

# The EU System for the Protection of Geographical Indications and Its External Dimension

Stefan Brocza\*

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\* Senior Lecturer, University of Vienna, Contact Email: stefan.brocza@univie.ac.at.

## **Abstract**

The European Union (EU) has established an extensive legal framework for the protection of geographical indications (GIs) for agricultural products, foodstuffs, wines, and spirits. GIs are distinctive signs used to identify a product originating in a territory of a particular country, region, or locality where its quality, reputation, or other characteristic is linked to its geographical origin.

In addition, the EU is active in multilateral and bilateral negotiations on this issue. At a multilateral level, they are within the WTO framework. At a bilateral level, it uses two different frameworks: the specific stand alone agreements on GIs (e.g. the currently negotiated agreement with China) and the broader trade agreements (e.g. the Free Trade Agreement (FTA)), such as the negotiations for an EU-Vietnam FTA or the negotiations for an FTA with Japan.

The EU has already concluded a series of free trade agreements that contain important levels of protection for geographical indications, such as the EU-Korea FTA or the EU-Singapore FTA.

In summary, the EU internal rules together with the external agreements concerning the protection of GIs created the world's largest legal system for GIs. The article presents this legal framework and focuses on the external dimension, e.g. the rights and obligations for participating third countries. Special emphasis thereby is given to the situation in Korea.

**Key Words:** geographical indications (GIs), protected food names, trademarks, market access, FTAs, EU, Korea

## I. Introduction

Geographical indications (GIs) are one of the great successes of European agriculture with over 3,300 European Union (EU) names registered. About 1,250 or so non-EU names are also protected within the EU as a result of bilateral agreements. In value terms, the market for EU GIs is around €54.3 billion, and together, they account for 15% of total EU foods and drink exports.<sup>1</sup>

GIs, which identify products with characteristics attributable to their geographical origin, are a complex matter and playing an important role in the debate on the on-going negotiations on various trade agreements.<sup>2</sup> However, the “GI issue” is not only about Intellectual Property (IP), but also has environmental, cultural, and socio-economic dimensions and political implications.<sup>3</sup>

The World Trade Organization’s (WTO) Trade-Related Aspects of Intellectual Property Rights (TRIPS) treaty defines GIs as “indications which identify a good as originating in the territory of a [WTO] Member or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin.”<sup>4</sup>

The protection of such GIs is advocated to offer opportunities to support local agrifood systems and to sustainable rural development.<sup>5</sup> Firms using protected GIs are expected to observe a reduction of unfair competition due to abuses or misuses and have the opportunity to differentiate their production on the market, thus, gaining higher prices, higher sales volumes, and/or access to some marketing channels. Moreover, the protection of GIs is often linked to the production of public “goods, such as biodiversity preservation, cultural heritage

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1) 100 European Geographical Indications Set to be Protected in China, EUROPEAN COMMISSION BRUSSELS (June 2, 2017), [http://europa.eu/rapid/press-release\\_IP-17-1507\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1507_en.htm) (last visited Apr. 6, 2018).

2) Stefan Brocza, *Was unterscheidet eigentlich „Tiroler Speck“ von „Südtiroler Speck“?: Zur wachsende Bedeutung geografischer Ursprungsbezeichnungen und warum Österreich diese Entwicklung verschlafen könnte* [What is the Difference Between “Tyrolean Bacon” and “South Tyrolean Bacon”]: *On the Growing Importance of Geographical Designations of Origin and Why Austria Could Overslept this Development*, ÖGfE POLICY BRIEF (Mar. 6, 2018), [http://oegfe.at/wordpress/wp-content/uploads/2018/03/OEGfE\\_Policy\\_Brief-2018.03\\_Brocza.pdf](http://oegfe.at/wordpress/wp-content/uploads/2018/03/OEGfE_Policy_Brief-2018.03_Brocza.pdf).

3) Maria Cecilia Mancini, Filippo Arfini, Mario Veneziani & Erik Thévenod-Mottet, *Indications géographiques et négociations commerciales transatlantiques: Différences de perspective entre l’Union européenne et les États-Unis* [Geographical Indications and Transatlantic Trade Negotiations: Different US and EU Perspectives], 16 EUROCHOICES 34 (2017).

4) Agreement on Trade-Related Aspects of Intellectual Property Rights art. 22(1), Apr. 14, 1994 [hereinafter TRIPS].

5) GIOVANNI BELLETTI & ANDREA MARESCOTTI, ORIGIN PRODUCTS, GEOGRAPHICAL INDICATIONS AND RURAL DEVELOPMENT 75-91 (Barham et al. eds., 2011).

protection, sociocultural development, and rural poverty reduction.<sup>6</sup>

Notwithstanding this growing “enthusiasm” for GIs, there is still a lack of systematic research on the effects of GI protection on firms’ profitability, local agri-food systems, and environmental and social aspects. So far, evidence on GI protection effects are mostly related to single aspects and/or single case studies. However, a study on the added value for producers of GIs stresses that the elements that emerged most often were the following:

- *Protection of intellectual property rights.* The function of GI protection in this respect is twofold: a) providing the legal framework for reacting effectively against attempts of imitation, misuse, use of “GI-sounding” terms, etc.; and b) acting as a tool to prevent the aforementioned issues. The protection of intellectual property rights, and in general of “immaterial” elements (e.g. know-how of producers, cultural values, traditions, etc.), help to build the reputation of a particular production area, which is the main reason behind the creation of a GI (rather than the implementation of a product-differentiation strategy based on intrinsic differences versus a standard product).
- *Improved visibility,* often deriving from *better access from participation in fairs.*
- *Access to new markets.* The GI status promotes access to new domestic and/or export markets in most cases, whereas it appears to have a less significant role in promoting increased market penetration.
- *Better access to promotion funds and investment aid* in the framework of the EU single CMO (for GI wines and oils), better access to support from co-financed EU programmes (as far as promotion is concerned), and better access to support for promotion and/or investments funded by national or regional governments.<sup>7</sup>

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6) EMILIE VANDECANDELAERE, FILIPPO ARFINI, GIOVANNI BELLETTI & ANDREA MARESCOTTI, LINKING PEOPLE, PLACES AND PRODUCTS: A GUIDE FOR PROMOTING QUALITY LINKED TO GEOGRAPHICAL ORIGIN AND SUSTAINABLE GEOGRAPHICAL INDICATIONS (Emilie Vandecandelaere et al. eds., 2d. 2010).

7) Areté, *Study on Assessing the Added Value of PDO/PGI Products*, EUROPEAN COMMISSION (Dec. 2013), [https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2013/added-value-pdo-pgi/exec-sum\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2013/added-value-pdo-pgi/exec-sum_en.pdf) (last visited Apr. 6, 2018).

## II. The Evolution of Geographical Indications

The explanation of the international evolution of GIs will enable the understanding of how the terminology has evolved over time and the backgrounds and contradictions that exist today in its current framework. At the same time, this historical context will contribute to explain the European position and its proposals that always tend to enhance protection in this area.

Only three international agreements treated the topic of GIs prior to the TRIPS in 1994, namely, the Paris Convention of 1883, the Madrid Agreement of 1891, and the Lisbon Agreement of 1958. Today, the World Intellectual Property Organization administers all of them.<sup>8</sup>

Article 1(2) of the *Paris Convention for the Protection of Industrial Property*<sup>9</sup> establishes what was understood as industrial property, including indications of source and appellations of origin. In Article 1(3), it stated that industrial property should be understood in a broad sense comprising both agricultural and natural products. Geographical indicators, patents, or trademarks were placed at the same level of protection as intellectual property rights. It refers to GIs in two ways: (1) establishing indications of source, and (2) appellations of origin even though it only regulates the former.<sup>10</sup> Indications of source are any expression or sign used to indicate that a product or a service originates in a country, region, or a particular place without any element of quality or reputation. On the other hand, appellations of origin is a concept that went one step further by including a unique link between the distinctive characteristics of these products and the area of production or the techniques used.<sup>11</sup>

Article 10 provides measures of protection and remedies in case of infringement. However, the protection was limited only to misuse of GIs that were false or misleading, protecting against cases of serious fraud when there

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8) WORLD INTELLECTUAL PROP. ORG., WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 230-240 (2d. 2004), [http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo\\_pub\\_489.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf).

9) Paris Convention for the Protection of Industrial Property art. 1(2), March 20, 1883.

10) DANIELE GIOVANNUCCI, TIMOTHY EDWARD JOSLING, WILLIAM KERR, BERNARD O'CONNOR & MAY T. YEUNG, GUIDE TO GEOGRAPHICAL INDICATIONS: LINKING PRODUCTS AND THEIR ORIGINS 66 (2009), [http://www.origin-gi.com/images/stories/PDFs/English/E-Library/geographical\\_indications.pdf](http://www.origin-gi.com/images/stories/PDFs/English/E-Library/geographical_indications.pdf).

11) Felix Addor & Alexandra Grazioli, *Geographical Indications Beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO/TRIPS Agreement*, 5 J. WORLD INTELLECTUAL PROP. 865, 868 (2002).

were false indications of origin or misleading trademarks. Regarding remedies, it was made possible to block imports at the border and to seize them when there was an improper use of an indication of source.<sup>12</sup> Many authors have praised the significant number of signatories (117), although they attribute it to the poor protection and the limited remedies offered at the convention.<sup>13</sup>

The primary objective of the *Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods*<sup>14</sup> was to advance the protection of GIs. That is the reason why it was not as successful as the Paris Convention, listing only 31 signatories and lacking very relevant countries like the US or Canada. Like the previous agreement, the Madrid Agreement guaranteed protection on the frontiers, permitting the seizure of imported products bearing a false indication of source (Article 1.1 and Article 1.3).

This agreement was novel for introducing two elements that will be relevant in order to understand the future European position and the roots of future divergences. It added clauses to fight against the “genericide” of indications of source, which happens when the use of a particular indication of source is so wide that it becomes the common name to refer to a class of product in order to prevent its dilution.<sup>15</sup> It also included provisions that fight against not only false indications of source, but also against ones that deceive those that are not false themselves but could be misleading as to their actual origin or quality.<sup>16</sup> That happens when you mark a product as coming from a particular area that has the same name in different countries. For example, a product is marked to have come from Paris but it actually came from Paris, Texas, USA, inferring that it came from France.<sup>17</sup>

The *Lisbon Agreement for the Protection of Appellations of Origin and their Registration of 1958* originally had only 25 signatories, and only 6 of them were European countries. Its primary goal was the protection of the

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12) Irene Calboli, *Expanding the Protection of Geographical Indications of Origin Under TRIPS: Old Debate or New Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181 (2006).

13) Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 86 TRADEMARK REP. 11 (1996); Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications*, 58 HASTINGS L. J. 299, 311 (2006).

14) Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, Apr. 14, 1891.

15) Stacy D. Goldberg, *Who Will Raise the White Flag--The Battle Between the United States and the European Union over the Protection of Geographical Indications*, 22 U. PA. J. INT'L ECON. L. 107, 113 (2001).

16) BERNARD O'CONNOR, THE LAW OF GEOGRAPHICAL INDICATIONS 31-32 (2004).

