the article was not an antiquity shall not be heard.").

<sup>91</sup> Antiquities Law, Ch. 4, ¶ 21.

Egypt's amended Antiquities Law of 1983<sup>92</sup> vests all intellectual property rights to reproductions and photographs of heritage monuments in the Supreme Council of Antiquities.<sup>93</sup> Although the law is drafted in broad terms—referring to “replicas” generally—officials responsible for drafting the provision insist that the law only regulates the production of full-scale replicas,<sup>94</sup> for which the law requires permission.<sup>95</sup> For example, Zahi Hawass, the then-secretary general of Egypt's Supreme Council of Antiquities, explained that a manufacturer could not produce a two-inch replica of an antiquity measuring two inches, but the manufacturer could legally produce a three-inch version of the same object.<sup>96</sup> Egypt also intends to demand royalties in return for the use of images of Egyptian heritage sites in photographs, film, and television.<sup>97</sup> Finally, the law criminalizes the act of counterfeiting an Egyptian antiquity “with the aim of deception or fraud.”<sup>98</sup> Unlike Greece or Israel, Egypt completely prohibits the domestic and international trade of antiquities,<sup>99</sup> which may explain why Law 117 exclusively addresses the producers of forgeries without reference to the merchants who sell them.

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<sup>92</sup> Law No. 117 of 1983, *as amended by* Law No. 3 of 2010 (Promulgating the Antiquities' Protection Law), *Al-Jarida Al-Rasmiyya*, 14 February, 2010 (Egypt); Alnajafi, *supra* note 2, at 243.

<sup>93</sup> *Id.* at Art. 36.

<sup>94</sup> Stanek, *supra* note 1.

<sup>95</sup> Alnajafi, *supra* note 2, at 243.

<sup>96</sup> Stanek, *supra* note 1 (citing Zahi Hawass).

<sup>97</sup> *Id.* The proposed application of Egypt's intellectual property rights against both domestic and foreign persons has garnered criticism from those who don't believe Egypt's copyright doctrine would be enforceable internationally. *See id.* (“[E]xperts say that the Egyptian legislation would not fit within U.S. and European laws, meaning they could not be enforced abroad.”).

<sup>98</sup> Law No. 117 of 1983, *as amended by* Law No. 3 of 2010, Art. 43.

<sup>99</sup> *Id.* at Art. 8.

Mexico's Federal Law on Archaeological, Artistic and Historic Monuments and Zones<sup>100</sup> prohibits the "reproduction of archaeological, historic or artistic monuments for commercial value" without permission from the relevant authority.<sup>101</sup> As in Egypt, the Federal Law subjects reproductions of antiquities to Mexico's Copyright Law.<sup>102</sup> The Federal Law, however, does not appear to have a general provision against the production of counterfeit antiquities. The limited scope of Mexico's "reproduction" provision clearly articulates the economic, exclusive rights rationale—the law only prohibits reproductions made for *commercial* value.

These patrimony laws are susceptible of two inferences: first, source nations sense real concerns which correspond with those enumerated in Part III, *supra*; and second, these nations also recognize that replicas have substantial value. Among the examples explored, we can easily see themes like avoiding market confusion and the ability to capture commercial value by enforcing an exclusive right to product replicas. It is unclear how successful these laws have been in practice. Almost certainly they are difficult to enforce beyond the nation's borders.<sup>103</sup> The remaining portion of this paper considers an international tool that source nations might use to support and strengthen their attempts to regulate replicas.

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<sup>100</sup> Federal Law on Archaeological, Artistic and Historic Monuments and Zones, English Translation, Diario Oficial de la Federación [DO], 6 May 1972 (Mex.).

<sup>101</sup> *Id.* at Art. 17.

<sup>102</sup> *Id.*

<sup>103</sup> Patrimony laws, like Egypt's, that claim copyright protection for antiquities are particularly problematic because the copyright law enforced domestically exceeds the right recognized by Western nations. *See* Alnajafi, *supra* note 2, at 245-47; 252 (discussing the conflicts between Western and international copyright law and the copyright protection Egypt seeks to enforce).

## **V. An Overview of International Intellectual Property Law**

With an understanding of the problems and concerns created by unregulated replicas, this paper now turns to a legal doctrine that may help bolster nations' regulatory efforts.

Specifically, this paper argues that the doctrine of Geographical Indications can lend international support to nations' attempts to regulate replicas. First, however, this section provides a brief overview of international intellectual property rights, the doctrine of Geographical Indications, and the doctrine's place in the current international trade regime.

