A capacity audience attended the 2000 Stephen Stewart Memorial Lecture, delivered by Judge David Edward under the title "Trade Marks, Descriptions of Origin and the Internal Market: What Lies Behind the Silhouette?" This apparently enigmatic title encompassed a judicial tour of European Court of Justice decisions on the territoriality of trade mark rights and the doctrine of exhaustion, from the earliest days of Sirena v. Eda and HAG I to the controversial 1998 Silhouette case.

Judge Edward opened his lecture with the observation that two previous Stephen Stewart Memorial lecturers, both members of the judiciary, had taken a somewhat iconoclastic view of intellectual property rights. Those two judges - Sir Robin Jacob and the evening's chairman Sir Hugh Laddie - were among the three judges in his audience, together with their colleague in the Patents Court Sir Nicholas Pumfrey. It was notable that, when questions were invited from the floor, Judge Edward’s first inquisitors were from the ranks of those judges.

It was not solely as a member of the European Court of Justice that Judge Edward was able to guide his audience through the conflicting interests of trade mark owners and their competitors. This was apparent when he drew on his personal experiences as an advocate in two Scottish cases: the important Harris Tweed certification mark litigation and the entertainingly-depicted battle between the mighty Coca-Cola Inc. and Struthers Brothers over the right to sell KOALA COLA. As to the Silhouette case, Judge Edward observed that this was a decision which had been misunderstood both by lawyers and by the popular press. Indeed, one Scottish paper had branded him a "fuddy-duddy" for banning cheap foreign imports without appreciating the full import of that case and its value in the protection of consumers' values.

The Intellectual Property Institute is proud to reproduce here the text of Judge Edward’s lecture.

I would first like to add my own tribute to Stephen Stewart. He made an impressive contribution to the study of intellectual property law, but he was also the author, with David
Vaughan, of an important article entitled "Does Legal Professional Privilege Exist in the EEC?". That was the first stage in the train of events that led to the A.M. & S case and so to effective protection of legal professional privilege in Community competition cases. It also led, incidentally, to my first taste, as an advocate, of the Court of Justice.

I am apprehensive about addressing this audience of intellectual property specialists because, like all Scottish advocates, I am a generalist. And nowadays there is little chance for a judge of the Court of Justice to be anything else. On Monday I was asked to give a lecture on pensions, today it is trade marks, and next week it will be rice from the Dutch Antilles. So I am conscious that whatever I say is liable to be either trite or wrong. I must in any event begin with two health warnings: first, that I speak only for myself and, second, that nothing I say can be taken as the slightest indication of what may be decided by the European Court in the future.

Nevertheless, I have been encouraged by reading the first two contributions to this series of lectures, the first by Sir Hugh Laddie on "Copyright: Over-Strength, Over-Regulated, Overrated?" and the second by Sir Robin Jacob on "Industrial Property: Industry's Enemy?". They called to mind the words of that noted London solicitor, Michael Finsbury, when he helped the artist Pitman to open the barrel that had been delivered to him in place of the crate containing the statue of Hercules destined for Mr Semitopolis. Out rolled a body and the question was how to dispose of it. Said Michael: "I am not going to embark on such a business and have no fun for my money." "Oh, my dear sir, is that a proper spirit?" cried Pitman. "Oh, I only said that to cheer you up", said Michael, "Nothing like a little judicious levity."

Reading the thoughts of my distinguished and expert predecessors, I found that, for the Stephen Stewart Lecture, there is nothing like a little judicial iconoclasm. That, at any rate, is the spirit in which I embark on my theme, which has essentially three strands: trade marks, descriptions (or designations) of origin and the internal market. The sub-theme is what lies behind Silhouette. At the end I will suggest that what really lies behind Silhouette is a problem, or a phenomenon, that goes well beyond the field of intellectual property. It can be summed up in the question, "How far are judges expected, or compelled by force of

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3. See The Wrong Box by Robert Louis Stevenson and Lloyd Osbourne, Ch.7.
circumstances, to be legislators and to make what are essentially political, or at any rate policy, choices?".