17) Marsha A. Echols, *Geographical Indications for Foods, TRIPS and the DOHA Development Agenda*, 47 J. AFR. L. 199, 205 (2003).

appellations of origin as defined in Article 2 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 geographic environment, including natural and human factors.”<sup>18</sup>

The scope of protection was no longer limited to guaranteeing the veracity of the provenance of the product. Now, there has to be some characteristics or quality linked principally or exclusively to that territory. This incarnates at the international level the development of the French concept of *terroir* in the essentially attributable test.<sup>19</sup> The considerable high level of protection granted in this agreement can be seen in two elements: first, in Articles 3 and 6, and second, in the establishment of a registration system.<sup>20</sup>

Article 3 held that only products coming from the place indicated in the appellations of origin could bear that mark and that usurpation or imitation will not be permitted and the use of translations or terms like kind, type, make or the like. This can be identified as the higher level of protection available to geographical indications, which is the one granted to wines in Article 23 of the TRIPS. Article 6 seeks protection against genericide. This article impedes the latter as long as those GIs are registered as an appellation of origin in the country of origin; therefore, a reciprocity principle is required. The other novel element was the establishment of an international multilateral registry system of the appellations of origin (Article 5) that sought to promote an equally effective protection similar to the one granted to trademarks.<sup>21</sup> These elements will be found below in the analysis of the EU’s position at the international multilateral and bilateral level and will serve as a yardstick to identify the level of protection granted to GIs. The Lisbon Agreement can now be seen as the one granting the highest protection at multilateral level.

On March 5, 2018, the EU Council of Ministers decided to authorize the opening of negotiations for a revised Lisbon Agreement on Appellations of Origin and Geographical Indications.<sup>22</sup> The EU argues that the Lisbon

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18) Lisbon Agreement for the Protection of Appellations of Origin and International Registration art. 2, Oct. 31, 1958 [hereinafter Lisbon Agreement].

19) O’CONNOR, *supra* note 16, at 38.

20) Goldberg, *supra* note 15, at 114-15.

21) Daniel J. Gervais, *Irreconcilable Differences? The Geneva Act of the Lisbon Agreement and the Common Law*. 53 HOUS. L. REV. 339, 351 (2015).

22) Council Decision 2018/416 of Mar. 5, 2018, Authorising the Opening of Negotiations for a Revised Lisbon Agreement on Appellations of Origin and Geographical Indications, 2018 O.J. (L 75) (EU).

Agreement has currently a membership of 28 contracting parties, including seven EU member states (Bulgaria, Czech Republic, France, Italy, Hungary, Portugal and Slovakia). The international system of the Lisbon Agreement is currently being reviewed in order to attract a wider membership while preserving its principles and objectives. A Working Group that established a basic proposal for the revision in October 2014 contributed to its progress. A Diplomatic Conference for the Adoption of a Revised Lisbon Agreement on Appellations of Origin and Geographical Indications (“revised Lisbon Agreement”) was held in Geneva from May 11 to 21, 2015. Taking into account the key role that the protection of intellectual property plays in international trade, particularly in the protection of appellations of origin and geographical indications, the revised Lisbon Agreement falls within the common commercial policy of the EU. As a consequence, the negotiation of the revised Lisbon Agreement falls within the exclusive competence of the Union. Therefore, the EU Commission has been authorized to open negotiations for a revised Lisbon Agreement on Appellations of Origin and Geographical Indications by the EU Council of Ministers.

Finally, the TRIPS Agreement of 1995 aimed to standardize the Intellectual Property (IP) regimes to all World Trade Organization (WTO) members. This expansive regulatory system applies to forms of IP as diverse as copyrights, trademarks, industrial designs, patents, and integrated circuit topographies. TRIPS also created an international system of GIs. Foods, drinks and agricultural products are certified as GIs if their positive qualities are believed to derive from the unique conditions of the specific locations from which they originate.<sup>23</sup> TRIPS Articles 22, 23, and 24 define GIs, provide the basis for protection, indicate the higher level of protection granted to wines and spirits, and explain the relationship between GIs and trademarks. Many European nations such as France, Greece, Italy, Portugal, and Spain have wholeheartedly embraced GIs while others like the United Kingdom are cautiously supportive. This suggests that the EU model should be an ideal target of analysis.<sup>24</sup>

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23) Matthew J. Rippon, *Traditional Foods, Territorial Boundaries and the TRIPS Agreement: The Case of the Melton Mowbray Pork Pie*, 16 J. WORLD INTELLECTUAL PROP. 262 (2013).

24) *Id.* at 263.



### III. From Lisbon to TRIPS to Protected Food Names

The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958) protects the name of goods that originate from defined places. Lisbon Article 2(1) defines these appellations 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>25</sup>

Lisbon protects “appellations of origin” rather than the considerably more vague “indications of source” recognized by the *Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods* (1891). An indication of source merely indicates that a good was created in a particular location whereas an appellation, by comparison, suggests a deeper connection between the attributes of a place (e.g. the soil, weather and climate) and the physical characteristics of the finished good.<sup>26</sup>

TRIPS Article 22(1) defines GIs as “indications which identify a good as originating in the territory of a [WTO] Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”<sup>27</sup>

Article 22 provides the goals: protecting consumers against being misled and protecting fair competition. The use of geographic indicators is equally prohibited by those who cannot use them and for misleading or deceiving purposes.<sup>28</sup>

One of the criticisms is that when disputes arise around these GIs, it will be the GI holders who will have to prove that the public was deceived or that unfair competition resulted from the incorrect use of those geographical indicators. This system of protection with such high protection costs will discourage the holders of these rights when it comes to claim against the unfair competitive uses of those marks. In this respect, Article 22 contrasts

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25) Lisbon Agreement, *supra* note 18, art. 2(1).

26) Rippon, *supra* note 23, at 264-65.

27) TRIPS, *supra* note 4, art. 22(1).

28) Jinghua Zou, *Rice and Cheese, Anyone? The Fight over Trips Geographical Indications Continues*, 30 BROOK. J. INT'L L. 1141, 1153 (2005).

with Article 23 that eliminates the burden of proof in the claimant.<sup>29</sup>

Article 22(3) determines the relationship between geographical indications and trademarks. A member of the agreement may, ex officio and if the legislation of that state allows it or at the request of an interested party, refuse or invalidate the registration of a trademark that contains or consists of a geographical indication concerning goods not coming from the mentioned territory if the use of that indication in a trademark for such goods is of such nature to mislead the public as to the true place of origin.

It may initially appear that TRIPS protect GIs even when they directly conflict with trademark law. However, this article should be read in conjunction with Article 24, which stipulates the exceptions to that statement that reads “continued and similar use of GIs for wines and spirits, prior and good faith trademark rights, and Generic designations.”<sup>30</sup>

Article 24.5 is a so-called “grandfather clause” that permits older trademark rights to subsist even when there is a conflict with a new geographical indication. The apparent contradiction (that first guarantees the supremacy of geographical indicators and then was carved out through exceptions) was the price paid to reach an agreement on TRIPS on this issue. The relationship between both rights can be synthesized in the fact that Article 24.5 only protects against future misappropriations and the previous ones will be unaltered.<sup>31</sup>

Article 24.6 of TRIPS establishes the obligation of the signatory countries to protect generic GIs. WTO countries can continue to use generic terms in their countries unless agreed otherwise in their FTAs. This was the gate used by the EU to seek enhanced protection in bilateral agreements such as the EU-Korea FTA or EU-Canada Comprehensive Economic and Trade Agreement (CETA). A GI under Article 22 has become generic when it is considered a valid GI in one member state, but is identical with the term customary in common language as the common name for a certain type of good in another country.

All the analysis in the protection and exceptions of Article 22 can be contrasted with the protection offered to wines and spirits in Article 23, which prohibits every kind of use of GIs regardless of whether it can be misleading

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29) Bruce A. Babcock & Roxanne Clemens, *Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products* 6 (Iowa State Univ., Working Paper No. 04-MBP 7, 2004).

30) RURAL DEVELOPMENT IN INDIA 208 (K.R. Gupta & Prasenjit Maiti eds., 2008).

31) Goldberg, *supra* note 15, at 122.

or result in unfair competition. It banned the use of GIs even with de-localizers in kind, like, type or indication of its real origin. Its protection is absolute and immediate, and it includes a notification and a registration system too.

As already mentioned, Articles 22-24 are very flexible and ambiguous and will be the root of problems and conflicts between the parties that negotiated its inclusion in the TRIPS. Firstly, because it was included as a proper intellectual property right at the same level of the others, patents, copyrights, its protection is neither uniform nor absolute.

Instead of harmonizing or unifying systems of protection, a bifurcation was created as an outcome. On one side, these countries more interested on GIs created an absolute system of protection, similar to the one granted in the TRIPS to wines, named in the EU as the *sui generis* protection system. On the other side, the countries less interested only adequately protect wines' and spirits' GIs while it is still debatable whether the remaining products were effectively protected or not. There are authors that claimed both ways.

Articles 22, 23 and 24 of TRIPS can be enacted through specific laws such as China's Regulation on Protection of Products of Geographical Indications (2005), India's Geographical Indication of Goods (Registration and Protection) Act (1999), or Thailand's Act on Protection of Geographical Indications (2003) (Kireeva and O'Connor, 2010). Geographical brands are protected in the US as certification marks and include "Florida Oranges," "Idaho Potatoes," "Napa Valley Wines," and "Washington State Apples." China, which appears to have a particularly complex GI system, protects place-based goods as certification marks and collective marks.<sup>32</sup>

There are two essential peculiarities in the TRIPS agreement that will give rise to many of the debates and conflicts that still operate until now.<sup>33</sup> First, it is a minimum agreement that will allow members to grant superior protection if they deem it appropriate.<sup>34</sup> Second, the members are left a wide margin of decision to determine the suitable way to implement the agreement into their legal traditions and practices,<sup>35</sup> which makes it very hard to enforce it.<sup>36</sup> This

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32) Wang Xiaobing & Irina Kireeva, *Protection of Geographical Indications in China: Conflicts, Causes and Solutions*, 10 J. WORLD INTELLECTUAL PROP. 79 (2007).

33) Kevin M. Murphy, *Conflict, Confusion, and Bias Under TRIPs Articles 22-24*, 19 AM. U. INT'L L. REV. 1181 (2003).

34) *Symposium on the International Protection of Geographical Indications*, WIPO/GEO/MVD/01/2 28-29 (2001).

