

GEOGRAPHICAL INDICATIONS: A GREAT OPPORTUNITY TO FOSTER TRADE AND
DEVELOPMENT UNDER THE TRANSATLANTIC TRADE AND INVESTMENT
PARTNERSHIP AND THE TRIPS AGREEMENT: THE CASE OF BELIZEAN BANANAS

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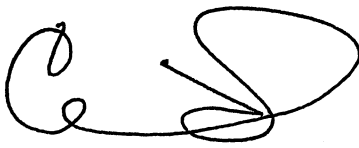
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Dedicated to my wife, Juana, our children—Juana, Julia, Jesus, Jimena, and Juncal—and to our families for their love and support. Life has been very generous to me mainly because of you. Research has taken much of our time together but never forget to listen, study, work hard, travel, and learn, using your knowledge and capacities to be happy, good people, and restless dreamers permanently inspiring those around you—no matter how far they might be or how different they are—sharing values, ideas and actions.

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ABSTRACT

Geographical Indications (GIs) are a major intellectual asset as a tool for ensuring the benefits and distinctiveness of unique agricultural products while protecting consumer interests. Furthermore, GIs—as indicators of quality, reputation, and other characteristics linked to origin—serve as a legal and economic mechanism for development, market access, local distribution of added value, preservation of diversity and cultural heritage, and environmental sustainability. Recent inclusion of GIs regulations within important trade agreements signed by the European Union (South Korea, Central America and Canada), announce a very interesting negotiation under the Transatlantic Trade and Investment Partnership Agreement (TTIP) with the United States and the revision of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement). Based on the complexities of existing models for the protection of agricultural products through traditional trademarks or a *sui generis* GI system, this research provides a new concept of GIs protection including certification, registration, fair trade, and the interest of developing countries to overcome the current legal schemes.

PREFACE

“EACH AGE HAS ITS OWN CHALLENGE. Our world of today in a fast moving, rapidly expanding society in a great process of transition, with the challenge of recognizing the rising demands of people everywhere to a decent standard of living, and to the full recognition of their dignity and their worth as human beings.

We are witnessing in recent years a metamorphosis of our world due primarily to the surging tides of technology and the practical applications of vast developments in scientific knowledge. And this is probably still the beginning. Science forges ahead in a hundred directions. The results of researches in inventions feed upon each other continuously and synergetically to enlarge the whole.

Human ingenuity and intelligence in engaged in the highly rewarding and at the same time spiritual endeavor to relieve human hardship, liberate the human spirit and provide for conditions of enjoyment of life. This endeavor must reach affluent and poor peoples alike. Failure to extend the benefits of technology and science to large parts of the world is not only morally wrong, but in the long run it denies to the total system its ultimate fulfillment. Prosperity like peace is indivisible. The accelerated pace of the West’s own economic progress could be nullified by the failure of the rise in the standard of living of the larges part of the world.”

Stephen P. Ladas¹ (father of U.S. Trademark Law).

¹ Stephen P. Ladas, *Existing Uniformity of Industrial Property Laws and Revised Patent of Introduction: Means for Transfer of Technical Information to Less Industrialized Countries*, 12 IDEA 163, 163 (1968).

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As a lawyer, professor, and international consultant, my professional life and passion for justice, trade, and development is due to my father, Jesus Bores Saiz. Of course, there are other great people as well, specifically Guillermo Jiménez Sánchez as a unique intellectual reference but also Juan Antonio Carrillo Salcedo, Jose Manuel Peláez Marón, Javier Puech Suances, Carlos Camacho Gaos, Juan Ramón Iturriagatoitia, Enrique Sánchez, Ulf Renzenbrink, Telmo Baltazar, Cristina Lobillo, Cristina Miranda, Jose María Cueto, Asko Linqvist, Pilar González, Magdalena Requena, and Ignacio Gallego Jiménez.

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Naturally, I take full responsibility for any errors or omissions and the views expressed herein are my own.

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LIST OF ACRONYMS

ACP	African, Caribbean, and Pacific Group of States
ACTA	Anti-Counterfeiting Trade Agreement
AIPPI	International Association for the Protection of Intellectual Property
AO	Appellation of Origin
AOC	Controlled Appellation of Origin (in several languages, i.e. Appellation d'origine controlee)
AOP(A)	American Origin Products (Association)
ASEAN	Association of Southeast Asian Nations
ATF	Department of Justice, the Alcohol and Tobacco Tax and Trade Bureau
AVA	American Viticultural Area
BAM	Banana Accompanying Measures
BGA	Banana Growers Association
BSP	Banana Support Programme
CAC	Codex Alimentarius Commission
CAP	Common Agricultural Policy
CARICOM	Caribbean Community
CARIFORUM	Caribbean Forum
CBERA	Caribbean Basin Economic Recovery Act
CBTPA	United States-Caribbean Trade Partnership Act
CCFN	Consortium for Common Food Names
CETA	Canada-European Union Trade Agreement

CFR	Code of Federal Regulations (U.S.)
CIRAD	Agricultural Research Center for International Development (France)
CMOB	Common Market Organization for Bananas (EU)
COLA	Certificate of Label Approval (U.S.)
COOL	Country of Origin Labeling (U.S.)
CORBANA	National Banana Corporation (Costa Rica)
COTED	Council for Trade and Economic Development (CARICOM)
CSP	Country Strategy Paper
CTA	Technical Centre for Agricultural and Rural Cooperation
CTM	Community Trademark (EU)
DOOR	Database of Origin and Registration (EU)
EC	European Community
ECJ	European Court of Justice
EDF	European Development Fund (EU)
EEAS	European External Action Service
EPA	CARIFORUM-European Union Economic Partnership Agreement
EU	European Union
EUIPO	European Union Intellectual Property Office
FAO	Food and Agriculture Organization
FSMA	Food Safety Modernization Act (U.S.)
FTA	Free Trade Agreement
FTDA	Federal Trademark Dilution Act (U.S.)

GAP	Good Agricultural Practices
GDAPs	Geographically Differentiated Agricultural Products
GATB	Geneva Agreement on Trade in Bananas
GI/s	Geographical Indication/s
ICTSD	International Centre for Trade and Sustainable Development
IICA	Inter-American Institute for Cooperation on Agriculture
INAO	Institut National des Appellations d'Origine (France)
INTA	International Trademarks Association
IP or IPR	Intellectual Property (Rights)
ISO	International Organization for Standardization
KOREU	European Union-South Korea Free Trade Agreement
LAC	Latin America and Caribbean
MICO	Marks Indicative of Conditions of Origin
MFN	Most Favored Nations
NAFTA	North American Free Trade Agreement
NAO	National Authorizing Office
NGO	Non-Governmental Organization
NPRM	Notice of Proposed Rulemaking (U.S.)
OAPI	African Intellectual Property Organization
OECD	Organization for Economic Co-operation and Development
OECS	Organization of Eastern Caribbean States
ORIGIN	Organization for an International Geographical Indication Network

PCT	Patent Cooperation Treaty
PDO	Protected Designations of Origin (EU)
PGI	Protected Geographical Indications (EU)
SFA	Special Framework of Assistance
SINER-GI	Strengthening International Research on GIs Project of the EU
SCI	Supply Chain Initiative (EU)
TMs	Trademarks
TPA	Trade Promotion Authority (U.S.)
TPOs	Trade Promotion Organizations
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSG	Traditional Specialty Guaranteed (EU)
TTB	Alcohol and Tobacco Tax and Trade Bureau of the Department of the Treasury
TTBA	Trademark Trial and Appeal Board of the USPTO (U.S.)
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
U.S.	United States
USPTO	United States Patent and Trademark Office
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

CHAPTER 1: INTRODUCTION

Product information requirements increase as worldwide consumers demand high-quality food together with proper labeling.² Geographical Indicators (GIs) may link distinctiveness and quality to the geographical origin of a product, promote efficient methods of production, and facilitate market access, while contributing to local development and fair redistribution of added value.³ This is mainly due to reputation and the willingness of consumers to pay and recognize the uniqueness of such goods based on specific features and the impact in local development.⁴

However, the practice and politics of food production and GI systems is not homogeneous across borders.⁵ Important regulatory and cultural differences on how quality products and foodstuff rights should be granted have led to many disputes between the European Union (EU) and the United States (U.S.).⁶ As a matter of fact, the breach between these two

² Academic contributions have studied consumer perceptions and the existing links between quality product demands with their place of origin providing guidance and methodologies to add value and foster local development. See Klaus G. Grunert, *Food Quality and Safety: Consumer Perception and Demand*, 32 EUR. REV. AGRIC. ECON. 369 (2005). See also FABIO RUSSO, ADDING VALUE TO TRADITIONAL PRODUCTS OF REGIONAL ORIGIN. A GUIDE TO CREATING A QUALITY CONSORTIUM (2010). Regarding quality marketing indicators, see Efthalia Dimara, Anastasia Petrou & Dimitris Skuras, *Agricultural Policy for Quality and Producers' Evaluations of Quality Marketing Indicators: a Greek Case Study*, 29 FOOD POL'Y 485 (2004). For a practical example of considering information requirements connected to product quality, such as beef, see B. Babcock et al., *Creating a Geographically Linked Collective Brand for High-Quality Beef: A Case Study*, 4 INNOVATIVE MKTG. 16 (2008).

³ EMILIE VANDECANDELAERE ET AL., LINKING PEOPLE, PLACES AND PRODUCTS: A GUIDE FOR PROMOTING QUALITY LINKED TO GEOGRAPHICAL ORIGIN AND SUSTAINABLE GEOGRAPHICAL INDICATIONS 171 (2d ed. 2010).

⁴ Luisa Menapace & GianCarlo Moschini, *Quality Certification by Geographical Indications, Trademarks and Firm Reputation*, 39 EUR. REV. AGRIC. ECON. 539 (2012).

⁵ C. Clare Hinrichs, *The Practice and Politics of Food System Localization*, 19 J. RURAL STUD. 33 (2003) (illustrating the potential tension between defensiveness and diversity in food system localization).

⁶ For a good global analysis, see Christine Haight Farley, *Conflicts Between US Law and International Treaties Concerning Geographical Indications*, 22 WHITTIER L. REV. 73 (2000). Regarding the specific remaining conflicts between trademarks and *sui generis* GI systems, see Burkhart Goebel & Manuela Groeschl, *The Long Road to Resolving Conflicts between Trademarks and Geographical Indications*, 104 TRADEMARK REP. 829 (2014); and Dev S. Gangjee, *Quibbling Siblings: Conflicts between Trademarks and Geographical Indications*, 82 CHI.-KENT L. REV. 1253 (2007).

main trade and political partners has caused a global division on this matter. Consequently, there are two relevant models for the protection of certain agricultural products, wines, and spirits. Most countries, notably members of the European Union, define and treat GIs as a *sui generis* or distinct type of intellectual property (IP).⁷ This approach is also reflected in Section 3 of the TRIPS Agreement, specifically regulating GIs within Part II on “Standards concerning the availability, scope and use of Intellectual Property Rights.”⁸ Other legal systems, such as the common law system in the United States, consider GIs a subcategory of trademarks that function principally as a mean of providing information to consumers.⁹ The EU is attempting to incorporate other features of its own system of GI protection into trade agreements and the WTO regulatory bodies, often facing opposition from those states that do not consider GIs a distinctive tool for development and effective commercial trade.¹⁰

The potential of an international harmonized GI regulation and the need for the two parties negotiating Transatlantic Trade and Investment Partnership (TTIP) to agree on the

⁷ 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 the genuine products, not imitations seeking to benefit from the good name and reputation of the original. In the European Union, three quality indicators attest to the specific traditions and qualities of food, agricultural products, wines, aromatised wines, and spirit drinks: Protected Designation of Origin (PDO), Protected Geographical Indication (PGI), and Traditional Speciality Guaranteed (TSG). The most recent version of the legal framework can be found in Commission Regulation 1151/2012, of the European Parliament and of the Council of 21 November 2012 on Quality Schemes for Agricultural Products and Foodstuff, O.J. (L 343), 1 [hereinafter EU Agricultural Products and Foodstuff Regulation]. For complete European legislation on GIs, see European Commission, Agricultural and Rural Development, Quality Policy, Legislation, http://ec.europa.eu/agriculture/quality/schemes/legislation/index_en.htm (last visited Feb. 3, 2016).

⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

⁹ See IRENE CALBOLI & EDWARD LEE, TRADEMARK PROTECTION AND TERRITORIALITY CHALLENGES IN A GLOBAL ECONOMY (2014). See also Peter M. Brody, *Geographical Indications and Dilution: Reinterpreting Distinctiveness under the Lanham Act*, 100 TRADEMARK REP. 905 (2010).

¹⁰ Emily C. Creditt, *Terroir v. Trademarks: The Debate over Geographical Indications and Expansions to the TRIPS Agreement*, 11 VAND. J. ENT. & TECH. L. 425, 426 (2008).

regulation of effective and enforceable rules on innovation, intellectual, and industrial property rights—particularly regarding GIs—inspire this dissertation.¹¹ The discussion is currently open in the TTIP negotiations, the long debated revision of the TRIPS Agreement, and in other bilateral and multilateral *fora*. An agreement on GIs between the European Union and the United States may have global consequences since current gaps and diverse regulatory solutions are hindering global acceptance but also local development where it is really needed.¹²

Everywhere, diversity remains a fundamental value since globalization is rapidly transforming societies and international trade rules.¹³ In this confusing and interconnected context, legal developments and regulatory frameworks need accurate analysis and imaginative proposals to address complex international problems. GIs, as a form of industrial property rights, are today considered a major intellectual asset for a variety of agricultural products, wines, and spirits.¹⁴ After all GIs are not only as a tool for protecting consumer interests but also a legal and economic instrument for the development of rural and local areas together with the preservation of cultural and environmental heritage.¹⁵ From a Latin American perspective, GIs may provide

¹¹ The interest of both parties negotiating TTIP to regulate IPR rules is clearly established since the beginning of the negotiations. *E.g.*, EUROPEAN COMMISSION, DIRECTORATE GENERAL FOR TRADE, INSIDE TTIP. THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP), TOWARDS AN EU–US TRADE DEAL: AN OVERVIEW AND CHAPTER-BY-CHAPTER 45 (2015).

¹² See WIPO, *Worldwide Symposium on Geographical Indications*, Oct. 20-22 2015, WIPO/GEO/BUD/15, http://www.wipo.int/meetings/en/details.jsp?meeting_id=36422 (last visited Feb. 12, 2016).

¹³ Laurence Bérard & Philippe Marchenay, *Local Products and Geographical Indications: Taking Account of Local Knowledge and Biodiversity*, 58 INT'L SOC. SCI. J. 109, 112–6 (2006).

¹⁴ See BRUCE ALAN BABCOCK & ROXANNE L. CLEMENS, *GEOGRAPHICAL INDICATIONS AND PROPERTY RIGHTS: PROTECTING VALUE-ADDED AGRICULTURAL PRODUCTS* (2004). See also TANGUY CHEVER ET AL., *VALUE OF PRODUCTION OF AGRICULTURAL PRODUCTS AND FOODSTUFFS, WINES, AROMATISED WINES AND SPIRITS PROTECTED BY A GEOGRAPHICAL INDICATION (GI)* (2012). For a developing country perspective, see Maria Cecilia Mancini, *Geographical Indications in Latin America Value Chains: A “Branding from Below” Strategy or a Mechanism Excluding the Poorest?*, 32 J. RURAL STUD. 295 (2013).

¹⁵ Pradyot R. Jena & Ulrike Grote, *Changing Institutions to Protect Regional Heritage: A Case for Geographical Indications in the Indian Agrifood Sector*, 28 DEV. POL'Y REV. 217 (2010).

developing countries with a coherent, sustainable, and comprehensive development tool.¹⁶

Consequently, this dissertation provides a new concept for “Certification GIs,” based on existing international agreements and national rules, to harmonize traditional models and introduce certain fundamental elements to its legal definition such as certification, registration, fair trade, and local development.¹⁷

The relationship between trade and development is complex, especially since intellectual property rights (IPR) are protected territory by territory.¹⁸ However, GIs may serve as a legal mechanism for linking local products to global markets if they acquire global recognition.¹⁹ In this particular context, diversity of agricultural products and foodstuffs is a valuable asset to rely on and a fundamental engine for those depending on primary goods.²⁰ Furthermore, GIs also encourage quality production, fight the constant migration of rural population, and promote the development of tourism, among other benefits.²¹ Due to its economic, cultural, and social consequences, GIs grant protection to a community and not to individual right holders. GIs

¹⁶ Sarah Bowen & Ana Valenzuela Zapata, *Geographical Indications, Terroir, and Socioeconomic and Ecological Sustainability: The Case of Tequila*, 25 J. RURAL STUD. 108 (2009).

¹⁷ This study covers regulatory frameworks and international trade agreements but also practical concerns from developing country perspective in order to transform GIs into an effective legal tool to foster fair trade, adequate distribution of economic value, and social impact while ensuring environmental sustainability.

¹⁸ Christine Haight Farley, *Trips-Plus Trade and Investment Agreements: Why More May Be Less for Economic Development*, 35 UNIV. PA. J. INT'L L. 1061, 1062 (2014).

¹⁹ Three relevant guides have been published with the aim of linking GI products and markets. See VANDECANDELAERE ET AL., *supra* note 3. See PETER DAMARY & EMILIE VANDECANDELAERE, TRAINER SHEETS. TRAINING ON ORIGIN-LINKED PRODUCTS. TOOLS FOR A PARTICIPATORY APPROACH (2013), <http://www.fao.org/3/a-au693e/au693e01.pdf> (last visited Jul 23, 2016). See also DANIELE GIOVANNUCCI ET AL., GUIDE TO GEOGRAPHICAL INDICATIONS: LINKING PRODUCTS AND THEIR ORIGINS (2009).

²⁰ Compare coffee production and value in Daphne Zografos Johnson, *International Intellectual Property Scholars Series: Using Intellectual Property Rights to Create Value in the Coffee Industry*, 16 MARQ. INTELL. PROP. L. REV. 283 (2012) and Robert Fitter & Raphael Kaplinksy, *Who Gains from Product Rents as the Coffee Market Becomes More Differentiated? A Value-chain Analysis*, 32 IDS BULL. 69 (2001), with Wine prices as described in Helene Bombrun & Daniel A. Sumner, *What Determines the Price of Wine. The Value of Grape Characteristics and Wine Quality Assessments*, 18 AIC ISSUES BRIEF 1 (2003).

²¹ Menapace & Moschini, *supra* note 4, at 548.

justify regional, national, and international political strategies and trade agreements to establish the legal frameworks that allows local producers to obtain protection for unique quality products together with a decent proportion of its economic value.²²

While trade is not a guaranteed route to economic growth for developing countries, evidence suggests that openness to the global economy plays an important role in creating jobs and prosperity. The World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO) compel every country in the world to readjust, reform, and even redesign their economic system to synchronize with a commercial regime based on principles that may grant market access and development worldwide.²³ Every country is taking a position to establish appropriate strategies to meet the international challenges and to assure a fair share of benefits arising out of the new international economic order.

Today, most trade experts, and not just the negotiating partners, envision the TTIP as a unique, comprehensive, and high-standard trade agreement with global consequences.²⁴ The United States and the European Union seek to advance multilateral trade liberalization, set globally-relevant rules and standards, and address challenges associated with the growing role of rising economic powers in the global economy.²⁵ The established aims include the development of new rules in the area of intellectual property rights, increased market access, and enhanced

²² See May T. Yeung & William A. Kerr, *Increasing Protection of Geographic Indicators at the WTO: Clawbacks, Greenfields and Monopoly Rents*, 14 J. WORLD INTELL. PROP. 353 (2011).

²³ WTO, UNDERSTANDING THE WTO, 41 & 82 (2015), available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

²⁴ See *EU-US Transatlantic Trade and Investment Partnership (TTIP), Technical Barriers to Trade: Initial EU Position Paper*, at 7 (2013), available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf.

²⁵ *Interim Report of the Transatlantic Economic Council, High-Level Working Group (HLWG) on Jobs and Growth*, at 3 (June 19, 2012), available at http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149557.pdf.

regulatory coherence and cooperation.²⁶ Consequently, GIs are an effort to gain global acceptance and establish a regulatory model that, under the premises of proper certification and registration, may ensure more equitable trade and local progress based on distinctive agricultural products.

1. WORKING AND RESEARCH HYPOTHESIS

The United States and the European Union seek to use commitments reached in the TTIP to advance multilateral trade liberalization and set globally-relevant rules and standards.²⁷ Certain regulatory areas are fundamental for TTIP success due to their relevance considering the economic and political background of the partners and the nature of the agreement.²⁸ One of the main issues in the field of IPR is GIs, an expressed priority for the European Union.²⁹ The working hypothesis is grounded by the need of the parties to TTIP to establish trade rules to make the legal agreements enforceable and valid both in Europe and the United States regarding not just GIs, but also regulatory compatibility, investment protection, and dispute settlement.³⁰

²⁶ EU-US Transatlantic Trade and Investment Partnership (TTIP), *supra* note 24, at 4.

²⁷ Memorandum from the European Commission on the J. Statement from U.S. President Barack Obama, Eur. Council President Herman Van Rompuy and Eur. Comm'n President José Manuel Barroso, (Feb. 13, 2013) available at http://europa.eu/rapid/press-release_MEMO-13-94_en.htm.

²⁸ CENTRE FOR ECONOMIC POLICY RESEARCH ET AL., REDUCING TRANSATLANTIC BARRIERS TO TRADE AND INVESTMENT. AN ECONOMIC ASSESSMENT. FINAL PROJECT REPORT (2013).

²⁹ The European Parliament reinforced the inclusion of GIs recalling “that Parliament will be asked to give its consent to the future TTIP agreement, as stipulated by the Treaty on the Functioning of the European Union, and that its positions should therefore be duly taken into account at all stages” and stressing “that intellectual property is one of the driving forces of innovation and creation and a pillar of the knowledge-based economy, and that the agreement should include strong protection of precisely and clearly defined areas of intellectual property rights (IPRs), including GIs, and should be consistent with existing international agreements; believes that other areas of divergence relating to IPRs should be resolved in line with international standards of protection.” See Resolution on EU Trade and Investment Negotiations with the United States of America, EUR. PARL. DOC. P7_TA(2013)0227 (2013).

³⁰ EU-US Transatlantic Trade and Investment Partnership (TTIP), *supra* note 24, at 4.

This dissertation focuses on the grounds for harmonized and globally accepted regulation, protection, and enforcement of GIs. A new concept and solutions are proposed in this research considering TTIP negotiations, proposals introduced during the meetings for the long expected—but not achieved—review of Articles 22-24 of the TRIPS Agreement,³¹ and the positive improvements that are taking place under international trade agreements. The point of departure is the certification trademark system in the United States and the *sui generis* model in the European Union. Recognizing the main concerns and conflicts at the negotiating table is important to facilitate harmonization with the existing reference models.

GIs identify the origin, quality, reputation, or other characteristics of products. Therefore, the rights granted by this concept constitute an interesting instrument to foster local development, fair trade, and market access. TTIP will address this issue with global consequences but the United States and the European Union will need to agree on several fundamental issues such as certification, registration, and respect to preexisting rights while avoiding deceptively misleading consumers.³²

The international community remains deeply divided, with no agreement in sight, regarding the regulation of GIs. Consequently, the international protection of GIs is a sensitive and controversial issue while legal methods used to protect geographical origin in connection with certain goods diverge considerably in different jurisdictions. TTIP will reinforce the coherence of the international system for the protection of GIs and create synergy between the

³¹ See generally DEV S. GANGJEE, *RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS* (2012).

³² Tim Josling, *What's in a Name? The Economics, Law and Politics of Geographical Indications for Foods and Beverages*, 2 (2005), available at <http://www.tcd.ie/iis/documents/discussion/pdfs/iisdp109.pdf> (considering that in the global markets and multilateral food regulations the framework for the treatment of GIs is still under construction and the decisions to be taken on the subject matter will be fundamental in the near future).

multilateral trading system under the TRIPS Agreements and its own rules. Good understanding of the technicalities for both legal systems and the main international issues may facilitate the existence of a global effective regulation on GIs. This dissertation will propose a new concept and key fundamentals for a unique global framework to regulate GIs. The legal analysis of existing text, agreements, and case law will be complemented with a case study from Belize on the production and export of bananas to consider the practical implications of this research in developing countries.

2. SCOPE AND LIMITATIONS IN THE DISSERTATION

The scope of the study will include national and international rules on GIs including the ongoing negotiations and main concerns to be addressed under TTIP and the revision of the TRIPS Agreement. Special attention will be given to trademark system in the United States and existing regulatory frameworks in the European Union for current bilateral trade agreements to assess possible solutions.

This dissertation will study in the second chapter the regulation and importance of GIs for the European Union and its potential global impact to provide a comprehensive and far-reaching GI concept compatible with the existing models of quality product protection. The third chapter will examine the history of the Lanham Act, U.S. trademarks, and the mysteries of the General Inter-American Convention of 1929 for Trade Mark and Commercial Protection. These will be analyzed to interpret the opposition of U.S. legislators to GIs and to figure out the state of the play and the economic interests at stake. After analyzing the existing regulatory frameworks and conceptual essence of GIs and certification trademarks, Chapter Four will consider the case of Belizean bananas, studying the feasibility of changing unfair trade systems through GI models.

Finally, a deep comparative research on recent and relevant international trade agreements addressing industrial property protection—mainly European Union trade agreements with Canada, Central America, and South Korea—will facilitate, in Chapter Five, the proposal of a new conceptual definition and technical solutions under TTIP and the TRIPS Agreement.

The intention of this research is to foster understanding on GIs and certification trademarks building on the concept of “Certification GIs.” Most of the relevant studies are either in favor of or against GIs, but fail to build legal bridges between the existing conceptual and practical differences. Furthermore, there has been a tendency to confront instead of analyze the feasibility of a harmonized system that reinforces the drafting of GI regulations under TTIP to unravel enduring misunderstandings. Far from looking into the mutual trust and interest that have governed transatlantic relations, the legal concept of GIs is considered a European Union imposition to protect European products from competition in other countries where emigrants use generic names and trademarks obtained in good faith. Therefore, the success of this thesis proposals will certainly depend on their acceptance by GI experts and legislators.

3. RESEARCH METHODOLOGY

The analysis contains both descriptive and prescriptive elements. The descriptive aspects refer to the legal framework on GIs and trademarks mainly in the European Union and the United States, but also under the TRIPS Agreement, other international conventions, and bilateral trade agreements. Case law is relevant in certain areas but most of the resources providing data are either legislative or theoretical doctrines as well as economic analysis on GI models. Therefore, the descriptive research focuses on investigating and describing existing

rules, models, and practices on GIs to identify the features, dynamics, and chronology to discern cause and effect regarding the current situation of GIs in international trade.

Prescriptive elements will provide a conceptual approach and creative solution for some of the remaining conflicts currently being discussed. This dissertation identifies solutions and provides new ideas for further research in this area. As normative research, certain assertions and proposals are given on several issues regarding GIs regulation and enforcement.

Most of the studies on GIs were developed in Europe. The innovative approach of this dissertation provides a comparative study of models from the European Union and United States for the protection of agricultural products, considering the historical and conceptual background as well as recent developments in bilateral and multilateral trade agreements. Furthermore, this dissertation conducts a practical case analysis on the Belizean banana industry to understand the perspective of developing countries for GI protection. A transatlantic comparative approach with interesting and practical considerations from a developing country may furnish a more comprehensive viewpoint on GIs.

Other methods will be also used to improve the quality of research and achieve the expected aims, such as evaluative research concerning the assessment of policies, programs or institutional frameworks. This dissertation will also conduct exploratory research to understand the grounds for deeper international regulation of GIs and predictive research related to outcomes, consequences, costs, or effects of the regulatory options.

CHAPTER 2: REGULATION AND IMPORTANCE OF GEOGRAPHICAL INDICATIONS AND GLOBAL DEVELOPMENT

1. A LEGAL CONCEPT COMPELLING US TO THINK GLOBALLY AND ACT LOCALLY

Intellectual property rights (IPR) have never been more economically and politically important yet controversial.³³ Ownership and regulation of ideas and knowledge, as well as the associated branding and marketing identities, are increasingly relevant. Patents, copyrights, trademarks, industrial designs, integrated circuits, and geographical indications (GIs) are frequently included in discussions on topics such as innovation, public health, food security, trade, industrial policy, and many other issues that are fundamental for a knowledge-based economy.³⁴ Understanding IPR is, therefore, indispensable to informed policy making in all areas of human development in the era of knowledge and technology. Consequently, global issues increasingly have relevant local impacts. Difference, quality, innovation, and geographically diversified goods need to be kept and given the means for protection as fundamental industrial property rights.³⁵

³³ IPR are considered a particular field of law where the extent of protection and enforcement of rights vary widely around the world. These differences are often a source of tension in international economic relations, particularly between developed and developing countries. Much remains to be discussed and regulated despite impressive global developments—such as those provided by the TRIPS Agreement two decades ago; consistent and clear international IPR rules are needed for a changing world. See World Intellectual Property Organization, <http://www.wipo.int/portal/en/index.html> (last visited Nov. 3, 2016).