In order to set the scene, I will begin by examining what, as a matter of history, lay behind the judgment in Silhouette. The story begins in the 1970s with Sirena⁵, Deutsche Grammophon,⁶ and HAG ¹
d. Sirena was the case about "Prep Good Morning" shaving cream. Perhaps not surprisingly given the subject matter, the Advocate General suggested that

"both from the economic and from the human point of view, the interests protected by patent legislation merit greater respect than those protected by trade marks".⁸

The Court took the same line:

"A trade mark right is distinguishable from other rights of industrial and commercial property, inasmuch as the interests protected by the latter are usually more important, and merit a higher degree of protection, than the interests protected by an ordinary trade mark".⁹

In Deutsche Grammophon the Court explained the basis of its position:

"[T]he essential purpose of the Treaty, which is to unite national markets into a single market ... could not be attained if, by virtue of the differing legal régimes of the Member States¹⁰, nationals of those States were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between Member States".¹¹

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10. In the original French les divers régimes juridiques des États membres, translated misleadingly in E.C.R. as "the various legal systems of the Member States".
Remember that, at that time, free movement of goods was classified in the EEC Treaty as one of "The Foundations of the Community". One of the effects of the Maastricht Treaty was to remove that expression, so that free movement of goods has become only one amongst a number of "Policies". But, in 1971, the Court's overriding concern was with market integration, and this led - some would say logically - to the doctrine of common origin and \textit{HAG I}.

In his opinion in \textit{HAG I}, Advocate General Mayras again pointed out the policy conflict:

"It is the effect of territorial protection arising from national legislation which is incompatible with the Community principle of free movement of goods".\textsuperscript{12}

\textit{Sirena} and \textit{HAG I} led to an outcry, particularly amongst intellectual property experts and especially in the United Kingdom. There was justification for that outcry insofar as the Court appeared to ignore, or at least to undervalue, the moral value of some trade marks. I take as an example the "mouse" trade mark of Robert Thompson of Kilburn in Yorkshire.

Robert Thompson was a designer and maker of oak furniture, using traditional tools, such as the adze. His products are quite as admirable, as works of art, as those of many an author, painter or inventor. Each piece has a mouse running up the leg of the table or round the edge of the chair or the stool. I would think it shocking if Robert Thompson's trade mark were not thought worthy of special protection.

Thompson encouraged his apprentices to go out and use the skills he had taught them, and one of them put a beaver on his furniture, another a rabbit. Unlike some modern trade mark proprietors, whose thirst for "protection" seems inexhaustible, Thompson claimed no monopoly for the idea of using an animal as a trade mark, only the exclusive right to use a mouse.

Thompson's mouse was a trade mark in the original sense - a mark by which a craftsman differentiates the things he makes from those made by others. But a trade mark is not necessarily the same as a maker's mark. The trade mark proprietor may be, but frequently is not, the manufacturer of the products that are sold under the mark. Razor blades and throw-away ballpoint pens sold under well-known marks are, in many cases, manufactured in small workshops around Britain which have no connection, other than a very fragile contractual relationship, with the trade mark proprietor.

\textsuperscript{12} [1974] \textit{E.C.R.} at p.754.
Trade marks today are a guarantee of origin only as regards the trade mark proprietor and by no means necessarily as regards the designer or manufacturer. To that extent, and in that respect, there may be a qualitative difference between a trade mark right and the author's moral right protected by copyright, or the inventor's right protected by a patent.

The storm raised by Sirena and HAG I did not die down until the court was persuaded in HAG II to reverse its previous ruling and recant the doctrine of common origin. Personally, I am not convinced that HAG II had the degree of moral justification that is sometimes claimed for it. As a result of HAG I, the German HAG company had been able to market their product in Benelux alongside the product of van Zuylen and their successors. Their purpose in HAG II was to gain a monopoly in Germany in the market for decaffeinated coffee under the HAG mark, so excluding the Belgians from that profitable field of operation in Germany.