35) Goldberg, *supra* note 15, at 107.

erodes its legitimacy and stability, although it was already affected ab initio, because the TRIPS and particularly its GIs provision Articles 22 to 24 are not so much a success story as they are the embodiment of a century-long dispute<sup>37</sup> because the agreement reached was the outcome of very delicate compromises, including bargaining with aspects of the GATT agreement.<sup>38</sup> The novelty of the TRIPS lies in the fact that it considers GIs as proper intellectual property rights and granted it with an unprecedented level of protection including an effective system of disputes.<sup>39</sup> Nevertheless, it does not cease to be a somewhat peculiar right, which can be perceived in the collectivity of its ownership, in the indetermination of its duration or in the fact of different levels of protection depending on the kind of goods that were established.<sup>40</sup>

In 1992, the EU ratified its Regulation 2081/92.<sup>41</sup> It is commonly known as the Protected Food Names (PFN) scheme and was ratified three years before TRIPS, but conforms to the WTO regulation. The Preamble to the Regulation invoked three general justifications:

- First, the PFN scheme was supposed to benefit the EU as a whole. Regulation 2081/92 was negotiated during the period in which European policy-makers discussed reform of the Common Agricultural Policy (CAP). The EU wanted to limit agricultural subsidies, which had encouraged over-production and replace them with a structure that promoted quality foods. The Regulation was also one component of the political quest to harmonize policy throughout the EU. Some nation-states had appellations systems; others did not. The PFN model would apply to all members.

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36) Conrad, *supra* note 13, at 22.

37) DEV GANGJEE, RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS 184 (2012).

38) Steven A. Bowers, *Location, Location, Location: The Case Against Extending Geographical Indication Protection Under the TRIPS Agreement*, 31 AIPLA Q. J. 129, 133 (2003).

39) Leigh Ann Lindquist, *Champagne or Champagne? An Examination of US Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT'L & COMP. L. 309, 319 (1998).

40) What is Intellectual Property Right?, WIPO, [www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf) (last visited Apr. 4 201).

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

- Second, it was designed to promote desirable foods, which would hopefully retail for high prices. Production of these types of food often occurs in rural areas, which suffer from the debilitating effects of out-migration. The manufacturer of protected foods would ideally encourage investment in these lagging localities.
- Third, Regulation 2081/92 was supposed to guarantee consumers that their foods were accurately labelled.

PFNs are certified as either Protected Designation of Origin (PDO) or Protected Geographical Indication (PGI) foods or drinks. Regulation 2081/92 was predicated on a combination of French and German law.<sup>42</sup> The French aspect—based on the national AOC scheme—privileges the “natural” qualities of the land. The German element, in contrast, protects the names of goods, which enjoy a positive reputation. The quality of these products does not have to result from the characteristics of the locations from which they originate. An associated piece of legislation, Regulation 2082/92 created the Traditional Speciality Guaranteed (TSG) scheme. TSG foods must be fabricated in an apparently traditional manner, but their quality derives from the methods used rather than the place of production. Foods registered under Regulations 2081/92 and 2082/92 are listed together as PFNs even though TSGs are not geographically based.

In the light of the experience gained from the implementation of Council Regulation (EEC) No 2081/92 of July 14, 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and Regulation (EC) No 510/2006, there was a need to address certain issues, which was to clarify and simplify some rules and to streamline the procedures of this scheme. Result of this reform is the current valid Regulation (EU) No 1151/2012 of the European Parliament and of the Council of November 21, 2012 on quality schemes for agricultural products and foodstuffs.<sup>43</sup>

The Regulation covers agricultural products intended for human consumption and other agricultural products and foodstuffs listed in Annex I to it. The objectives are set out in Article 1:

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42) Gangjee, *supra* note 37.

43) Regulation 1151/2012 of Nov. 21, 2012 on the Quality Schemes for Agricultural Products and Foodstuffs, 2012 O.J. (L 343) (EU).

1. This Regulation aims to help producers of agricultural products and foodstuffs to communicate the product characteristics and farming attributes of those products and foodstuffs to buyers and consumers, thereby ensuring:
  - (a) fair competition for farmers and producers of agricultural products and foodstuffs having value-adding characteristics and attributes;
  - (b) the availability to consumers of reliable information pertaining to such products;
  - (c) respect for intellectual property rights; and
  - (d) the integrity of the internal market.

The measures set out in this Regulation are intended to support agricultural and processing activities and the farming systems associated with high quality products, thereby contributing to the achievement of rural development policy objectives.

2. This Regulation establishes quality schemes which provide the basis for the identification and, where appropriate, protection of names and terms that, in particular, indicate or describe agricultural products with:
  - (a) value-adding characteristics; or
  - (b) value-adding attributes as a result of the farming or processing methods used in their production, or of the place of their production or marketing.

Article 5 states the requirements for designations of origin and geographical indications. Therefore, for the purpose of the Regulation, “designation of origin” is a name that identifies a product:

- (a) originating in a specific place, region or, in exceptional cases, a country;

- (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and
- (c) the production steps of which all take place in the defined geographical area.

“*Geographical indication*” is understood as a name that identifies a product:

- (a) originating in a specific place, region or country;
- (b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and
- (c) at least one of the production steps of which take place in the defined geographical area.

Finally, certain names shall be treated as designations of origin even though the raw materials for the products concerned come from a geographical area larger than, or different from, the defined geographical area, provided that:

- (a) the production area of the raw materials is defined;
- (b) special conditions for the production of the raw materials exist;
- (c) there are control arrangements to ensure that the conditions referred to in point (b) are adhered to; and
- (d) the designations of origin in question were recognized as designations of origin in the country of origin before May 1, 2004.

Only live animals, meat and milk may be considered as raw materials for the purposes of this paragraph.

A protected designation of origin or a protected geographical indication shall comply with a specification. Following Article 7, this specification shall include at least:

- (a) the name to be protected as a designation of origin or geographical indication, as it is used, whether in trade or in common language, and only in the languages which are or were historically used to describe the specific product in the defined geographical area;
- (b) a description of the product, including the raw materials, if appropriate, as well as the principal physical, chemical, microbiological or organoleptic characteristics of the product;
- (c) the definition of the geographical area delimited with regard to the link referred to in point (f)(i) or (ii) of this paragraph;
- (d) evidence that the product originates in the defined geographical area;
- (e) a description of the method of obtaining the product and, where appropriate, the authentic and unvarying local methods as well as information concerning packaging, if the applicant group so determines and gives sufficient product-specific justification as to why the packaging must take place in the defined geographical area to safeguard quality, to ensure the origin or to ensure control, taking into account Union law, in particular that on the free movement of goods and the free provision of services;
- (f) details establishing the following:
  - (i) the link between the quality or characteristics of the product and the geographical environment; or
  - (ii) where appropriate, the link between a given quality, the reputation or other characteristic of the product and the geographical origin;
- (g) the name and address of the authorities or, if available, the name and address of bodies verifying compliance with the provisions of the product specification and their specific tasks;
- (h) any specific labelling rule for the product in question.<sup>44</sup>

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44) *Id.*



## IV. EU Agricultural Product Quality Policy

Agricultural products produced in the EU reflect the rich diversity of different traditions and regions in Europe. To help protect and promote products with particular characteristics linked to their geographical origin as well as traditional products, the EU created quality logos named “Protected Designation of Origin,” “Protected Geographical Indication,” and “Traditional Speciality Guaranteed.”

### A. EU Quality Schemes for Agricultural Products<sup>45</sup>

Through the EU quality schemes, the common agriculture policy (CAP) provides tools to help highlight the qualities and tradition associated with registered products and to assure consumers that these are genuine products and not imitations seeking to benefit from the good name and reputation of the original. As a result, these schemes and their logos help producers/groups of producers market their products better while providing them legal protection from misuse or falsification of a product name. In broader terms, GIs are part of the wider intellectual properties rights.

In concrete terms, the EU product quality schemes relate to *agricultural products and foodstuffs, wines, spirits and aromatized wines*, which producers or producer groups have registered according to the rules. The EU promotes quality schemes with campaigns such as "Tastes of Europe." There are also a number of optional quality terms and separate rules on organic farming.

A product name identified as a *geographical indication* is one that is closely linked to a specific production area. This concept encompasses protected designations of origin (PDOs) and protected geographical indications (PGIs) for foods and wines, while spirits and aromatized wines have geographical indications.

PDO identifies products that are produced, processed, and prepared in a specific geographical area using the recognized know-how of local producers and ingredients from the region concerned. These are products whose characteristics are linked to their geographical origin. They must adhere to a precise set of specifications and may bear the PDO logo below.

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45) *Id.*



Examples: Bordeaux PDO (France, wine), Cava PDO (Spain, wine), Manouri PDO (Greece, cheese), Tiroler Bergkäse PDO (Austria, cheese), Prés-salés du Mont-Saint-Michel PDO (France, fresh meat product) or Pistacchio verde di Bronte PDO (Italy, fruit).<sup>46</sup>

PGI identifies products whose quality or reputation is linked to the place or region where it is produced, processed, or prepared, although the ingredients used need not necessarily come from that geographical area. All PGI products must also adhere to a precise set of specifications and may bear the logo below.



Examples: Liliputas PGI (Lithuania, cheese), Gofio canario PGI (Spain, cereals product), Walbecker Spargel PGI (Germany, vegetable), České pivo PGI (Czech Republic, beer), Lammefjordskartofler PGI (Denmark, vegetable) or Primorska PGI (Slovenia, wine).<sup>47</sup>

Finally, there is also a third label known as the traditional speciality guaranteed (TSG), which is not a geographical indication, but focuses the spotlight on tradition. TSG identifies products of a traditional character, either in the composition or means of production, without a specific link to a particular geographical area.

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46) *EU Quality Logos*, EUROPEAN COMMISSION, [https://ec.europa.eu/agriculture/quality/schemes\\_en](https://ec.europa.eu/agriculture/quality/schemes_en) (last visited Apr. 6, 2018).

47) *Id.*



Examples: Kriek TSG (Belgium, beer), Hollandse maatjesharing TSG (Netherlands, fish product), File Elena TSG (Bulgaria, meat product) or Prekmurska gibanica TSG (Slovenia, cake).<sup>48</sup>

Names and details of products registered – there are more than 3,300 – under the different schemes are additionally listed in the following databases:

- DOOR ("Database Of Origin & Registration") includes product names for foodstuffs registered as Protected Designation of Origin (PDO), Protected Geographical Indication (PGI), and Traditional Specialties Guaranteed (TSG) as well as names for which registration has been applied.
- E-BACCHUS is the database on geographical indications protected in the European Union for wines originating in member states and third countries.
- E-SPIRIT DRINKS is a database on geographical indications protected in the European Union for spirit drinks originating in member states and third countries as well as new applications for protection.

Quality schemes are backed by EU marketing standards (Council Regulation (EC) No 1234/2007) laying down product definitions and categories, minimum characteristics, and labelling requirements to be respected on the EU single market.<sup>49</sup>

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48) *Id.*

49) Council Regulation 1234/2007 of Oct. 22, 2007, Establishing a Common Organisation of Agricultural Markets and on Specific Provisions for Certain Agricultural Products, 2007 O.J. (L 299) (EC).

## B. EU Quality Logos

The above-presented three quality logos attest to the specific traditions and qualities of food, agricultural products, wines, aromatized wines, and spirit drinks produced in the EU or in other countries. Two of the logos, the PDO and PGI, have a specific link to the region where the product comes from while the third one, the TSG logo, highlights a traditional production process. Food products are eligible for all three logos: PDO, PGI and TSG. Wine is eligible for PDO and PGI while spirit drinks and aromatized wines qualified for PGI recognition.<sup>50</sup>

Through these logos, consumers can easily recognize these traditional quality products and can rely on their authenticity in terms of regional origin or traditional production. Indeed, as well as providing a useful marketing tool in the EU and on other markets, registration under these schemes provides producers with legal protection against imitation or misuse of the product name.