³⁴ See Marion Panizzon & Thomas Cottier, *Traditional Knowledge and Geographical Indications: Foundations, Interests and Negotiating Positions* 35, 32 (2006), available at <http://papers.ssrn.com/abstract=1090861>. Both, Traditional Knowledge and GI protection are inherently linked to liberalization of market access in agriculture since they offer the potential to support niche products and to make a contribution, at the same time, to sustainable agriculture.

³⁵ See Dwijen Rangnekar, *Geographical Indications—A Review of Proposals at the TRIPS Council: Extending Article 23 to Products other than Wines and Spirits*, ICTSD and UNCTAD Issue Paper 4 (2003), available at <https://www.iprsonline.org/resources/docs/Rangnekar%20-%20GI%20-%20Blue%204.pdf>.

Geographical indications—defined as signs that identify unique products with a specific geographic origin—recognize and distinguish agricultural goods, wines, and spirits.³⁶ These indicators reinforce the qualities, features, or reputations of certain products based on provenance and provide legal protection.³⁷ Behind the concept there is a fundamental public element enhancing local development, together with a fair distribution of added value among those involved in the territory of production and the protection of unique products, traditions, and qualities. Geographic indication grants certain exclusivity rights through the notion of “terroir”³⁸ or claims of geographical uniqueness,³⁹ recognizing that more protection is required than what is provided by mere branding. This type of IPR protection is acquired through triple association, which requires connection between product, place of origin, and quality-related factors.

³⁶ World Intellectual Property Organization, *World Intellectual Property Indicators* 106, 3 (2014), available at http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2014.pdf.

³⁷ *Id.*

³⁸ “The term ‘terroir’ first appeared in the early 13th Century and is thought to be a corruption of *territorium*, meaning a piece of land or territory. The concept became more scientific in the 19th Century with the emergence of pedology, a scientific discipline concerned with the role of the soil. The terroir then was a given factor: it has always existed, pre-dating man, who only served to reveal its potential. Taking winegrowing terroirs as an example, Roger Dion in his book *Le Paysage et la Vigne* (1990) observed that the quality of a wine is the expression of a particular social milieu and what he called human will. To quote the expression used by Georges Bertrand (1975) in his *L’Histoire Ecologique de la France Rurale*: there is a ‘subtle dialectic between the ecological complex and the historical-economic complex’ that comes from the constant interaction between the agrosystem, production and human effort. The terroir concept is in fact polysemous: it has multiple meanings depending on what it refers to. If it embraces the human dimension, it connects with temporal density and gives new meaning to the relationship with place. The word itself does not exist as such in other European languages. The Italians refer to ‘prodotti tipici’ (‘typical products’) or simply ‘nostri’ (‘ours,’ from our land), while the Spanish speak of ‘productos de la tierra.’” Claude Bertrand & Georges Bertrand, *Pour une Histoire Écologique de la France Rural*, in *HISTOIRE DE LA FRANCE RURAL*, 63, 64 (G. Duby & A. Wallon ed., 1975). For a full analysis from the global TRIPS Agreement perspective on terroir, see Elizabeth Barham, *Translating Terroir: the Global Challenge of French AOC Labeling*, 19 *J. RURAL STUD.* 127 (2003).

³⁹ Justin Hughes, *Champagne, Feta, and Bourbon: the Spirited Debate about Geographical Indications*, 58 *HASTINGS L.J.* 299, 385–6 (2006).

Acquiring this type of protection remains problematic, however, since reputation and quality may be highly contested or even considered socially constructed and ambivalent descriptions.⁴⁰

Most international organizations and IPR experts agree that GI systems serve two functions: property rights protection and quality assurance.⁴¹ For some, the effectiveness of GI systems depends, to a large extent, on regulation and formal governance regimes deployed to control these systems.⁴² GI systems then consider heterogeneity of capabilities and interests among participating producers, as well as the level of communal control over production and marketing decisions granted to the GI organization.⁴³ The international legal and institutional frameworks for GI protections, however, have remained unclear since the GI concept was introduced in the TRIPS Agreement in 1994. In an effort to clarify the benefit of GI systems, the International Centre for Trade and Sustainable Development (ICTSD) and the United Nations Conference on Trade and Development (UNCTAD) drafted a report to provide policy makers in developing countries with concrete insight on the welfare potential of GI systems. The report positively highlights the multitude of factors that need to be mobilized to realize the potential of GI systems since legislation alone is not responsible for economically successful GI operations.⁴⁴

⁴⁰ See Dwijen Rangnekar, *The Socio-Economics of Geographical Indications*, ICTSD and UNCTAD Issue Paper 8, 5 (2004), available at https://www.iprsonline.org/unctadictsd/docs/CS_Rangnekar2.pdf.

⁴¹ Skilton, Paul F. & Wu, Zhaohui, *Governance Regimes for Protected Geographic Indicators Impacts on Food Marketing Systems*, 33 J. MACROMARKETING 144, 145 (2013).

⁴² *Id.* at 145. (“This study is possible because there are numerous case studies of PGI systems in publications and commissioned reports on rural development, sustainable food systems, and food quality (Aubard 2010; Bowen and Zapata 2009; El Benni and Reviron 2009; Gay 2007; Kruijssen, Keizer, and Giuliani 2008; Lindkvist and Sanchez 2008; Vandecandelaere et al., 2009). ... [T]his study draws on eighty product cases from thirty-six countries, published in twenty-one different studies and reports. Twenty-nine of the cases in Table 1 come from outside the EU, and the majority of the European cases come from less favored areas within the union (Parrot, Wilson, and Murdoch 2002).”).

⁴³ *Id.* at 150.

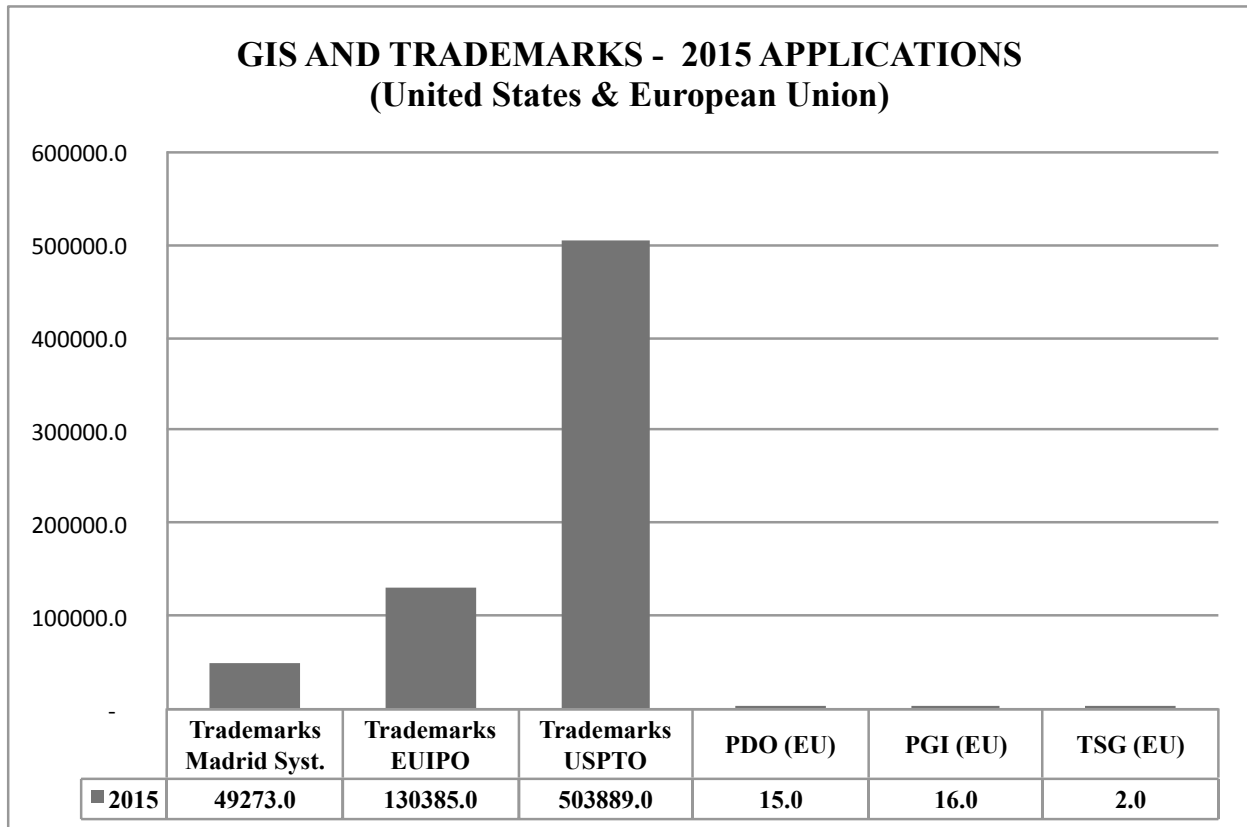
⁴⁴ Rangnekar, *supra* note 35, at V and Foreword.

Despite the clear conceptual distinction between GI and trademark, the two legal tools share a common arc of industrial protection. However, the complex regulatory framework and demanding requirements are probably why only a few thousand GIs exist compared to millions of registered trademarks. In 2015, the United States Patent and Trademarks Office (USPTO) received 503,889 applications trademarks registration,⁴⁵ while the European Union Intellectual Property Office (EUIPO) received 130,385 European Trademarks reaching in its 20 years of existence a total of 1,582,545 (plus many other millions in the national office of the Member States).⁴⁶

⁴⁵ United States Patent and Trademarks Office, TRADEMARK ELECTRONIC SEARCH SYSTEM (TESS), <https://www.uspto.gov/trademarks-application-process/search-trademark-database> (last visited Nov. 11, 2016).

⁴⁶ European Union Intellectual Property Office, STATISTICS EUIPO, <https://euipo.europa.eu/ohimportal/en/the-office> (last visited Aug 11, 2016).

Figure 1: Comparative Analysis of 2015 GI and Trademark Applications⁴⁷



Source: Author (information from WIPO, USPTO, EUIPO, and European Commission)

The comparison between trademark registration and GIs provides a clear picture on the current state of the play. In the same period, only fifteen Protected Designation of Origin (PDO), sixteen Protected Geographical Indications (PGI) and two Traditional Specialty Guaranteed (TSG) were filed in the European Union and only thirty-five applications for registration of appellation or origin were received under the Lisbon Agreement; there are still only a total of 1,035 registered GIs since the register was created more than five decades ago.⁴⁸

⁴⁷ Last updated August 12, 2016.

⁴⁸ World Intellectual Property Organization, LISBON SEARCH, <http://www.wipo.int/ipdl/en/lisbon/search-struct.jsp> (last visited Dec 5, 2013).

Embracing reality, and understanding the practical problems, is fundamental to finding effective and sustainable international legal solutions. Despite its importance for the European Union, the GI system of IPR protection is not effortlessly perceived. Including ideas linked to quality, trade, agriculture, IPR, and local development, the legal nature of GI is highly controversial, particularly outside the European continent.⁴⁹ Developing reasonable proposals to promote international agreement based on the legal concept and on the practical consequences of GI protection requires understanding the position of the United States and the European Union—as well as that of other countries, estimating the value of the products affected by GIs, and separately addressing the main issues at stake. In fact, the economic and political relationship between the United States and European Union—broader and deeper than between any two other regions in the world—is the most defining feature of the global economy and trade regulation. Close legal traditions, shared values, and common views for similar industrial property concerns should facilitate agreement between these transatlantic partners on GIs. When transatlantic trade negotiations were opened in 2006, the European Union and United States accounted for over 35% of global merchandise trade, 45% of world trade in services, and produced around 57% of the global Gross Domestic Product. Bilateral trade between the European Union and United States was about €627 billion a year or €1.7 billion a day, which equaled European Union trade with its three most important trade partners combined: Switzerland, China, and Russia.⁵⁰

⁴⁹ For a global and updated vision of the controversial matters considering a new revision of the legal framework, see Anna Micara, *The Geneva Act of the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration: An Assessment of a Controversial Agreement*, INT'L REV. INTELL. PROP. COMPETITION L. 1 (2016).

⁵⁰ *European Union Factsheet, EU-US Summit 2006 on Bilateral Economic Relations* (June 21, 2006), available at http://trade.ec.europa.eu/doclib/docs/2006/june/tradoc_129007.pdf.

Over the last three decades, more than forty nations have developed GI legislation facilitated and fostered by the Food and Agriculture Organization (FAO), the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the European Union, and nongovernmental organizations (NGOs) such as the Slow Food Foundation and OriGIn.⁵¹ However, other countries and organizations strongly oppose the development of GI protections, particularly the United States and the Consortium for Common Food Names.⁵² The disparate opinions promote confusion and obstacles to GI protection, which negatively affects trade and development. This chapter addresses the idea of GI protections, the legal climate for these protections, existing regulations, and the main concerns of those opposing GIs to assess the global consequences of GIs on local development.

1.1. Legal Concepts of Geographical Indications

Although the European Union is the main global promoter of GIs, the provision of arguments grounding the benefits of the model—while respecting certain existing rights and generic names in other jurisdictions—is not sufficiently convincing to finalize discussions on the matter. Many studies, methodologies, and significant analysis have been conducted to assess cases that reinforce the economic and social impact of GIs, since the commercial justifications that led to the development of GIs are as relevant today as when first established.⁵³ Most experts agree on the important impacts of GI systems linked to economic-related issues. However there exist some crucial and implicit risks on GIs leading to monopolistic power in favor of the most

⁵¹ See Skilton & Wu, *supra* note 42, at 144.

⁵² CONSORTIUM FOR COMMON FOOD NAMES, <http://www.commonfoodnames.com/> (last visited Sep. 27, 2015).

⁵³ Michael Blakeney, *Proposal for the International Regulation of Geographical Indications*, 4 J. WORLD INTELL. PROP. 629, 652 (2001).

powerful actors or the establishment of complex and inefficient regulations that are often turned into wet paper very far for supporting local development.⁵⁴

Intellectual property rights and the case for GIs, is an open international debate that remains unresolved.⁵⁵ Challenges of GI protection indicate the need to revisit trade negotiations⁵⁶ due to the variety of products in Asia,⁵⁷ along with certain cases in India,⁵⁸ China,⁵⁹ and Saudi Arabia,⁶⁰ including Champagne's successful registrations in Thailand and Indonesia,⁶¹ certain wine in Australia,⁶² and GI development in Colombia⁶³ and South Africa.⁶⁴ For instance, regarding South Africa liquors, the debate is quite interesting regarding the alternative names of

⁵⁴ Dominique Barjolle, Marguerite Paus & Anna Perret, *Impacts of Geographical Indications: Review of Methods and Empirical Evidences*, 14, 11 (2009), available at http://ageconsearch.umn.edu/bitstream/51737/2/PaperIAAE2009_85.pdf.

⁵⁵ Malcolm Voyce, *Geographical Indications, the EU and Australia: A Case Study on Government at a Distance through Intellectual Property Rights*, 7 MACQUARIE L.J. 155 (2007).

⁵⁶ Jean-Frédéric Morin & Érick Duchesne, *Revisiting Structural Variables of Trade Negotiations: The Case of the Canada-European Union Agreement*, 18 INT'L NEGOT. 5–24 (2013).

⁵⁷ See Bernard O'Connor, *The European Union and the United States: Conflicting Agendas on Geographical Indications; What's Happening in Asia?*, 9 GLOBAL TRADE CUSTOMS J. 66–69 (2014). See also LOUIS AUGUSTIN-JEAN, HÉLÈNE ILBERT & NEANTRO SAAVEDRA-RIVANO, *GEOGRAPHICAL INDICATIONS AND INTERNATIONAL AGRICULTURAL TRADE: THE CHALLENGE FOR ASIA* (2012).

⁵⁸ Jena & Grote, *supra* note 15. See also Kasturi Das, *Socio-Economic Implications of Protecting Geographical Indications in India* (2009), available at http://wtocentre.iift.ac.in/Papers/GI_Paper_CWS_August%2009_Revised.pdf.

⁵⁹ SANQIANG QU ET AL., *INTELLECTUAL PROPERTY LAW IN CHINA* (2012).

⁶⁰ Myra E. J. B. Williamson, *Geographical Indications, Biodiversity and Traditional Knowledge: Obligations and Opportunities for the Kingdom of Saudi Arabia*, 26 ARAB L.Q. 99 (2012).

⁶¹ Charles Goemaere & Fabrice Mattei, *Champagne's GI Journey in Asia*, *MANAGING INTELL. PROP.* 72 (2010).

⁶² Stephen Stern & Christine Fund, *The Australian System of Registration and Protection of Geographical Indications for Wines*, 5 FLINDERS J. REFORM 39 (2000).

⁶³ DANIEL PEÑA SÁNCHEZ DE RIVERA, *INTELLECTUAL PROPERTY LAW IN COLOMBIA* (2012).

⁶⁴ *DEVELOPING GEOGRAPHICAL INDICATIONS IN THE SOUTH: THE SOUTHERN AFRICAN EXPERIENCE* (Cerkia Bramley et al. eds., 2013).

Tawny and Ruby instead of GIs names such as Port and Sherry placing the subject matter in the spotlight.⁶⁵

Whether old European food names should be kept for certain similar products or whether a differentiated industry should be developed is a continuing debate in certain countries and industries, as was the case of Australian wine.⁶⁶ These issues limit but do not stop implementation of GI systems for local development. In fact, GI models can improve fundamental rural and local development by addressing information asymmetry as well as the role of product reputation, formation of niche markets, monopoly formation, and value added.⁶⁷

Many GI critics consider its collective features “club goods,” implying a particular category of products that exhibit dual features of excludability and non-rivalry.⁶⁸ Thus, a variety of theoretical perspectives suggest that GIs are grounded by the collective reputation embedded in them.⁶⁹ Furthermore, consumer perceptions of origin, uniqueness, authenticity, and quality seem to be culturally disparate. Although the marketplace demonstrates movement toward a differentiated food supply, there is a need to establish closer forms of co-operation between value chain members. This involves finding the right contractual forms since differentiation pervades the food chain, often having implications for governance of the food. Consequently, it

⁶⁵ Bramley, Cerchia & Kirsten, Johann. *Exploring the Economic Rationale for Protecting Geographical Indicators in Agriculture*, 46 *AGREKON* 47, 69 (2007).

⁶⁶ Stern & Fund, *supra* note 62. (Initially reluctant towards the GIs concept, Australian wine is now strongly competing with French and European wines).

⁶⁷ Bramley & Kirsten, *supra* note 65, at 71.

⁶⁸ RANGNEKAR, *supra* note 40 at 4.

⁶⁹ Giovanni Belletti, *Sviluppo Rurale e Prodotti Tipici: Reputazioni Collettive, Coordinamento e Istituzionalizzazione*, 7 *SVILUPPO LOCALE* 17, 34 (2000). See also STÉPHAN MARETTE, *THE COLLECTIVE-QUALITY PROMOTION IN THE AGRIBUSINESS SECTOR: AN OVERVIEW* (2005).

is important for producers to tap into traditional marketing strategies to convey these factors and enhance the distinctiveness and attractiveness of their products.⁷⁰

GIs are particularly important in certain European Union member states with a rich history of local and unique agricultural production linked to geographic origin.⁷¹ Countries along the northern shore of the Mediterranean Sea consider GIs much more than mere collective trademarks. These GIs connect to places and history—culture that is part of the local identity;⁷² this allows producers to receive a premium value for products that keep their economies, landscapes, and communities sustainable.⁷³

The United States, however, is reluctant to regulate GIs because certain product names have become generic, such as Parmesan cheese, or trademarks already exist that are similar or identical to GIs, which could cause confusion in the market. For instance, dairy and meat lobbies in the United States argue it would be incomprehensible to most Americans if companies that have produced popular food products for decades were no longer allowed to use now-common product names. The substance of the economic conflict and existing precedent in other negotiations and agreements provide areas to build upon in order to find valid international legal solutions for remaining unresolved conceptual and practical matters.⁷⁴

⁷⁰ Daniele Giovannucci, Elizabeth Barham & Rich Pirog, *Defining and Marketing “Local” Foods: Geographical Indications for US Products*, 13 J.L. INTELL. PROP. 94 (2010).

⁷¹ See Amy B. Trubek & Sarah Bowen, *Creating the Taste of Place in the United States: Can We Learn from the French?*, 73 GEOJOURNAL 23 (2008).

⁷² *Id.*

⁷³ Eric Trachtenberg, *A Transatlantic Partnership, Agricultural Issues. Different Visions, a Common Destiny*, ECON. POL. PAPER SERIES, 15 (2012).

⁷⁴ *Id.* at 28.

As Edward Rogers, one of the architects of modern trademark law in the United States, suggested, it is important to look into questions of fact rather than be misled by definitions.⁷⁵ Therefore, consider the two inter-related policy presumptions underlying European Regulation 2081/92 establishing the EU Model:⁷⁶ (a) the symbiotic relationship protecting “provenance” and promoting rural development⁷⁷ and (b) the increasing interest of consumers in qualitative aspects of foodstuffs.⁷⁸

European Union GIs⁷⁹—known separately as Protected Designations of Origin (PDO),⁸⁰ Protected Geographical Indications (PGI),⁸¹ and Traditional Specialty Guaranteed (TSG)⁸²—were created in 1992 to promote and protect food products and are now considered a fundamental pillar of EU agricultural policy.⁸³ A global concept for GI protection was then introduced in 1994 under the TRIPS Agreement. While the European system has been amended and further developed, however, the system established under the TRIPS Agreement has remained unchanged due to a lack of international consensus.

⁷⁵ Edward S. Rogers, *New Directions in the Law of Unfair Competition*, 74 N.Y. L. REV. 317, 323 (1940) (“These cases finally resolve themselves into questions of fact. Does the mark or device in controversy distinguish the plaintiff’s goods? Does it point to one, although possible an anonymous, source? Is the mark one which in the public mind indicates that the goods are of somebody’s make? Do not be misled by definitions.”).

⁷⁶ Council Regulation 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 1992, O.J. (L 208) 1, as amended by Council Regulation 535/97, 1997, O.J. (L 83) 3, and Council Regulation 692/2003, 2003, O.J. (L 99) 1.

⁷⁷ *Id.*

⁷⁸ *Id.* See also EUROPEAN COMMISSION, AGRICULTURAL PRODUCT QUALITY POLICY, http://ec.europa.eu/agriculture/quality/index_en.htm (last visited, Oct. 22, 2016).

⁷⁹ The most relevant conceptual modification is the simplification provided in the EU Agricultural Products and Foodstuff Regulation, see *supra* note 7.

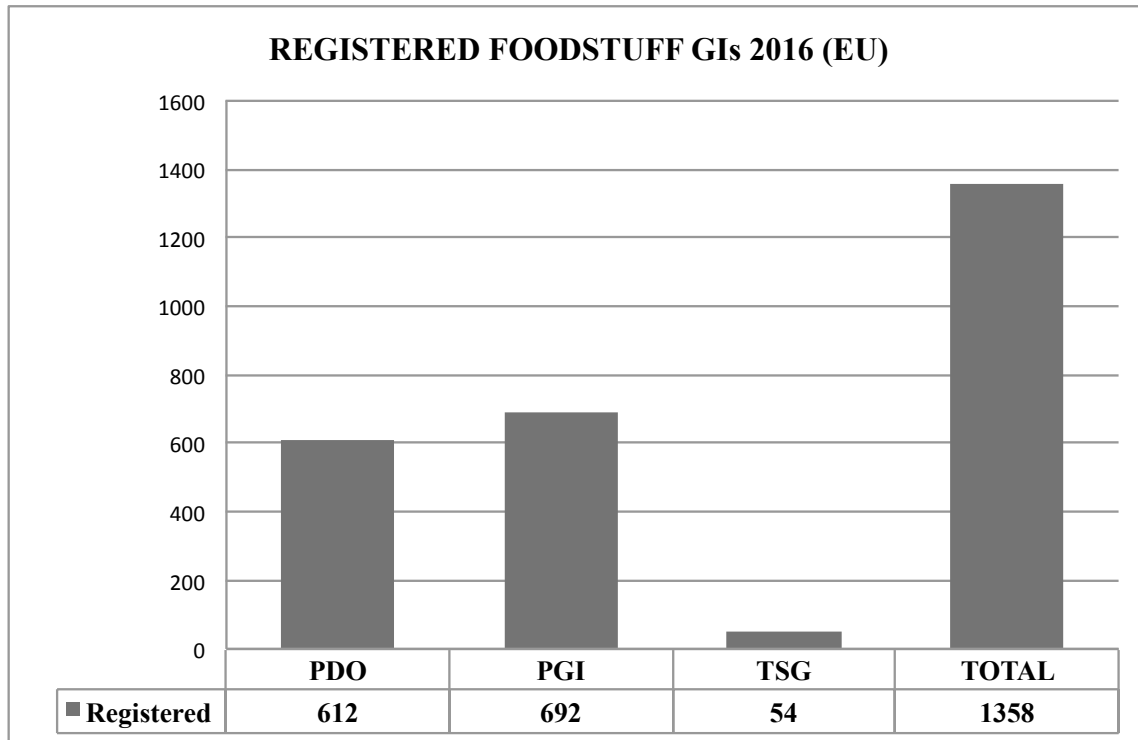
⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Figure 2: Registered Foodstuff GIs in the European Union (August 2016)



Source: Door Database⁸⁴

Furthermore, other experts developed similar notions of agricultural product protection such as “indications of source,”⁸⁵ “appellation of origin,”⁸⁶ “place names,”⁸⁷ “typical names,”⁸⁸

⁸⁴ European Commission, DATABASE OF ORIGIN AND REGISTRATION (DOOR), <http://ec.europa.eu/agriculture/quality/door/list.html?locale=en> (last visited Aug 11, 2016).

⁸⁵ Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, Oct. 31 1958, 923 U.N.T.S. 205 [hereinafter Lisbon Agreement]. See also 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).

⁸⁶ Sabrina Lucatelli, *Appellations of Origin and Geographical Indications in OECD member Countries: Economic and Legal Implications* (2000).

⁸⁷ 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 (2001). See also Barham, *supra* note 38.

⁸⁸ Angela Tregear, *From Stilton to Vimto: Using Food History to Re-think Typical Products in Rural Development*, 43 SOCIOLOGICA RURALIS 91 (2003).

“original product names,”⁸⁹ “geographically deceptively misdescriptive marks,”⁹⁰ “marks indicative of conditions of origin (MICO),”⁹¹ and “geographically differentiated agricultural products (GDAP),”⁹² along with other terms to reference the “terroir” of products.⁹³ The conceptual variety goes far beyond the well-known European terminology.

“Local (or community) food system” is commonly used in the United States to refer to the interconnected processes of food production, processing, consumption, and disposal, predominantly characterized as a complex and globally integrated system.⁹⁴ “Food Policy Councils” exist to set food policy at the state or local level. Other concepts, such as the American Viticultural Areas (AVAs) administered by the United States Department of the Treasury, are similar to the idea of GIs. However, experts suggest that, from the perspective of both producer surplus and societal surplus, the United States GDAP legislation, which is based on certification

⁸⁹ Michael Howley, *Criteria for Success in New Product Development for Consumer Goods: A Comparative Study*, 24 EURO. J. MKTG. 55 (1990).

⁹⁰ Christine Haight Farley, *Conflicts Between US Law and International Treaties Concerning Geographical Indications*, 22 WHITTIER L. REV. 73 (2000). See Gangjee, *supra* note 6. See also Frances G. Zacher, *Pass the Parmesan: Geographic Indications in the United States and the European Union-Can There Be Compromise*, 19 EMORY INT’L L. REV. 427 (2005).

⁹¹ Nicole Aylwin & Rosemary J. Coombe, *Marks Indicating Conditions of Origin in Rights-based Sustainable Development*, 47 U.C. DAVIS L. REV. 753 (2014).

⁹² Sergio H. Lence et al., *Collective Marketing Arrangements for Geographically Differentiated Agricultural Products: Welfare Impacts and Policy Implications*, 89 AM. J. AGRIC. ECON. 947, 947 (2007).