### **A. Intellectual Property Protection in International Law**

WIPO describes intellectual property as “the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields.”<sup>104</sup> Intellectual property doctrines protect a wide range of subject matter, including artistic works, scientific inventions, industrial designs and indications of source.<sup>105</sup> In general, intellectual property rights give the holder exclusive rights to exploit the identified property for commercial value; the right encourages would-be inventors and creators to engage in inventive or creative behavior.<sup>106</sup>

Perhaps the most easily recognizable forms of intellectual property rights include patent, copyright, and trademark. Patent protection incentivizes inventions by granting the inventor the right to exclude others from using the identified invention for a limited time.<sup>107</sup> Copyright

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<sup>104</sup> WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 3 (2d ed. 2008), *available at* [http://www.wipo.int/export/sites/www/freepublications/en/intproperty/489/wipo\\_pub\\_489.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/489/wipo_pub_489.pdf).

<sup>105</sup> *Id.*; Wend B. Wendland, *Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions*, in ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE 329 (Barbara T. Hoffman ed., 2006).

<sup>106</sup> Wendland, *supra* note 105, at 329.

<sup>107</sup> WIPO INTELLECTUAL PROPERTY HANDBOOK, *supra* note 104, at 17; INTERNATIONAL INTELLECTUAL PROPERTY LAW 18 (Anthony D'Amato & Doris Estelle Long ed., 1997).



protection similarly grants the author of a creative work the exclusive right—also for a limited period of time—to make or distribute copies of his creation.<sup>108</sup> Trademark law—rooted in a slightly different rationale than patent and copyright—protects the distinctive mark of a producer in the market place in order to encourage the trademark holder to produce goods of a consistent quality and to avoid consumer confusion as to the source of the goods.<sup>109</sup> Of the three basic intellectual property doctrines, Geographical Indicators—which will be explained more fully below—are most similar to trademark protection.

When considering whether an intellectual property right is appropriate to protect a given interest, jurists strive to achieve a close match between the level of protection sought (the objective) and the underlying justification for the IP mechanism chosen.<sup>110</sup> For instance, the basic intellectual property rights described above can be divided into two groups based on their underlying justifications: patent and copyright protection seek to incentivize creators, while trademark protection aims to avoid consumer confusion in the market.<sup>111</sup> In reality, it is useful to consider the various levels of protection that we assign to different intellectual property rights on a spectrum. While some doctrines, like patent law, grant the holder an exclusive right to exclude, other IP doctrines are justified by a moral rights approach, an unfair competition approach, or a penal sanctions approach.<sup>112</sup> Considering the concerns set out above and various

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<sup>108</sup> WIPO INTELLECTUAL PROPERTY HANDBOOK, *supra* note 104, at 40; Wendland, *supra* note 105, at 329.

<sup>109</sup> See WIPO INTELLECTUAL PROPERTY HANDBOOK, *supra* note 104, at 68; INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 107, at 21; LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, INTELLECTUAL PROPERTY LAW: CASES & MATERIALS 546-47 (2013).

<sup>110</sup> Wendland, *supra* note 105, at 329.

<sup>111</sup> See *supra* notes 107-09 and accompanying text.

<sup>112</sup> Wendland, *supra* note 105, at 329.

national legislative experiences, we may infer that the question of replicas invokes multiple protection levels:<sup>113</sup> an approach similar to an unfair competition protection may be appropriate for nations like Greece and Israel, which seek to avoid market confusion, while Egypt and Mexico would likely seek an exclusive right to exploit replicas.

## **B. The Role of Geographical Indications in International Trade**

Geographical Indications are a type of IP right closely related to trademarks: both protect against consumer confusion by preventing others from attributing their products to a given source.<sup>114</sup> For trademarks, the source is generally the individual producer.<sup>115</sup> For GIs, however, the source is the unique geographic region known for producing the product.<sup>116</sup> Indeed, GI's provide a right that can be held communally—even by an entire nation (as with feta cheese, a product associated with the entire nation of Greece).<sup>117</sup> Besides feta, other easily recognizable GI-protected products include champagne, parmigiano-reggiano, and Basmati Rice.<sup>118</sup>

The doctrine of geographical source indications is rooted in the French concept of *terroir*, which describes the unique connection between the soil and local human skill with which grapes

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<sup>113</sup> See *id.* at 329 (suggesting that legislative experience may help match the nation's goal in seeking an IP right with the appropriate level of protection).

<sup>114</sup> GANGJEE, *supra* note 13, at 2.

<sup>115</sup> *Id.*

<sup>116</sup> See Kal Raustiala & Stephen R. Munzer, *The Global Struggle over Geographic Indications*, 18 EUR. J. INT'L L. 337, 342 (2007) (“A GI applies to a specific region within a given state.”).

<sup>117</sup> See *id.* (using feta cheese to illustrate the idea that “[t]he relevant region can . . . encompass[] an entire state”).