Nevertheless HAG II became the vehicle for the final assault on the doctrine of common origin, with the UK government in the vanguard of those who wished to reassert the territoriality of trade marks. The opportunity of developing a Community doctrine of honest concurrent user, propounded very soon after HAG I in a thoughtful article by Hartmut Johannes and George Wright, was ignored by the Court. The Advocate General pointed out that the doctrine had been developed during the nineteenth century, when local markets in Britain were being brought together into a national market, and held that it was not "suitable for resolving trade mark conflicts in Community law".

With respect, it is not obvious to me why there is not a direct analogy between transforming local markets into a single UK market, and transforming separate member state markets into a single Community market. The point surely is that a highly developed legal system has for many years tolerated, and found ways to accommodate, honest concurrent user of the same trade mark. Whatever the merits of that argument, the Court repeated a previous dictum to the effect that

"The essential function of the trade mark [is] to guarantee the identity of the marked product to the consumer or ultimate user by enabling [the owner of

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the trade mark], without any possibility of confusion, to distinguish that product from products which have another origin.*16

Again, the Court said

"[T]he essential function of the trade mark would be jeopardised if the proprietor of the trade mark could not exercise the right conferred on him by national legislation to oppose the importation of similar goods bearing a designation liable to be confused with his own trade mark."*17

This tide of judicial opinion reached what I hope is its high water mark in Ideal Standard*18.

In Ideal Standard, rejecting the opinion of the Advocate General, the Court once again accepted a position strenuously asserted by the United Kingdom:

"[A]s the United Kingdom pointed out, national trade marks are not only territorial but also independent of each other."*19

And again:

"[S]ince trade mark rights are territorial, the function of the trade mark is to be assessed by reference to a particular territory."*20

That is the doctrinal context of Silhouette and it was therefore no surprise - at least to me - that the United Kingdom, along with the Commission and all the other governments except Sweden, argued in that case that the principle of exhaustion set out in Article 7 of the Trade Marks Directive*21 must be confined to the territory of the EEA.

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It is also important, in order to understand Silhouetre, to note that the legal base of the Trade Marks Directive was Article 100A. That article, derogating from Article 100, provides for legislation by qualified majority for achievement of the internal market. The power to legislate by QMV for that purpose, as the Court has recently had occasion to remind the Commission and the Member States in the tobacco judgment\(^2\), is an exception to the general principle that harmonising legislation requires unanimity.

On this particular point, the need for unanimity was unimportant because, when the Directive was passed, none of the then Member States recognised the principle of international exhaustion.

The principle of free circulation\(^2\), which is the essence of the internal market in goods, could hardly operate if some Member States recognised international exhaustion and others did not. Goods would simply enter through the most liberal port of entry and then be able to circulate freely throughout the EC (and now the EEA), unless, of course, we were to revert to territorial protection within the EC or EEA, so defeating the whole purpose of the Directive.

The principle of the Directive, as interpreted by the Court, is therefore that, in order to secure free circulation within the EEA, there must, in the absence of agreement to accept international exhaustion, be territorial protection vis-à-vis the rest of the world. This, as I have said, was the position urged on the Court by the Commission and all the intervening governments except Sweden.

Silhouetre was about a consignment of out-of-date spectacle frames destined for Bulgaria. It was therefore with some astonishment that, on the day after judgment was delivered, I found myself pilloried in the Scottish Daily Record as a fuddy-duddy who was guilty of depriving my own and other people's children of the chance to buy designer clothes at knock-down prices in supermarkets - a possible consequence that had not been mentioned from beginning to end of the case. I was even less enchanted to read that the British Consumer Affairs Minister was attacking the Court for deciding the case precisely in the sense contended for by the United Kingdom Government.