⁹³ Tim Josling, *The War on Terroir: Geographical Indications as a Transatlantic Trade Conflict*, 57 J. AGRIC. ECON. 337 (2006). For French and European authors, “terroir” is much more than just soil, including the broad concept of culture, people, and history. See DOMINIQUE BARJOLLE, STEPHANE BOISSEAUX & MARTIN DUFOUR, LE LIEN AU TERROIR. BILAN DES TRAVAUX DE RECHERCHE, 8 (1998). (“*le terroir n’est pas seulement une entité avec des caractéristiques agronomiques et pédo-climatiques mesurables. Le terroir a aussi des composantes humaines, techniques, culturelles, historiques, voire symboliques. En un mot, le terroir a aussi une histoire.*”). For an even more romantic and broader social implication see also Laurence Bérard & Philippe Marchenay, *Lieux, Temps et Preuves*, TERRAIN REV. D’ETHNOLOGIE L’EUROPE 153 (2005).

⁹⁴ NATIONAL AGRICULTURAL LAW CENTER, <http://nationalaglawcenter.org/research-by-topic/local-food-systems/> (last visited Jan 20, 2014).

marks and marketing orders, is not equivalent to the European Union's GI system.⁹⁵ However, certain fundamental similarities exist in both systems that justify the development of these agricultural regulations.

⁹⁵ Lence et al., *supra* note 92, at 960.

Table 1: Comparative Conceptual Analysis on GIs

	Geographical Indication	Appellation of Origin	Indication of Source	Indication of Geographical Origin or Source
D I S T I N C T I O N E L E M E N T S S O U R C E	Indications which identify a good as originating in the territory of a Member (of the WTO), 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.	Geographical denomination of a country, region or locality which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.	Expression or sign used to indicate that a product or service originates in a country, a region or a specific place. As such, an indication of source is dependant only on the product's geographical origin and not necessarily its inherent qualities.	The place of geographical origin or source shall be considered as indicated when the geographical name of a definite locality, region, country or nation, either expressly and directly, or indirectly, appears on a trade mark, label, cober, packing or wrapping, of any article, product or merchandise, directly or indirectly thereon, provided that said geographical name serves as a basis for or is the deominant element of the sentences, words or expressions used.
	<ul style="list-style-type: none"> ■ Constituted by words, phrases, symbols or iconic emblems associated with the good and preferably but not necessarily with its geographical origin. ■ The good must possess given quality, attributes or reputation essentially due to its designated geographical area of origin. ■ The designated geographical area must be identified by the indication. 	<ul style="list-style-type: none"> ■ Constituted by words, phrases, symbols or iconic emblems that must be direct geographical names. ■ The appellation must serve as a designation of geographical origin of the good. ■ Quality and characteristics exhibited by the good must be essentially attributable to the designated area of geographical origin. 	<ul style="list-style-type: none"> ■ Constituted by words, phrases, symbols or iconic emblems associated with the geographical origin. ■ Clear link between the indication and geographical origin. ■ Broad scope and do not contain any intrinsic reference to a specific quality, attributes or reputation of the good. 	<ul style="list-style-type: none"> ■ There is not a proper definition but they are regulated in the Inter-American Convention. ■ Refers to trademarks or indications with a geographical reference. ■ the geographical name serves as a basis for or its the dominant element of the sentences, words or expressions used.
	Defined under Art 22-24 TRIPS Agreement in 1994 applicable in the 149 signatory countries of the WTO and which is undoubtedly the most important multilateral document to date in this field. Also in various multilateral treaties (Paris, Madrid, Lisbon).	Mentioned in the Paris Convention (section 1.2) and defined in the Lisbon Agreement as follows (section 2.1).	Mentioned in the Paris Convention for the Protection of Industrial Property of 1883 (section 1.2 and 10) and the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 (Section 1).	Art 24, 1929 Washington General Inter-American Convention for Trademark and Commercial Protection.

Source: Author

It is difficult to accurately summarize the heterogeneous sets of European Union GIs and United States certification marks and regulations. The European Union system allows limits on the area and methods used to produce though not explicit price controls, whereas the United States disallows both acreage restrictions and price controls but permits post-harvest quality sorting that reduces the amount of product released on to the market.⁹⁶ Protective agricultural regulations by the transatlantic partners share aims and principles, yet certain differences are derived from particular lobbying interests in favor of certain industries.

The conceptual legal approach to harmonizing current GIs has been under discussion for over a century and remains unresolved. Confusing terminology representing similar geographic names requires precise clarification. A revision of attributes and historical development in existing treaties ensures proper distinction and comprehension of the existing meaning and connotations of specific nomenclature under the broad term of GI.

The initial term “indication of source” was used in both the Paris Convention for the Protection of Industrial Property of 1883 (section 1.2 and section 10)⁹⁷ and the Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods of 1891 (section 1).⁹⁸ These treaties consider an “indication of source” to refer to a particular country or a place therein as being the origin of a product.⁹⁹ Three key components of an indication of source of derived from these treaties: (i) a clear link between the indication and geographical origin; (ii)

⁹⁶ *Id.* at 949.

⁹⁷ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised 1967) [hereinafter Paris Convention].

⁹⁸ Madrid Agreement for the Repression of False and Deceptive Indications of Source, Apr. 14, 1891, 828 U.N.T.S. 168 [hereinafter Madrid Agreement].

⁹⁹ Ludwig Baeumer, *Protection of Geographical Indications Under WIPO Treaties and Questions Concerning the Relationship Between those Treaties and the TRIPS Agreement*, 9, 11 (1997), available at http://www.wipo.int/edocs/pubdocs/en/geographical/760/wipo_pub_760.pdf.

a lack of requirement to distinguish qualities or attributes of the good; and (iii) words or phrases that directly indicate geographical origin or phrases, symbols, or iconic emblems associated with the area of geographical origin. For example, “Made in Belize,” is an indication of source distinct from a GI because its definition does not imply any special quality, reputation, or particular feature due to its origin. As such, an indication of source is dependent only on the product’s geographical origin and not necessarily its inherent uniqueness.

The notion of “geographical indication” is globally defined as “indications which identify a good as originating in the territory of a Member [of the WTO], or region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin.”¹⁰⁰ Consequently, three conditions must be met: (i) the indication must identify a good but can include non-geographical names, iconic symbols, words, or phrases; (ii) the good must necessarily possess a “given quality,” “reputation,” or “other characteristics” that are “essentially attributed” to the designated geographical area of origin; and (iii) the designated geographical area must be identified by the indication.¹⁰¹

The term “appellation of origin” is mentioned in the Paris Convention (section 1.2) and defined in the Lisbon Agreement (section 2.1) as “the geographical name of a country, region or locality which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.” The key components to this concept, again following the Rangnekar analysis, require that: (i) the appellation must include a direct geographical name; (ii) the appellation must serve as a designation of geographical origin of the product; and (iii) the quality and

¹⁰⁰ TRIPS Agreement, note 8, at *supra* sArt. 22.

¹⁰¹ Rangnekar, *supra* note 35, at 3.

characteristics exhibited by the product must be essentially attributable to the designated area of geographical origin.¹⁰² “Appellation of origin” is therefore regarded as a special type of indication of source making a direct link between a product’s quality and its geographical origin.

Of these terms, “indication of source” is the broadest term, including both the more specific “geographical indications” and “appellations of origin.” All appellations of origin are geographical indications but not all geographical indications are appellations of origin.

Therefore, in practice, it is necessary to make a distinction in the context of the regulation or agreement when referring to GIs.¹⁰³

Analysis of GIs is extremely difficult due to conceptual confusion and the lack of a common system for information and registration. With the limited scope of the system agreed under the Lisbon Agreement—restricted to “appellations of origin”—it is not possible to have clear data on currently protected GIs.

As of August 2016, there are three different electronic directories identifying a total of 4,585 registered GIs in the European Union: (i) Foodstuff can be found at the Database of Origin and Registration (DOOR), which contains 612 PDOs,¹⁰⁴ 692 PGIs,¹⁰⁵ and 54 TSGs;¹⁰⁶ (ii) E-SPIRIT-DRINKS, contains 343 spirits protected¹⁰⁷ by geographical indications; and (iii) e-

¹⁰² *Id.* at 3.

¹⁰³ Bramley & Kirsten, *supra* note 65, at 68–70.

¹⁰⁴ DATABASE OF ORIGIN AND REGISTRATION (DOOR), *supra* note 84.

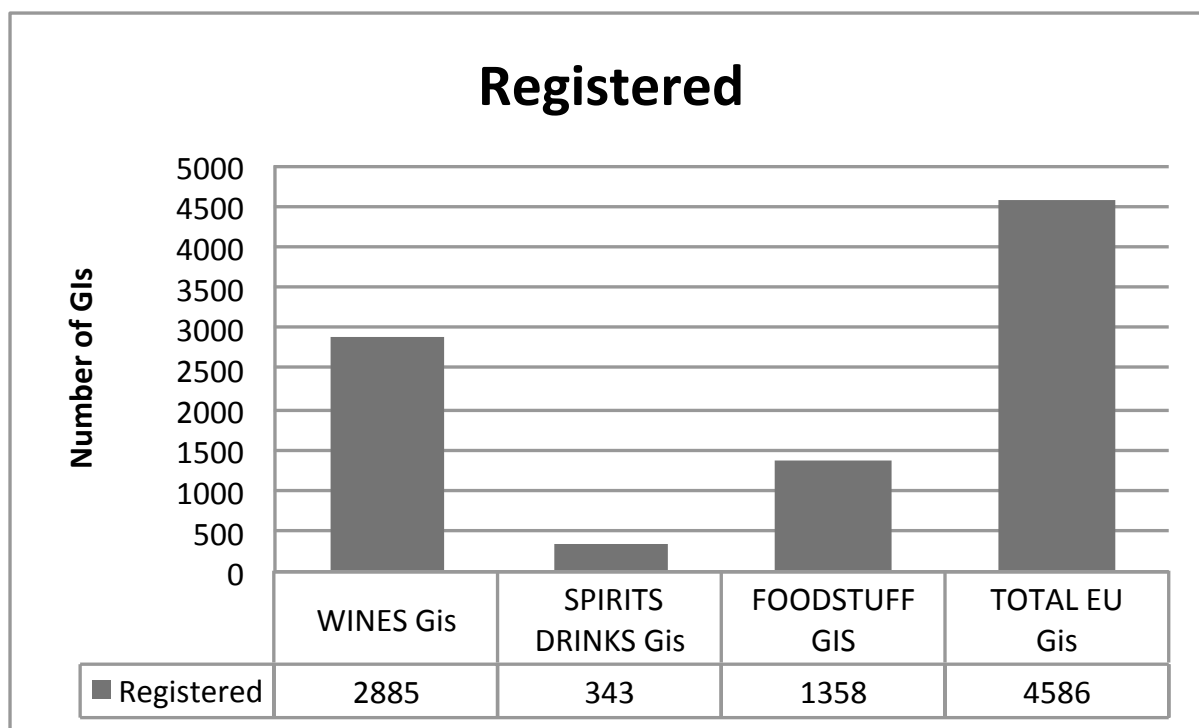
¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ E-SPIRIT DRINKS, <http://ec.europa.eu/agriculture/spirits/> (last visited Aug 11, 2016).

Bacchus, lists a total of 2,884 wine GIs,¹⁰⁸ including 1,291 PDOs,¹⁰⁹ 459 PGIs,¹¹⁰ 437 GIs,¹¹¹ 2 PDOs¹¹² from non-EU member states, and 696 wines from the United States.¹¹³

Figure 3: Registered GIs in the European Union (August 2016)



Source: (DOOR, E-SPIRIT-DRINKS, and E-Bacchus)

¹⁰⁸ E-BACCHUS, DATABASE FOR WINES, <http://ec.europa.eu/agriculture/markets/wine/e-bacchus/index.cfm?event=pwelcome&language=EN> (last visited Aug 11, 2016).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

With 60.1% of world wine production originating in the European Union—versus 8% in the United States—and considering that 79% of grape growing and wine production is protected under GIs, the relevance of this system for Europeans is evident.¹¹⁴

1.2. Quality and The “Market for Lemons”: GI Economic Theories and Value

Economic theory relating to the use of distinctive or quality signs, such as GIs, derives from either the information theory developed by George A. Akerlof¹¹⁵ or Shapiro’s model on reputation, which is concerned with a decision about the quality of output with a view to maximizing profits assuming perfect competition but imperfect consumer information.¹¹⁶ Under Akerlof’s theory, an asymmetry of information between producers and consumers gives rise to market failure since consumers generally receive less information. According to Shapiro, the need for initial investment implies that high quality goods must be sold at premium prices to obtain returns on initial investment to build reputation.¹¹⁷

Trademarks and GIs share a common rationale for protection based on informational asymmetries between buyers and sellers along with the role of reputation, conveyed through

¹¹⁴ With a total production of 104,044,000 hectoliters (approximately 2,749 Million U.S. gallons) in 2015, 65,081,000 h. (1719 Million U.S gallons) were produced under PDOs and 17,594,000 (465 Million U.S. gallons) as PGIs. WINE STATISTICS AND DATA, http://ec.europa.eu/agriculture/wine/statistics/index_en.htm (last visited Aug 11, 2016). See also DASHBOARD: WINE (2016), http://ec.europa.eu/agriculture/dashboards/wine-dashboard_en.pdf (last visited Aug 10, 2016).

¹¹⁵ George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

¹¹⁶ Carl Shapiro, *Consumer Information, Product Quality, and Seller Reputation*, 13 BELL J. ECON. 20 (1982).

¹¹⁷ Many authors developed on the economic theories supporting GIs development with Josling, Rangnekar, Lucatelly, Ritzer, Galsteier, Barjolle, Gowert, and Moschini agreeing on the fundamentals. For a comprehensive approach see Bramley & Kirsten, *supra* note 65. Cerkia Bramley, Estelle Biénabe & Johann Kirsten, *The Economics of Geographical Indications: Towards a Conceptual Framework for Geographical Indication Research in Developing Countries*, ECON. INTELL. PROP. 109 (2009). Cerkia Bramley & Indications June, *A Review of the Socio-economic Impact of Geographical Indications: Considerations for the Developing World*, WIPO WORLDWIDE SYMPOSIUM ON GEOGRAPHICAL, INDICATIONS 22 (2011),.

distinctive signs, to ameliorate these differences. It is in this world of asymmetric information that notoriety plays an important role by signaling a certain level of quality that consumers expect.¹¹⁸ Reputation, notoriety, and distinction are thus fundamental both to trademarks and GIs as IPR based on identifying or recognizing products in the market.¹¹⁹

Trademarks must be distinct and differentiated to protect investments and brand development. Some experts draw attention to the ascendancy of the Chicago School's economic theories underpinning juridical developments in the United States, which have, since the mid-1970s, enabled stronger trademark protection.¹²⁰

According to Akerlof's theory of lemon markets, a buyer cannot observe the quality of a used car with any significant surety whereas a used car seller has more reliable information about it. In this situation of information asymmetry good used cars and bad used cars would sell at comparable prices, however, this leads "bad cars driv[ing] out good cars."¹²¹ The common price between good and bad products presents sellers with perverse incentives motivating the withdrawal of the good products. Consequently, as good cars are withdrawn from the market, equilibrium is achieved at lower levels of quality.¹²²

Similarly, buyers of GI products like wine or cheese—particularly in countries far from the origin of the product—cannot distinguish between a high-quality food product and a bad one. Then they are only willing to pay a fixed price for a product that averages the value of a good

¹¹⁸ RANGNEKAR, *supra* note 40, at 1, Executive Summary and 10.

¹¹⁹ Martin Blackwell, *The Relationship of Geographical Indications with Real Property Valuation and Management*, 25 PROP. MGMT. 193 (2007) (studying the implications of GIs on real property valuation and management).

¹²⁰ Daniel M. McClure, *Trademarks and Unfair Competition: a Critical History of Legal Thought*, 69 TRADEMARK REP. 305 (1979). *See also* Daniel M. McClure, *Trademarks and Competition: the Recent History*, 59 LAW CONTEMP. PROBLEMS 13–43 (1996).

¹²¹ Akerlof, *supra* note 115, at 490.

¹²² *Id.* at 489.

product and bad product together. The memory of a certain name, a familiar ancestral label, or an identity call to the nationality or traditional origin of the product—not necessarily related to quality—may be enough for a consumer to choose the product, due to its perceived reputation as higher quality.¹²³ The mere presence of low quality agricultural goods destroys the market for quality goods when information is imperfect; signaling quality goods is essential, then, to avoid this problem. Using reputation to restore efficiency to the market by averting the consequences of information asymmetries requires that reputation be protected through a process such as GIs or the “institutionalization of reputation.”¹²⁴

Food markets and consumers are increasingly determined by an array of quality assurances, reflecting a growing interest on product origin and production method, demonstrating a need for the institutionalization of quality.¹²⁵ Theory suggests that credible signals—such as GIs—in the form of labels and verification marks are necessary to ameliorate the information asymmetry inherent in the provision of a credence attribute. Moreover, empirical results demonstrate the important need for a system to facilitate the establishment and verification of these credible industry-led quality assurances.¹²⁶

¹²³ Jesús Cambra Fierro & Antonio Villafuerte Martín, *Denominaciones de Origen e Indicaciones Geográficas: Justificación de su Empleo y Valoración de su Situación Actual en España*, in *EL NUEVO SISTEMA AGROALIMENTARIO EN UNA CRISIS GLOBAL* 329, 340 (2009).

¹²⁴ Bramley & Kirsten, *supra* note 65, at 76.

¹²⁵ See Gilles Allaire, *Quality in Economics, a Cognitive Perspective*, in *THEORETICAL APPROACHES TO FOOD QUALITY* 61, 61 (Mark Harvey, Andrew McMeeking, & Alan Warde eds., 2004).

¹²⁶ Jill E. Hobbs et al., *Food Quality Verifications and Consumer Trust*, in *86TH ANNUAL CONFERENCE, APRIL 16-18, 2012, WARWICK UNIVERSITY, COVENTRY, UK* 24, 21 (2012), http://ageconsearch.umn.edu/bitstream/135069/2/Jill%2520E_Hobbs_Hobbs%2520et%2520al_Trust_AES2012.pdf (last visited Nov. 14, 2016).

GIs may serve to protect intangible assets such as market differentiation, reputation, and quality standards,¹²⁷ as well as innovation and development, in the increasingly open global economy. Furthermore, GIs implying a competitive equilibrium that arises with a credible GI mechanism may be treated as effective certification tools for high-quality products that attempt to overcome the very real information problem that consumers face when quality cannot be readily ascertained prior to purchasing.¹²⁸

For the GI process to become a useful tool for development, public actors —not just the legal and institutional frameworks— must play a major role ensuring certain conditions to support local stakeholders. These conditions include identification of local resources, qualification and certification of the product as a GI, remuneration and management of the GI system, and reproduction of local resources to grant sustainability. It requires a proper combination of an integrated rural development policy that supports local stakeholders through stages including fair trade and redistribution of value along the production chain, as well as the recognition of collective property rights attached to the GI through sound legislative and regulatory frameworks.¹²⁹

Among IPR, GIs may ensure a positive result when sustainable agricultural actions and rural development policies complement the legal framework.¹³⁰ Those policies, together with

¹²⁷ Felix Addor, Nikolaus Thumm & Alexandra Grazioli, *Geographical Indications: Important Issues for Industrialized and Developing Countries*, 74 IPTS REP. 24, 29 (2003).

¹²⁸ See GianCarlo Moschini, Luisa Menapace & Daniel Pick, *Geographical Indications and the Competitive Provision of Quality in Agricultural Markets*, 90 AM. J. AGRIC. ECON. 794, 809 (2008).

¹²⁹ VANDECANDELAERE ET AL., *supra* note 3, at 148 (creating conditions for the development of GIs: the role of public policies).

¹³⁰ Giovanni Belletti, *Le Denominazioni Geografiche nel Supporto all'Agricoltura Multifunzionale*, 4 POLIT. AGRIC. INTERNAZIONALE 81 (2003) (regarding the multifunctionality of agriculture and how it represents a problem of public policy when it comes from the a reform of market and institutions signaling the specific attributes of the commodity output being a typical agro-food product and its production system can be regulated under a GI).

others such as food safety regulations or anti-trust policies, are crucial to optimization the effects of GIs.¹³¹ An origin-linked product, and consequently a GI, may become the cornerstone of a specific-quality virtuous circle within a territorial approach, having a positive impact contributing to economic, sociocultural and environmental sustainability.¹³²

¹³¹ Barjolle, Paus, & Perret, *supra* note 54, at 12.

¹³² FILIPPO ARFINI, GIOVANNI BELLETTI & ANDREA MARESCOTTI, PRODOTTI TIPICI E DENOMINAZIONI GEOGRAFICHE. STRUMENTI DI TUTELA E VALORIZZAZIONE, 16 (2010) (originating in France but also extended to Italy through the idea of “*valori e valorizzazione del prodotto tipico: l’idealtipo del circolo virtuoso*”).

Figure 4: The Original-Linked Vicious Circle



Source: Giovannucci *et al.*¹³³

A literature review on methods to analyze the impact of GIs shows a clear distinction between objective and subjective approaches. These studies demonstrate the ability of GI production systems to create or reinforce positive effects on rural development, which are welcome in marginal areas. However, these studies also show that there is no single well-established method to measure the impacts of a GI system or protection scheme.¹³⁴

¹³³ GIOVANNUCCI ET AL., *supra* note 19.

¹³⁴ Barjolle, Paus, & Perret, *supra* note 54, at 7.

Nonetheless, there is a clear need for further research on impact assessment for a quantitative representative sample of GI systems.¹³⁵ After all, as with any other economic activity, it is important to consider consequences beyond pure monetary and marketing data. Sales, market access and profit are extremely important, while many other elements are a fundamental part of the concept of GIs such as social and community development, traditional knowledge and diverse product conservation, environmental protection or even fair trade. However, public regulation and implementation of certain policies, along with the bureaucracy linked to registration and control procedures, hinder the efficiency of GIs.¹³⁶

Global sales of GI products are estimated to be over €50 billion.¹³⁷ The market value for French GI products, specifically, is around €19 billion,¹³⁸ while Italy alone retains 430 registered GIs that employ about 300,000 persons and generate a value of €12 billion.¹³⁹ Similarly, argane oil represents between 25% and 45% of the local population income in Morocco (around 100 female cooperatives exist around the GI), Darjeeling tea employs over 50,000 people in India, and the turnover of Rooibos in South Africa is estimated to be over €22.5 million.¹⁴⁰

The objective method measures impact differential between two states allowing quantitative comparison between products. On the other hand, the subjective method measures

¹³⁵ *Id.* at 12.

¹³⁶ Bertil Sylvander, Louis Lagrange & Christine Monticelli, *Les Signes Officiels de Qualité et d'Origine Européens*, 299 *ÉCONOMIE RURALE* 7, 23 (2007) (analyzing how to improve the system in order to face the main critics received from those opposing to the GIs systems. The French and European isolation were criticized and expressly required to take into account the international demands together with the need of improving the coherence, efficiency, and effectiveness of their public legal instruments).

¹³⁷ WORKSHOPS ON GEOGRAPHICAL INDICATIONS: DEVELOPMENT AND USE OF SPECIFIC INSTRUMENTS TO MARKET ORIGIN-BASE AGRICULTURAL PRODUCTS IN AFRICAN-ACP COUNTRIES 4 (2014), *available at* pdf. http://ec.europa.eu/agriculture/events/2014/gi-workshops/training-brochure_en.pdf (last visited Nov. 12, 2016).

¹³⁸ *Id.* at 3.

¹³⁹ *Id.* at 4.

¹⁴⁰ *Id.* at 26.

other indicators directly linked to GIs. The issue is directly connected the feasibility of the establishment of a GI system and its conditions, both, objective and subjective, that may be considered by any producer before joining a GIs. While the approach and analysis focus on the individual interest of a producer, considerations of the consumer, the community, the public, and the environment must also be taken into account. Referring the issue of the economic impact of GIs would be relevant while facilitating the establishment of a diagnostic system to evaluate why, when, and how it may be established and the parameters to measure its feasibility.

The economic rationale for GIs is the correction of a market failure caused by two main problems. The first problem is the problem of asymmetric information and the unwillingness of consumer to pay a higher price. The second problem is that, as a public good, the reputation of GIs could be used by those outside the production area. However, if GIs are protected as IPR, both problems are solved. A consumer can be certain that the product branded with the GI will incorporate the expected quality and rely on the product's origin indicated on the label, with quality and origin being inextricably associated.¹⁴¹

The concern of any farmer is how to make a sustainable living from the difficult business of agriculture. Agricultural products need to be sold at the highest possible price while reducing productions costs for the producer to make a viable living. These uncontested assumptions, based on cost benefit analysis and market driven acts, are affected by external elements such us direct public aid to agriculture, regulations and tariffs, sanitary and phytosanitary measures, and limitations to market access, along with traditional meteorological, land, and water conditions.¹⁴²

¹⁴¹ GIOVANNI BELLETTI ET AL., THE EFFECTS OF PROTECTING GEOGRAPHICAL INDICATIONS WAYS AND MEANS OF THEIR EVALUATION, 1 (2011).

¹⁴² María Paola Rizo, *La Protección de las Indicaciones Geográficas*, PERSPECT. RURAL. NUEVA ÉPOCA 45 (2012). As Chief of the Section on GIs and Industrial Designs at the WIPO Division for Trademarks and Designs, Rizo

The challenges are grounded on the inelastic nature of agricultural markets since demand for food is not just market-based and farmers are mainly price-takers in the food system.¹⁴³

This association between the quality of a product and its geographical origin is not arbitrary and is one of the main features of GIs. Evidence from existing agreements and registers demonstrates regional specialization within product categories. That is the true of Cuba (cigars), the Czech Republic (beers and malt), or France (cheeses), among many others, although the increasing amount of registered GIs provides product diversity.¹⁴⁴ On the distribution and purchase side, the high concentration of buyers also has important consequences on any economic analysis.¹⁴⁵ Food chains link consumers to farmers through direct sales (only about 2% of the fresh food market in volume terms)¹⁴⁶ while farmers tend to have weaker negotiating power in the food chain even though they are key players in the production of raw materials.¹⁴⁷

Product specifications defining a GI have wide socio-economic implications implying not just recognition of industrial property but also socio-economic fundamental rights.¹⁴⁸ Some of

develops on the great deal of effort required for developing a geographical indication scheme through an industrial property right.

¹⁴³ *Id.* at 49.

¹⁴⁴ RANGNEKAR, *supra* note 40 at 14.

¹⁴⁵ YOU ARE PART OF THE FOOD CHAIN: KEY FACTS AND FIGURES ON THE FOOD SUPPLY CHAIN IN THE EUROPEAN UNION (2015), available at http://ec.europa.eu/agriculture/markets-and-prices/market-briefs/pdf/04_en.pdf. (“Concentration in the food processing industry and retail sectors is higher than in the agricultural sector, endowing downstream actors with higher bargaining power. Though this development is not problematic in itself, the abuse of bargaining power is at the basis of unfair trading practices in the food chain. This is a reality confirmed by all stakeholders under the High Level Forum for a Better Functioning Food Supply Chain, who acknowledged the existence of unfair practices. As a result, representatives from across the food chain agreed on a list of principles of good practice in contractual relations, while part of the food chain (the food industry and food distribution) has engaged in a voluntary scheme for the implementation of these principles.”).

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Id.* at 5.

¹⁴⁸ Teresa Acampora & Maria Fonte, *Productos Típicos, Estrategias de Desarrollo Rural y Conocimiento Local*, REV. OPERA 191, 212 (2007).

these implications are borne out by the case study of Tuscany extra virgin olive oil. For instance, the demands of the specifications might lead to the exclusion of certain farmers. In such cases, small producers accounted for less than 2% of the certified production while large producers accounted for more than 77%, provoking the exclusion of small producers either by “self-exclusion” due to disinterest in using the geographic indication or inability to afford certification costs. However, standardization and differentiation of products leads to positive implications on quality and pricing for those using the geographic indication.¹⁴⁹

Currently, the European Union framework for GIs and appellation of origin for agricultural and food products allows producers from third countries—ACP countries—to register their indications in the European GI Register, allowing products to be protected within the European Union.¹⁵⁰

Geographical indications pertaining to products of third countries that are protected in the Union under an international agreement to which the Union is a contracting party may be entered in the register. Unless specifically identified in the said agreement as protected designations of origin under this Regulation, such names shall be entered in the register as protected geographical indications.¹⁵¹

In some ACP countries efforts have been made to implement institutions and an appropriate legal framework. In West and Central Africa, the African Intellectual Property Organization (OAPI),¹⁵² within the framework of the Bangui Agreement on Intellectual

¹⁴⁹ RANGNEKAR, *supra* note 40, at 5.