<sup>118</sup> See *id.* at 338 (champagne; parmigiano-reggiano); see generally Dwijen Rangnekar & Sanjay Kumar, *Another Look at Basmati: Genericity and the Problems of a Transborder Geographical Indication*, 13 J. WORLD INTELL. PROP. 202 (2010).

are grown for wine.<sup>119</sup> Although protected in an earlier international agreement,<sup>120</sup> the first definition of the doctrine appeared in 1958, in the Lisbon Agreement for the Protection of Appellations of Origin in their International Registration.<sup>121</sup> The Lisbon Agreement recognizes “appellations of origin,” defined as “the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.”<sup>122</sup> This definition emphasizes the “quality and characteristics that provide a reputational advantage (the land, its particular use or, more typically, both).”<sup>123</sup> By contrast, the World Trade Organization (“WTO”) recognizes “Geographical Indications”—rather than “appellations of origin”—in the Agreement on Trade-Related Aspects of Intellectual Property

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<sup>119</sup> Daniel Gervais, *Traditional Innovation and the Ongoing Debate on the Protection of Geographical Indications*, in *INDIGENOUS PEOPLES’ INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT* 121, 123 (Peter Drahos & Susy Frankel eds., 2012), available at <http://epress.anu.edu.au/apps/bookworm/view/Indigenous+Peoples%E2%80%99+Innovation%3A+Intellectual+Property+Pathways+to+Development/9731/cover.html>.

<sup>120</sup> The Paris Convention of 1883 established international rules for geographical source indicators, but did not define the concept. Hélène Ilbert & Michel Petit, *Are Geographical Indications a Valid Property Right? Global Trends and Challenges*, 27 *DEV. POL’Y REV.* 503, 505 (2009).

<sup>121</sup> *Id.*

<sup>122</sup> Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 31 October 1958, as revised at Stockholm on 14 July 1967, and as amended on 28 September 1979, Article 2.1, [http://www.wipo.int/lisbon/en/legal\\_texts/lisbon\\_agreement.html](http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.html); Ilbert & Petit, *supra* note 127, at 505-06.

<sup>123</sup> Gervais, *supra* note 119, at 126.

Rights (“the TRIPS Agreement”).<sup>124</sup> GIs include denominations of the geographical region or *any other* indication, and protection is premised on the unique connection between location, production, and reputation.<sup>125</sup>

Because this paper focuses on GIs as protected by the TRIPS agreement, some background on TRIPS and its place in the WTO, as well as the treatment of GIs under the TRIPS agreement, will be useful. At the formation of the WTO,<sup>126</sup> the Member nations adopted the TRIPS Agreement, expanding the scope of the international trade regime to include IP rights for the first time.<sup>127</sup> The TRIPS Agreement not only covers the three basic IP doctrines—patent, copyright, and trademark—but also includes more targeted protections for Geographical Indications and other specific IP rights.<sup>128</sup> In a broad sense, the TRIPS Agreement works with other international treaties “to ensure . . . that [IP] law contributes to the social and economic needs of society.”<sup>129</sup> The Agreement does not dictate specific regulations that Member nations must adopt; rather, TRIPS sets certain “minimum standards of protection” that Member nations must meet in each covered area.<sup>130</sup> This approach has led to “diverse and uncoordinated”

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<sup>124</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (entered into force Jan. 1, 1995), Art. 22 [hereinafter TRIPS Agreement].

<sup>125</sup> Gervais, *supra* note 119, at 125-26.

<sup>126</sup> The WTO was a product of the Uruguay Round (1986-1994) of negotiations under the General Agreement on Tariffs and Trade (GATT). Davey, *supra* note 19, at 90.

<sup>127</sup> ANDREW T. GUZMAN & JOOST H.B. PAUWELYN, INTERNATIONAL TRADE LAW 631 (2d ed. 2012).

<sup>128</sup> *Id.* at 638.

<sup>129</sup> J. Janewa OseiTutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147, 178 (2011).

<sup>130</sup> *Id.*

legislative results.<sup>131</sup> Importantly, however, the inclusion of IP rights under the umbrella of the WTO subjects violations of IP rights to the WTO's robust dispute settlement body.<sup>132</sup>

The TRIPS Agreement defines GIs as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”<sup>133</sup> This definition builds in substantial flexibility, in that the “physical geography factors no longer have dispositive importance.”<sup>134</sup> Rather, the definition emphasizes a unique link between product, producer, and place.<sup>135</sup> By contrast, WIPO's definition focuses more exclusively on a relationship between geographical origin and the reputation of the product.<sup>136</sup>

Two standards of protection are provided for GIs.<sup>137</sup> Article 22 provides three minimum requirements for products other than food and wine: (1) protection against the use of marks or indications that mislead the consumer as to the source of the product;<sup>138</sup> (2) protection against

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<sup>131</sup> Dwijen Rangnekar, *The Law and Economics of Geographical Indications: Introduction to Special Issue of the Journal of World Intellectual Property*, 13 J. WORLD INTELL. PROP. 77, 79 (2010).