## C. Foodstuff and Agricultural Products

Foodstuff products, which have specific characteristics such as traditional production methods or characteristics attributable to a specific region, may be also granted the EU quality logo.<sup>51</sup>

Foodstuff producers have to, therefore, join forces as a group and agree on the specifications for their product before applying for one of the EU quality logos: “Protected Designation of Origin” (PDO), “Protected Geographical Indication” (PGI), or “Traditional Speciality Guaranteed” (TSG). In order to register their product, the product specification must be in line with the requirements outlined in the Regulation (EU) No 1151/2012.

The Protected Designation of Origin (PDO) logo underlines the strongest link to the territory requiring that all aspects of production, processing, and preparation originate from that region. For example, Kalamata olive oil PDO is entirely produced in the region of Kalamata in Greece, using olive varieties from that area.

The Protected Geographical Indication (PGI) logo underlines the local

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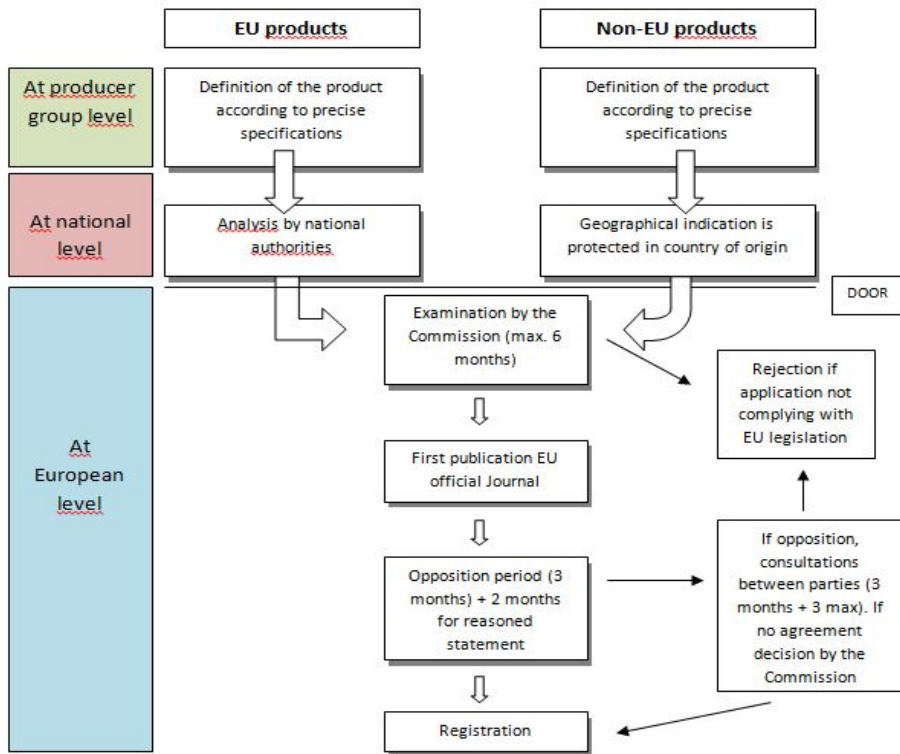
50) *EU Quality Logos*, *supra* note 46.

51) *Foodstuff and Agricultural Products*, EUROPEAN COMMISSION, [https://ec.europa.eu/agriculture/quality/schemes/foodstuff\\_en](https://ec.europa.eu/agriculture/quality/schemes/foodstuff_en) (last visited Apr. 6, 2018).

know how and the close link between a product and the place or region. For registered products, at least one of the stages of production, processing, or preparation takes place in the region, but the ingredients need not necessarily come from that geographical area. For example, Westfälischer Knochenschinken PGI ham is produced in Westphalia using age-old techniques, but the meat used does not originate exclusively from animals born and reared in that geographical area.

On the other hand, the Traditional Speciality Guaranteed (TSG) is not linked to the territory and focuses the spotlight on tradition. The Traditional Speciality Guaranteed (TSG) logo highlights the traditional production method or composition of a product handed down from generation to generation without necessarily being linked to a specific geographical area. For example, Gueuze TSG is a traditional beer, which is obtained by spontaneous fermentation. It is generally produced in and around Brussels.

The following graphic shows the procedure to register a product under this scheme:



## D. Wines<sup>52</sup>

Wines with specific characteristics attributable to a specific region can be registered under the EU's quality logos "Protected Designation of Origin" (PDO) and "Protected Geographical Indication" (PGI). Products have to respond to the specifications outlined in Regulation (EU) No 1308/2013.

The Protected Designation of Origin (PDO) identifies a wine from a region, a specific place, or, in exceptional cases, a country, whose quality and characteristics are essentially or exclusively due to particular inherent natural and human factors, i.e. to its geographical environment. The grapes have to come exclusively from that geographical area where the production also takes place. The product is obtained from vine varieties belonging to *vitis vinifera*.

The Protected Geographical Indication (PGI) identifies a wine from a specific place, or, in exceptional cases, a country, whose specific quality, reputation, or other characteristics are attributable to that geographical origin. At least 85% of the grapes used have to come exclusively from that geographical area where production takes place. The wine has to be obtained from vine varieties belonging to *vitis vinifera* or a cross between the *vitis vinifera* species and other species of the genus *vitis*.

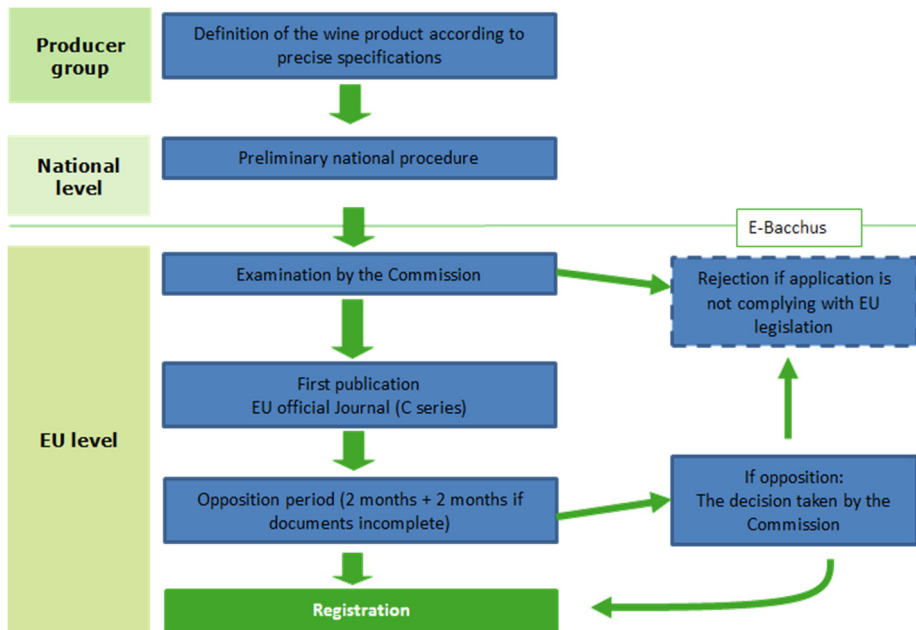
Some traditionally used names for wines might, under certain conditions, constitute a designation of origin.

To register a wine name, products have to respond to the specifications outlined in Regulation (EU) No 1308/2013.<sup>53</sup> The procedure can be shown as follows:

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52) *Wines*, EUROPEAN COMMISSION, [https://ec.europa.eu/agriculture/quality/schemes/wines\\_en](https://ec.europa.eu/agriculture/quality/schemes/wines_en) (last visited Apr. 6, 2018).

53) Regulation 1308/2013 of Dec. 17, 2013, Establishing a Common Organisation of the Markets in Agricultural Products and Repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, 2013 O.J. (L 347) (EU).



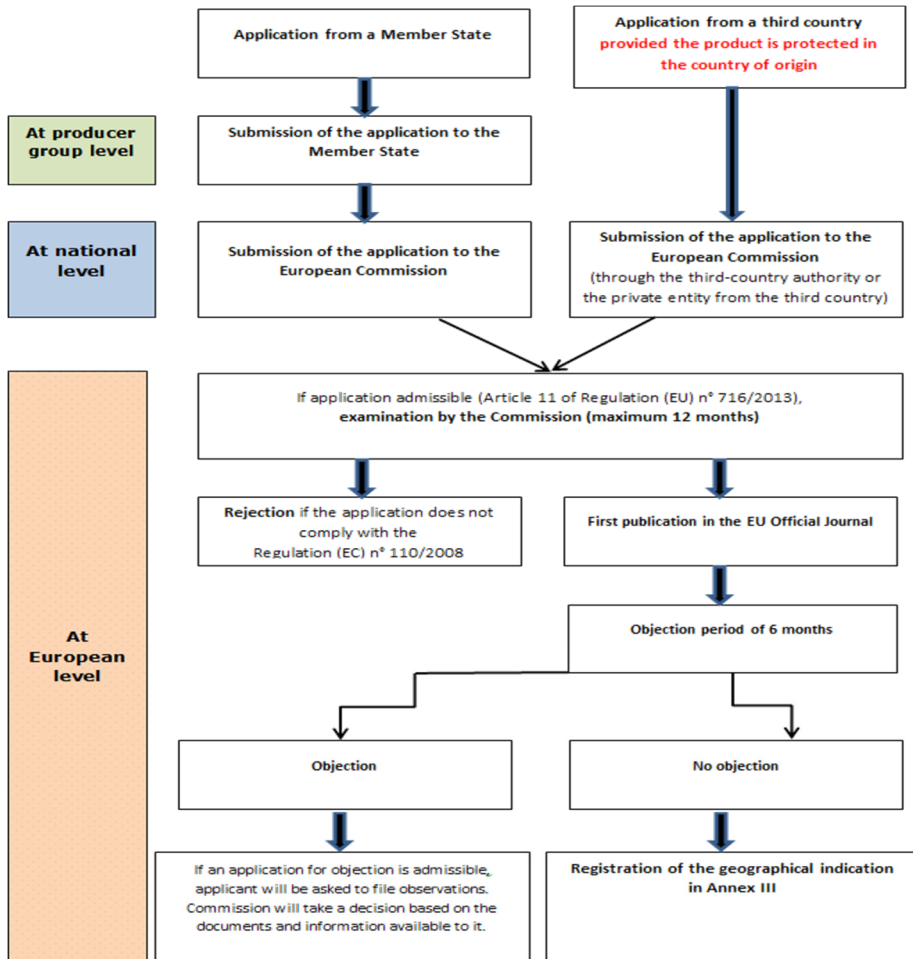
[http://ec.europa.eu/agriculture/sites/agriculture/files/agriculture/quality/schemes/graph-wine\\_en.png](http://ec.europa.eu/agriculture/sites/agriculture/files/agriculture/quality/schemes/graph-wine_en.png)

## E. Spirit Drinks

Spirit drinks such as Cognac, Scotch whisky, Polish vodka, or Brandy de Jerez can hold the logo “Protected Geographical Indication” (PGI).