¹⁵⁰ EU Agricultural Products and Foodstuff Regulation, Art. 11.2.

¹⁵¹ *Id.*

¹⁵² *See* OAPI, <http://www.oapi.int> (last visited Oct 15, 2016).

Property,¹⁵³ permits official recognition of GIs and protects appellation of origin products simultaneously within its sixteen member states. However, despite this developed legal framework, it should be noted that not a single GI has been formally registered.¹⁵⁴ As a matter of fact, GIs are often ascribed benefits that have nothing to do with the legal instrument itself, but rather with the collective projects that strive for differentiation. This depends on the market reputation of origin, partnership collaboration between producers, joint standardization of product quality, monitoring of compliance with production procedures, and collective marketing. Sometimes the organizational and productive infrastructure is even more important than the adequate legal framework.¹⁵⁵

The Center for Agriculture and Rural Development at Iowa State University examined the incentives of atomistic producers to differentiate and collectively market products under a GI, analyzing market and welfare effects of alternative producer organizations.¹⁵⁶ They created a model to study the market and welfare effects of “real-world GDAP (Geographically Differentiated Agricultural Products) organizations,” and used it to derive economic insights regarding GIs and to describe implications of the different perspectives between the European Union and the United States.¹⁵⁷ The study concludes that individual firms that have adequate IPR protection are incentivized to innovate and market products because they can capture the rents

¹⁵³ Bangui Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property, Mar. 2, 1977, WIPO, *available at* http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=227.

¹⁵⁴ OAPI, *supra* note 152.

¹⁵⁵ Lence et al., *supra* note 92 at 947.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 948.

associated with success.¹⁵⁸ However, they also recognize that this incentive does not exist in commodity agriculture because rational producers realize that other producers will expand production in response to any economic rents that result from successful innovations.¹⁵⁹

Preliminary results already give some tentative answers to these questions. Specifically, many studies suggest that cheeses, fruits and vegetables, and grain receive a larger premium when using a GI.¹⁶⁰ In Europe, PDO products, which observe a more strict production protocol and the highest regulatory standards, obtain the best market premiums, followed by PGI as more generic GI denominations.¹⁶¹ Another initial conclusion is that, when multiple certification options are available, as in Europe, generic GI names become less effective, even though GI premiums are different across products and categories.¹⁶²

Regarding their economic impact, the subject matter is guided by the contributions of Barjolle,¹⁶³ Belletti,¹⁶⁴ Deselnicu,¹⁶⁵ and several selected practical cases on GIs emphasizing

¹⁵⁸ *Id.* at 962.

¹⁵⁹ *Id.*

¹⁶⁰ Dominique Barjolle & Erik Thevenod-Mottet, *Ancrage Territorial des Systèmes de Production: le Cas des Appellations d'Origine Contrôlée*, 121 INDUSTRIES ALIMENTAIRES ET AGRICOLES 19 (2004).

¹⁶¹ Oana Deselnicu et al., *What Determines the Success of a Geographical Indication? A Price-based Meta-analysis for GIs in Food Products*, 29, 20 (2011), available at <http://ageconsearch.umn.edu/bitstream/104000/2/GI-paper%20AAEA%202011.pdf>.

¹⁶² *Id.*

¹⁶³ Dominique Barjolle, Marguerite Paus & Anna Perret, *Impacts of Geographical Indications. Review of Methods and Empirical Evidences*, 14, 11. “For a first group of geographical indications in progress, which we called “enthusiasts,” the most important expected impacts are the market stabilization or increase, the value added in the region, but also the preservation of local breeds or varieties. For a second group of geographical indications in progress, that we called “socio-environmentalists,” the expectations on economic issues are less important than the social and the environmental ones. Finally, for a third group of geographical indications in progress, that we called “undecided,” we find that the highest scores are given to the expected economic impacts. We can conclude that in general, observed or expected impacts of geographical indication systems are mainly linked with economic or economic-related issues. But the review of the 14 case studies also shows that if the economic concerns are the only motives in the implementation of the GI protection schemes, there are some crucial risks.”

¹⁶⁴ BELLETTI ET AL., *supra* note 140.

¹⁶⁵ Deselnicu et al., *supra* note 160.

advantages of the system.¹⁶⁶ Two researchers from the University of Florence, Giovanni Belletti and Andrea Marescotti, along with Marguerite Paus and Sophie Reviron of AGRIDEA, as well as Angela Deppeler, Hansueli Stamm, and Erik Thévenod-Mottet of the Swiss Federal Institute of Intellectual Property, studied the effects of protecting GIs and their evaluation.¹⁶⁷ The aim of that project was to establish, together with the Jamaican authorities and the producers of rum, jerk (typical Jamaican mixed spices), and Blue Mountain Coffee, the legislative foundation for a GI register while supporting producers fulfilling the necessary conditions for registration. The study provided a standardized methodology for assessing positive and negative effects caused by the introduction of a GI system, even comparing the effects between GI projects protecting different products in different regions and countries.¹⁶⁸ It is interesting to check effects of first (, second and third order and their development impact:¹⁶⁹ first order effects are the immediate outputs of the GI registration, and measure the level of use of the registered GI inside the local production system;¹⁷⁰ Second order effects are the outcomes generated by the use of the registered GI on the structure of the GI system, its economic performance and on consumers and final markets;¹⁷¹ and the third order effects refer to the local markets of inputs needed by the GI system and consequently its impact on local development.¹⁷²

¹⁶⁶ SANJEEV AGARWAL & MICHAEL J. BARONE, EMERGING ISSUES FOR GEOGRAPHICAL INDICATION BRANDING STRATEGIES (2005) (providing a view from the perspective of the Midwest Agribusiness Trade Research and Information Center, Iowa State University).

¹⁶⁷ BELLETTI ET AL., *supra* note 140.

¹⁶⁸ *Id.* at 9.

¹⁶⁹ *Id.* at 55, Scheme 4.1 Effects of the GI framework establishment.

¹⁷⁰ *Id.* at 61.

¹⁷¹ *Id.*

¹⁷² *Id.* at 71.

Barjolle, Paus, and Perret also studied the impact of GI reviewing methods and empirical evidence to assess their territorial impact (economic, social, and environmental).¹⁷³ They found that clear methodological choices can be identified according to the objective/subjective approach, diachronic/synchronic evaluation, and to the reference point. Furthermore, the study found that governance regimes for GIs may have a clear and measurable impact on food marketing systems¹⁷⁴ leading some to see GIs and distinctive models as innovative.¹⁷⁵

All these studies address the importance of GIs from different perspectives. Data and cases highlight the importance of, and need for, a clear regulatory framework and registration system. Assessment, methods, and evaluation of GI models insist on the relevance of a proper coordination of legislation and policies focused on local development to obtain the premium and local distribution of profit.

¹⁷³ Barjolle, Paus, & Perret, *supra* note 54.

¹⁷⁴ Skilton & Wu, *supra* note 42. (“Using a method based on historical narrative, we argue that the structure of governance regimes impacts the effectiveness of the marketing systems associated with protected geographic indicators (PGIs). A PGI is a form of communal intellectual property that is combined with privately held resources to enable the exclusive production and marketing of traditional specialty food and beverage products. We use two factors to differentiate governance regimes: the heterogeneity of producer interests and capabilities and the level of communal control over production and marketing. Together these factors determine how committed producers are to participation and how strongly they coordinate their actions. Commitment and coordination in turn influence the quality and consistency of production, the effectiveness of promotion, the kinds of placement the product can achieve, and the availability of price premiums.”).

¹⁷⁵ D. Desbois & J. Nefussi, *Signes de Qualité, quels Résultats Économiques pour le Producteur*, DEMETER 49, 89 (2008). (“Enfin, les résultats mitigés que nous observons sur la valorisation des dispositifs officiels de signes de qualité au début des années 2000 peuvent être interprétés comme l’épuisement d’une source d’innovation des produits alimentaires. La différenciation de la matière première agricole sur la base de valeurs traditionnelles, régionales ou fermières, s’est banalisée face à de nouvelles orientations de l’industrie alimentaire, notamment le lien entre santé et alimentation. Les produits agricoles “sans signes officiels de qualité”, qui constituent notre échantillon témoin, répondent à ces nouvelles orientations de l’industrie alimentaire. Dans ce contexte économique, le “génie alimentaire” et le marketing des entreprises industrielles constitueraient de nouveau les principaux leviers de l’animation de la consommation alimentaire. L’identité du produit agricole ne serait plus centrale.”).

1.3. The Value of GIs and Potential Opportunity for Developing Countries

There are more than 10,000 GIs in the world with an estimated trade value of more than \$50 billion, but about 90% of them originate from only thirty industrialized OECD countries.¹⁷⁶ However, many products suitable for GI development remain unprotected and consequently, quality schemes are increasingly perceived as an opportunity to translate unique physical and cultural attributes into product differentiation and market access.¹⁷⁷

Interestingly, unlike any other IPR-instrument in the TRIPS Agreement, the demand for stronger protection includes many developing countries based on a presumption of strong commercial potential as GIs tend to originate from primary economic development, mainly agricultural. With only 10% of the world's protected GIs coming from developing countries, there is great potential for this tool to reduce poverty through trade.¹⁷⁸

The Center for Law and Economics of International Trade has targeted the business sector in developing countries on this topic drawing from eight case studies and 200 published reports to provide valuable insights on how to set up and monitor GIs, share costs and benefits, and interpret legal frameworks.¹⁷⁹ The main factors that influence the success of unique GIs—meaning that the largest portion of the GI stakeholders receive economic benefits (strengthening local economic, employment, etc.) while social and environmental conditions are enhanced, or at

¹⁷⁶ GIOVANNUCCI ET AL., *supra* note 19, at xvii, Executive Summary.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

least not compromised—are: (i) strong organizational and institutional structures; (ii) equitable participation; (iii) strong market partners; and the envisaged (iv) effective legal protection.¹⁸⁰

Over the last few decades, many nations have completed GI legislation to take advantage of international IPR frameworks promoted by the TRIPS Agreement, the WTO, WIPO, FAO, and the European Union.¹⁸¹ This support has been forthcoming because GI systems may help less favored rural communities overcome sustainable development challenges.¹⁸² It is important to underscore that the uniqueness of products provides the main justification for protection under a GI due to the significance of preserving the integrity of certain assets. In many cases, this represents the result of centuries of human development, the effort to achieve the desired result, and the strict relationship with the territory of origin.¹⁸³ Yet, perceived deficiencies in international IPR generates a debate that may conflict with the general health and welfare of a society as a whole.¹⁸⁴ In fact, evidence linking the level of IPR protection to economic development is unconvincing. All countries, developed and developing, must work together to adapt existing IPR and GI systems to address the disparate positions of the participants and the uncertainties created.¹⁸⁵

¹⁸⁰ *Id.* at 93.

¹⁸¹ N. Parrott, N. Wilson & J. Murdoch, *Spatializing Quality: Regional Protection and the Alternative Geography of Food*, 9 EUR. URBAN REG. STUD. 241 (2002).

¹⁸² *Id.* at 245.

¹⁸³ Stefania Fusco, *Geographical Indications: A Discussion on the TRIPS Regulation after the Ministerial Conference of Hong Kong*, 12 MARQ. INTELL. PROP. L. REV. 197, 260 (2008).

¹⁸⁴ Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 90 (1993).

¹⁸⁵ *Id.* at 137–8.

In 2010 the European Commission¹⁸⁶ collected data covering the 2,768 GIs in the European Union at that time and estimated an average value premium rate in Europe over non-GI products of 2.23.¹⁸⁷ The total sales value of GI products were €54.3 billion, more than half (56%) accounted for by wines and 15% by spirits.¹⁸⁸ Of the €11.5 billion in GI-protected exports, the United States was the leading importer at €3.4 billion including 30% of the food and beverages exported by the European Union.¹⁸⁹ Therefore, the economic interest for the European Union is clear, emphasizing the economic rationale for the protection of GIs and its socio-economic impact.¹⁹⁰ However, the sales value of the European food and drink sector in 2010 was estimated at €956 billion while the share of GIs was only 5.7%.¹⁹¹ Exports of GI products to third countries were €11.5 billion, representing 15% of all extra-European Union trade for food and beverages (wines, 51%; spirits, 40%; agricultural products and foodstuffs, 9%).¹⁹²

One of the presumptions grounding Regulation EEC 2081/92 when establishing the European protection for agricultural quality products was that consumers were interested in knowing the origin of products: “Whereas in view of the wide variety of products marketed and of the abundance of information concerning them provided, consumers must, in order to be able

¹⁸⁶ CHEVER ET AL., *supra* note 14. (This is an updates version of the previous report Value of Agricultural Production under Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI) (Tender N° AGRI–2008–EVAL–02) performed in 2009 for the DG AGRI of the European Commission. The study aimed to update the database for the period 2009-2010; expand and complete the database with data on the volume, value and trade of production for each wine, aromatised wine and spirit registered under GI for the period 2005-2010; analyse the value premium received by products bearing a registered name, to assess the evolution of value, volume and trade of geographical indications during the period 2005-2010; and, finally, to compare the situation with standard products and between different GI products and sectors at European Union and Member State levels.).

¹⁸⁷ *Id.* at 10 (Executive Summary).

¹⁸⁸ *Id.* at 4.

¹⁸⁹ *Id.* at 6.

¹⁹⁰ *See* Bramley & Kirsten, *supra* note 65. *See also* RANGNEKAR, *supra* note 40.

¹⁹¹ CHEVER ET AL., *supra* note 14, at 4.

¹⁹² *Id.* at 6.

to make the best choice, be given clear and succinct information regarding the origin of the product.”¹⁹³ The Commission’s survey of 16,000 consumers across sixteen western European countries verified this interest in origin and indicated that consumers are more interested in tradition over mass-produced food items. The Dolphins and Siner-Gi projects, as well as the FAIR Research, corroborated this conclusion.¹⁹⁴ In other words, consumers will pay a premium if quality promises are delivered, implying that interest in origin is part of wider trend of changing consumption patterns.¹⁹⁵

For the United States, the main issue is the economic impact of limiting the use of GIs that are considered common or generic food names. The European Commission approach is considered too restrictive and certain affected industries in the United States—particularly

¹⁹³ See Council Regulation 2081/92, *supra* note 76.

¹⁹⁴ The DOLPHINS Project “Development of Origin-Labeled Products: Humanity, Innovation, and Sustainability” was a European Union sponsored research initiative on the effects of GIs on local economies that examined how GIs were protected by public policies in various EU member countries and how they might be harmonized. The objective of the Strengthening International Research on Geographical Indications (SINER-GI) project was to build and share a coherent scientific basis worldwide, regarding economic, legal, institutional, and socio-cultural conditions of success of GIs, in order to support their legitimacy in the framework of WTO negotiations. SINER-GI was a research project and network supported by the European Community (Priority 8.1: Policy-oriented research) from May 2005 to July 2008. It was coordinated by Bertil Sylvander up to 2007, and by Gilles Allaire from 2007 up to the termination of the Project, to build and share a coherent worldwide scientific basis regarding economic, legal, institutional and sociocultural conditions of success for GIs. GENERAL DESCRIPTION: SINER-GI AND DOLPHINS EU PROJECTS, <http://www.origin-food.org/2005/base.php?cat=20> (last visited May 13, 2016). Previously completed in 1999, the FAIR research project co-directed by Dominique Barjolle and Bertil Sylvander was also dedicated to the specific conditions and institutional requirements for the development of PDO and PGI products on twenty-one supply chains in seven countries to provide an assessment and recommendations for implementation of European Council Regulation (EEC) No 2081/92. See Dominique Barjolle & Bertil Sylvander, *Some Factors of Success for “Origin Labelled Products” in Agri-Food Supply Chains in Europe: Market, Internal Resources and Institutions*, in THE SOCIO-ECONOMICS OF ORIGIN LABELLED PRODUCTS IN AGRICULTURE: SPATIAL, INSTITUTIONAL AND CO-ORDINATION ASPECTS”, INRA ACTES ET COMMUNICATIONS 45–71 (1999), available at [http://ageconsearch.umn.edu/bitstream/241033/2/Barjolle%20and%20Sylvander%20\(1999\)%20Some%20factors%20of%20success%20for%20origin%20labelled%20products%20in%20agri-food%20supply%20chains%20in%20europe.pdf](http://ageconsearch.umn.edu/bitstream/241033/2/Barjolle%20and%20Sylvander%20(1999)%20Some%20factors%20of%20success%20for%20origin%20labelled%20products%20in%20agri-food%20supply%20chains%20in%20europe.pdf).

¹⁹⁵ RANGNEKAR, *supra* note 40, at 27.

dairy¹⁹⁶ and meat—argue that everyone should have the right to use common names in marketing those well-known foods and oppose any attempt to monopolize common or generic names that have become part of the public domain.¹⁹⁷

Many of these products are made in significant volumes around the world, not just in the United States, under these generic food names and the prospect of re-labeling products and the anticipated loss of sales could easily involve billions of dollars.¹⁹⁸ In the United States, the United States Dairy Export Council estimates that just the top cheese products that could be impacted represent at least 14% of United States cheese production, valued at \$4.2 billion a year.¹⁹⁹

The different approaches between the European Union and the United States are also a fundamental ground for discussion considering the weak competitiveness of the EU food industry.²⁰⁰ It is not just generic or common food names versus GIs, or economic interests on both sides, but rather different agricultural and foodstuff marketing models and even a political

¹⁹⁶ INTERNATIONAL DAIRY FOODS ASSOCIATION, <http://www.idfa.org> (last visited Oct. 24, 2016). The International Dairy Foods Association (IDFA), represents the nation's dairy manufacturing and marketing industries and their suppliers, with a membership of 550 companies in a \$125-billion a year industry. IDFA is composed of three constituent organizations: the Milk Industry Foundation (MIF), the National Cheese Institute (NCI), and the International Ice Cream Association (IICA). IDFA's nearly 200 dairy processing members run nearly 600 plant operations, and range from large multi-national organizations to single-plant companies. Together they represent more than 85% of the milk, cultured products, cheese, ice cream and frozen desserts produced and marketed in the United States.

¹⁹⁷ The Common Food Names organization represents the main lobby in this matter. For more information see CONSORTIUM FOR COMMON FOOD NAMES, *supra* note 52.

¹⁹⁸ *Id.*

¹⁹⁹ CONSORTIUM FOR COMMON FOOD NAMES, *supra* note 52.

²⁰⁰ J. H. M. WIJNANDS & B. M. J. VAN DER MEULEN, COMPETITIVENESS ON THE EUROPEAN FOOD INDUSTRY. AN ECONOMIC AND LEGAL ASSESSMENT 2007, 273 (2006).

issue considering the importance of the European budget to support the agricultural policy, farms and its own middle class.²⁰¹

The battle is pointing to the use of names—generic or GIs depending on who address them—not just in the European Union and the United States, but also in many other markets around the world,²⁰² however, the consequences of the debate should be understood in proper terms. In fact, two third of the legal systems around the world follow the European Union *sui generis* GI model while one third use a trademark system similar to the United States.²⁰³ Many authors claim that GIs were the earliest types of trademark and its legal is deeper and broader due to its permanent interconnection with the place of origin.²⁰⁴

Obviously, there exists an immediate connection with consumers right to choose and be informed while the point of departure is the nature of foodstuff names.²⁰⁵ Economic interests and legal frameworks are addressed to the market but consumers may have an important say on both sides of the Atlantic.²⁰⁶ Actually, as one of the fathers of United States Trademark Law Edward Rogers, stated more than a hundred years ago:

²⁰¹ Loïc Sauvée & Egizio Valceschini, *Agro-Alimentaire: la Qualité au Coeur des Relations entre Agriculteurs, Industriels et Distributeurs*, DEMETER 181 (2004).

²⁰² *Id.* at 224

²⁰³ GIOVANNUCCI ET AL., *supra* note 19, at 14 and 124 (developing on the fragmented, overlapping, and unclear national protection systems with 167 countries actively protecting GIs as a form of IPR fall into two main groups: 111 nations with specific or *sui generis* systems of GI laws and 56 that prefer to use their trademark systems).

²⁰⁴ Blakeney, *supra* note 53, at 629.

²⁰⁵ Ricardo Rafael Ulloa Castañeda & José María Gil Roig, *Importancia de la Marca Ternasco de Aragón con IGP Medida a Través del Método de Análisis Conjunto desde el Punto de Vista del Consumidor*, XI REVISTA MEXICANA DE AGRONEGOCIOS 408–423 (2007) (confirming its relevance to consumers).

²⁰⁶ *Id.* at 412.

The importance of any industry and the quality of the goods it produces can pretty accurately be gauged by the extent to which trademarks (or GIs) are used in the industry and on the goods. For, if the market is at all extensive, and the goods are sold generally, a means of identification to the ultimate purchaser is essential, and unless the quality of the product is good, no producer cares to identify it as his.²⁰⁷

1.4. Complexities Deriving from Lack of Consensus on GI Concept in a Globalized but Legally Fragmented World

All typical and unique products represent a mixture of tradition and innovation, physicality and symbolism, mechanization and craftsmanship, endogeneity and exogeneity, myths and realities.²⁰⁸ The variety of products and conceptual hierarchies vary from time to time, place to place and even from culture to culture, since food preferences differ according to conventions of place, time, and cultural perception. There is often a distinction between north and south; the first difference is grounded on functional and spatial approaches to food quality oriented to economic efficiency while the second one is associated with territorial, social, and cultural embeddedness within traditions of regional distinctiveness.²⁰⁹ Much has been written and discussed on the uniqueness and immaterial quality of wines, spirits, and agricultural products, however, there is still no global consensus on regulation, legal protection, and enforcement of industrial property rights directly linked to territories and producing communities.

²⁰⁷ Edward S. Rogers, *Some Historical Matter concerning Trade-Marks*, 9 MICH. L. REV. 29 (1910), reprinted in 62 TRADEMARK REP. 239, 250 (1972).

²⁰⁸ ALESSANDRO PACCIANI ET AL., GUIDA PER LA VALORIZZAZIONE DEI PRODOTTI AGROALIMENTARI TIPICI. CONCETTI, METODI E STRUMENTI, 13 (2006) (“*Prodotto è “tipico” quando presenta caratteristiche costanti proprie di una determinata categoria; che ne è peculiare, caratteristico.... un prodotto che presenta alcuni attributi di qualità unici che sono espressione delle specificità di un particolare contesto territoriale.*”).

²⁰⁹ Parrott, Wilson, & Murdoch, *supra* note 180, at 256.

In the United States, consumers are willing to pay more for food safety and quality.²¹⁰ As explained in the lemon market theory, consumers can distinguish credible claims from non-credible claims about food quality and safety, therefore, reputation and credibility in the marketplace is rewarded by increased market share and higher profits.²¹¹ The importance of GI regulation and its reputation are promoted with four basic suggestions: (i) increasing visibility and decreasing irresponsibility; (ii) increasing accountability and decreasing externalities; (iii) increasing reliability and decreasing fraud; and (iv) increasing traceability and decreasing anonymity.²¹²

A different perspective, however, distinguishes four groups of quality attributes regarding food products: (i) sensory attributes, such as taste, tenderness and juiciness, (ii) health attributes, (iii) process attributes in relation to animal welfare, the environment, or organic production, among other factors, and (iv) convenience attributes, saving time or energy for the consumer due to storage, preparation, eating, and disposal.²¹³ This perspective examines the complexities involved in these attributes, considers how consumers form judgments on the quality or safety of a product, and shows how these judgments trade off against price in consumer food choice. The results show that many of these complexities are still poorly understood but the market has clearly shown a development towards more differentiated products in terms of quality and safety.²¹⁴ Existing examples can be found in the United States such as Idaho potatoes, Florida

²¹⁰ Denis Stearns, *On (C)redibility: Why Food in the United States May Never Be Safe*, 21 STAN. L. & POL'Y REV. 245, 253 (2010).

²¹¹ *Id.* at 259.

²¹² *Id.* at 267–74.

²¹³ Grunert, *supra* note 2, at 374.

²¹⁴ *Id.* at 385.

oranges, or the increasing variety of wines. However, the champagne designation issues²¹⁵ demonstrates the continued failure of the United States to comply with rules established under the TRIPS Agreement.²¹⁶

Despite the many FAO and UNCTAD studies on GI importance for development,²¹⁷ a good example in the added value provided for coffee,²¹⁸ as it is for wine initially mainly in western societies but nowadays also produced in many other areas. However, there is no consensus to establish common legal solutions to the main conflicts on GIs. It is accepted that the structure of governance regimes impacts the effectiveness of the marketing associated with GI systems as a form of communal intellectual property combined with privately held resources to enable the exclusive production and marketing of traditional specialty food and beverage products.²¹⁹ While only a minority of GIs originate in developing countries, there is potential to use this tool to reduce poverty, foster market access, and improve consumer awareness. In fact, many cases and reports provide valuable insights on how to set up and monitor geographical indications, share costs and benefits, as well as interpret and apply legal frameworks.²²⁰ Although there is agreement on its potential there is not a clear consensus on the framework for legal protection and the means to enforce it.

²¹⁵ Tim Jay & Madeline Taylor, *A Case of Champagne: A Study of Geographical Indications*, CORPORATE GOV'T EJOURNAL 1 (2013).

²¹⁶ 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 (1998).

²¹⁷ See, e.g., Ermias Biadgleng & Jean-Christophe Maur, *The Influence of Preferential Trade Agreements on the Implementation of Intellectual Property Rights in Developing Countries: A First Look*, UNCTAD-ICTSD PROJ. IPRS SUSTAIN. DEV. PAP. (2011).

²¹⁸ See, e.g., Johnson, *supra* note 20.

²¹⁹ Skilton & Wu, *supra* note 41, at 146–47.

²²⁰ GIOVANNUCCI ET AL., *supra* note 19.

In a globalized economy, the increased ruling power of the market may generate a race to the bottom based on quantitative and price models. Economic models for commodities such as cocoa, coffee, rice, sugar, or bananas, show that the industry receives most of the profit while small farmers remain weak. The strong superiority of developed industries, together with the multinational foodstuffs distribution network, grants full control of product qualities, market access, and purchase conditions. It is easy to wonder about the gap between exporters and importers, those growing and harvesting the product, and those marketing and selling the final product to consumers.²²¹ Perhaps the best possible system of fair trade would establish a legal framework to facilitate the economic added value mainly remaining in the territory. This is one of the cornerstones of GIs not just granting protection the product, but also pursuing the general interest, respecting traditions, fostering quality, and developing systems of production to ensure a better distribution of profit among those embedded in the territory and effective tools for promoting locally-based development.²²² It is not possible to understand GIs without accepting diversity, quality, and fair development; for many that is essential to explain the comprehensive legal concept of GIs and distinguish with the distinctiveness provided by trademarks.

2. INTERNATIONAL REGULATION ON GIS

As with other IPR protections, the effectiveness of GI systems depends, to a large extent, on formal governance regimes and the controlling legal framework.²²³ Any discussion on

²²¹ Detailed information can be obtained from the International Cocoa Organization, located in London, <https://www.icco.org> (last visited Nov. 8, 2016).

²²² WIPO, GEOGRAPHICAL INDICATIONS, AN INTRODUCTION 41 (2010), http://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo_pub_952.pdf.

²²³ See Skilton & Wu, *supra* note 41, at 145.

unification or harmonization of law suffers from the false assumption that it is a simple single conception. Many are apt to think only of legal texts and regulations when referring to uniformity of law in the international field. But practices and ideas are also relevant only after reaching certain fixity on the judicial and professional tradition.²²⁴ Thus, in the matter of GIs we have to consider the law in its living content when it constitutes the law as it is rather than the illusion of law.²²⁵ Legal concepts are often developed, adapted to time and place, and extended to cover minor details but may sometimes deviate from the essence of the regulated reality. The variety of denominations, typologies, legal texts, and practicalities of GIs create confusion that hinders understanding and limits potential impacts.²²⁶ The existing international agreements explain the difficulties certain jurisdictions face when deciding on the best possible system to regulate quality agricultural products.

The regulatory evolution of GIs shows an unresolved tension between aspirations for extraterritorial application of rights in geographic names as a public right and pure IPR where territoriality is the general rule.²²⁷ The aim of protecting GIs against false and deceptive goods has been the *leitmotiv* for the old Europe. Initially, in early agreements, the terms “false” and “deceptive” were confused and the distinctiveness of indications of source was not evident since not all consumers were familiar with the specific goods and places.