<sup>132</sup> Raustiala & Munzer, *supra* note 116, at 341.

<sup>133</sup> TRIPS Agreement, Art. 22(1).

<sup>134</sup> Dev S. Gangjee, *Geographic Indications and Cultural Heritage*, 4 W.I.P.O.J. 85, 86 (2012) [hereinafter “*GIs and Cultural Heritage*”].

<sup>135</sup> GANGJEE, *supra* note 13, at 2.

<sup>136</sup> WIPO defines Geographical Indications as marks that are “used to demonstrate a link between the origin of the product to which it is applied and a given quality, reputation or other characteristic that the product derives from that origin.” WIPO, “The Definition of Geographical Indications,” Oct. 1, 2002, SCT/9/4, para 4.; see also *GIs and Cultural Heritage*, *supra* note 134, at 86.

<sup>137</sup> TRIPS Agreement, Arts. 22-23; *GIs and Cultural Heritage*, *supra* note 134, at 86.

<sup>138</sup> TRIPS Agreement, Art. 22.2(a).

unfair competition;<sup>139</sup> (3) refusal or invalidation of a trademark consisting of a geographical indication for a product that does not originate the territory indicated;<sup>140</sup> and (4) protection against the use of indications that falsely represent the origin of a product even though the name of the origin is literally true,<sup>141</sup> as in, for example, Athenian olives from Athens, Georgia. For most goods, however, a Member would not violate its obligation to protect GIs if it allowed producers to market goods in the “style” of a specific geographic region.<sup>142</sup>

Article 23, however, provides a heightened level of protection for wine and spirits. Under this “absolute” protection,<sup>143</sup> Members must provide the legal means for challenging a wine or spirits product not originating from the territory in question even where the “true origin of the goods is indicated or the [GI] is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.”<sup>144</sup> A California winery, for example, may not market its sparkling wine as “Champagne-style” wine.

Two legal justifications support protection for GIs: (1) an economic rationale, and (2) a cultural heritage rationale. Most international IP scholars agree that GIs are justified under the consumer confusion rationale.<sup>145</sup> The exclusive right to use the indication protects consumers

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<sup>139</sup> TRIPS Agreement, Art. 22.2(b).

<sup>140</sup> TRIPS Agreement, Art. 22.3.

<sup>141</sup> TRIPS Agreement, Art. 22.4.

<sup>142</sup> See Raustiala & Munzer, *supra* note 116, at 345 (noting that German producers cannot label their sparkling wine with the phrase “*méthod champenoise*”).

<sup>143</sup> *GIs and Cultural Heritage*, *supra* note 140, at 87.

<sup>144</sup> TRIPS Agreement, Art. 23.1.

<sup>145</sup> GANGJEE, *supra* note 13, at 4; see also Raustiala & Munzer, *supra* note 116, at 340 (“We argue that GI protection in international law is justifiable for many of the reasons that trademark protection is justifiable: primarily, to protect consumers against confusion and to lower their search costs.”).

from purchasing deceptive products and safeguards against unfair competition.<sup>146</sup> Further, because consumers cannot easily gauge the quality of a food product, the exclusive use of an indication ensures consistent quality and re-balances informational asymmetries between buyers and sellers.<sup>147</sup> But GIs can also be justified under a cultural heritage rationale.<sup>148</sup> Although the historic French conception of source indications emphasized the link between the product and the *land*, GI protection has gradually come to emphasize “human factors” as well as geographical factors.<sup>149</sup> Because GI protection under the TRIPS Agreement depends partially on the skill or customs of local producers—aside from some special quality or characteristic inherent in the land itself—GIs protect communal traditions and cultural practices.<sup>150</sup>

## **VI. GI Protection for Antiquities**

As we have seen, the demand for antiquities in market nations incentivizes opportunists to supplement the low supply of authentic antiquities with fakes and replicas. These objects, in turn, pose real concerns for source nations. This section of the paper examines how source nations can use Geographical Indications to curb the presence of unmarked replicas on the market. Although it does not appear that GIs have yet been used in the context of antiquities, GI protection may be a useful tool in addressing the specific concerns identified above in Part III.

In order to address unmarked replicas, this paper proposes that the authorities charged with maintaining and preserving antiquities in source nations register those antiquities for GI

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<sup>146</sup> *GIs and Cultural Heritage*, *supra* note 134, at 87.

<sup>147</sup> *Id.* at 87, 89; Raustiala & Munzer, *supra* note 116, at 340.

<sup>148</sup> *GIs and Cultural Heritage*, *supra* note 134, at 89-91. *But see* Raustiala & Munzer, *supra* note 116, at 340 (rooting GI protection more exclusively in the economic justification).