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\(^2\) Articles 23 and 24 EC (ex-articles 9 and 10).
I defend the judgment in *Silhouette* because I believe there was no other result open to the Court consistent with the text of the directive, with its legal base and, perhaps most importantly, with the doctrinal position unambiguously adopted in *HAG II* and *Ideal Standard*.

That said, I think there is much good sense in what Sir Robin Jacob said in a lecture quoted by Sir Hugh Laddie in *Davidoff*:24

"The doctrine of non-exhaustion, whilst it makes some sense in patents and copyrights, is inimical to the very nature of a trade mark. 'Kodak' means the goods of the Kodak company wherever they were made. When you import Kodak film, the name Kodak still tells you the truth that this is Kodak's film; no rational trade mark law would allow any other result."25

The essence of the point seems to me to lie in making a clear distinction between, on the one hand, recognition that registration of trade marks and their protection by the courts is necessarily territorial and, on the other, attributing "territoriality" to the mark as such. Registration can be effected only for a given territory. Whether registered or not, the mark can be protected only by courts with the territorial jurisdiction to make their orders effective. But a mark lawfully applied to a product in one country does not become any less the mark of the trader who applied it because the product has crossed a frontier. Whether the product may then lawfully be sold in that second territory is a separate question that does not derogate from the character of the mark as the trader's mark. So, a mark as such is not territorial in the same sense as a patent which, by its very nature as a sovereign grant, is necessarily limited to the territory of the sovereign granting it.

More generally, I join with my predecessors in believing that, in certain respects, the law of intellectual property has become counter-productive, and in some respects absurd. Should a motor manufacturer really be able to come to a court to claim a monopoly in "fourness" on the basis that there are consumers who might go into a sale room to buy an Audi Quattro and come out by mistake with a Renault Quadro?26 It is even more surprising

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26. *Audi AG v. Deutsche Renault AG*, C-317/91, [1993] E.C.R. 1-6227. It is important to note that the Court of Justice did not rule that Quadro was an infringement of Quattro. That was a question for the referring court.
to read, as I did last week, that the Bundesgerichtshof\textsuperscript{27} has authorised registration as a trade mark of the imperial colours of the Habsburgs, yellow and black, so that this combination of colours will apparently, at least in Germany, become the exclusive property of a particular trade mark proprietor.

Perhaps my outlook is coloured by my experience as a very junior counsel in \textit{Coca-Cola v Struthers}.\textsuperscript{28} That was a case in which a small firm of soft drinks manufacturers in the West of Scotland had for many years been producing fizzy drinks, including one that was well known in Scotland as "Cola" (or "Scotch Cola"). One of the Struthers went to Australia. On his return, he proposed to his brother that they should call one of their products "Koala Cola". They sold it in big lemonade bottles with a picture of a Koala Bear on a yellow label, whereupon the great might of Coca-Cola descended upon them in the forensic guise of H.S. Keith QC, J.P.H Mackay QC and A.M.M. Grossart (now one of the kings of banking in Scotland). The line-up on the other side was A.J. Mackenzie Stuart QC, C.E. Jauncey QC and me.

For Coca-Cola the evidence of infringement was a consumer survey which consisted in thrusting a microphone and a Koala Cola label in the faces of passers-by in a Scottish high street, and saying "Read that!". The resulting tape-recording, which lasted about 20 minutes, was a fine anthology of West of Scotland phonemes which would have done justice to Billy Connolly and even succeeded in discomposing the stern countenances of Lord Avonside and (on appeal) of Lord Guthrie.

For Struthers, we decided to lead evidence more closely related to the market-place where Scotch Cola was wont to be consumed. Our star witness was the manageress of the Royal Ordnance Factory canteen. Faced in cross-examination with the proposition that her customers were liable to confuse the products of William Struthers of Lochwinnoch and those of Coca-Cola, she replied "Don't be silly". That won us the case.