Summarizing current international legal text regulating GIs—with special attention given to the arguments of those opposing to their development—suggests that the idea is to clarify

²²⁴ Ladas, *supra* note 1, at 164-65.

²²⁵ *Id.*

²²⁶ RUSSO, *supra* note 2, at 5 (referring to GIs as a “legal maze”).

²²⁷ Amy Cotton, *123 Years at the Negotiating Table and Still No Dessert. The Case in Support of TRIPS Geographical Indication Protections*, 82 CHI.-KENT L. REV. 1295, 1312 (2007).

existing conceptual differences and identify the practicalities and potential solutions for the main regulatory issues. It is not the intention to provide a detailed analysis of the existing texts but to look toward the future considering the reality and potential of GIs under TTIP to unlock the existing multilateral system established under the TRIPS Agreement. Therefore, the aim of the brief analysis of the international agreements on GIs is to incorporate a comparative and clear description of the current state and a complete picture on the conceptual differences.

2.1. GIs Under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)

International organizations actively compel every country to readjust, reform, and even redesign their economic system to synchronize with a trade regime base on principles that may grant market access and development worldwide. Developing countries are expending a considerable amount of effort to establish positions and rules for appropriate strategies to meet the international challenges and ensure a fair share of the benefits arising out of the new international economic order.²²⁸ Recent developments at the WTO and other international fora, along with many bilateral and multilateral free trade agreement negotiations, have gained relevance since more than one hundred states signed the Marrakesh Agreement establishing the WTO and the Uruguay Round of the General Agreement on Tariffs and Trade in 1994. Now, the TRIPS Agreement is binding on the 164 members of the WTO, and it is also relevant to many other governments and international intergovernmental organizations granted observer status at

²²⁸ K. Raustiala & S. R. Munzer, *The Global Struggle over Geographic Indications*, 18 EUR. J. INT'L L. 337, 354 (2007) (in relation with John Lock's theory on property, "labour and desert" establishes that GIs are property rights that must be deserved and, consequently, their scope and strength must be commensurate with the organization and quality both in product and GI organization).

the WTO.²²⁹ IPR protection, and particularly GIs, are now a universal issue. Bound by an obligation to implement these changes in sixteen years, an important dilemma was opened.²³⁰

The TRIPS Agreement provides that Contracting States may, but are not obligated to, implement more extensive protection in domestic laws than is required by the existing Agreement, provided that such protection does not contravene its own provisions.²³¹ Under the principle of “National Treatment,” members are also required to grant the treatment provided for in the TRIPS Agreement to the nationals of other member states.²³² The European Union, a WTO member since 1995, is leading the proposal for the reinforcement of GIs but negotiations are currently blocked.

The Doha Round, the ninth global trade conference and the first one since the WTO inherited the multilateral trading system in 1995, aims to produce the first major overhaul of the system in the 21st Century. Officially launched at the WTO’s Fourth Ministerial Conference in Doha, Qatar, in November 2001, virtually every item of the negotiation is part of a whole package and cannot be agreed separately, so “nothing is agreed until everything is agreed.”²³³ Its

²²⁹ World Trade Organization, UNDERSTANDING THE WTO, MEMBERS, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Aug 6, 2016).

²³⁰ Raustiala & Munzer, *supra* note 227, at 357.

²³¹ TRIPS Agreement, note 8, at Art.note 8 1(1).

²³² TRIPS Agreement, note 8, at Art.note 8 1(3), 3.

²³³ Adopted on November 14, 2001, the Doha WTO Declaration established among its objectives for trade-related aspects of intellectual property rights “to complet[e] the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this declaration.” WORLD TRADE ORGANIZATION, THE DOHA ROUND, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Aug 8, 2016).

work program covers twenty areas of trade, including GIs,²³⁴ and a fundamental objective of the Doha Development Agenda is to improve the trading prospects of developing countries.²³⁵

After almost fifteen years of expectations and doubts, and following the Nairobi Ministerial Conference, much work remains while the whole package agreements do not seem to be easily achieved.²³⁶ Furthermore, a new mode of negotiating received certain criticism due to the fact that it resulted in an agreement that moves away from the pursuit of universal agreements and establishes a pattern of asymmetrical trade deals.²³⁷ These deals appear to favor developed members fundamentally altering future WTO deals with significant consequences for developing country trade gains.²³⁸ Stagnation, uncertainty, fragmentation, division, and disappointment seem to define the new development agenda despite the tremendous positive impacts of multilateralism and trade openness in the last few decades.²³⁹ With the prevalence of bilateral and regional agreements, Doha's conclusion may generate more hesitation than results, since development goals are being diluted within the complexities of globalization. Thus, the TRIPS agreement and its future development,²⁴⁰ is also depending on the overall global relation

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Rorden Wilkinson, Erin Hannah & James Scott, *The WTO in Nairobi: The Demise of the Doha Development Agenda and the Future of the Multilateral Trading System*, 7 GLOB. POL'Y 247 (2016).

²³⁷ *Id.* at 250.

²³⁸ *Id.* at 254.

²³⁹ Ryan Cardwell & Pascal L. Ghazalian, *The Effects of the TRIPS Agreement on International Protection of Intellectual Property Rights*, 26 INT'L TRADE J. 19, 35 (2012) (developing an empirical model to evaluate the effectiveness of the TRIPS Agreement in tightening IPR protection and concluding: "that the effects of the TRIPS Agreement vary across regions. The TRIPS Agreement has had positive and significant effects on IPR protection in Central and South America, in Asia, and in North Africa and the Middle East. The TRIPS Agreement has not significantly affected protection of IPR in Sub-Saharan Africa. However, the only Sub-Saharan African country in our sample that is bound by the TRIPS Agreement is South Africa.").

²⁴⁰ Mark Shugurov, *The TRIPS Agreement, International Technology Transfer and Development: Some Lessons from Strengthening IPR Protection*, 3 BRICS L.J. 90, 125 (2016).

between the main trading partners now sat at the WTO table, but also in many other bilateral and multilateral ones, being TTIP the main center of interest where many of the issues, such as GIS, may be unravel.

2.1.1. Legal Concept of GIs under the TRIPS Agreement

The inclusion of GIs under TRIPS was due to European diplomatic efforts that established a global minimum standard for GI protection similar to the system previously included in the Madrid Agreement.²⁴¹ This was the outcome of lengthy negotiations and the result is broad enough to include both appellations of origin and geographical indications.²⁴²

Part II of the TRIPS Agreement includes “standards concerning the availability, scope and use of IPR.” Section 3 mentions GIs, including Article 22 regulating “protection,” Article 23 on “additional protection for wines and spirits,” and Article 24 on “international negotiations; exceptions.” Consequently, GI protection under TRIPS can be broken into four main areas providing more than two decades of interesting debates:²⁴³ (i) minimum protections for all GIs establishing a floor of unfair competition norms;²⁴⁴ (ii) higher level and special protection for wines and spirits;²⁴⁵ (iii) defined certain special circumstances and complex exceptions where no

²⁴¹ Calboli, *supra* note 85, at 190.

²⁴² LUCATELLI, *supra* note 86.

²⁴³ See Justin M. Waggoner, *Acquiring a European Taste for Geographical Indications*, 33 BROOK. J. INT'L L. 569, 575 (2008).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

protection is required;²⁴⁶ and (iv) obligations to conduct further negotiations to increase protection of wines and spirits.²⁴⁷

The broad definition granted under Article 22(1) of the TRIPS Agreement²⁴⁸ refers to quality, reputation, or other characteristics of the good attributable to its geographical origin, recognizing that “geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

The protection and prohibition established under Article 22(2) refers to both the use of any means in the designation or presentation of a good misleading the public as to its geographical origin and acts constituting unfair competition within the meaning of Article 10bis of the Paris Convention. This in line with previous international conventions but establishes the obligation of implementation by national legislation and the provision of enforcements procedures. Consequently—in accordance with Part II of the TRIPS Agreement regarding enforcement of IPR, and Article 41 of section 1, which establishes its general obligation—all WTO Members must ensure that enforcement procedures are available under domestic law to permit effective action against any infringement of IPR covered by the Agreement, including expeditious and deterrent remedies.

Additional protection for wines and spirits is established under Article 23, which obligates states to enact laws preventing the use of a geographical indication that attempts to

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Most of this section summarizes the content of the TRIPS Agreement and, therefore footnotes, are not necessary since the articles and sections are duly specified in the text.

identify wines or spirits not originating in the place indicated by the geographical indication, including also translations and expressions such as “kind,” “type,” “style,” “imitation,” or the like. Furthermore, Article 23(2) imposes the obligation to refuse or invalidate the registration of a trademark containing or consisting of a GI for wines or spirits. However, the envisaged multilateral system of notification and registration of GIs for wines eligible for protection under the TRIPS Agreement was never implemented and remains highly controversial issue in the Doha Agenda.

Article 23(3) of the TRIPS Agreement establishes that member states shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other while ensuring equitable treatment to producers concerned and avoiding consumer misleading. Therefore, in relation with homonymous names and considering the grandparent rights of those who have brought their motherland names and traditions to new places, are duly granted.

Since the minimum standard regulating GIs was first established under the TRIPS Agreement and not being a peaceful legal concept, Article 24 recognizes the need for further negotiations aimed at increasing the protection for individual GIs under Article 23. This article provides an active role for the Council in supervising GI protection and invites all members to develop new negotiations and even conclude bilateral or multilateral agreements on the matter. This general provision on the goodwill of the parties to move forward is immediately followed by a set of exceptions to the enhanced protection, noting that:

Nothing in this section shall require a Member to prevent continued and similar use of a particular geographical indication when having used it in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.²⁴⁹

Likewise, Article 24(5) on trademarks provides similar protection when acquired or registered in good faith before the date of the application of the TRIPS Agreement or before the GI was protected in its country of origin.

Trying to reach a similar balance among members in favor and reluctant to GIs, Article 24(6) shows a compromise with generic and common names. It requires respect of existing rights when indications are “(i)dentical with the term customary in common language as the common name” or “with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.”

However, other relevant exceptions affect the practical applicability of the TRIPS Agreement. Article 24(7) establishes a time limit of five years and a “bad faith” contingency for exercising the right to invalidate or refuse registration of trademarks that contain an indication while Article 24(8) recognizes the right of a person to use his name or the name of their predecessor in business in the course of trade as far as it does not mislead the public. Furthermore, Article 24(9) exempts member states from protecting indications that are either not protected in their country of origin, that cease to be protected in their country of origin, or that have fallen into disuse in that country.

Despite the differences in the level of protection between Articles 22 and 23, there exist some commonly shared features: (a) in jurisdictions that implement Section 3 through a *sui*

²⁴⁹ TRIPS Agreement, Art. 24.

generis mechanism, GIs are largely available as a public or collective right that is not vested in an individual firm, person or enterprise; (b) the scope of protection available does not include the right to license or assign a GI; (c) the domain of protection is narrow in comparison to trademarks where “confusingly similar marks” will be considered infringing; (d) the duration of protection tends to be indefinite as long as the GI remains in use; (e) as GIs cannot be licensed or assigned, the good must originate in the designated area of geographical origin.²⁵⁰

2.1.2. Negotiations and Proposals to Reinforce the Global System of GI Protection

The obligation of the TRIPS Council to conduct further negotiations on the establishment of a multilateral system of notification and registration of GIs was raised by Turkey and endorsed by other countries in 1999.²⁵¹ Since then, the diplomatic agenda failed to expand the current protection blaming the ideological division, the lack of dynamism, and the unwillingness to advance despite negative consequences for the system of protection.²⁵² The debates about GIs are much more than just intellectual property arcana since they affect longstanding, high-stakes negotiations over trade in agricultural goods.²⁵³ Many countries are simply waiting to see whether the European Union and the United States agree on the matter.²⁵⁴ Only a meaningful and truly multilateral system could fulfill the TRIPS’ mandate.²⁵⁵

²⁵⁰ RANGNEKAR, *supra* note 101, at 6.

²⁵¹ WTO Doc. WT/GC/W/249, July 13, 1999.

²⁵² Calboli, *supra* note 85, at 194.

²⁵³ Hughes, *supra* note 39, at 302.

²⁵⁴ Teresa Mera Gómez, *Ampliar o No Ampliar la Protección de las IGs, Esa Es la Pregunta*, Año III, N° 4 ANU. ANDINO DERECHOS INTELLECT. 367, 394 (2008).

²⁵⁵ Jose Manuel Cortes Martin, *Trips Agreement: Towards a Better Protection for Geographical Indications*, 30 BROOK. J. INT’L L. 117, 183 (2004).

The current scope of protection for GIs under the TRIPS Agreement consists of two main elements: (1) protection against use of GIS misleading the consumer and (2) protection against the use of indications in a manner that is unfair competition.²⁵⁶ However, differences in how the fundamental elements of the scope of protection are articulated in Articles 22 and 23 constitutes the basis for demands on reform and extension of the system relevant to the economic value of GIs.²⁵⁷ Three main themes were identified from submissions to the TRIPS Council: (i) the “negotiating balance” achieved at the time of the Uruguay Round and the justification or rationale for different levels of protection in Section 3; (ii) insufficiency or adequacy of the scope of protection available under Article 22 (in contrast to Article 23) that distinguishing effective and absolute protection; and (iii) the substantive and potential impact of GI-extension on trade, consumers, and TRIPS obligations, affecting the traditional North-South divide,²⁵⁸ and the different Old World-New World approach to GIs.²⁵⁹ Conducting research on the deadlock of GI-extension, Rangnekar in his UNCTAD/ICTSD study suggested three areas to assist the TRIP Council: (1) develop systematic economic and statistical research on GI-protection; (2) review the economic value of GI-extension and the appropriate legal system to fulfill the obligation along with strategies to promote the commercialization of GIs; and (3) acknowledge and assess

²⁵⁶ TRIPS Agreement, note 8, at Artsnote 8. 22-24.

²⁵⁷ Felix Addor & Alexandra Grazioli, *Geographical Indications Beyond Wines and Spirits*, 5 J. WORLD INTELL. PROP. 865 (2002).

²⁵⁸ Parrott, Wilson, & Murdoch, *supra* note 180, at 256 (studying the alternative geography of food underpinned by “orders of worth” arranged into hierarchies that vary from place to place and consequently food qualities are differentially assessed and evaluated in line with the differing convention hierarchies: economic and efficiently oriented in the North and deeply embedded in social and cultural factors in the South).

²⁵⁹ RANGNEKAR, *supra* note 101, at 7 and 8.

the concessions to be granted in exchange for agreement on GI-extension based on the political reality of multilateral negotiations.²⁶⁰

Because of the deep divide, the negotiations collapsed and post-TRIPS GI protection has not progressed. The Doha Development Agenda of multilateral trade negotiations at the WTO may fail unless a solution to the establishment of a multilateral register for geographical indications on wines and spirits (GIs) foreseen in the TRIPS Agreement is found. European Union insistence on a deal for GIs is now accompanied by demands from several developing countries for an extension of GI protection to their own products.²⁶¹ In fact, many consider the current emphasis on alcoholic beverages to be both culturally discriminatory and a commercial impediment to the ability to collect rents associated with GIs on various products including certain commodities such as bananas or coffee. Some argue that international GI protection would support rural and traditional products, which in turn would lead to development from within. Nonetheless a development strategy that prioritizes local development goals is increasingly relevant for global agricultural and policy discussions.²⁶² Furthermore, the prominent "foodie" movement is likely to grow and increase its importance.²⁶³ There is a need to

²⁶⁰ *Id.* at 10.

²⁶¹ R. Banerjee & M. Majumdar, *In the Mood to Compromise? Extended Protection of Geographical Indications under TRIPS Article 23*, 6 J. INTELL. PROP. & PRACTICE 657, 661 (2011) (referring to the cases of China, Kenya, and India, where over 100 GIs have been recently recognized and registered).

²⁶² See Daniel J. Gervais, *Reinventing Lisbon: The Case for a Protocol to the Lisbon Agreement (Geographical Indications)*, 11 CHI. J. INT'L L. 67 (2010).

²⁶³ Danielle Dudding, *The Lisbon Agreement: Why the United States Should Stop Fighting the Geneva Act*, 18 VAND. J. ENT. & TECH. L. 167, 189 (2015).

reach an agreement on the proprietary nature of GIs considering its collective relevance to local communities and then adopt a uniform system for protection.²⁶⁴

In the last two decades, the European Union willingly reinforced and developed the GI system of protection granted under the TRIPS Agreement.²⁶⁵ During the 2003 WTO meeting in Cancun, the European Union requested increased protection for forty-one regional quality products.²⁶⁶ This proposal represented the consolidation of a number of prior attempts to implement Article 23(4) of the TRIPs Agreement. The European Union referred primarily to the three main issues surrounding GIs discussion: the establishment of a multilateral register of GIs, the extension of the protection foreseen for wines and spirits to other products, and the claw-back of certain GIs whose names are usurped worldwide.²⁶⁷ In opposition to the proposals for an extension of the protection of GIs, a communication was introduced on June 29, 2001 by Argentina, Australia, Canada, Chile, Guatemala, New Zealand, Paraguay, and the United States.²⁶⁸ Their main argument referred to the cost of extending the scope of the TRIPS Agreement, the lack of evidence that Article 22 failed to protect GIs, the inexistence of cases

²⁶⁴ Tunisia L. Staten, *Geographical Indications Protection Under the TRIPS Agreement: Uniformity Not Extension*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 221, 245 (2005).

²⁶⁵ See the different reforms of its Agricultural Products and Foodstuff Regulation mainly in 2006 and 2012, *supra* note 7.

²⁶⁶ WTO, *Geographical Indications: Negotiations Relating to the Establishment of a Multilateral System of Notification and Registration of Geographical Indications*, TN/IP/W/11 (Jun. 24, 2002), available at https://www.wto.org/english/tratop_e/trips_e/gil_docs_e.htm.

²⁶⁷ UNITED STATES DEPARTMENT OF AGRICULTURE, EU RELEASES FINAL LIST OF GEOGRAPHICAL INDICATORS FOR CANCUN 2003 (2003).

²⁶⁸ Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Argentina et al.* ¶ 8, IP/C/W/289 (June 29, 2001) [hereinafter Argentina Communication (2001)].

where enforcement failed, and other matters linked to the effectiveness of the application of existing clauses, as well as the potential costs and burdens of the extension.²⁶⁹

The European Union then submitted a detailed proposal in June 2005 known as the TRIP-PLUS²⁷⁰ to amend the TRIPS Agreement and establish a multilateral register for wines as an annex to Article 23(4).²⁷¹ The only way that “absolute” protection for GIs could realistically be achieved would be if there were a clear list of terms and translations that would be agreed in a bilateral or multilateral agreement.²⁷² These registration systems to identify and protect GIs already exist in national trademark offices and, therefore, could be an easy solution to the perceived international conundrum.²⁷³

Finally, the TRIPS Agreement was a compromise and protects GIs from three abuses: (i) false or misleading geographical names; (ii) registration of GIs as trademarks; and (iii) dilution of GIs into generic terms.²⁷⁴ Finding consensus between aims, compromises, and needs is the cornerstone of the negotiation, however, no global regulatory solutions have emerged yet.

2.2. International Conventions Regulating GIs

International conventions on GIs have been more ambitious in language that efficacious in accomplishment. Unfortunately, the text wording remains reminiscent of United Nations

²⁶⁹ *Id.*

²⁷⁰ SISULE F. MUSUNGU & GRAHAM DUTFIELD, *MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY* (2003).

²⁷¹ WTO, *Geographical Indications: Communication from the European Communities*, TN/IP/W/11 (Jun. 14, 2005), available at https://www.wto.org/english/tratop_e/trips_e/gi1_docs_e.htm.

²⁷² *Id.*

²⁷³ Cotton, *supra* note 224, at 1315–6.

²⁷⁴ Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 86 TRADEMARK REP. 11, 44–46 (1996).

literature, conceptual differences, and ambiguities dependent on nationalism and local legislation that do not refer global concerns and existing needs.²⁷⁵ Prior to TRIPS there were four fundamental agreements relevant to international protection of GIs: the 1883 Paris Convention for the Protection of Industrial Property;²⁷⁶ the 1891 Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods;²⁷⁷ the 1929 Washington Inter-American Convention for Trademark and Commercial Protection;²⁷⁸ and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.²⁷⁹

When appellation of origin and indications of source were first included in an international agreement—the Paris Convention—they were left undefined and the level of protection was left to each jurisdiction. The broad concept of Article 10 prohibited the direct and indirect use of false indications on the source of goods or the identity of the producer, manufacturer, or merchant disregarding the features, quality or reputation of the goods. However, the lack of references to consumer deception and potential confusion on geographical origin of the goods resulted in the Madrid Agreement, which provided a higher level of protection and included the principle of national treatment. As a consequence, imported and locally-produced goods should be treated equally—at least after the foreign goods have entered the market. But the limitation of prohibition to deception and therefore excluding the prevention of free riding regarding goods reputation, and the inexistence of civil or criminal sanctions did

²⁷⁵ Hugo Mock, *Is an International Trade-Mark Law Desirable Now?*, 40 TRADEMARK REP. 3, 4 (1950).

²⁷⁶ Paris Convention, *supra* note 97.

²⁷⁷ Madrid Agreement, *supra* note 98.

²⁷⁸ General Inter-American Convention for Trade Mark and Commercial Protection, Feb. 20, 1929, 46 Stat. 2907, 124 L.N.T.S. 357 [hereinafter General Inter-American Convention].

²⁷⁹ Lisbon Agreement *supra* note 85.

not grant an effective protection. Later on, the Lisbon Agreement resulted in clearly defined concepts, insisted on the quality link between products and their place of origin, and excluded non-geographical names as well as those based on reputation. To understand the main content and regulatory developments of GIs, however, requires an understanding of the main international legal instruments where division exists between GI interests and aims of the European Union and the United States.

2.2.1. The 1883 Paris Convention for the Protection of Industrial Property

The Paris Convention is the first international legal instrument that mentions the protection of GIs—then referred as “indications of source” and “appellations of origin”—and applies to industrial property in the widest sense—including patents, trademarks, industrial designs, utility models, trade names, and the repression of unfair competition.²⁸⁰ The Paris Convention was concluded in 1883, revised at Brussels in 1900, then Washington in 1911, the Hague in 1925, London in 1934, Lisbon in 1958, and Stockholm in 1967, before it was amended, again, in 1979. With 176 members, its substantive provisions develop the principles of national treatment, right of priority, and certain innovative common rules.²⁸¹

The protected scope granted to names but not defined “indications of source” and “appellations of origin” only benefited from certain measures at the border and was extended only to false uses under Article 10, which prohibited uses when they were accompanied by a false, fictitious, or deceptive trade name. This concept was reinforced in 1958 when Article 10bis

²⁸⁰ Stephen P. Ladas, *Proposed Reorganization of the Paris Union and the International Industrial Property Organization*, 56 TRADEMARK REP. 817 (1966) (analyzing the governance structure of the Paris Union). Ladas also provided very accurate and useful information on the revisions of the Convention. See Stephen P. Ladas, *The Revision of the International Convention for the Protection of Industrial Property*, 16 J. PAT. SOC'Y 688 (1934).

²⁸¹ Paris Convention, *supra* note 97.

introduced the denomination of unfair competition,²⁸² and later on with Article 10ter, which referred to false indications and included certain remedies and the right to sue. Article 11bis of the Convention provided the basis for protection against misleading indications of source, including appellations of origin obliging members to provide protection against unfair competition and containing a non-exhaustive list of prohibited acts. However, the Convention does not provide protection when the indication is used in translated form or accompanied by terms such as “kind,” or “type,” or when it is deceptive, i.e. likely to mislead the consumer and it did not provide for special remedies against infringement of these provisions.

Under Article 25, any country party to the Paris Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure its application and Article 19 allows the parties to establish special agreements for the protection of IPR. This led to both the 1891 Madrid Agreement and the 1958 Lisbon Agreement.

The priority for the United States in the revision of the Convention was the protection of trademarks and other IPR. However, Professor Ladas, a Member of the United States Delegation to the Conference, shared not just his frustration at the “los[s] of many desirable improvements” during the Lisbon revision²⁸³ but also on the intended amendments to include misleading in the wording of Article 10,²⁸⁴ referring that eight countries signed a new Arrangement of Lisbon concerning the International Registration of Appellations of Origin.²⁸⁵ The inefficiency of this system of protection originated in the potential falsification of indications that limited other

²⁸² Calboli, *supra* note 85, at 187.

²⁸³ Stephen P. Ladas, *The Lisbon Conference for Revision of the International Convention for the Protection of Industrial Property*, 48 TRADEMARK REP. 1291, 1318 (1958).

²⁸⁴ *Id.* at 1312.

²⁸⁵ *Id.* at 1317.

regulations on GIs. Therefore, as a question of fact considering the burden of proof, knowledge of every place name around the world is required to assess any infringement and consider the intention to misuse a GI.²⁸⁶

2.2.2. The 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods

The Madrid Agreement initially offered a slightly higher level of protection by providing specific rules for the repression of false and deceptive indications of source that were not conceptually defined.²⁸⁷ Without the establishment of a governing body or a budget, however, and with only thirty-six countries party to the Agreement, the only new members in the last twenty years include Bosnia and Herzegovina, Montenegro, the Republic of Moldova, Serbia, and the Islamic Republic of Iran.²⁸⁸ After the TRIPS Agreement was established not much attention was given to the Madrid Agreement since the last revision in Lisbon on October 31, 1958 (and previously revised in Washington on June 2, 1911, at The Hague on November 6, 1925, and in London on June 2, 1934).²⁸⁹

According to the Agreement, all goods bearing a false or deceptive indication of source must be seized on importation and sanctions must be applied in connection with such importation.²⁹⁰ Procedures for seizure are clearly established in the agreement and it prohibits deceiving the public as to the source of the goods. However, national courts alone decide what

²⁸⁶ Cotton, *supra* note 224, at 1299–300.

²⁸⁷ Calboli, *supra* note 85, at 189.

²⁸⁸ Madrid Agreement, *supra* note 98.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

appellations may be included within the scope of the Agreement.²⁹¹ The lack of notification mechanism in the Madrid Agreement, and confusion defining “false” and “deceptive,” render the agreement impossible to implement without proper information available locally about the foreign indication of source.²⁹²

2.2.3. The Madrid System for the International Registration of Marks Governed by The 1891 Madrid Agreement Concerning the International Registration of Marks and the 1989 Protocol Relating to that Agreement

The Madrid Agreement and its 1989 Protocol govern the Madrid System for the International Registration of Marks, which provides proper legal protection of any mark by obtaining an international registration that has effect in each of the designated Contracting Parties. As a reference for GIs, the Madrid system offers trademark owners the possibility of filing, maintaining, or reviewing international registration applications with the International Bureau through the office of its home country and paying one set of fees instead of a separate national application in each country of interest. This is particularly relevant since, in some jurisdictions, GIs may only be only protected as collective, certification, or guarantee marks. With ninety-seven contracting parties, many new members joined after the Protocol was established to make the Madrid System more flexible and more compatible with the domestic legislation of certain countries or intergovernmental organizations that had not been able to accede to the Agreement.²⁹³

²⁹¹ Stephen P. Ladas, *The Madrid Agreement for the International Registration of Trademarks and the United States*, 56 TRADEMARK REP. 346 (1966) (completing analysis of the membership of the United States).

²⁹² Cotton, *supra* note 224, at 1301.

²⁹³ Madrid Agreement, *supra* note 98.

The Madrid System establishes a special Union for the Protection of Industrial Property and harmonizes procedure for international registration of marks, granting protection based on national registration. Once the International Bureau receives an application—and after proper examination for compliance with formalities and requirements of the Agreement, the Protocol and their Common Regulations—it is recorded in the International Register, published in the WIPO Gazette of International Marks,²⁹⁴ and shared with each Contracting Party. The effect of an international registration is the same as if the mark had been directly deposited with the office of that Contracting Party. This is one of the aims of GIs defenders since registration recognition under a single framework seems essential for its global protection.

2.2.4. *The 1929 Washington General Inter-American Convention for Trademark and Commercial Protection*

Administered by the Organization of American States, there are a number of areas where the Pan-American Convention appears to meet and even exceed the minimum TRIPS standards regarding enforcement. These standards include national treatment, protectable subject matter, and enforceability of registrations with or without use in the country where protection is sought, and unauthorized use by agents.²⁹⁵

The General Inter-American Convention for Trade-Mark and Commercial Protection of 1929 is considered—by the Fathers of IPR law in the United States, Rogers and Ladas—as the greatest achievement in this field since it embodies international legislation on trademarks, trade-

²⁹⁴ WIPO, GAZETTE OF INTERNATIONAL MARKS, <http://www.wipo.int/madrid/en/madridgazette/index.html> (last visited Aug 7, 2016). A complete guide to the International Registration of Marks under the Madrid Agreement and the Madrid Protocol is provided by WIPO, with the last update in 2014. World Intellectual Property Organization, GUIDE TO THE INTERNATIONAL REGISTRATION OF MARKS UNDER THE MADRID AGREEMENT AND THE MADRID PROTOCOL, <http://www.wipo.int/madrid/en/guide/> (last visited Aug 7, 2016).