<sup>149</sup> *GIs and Cultural Heritage*, *supra* note 134, at 89-90.

<sup>150</sup> *Id.* at 90.

protection under already existing GI regimes. Many source nations—indeed, each of the source nations discussed above in Part IV—are Members of the WTO<sup>151</sup> and are therefore obliged to comply with the TRIPS Agreement. Accordingly, each nation must have in place the legal means for protecting GIs.<sup>152</sup> Each source nation should be able to register a GI for authentic antiquities. The result of such protection would be that a producer of replicas or fakes would not be able to market his goods in a misleading manner. Although the heightened protection for wine and spirits would likely not apply, a registered GI for antiquities would require the manufacturers of fakes and replicas to mark them as imitative goods.

GI protection for antiquities is more appropriate than trademark or copyright protection for several reasons. First, the rights provided by GI protection can be held by a group.<sup>153</sup> Trademark protection, although accomplishing similar results and supported by similar justifications, provides protection to a single rights holder.<sup>154</sup> This is important in the antiquities context because the rights sought to protect antiquities will be held by the nation—by the public in general. Second, unlike copyright law, which requires an author and provides protection only for a set time period,<sup>155</sup> GI protection does not depend on an identified author and can last indefinitely. This distinction is crucial for the protection of antiquities: the concern with, for example, copyrighting the pyramids is that we cannot identify a specific author of the work, and even if we could, the time period for protection would have long expired.<sup>156</sup>

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<sup>151</sup> Members and Observers, WTO.ORG, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>152</sup> See *supra* notes 130-31 and accompanying text.

<sup>153</sup> See GANGJEE, *supra* note 13, at 255 (referring to GIs as “collective marks”).

<sup>154</sup> *Id.*

<sup>155</sup> Alnajafi, *supra* note 2, at 252-53.

<sup>156</sup> *Id.*



The scope of GI protection provided by the TRIPS Agreement is sufficiently flexible to permit the registration of GIs for antiquities. Although distinct from food and wine products, antiquities properly fit the definition of a GI under Article 22 of the TRIPS Agreement. First, antiquities are tied to a specific geographical location of origin: they are inherently linked to the region where the producer civilization existed. An Egyptian statue or a Khmer artifact derives value from the fact that the piece originated from the region in which the civilization lived. And although no inherent quality of the *land* gives the antiquity its value, the TRIPS Agreement deemphasizes the value of the land and refocuses the term on the reputation of the producer.<sup>157</sup>

Second, the quality and reputation attributed to an authentic antiquity is a direct result of its origin in a particular geographic location. The “reputation” of an antiquity is attributable to its age, authenticity, degree of skilled craftsmanship involved, and the particular civilization of origin. Under the TRIPS Agreement, there is a link between the geographic location and the producer of the object. Importantly, unlike other theories of protection for Traditional Knowledge and Cultural Expressions, which focus on a *living* culture,<sup>158</sup> GI protection does not hinge on whether the original *producer* of the design is still living.

Further, even if the strict definition of GI’s under the TRIPS Agreement does not exactly capture the unique situation of antiquities as “goods,” the policies of GI protection would support the inclusion of antiquities. Under an economic view, GIs guard against consumer confusion and unfair trade. The first and second concern identified above deal with confusion for parties along the chain of consumption—historians and customs officers. GI’s are also susceptible to a

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<sup>157</sup> See *supra* notes 133-36 and accompanying text.

<sup>158</sup> See Wendland, *supra* note 105, at 329 (discussing WIPO’s working definitions of Traditional Knowledge and Cultural Expressions, both of which emphasize living communities).

cultural heritage justification. This view emphasizes the unique connection between the object and the culture that created it. Here, authentic antiquities are inherently connected to the ancient civilization that fashioned them—a connection lacking for modern-day replicas.

Of course, it might prove unworkable for a nation to register one GI for all antiquities. But a source nation might register a GI for a defined class or category of antiquities. For example, Cambodia might register a GI for Khmer Empire objects from the 9th to 13th Centuries. Should it prove too unwieldy to register indications for such a large body of antiquities, source nations might register GIs only for cultural heritage monuments and movable objects that form an intrinsic part of the national identity. Thus, Cambodia might register a GI for the Temple of Angkor Wat, which forms an important part of the national identity and is featured prominently on the national flag. Indeed, an approach favoring GI protection for monuments and objects that rise to the level of being intrinsically linked to the national identity might be more in line with the nature of the group rights afforded by GIs.<sup>159</sup> GIs are anomalous in being one of the few intellectual property doctrines that grant communal or collective rights. Notably, the “property for grouphood” theory of collective rights *requires* that the object be intertwined with the group identity before granting rights.<sup>160</sup>

Once a GI is registered to protect antiquities, the TRIPS Agreement would prevent others from marketing misleading objects or objects that suggest that they originated from the protected geographic location. This base-line level of protection would require all producers of replicas to mark their product as imitative. The heightened level of protection for wines and spirits would

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<sup>159</sup> See Moustakas, *supra* note 76, at 1184 (noting that property for grouphood should be intrinsically connected to the group’s identity).