What then is, or should be, the essence of trade mark protection? In a Scottish case about the right to use the trade description "Glenboig Fireclay". Lord Craighill said:

"The law is not jealous of such a claim as that here put forward. Monopoly is not the thing for which the complainers contend and which the respondents

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resist. On the contrary, *fair trading* is all that for the protection of which the law is invoked; and the public as well as the manufacturer or merchant are concerned that infringement of trade marks and trade designations should be prevented. *For there is a double wrong to be apprehended; the public are or may be deceived and the owner of the trade mark is or may be injured.*

The language is archaic, even by Scottish standards, but the point is well made. Trade mark law is ultimately about fair trading. Deception of the public and protection of the trade mark owner as a trader are two sides of the same coin.

I believe that the development of the law in the early part of the twentieth century was distorted by the preoccupation of lawyers with rights of property. They therefore concentrated on the *property* rights of trade mark owners. Registration of trade marks, introduced in the latter part of the nineteenth century, came to be seen (wrongly) as the *grant* of a right of property, and therefore as something inherently worthy of protection, rather than as a more effective means of ensuring protection of a right whose essence lay in the common law of fair competition. Consequently, too little attention was (and is) paid to the question whether protection of trade marks need go any further than is necessary and proportionate to maintain fair competition by protecting the public against deception.

That brings me to my second theme, Descriptions or Designations of Origin. This is a field in which development of the law has depended greatly on the "public protection" side of the coin. My interest in this aspect of intellectual property started with the *Harris Tweed* case which was the very first case in which I was instructed. The case was already going when Dankwerts, J., decided *Spanish Champagne*. It is noteworthy that, groundbreaking as that judgment was, it was again based on one aspect only of the "double wrong", the injury to property. The need to find an anchor for the right of action in a proprietorial interest led to the concept of collective goodwill.

Collective goodwill is, constructively, property belonging to a class of persons rather than to one or more identifiable individuals. The class is open in terms of time and number but closed as against those who do not qualify at any given time. Moreover, malpractice on the part of some members of the class, now or in the past, does not necessarily destroy the

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goodwill belonging to the class as a whole. That, at least, is what I take from the *Harris Tweed* case because the history of Harris Tweed, as revealed in Lord Hunter’s judgment, was a catalogue of malpractice and deception on both sides.\(^{32}\)

The case arose from a dispute between the producers of Harris Tweed based in the islands of the Outer Hebrides and certain tweed producers on the mainland who called their product Harris Tweed. Some of them justified their use of the name by putting their yarn on beams and shipping them to South Uist where a number of unemployed crofters sat in a warehouse pedalling looms to turn the yarn into tweed. The unfinished tweed was then taken back to the mainland, finished by the producers and marketed as Harris Tweed.

The product of most of the mainland manufacturers was, in quality terms, just as good as that of the island manufacturers. The essence of Lord Hunter’s judgment was that, whatever the merits of the mainland product and whatever the sins of the island manufacturers, mainland producers could not hitch a lift on the reputation of a product that people believed was wholly made on the islands. The reputation of the product depended not only on "origin" but also on what the public believed about the place and method of manufacture which had sentimental as well as quality implications. Public perception was the source or foundation of the collective goodwill. (Lord Hunter did not, I think, lose sight of the balance between the rights of the trade mark owner and protection of the public against deception.)

Protection of geographical designations as such (as opposed to individual trade marks with a geographical connotation, such as "Glenboig Fireclay") is a relatively recent phenomenon in the common law, as compared with the statutory protection of *appellations d'origine* in France and its equivalent in other continental countries. The limited statutory protection of "Scotch whisky" was a rare exception. The Certification Trade Mark, though useful as a means of *certifying* the origin or method of manufacture of products that complied with the criteria of the mark, did nothing, as the history of Harris Tweed showed, to keep off the market products, however named or described, that did not comply with those criteria.