The geographical indication identifies a spirit drink as originating within the territory of a country where a given quality, reputation, or other characteristic is attributable to its geographical origin. There are 46 categories of spirit drinks with different qualities. The spirit drinks can bear the logo, provided they comply with the Regulation (EC) No 110/2008.<sup>54</sup>

54) Regulation 110/2008 of Jan. 15, 2008 on the Definition, Description, Presentation, Labelling and the Protection of Geographical Indications of Spirit Drinks and Repealing Council Regulation (EEC) No 1576/89, 2008 O.J. (L 39) (EC).



[https://ec.europa.eu/agriculture/sites/agriculture/files/agriculture/quality/schemes/grph-spirit-drinks\\_en.png](https://ec.europa.eu/agriculture/sites/agriculture/files/agriculture/quality/schemes/grph-spirit-drinks_en.png)



## **V. Various Methods for Protection**

### **A. Protection and Control**

Registered names of GIs are legally protected against imitation and misuse. Controls and legal actions against misuse of GIs are carried out by national authorities. Contrary to other intellectual property rights such as trademarks or patents, GIs are available to all producers whose products originate in a defined geographical area and comply with the specifications set out for the GI.<sup>55</sup>

The legal concept of a “geographical indication” is a way of providing legal protection against imitation for food and agricultural products. Protection through geographical indications focuses on preventing the misuse of names, which could mislead consumers as to the origin of agriculture products and their quality or characteristics.

Member states take administrative or judicial measures to prevent or stop the unlawful use of geographical indications that are produced or marketed in their territories. The competent authorities of member states carry out controls to verify the compliance of product specification and to monitor the market in order to detect possible cases of usurpation. When the national competent authority identifies non-compliance, it takes action to ensure that the operator remedies the situation by taking appropriate administrative or judicial measures.

Outside the EU territory, EU GIs are protected only if and insofar such names are covered by an international agreement. Therefore, outside the EU, the protection of each geographical indication depends on which country is taken into consideration.

### **B. Optional Quality Terms, Voluntary Certification Schemes & Third Country Agreements**

Finally, optional quality terms help farmers to market products made in difficult natural conditions, such as mountainous regions or islands, while others are used to promote local farming and direct sales. Voluntary certification schemes at the national level or those run by private operators can also help consumers be confident about the quality of the products they choose. The EU

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55) *Protection and Control*, EUROPEAN COMMISSION, [https://ec.europa.eu/agriculture/quality/schemes/ipr\\_en](https://ec.europa.eu/agriculture/quality/schemes/ipr_en) (last visited Apr. 6, 2018).

also has numerous agreements with many other countries guaranteeing the protection of certain products.<sup>56</sup>

Existing quality terms include:

- *Mountain product*: In order to use this term, the products' raw materials and the animal feed used must come essentially from mountain areas, while production for processed products should generally take place in such areas.<sup>57</sup> The legal basis, therefore, is the Commission Delegated Regulation (EU) No 665/2014<sup>58</sup> supplementing Regulation (EU) No 1151/2012.
- *Product of EU's outermost regions (French Overseas Departments - Guadeloupe, French Guiana, Réunion and Martinique- and the Azores, Madeira and the Canary Islands)*: Outermost regions face difficulties relative to regions in mainland Europe from their remoteness and insularity, including difficult geographical and meteorological conditions. With a view of ensuring greater awareness and consumption of quality agricultural products, whether natural or processed that is specific to these outermost regions, a graphic symbol (logo) was introduced in 2006. The regulation sets out specific measures in the agricultural sector to remedy the difficulties caused by the specific situation facing the Union's outermost regions. Relevant legal basis are Regulation (EU) No 228/2013<sup>59</sup> and Commission Regulation No 793/2006.<sup>60</sup>

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56) *Optional Quality Terms, Voluntary Certification Schemes & Third Country Agreements*, EUROPEAN COMMISSION, [https://ec.europa.eu/agriculture/quality/optional-voluntary-certification\\_en](https://ec.europa.eu/agriculture/quality/optional-voluntary-certification_en) (last visited Apr. 6, 2018).

57) Fabien Santini, Fatmir Guri & Sergio Gomez y Paloma, *Labelling of Agricultural and Food Products of Mountain Farming*, EUROPEAN COMMISSION, [https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2013/mountain-farming/fulltext\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2013/mountain-farming/fulltext_en.pdf).

58) Commission Delegated Regulation 665/2014 of Mar. 11, 2014, Supplementing Regulation (EU) No 1151/2012 of the European Parliament and of the Council with Regard to Conditions of Use of the Optional Quality Term 'Mountain Product,' 2014 O.J. (L 179) (EU).

59) Regulation 228/2013 of Mar. 13, 2013, Laying Down Specific Measures for Agriculture in the Outermost Regions of the Union and Repealing Council Regulation (EC) No 247/2006, 2013 O.J. (L 78) (EU).

60) Commission Regulation 793/2006 of Apr. 12, 2006, Laying Down Certain Detailed Rules for Applying Council Regulation (EC) 247/2006 Laying Down Specific measures for Agriculture in the Outermost Regions of the Union, 2006 O.J. (L 145) (EC).

Furthermore, the EU carried out a review of options to introduce labels for:

- *Local farming and direct sales:* The European Commission published, on December 6, 2013, a report on the case for a local farming and direct sales labelling scheme.<sup>61</sup> The report points out the main features of local farming, short food supply chains, and direct sales in the EU and explores the possibilities of adopting a labelling scheme for these local food systems.
- *Island farming:* The European Commission adopted, on December 16, 2013, a report on the case for an optional quality term "product of island farming"<sup>62</sup> analyzing whether establishing a new term "product of island farming" would add value to island product as compared to similar ones, outlining advantages and drawbacks.

### **C. Voluntary Certification Schemes**

In addition to these EU schemes, a large number of private and national food quality schemes or logos exists covering a wide range of initiatives, such as "Fair Trade" and operating between businesses (B2B) or between businesses and consumers (B2C). Already in 2010, an inventory compiled for the European Commission counted 441 schemes for agricultural products and foodstuffs marketed in the EU.

### **D. Third-Country Agreements**

A growing number of countries have their GIs protected in the EU through bilateral or regional agreements.

As of May 2017, the names of 1,531 products have been protected from the following countries: Albania, Australia, Bosnia Herzegovina, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Liechtenstein, Moldova, Montenegro, Panama, Peru, Serbia, South Africa,

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61) *Report from the Commission to the European Parliament and the Council on the Case for a Local Farming and Direct Sales Labelling Scheme*, COM (2013) 866 final (Dec. 13, 2013).

62) *Report from the Commission to the European Parliament and the Council on the Case for an Optional Quality Term 'Product of Island Farming.'* COM (2013) 888 final (Dec. 16, 2013).

South Korea, Switzerland, United Mexican States, Ukraine, and the USA.

The protected names cover a wide range of products: wine, food, aromatized wines, and spirit drinks.<sup>63</sup>

In the case of Korea, the list includes the following under the EU-South Korea FTA.<sup>64</sup>

Name of 3rd country GI protected in EU	Transcription (if exists)	Applicable date of Protection EU	Sector	Class
보성녹차	Boseong Nokcha	01/07/2011	FOOD	Green Tea
하동녹차	Hadong Nokcha	01/07/2011	FOOD	Green Tea
고창복분자주	Gochang Bokbunjaju	01/07/2011	FOOD	Black Raspberry Wine
서산마늘	Seosan Maneul	01/07/2011	FOOD	Garlic
영양고춧가루	Yeongyang Gochutgaru	01/07/2011	FOOD	Red Pepper Powder
의성마늘	Uiseong Maneul	01/07/2011	FOOD	Garlic
괴산고추	Goesan Gochu	01/07/2011	FOOD	Red Pepper
순창전통고추장	Sunchang Jeontong Gochujang	01/07/2011	FOOD	Gochujang
괴산고춧가루	Goesan Gochutgaru	01/07/2011	FOOD	Red Pepper Powder
성주참외	Seongju Chamoe	01/07/2011	FOOD	Oriental Melon
해남겨울배추	Haenam Gyeoul Baechu	01/07/2011	FOOD	Chinese Cabbage
이천쌀	Icheon Ssal	01/07/2011	FOOD	Rice
철원쌀	Cheorwon Ssal	01/07/2011	FOOD	Rice
고흥유자	Goheung Yuja	01/07/2011	FOOD	Citron
홍천찰옥수수	Hongcheon Charoksusu	01/07/2011	FOOD	Waxy Corn
강화약쑥	Ganghwa Yakssuk	01/07/2011	FOOD	Mugwort
횡성한우고기	Hoengseong Hanwoogogi	01/07/2011	FOOD	Beef
제주돼지고기	Jeju Dwaejigogi	01/07/2011	FOOD	Pork
고려홍삼	Goryeo Hongsam	01/07/2011	FOOD	Red Ginseng
고려백삼	Goryeo Baeksam	01/07/2011	FOOD	White Ginseng
고려태극삼	Goryeo Taekuksam	01/07/2011	FOOD	Taekuk Ginseng

63) *List of 3C GI Protected in EU*, OFFICIAL J. EU (May 31, 2017), [https://ec.europa.eu/agriculture/sites/agriculture/files/quality/documents-links/pdf/list-gis\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/quality/documents-links/pdf/list-gis_en.pdf) (last visited Mar. 1, 2018).

64) *Id.* at 14-16.

Name of 3rd country GI protected in EU	Transcription (if exists)	Applicable date of Protection EU	Sector	Class
영주사과	Chungju Sagwa	01/07/2011	FOOD	Apple
밀양얼음골사과	Miryang Eoreumgol Sagwa	01/07/2011	FOOD	Apple
정선황기	Jeongseon Hwanggi	01/07/2011	FOOD	Milk Vetch Root
남해마늘	Namhae Maneul	01/07/2011	FOOD	Garlic
단양마늘	Danyang Maneul	01/07/2011	FOOD	Garlic
창녕양파	Changnyeong Yangpa	01/07/2011	FOOD	Onion
무안양파	Muan Yangpa	01/07/2011	FOOD	Onion
여주쌀	Yeoju Ssal	01/07/2011	FOOD	Rice
무안백련차	Muan Baengnyeoncha	01/07/2011	FOOD	White Lotus Tea
청송사과	Cheongsong Sagwa	01/07/2011	FOOD	Apple
고창복분자	Gochang Bokbunja	01/07/2011	FOOD	Black Raspberry
광양매실	Gwangyang Maesil	01/07/2011	FOOD	Apricot
정선찰옥수수	Jeongseon Charoksusu	01/07/2011	FOOD	Waxy Corn
진부당귀	Chinbu Dangui	01/07/2011	FOOD	Angelica Gigas Nakai Root
고려수삼	Goryeo Susam	01/07/2011	FOOD	Fresh Ginseng
청양고추	Cheongyang Gochu	01/07/2011	FOOD	Red Pepper
청양고춧가루	Cheongyang Gochutgaru	01/07/2011	FOOD	Red Pepper Powder
해남고구마	Haenam Goguma	01/07/2011	FOOD	Sweet Potato
영암무화과	Yeongam Muhwagwa	01/07/2011	FOOD	Fig
여주고구마	Yeoju Goguma	01/07/2011	FOOD	Sweet Potato
함안수박	Haman Subak	01/07/2011	FOOD	Watermelon
고려인삼제품	Goryeo Insamjepum	01/07/2011	FOOD	White or Taekuk Ginseng Products
고려홍삼제품	Goryeo Hongsamjepum	01/07/2011	FOOD	Red Ginseng Products
군산찰쌀보리쌀	Gunsan	01/07/2011	FOOD	Barley