<sup>160</sup> See *supra* notes 76-78 and accompanying text.

be unnecessary to address the concerns for confusion of the scholarly record and burden on export regimes. Patrimony laws from nations more concerned with “sorting” than with commercial exploitation imply that these nations would not worry about replicas marked as replicas—even marked “in the style” of a certain type of antiquity. Although Israel and Greece currently have a similar requirement for domestic merchants, the registration of a GI would extend this “marking” requirement to an international level.

Importantly, registering a GI for antiquities would allow Members to enforce protection at the international level by bringing a dispute in the WTO. Many source nations, including Cambodia, Egypt, Greece, Israel and Mexico, are among the WTO’s 159 Members. Most market nations are also WTO Members and are therefore obliged to provide the legal means for protecting the GIs registered by source nations—up to the minimum standards provided under the Trips Agreement. Failure to satisfy its obligations under the TRIPS Agreement opens a nation to suit by the aggrieved nation in the WTO’s dispute settlement body. For example, if an industrialized Member nation permits business organizations to mass produce unmarked replicas of Cambodian antiquities, Cambodia can bring a dispute in the WTO against the producer-nation for violating its obligations under TRIPS Article 22. Thus, a registered GI for antiquities would give source nations an additional tool—with the backing of the WTO—to address the concerns associated with unmarked replicas of antiquities on the market.

## **VII. Cambodia: An Illustration**

To illustrate how GIs can protect antiquities, this paper now considers how such a regime could work for Khmer antiquities in Cambodia. Indeed, Cambodia provides an interesting example due to its relatively new relationship with GI protection. A WTO member since

2004,<sup>161</sup> Cambodia acceded to the WTO as a “least developed country” and thus was not immediately required to be in full compliance with all obligations.<sup>162</sup> In 2009, Cambodia created a pilot program that protected Kampot Pepper and Kampong Speu Palm Sugar as its first two GIs.<sup>163</sup> The regulation governing this pilot program mirrored the language of a then-pending draft law on GIs.<sup>164</sup> The Council of Ministers approved the draft law in November 2013.<sup>165</sup>

The first step towards protecting a hypothetical GI for antiquities would be to identify the applicable domestic law governing registration and application for GIs.<sup>166</sup> In Cambodia, in order to obtain a GI, the producers of a good must form a group that will apply for and manage the GI

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<sup>161</sup> Members and Observers, WTO.ORG, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>162</sup> *Trade Policy Review: Report by Cambodia*, World Trade Organization, WT/TPR/G/253, Sept. 27, 2011, available at [www.wto.org/english/tratop\\_e/tpr\\_e/g253\\_e.doc](http://www.wto.org/english/tratop_e/tpr_e/g253_e.doc), at 10.

<sup>163</sup> *Id.* at 16; *Protected Geographical Indications in Cambodia: Outcome and Prospects of the Pilot Project on Protected Geographical Indications in Cambodia*, Gret.org, June 2010, available at <http://www.gret.org/publication/protected-geographical-indications-in-cambodia-outcome-and-prospects-of-the-pilot-project-on-protected-geographical-indications-in-cambodia/>, at 4.

<sup>164</sup> *Protected Geographical Indications in Cambodia*, *supra* note 163, at 3; Prakas No 105 MOC/SM 2009 “On the Procedures for Registration and Protection of Marks of Goods Which Include a Geographical Indication” (May 18, 2009), available at <http://www.wipo.int/wipolex/en/profile.jsp?code=KH>.

<sup>165</sup> Hul Reaksmey & George Syllis, *Law Aimed at Protecting Local Products Approved*, THE CAMBODIA DAILY, Nov. 12, 2013, available at <http://www.cambodiadaily.com/news/law-aimed-at-protecting-local-products-approved-46855/>. The approved draft law does not yet appear to be published; as the language mirrors the pilot program, however, this paper will consider the scheme of registration and protection put in place for the pilot program.