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\(^{32}\) One illustration from earlier in the century was the practice of some Yorkshire manufacturers of spraying the tweed they sold as Harris Tweed with a “Harris Tweed Aroma”. This was thought to make it smell as if it had been produced in the reek of peat fires. What they did not realise was that the traditional aroma of Harris Tweed was due, not to peat smoke, but to the fact that the liquid used to shrink the tweed after weaving was the collected urine of the crofters.
Following Spanish Champagne and Harris Tweed, the protection of geographical designations through the concept of collective goodwill developed fast. More recently, "Harris Tweed" has become what amounts to an appellation d'origine, since a private Act of Parliament both protects the name as an indication of origin and prescribe the conditions of manufacture. But, for many British geographical designations - the classic example being Cheddar cheese, the time had long passed when they could be protected.

It is worth remembering that it was the statutory protection of "champagne" as an appellation d'origine that had maintained the distinctiveness of the mark and made the Spanish Champagne case possible. The continuing strength, over the years, of French local products, such as cheeses, is due to long protection of appellations d'origine, and I wonder whether more of our traditional local products would have remained commercially viable if we had had the same mechanism of statutory protection.

When we joined the Community, I remember having anxious discussions with intellectual property specialists as to whether we were at a disadvantage because we did not have a system of statutorily protected appellations d'origine. Some officials in the European Commission took the view that there could be no Community protection for geographical designations in the absence of statutory protection at national level.

Another concern was that, while many of the continental countries had a highly developed system of statutory protection of geographical designations, they took a very restricted view of their function and of the kinds of designation that were entitled to protection. This was illustrated by a case in 1975, Commission v. Germany, the result of which was summed up by the Commission in its argument in Exportur in the following terms:

"[T]he specific function of a geographical name is satisfied, and the prohibition imposed on other undertakings from using that name is justified, only if the product to which the protected name applies possesses qualities and characteristics which are due to its geographical place of origin and are such as to give it its individual character."

On this view, protection of geographical designations depended not just on origin but on the existence of some relationship between that origin and the quality or character of the goods.

That limited approach was rejected by the Court of Justice in *Exporur*: 

"The Commission's position ... would have the effect of depriving of all protection geographical names used for products which cannot be shown to derive a particular flavour from the land and which have not been produced in accordance with quality requirements and manufacturing standards laid down by an act of public authority, such names being commonly known as indications of provenance. Such names may nevertheless enjoy a high reputation amongst consumers and constitute for producers in the places to which they refer an essential means of attracting custom. They are therefore entitled to protection."

That seems to me to be a classic example of the marriage between the common law approach and the civil law approach. Regulation 2081/92, virtually contemporaneous with *Exporur*, and the much more recent *Rioja* case are symptomatic of a general tendency towards the protection of geographical designations of origin.

Against that background, I would like to move towards more general considerations. Whether we are talking about international exhaustion or geographical designations, the problem is ultimately one of balancing interests: on the one hand, the interest of the public in having a wide range of choice of products but also in not being deceived; on the other, the interest of the producer or trader in preserving his good will. But we must now begin to be more precise as to the nature of the interests at issue, identifying those that are relevant and those that are not.

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35. They are not, of course, "commonly known" by that term in Britain, but that illustrates a problem that is common both to Community legislation and to Court judgments - finding words in one language to convey a distinction which has no particular legal importance in that language but has a precise legal significance in another.


Is the trade mark owner's right a right to be protected against "any possibility of confusion", as the court said in HAG I, or is it simply a right to be protected against unfair competition, which is not necessarily the same thing? As regards the consumer, is the public expectation that is to be protected an expectation of trade origin only? Designer products may be available at a low price in supermarkets only because the supermarket has been able to buy up dead stock of last year's range. When the younger generation go into the supermarket, how would they react if they were told that the designer products on offer at knock-down prices are a job lot that proved to be unsaleable by retailers in another country? I don’t know the answer to that question but it doesn’t seem to me to be wholly irrelevant to the policy of the law.

As regards geographical designations, to what extent is the method of manufacture relevant, as it was in Harris Tweed? And what about social and economic interests? Behind the Harris Tweed case was the situation of producers in a remote, and in some respects deprived, area, whose way of life or possibility of earning a living was liable to be prejudiced if their designation of origin could be used for products produced elsewhere.