Name of 3rd country GI protected in EU	Transcription (if exists)	Applicable date of Protection EU	Sector	Class
	Chalssalborissal			
제주녹차	Jeju Nokcha	01/07/2011	FOOD	Green Tea
홍천한우	Hongcheon Hanwoo	01/07/2011	FOOD	Beef
양양송이버섯	Yangyang Songibeoseot	01/07/2011	FOOD	Pine-mushroom
장흥표고버섯	Jangheung Pyogobeoseot	01/07/2011	FOOD	Oak-mushroom
산청곶감	Sancheong Gotgam	01/07/2011	FOOD	Persimmon Dried
정안밤	Jeongan Bam	01/07/2011	FOOD	Chestnut
울릉도삼나물	Ulleungdo Samnamul	01/07/2011	FOOD	Aruncus Dioicus
울릉도미역취	Ulleungdo Miyeokchwi	01/07/2011	FOOD	Golden rod
울릉도참고비	Ulleungdo Chamgobi	01/07/2011	FOOD	Fern
울릉도부지갱이	Ulleungdo Bujigaengi	01/07/2011	FOOD	Aster
경산대추	Gyeongsan Daechu	01/07/2011	FOOD	Jujube (date)
봉화송이	Bonghwa Songi	01/07/2011	FOOD	Pine-mushroom
청양구기자	Cheongyang Gugija	01/07/2011	FOOD	Boxthorn
상주곶감	Sangju Gotgam	01/07/2011	FOOD	Persimmon Dried
남해창선고사리	Namhae Changsun Gosari	01/07/2011	FOOD	Fern
영덕송이	Yeongdeok Songi	01/07/2011	FOOD	Pine-mushroom
구례산수유	Gurye Sansuyu	01/07/2011	FOOD	Corni fructus
광양백운산	Gwangyang baekunsan Gorosoe	01/07/2011	FOOD	Sap
진도홍주	Jindo Hongju	01/07/2011	SPIRIT DRINKS	Spirits

## E. EU-GI Protection in Preferential Trade Agreements

The EU believes that protection and enforcement of EU intellectual property rights, especially geographic indications, is a key element of its

global competitiveness. As such, one of the EU's stated objectives is to see the high level of IPR protection available in the EU respected by third countries. It pursues this objective at the multilateral level working with WTO and TRIPS, lobbying that the greater protection accorded to wines and spirits be extended to agricultural products and foods. The EU also wants to create a multilateral register for geographic indications. A third goal of the EU is the multilateral acceptance and enforcement of a select list of European GIs, which would entail the revocation of prior conflicting trademarks and the clawing back of EU GIs that have become generic in third countries; thereby, negating the exceptions provided in TRIPS Article 24.<sup>65</sup> As the latter has not been well received at the multilateral level, the EU is pursuing its Article 24 objectives through bilateral and regional trade agreements.<sup>66</sup>

The EU strategy of protecting European GI's through preferential trade agreements has established a pattern of EU demands in their trade agreement negotiations. It has sought and achieved significant and substantial protection of wine and spirit names as well as oenological practices in many of its preferential trade agreements. Through standard practice in its preferential trade agreements, the EU has also successfully exported its particular laws pertaining to a specific protected GI to the bilateral trade partner who must then defend those European GI measures in their country. All of the EU's preferential trade agreements subject the use of protected GIs to the legal regime from which the respective GIs originate.<sup>67</sup> For example, the EU domestic legislation stipulating that trademarks conflicting with a limited list of wine GIs may not be used or may only be used until December 31, 2002, which has been technically adopted or *imported* by the EU's preferential trade agreement partner.<sup>68</sup>

The EU has also integrated a reciprocal obligation upon the parties to

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65) CRINA VIJU, MAY T. YEUNG & W. A. KERR, GEOGRAPHICAL INDICATIONS, BARRIERS TO MARKET ACCESS AND PREFERENTIAL TRADE AGREEMENT 16 (2012), <http://www.uoguelph.ca/catprn/PDF-CP/CP-2012-01-viju-yeung-kerr.pdf>.

66) May T. Yeung & William A. Kerr, *Increasing Protection of GIs at the WTO: Clawbacks, Greenfields and Monopoly Rents* (CATPRN, Working Paper No. 2008-2, 2008), <https://ageconsearch.umn.edu/bitstream/43459/2/CATPRN%20Working%20Paper%20WP%2008-02%20Kerr.pdf>.

67) VIJU ET AL., *supra* note 65, at 17.

68) David Vivas-Eugui & Christoph Spennemann, *The Treatment of Geographical Indications in Recent Regional and Bilateral Free Trade Agreements* in THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW, ECONOMICS AND POLITICAL ECONOMY 305 (Meir Perez Pugatch ed., 2006).

several of its preferential trade agreements, which bestows automatic protection upon particular GIs listed in Annexes to the Agreements. This obliges the parties to extend automatic protection to each other's GIs without the discretion to examine them under the TRIPS parameters for the protection of GIs. Under TRIPS, the parties have the discretion to examine the GI for eligibility under TRIPS Article 22.1.<sup>69</sup> The EU has eliminated this discretion in its preferential trade agreements for the GI names listed in Annexes to their Agreements. Vivas-Eugui and Spennemann's (2006) analysis of the EU-Mexico Agreement's wording concludes that despite the absence of the words *reciprocal* or *mutual* which were contained in prior preferential trade agreements, automatic protection is still granted in the EU-Mexico Agreement. The text for the EU-Korea Agreement is very similar to the EU-Mexico agreement. Thus, it could be deductively inferred that automatic protection has also been afforded in the EU-Korea Agreement.<sup>70</sup>

While the texts for the EU-Korea and EU-Mexico Agreements are similar, their motivations and GI coverage differ substantially. The EU-Mexico Agreement, signed in 2000, was sought by the EU as a means to counter trade diversion occurring subsequent to the conclusion of NAFTA when the EU's trade with Mexico plummeted.<sup>71</sup> The EU-Mexico Agreement was negotiated in order to gain NAFTA-equivalent access to Mexico's market; legally, it is an Economic Partnership Agreement that incorporated an existing bilateral agreement extending the EU's protected GI coverage only to spirits (as was typical of many of the EU's bilateral agreements at that time, which protected either or both wines and spirits only). The sectoral agreement, signed in 1997, extends recognition and protection of designation for EU and Mexican spirits. Of the substantial list of protected spirits, Mexico protected only two – Tequila and Mezcal. The EU-Mexico FTA does not contain protection for any GIs other than spirits, likely because at the time, the EU was not as stringently seeking protection of European GIs and because this agreement was mainly to halt trade diversion due to NAFTA.<sup>72</sup>

The Economic Partnership Agreement contains provisions to revisit geographic indications, but it does not appear to have occurred. Discussions addressing GIs occurred at the annual IPR Special Committee meeting where

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69) GIOVANNUCCI ET AL., *supra* note 10.

70) VIJU ET AL., *supra* note 65, at 17.

71) Stephen Woolcock, *European Union Policy Towards Free Trade Agreements* (ECIPE, Working Paper No. 03/2007, 2007).

72) VIJU ET AL., *supra* note 65, at 17.



the Mexican Institute for Intellectual Property (IMPI) has agreed on several occasions to address specific GI problems. These bilateral discussions appear effective in solving GI related irritants, for as of the end of 2011, there had not been any issues arising in the EU-Mexico Agreement pertaining to GIs that have been taken to WTO DSP.<sup>73</sup>

In contrast, the EU-Korea FTA is the EU's first to extend the EU's protected GI coverage beyond wines and spirits to agricultural products and foodstuffs including meat and dairy products, fish, fruit, vegetables, beer, beverages from plant extracts, pasta, bread, pastry, cakes, confectionary and other bakers wares. Korea has included 63 food products (mostly teas, rice and spices) and 1 wine as protected GIs while the EU has listed 60 food products and 105 wines/spirits as protected GIs in the EU-Korea FTA as of October 2010. The EU Korea FTA is one focusing on a greater commercial assertiveness with less emphasis on developmental, political, or cooperation goals.<sup>74</sup>

The EU has also been successful at *clawing back* as GIs terms have become generic in the markets of preferential trade agreement partners, negating the exceptions to protection provided for in TRIPS Article 24.<sup>75</sup> Furthermore, the EU typically includes provisions for creation of a registration system for GIs in its preferential trade agreements. The EU has systematically sought and regularly achieved the pre-eminence of its GIs over similar or identical trademarks in a number of its recent trade agreements. Any trademark registration that is similar or identical to an existing EU GI cannot be registered, but conversely, a conflicting GI could be registered despite the prior existence of a similar or identical trademark. An existing trademark for a product included on the lists annexing the EU's preferential trade agreements that conflict with an EU GI must be cancelled within a specified time frame, regardless of compliance with TRIPS Article 24.5. Once registered, a GI cannot become generic and override prior and subsequent trademarks. The trademark owner is also subordinate to anyone who uses a conflicting registered GI in good faith. The EU GI system permits a trademark to coexist with a protected GI when the trademark is applied for, registered, or

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73) VIJU ET AL., *supra* note 65, at 18.

74) Iana Dreyer, *What the EU South Korea Free Trade Agreement Reveals About the State of EU Trade Policy*, ECIPE (Jan. 7, 2010, 2:15 PM), <http://www.ecipe.org/blog/what-the-eu-south-korea-free-trade-agreement-reveals-aboutthe-state-of-eu-trade-policy> (last visited Apr. 14, 2018).

75) Yeung et al., *supra* note 66.

established by use only under two conditions: the first is if it existed prior to the GI becoming protected in the country of origin, and the second is if it was in place prior to the cut-off date of Jan 1, 1996 (even if this date is subsequent to the date the GI was granted protection in the country of origin).<sup>76</sup> In other words, the EU's GIs have TRIPS-plus priority rights over both previous and subsequent trademarks and a GI that follows an already-registered trademark can be refused under the TRIPS/ trademark system but accepted by the EU's GI system.