<sup>166</sup> While some nations (e.g., Cambodia) have created specific legislation protecting Geographical Indications, others codify this protection within existing legal regimes such as trademark or tort law. Irina Kireeva & Bernard O’Connor, *Geographical Indications and the TRIPS Agreement: What Protection is Provided to Geographical Indications in WTO Members?*, 13 J. WORLD INTELL. PROP. 275 (2010).

mark. The application for registration must: (1) “[D]efine the production zone and explain how it influences product quality, and [(2)] describe the GI products’ production methods and the specificities that distinguish them from generic versions . . . . They must also elaborate control and traceability procedures.”<sup>167</sup>

In many ways, an application to register a GI for Khmer antiquities would not differ greatly from other GI applications. The Ministry of Culture could form the core of the management group responsible for registering and protecting the GI. This group might also include those dealers that the Ministry of Culture has licensed to sell antiquities. As with the registered GI for feta cheese in Greece, the “production zone” could cover the entire nation of Cambodia. Alternatively, the application might specify particular archaeological and cultural centers where antiquities are known to originate—the Angkor region, as well as myriad temples located in the jungle that house their own store of antiquities for looting and copying.<sup>168</sup> Further, the application would describe the traditional artistic methods used to produce these artifacts.

An application for an antiquities GI will differ from other applications in one unique aspect: the application must focus heavily on the *time-period* as an added fourth dimension of the GI definition, along with product, place, and production method. This dimension will likely be

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<sup>167</sup> *Protected Geographical Indications in Cambodia*, *supra* note 163, at 2. While some nations provide a specific registration form, many, like Cambodia, merely require the applicant to provide information to satisfy an enumerated list of items. Kireeva & O’Connor, *supra* note 166, at 285.

<sup>168</sup> See, e.g., Letter from Patty Gerstenblith, President, Lawyers’ Committee for Cultural Heritage Preservation, to the Cultural Property Advisory Committee (Feb. 25, 2008), *available at* <http://www.culturalheritagelaw.org/Default.aspx?pageId=760319> (“While looting at Angkor, once endemic, is subsiding, looters have begun to target archaeological sites throughout the rest of the country, which are remote and rarely guarded.”).

woven throughout the application, appearing as an element of the “production zone” as well as the production methods. In both areas, the application must limit the description of the GI product to those goods that originated in the “zone” during the right historical time period. Without such limitation, local producers could easily manufacture artifacts under the GI mark by producing in the physical zone of protection—Cambodia—using traditional methods.<sup>169</sup>

The pilot program in Cambodia illustrates that protection comes in part from policing efforts by the GI management group. Protection efforts would include educational programs to advocate for the GI, an effort that will be aided also by a growing awareness of the legal framework for GI protection in general. Additionally, it would be the promoters of the antiquities GI that would mobilize against the known production and sale of unmarked counterfeit antiquities.<sup>170</sup> Beyond these self-help methods, the newly approved Law on Geographical Indications provides that a producer who violates the registered antiquities GI would face punishment of up to \$5,000 and a five-year prison sentence.<sup>171</sup>

Although such domestic protection efforts would prevent nationals from producing unmarked counterfeit antiquities, GI protection can also protect against an influx of counterfeit

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<sup>169</sup> While the historical time period limitation is not commonly considered within the GI definition, the doctrine is susceptible of this limitation. Unlike IP protection for Traditional Knowledge or Cultural Expressions—which both inherently require a presently existing community—the definition of GI under the TRIPS Agreement makes no such requirement. *See supra* note 158 and accompanying text. Because GIs aim to prevent consumer confusion as to the source of *goods*, to the extent that antiquities *are goods*, they can be protected from encroaching counterfeit goods.

<sup>170</sup> *See Protected Geographical Indications in Cambodia, supra* note 163, at 8 (discussing the successful mobilization of the Kampot Pepper Promotion Association against a producer who attempted to sell pepper under the protected “Kampot pepper” mark).

<sup>171</sup> Reaksmey & Syllis, *supra* note 165.

goods from other countries with the capacity to mass-produce fakes. To achieve protection outside Cambodia, the Kingdom of Cambodia or the GI management group would apply to register its GI as a “foreign GI” in other member countries.<sup>172</sup> One might imagine Cambodia registering in the EC, the United States, and China—all areas with the industrial capacity to mass-produce and export fake antiquities. Once registered, the TRIPS Agreement would allow Cambodia to bring a suit against violating producers under their country’s laws.<sup>173</sup> Thus, for example, if producers in the United States manufacture unmarked counterfeit Khmer antiquities, the holders of the Khmer antiquities GI could sue those producers in the United States under existing trademark laws, which the United States uses to protect GIs.<sup>174</sup>

But if the counterfeit-producing *nation* does not comply with its TRIPS obligations—by either continuing to permit the violation of Cambodia’s registered GI or by not providing the means for Cambodia to bring a suit—Cambodia would have recourse in the WTO. Cambodia, or another nation on its behalf, could file a complaint in the WTO and request consultations with the non-complying nation.<sup>175</sup> Failure of negotiations would send the dispute to the WTO’s arbitration body and could result in trade sanctions against the violating nations until they were

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<sup>172</sup> Because the TRIPS Agreement does not specify the *means* for protecting GIs, the registration of foreign GIs takes on different forms in different countries. While some nations accept applications for foreign GIs, other nations “recognize the registration of the country of origin.” Kireeva & O’Connor, *supra* note 166, at 286.