²⁹⁵ Thomas D. Drescher, *Nature and Scope of Trademark Provisions under TRIPS and the Pan-American Convention*, 87 TRADEMARK REP. 319–27, 327 (1997).

names, indications of origin, and unfair competition in some respects superior to that achieved by the International Union for the protection of Industrial Property.²⁹⁶ Credited for the Lanham Act of 1946, Rogers, together with Ladas, was influential in the creation of the system of trademarks protection and it was under his guidance that the General Inter-American Convention of 1929 closed a cycle of revisions of previous agreements. Rogers and Ladas met in 1928 when the Harvard Bureau of International Research sent Rogers part of a manuscript on the international protection of trademarks, trade names, and repression of unfair competition.²⁹⁷ The contributions of Rogers at the beginning of the century and those of Ladas after World Word II until 1976, particularly the work carried out by both of them prior to the Lanham Act in 1946, may help explain interesting issues under TTIP and overcome certain GI concerns. However, not being the aim of this article to provide a detail historical analysis it is not possible to deepen on the relations of Rogers and Mr. Major Bufill (Cuba) that made possible this Convention, although considering the new relations among these countries is a good experience of successful collaboration on the matter of IPR.²⁹⁸

It is important to examine the Inter-American Convention in light of United States legislation and NAFTA, but also TTIP proposals, to determine whether certain features might offer any insight into the process and requirements of hemispheric harmonization. Certain issues regarding trademarks do not meet TRIPS standards since development is left to domestic

²⁹⁶ Edward S. Rogers & Stephen P. Ladas, *Proposals for Uniform Trade-Mark Laws*, 40 TRADEMARK REP. 8, 13–14 (1950).

²⁹⁷ Stephen P. Ladas, *The Contribution of Edward S. Rogers in the International Field of Industrial Property*, 62 TRADEMARK REP. 197, 197 (1972).

²⁹⁸ *Id.* at 199.

legislators. Significantly, other matters appear to exceed TRIPS requirements and go beyond any global agreements.²⁹⁹

2.2.5. The 1958 Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration

The Lisbon Agreement, based on foundations laid by existing international instruments, entered into force on September 25, 1966, and is administered by the International Bureau of WIPO, which is responsible for the International Register of Appellations of Origin and the “Appellations of Origin” bulletin.³⁰⁰ Its protection went beyond GIs to initially protect “appellations of origin,” however it did not establish a worldwide system and its membership is still largely concentrated in the Mediterranean with wines, spirits and pioneer France—historical and legal engine and think tank for GIs together with Italy, and recently Spain—leading the percentages on registration.³⁰¹ Considering only twenty-eight countries are party to the Lisbon Agreement,³⁰² the original goal to establish a worldwide system of protection for GIs has not been successful. In fact, the Agreement's contracting parties and most current registration are largely concentrated in the Mediterranean basin.³⁰³

Due to strict levels of protection requiring major changes to domestic laws and the existence of deterrent circumstances in certain jurisdictions, the Lisbon Agreement, like the

²⁹⁹ Drescher, *supra* note 282, at 327.

³⁰⁰ World Intellectual Property Organization, APPELLATIONS OF ORIGIN BULLETIN, <http://www.wipo.int/lisbon/en/bulletin/> (last visited Aug 7, 2016).

³⁰¹ Daniel J. Gervais, *Traditional Innovation and the Ongoing Debate on the Protection of Geographical Indications*, in INDIGENOUS PEOPLES' INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT 121, 124 (2012).

³⁰² The last country to join was Bosnia and Herzegovina on July 4, 2013. WIPO, *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration*, <http://www.wipo.int/treaties/en/registration/lisbon/> (last visited Aug 7, 2016).

³⁰³ A breakdown and deep analysis can be found in Gervais, *supra* note 251, at 80.

Madrid Agreement, had few signatories.³⁰⁴ Despite providing the broadest protection for appellations of origin to date, the serious implementation problems are grounded in the scope of the protection, the actionable translations and uses, and the role of *ex officio* enforcement versus private action.³⁰⁵

The Lisbon Agreement, however, provides the first international definition of appellations of origin and introduces a mechanism of international protection and registration independent of domestic systems. Furthermore, Contracting Parties, in accordance with Article 1, undertake to protect in their territories—in accordance with the terms of this Agreement—the appellations of origin of products of the other countries of the Special Union, recognized and protected as such in the country of origin. Consequently, as long as an appellation of origin is protected in the country of origin, it cannot be deemed generic in another country of the Special Union created under the Agreement.

Specifically, appellations of origin are denominations that designate a geographical location to distinguish products of a certain quality produced in accordance to specific regulations or local, constant and trusted usage³⁰⁶ resulting in the acquisition of a reputation. The treaty applies only to appellations of origin recognized and protected as such in the country of origin—until the Geneva Act included GIs—and establishes the requirement of a demonstrated protection through a legislative, administrative, or judicial act. This required authorization makes it a public right, and not just privately owned as provided by trademark.

³⁰⁴ Calboli, *supra* note 85, at 189.

³⁰⁵ Cotton, *supra* note 224, at 1302.

³⁰⁶ Actes de la Conférence Réunie à Lisbonne du 6 au 31 Octobre 1958 (Actes), BIRPI, 1963, 813. The Acts of the Lisbon Conference were published in French.

A suggested protocol to the Agreement could align the Lisbon terminology and prohibitions with the TRIPS concepts to avoid the inherent risks associated with dual standards and a scope of protection.³⁰⁷ Furthermore, most WTO members agree on Lisbon-type protections for GIs (even in the absence of consumer confusion), and Paris-type protections for other GIs.

2.2.6. Changes Introduced by the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications

After many initiatives to improve the international legal framework on GIs, the Diplomatic Conference held in Geneva in May 2015 finally adopted the Geneva Act of the Lisbon Agreement extending its previous protection of appellations of origin to GIs. Many previous attempts were frustrated, such as the Draft Treaty on the Protection of Geographical Indications,³⁰⁸ issued by WIPO in 1975, that would provide for the protection both of appellations of origin and GIs. Unlike the Lisbon Agreement, the Draft Treaty was not based on domestic laws.³⁰⁹ However, the proposal for a new international legal framework was interrupted due to preparations for the revision of the Paris Convention in the late 1970s.³¹⁰ Again, in 1990, a WIPO memorandum expressed the need for a new treaty on GIs—even providing possible content and guiding members states on the matters to be regulated.³¹¹ In the same year, WIPO issued a Model Law on GIs for developing countries to adopt;³¹² unfortunately, these initiatives

³⁰⁷ Gervais, *supra* note 287, at 126.

³⁰⁸ The draft Treaty and the report adopted by the Committee of Experts are contained in WIPO documents TAO/II/2 and 6, respectively. WORLD INTELLECTUAL PROPERTY ORGANIZATION, MEMORANDUM ON THE NEED FOR A NEW TREATY AND ITS POSSIBLE CONTENTS 26, 11 (1990).

³⁰⁹ Michael Blakeney, *supra* note 53, at 639.

³¹⁰ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *supra* note 294, at 12.

³¹¹ *Id.* at 16.

³¹² Model Law for Developing Countries on Appellations of Origin and Geographical Indications, Pub. 809 (1975).

were not successful. The main proposed changes to the Lisbon system launched at WIPO in 2011 intended to facilitate the emergence of a multilateral GI system considering the main existing concerns and without endangering prior marks used in good faith,³¹³ although the Working Group on the Development of the Lisbon System has been engaged in a review of the Lisbon Agreement since 2009.³¹⁴ The Geneva Act followed decades of international controversy that remain even after it opened for signatures in May 2015.³¹⁵

A study on the Geneva Act examines its potential reconciliation with common-law approach to GIs protection as trademarks.³¹⁶ Now, with membership opened to intergovernmental organizations such as the European Union or OAPI,³¹⁷ it is estimated that the number of members will increase from the current twenty-eight to fifty-five.³¹⁸ The study even suggested—although considered it very unlikely—the possibility of the United States and other common law jurisdiction joining the new Act within the frame of ongoing trade negotiations such as the TTIP.³¹⁹ But many consider the Geneva Act to be a new missed opportunity to restart multilateral negotiations due to the continued absence of consensus, the entrenched ideological divide, and the incompatibility with trademark-based GI systems.³²⁰ In any case, the Geneva Act

³¹³ Gervais, *supra* note 287, at 145.

³¹⁴ WIPO, FURTHER DEVELOPMENT OF THE LISBON SYSTEM, <http://www.wipo.int/lisbon/en/review.html> (last visited Aug 7, 2016).

³¹⁵ Irene Calboli, *The Growing Case for Geographic Indications*, JOTWELL (May 10, 2016) (reviewing Daniel J. Gervais, *Irreconcilable Differences? The Geneva Act of the Lisbon Agreement and the Common Law*, 53 HOUS. L. REV. 339 (2015)).

³¹⁶ Daniel J. Gervais, *Irreconcilable Differences? The Geneva Act of the Lisbon Agreement and the Common Law*, 53 HOUS. L. REV. 339, 339 (2015).

³¹⁷ *See supra* note 49.

³¹⁸ Gervais, *supra* note 302, at 368.

³¹⁹ *Id.* at 369.

³²⁰ *Id.* at 371.

grants the protection desired by those delegations of the WTO willing to achieve higher protection for geographical indications and obtaining quicker international registration.³²¹

The outcome of the Geneva Act did not bridge the existing gaps on GIs. Although the protection was extended to GIs, the other two main topics were changes to the international registration system and a potential maintenance fee, together with other administrative improvements.³²² In fact, the strong words of the Statement on the Adoption of the Geneva Act of the Lisbon Agreement, delivered by the United States Mission, led by Ambassador Pamela Hamamoto, evidence the wounds of a new GI battle: “the long-term interests of the many—and of the system—have been sacrificed for the short-term and narrow interests of the few...we continue to have grave concerns regarding the texts, including with respect to critical issues such as the scope of protection, generalness, trademark protections, and financial sustainability...[and are] unable to join the Geneva Act because the Lisbon members refused to make it compatible with trademark systems.” The United States added that it had “serious concerns regarding the inadequacy of safeguards for (GI) producers.” Furthermore, the United States Mission expressed that it was “extremely disappointed with the process and its outcome which raise fundamental questions about the legitimacy of the new Geneva Act,” and that it had “serious concerns with the precedent set at WIPO.”³²³

³²¹ Dudding, *supra* note 252, at 191.

³²² For a complete analysis of the Geneva Act, *see* Micara, *supra* note 49. *See also* Dudding, *supra* note 252.

³²³ U.S. STATEMENT ON THE ADOPTION OF THE GENEVA ACT OF THE LISBON AGREEMENT (2015), <https://geneva.usmission.gov/2015/05/20/u-s-statement-on-the-adoption-of-the-geneva-act-of-the-lisbon-agreement/> (last visited Aug 8, 2016).

2.3. Recent Relevant European Trade Agreements Including GIs

The European Union manages its trade relations with third countries through trade policy negotiated by the European Commission in close cooperation with the Council and European Parliament, which ultimately approve the overall agreement.³²⁴ With a significant development of free trade agreements (FTAs) and region-to-region negotiations, the European Union typology of agreements varies from agreements between neighbor states in Eastern Europe, the Balkans, and the Mediterranean. This is mainly motivated by a desire to promote economic development and political stability along the nearest borders. Partnership agreements with ACP countries are fundamentally motivated by development policy objectives and international compromises previously acquired.³²⁵ Many other agreements are largely bilateral, commercially motivated FTAs, including agreements in Latin America between Mexico and Chile, as well as region-to-region negotiations with Central America.³²⁶

IPR are among the most important components of the bargaining packages of European FTAs, and GIs are a fundamental matter forced into most agreements, particularly in countries where the subject matter is unknown.³²⁷ Developing country concerns depend on the influence of

³²⁴ See Pedro Roffe, *Intellectual Property Chapters in Free Trade Agreements: Their Significance and Systemic Implications*, in EU BILATERAL TRADE AGREEMENTS AND INTELLECTUAL PROPERTY: FOR BETTER OR WORSE? 17 (Josef Drexler, Henning Grosse Ruse-Khan, & Souheir Nadde-Phlix eds., 2014).

³²⁵ Stephen Woolcock, *European Union Policy Towards Free Trade Agreements* (2007), <http://www.felixpena.com.ar/contenido/negociaciones/anexos/2010-09-european-union-policy-towards-free-trade-agreements.pdf>.

³²⁶ For a complete list of agreements currently in force, provisionally applied, signed but not provisionally applied, finalized with negotiations concluded but not yet signed, and those being negotiated see European Commission, TRADE AGREEMENTS, http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index_en.htm (last visited Aug. 14, 2016).

³²⁷ *Id.*

the major trading partners and the transposition of the legislative models in existence.³²⁸ The European Union supports better protection of GIs internationally and is very active in protecting them through multilateral and bilateral negotiations.³²⁹ At a multilateral level, particularly regarding the TRIPs Agreement, the European Union works to extend protection to all agricultural products at the level of protection granted to wines or spirits and negotiates for the establishment of a multilateral register for GIs. At the bilateral level, GIs are protected under specific standalone agreements, as is the case with China,³³⁰ and broader FTAs, as with Canada, South Korea, and many others.

The European Commission made protection of GIs an integral part of its agricultural and rural development strategy and aggressively extends its protection through FTAs.³³¹ The European Commission even proposed a new trade and investment strategy for the European Union, entitled “Trade for All: Towards a more responsible trade and investment policy.” This adapted its approach to make more responsible policies that it will be more effective and more transparent, projecting not just European interests but also European values.³³² The new strategy lays out an up-to-date program of trade negotiations, listings its top priorities as reenergizing the WTO and concluding the TTIP, as well as finalizing the Japanese free trade agreement and the

³²⁸ *Id.*

³²⁹ ORIGIN, REDD & INSIGHT CONSULTING, STUDY ON GEOGRAPHICAL INDICATIONS PROTECTION FOR NON-AGRICULTURAL PRODUCTS IN THE INTERNAL MARKET 328 (2013), http://ec.europa.eu/internal_market/indprop/docs/geo-indications/130322_geo-indications-non-agri-study_en.pdf (last visited Jan. 9, 2014).

³³⁰ *Geographical Indications: Guides and Commitments*, CHINA IPR BLOG (Mar, 1, 2015), <https://chinaipr.com/2015/03/01/geographical-indications-guides-and-commitments/> (last visited Aug 15, 2016).

³³¹ William A. Kerr, *Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development*, 28 ESTEY CTR. J. INT'L L. & TRADE POL'Y 1 (2006). See also Josling, *supra* note 93.

³³² European Commission, *supra* note 326.

China investment agreement.³³³ With the widest range of FTAs in the world, the challenge is now to ensure that they make a difference “for all,” as specifically indicated in the title of the European Communication strategy.³³⁴ Among its new aims is also the promotion of fair and ethical trade schemes contributing to the development of more sustainable trade opportunities for small producers in third countries and also fighting against corruption while promoting good governance.³³⁵

In country after country, the European Union has used its FTAs to persuade trading partners to impose GI protections.³³⁶ This trade practice is concerning anywhere, but it is most deeply troubling where it conflicts with other interests reflected in parallel negotiations, particularly with the United States. For example, Canada agreed, as part of its recent agreement concluded with the European Union, to impose new restrictions on the use of “feta” and other common cheese names.³³⁷ This is also relevant in Latin America, Africa, and Asia, where FTAs are expanding but not always with a coherent policy on GIs considering the different interests at stake.

The main conclusions on the influence of trade agreements for the implementation of IPR in developing countries are two-fold. Being clearly drivers of significant reform in countries, and therefore a positive impact, the implementation constitute a real and complex challenge for

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Letter on Cheese Focus to Agriculture Secretary Vilsack and U.S. Trade Representative Froman, from U.S. Senators (Mar. 11, 2014) *available at* <http://www.commonfoodnames.com/wp-content/uploads/CCFN-Letter-to-Michael-Froman-12-20-2012.pdf> (last visited Nov. 14, 2016).

³³⁷ Comprehensive Trade and Economic Agreement (CETA), Canada-European Union, Consolidated CETA Text, Ch. 22, Intellectual Property, Sept. 26, 2014, *available at* http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [hereinafter CETA Agreement].

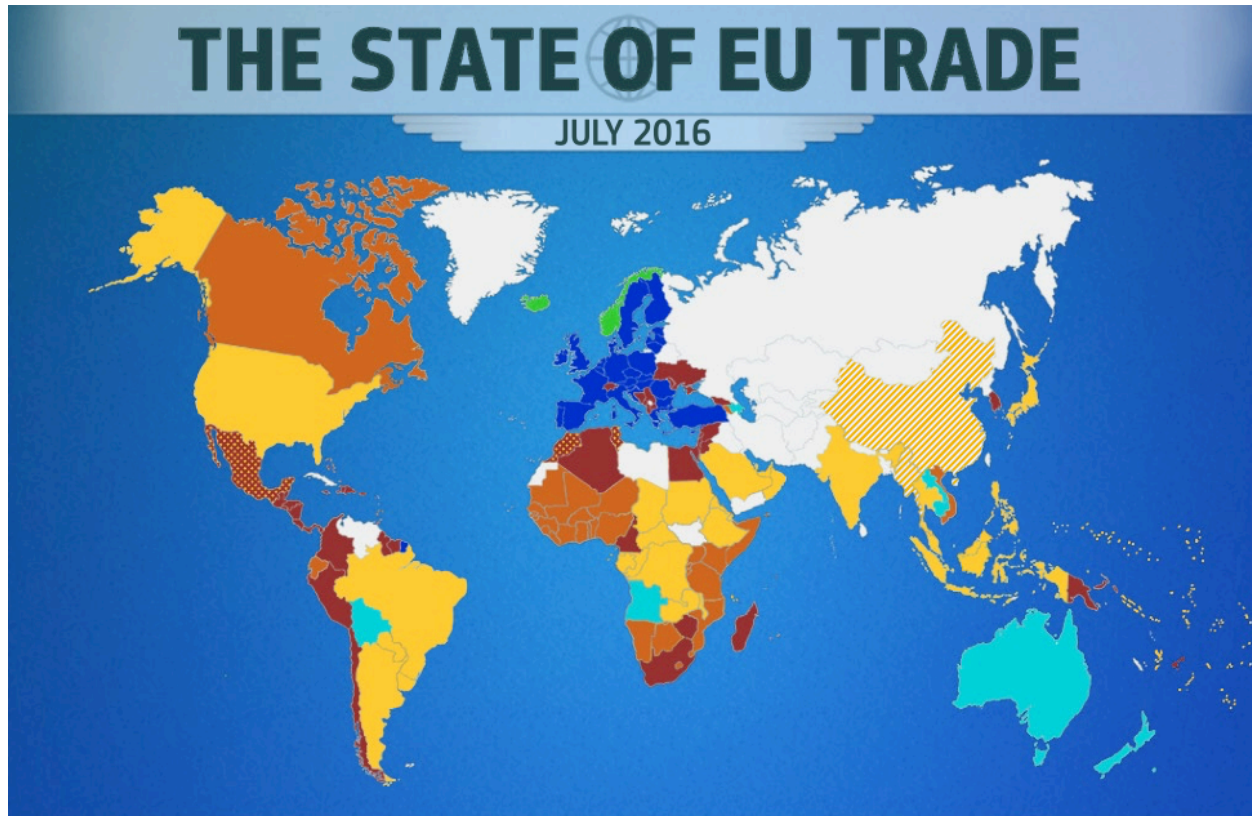
developing countries often unable to comply with their compromises³³⁸ Often partners to these agreements may not have entirely assessed the extent and precise meaning of the commitments they are entering into.³³⁹ The aim of this section is to review the main FTAs of the European Union,³⁴⁰ particularly those with Canada and South Korea, where the regulation of GIs may provide certain solutions to the current debate.

³³⁸ Ermias T. Biadgleng & Jean-Christophe Maur, *The Influence of Preferential Trade Agreements on the Implementation of Intellectual Property Rights in Developing Countries: A First Look*, UNCTAD-ICTSD Project on IPRs and Sustainable Development Paper No. 33 (November 2011), available at <http://papers.ssrn.com/abstract=1962832> (last visited Mar 25, 2014).









³³⁹ *Id.* at 27.

³⁴⁰ There are many other cases that will not be currently referenced, such as the case in Ukraine. See D. O. Romashchenko, *Legal Regulation of Geographical Indications Using in European Union in the Context of Association Agreement: Practical Issues*, JE EUR. L. 157–62 (2016). For Central American FTA, see also Maria Cecilia Mancini, *Localised Agro-Food Systems and Geographical Indications in the Face of Globalisation: The Case of Queso Chontaleño*, 53 SOCIOLOGICA RURALIS 180 (2013).

Figure 5: EU Trade Agreements Worldwide (July 2016)



Source: European Commission, Europa.³⁴¹

	EU & Custom Union (Andorra, Monaco, San Marino, Turkey)		Preferential Trade Agreement being Negotiated
	European Economic Area (Norway, Iceland, Liechtenstein)		Potential for Free Trade Partnershi
	Preferential Trade Agreements in Places		Stand-Alone Investement Agreement being Negotiated
	Preferential Agreements Awaiting Adoption/Ratification		Preferential Agreement in the process of Modernization

³⁴¹ European Commission, *supra* note 326.

2.3.1. Canada: The Experience of the Comprehensive Economic and Trade Agreement (CETA)

The agreement on GIs under the European Union-Canada Comprehensive Economic and Trade Agreement (CETA),³⁴² reached in October 2013,³⁴³ is particularly relevant considering the it involves a key partner of the United States under the North American Free Trade Agreement (NAFTA).³⁴⁴

In October 2008, after negotiations were launched by Prime Minister Stephen Harper of Canada and President Nicolas Sarkozy of France during the Canada-European Union Summit, a joint study was released assessing the costs and benefits of a closer economic partnership.³⁴⁵ Actually, CETA was projected to create business opportunities for a large number of sectors including advanced manufacturing, the automotive industry, chemicals and plastics, agriculture and agri-food, food processing, metals and mineral products, fish and seafood products, information and communications technology, services, investment, and government procurement.³⁴⁶ But the interest of the European Union was not just in its 0.08 expected GDP

³⁴² CETA Agreement. For a detailed description of the negotiation process and main concerns *see* Crina Viju & William A. Kerr, *Agriculture in the Canada-EU Economic and Trade Agreement*, 66 INT'L J. 677 (2010).

³⁴³ On August 5, 2014, the final text for the CETA was reached and on September 26, 2014, the full text was published and signed by Canada. On January 22, 2016, Canada's newly elected Prime Minister Justin Trudeau expressed support for CETA at the World Economic Forum in Davos, further encouraging ratification. The federal minister of international trade, Chrystia Freeland refers to it as the "gold standard of trade agreements." *See* The Council of Canadians, TRUDEAU'S TRADE MINISTER SAYS CETA "GOLD STANDARD OF TRADE AGREEMENTS," <http://canadians.org/blog/trudeaus-trade-minister-says-ceta-gold-standard-trade-agreements> (last visited Aug 15, 2016). *See also* GOVERNMENT OF CANADA, TECHNICAL SUMMARY OF FINAL NEGOTIATED OUTCOMES. CANADA-EUROPEAN UNION COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (2013), *available at* <http://actionplan.gc.ca/sites/default/files/pdfs/ceta-technicalsummary.pdf> (last visited Jan 13, 2014).

³⁴⁴ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA Agreement].

³⁴⁵ GOVERNMENT OF CANADA & EUROPEAN COMMISSION, ASSESSING THE COSTS AND BENEFITS OF A CLOSER EU-CANADA ECONOMIC PARTNERSHIP, http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf (last visited Aug 15, 2016).

³⁴⁶ *See* Daniel L. Kiselbach, *The Canada-EU Free Trade Agreement Demystified: New Opportunities for Trade, Investment and Government Procurement*, 9 GLOBAL TRADE & CUSTOMS J. 52 (2014).

increase and facilitating commerce with its eleventh-largest trading partner; it was also interested in the importance of Canada in its future deals with the United States. In fact, the importance of agriculture for Canada and its role in NAFTA made the outcome of this agreement fundamental for the expectations under TTIP negotiations. Given the agricultural policy constraints in both the European Union and Canada, only limited liberalization was expected in the agricultural sector;³⁴⁷ however, CETA is now considered the European Union's most comprehensive FTA to date as a "gold standard,"³⁴⁸ groundbreaking agreement, due to its ambitious liberalization of trade and investment creating significant economic opportunities and also for its unprecedented commitments from Canada on GIs.³⁴⁹

The partners, as in similar trade agreements, resolved to further strengthen their close economic relationship in certain fundamental areas and build upon their respective rights and obligations under the WTO and other multilateral and bilateral instruments of cooperation. Although Chapter 20 of the FTA regulates IPR, Canada already recognized the European GIs for wine and spirits before CETA negotiations began.³⁵⁰ Canada is a good reference regarding deregulation of international trade in wine, not being among the main producer or consumer countries, but it has bridged in this area between the European Union and the United States, considering its legal, commercial and policy differences.³⁵¹ 125 of the 145 European Union priority protected GIs will enjoy, in full, the high protection reserved by the TRIPS Agreement to

³⁴⁷ Viju & Kerr, *supra* note 326, at 693.

³⁴⁸ The Council of Canadians, *supra* note 327.

³⁴⁹ EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR TRADE, *supra* note 330, at 30.

³⁵⁰ Agreement Between Canada and the European Community on Trade in Wines and Spirit Drinks, Can.-Eur., Jun. 1, 2004, E104976.

³⁵¹ Richard Mendelson et al., *Wine Trade with Canada: A Case Study in Trade Deregulation*, 7 INT'L TAX BUS. L. 91 (1989).

wines and spirits, and a prohibition on the use of a GI name even when the true origin of the product is indicated by “kind,” “type,” “style,” “imitation,” or the like. As a consequence, certain products have changed their commercial names respecting GIs (e.g. Port as Pipe).³⁵²

A list of thirty-six alleged agricultural product conflicts were identified³⁵³ but Canada agreed to varying ways of addressing European Union requests regarding 179 terms used for foods and beer while preserving space for Canadian trademarks holders and for users of commonly used English and French names for food products.³⁵⁴ In short, CETA offers protection to GIs without prejudicing the validity of existing Canadian trademarks while enforcement of GIs in the Canadian market remains a private matter to be argued before the courts. The main results of the agreement can be summarized as follows:

- Canada recognizes the European Union system of GIs and Canadian producers will cease labeling and marketing certain products that conflict with this system. Canada will also cease importing products under GIs from third countries despite the third party producers holding the trademark. This measure will mainly affect the United States since Canada is the fourth largest export destination for United States cheeses;³⁵⁵ and The European Union preserved space for Canadian trademark holders and for users of commonly used English and French names for food products;
- Canada will provide protection for European GIs without prejudicing the validity of existing Canadian trademarks;

³⁵² YEUNG & KERR, *supra* note 22.

³⁵³ Most of them were represented by cheese and meat products. Fifteen represented conflicts between European Union GIs and Canadian generic products (Feta), eight conflicted with registered trademarks by Canadian or third party producers (e.g. Prosciutto di Parma). See Kiselbach, *supra* note 346 at 56.

³⁵⁴ GOVERNMENT OF CANADA, *supra* note 327.

³⁵⁵ Crina Viju, *CETA and Geographical Indicators: Why a Sensitive Issue?* 7 (2013).