How far should the courts go in protecting ill-informed or ignorant consumers, or using their purported ignorance or indolence as a justification for conferring timeless monopolies on trade mark owners? And who or what are we rewarding, if indeed we are "rewarding" anyone or anything, by trade mark protection unlimited in time? We reward inventiveness by patents, but only for a period. We reward other forms of originality by copyright, but only for a period. Why are trade marks different?

In short, it seems to me that the interests to be balanced and the questions to be asked, if we are interested in the policy of the law, go well beyond what one might call the 'mere' right of property - the registered trade mark, or the goodwill - and the 'mere' guarantee of origin.

The question then is whether judges are well placed to conduct such balancing exercises. The NERA-Berwin report on exhaustion of rights illustrates the complexity of the problem. And the reactions of the Commission and the member states to that report and to the question of international exhaustion show how divided political opinion may be on such a question.

Nevertheless, precisely because there is a divergence of political opinion and also because there is a divergence of economic evidence, it is more than likely that judges will be left to decide, if not the question whether there should be international exhaustion as such, at least what the limits of the territorial principle should be. And, as in the Rioja case, judges have to decide between the conflicting claims of the principle of free movement of goods and the scope of protection for geographical designations.

This is not the only area in which judges are being called on to perform such a task. The same sort of "balancing" questions are now arising through incorporation of the European Convention on Human Rights, and British judges now face the same criticisms as have been levelled against the Luxembourg Court for its alleged activism in giving effect to an international contract whose express purpose was to promote European integration and the creation of a single market. The reality, I think, is that judges in the modern world cannot escape the task of taking "policy" decisions and therefore cannot escape being accused, by those who do not like those decisions, of taking "political" decisions.

But I comfort myself with three quotations. The first comes from Sir William Wade in his Judicial Studies Board Lecture (1998) about the Human Rights Act. He said:

"These rights and freedoms will often pull in different directions and delicate balancing exercises will be demanded. ... Inevitably there will be criticism of the increased powers and duties being given to the judges, but it is only because of our national constitutional myopia that such criticism is common. We do not seem to realise that, in comparison with many other countries, our conception of the judicial function is a narrow one."

The next is a quotation from the Inaugural Lecture (unpublished) of my ultimate personal guru, the former Professor of Constitutional and European Law at the University of Edinburgh, J.D.B. Mitchell:

"Governments and governmental bodies have as many reasons for conniving amongst themselves as they have for opposing each other and, in the evolution of government, it is important that within acceptable limits individuals should be able to participate through the neutral mechanism of courts, not merely in advancing the framework of rules, but also in advancing its construction. ... I think it is not unreasonable to assert that the role of courts has, or should have, something to do with the realities of democracy. Properly organised,
it is through them that the individual can play a larger and more significant part in government while gaining a greater sense of security."

My last quotation is from Dicey's *Law and Public Opinion in England*:

"As all lawyers are aware, a large part and, as many would add, the best part of the law of England is judge-made law - that is to say, consists of rules to be collected from the judgments of the Courts. This portion of the law has not been created by Acts of Parliament, and it is not recorded in the statute-book. It is the work of the Courts; it is recorded in the Reports; it is, in short, the fruit of judicial legislation. ... Judicial legislation aims to a far greater extent than do enactments passed by Parliament at the maintenance of the logic or the symmetry of the law." 40

So, I believe, courts (including the European Court) are a forum in which the citizen, whether company or individual, can bring a concrete problem to bear on a policy issue and demand that the decision funk at the political level be faced up to and made. Far from resenting the criticisms that have been levelled at our judgment in *Silhouette*, I find it refreshing and encouraging that the logic and symmetry of our judgments should be tested, not only by academic discussion, but by judges who ask us to take a position on specific cases which raise an issue, such as international exhaustion, that affects the economic well-being of the trader and the consumer.

As Sir Robin Jacob said to me as we came in, it is an exciting time to be a lawyer.