The EU also places additional restrictions on 'traditional expressions' or names with an associated production method in its trade agreements, despite their not necessarily having a geographic link to an area, which disqualifies them as GIs under TRIPS definitions.<sup>77</sup> The EU designates these 'traditional expressions' as "Traditional Specialty Guaranteed" (TSG). Such a designation means that a product must be traditional or established by custom (for at least one generation or 25 years), with uniquely distinguishing characteristics from other agri-food products. TSGs may have geographic affiliations but can be produced anywhere, subject to appropriate controls, thus, they are not a true form of GI. Haggis, mozzarella, ice wine, or eiswein are common examples. Due to a lack of legal designations for such foods or traditions elsewhere, adequate systems to protect TSGs outside of the EU are rare, and consumers in most countries are left to their own devices in determining the authenticity of such products.<sup>78</sup>

## 1. GIs within the EU-Korean FTA<sup>79</sup>

Building on the TRIPS (trade-related aspects of intellectual property rights) Agreement, the FTA gives a legal framework to basic rules in the EU and in Korea for the protection of intellectual property rights and enforcement of such protection. The FTA establishes mechanisms for exchange and cooperation. It sets standards of protection for intellectual property rights,

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76) Thitapha Wattanapruttipaisan, *Trademarks and Geographical Indications: Policy Issues and Options in Trade Negotiations and Implementation*, 26 *ASIAN DEV. REV.* 166 (2009).

77) GIOVANNUCCI ET AL., *supra* note 10.

78) VIJU ET AL., *supra* note 65, at 19.

79) Council Decision 2011/265 of Sept. 16, 2010 on the Signing on Behalf of the European Union, and Provisional Application of the Free Trade Agreement Between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part, 2011 O.J. (L 127) (EU).

such as the protection of authors' work for duration of 70 years after the death of the author and the right to a single equitable remuneration for performers and producers of phonograms.

The FTA ensures that procedures for registering trademarks in the EU and Korea follow certain rules, such as the possibility of opposition by interested parties and the availability of a public electronic database of applications and registrations. It details the rights conferred on registered and unregistered designs. The FTA gives guarantees for the protection of data submitted to obtain marketing authorization for pharmaceutical and for plant protection products and provides protection for a number of European and Korean GIs.

The FTA details enforcement measures to be applied in Korea and in the EU to ensure effective action against infringement of the protection granted to intellectual property rights. This includes minimum rules on civil and administrative proceedings and criminal procedures and penalties in certain cases. The FTA provides that online service providers are not liable under certain conditions where services of intermediaries are used by third parties for infringing activities. The FTA also foresees that measures can be taken at the border upon request or by the authorities where it is suspected that goods infringing an intellectual property right may be imported, exported, or placed under other customs procedures mentioned in the FTA.

Sub-section C of the EU-Korea FTA is headed GIs. Footnote 51 states:

Geographical indication' in this Sub-section refers to:

- (a) geographical indications, designations of origin, quality wines produced in a specified region and table wines with geographical indication as referred to in Council Regulation (EC) No 510/2006 of March 20, 2006; Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008; Council Regulation (EEC) No 1601/1991 of June 10, 1991; Council Regulation (EC) No 1493/1999 of May 17, 1999; and Council Regulation (EC) No 1234/2007 of October 22, 2007, or provisions replacing these regulations; and
- (b) geographical indications as covered by the Agricultural Products Quality Control Act (Act No. 9759, Jun. 9, 2009) and the Liquor Tax Act (Act No. 8852, Feb. 29, 2008) of Korea.

The geographical indications of the EU listed in Annex 10-B of the FTA shall be protected in Korea for those products that use these geographical indications in accordance with the relevant laws of the EU on geographical indications. On the other hand, in the EU, the geographical indications of Korea listed in Annex 10-B shall be protected for those products that use these geographical indications in accordance with the relevant laws of Korea on geographical indications.

The Scope of this protection covers the protection of these geographical indications against:

- (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
- (b) the use of a geographical indication identifying a good for a like good ( 56 ) not originating in the place indicated by the geographical indication in question, even where the true origin of the good is indicated or the geographical indication is used in translation or transcription or accompanied by expressions such as ‘kind,’ ‘type,’ ‘style,’ ‘imitation’ or the like; and
- (c) any other use which constitutes an act of unfair competition within the meaning of Article 10 bis of the Paris Convention.<sup>80</sup>

Article 10.24 of the FTA fixes the procedures for adding geographical indications for protection to the meaning of the agreement

If a proposal is made by:

- (a) Korea for an originating product falling into the scope of the legislation of the European Union set out under Article 10.18.2 and footnotes of Article 10.19; or
- (b) the European Union for an originating product falling into the scope of the legislation of Korea set out under Article 10.18.1 and

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80) Free Trade Agreement, EU-S. Kor., art. 10.21, May 14, 2011.

footnotes of Article 10.19, to add a name of origin to this Agreement which has been recognized by either Party as a geographical indication within the meaning of Article 22.1 of the TRIPS Agreement through laws of either Party other than those referred to in Articles 10.18.1 and 10.18.2 and footnotes of Article 10.19, the Parties agree to examine whether the geographical indication can be added to this Agreement pursuant to this Sub-section.<sup>81</sup>

A separate Working Group on geographical indications is established under Article 10.25 of the FTA. This Working Group shall meet, as mutually agreed or upon request of a Party, for the purpose of intensifying cooperation between the Parties and dialogue on geographical indications. It may make recommendations and adopt decisions by consensus and to ensure the proper functioning of the Sub-section on geographical indications. It may also consider any matter related to its implementation and operation. In particular, it shall be responsible for:

- (a) exchanging information on legislative and policy developments on geographical indications;
- (b) exchanging information on individual geographical indications for the purpose of considering their protection in accordance with this Agreement; and
- (c) exchanging information to optimize the operation of this Agreement.<sup>82</sup>

In 2015, the Working Group on GIs met twice. The first meeting took place in Seoul on September 14, 2015, followed by a second meeting in Brussels on November 4, 2015. Progress was made on the new GIs to be added to the list of protected GIs under the FTA. Discussions continued on the process leading up to such additions. In both meetings, the parties also discussed enforcement of some European GIs on the Korean market and some Korean GIs on the EU market.<sup>83</sup>

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81) *Id.* art. 10.24.

82) *Id.* art. 10.25, ¶ 4.

83) *Report from the Commission to the European Parliament and the Council Annual Report on the Implementation of the EU-Korea Free Trade Agreement*, at 9, COM (2016) 268 final (June 30, 2016).

In 2016, the Working Group on GIs had two working meetings organized by teleconference, one on July 7 and the other on November 30. Discussions continued on the process to add GIs to the list protected under the FTA. The parties also discussed the enforcement of European GIs on the Korean market and Korean GIs on the EU market.<sup>84</sup>

However, it is important to note that the addition of new GIs is subject to two types of limitations:

- First of all, a “new” European GI must be recognized and registered at EU level before its potential entry into the Annex 10-A or 10-B. In the same manner, a “new” Korean GI must be recognized and registered at Korean level before its potential entry into the Annex 10-A or 10-B.
- Secondly, a name may not be registered as a new GI where it conflicts with the name of a plant variety, including a grape variety, or an animal breed and as a result is likely to mislead the consumer as to the true origin of the product (Article 10.24.3 of the FTA).

\* **The Scope of Protection Given to GIs Under the EU-Korean FTA**<sup>85</sup>

The protection afforded to GIs under the FTA is broader than the basic protection afforded to GIs by the general TRIPS Agreement.

According to Article 10.21 of the FTA, this enhanced level of protection is given to all GIs, i.e. GIs for wines and spirits but also GIs for agricultural products and foodstuffs. Because of Article 10.21, the EU producers of the GIs (listed in the Annexes 10-A and 10-B) will be protected against an act of use of the GI committed in South Korea, even though there won't be any likelihood of confusion between the GI and the infringing sign relating to the true origin of the good.

This protection of the European GIs (listed in the Annexes 10-A and 10-B) shall also extend to their Korean translations and/or transcriptions. In this

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84) *Id.*

85) CORÉE AFFAIRES, *European Union and South Korea Free Trade Agreement – The Recognition and Protection of Key EU Geographical Indications in South Korea Following the Adoption of the EU* (Apr. 7, 2011), <http://coreeaffaires.com/2011/04/07/european-union-and-south-korea-free-trade-agreement-the-recognition-and-protection-of-key-eu-geographical-indications-in-south-korea-following-the-adoption-of-the-eu/> (last visited Apr. 6, 2018).

context, it is important to note that the Annexes 10-A and 10-B of the FTA provide an official transcription into Korean alphabet for each European listed GI and an official transcription into Latin alphabet for each Korean listed GI. However, this “objective” protection (for which it is not necessary to demonstrate a risk of confusion) seems to be limited to goods having an identical nature (see footnote 7 under Article 10.21 (b) of the FTA).

An additional major effect of the GIs protection within the EU-Korean FTA will be that producers of generic goods such as “feta” and “parmesan” in third party countries will be forced to rebrand their goods for export to the South Korean market.<sup>86</sup>

In all cases, the protection given by the FTA appears to be more comprehensive than the protection given by a trademark registration. Indeed, in general, trademark registration does not cover translation nor does it prevent the use of the trademark with “de-localizers.”

However, this does not mean that trademark protection is not necessary. Indeed, because only a name (and especially a geographical name) can be registered in the EU Register of protected designations of origin and protected geographical indications, it is highly recommended for the producers of EU GIs to not only file several trademark applications (single or collective trademark applications depending on the case) to protect the name(s) under which the GI is or will be commercialized, but also the logos, the packaging of the product, and even the shape of the bottle (for wines and spirits).

The FTA contains also important provisions relating to the conflict between GIs and trademarks. Two types of conflicts may exist: a conflict between a trademark and a prior registered GI and a conflict between a prior registered trademark and a GI.

Regarding the first type of conflict, Article 10.23 of the FTA states that

the registration of a trademark that corresponds to any of the situations referred to in Article 10.21.1 in relation to a protected geographical indication for like goods, shall be refused or invalidated by the Parties, provided an application for registration of the trademark is submitted after the date of application for protection or recognition of the geographical indication in the territory concerned.

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86) Michael Handler, *Rethinking GI Extension* 146-82 (UNSW, Working Paper No. 2016-80, 2016).

Regarding the second type of conflict between a prior registered trademark and a GI Article 10.21.5 of the FTA states that the protection of a geographical indication under this Article is without prejudice to the continued use of a trademark which has been applied for, registered or established by use, if that possibility is provided for by the legislation concerned, in the territory of a Party before the date of the application for protection or recognition of the geographical indication, provided that no grounds for the trademark's invalidity or revocation exist in the legislation of the Part concerned. The date of application for protection or recognition of the geographical indication is determined in accordance with Article 10.23.2.

Article 10.21.5 of the FTA prevents the exercise of rights conferred by registration of a GI against the continued use of that particular prior trademark and is an express recognition that, in principle, a GI and a trademark can coexist under the FTA. In that sense, Article 10.21.5 of the FTA is probably intended to implement Article 24.5 of the TRIPS Agreement. However, Article 10.21.5 only applies:

- with respect to the GI, where a particular indication satisfies the conditions for protection, including the definitions of a « designation of origin » or a « geographical indication », and is not subject to refusal on any grounds;
- with respect to the trademark, where a particular sign has already been applied for, registered or established by use and there are no grounds for its invalidity or revocation; and
- where use of that trademark would infringe the GI registration.

The scope of Article 10.21.5 is confined temporally to those trademarks applied for, registered, or established by use either before the date of entry into force of the FTA, i.e. July 1, 2011 or before the date of a Party's receipt of a request by the other Party to protect or recognize a geographical indication.