- Grandfathering rights will be respected and limited rights will be provided to European Union GIs (such as Asiago, Feta, Fontina, Gorgonzola, and Munster). This will not affect the current use of these names in Canada but future users must use the names only when accompanied by expressions such as “kind,” “type,” “style,” “imitation,” or the like. This compromise solution protects the market position of GI producers by clearly distinguishing them from the original product obtaining protection from the misleading use of symbols or flags and all products must have a clear and visible indication of their origin;
- Some European Union GIs were protected but with the caveat and limitation that they respect the use of English and French terms commonly employed in Canada. Therefore, certain terms continue to be allowed in the Canadian markets regardless of product origin such as Parmesan, Valencia orange, Black Forest ham, Tiroler bacon, Bavarian beer, and Munich beer;
- Canada reserves the ability to use the customary name of a plant variety or an animal breed. Consequently, Canadian producers may, for example, sell the kalamata variety of olive and use the variety name in their packaging;
- Canada maintains the ability to use components of multi-part terms. For example, “Gouda Holland,” “Mortadella Bologna,” or “Brie de Meaux” are duly protected, but the terms “Gouda,” “Mortadella,” “Bologna,” or “brie” may be used separately in their own. However, Canada did not agree to protect the French term “noix de Grenoble” (walnut, in English), meaning this term remains free for use in Canada;

- Five existing GIs conflicted with prior trademarks (“Canards à foie gras du Sud-Ouest” (Périgord), “Szegedi téliszalámi/Szegedi szalámi,” “Prosciutto di Parma,” “Prosciutto di S. Daniele,” “Prosciutto Toscano”) with existing trademarks is established as a solution for the first time in a common law jurisdiction implying and important deviation from the principle “first in time, first in right” and it is therefore seen as a major gain for the European Union; and Canada will not protect the GI “Budejovicke,” preventing any potential conflict with the Budweiser beer trademark;
- Enforcement of GIs in the Canadian market remains a private matter to be argued before the courts. However, there is a possibility for administrative recourse to uphold GI rights rather than relying on the judicial system.

One of the consequences of CETA is its indirect effect on the on-going disputes and parallel negotiations between the United States and the European Union on the issue of GIs and semi-generic denominations. For instance, the United States allows the term “champagne” to a sparkling white wine provided that its true places of origin is also mentioned on the label. The closing of the Canadian market to these wines may well be a turning point in this seemingly never-ending dispute.³⁵⁶ Therefore, the general discussions opened by CETA refer to restrictions on market access either by de facto import bans or the imposition of additional costs and if GIs be treated in the same way as a country entering a customs union and having to provide compensation if it raises tariffs to the common level.³⁵⁷

³⁵⁶ Jean-Christophe Boze & Jean-Francois Nadon, *Give Me a Cup of Sack, Boy: Why Bordeaux, Chianti, and Medoc Are Not Generic Denominations in Canada Anymore*, 10 DRAKE J. AGRIC. L. 247, 253 (2005).

³⁵⁷ Crina Vijju, May T. Yeung & William A. Kerr, *Geographical Indications, Conflicted Preferential Agreements, and Market Access*, 16 J. INT'L ECON. L. 409 (2013).

Table 2: European Union FTAs with Canada, South Korea and Central America

	EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT	EU-SOUTH KOREA FREE TRADE AGREEMENT	EU-CENTRAL AMERICA ASSOCIATION AGREEMENT
	Negotiations Closed - 2014. Legal Review Completed - 2016. Signed-2016 and In Force-2017 (expected).	Signed - 2010. Provisional Application - 2011. In Force - 2015.	Signed in 2012. Provisional Application 2013.
	Chap. 20 IPR and Annexes 20 A, B and C.	Chap. 10 IPR and Annexs 10 A and B.	Part IV Trade- Tit.VI IPR and Annexes 17 A&B.
O B J E C T I V E S	Art.20.1: (a) Facilitate de productions and commercialistaion of innovative and creative products (b) Achieve an adequate and effeictive level of protection and enforcementof IPR.	Art.10.1: (a) Facilitate de productions and commercialistaion of innovative and creative products (b) Achieve an adequate and effeictive level of protection and enforcementof IPR.	Art.228: (a) ensure an adequate and effective protection of IPR in the territories of the Parties, taking into consideration the economical situation and the social or cultural need of each Party; (b) promote and encourage technology transfer between both regions in order to enable the creation of a sound and viable technological base in the Republics of the CA Party; and (c) promote technical and financial co-operation in the area of IPR between both regions.
D E F I N I T I O N S	Art.20.15: geographical indication means an indication which identifies an agricultural product or foodstuff as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin; and product class means a product class listed in Annex 20.	Art.10.18: No proper definition. Concept of GIs based on existing regulation in the European Union (Council Regulation (EC) No 510/2006, with its implementing rules, for the registration, control and protection of geographical indications of agricultural products and foodstuffs in the European Union, and Council Regulation (EC) No 1234/2007 on the common organisation of the market in wine) and South Korea (Agricultural Products Quality Control Act, with its implementing rules). Art 10.19 for wines, aromatised wines and spirits (<i>also national laws</i>).	Art.242: 1. The following provisions apply to the recognition and protection of geographical indications which originate in the territories of the Parties. 2. For the purposes of this Agreement, geographical indications are indications which identify a good as originating in the territory of a Party, 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.
S C O P E	Art.20.17: This Sub-section applies to geographical indications identifying products falling within one of the product classes listed in Annex 20-C.	Art.10.18: 3. Having examined a summary of the specifications of the agricultural products and foodstuffs corresponding to the geographical indications of Korea listed in Annex 10-A, which have been registered by Korea under the legislation referred to in paragraph 1, the European Union undertakes to protect the geographical indications of Korea listed in Annex 10-A according to the level of protection laid down in this Chapter. 4- (<i>Same as previous paragrahp for EU GIs</i>) 5. Paragraph 3 shall apply to geographical indications for wines with respect to geographical indications added pursuant to Article 10.24.	Art.245: 1. The Parties reaffirm the rights and obligations established in Part II, Section 3, of the TRIPS Agreement. 2. Geographical indications of a Party to be protected by the other Party shall only be subject to this Article if they are recognised and declared as such in their country of origin.
S P E C I F I C	Annex 20-A Part A: 172 EU GIS, 58 cheeses, 2 CZ, 14 DE, 1 DK, 16 GR, 1 CY, 27 ES, 42 FR, 41 IT, 2 HU, 3 AT, 20 PT, 2 NL, 1 SE, 1 RO. Annex 20-A Part B: No Canadian GIs included in Annex 20-A Part B.	Annex 10-A Part A: 60 EU GIS, 19 cheeses, 2 AT, 5 CZ, 12 FR, 2 DE, 3 GR, 1 HU, 16 IT, 1 PT, 18 ES. Annex 10-A Part B: 64 South Korean GIS. Annex 10-B Part A Sect. 1 and 2: 80 EU Wine GI, 21 FR, 4 DE, 2 GR, 1 HU, 21 IT, 7 PT, 2 RO, 1 SK, 21 ES and 25 EU Spirits Gis. Annex 10-B Part B: 1 SouthKorean Spirit GI.	Annex 17 Part A: 219 EU GIS, 27 cheeses, 5 CZ, 3 DK, 12 DE, 2 IE, 14 GR, 53 ES, 43 FR, 44 IT, 5 CY, 1 LT, 4 HU, 3 AT, 3 PL, 14 PT, 8 RO, 1 SK, 2 FI, 2 SE, 1 GB. Annex 17 Part B: 10 CA GIS, 5 coffees, 1 cheese, 1 CR, 2 SV, 2 GT, 2 HN, 2 NI, 1 PA.

2.3.2. *South Korea: Similarities in the New Approach to Trade Agreements*

The South Korean FTA³⁵⁸ is a prime example of new European Union agreements as an ambitious trade deal eliminating almost 99% of duties on both sides with a short period of time; it goes far beyond the United States-South Korean FTA³⁵⁹ with outstanding economic results.³⁶⁰ Furthermore, it is the first comprehensive FTA where the European Union meets the United States through same FTA partner and is used as an important reference.³⁶¹ The success of the comprehensive bilateral free trade agreements with South Korea is a good ground to build on new negotiations considering that both the European Union and the United States could give each other what each of them gave to South Korea.³⁶² Many consider the South Korean and Canadian FTAs with the European Union as a bridge to facilitate agreement under TTIP.³⁶³ Finding a balanced outcome should not be beyond the ingenuity of the negotiators and the United States will less be likely to oppose the protection of compound names if the European

³⁵⁸ *The European Union–South Korea Free Trade Agreement* of May 10 2010, O.J. L168/1. [hereinafter KOREU Agreement].

³⁵⁹ *Compare* EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR TRADE, *supra* note 317 at 9. *with* Yong-Shik Lee, Jaemin Lee & Kyung Han Sohn, *The United States-Korea Free Trade Agreement: Path to Common Economic Prosperity or False Promise*, 6 U. PA. E. ASIA L. REV. 111 (2011).

³⁶⁰ In four years, EU exports increased by 55%, generating €4.7 billion worth of extra exports in the first three years turning the long-standing EU trade deficit into a surplus and the EU's share of South Korea's imports increased from 9% to 13%, while the US remained stable and Japan lost 2%. EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR TRADE, *supra* note 339 at 9. *See also* EUROPEAN COMMISSION & DIRECTORATE-GENERAL FOR TRADE, *THE EU-KOREA FREE TRADE AGREEMENT IN PRACTICE* (2011).

³⁶¹ Yoo-Duk Kang, *EU's Global Europe Initiative and Korea-EU FTA*, 8 KOR. U. L. REV. 47, 58 (2010).

³⁶² JEFFREY J. SCHOTT & CATHLEEN CIMINO, *CRAFTING A TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: WHAT CAN BE DONE?* 5 (2013).

³⁶³ G. E. Evans & Michael Blakeney, *The Protection of Geographical Indications After Doha: Quo Vadis?*, 9 J. INT'L ECON. L. 575–614 (2006). *See also* Goldberg, *supra* note 87.

Union is willing to accept significant exceptions from the level of protection to make progress.³⁶⁴ However, there are political as well as economic interests at stake. Politically, EU agriculture has relatively few offensive interests in the TTIP negotiations so gaining greater protection for GIs is seen as a way to sell a deal to EU farmers as a compensating factor for likely losses for EU livestock producers.³⁶⁵

Launched in 2007 as part of the “Global Europe” initiative,³⁶⁶ the European Union-South Korean FTA agreement is based on solid economic criteria and represents a stepping-stone—tackling issues that are not ready for multilateral discussion and going beyond the market opening that can be achieved in the TRIPS Agreement, particularly regarding GIs. As the first completed agreement in the new generation of FTAs launched by the European Union, it also goes further than previous agreements to lift trade barriers, including provisions on issues ranging from services and investments, competition, government procurement, transparency in regulation, and sustainable development to IPR.³⁶⁷ The agreement of October 6, 2010 comprises fifteen chapters, several annexes and appendixes, three protocols, and four understandings entering into force in July 2011.³⁶⁸

The provisions on GIs under the EU-South Korea FTA can be summarized as follows:

³⁶⁴ Alan Matthews, *GEOGRAPHICAL INDICATIONS (GIS) IN THE US-EU TTIP NEGOTIATIONS, CAP REFORM* (2014), <http://capreform.eu/geographical-indications-gis-in-the-us-eu-ttip-negotiations/> (last visited Sep. 27, 2015).

³⁶⁵ *Id.*

³⁶⁶ See Boris Rigod, *Global Europe: The EU's New Trade Policy in Its Legal Context*, 18 COLUM. J. EUR. L. 277 (2012).

³⁶⁷ JAMES HARRISON, *THE EUROPEAN UNION AND SOUTH KOREA THE LEGAL FRAMEWORK FOR STRENGTHENING TRADE, ECONOMIC AND POLITICAL RELATIONS* (2013).

³⁶⁸ EUROPEAN COMMISSION, *EU-SOUTH KOREA FREE TRADE AGREEMENT: A QUICK READING GUIDE* (2010), http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145203.pdf (last visited Jan 15, 2014).

- Legislation will be developed for the registration, protection, and control of GIs in accordance with the agreement;
- Lists of GIs are annexed to the agreement and parties agree to protect them. Separate lists of GIs are annexed for wines and spirits. There are sixty-three Korean foodstuff GIs given protection compared to just sixty European products, chosen for their importance to trade out of the total number of GI agriculture and foodstuff names registered in the EU. Also, 105 wines and spirits are included among selected European products,³⁶⁹
- Among the sixty European Union GIs included in the foodstuff annex only compound names are protected. “Parmigiano Reggiano,” “Tiroler Speck,” or “Camembert de Normand,” are protected, but not the individual names (parmigiano, speck, or camembert). However, many single GIs names are protected mainly for cheeses (Comté, Roquefort, Reblochon, Taleggio, Asiago, Fontina, Gorgonzola, and, notably, Feta). The wines and spirits list includes many of the well-known wine regions of Europe;
- A “grandfather” clause is included allowing continued use of trademarks already in existence when the Agreement enters into force;
- Enforcement of protection will be granted at the initiative of the respective authorities or at the request of an interested party, which presumably could be the producers concerned, a Member State, or the European Union Commission;

³⁶⁹ KOREU Agreement, Chapter 10, Intellectual Property, Section B, Standards concerning intellectual property rights, Sub-section C, Geographical Indications. Art 10.18 “Recognition of geographical indications for agricultural products and foodstuffs and wines”; Art. 10.19 “Recognition of specific geographical indications for wines, aromatized wines and spirits” listed in Annex 10-B.

- A Working Group on Geographical Indications is established which can add additional GIs to the annexes as they are approved to ensure the functioning of the agreement.

The case of South Korea is a good example where both the United States and the European Union have used FTAs to expand the scope of IPRs beyond the level of protection provided by TRIPS Agreement. In the field of GIs, EU-South Korea FTA extends protection by offering all GIs the higher level of protection granted to wines and spirits under Article 23 of the TRIPS Agreement, establishes a register and increases overall protections.³⁷⁰

³⁷⁰ SCHOTT & CIMINO, *supra* note 345, at 11 and 12.

**CHAPTER 3: THE MISSING LINK OF GEOGRAPHICAL INDICATIONS IN THE
UNITED STATES. MYSTERIES AND RELEVANCE OF THE GENERAL INTER-
AMERICAN CONVENTION OF 1929 FOR TRADE MARK AND COMMERCIAL
PROTECTION**

In these relationships between developed and developing countries, terminology is uncertain and dangerous. Talk about private enterprise and freedom of contract can only invite the developing world to reject them. We should rather remind them of the wisdom of Henri Bergson, that progress and evolution in economic life, as in all life, can only develop in an atmosphere of freedom...And we must look behind the words to the realities. What the less-developed countries demand is profit-sharing, mixed enterprises or local participation in the administration of enterprises, and approval of investment or contractual arrangements within the framework of their development plans. This demand is not unreasonable.³⁷¹

Stephen P. Ladas

**1. FINDING IN HISTORY THE BONDS NEEDED FOR THE FUTURE OF A JOINT
REGULATION ON GIS BETWEEN THE UNITED STATES AND THE EUROPEAN
UNION**

In both the United States and Europe, and probably anywhere, children are born citizens attached to flags and regulations of their sovereign country as much as certain agriculture products are linked to their place of origin. Identity and origin are linked and determine applicable rights both to persons and foodstuff in an increasingly interconnected global society and trade. The traditional view of GIs, as that of patents, focused on the trade-off between competition and innovation incentives.³⁷² However, national legislators keep ruling locally, but

³⁷¹ Stephen P. Ladas, *Comments on the Model Law for Developing Countries on Inventions*, 1 *STUD. L. & ECON. DEV.* 116, 120 (1966).

³⁷² Ted Sichelman & Sean O'Connor, *Patents as Promoters of Competition: The Guild Origins of Patent Law in the Venetian Republic*, *SAN DIEGO L. REV.* 1267, 1282 (2012).

they are also influenced by international regulations that address global market concerns, developing a complex web of rules which effectiveness and enforcement to protect the rights of individual are not always duly ensured. Due to limitations on the nature of the legal systems based on the national sovereignties, and the lack of development of the international institutionalized system generated last century after the disaster of World War II, there is a real necessity for global regulation and compliance. Therefore, our own identities, legal backgrounds, and the new partnership currently being negotiated must overcome traditional burdens in order to establish regulatory and shared high standards for the future.

This chapter dives into the roots and origin of the United States and international regulation for the protection of IPR throughout the contributions of the two main authors of the twentieth century: Edwards S. Rogers and Stephen P. Ladas. Their academic work, together with their direct participation in the drafting on the main acts and international agreements provide detailed information to understand the reasoning behind the inclusion of Chapter V on the “Repression of False Indications of Geographical Origin or Source” within the 1929 General Inter-American Convention For Trade-Mark and Commercial Protection established in Washington DC³⁷³ and the absence of development and regulation of GIs under the Lanham Act in 1946.³⁷⁴

What makes the United States distinct to other nations? Why is it so unique? What are the pillars of such a strong identity? Probably the importance and legal protection of its own diversity is a key approach to these queries. Quality of life and quality of rights are intrinsic to the United States and the European Union. And diversity is the cornerstone for understanding the

³⁷³ General Inter-American Convention for Trade Mark and Commercial Protection,,*supra* note 85.

³⁷⁴ Trademark Act of 1946, 15 U.S.C. §§ 1051-1141 [hereinafter Lanham Act].

concept of GIs. As President John F. Kennedy mentioned in his 1963 commencement address at the American University, “if we cannot end our differences, at least we can help make the world safe for diversity.”³⁷⁵ Similar to his statement, the European Union and the United States seem to be directing their attention to their common interests and the means by which existing regulatory and trade divergences may be resolved with positive global consequences. Actually, the quality of being different is highly appreciated in the United States.³⁷⁶ The coexistence of preexisting nationalities, ethnicities, and cultures, for the establishment of its identity and the traditional metaphors of a “crucible” nation, the “melting pot,” and, therefore, diversity, have been fundamental for its modern success.

Identity, quality, diversity, uniqueness, and reputation—determined by singular origin—are the fundamentals grounds of GIs. Proper rules on this field of IPR are as feasible as necessary both in the United States and globally. Unjustified protectionist systems are, nowadays, an unacceptable luxury that cannot be maintained and an agreement on the extension of the TRIPS Agreement is imperative for the economic leaders of the old and new world considering the current economic challenges. “Common Sense”³⁷⁷ is one of the pillars of the United States values. And Europe has learned from its historical mistakes fostering a new political, legal,

³⁷⁵ John F. Kennedy, Commencement Address at American University, June 10, 1963, John F. Kennedy Presidential Library and Museum, <http://www.jfklibrary.org/Asset-Viewer/BWC7I4C9QUmLG9J6I8oy8w.aspx> (last visited Jan. 26, 2014) (“So let us not be blind to our differences, but let us also direct attention to our common interests and the means by which those differences can be resolved. And if we cannot end now our differences, at least we can help make the world safe for diversity. For, in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children's futures. And we are all mortal”).

³⁷⁶ See *Cnty. of Roquefort v. William Faehndrich, Inc.*, 198 F. Supp. 291, 292 (S.D.N.Y. 1961), aff'd 303 F.2d 494 (2d Cir. 1962) (“A French law adopted on July 26, 1925 prohibits the sale of this type of cheese under the name “Roquefort” unless the product is made within the Community of Roquefort and has received the certificate of the community.”).

³⁷⁷ THOMAS PAINE, COMMON SENSE: ADDRESSED TO THE INHABITANTS OF AMERICA (1792).

social and economic framework facilitating common standards of IPR to citizens and consumers is to be developed. Common sense, as common identities, should facilitate the development of a system of adequate GIs protection.

Considered a major asset for a variety of goods, GIs are not only a market tool for granting the highest quality to singular products and protecting consumer interests but also a legal and economic tool for the development of rural areas and the preservation of cultural heritage.³⁷⁸ Over the years, certain European countries took the lead in identifying and protecting their GIs, but today GI protection constitutes a global phenomenon.³⁷⁹ Protecting and preserving the benefits related to traditional cultures, geographical diversity, and production methods is a priority for development. GIs offer a legal possibility not just to comply with complex international regulations addressed to product quality and market access, but also for original products to be internationally distinguished.³⁸⁰ Since GIs requires intense and costly social and legal efforts that small rural communities can rarely afford, they justify an enhanced protection to guarantee quality to consumers as well as a fair price and fidelity for farmers.³⁸¹ Those are the

³⁷⁸ See ELIZABETH BARHAM ET AL., AMERICAN ORIGIN PRODUCTS (AOPS): PROTECTING A LEGACY, 3 (2010).

³⁷⁹ In accordance with the "E-Bacchus" database developed by the European Commission, there exist a total of 2,885 GIs referred to wine registered in the European Union: 1,293 European Union wines with protected designation of origin (PDO), 459 European Union wines with protected geographical indication, 435 third countries wines with a geographical indication, 696 third countries wines with a name of origin, and two third countries wines with protected designation of origin.

³⁸⁰ DOMINIQUE BARJOLLE & EMILIE VANDECANDELAERE, IDENTIFICATION OF ORIGIN-LINKED PRODUCTS AND THEIR POTENTIAL FOR DEVELOPMENT: A METHODOLOGY FOR PARTICIPATORY INVENTORIES (2012), http://www.fao.org/fileadmin/templates/olq/files/MethodologyEN_01.pdf (last visited Jul 28, 2016) (providing, as part of FAO's Quality & Origin Programme, a methodological participatory approach to identifying products of origin-linked quality to be used as levers for sustainable rural development. The study adopts two analytical tools or questionnaires to define a strategy based on the value of production and can even be used online (1) assessing the link between a product and its origin, (2) focusing on strengths and weaknesses in terms of economic value and/or preservation of a heritage.).

³⁸¹ Edward S. Rogers, *Excerpts from the Lanham Act and the Social Function of Trade-Marks*, 62 TRADEMARK REP. 255, 258 (1972) (referring to President Jefferson's view on trade-marks as symbolizing reputation and contributing to fidelity).

main arguments for the European Union to actively promote it both in its trade relations and developing policy.³⁸² Therefore, even although all nations have a wide range of local products that correspond to the concept of a GI, only a few are already known as such or duly protected. Unfortunately, legal and regulatory limitations remain, which make the protection system ineffective and hinder its economic and social potential.

As indicated in the previous chapter, there are two basic types of legal regimes for the protection of GIs. Some countries, notably members of the European Union, define and treat GIs as a distinct type of IPR, which is also reflected in the TRIPS Agreement. Other countries, such as the United States, consider GIs a subcategory of trademarks. Furthermore, The European Union is attempting to incorporate other features of its system of GI protection into the WTO system, often finding opposition from countries that do not consider this a tool for development and effective commercial trade. However, certain countries consider better protection of GIs useful to increasing income, in particular in rural areas dependent on agricultural products. There exists a belief in Europe that GIs encourage quality production, fight the constant migration of population, and can promote the development of tourism, among many other benefits. In fact, due to the economic, cultural, and social consequences, GIs grant protection to a community and not to individual right holders. National and international political strategies and trade agreements are needed to establish the legal frameworks that allow local producers and the market to obtain the required recognition of uniqueness and due value from their products.³⁸³

³⁸² *Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Region, Global Europe: Competing In The World. A Contribution to the EU's Growth and Jobs Strategy*, at 5, COM(2006) 567 (Oct. 4, 2005) [hereinafter *Global Europe*].

³⁸³ See UNITED STATES DEPARTMENT OF AGRICULTURE, RURAL AMERICA AT A GLANCE 2015 EDITION (2016), http://www.ers.usda.gov/webdocs/publications/eib145/55581_eib145.pdf, last visited Nov.14, 2016). Population

In a globalized economy, the increased ruling power of the market may generate a race to the bottom based on quantitative and price models. Commodities such as banana, cocoa, coffee, rice, corn, or sugar, have developed economic models in which the industry receive most of the profit out of the business while the small farmers remain in a weak and arduous situation. The strong position of developed industries such as the one of chocolate or coffee, together with the main foodstuffs distribution network, grants them full control of market access and purchase conditions. It is easy to wonder about the gap between exporters and importers, those who grow and harvest the pods and those marketing and selling the final product to consumers.³⁸⁴ Perhaps the best possible system of fair trade should pursue that the economic added value remains in the territory of production being duly shared by all those participating and making it sustainable.

Taxation traditionally facilitates a better distribution of wealth, including through the consumption of products highly damaging to health, such as tobacco and alcohol. In countries and regions where the establishment of duties and tax collection are not easy established, GIs can be placed among other methods to foster equality and development, since consumers are ready to pay more for GIs products and contribute directly if a larger part of the price is directly granted to local farmers.

Now, imagine yourself tasting something really special, that gives you great pleasure and also brings your memories back to a very special location. Try to go beyond emotional

decline continues in rural areas and particularly child poverty, including deep poverty, increase the most during and after the recession reaching 25.3 percent in 2014, and it is higher among minority racial and ethnic groups.

³⁸⁴ Detailed information can be obtained from the International Cocoa Organization, located in London, as a good example on the referred debate on trade of commodities. See DOMINIQUE BARJOLLE & EMILIE VANDECANDELAERE, IDENTIFICATION OF ORIGIN-LINKED PRODUCTS AND THEIR POTENTIAL FOR DEVELOPMENT: A METHODOLOGY FOR PARTICIPATORY INVENTORIES 56 (2012), http://www.fao.org/fileadmin/templates/olq/files/MethodologyEN_01.pdf (last visited Jul 28, 2016).

perceptions and think of the product qualities, particular features, and origin.³⁸⁵ What was it? Something unique? Or just something special? If it was special but not unique it could be protected by a trademark and the product easily substituted. However, something unique, linked to a particular location or traditions, and duly certified, may have an extraordinary value, both in perception but also economically.³⁸⁶

GIs are often categorized as trademarks, strongly linked to European interests, and considered a protectionist system to avoid competition or at least to protect certain wines, spirits, and foodstuffs. Opposed economic interests and incorrect regulatory approaches have led to a situation that can be addressed under TTIP in order to establish a bilateral agreement that will facilitate a global system for the protection and development of GIs. It is much more than just about toasting champagne with our beloved ones in front of the Eiffel Tower, enjoying a traditional Darjeeling tea at four in London or Delhi, tasting Parmigiano-Reggiano with a good Chianti in Piazza Nabona in Rome, or just getting lost in the historical and gastronomical roots of Mediterranean Europe.

Since the mid-18th century, the derivation of any kind of property from nature constitutes a moot question.³⁸⁷ Even today, a proposal exists to examine whether the Pan-American

³⁸⁵ M. DE LA GUARDIA & A. GONZÁLVEZ, 60 FOOD PROTECTED DESIGNATION OF ORIGIN. METHODOLOGIES AND APPLICATIONS. COMPREHENSIVE ANALYTICAL CHEMISTRY (2013). Complete study providing analytical and chemometric methods for food protected designation authentication, monitor and evaluation. Provides specific techniques and analytical methods in Part III including wine, alcoholic beverages, juices and non-alcoholic beverages, fruits and vegetables, cheeses, honey, vegetable oils, coffee, wheat, corn, rice, fishery products, and sea salt.

³⁸⁶ See GARY PAUL NABHAN, ASHLEY ROOD & DEBORAH MADISON, RENEWING AMERICA'S FOOD TRADITIONS: SAVING AND SAVORING THE CONTINENT'S MOST ENDANGERED FOODS (2008) ("Illustrated dramatic call to recognize, celebrate, and conserve the great diversity of foods that gives North America its distinctive culinary identity that reflects our multicultural heritage.").

³⁸⁷ THOMAS JEFFERSON & HENRY AUGUSTINE WASHINGTON, THE WRITINGS OF THOMAS JEFFERSON: CORRESPONDENCE, 180 (1859). ("But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural and even an hereditary right to inventors.").

Convention might offer any insight into the process and requirements of hemispheric harmonization in light of NAFTA.³⁸⁸ And, in any case, the basic rules of the United States legal system have reconciled the right of original users, the rights of the new comers to develop new business, and the avoidance of deception or misleading consumers:

Two and perhaps three distinct rights have to be reconciled...the right of the original user of the name to the business that he has built up under it; the right of the new comer honestly to go to the place and establish a business there and to state the fact of its location, and the right of the public to purchase an article desired without deception. The late comer will therefore be required so to use the name as not to injure the original user or mislead the public.³⁸⁹

Just after the conflict where over 80 millions human beings died, World War II, authors from both shores of the Atlantic suggested that nations of the Eastern and Western Hemisphere would do well to cooperate and work together and even suggested that the United States adhere to the Paris Union and thereby reject the idea of any isolationism, even in treaties affecting industrial property.³⁹⁰ Suggestions to reconcile Europe and the United States on issues, such as IPR, derives from their shared history—the contributions of Europe to the roots of the modern United States, and the United States efforts to rebuild Europe following World War II. As a matter of fact, in the common history of IPR and GIs, the intention of the United States was to actively work together and not just foster inter-American agreements on the matter.³⁹¹ Since

³⁸⁸ Drescher, *supra* note 282, at 327.

³⁸⁹ EDWARD SIDNEY ROGERS, GOOD WILL, TRADE-MARKS AND UNFAIR TRADING, 147 (1914).