<sup>173</sup> TRIPS Agreement, Art. 22.

<sup>174</sup> United States Patent and Trademark Office, *Geographical Indication Protection in the United States*, available at <http://www.uspto.gov/ip/global/geographical/>, Oct. 1, 2013.

<sup>175</sup> See William Davey, *The WTO Dispute Settlement Mechanism*, in ANDREW T. GUZMAN & JOOST H. B. PAUWELYN, *INTERNATIONAL TRADE LAW* 128, 131-35 (2d ed. 2012) (describing the progression of the dispute settlement process under the WTO).

to bring their laws into compliance.<sup>176</sup> Because the protection of antiquities falls under the international trade regime, nations like Cambodia can use leverage from other areas of trade to sanction infringing countries until they come into compliance with their TRIPS obligations.

### **VIII. Not a Perfect Solution**

To be sure, a registered GI for antiquities would address some of the concerns identified in Section III better than others. This IP solution is more suited to those nations primarily concerned with confusion of the historical record and the administration of export regimes, because both boil down to a market-confusion problem—an issue that the doctrine of Geographical Indications is particularly suited to addressing. By registering GI protection for authentic antiquities, a source nation can require that producers of fakes and replicas—both domestic and foreign—mark them as such. The force of the WTO dispute settlement mechanism makes GI protection a more powerful tool than the current legislation enacted by source nations, which only have domestic reach and are difficult to enforce.

GI protection, however, may not be as helpful for those nations that seek an exclusive right to commercially exploit replicas. Unlike a patent, GI protection does not prevent others from making a product identical—in design or method—to the registered product.<sup>177</sup> The requirement that others mark their replicas as such, or otherwise indicate their true origin, does not do much to address the problem that they are making copies for commercial value in the first place. Here, the heightened level of protection reserved for wine and spirits may be more helpful, as it prohibits products marked “in the style” of the original good. Arguably, a

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<sup>176</sup> GUZMAN & PAUWELYN, *supra* note 127, at 151-52 (describing equivalent suspension of trade following a losing nation’s failure to comply within the time-frame provided under the dispute settlement mechanism).

<sup>177</sup> Raustiala & Munzer, *supra* note 116, at 345.



manufacturer who produces replicas or fakes crafted in the particular artistic style registered for GI protection would be marketing goods in the “style” of the protected product. In this case, the “style” in which the piece was executed is evident on the face of the product, rather than articulated on the product’s label (e.g., sparkling wine in the *méthod Champenois*). Thus, the objective of nations that seek an exclusive right to produce replicas may require a *sui generis* approach—extending principles generally reserved for wines and spirits to attack a problem otherwise unaddressed by the base-line level of protection under the TRIPS Agreement.

### **IX. Conclusion**

To the Western consumer, the greatest concern regarding a fake antiquity may be the thousands or millions of dollars she paid for it. But fakes and replicas raise wide-reaching concerns for other players in the economic and scholarly markets. Historians depend on authenticity to accurately recreate the past. Fakes and replicas cause source nations to waste valuable resources in the effort to preserve authentic antiquities. Finally, the ability to control the production of replicas is an economic asset that many heritage-rich nations seek to harness in order to boost their developing economies. These concerns can best be addressed by registering Geographical Indications for authentic antiquities. This international IP tool can strengthen the domestic legislation already in place in several source nations by extending protection to the international level. Of course, this novel use of Geographic Indication raises its own challenges. For example, where the civilization giving rise to the antiquities stretched across several modern boundaries—as is the case for the Roman Empire or the Khmer Empire of Southeast Asia—source nations may be pushed to negotiate with each other to register a trans-border GI or a GI

“club” in order to protect their shared heritage.<sup>178</sup> Further, developing nations seeking international GI protection may have to strengthen their own compliance with the TRIPS Agreement before nations among the Global North are willing to lend their cooperation. Developed nations already complain that TRIPS compliance in developing nations is lagging.<sup>179</sup> But the sentiment that the TRIPS Agreement protects only the intellectual outputs of developed nations<sup>180</sup> may shift if developing source nations can invoke the rights set out in the TRIPS Agreement to their benefit—to protect their own heritage and their own economic assets.

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<sup>178</sup> The problem of identical products being “unique” to different regions is not new. For a discussion of several approaches to this problem, see Rangnekar & Kumar, *supra* note 118, at 202.

<sup>179</sup> See Alnajafi, *supra* note 2, at 261 (discussing U.S. complaints that Egypt is not in compliance with its obligations under the TRIPS Agreement).

<sup>180</sup> See GUZMAN & PAUWELYN, *supra* note 127, at 635 (discussing hostility against the TRIPS Agreement among industrialized developing nations).