Finally, it is very important to note that several and efficient measures and remedies shall be available to the producers of EU GIs in case they need to introduce an infringement action before the Korean courts to defend their rights. These measures, procedures, and remedies mainly include provisional measures for preserving evidence, right of information, provisional and



precautionary measures, corrective measures, injunctions and damages (Sub-Section A of the Section C of the Chapter 10 of the FTA).

## 2. Mutual Recognition of Certain Geographical Indications from the EU and China

In June 2017, the European Commission published details of a bilateral agreement with China's Ministry of Commerce. Under the agreement, each side will protect around 100 geographical indications from the other. While there is – as shown above – a long history of recognizing GIs in the EU, the law in China is more recent and provides GI owners with various means of securing protection via certification/collective marks and a *sui generis* system. The approval stage in the agreement has passed, and it is expected to apply in full by the end of this year. After that, the big test will be how effectively GIs can be enforced in China and what impact the new protection will have on GI holders, consumers, and other parties.<sup>87</sup>

The list of 100 EU GIs (here) includes food products, wines, and spirits. Twenty-one EU GIs were already registered locally in China via direct application and will nevertheless be attached to the future agreement. This follows the “10 plus 10” project, which in 2012, experimented granting a reciprocal protection to 10 EU and Chinese renowned GIs (here).

On June 3, 2017, the European Commission started a so-called “public consultation” on these GIs from the People's Republic of China.<sup>88</sup> The EU Commission informed that it has considered whether to protect these GIs under the Agreement as GIs within the meaning of Article 22(1) of the TRIPS Agreement. Therefore, any EU member state or third country or any natural or legal person having a legitimate interest, is a resident or established in a member state, or in a third country, is invited to submit oppositions to such protection by lodging a duly substantiated statement. Statements of opposition under such a consultation shall be examined only if they are received within the two-month time limit and they show that the protection of the name proposed would:

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87) Katharina König & Matthew Murphy, *EU and China Sign Geographical Indications Agreement*, MANAGING INTELLECTUAL PROP. (Sept. 28, 2017), <http://www.managingip.com/Article/3747651/EU-and-China-sign-geographical-indications-agreement.html> (last visited Apr. 6, 2018).

88) European Commission 2017/C 177/05, Information Notice- Public Consultation Geographical Indications from the People's Republic of China, 2017 O.J. (C 177).

- (a) conflict with the name of a plant variety or an animal breed and as a result is likely to mislead the consumer as to the true origin of the product;
- (b) be wholly or partially homonymous with that of a name already protected in the Union under Regulation (EU) No 1151/2012 of the European Parliament and of the Council of November 21, 2012 on quality schemes for agricultural products and foodstuffs (1), Regulation (EU) No 1308/2013 of the European Parliament and of the Council of December 17, 2013 establishing a common organisation of the markets in agricultural products (2) and Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks (3), or contained in the agreements the Union has concluded with the following countries:

Australia, Chile, SADC EPA States (comprising Botswana, Lesotho, Mozambique, Namibia, Swaziland and South Africa), Switzerland, Mexico, Korea, Central America, Colombia and Peru, Former Yugoslav Republic of Macedonia, Canada, United States, Albania, Montenegro, Bosnia and Herzegovina, Serbia, Moldova, Georgia

- (c) in the light of a trade mark's reputation and renown and the length of time it has been used, be liable to mislead the consumer as to the true identity of the product;
- (d) jeopardize the existence of an entirely or partly identical name or of a trade mark or the existence of products which have been legally on the market for at least five years preceding the date of the publication of this notice;
- (e) or if they can give details from which it can be concluded that the name for which protection is considered is generic.

The criteria referred to above shall be evaluated in relation to the territory

of the Union, which in the case of intellectual property rights, refers only to the territory or territories where the said rights are protected.

### 3. GIs under the EU-Japan Economic Partnership Agreement

On December 8, 2017, the EU and Japan announced the successful conclusion of the final discussions of the EU-Japan Economic Partnership Agreement (EPA). The conclusion of these negotiations is an important milestone to put in place the biggest bilateral trade agreement ever negotiated by the EU. The EPA will open huge market opportunities for both sides strengthening cooperation between Europe and Japan in a range of areas.<sup>89</sup>

Japan is the fourth biggest market for EU agricultural exports. EU agricultural exports to Japan are worth more than 20 times than exports from Japan to the EU. Under the EU-Japan EPA, EU farming communities and producers of food and drink will gain easier access to the Japanese market and more opportunities to sell their produces to Japan's 127 million consumers. The EU-Japan EPA will see Japan eliminating duties on more than 90% of EU agricultural exports from day one. This will make European products more affordable and even more attractive to Japanese consumers.<sup>90</sup>

Japan will recognize more than 200 European GIs chosen by EU member states for their actual or potential export value in the Japanese market. Only products with this status would be allowed in Japan to be sold under the corresponding name. This would make it illegal to sell imitation produce, for example, cheese labelled as Roquefort but which is not made in Roquefort. This will:<sup>91</sup>

- fully recognize products like Chablis, Chianti, Tiroler Speck, or Jambon de Bayonne on the Japanese market
- help European producers and exporters develop their marketing in Japan; and

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89) *EU and Japan Finalise Economic Partnership Agreement*, EUROPEAN COMMISSION (Dec. 8, 2017), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1767> (last visited Apr. 6, 2018).

90) EUROPEAN COMMISSION, AN INTRODUCTION TO THE EU-JAPAN ECONOMIC PARTNERSHIP AGREEMENT 1, [http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155715.pdf](http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155715.pdf).

91) *Id.* at 2.

- reassure Japanese consumers that they are buying the genuine European product.

The complete list of GIs for products referred to in Article 24 of the EU-Japan FTA / EPA, as of January 18, 2018 can be found here at [http://trade.ec.europa.eu/doclib/docs/2018/january/tradoc\\_156549.pdf](http://trade.ec.europa.eu/doclib/docs/2018/january/tradoc_156549.pdf). It also includes 48 GIs for agricultural products of Japan to be protected in the EU as well as 8 GIs for wine, spirits, and other alcoholic beverages of Japan to be protected in the EU.

## VI. Conclusions

“The EU’s Disputed System of Geographical Indications is Taking over the Planet,” headed by POLITICO, is a recent article in the ongoing scramble for geographical indications.<sup>92</sup> The EU is accelerating international trade agreements to establish a new world order in protected delicacies. If the EU concludes all the trade agreements involving GIs that it is now working on across Latin America, Australasia, and China, Europe’s culinary security shield will cover markets with a population of some 2.3 billion — over a third of the world’s population.

The EU uses a *sui generis* system to protect GIs. In addition, it has made protection of geographical indicators, an integral part of its agricultural and rural development strategies, and has been aggressively extending protection of the geographical indications recognized domestically to additional countries through various preferential trade agreements.

For decades, the US and the EU have each led one of two seemingly irreconcilable camps on how to address the protection of GIs at the international level. Agreeing on GIs’ protection in international trade raises important issues that relate to four dimensions of the GI system, which are likely to become ever more relevant elements in future trade negotiations:

- legal and institutional protection;

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92) Emmet Livingstone, *Europe Eats Trump’s Lunch: The EU’s Disputed System of Geographical Indications is Taking over the Planet*, POLITICO (Nov. 22, 2017), <https://www.politico.eu/article/europe-eats-trumps-lunch/> (last updated Nov. 25, 2017).

- domestic and international trade;
- rural/local development and sustainability; and
- consumers, quality and food safety.

It seems that the EU is establishing a worldwide legal standard for the protection of geographical indications. At the same time, it would be too simplistic to say that the EU is likely to achieve through preferential trade agreements what it has failed to achieve at the WTO level. One reason for this is that the US has also been addressing GIs in its preferential trade agreements over the past ten or so years. Rather than requiring its trading partners to protect a long list of US terms,<sup>93</sup> the US's approach has been to encourage such countries to adopt a trademark model of protection of GIs and to manage potential conflicts between traditional trade marks and GIs by giving priority, wherever possible, to the former.<sup>94</sup> It is also likely that in future agreements, the US will seek to impose requirements on its trading partners limiting their ability to enter into agreements with third parties that involve the automatic recognition of each other's GIs and the provision of the TRIPS Article 23 standard of protection for such GIs.<sup>95</sup> These approaches seem clearly designed to foster resistance toward the EU's attempts to make its model of GI protection a de facto global standard.<sup>96</sup> However, following the unclear trade agenda under the current US Administration, it seems unclear how this US position will be continued at a multilateral level.

What is even more interesting about the treatment of GIs in the EU's bilateral agreements is that they involve a far more explicit recognition of GIs as instruments of trade policy. That is, countries that might have little interest in increasing GI standards in the abstract are being offered some other trade

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93) The US has, however, sought specific recognition for the names 'Bourbon Whiskey' and 'Tennessee Whiskey' in the market access chapters of some of its preferential trade agreements.

94) Michael Handler & Bryan Christopher Mercurio, *Intellectual Property* in BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 334-40 (Simon Lester & Bryan Mercurio eds., 2d ed. 2015). See also David Vivas-Eugui et al., *supra* note 68.

95) See Trans-Pacific Partnership Agreement 2015, § E, art. 18.36 (The negotiating parties are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Singapore, Peru, the US and Vietnam.).

96) Michael Handler, *The WTO Geographical Indications Dispute*, 69 MODERN L. REV. 70 (on the tactical reasons for the US and Australia bringing WTO dispute settlement proceedings against the EU in relation to its GI registration scheme).

benefits in return. Those countries are given the opportunity to consider whether such a trade-off would be in their overall national interests.<sup>97</sup> This is something that is missing from the TRIPS GI extension debate. But it would be a mistake to suggest that bilateralism offers a simple way of resolving global disagreements over GIs. Trading levels of GI protection for market access is itself highly controversial.<sup>98</sup> It gives trade negotiators an extraordinary degree of power in being able to fix the meaning of certain terms, takes away from domestic courts and other tribunals the ability to assess whether particular signs qualify for GI protection at all, and deprives traders of language customarily used to market their goods.<sup>99</sup>

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97) Handler, *supra* note 86, at 182.

98) See Emily Craven & Charles Mather, *Geographical Indications and the South Africa-European Union Free Trade Agreement*, 33 *AREA* 312, 313–15 (2001) (“Indeed, negotiations between the EU and South Africa in the late-1990s over the much larger Trade, Development and Cooperation Agreement almost broke down over the EU’s insistence that South Africa cease using certain generic wine and spirit denominations.”).

99) See Antony Taubman, *Thinking Locally, Acting Globally: How Trade Negotiations Over Geographical Indications Improvise ‘Fair Trade’ Rules* in *RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND GEOGRAPHICAL INDICATIONS* 202 (Dev. S. Gangjee ed., 2016). See also Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 *HARV. L. REV.* 809, 873 (2010); TONY BATTAGLENE, *THE AUSTRALIAN WINE INDUSTRY POSITION ON GEOGRAPHICAL INDICATIONS* 9 (2005) (how allowing the EU to monopolize certain ‘generics’ might ultimately advantage Australian wine producers as consumers look more to brand names and varieties).

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