³⁹⁰ Cyril Drew Pearson, *Proposal That Non-Member Countries of the Western Hemisphere Adhere to the International Union for the Protection of Industrial Property Signed at Paris, March 20, 1883 as Revised at London, June 2, 1934*, 44 TRADEMARK REP. 465, 473 (1954).

³⁹¹ Edward S. Rogers, *The Expensive Futility of the United States Trade-Mark Statute*, MICH. L. REV. 660 (1914).

1897, twenty-two congresses were held to formulate recommendations for revision of existing rules, but not until Washington (1956) did these meetings take place in America.³⁹²

2. CHALLENGES OF THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

In February 2013, leaders from the United States and the European Union announced the launch of negotiations to take their economic relationship to a higher level.³⁹³ This comprehensive trade and investment agreement intends to be the biggest bilateral trade deal ever negotiated including the opportunity not only to expand trade and investment across the Atlantic, but also to contribute to the development of global rules to strengthen the multilateral trading system.³⁹⁴ In fact, the benefits for the European Union and the United States are not at the expense of the rest of the world; on the contrary, this agreement should have a positive impact on worldwide trade and incomes, increasing global income by almost €100 billion.³⁹⁵ Considering the partners to this agreement, together with the existing web of bilateral and multilateral trade agreements,³⁹⁶ a key component is the extension to regulatory obstacles of trade and the achievement of a substantial reduction of cost for traders and investors.³⁹⁷

³⁹² Cyril Drew Pearson, *The Significance to the Washington (1956) A.I.P.P.I. Congress to Western Hemisphere Countries*, 47 TRADEMARK REP. 1188, 1190 (1957).

³⁹³ Joint Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso, European Commission, European Commission Press Releases Database, February 13, 2013, *available at* http://europa.eu/rapid/press-release_MEMO-13-94_en.htm (last visited April 18, 2014).

³⁹⁴ *Id.*

³⁹⁵ *See* CENTRE FOR ECONOMIC POLICY RESEARCH ET AL., *supra* note 28.

³⁹⁶ The United States has free trade agreements in force with twenty countries: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Singapore, and South Korea. The European Union has already in place trade agreements with nearly fifty partners and many others are currently being negotiated. Up to date information can be obtained from the web sites of the United States Trade Representative at <http://www.ustr.gov/trade-agreements> and

At this stage, after many negotiation rounds, two different scenarios proposing different degrees of trade liberalization continue to be foreseen.³⁹⁸ A “conservative” scenario envisages that the parties would negotiate an agreement in line with existing trade partners; the “ambitious” scenario imagines that it would potentially differ in terms of scope including three interlinked components:³⁹⁹ (i) an ambitious market access on tariffs, services, investment, and procurement;⁴⁰⁰ (ii) a determined approach to regulatory issues, including technical barriers to trade, sanitary and phytosanitary measures, upstream regulatory cooperation and enhanced sectorial regulatory compatibility beyond the partners standard approaches;⁴⁰¹ and (iii) rules on a number of areas of common concern, such as trade facilitation, customs, trade related aspects of competition policy, labor and the environment, and IPR, including GIs.⁴⁰²

the European Commission Directorate General on Trade at http://ec.europa.eu/trade/policy/countries-and-regions/index_en.htm.

³⁹⁷ For a global understanding of the New Transatlantic Marketplace see Charles W. Smitherman III, *New Transatlantic Marketplace: A Contemporary Analysis of United States-European Union Trade Relations and Possibilities for the Future*, 12 MINN. J. GLOBAL TRADE 251 (2003). For the remaining trade barriers and existing difficulties see *Impact Assessment Report on the Future of EU-US Trade Relations. Accompanying the Document Recommendation for a Council Decision Authorising the Opening of Negotiations on a Comprehensive Trade and Investment Agreement, Called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America*, at 29, SWD (2013) 68 final (Mar. 12, 2013) [hereinafter TTIP Impact Assessment Report].

³⁹⁸ TTIP Impact Assessment Report at 6.

³⁹⁹ See TTIP Impact Assessment Report at 5 (previously, President Barroso, President Van Rompuy and President Obama established the High Level Working Group on Jobs and Growth (HLWG) in November 2011 with the mission of identifying policies and measures to increase trade and investment to support mutually beneficial job creation, economic growth, and competitiveness. A joint work program was established and a series of thematic subgroups. Among the areas that were discussed at both expert and political levels were: tariffs, regulatory issues (including technical barriers to trade and sanitary and phytosanitary rules), services, investment, public procurement, intellectual property rights (including GIs), and trade rules that cover, inter alia, trade facilitation/customs, trade-related aspects of competition and state-owned enterprises, trade-related aspects of labour and environment, horizontal provisions on small- and medium-sized enterprises, and access to raw materials and energy)

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

Regarding this last component, GIs constitute economic and political priority for both the European Union and developing countries. Given the global competitive environment characterized by declining agricultural commodity prices, and the global trend towards quality, unique and traditional products provide producers of value added products with a strong link to a particular geographical origin the opportunity to access developed markets through differentiation. As such, territorial origin and GIs becomes a strategic tool for differentiation and the international regulation of origin-labeled products is increasingly important.⁴⁰³

In the context of the negotiation, GIs have been considered a protective (mainly European) tool to the advantage to their own farmers. However, GIs are known as a mechanism for granting that the economic added value of the products remains within the territory where they have been obtained ensuring prosperity for local agriculture. In any case, the global economy requires clear rules and an effective enforcement system for the GI system to be broadly accepted.⁴⁰⁴ Therefore, a comprehensive TTIP that includes GIs would have important implications for global trade; it may strengthen transatlantic economic relations while also spurring trade reforms that both sides could jointly put forward to reinvigorate flagging multilateral trade negotiations.⁴⁰⁵

⁴⁰³ A good analysis on the existing debate and economic consequences, including fundamental grounds and a summary of studies analyzing the welfare impact of quality and origin-based labeling, was developed by Cerka Bramley and others. Cerka Bramley, Estelle Biénabe & Johann Kirsten, *The Economics of Geographical Indications: Towards a Conceptual Framework for Geographical Indication Research in Developing Countries*, ECON. INTELL. PROP. 109 (2009) (the study illustrates that providing protection for geographical indications is more than just linguistic monopolization and that the economic underpinnings of geographical indications derive from considerations of value added and market access through differentiation. The economic arguments presented provide a strong justification for their protection in the developing world).

⁴⁰⁴ Since 2000, regional and bilateral trade agreements between developed and developing countries have developed IPR provisions that go beyond the level of protection provided by TRIPS Agreements, categorized as *ra*TRIPS plus.” See, e.g., M. Perez Pugatch, *A Transatlantic Divide? The US and EU’s Approach to the International Regulation of Intellectual Property Trade-Related Agreements*, ECIPE Working Paper No. 02/2007 (2007).

⁴⁰⁵ See SCHOTT & CIMINO, *supra* note 345.

The European Union is considered to be one of the main proponents of the deep trade agenda to push for further trade liberalization with an emphasis on the removal of domestic non-tariff regulatory measures affecting trade.⁴⁰⁶ However, within the complex framework of IPR and the “Global Europe” initiative,⁴⁰⁷ GIs play a significant role. The European Union is attempting to achieve these aims by entering into comprehensive FTAs including services, IPR, competition, and investment. In fact, TRIPS-Plus provisions seem to be the only way forward, as long as TRIPS does not offer a satisfactory level of protection for European Union GIs, and is crucial to achieve a good outcome on GIS in bilateral FTAs.⁴⁰⁸

So the question is whether an agreement could be found between the United States and the European Union on the regulation of GIs.⁴⁰⁹ There is a view that, to most Americans, as long as the characteristics of the cheese or the wine remain consistent with taste and expectations, the average consumer will not care who makes it or where it comes from.⁴¹⁰ However, room for compromise exists in a three-tiered approach: (i) register a list of compound terms for GI protection, (ii) negotiate an exceptions list for specific generic terms, and (iii) create a third list

⁴⁰⁶ A solid study on the current external trade policy in the area of intellectual property, particularly its attempts to promote its own regulatory model for the protection of IP rights through trade agreements. B. A. Melo Araujo, *Intellectual Property and the EU's Deep Trade Agenda*, 16 J. INT'L ECON. L. 439 (2013).

⁴⁰⁷ In 2006, the Commission launched its above referred “Global Europe” communication outlining a change in its external trade policy considering that in the absence progress in the WTO Doha Development Round of negotiations, the European Union should enter into FTAs promoting a deeper integration, Commission Staff Working Document annexed to Global Europe, *supra* note 382.

⁴⁰⁸ See ADVISORY GROUP INTERNATIONAL ASPECT OF AGRICULTURE, DG AGRI WORKING DOCUMENT ON INTERNATIONAL PROTECTION OF EUROPEAN UNION GEOGRAPHICAL INDICATIONS: OBJECTIVES, OUTCOME AND CHALLENGES (2012), http://ec.europa.eu/agriculture/consultations/advisory-groups/international/2012-06-25/agri-working-doc_en.pdf.

⁴⁰⁹ This has previously been claimed by authors after the conflict that took place at the WTO Appellate Body, *see, e.g., Zacher, supra* note 90.

⁴¹⁰ See Leigh Ann Lindquist, *Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT'L & COMP. L. 309, 342-43 (1999).

of GIs subject to future negotiations.⁴¹¹ Understanding the importance of agriculture in trade,⁴¹² and the real economic and social impact of GIs should be considered along with a global analysis of TTIP on Agriculture.⁴¹³ The future vitality and legitimacy of an agreement depends on *bona fide* attempts to reach consensus, not just at the expense of the United States legal regime,⁴¹⁴ while protecting foreign national symbols and European Union GIs domestically ensures protection of United States symbols abroad.⁴¹⁵ Certain developments in the protection of GIs for wines and spirits show that trademark law is adapting to the expansion of international agreements.⁴¹⁶ Unfortunately, there has been relatively little systematic, scholarly analysis of GIs in Europe and almost none on the other side of the Atlantic.⁴¹⁷ Hence, the lack of consistent legal instruments on the matter of GIs among the trade partners, and the will to contribute to building a mutually accepted conceptual system, is one of the objectives of this dissertation. As Ladas established,

⁴¹¹ See Jeffrey J. Schott & Cathleen Cimino, *Keys to Negotiating the Transatlantic Trade and Investment Partnership*, 48 *INTERECONOMICS* 263–64 (2013).

⁴¹² Tim Josling, *World Trade in Basic Foodstuffs*, 34 *INT'L J.* 39–52 (1978) ; WTO DISCIPLINES ON AGRICULTURAL SUPPORT: SEEKING A FAIR BASIS FOR TRADE, (David Orden, David Blandford, & Tim Josling eds., 2011).; TIM JOSLING & INSTITUTE FOR INTERNATIONAL ECONOMICS (U.S.), *FOOD REGULATION AND TRADE: TOWARD A SAFE AND OPEN GLOBAL SYSTEM* (2004).; T. Josling et al., *Understanding International Trade in Agricultural Products: One Hundred Years of Contributions by Agricultural Economists*, 92 *AM. J. AGRIC. ECON.* 424–46 (2010).

⁴¹³ *RESEARCH HANDBOOK ON THE WTO AGRICULTURE AGREEMENT: NEW AND EMERGING ISSUES IN INTERNATIONAL AGRICULTURAL TRADE LAW*, (Joseph A. McMahon & Melaku Gebeye Desta eds., 2012).

⁴¹⁴ David Synder, *Enhanced Protections for Geographical Indications under TRIPs: Potential Conflicts under the US Constitutional and Statutory Regimes*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1297, 1321 (2007).

⁴¹⁵ Scott Danner, *Not Confused-Don't Be Troubled: Meeting the First Amendment Attack on Protection of Generic Foreign Geographical Indications*, 30 *CARDOZO L. REV.* 2257, 2292 (2008).

⁴¹⁶ Jeff Young, *The Lanham Act and Geographical Indications Used on or in Connection with Wines or Spirits*, 19 *J. CONTEMP. LEGAL ISSUES* 95, 97 (2010).

⁴¹⁷ Hughes, *supra* note 39.

It is the task of those engaged in the study and application of the law as well as of those who legislate to appraise these various interests involved in order to avoid the sacrifice of any regardless of whether one set of interests or the other exercises a greater organized pressure.⁴¹⁸

3. THE IMPORTANCE OF LADAS AND ROGERS IN THE DEVELOPMENT OF INDUSTRIAL PROPERTY PROTECTION BOTH IN THE UNITED STATES AND INTERNATIONALLY

Stephen Ladas refers to Rogers as the person in the United States who has done more, both abroad and domestically, to advance international protection for industrial property.⁴¹⁹ It is accepted and argued that “there would have been no Lanham Act had it not been for Mr. Rogers’ indefatigable efforts towards this goal for over twenty-five years and his exceptional statesmanlike approach.”⁴²⁰ And both of them, Ladas and Rogers, are responsible for the existing model of IPR protection in the United States since, before their contributions pre-Lanham Act, statutes were inconsistent and presented a rather confusing amalgam of law.⁴²¹

The developments of industrial property rights in the United States can be understood through the contributions of these two geniuses to the main pieces of legislation and international agreements sustaining its protection. Rogers’ work, in favor of the international protection of industrial property, was glossed and followed by Ladas,⁴²² and their relationship and views

⁴¹⁸ Stephen P. Ladas, *Inter-American Copyright*, 7 U. PITT. L. REV. 283, 284 (1940).

⁴¹⁹ Ladas, *supra* note 297 at 201.

⁴²⁰ See Walter J. Derenberg, *The Contribution of Edward S. Rogers to the Trademark Act of 1946 in Historical Perspective*, 62 TRADEMARK REP. 189, 194 (1972).

⁴²¹ See Ethan Horwitz & Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43 (a)*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 59, 62 (1996).

⁴²² The University of Michigan Alumni Association provides an interesting Necrology File for Edward Sidney Rogers, at the Bentley Historical Library, *available at* <https://www.law.umich.edu/historyandtraditions/students/Pages/ProfilePage.aspx?SID=5340&Year=189>.

provided guidance on IPR for over half a century. Advising inventors such as Thomas A. Edison or companies like Coca-Cola, Rogers developed a practical knowledge and approach to legislative and international regulations. He even participated in the establishment of the International Chamber of Commerce in Atlantic City in 1919.⁴²³ However, Rogers and Ladas may be recognized and given their just value through their articles, conferences, and international conventions, as well as the rich heritage of words, comments, and legal ideas responsible for the most advanced legal system on IPR and its impact in United States research and development. Reading their articles to understand IPR in the United States is like reading Jean Monnet's "Memories" to understand and believe in the European Union.⁴²⁴

Their visionary intentions demonstrated local action with global results. Under the debates on the adherence of the United State to international conventions, such as the Madrid Agreement, Ladas would always take proactive initiative recommending and proposing innovative solutions.⁴²⁵ One hundred years ago, Rogers published a book—often considered the bible of good will, trademarks, and unfair trading⁴²⁶—starting with a famous statement by the publishers suggesting that “every business worth imitating has the problem of mistaken identity to deal with.”⁴²⁷ Far beyond the general principles, the matter was developed by Rogers as a solid ground to build the system of IPR protection in the United States.⁴²⁸

⁴²³ FREDERICK PAUL KEPPEL & AMERICAN ASSOCIATION FOR INTERNATIONAL CONCILIATION, *THE INTERNATIONAL CHAMBER OF COMMERCE* (1922).

⁴²⁴ JEAN MONNET, *MÉMOIRES* (Édition : 1976 FAYARD ed. 1988).

⁴²⁵ Stephen P. Ladas, *Proposal for a New Agreement for International Registration of Trademarks*, 57 TRADEMARK REP. 433, 433 (1967).

⁴²⁶ ROGERS, *supra* note 372.

⁴²⁷ *Id.* at 8.

⁴²⁸ Edward S. Rogers, *Predatory Price Cutting as Unfair Trade*, 27 HARV. L. REV. 139 (1913).

Ladas argued against the limitations of the trademark system in the United States⁴²⁹ and promoted necessary changes in domestic law to join the Madrid Agreement. His argument was that the greatest export country in the world should participate in any organization or arrangement that would enable trademark registrations to be obtained expeditiously and at reduced expenses. In fact, he specifically suggested that American trademark owners should be placed in a position to derive the same benefits as German or French trademark owners through the Madrid Agreement.⁴³⁰ Both Rogers and Ladas always fought for uniform solutions, both in the United States and abroad;

The only practical and effective method of adopting uniform solutions for these problems, or of establishing harmony between the legislations of the various countries on these questions, is the adoption of an Inter-American Trade-Mark Convention with suitable stipulations.⁴³¹

Excellent ideas irrigated the roots of the IPR system in the United States, as those of the unwary purchaser regarding trademark infringement. These concept fundamentals could be nowadays applied to the unwary legislator regarding GIs.⁴³² Furthermore, Roger provides a great analysis on how countries that forbid unfair practices by domestic legislation relieve their own nationals of unnecessary and inhibiting burdens, placing them at a disadvantage in international

⁴²⁹ For a contextual situation of trademarks in the beginning of the 20th Century, see BERTHOLD SINGER, *TRADE MARK LAWS OF THE WORLD, AND UNFAIR TRADE* (1913).

⁴³⁰ Stephen P. Ladas, *Additional Memorandum*, 56 TRADEMARK REP. 361, 361 (1966).

⁴³¹ Edward S. Rogers & Stephen P. Ladas, *Proposal for Uniform Trade-Mark Laws*, 40 TRADEMARK REP. 8, 8 (1950).

⁴³² Edward S. Rogers, *The Unwary Purchaser. A Study in the Psychology of Trade Mark Infringement*, 8 MICH. L. REV. 241, 241 (1909).

trade.⁴³³ Actual and complete descriptions of misleading and unfair practices that were referred to trademarks are fully applicable to *sui generis* GI regulatory systems.

...we suggest that an effort be made to include in the domestic law of all countries, appropriate legislation to forbid the following practices:

- (a) any and all representations, express or implied and however such representations may be made, that the goods of one manufacturer or trader are the goods of another, such as by the use or colorable imitation of a trade mark or other distinguishing name or symbol, the colorable imitation of label or container or of any means of identification;
- (b) acts inducing breach of contract;
- (c) trade libel;
- (d) commercial bribery;
- (e) enticing employees;
- (f) betrayal of confidential information;
- (g) disparagement of establishment or goods;
- (h) false use of testimonials, warrants, appointments and false statements of membership in associations;
- (i) intimidation of customers;
- (j) attempts to cut off supplies or hamper distribution of goods;
- (k) use of false indications of geographical origin;
- (l) Use of false descriptions of merchandise, and
- (m) in general all acts of a trader designed to damage competitors as a means of seeking a business advantage instead of relying for that advantage on the excellence of his own service; all acts characterized by bad faith, deception, fraud or oppression and all acts contrary to honorable commercial usage.⁴³⁴

Ladas' arguments for the international protection of well-known trademarks provide an interesting analysis of the attributive system, where ownership of the trademark is acquired by

⁴³³ Edward S. Rogers, *Protection of Industrial Property*, 27 MICH. L. REV. 491, 498 (1929).

⁴³⁴ *Id.* at 497–8.

registration and not by prior use.⁴³⁵ In fact, he refers to Articles 7 and 8 of the General Inter-American Convention for Trade-Mark and Commercial Protection and the right to oppose the application or cancel the registration of an interfering mark in the other contracting countries by proving that the applicants or registrant “had knowledge” of the prior use of registration of the complainant in the latter’s home country, specifying that no prior use of the mark in question by importation of the goods in the defendant’s country is needed since knowledge of the prior use by the defendant is sufficient.⁴³⁶ As Ladas also notes, developing countries—due to their lack of traditional techniques and skills and inability to invest in research—depend even more heavily on foreign know-how and IPR.⁴³⁷

According to Rogers, geographical names are not trademarks because their very nature provides exclusive rights that cannot, and ought not, to be confused.⁴³⁸ He refers, for example, to the origin of wine marked on the bottles and the famous cheese of Etruscan Luna marked with the picture of the city.⁴³⁹ Considering the strict IPR feature of private and exclusive rights, together with the historical trade traditions in the United States and the complexities incorporating GIs in the common law system, protection against infringement and unfair competition seem to be the proper ground for finding common solutions. Rogers provides excellent analysis to support the protection of GIs,⁴⁴⁰ backed by Ladas who provides the main

⁴³⁵ Stephen P. Ladas, *International Protection of Well-Known Trade-Marks*, 41 TRADEMARK REP. 661 (1951).

⁴³⁶ *Id.* at 663.

⁴³⁷ *Id.* at 160.

⁴³⁸ ROGERS, *supra* note 372, at 146.

⁴³⁹ Rogers, *supra* note 204, at 241.

⁴⁴⁰ Edward S. Rogers, *New Concepts of Unfair Competition under the Lanham Act*, 54 TRADEMARK REP. 752 (1964); Rogers, *supra* note 75. *See also* Edward S. Rogers, *Comments on the Modern Law of Unfair Trade*, 3 U. ILL. L. REV. 551 (1908); Rogers, *supra* note 407. Edward S. Rogers, *Unfair Competition*, 17 MICH L. REV. 490 (1919); Edward S. Rogers, *Unfair Competition*, 35 TRADEMARK REP. 126 (1945).

principles that inspire not just the Lanham Act but also the main international conventions on IPR.⁴⁴¹ Both of them agree that infringement (in the field of trademarks) occurs whenever two marks resemble each other sufficiently enough to make it probable that the ordinary consumer will be deceived, exercising no more care than they usually do.⁴⁴² After cases such as “Chero-Cola” and the definition of the problem in the case Pillsbury v. Pillsbury-Washburn Flour Mills Company, the existing conceptual model was developed upon previous ideas grounded on the unwary purchaser.⁴⁴³ Therefore, trademarks and GIs are inspired by the same principles, as well as the grounds of distinctiveness and due legal protection, shared by the United States.

There is no field that lends itself better to the comparative approach than the field of unfair competition...even the most provincial lawyer can hardly deny that in trying to find out what unfair competition is, the experience abroad should be of invaluable aid.⁴⁴⁴

4. EXISTING REGULATION OF GEOGRAPHICAL INDICATIONS UNDER A TRADEMARK SYSTEM IN THE UNITED STATES

The evolution of federal registration for geographic indicators in the United States has been fundamentally related to the protection of trademarks, generating certain confusion on legal status of GIs and inconsistencies regarding both the text and the legislative history of registration provisions.⁴⁴⁵ Although this section does not provide an exhaustive analysis of the historical

⁴⁴¹ Stephen P. Ladas, *Unfair Competition in Trademarks Abroad*, 15 PAT. TRADEMARK & COPY. J. RES. ED. 140 (1971).

⁴⁴² Edward S. Rogers, *An Account of Some Psychological Experiments on the Subject of Trade-Mark Infringement*, MICH. L. REV. 75 (1919).

⁴⁴³ Rogers, *supra* note 411.

⁴⁴⁴ John Wolff, *American Decisions in Trade-Mark Cases as Influenced by Foreign Law*, 31 TRADEMARK REP. 102, 105 (1941).

⁴⁴⁵ Mary LaFrance, *Innovations Palpitations: The Confusing Status of Geographically Misdescriptive Trademarks*, 12 J. INTELL. PROP. L. 125, 126 (2004).

development of trademark protection, there are five significant eras that are essential to understand the legal framework in the United States:⁴⁴⁶ (i) the first federal trademark statute (1905-1946); (ii) the enactment of the Lanham Act (1947-1982); (iii) the period following the decision of *In re Nantucket*, ascertaining whether a goods-place association existed;⁴⁴⁷ (iv) the decade following the adoption of the NAFTA Amendments when Congress uncoupled the category of “primarily geographically deceptively misdescriptive” marks—no longer salvaged by proof of secondary meaning and therefore barred to registration—from “primarily geographically descriptive” ones;⁴⁴⁸ and (v) the period after the 2003 decisions in *In re California Innovations, Inc.*⁴⁴⁹ and *In re Les Halles de Paris, J.V.*⁴⁵⁰ This last period exemplifies three broad trends in the legal treatment of geographic marks in the United States: increasing liberalization of registration, consumer perception (as manifested by the “goods-place association” and “materiality” tests), and a declining role for secondary meaning, as the choice for whether or not to protect geographic trademarks.⁴⁵¹

4.1. Historical Approach to the Lanham Act

Congressional reports and hearings on this issue suggest that legislators, as well as the vast majority of businesses in the United States, agreed on the desirability of the Lanham Act to furnish the statutory basis for the reciprocal advantages offered by the international

⁴⁴⁶ Robert Brauneis & Roger E. Schechter, *Geographic Trademarks and the Protection of Competitor Communication*, 96 TRADEMARK REP. 1, 5 (2006).

⁴⁴⁷ *In re Nantucket*, 677 F.2d 95 (C.C.P.A. 1982).

⁴⁴⁸ Pub. L. No. 103-182, 107 Stat. 2057 § 333(a)(2) (1993), codified at 15 U.S.C. §§ 2(e)(3), 2(f).

⁴⁴⁹ *In re California Innovations, Inc.* 329 F.3d 1334 (Fed. Cir. 2003).

⁴⁵⁰ *In re Les Halles de Paris*, 334 F.3d 1371 (Fed. Cir. 2003).

⁴⁵¹ Brauneis & Schechter, *supra* note 425, at 20.

conventions.⁴⁵² The development of this coherent system to protect IPR in the United States—a new market that is continuously expanding and competing with old European models—requires a proper understanding of convention and practices. As Rogers quoted United States Senator Lott, “honest competitions relies only on the intrinsic merits of the article brought into the market, and does not require a resort to a false or fraudulent device or token.”⁴⁵³ The aim was to fight unfair trade and therefore develop means for protection:

In short that no one has any right to sell his goods as the goods of another. This principle is perfectly general and without exception. The means by which the end is accomplished do not matter, whether in the particular case it be by the use of a personal, descriptive, or geographical name, imitated labels, color of label, appearance of package, shape of package, form or peculiarities of the goods themselves, misleading advertising, oral false statements, or silent passing off.⁴⁵⁴

The initial incentive for the Lanham Act was brought to the attention of Congress over twenty years before it was enacted in 1946. It is the result of implementing, by domestic legislation, the provisions of the international conventions, particularly the Inter-American Convention of 1929.⁴⁵⁵ The first precedent of regulation on these issues derived from Section 3 of the Act of March 19, 1920.⁴⁵⁶ In order to implement Article VIII of the Buenos Aires Convention, the wording before being superseded by the later Section 43(a) of the Lanham Act, provided a limited application as to deprive it of practical use as the required foundation for a

⁴⁵² Hanna Katz, *An International Aspect of the Pending Trade-Mark Bill*, 35 TRADEMARK REP. 146, 149 (1945).

⁴⁵³ Rogers, *supra* note 419, at 551.

⁴⁵⁴ *Id.* at 556–57.

⁴⁵⁵ Walter J. Derenberg, *Federal Unfair Competition Law at the End of the First Decade of the Lanham Act: Prologue or Epilogue*, 32 N.Y.U. L. REV. 1029, 1029 (1957).

⁴⁵⁶ Act of Mar. 19, 1920, ch.104, 41 Stat. 533 (1920) [hereinafter 1920 Act], entitled “An Act to Give Effect to Certain Provisions of the Convention for the Protection of Trade-Marks and Commercial Names Made and Signed in the City of Buenos Aires, in the Argentine Republic, August 20, 1910, and for Other Purposes.”

new private remedy.⁴⁵⁷ Considered the first milestone towards a federal law of unfair competition, the Lanham Act established the first criteria regarding GIs. Specifically, the Act referred exclusively to articles of merchandise with false designation of origin that required that the use of the false designation of origin occurred “willfully and with intent to deceive:”

Any person who shall willfully and with intent to deceive, affix, apply, or annex, or use in connection with any article or articles of merchandise, or any container or containers of the same, a false designation of origin, including words or other symbols, tending to falsely identify the origin of the merchandise, and shall then cause such merchandise to enter into interstate or foreign commerce, and any person who shall knowingly cause or procure the same to be transported in interstate or foreign commerce or commerce with Indians tribes, or shall knowingly deliver the same to any carrier to be so transported, shall be liable to an action at law for damages and to an action in equity for an injunction, at the suit of any person, firm, or corporation doing business in the locality falsely indicated as that of origin, or in the region in which said locality is situated, or at the suit of any association of such persons, firms, or corporations.⁴⁵⁸

The inadequacy of this regulation soon became apparent just a few months after its enactment. Proposals to revise the trademark law appeared at the St. Louis meeting of the American Bar Association and the bill introduced by Senator Erns⁴⁵⁹ was subsequently followed by the Vestal Bill⁴⁶⁰ and, ultimately, by the Lanham Bill.⁴⁶¹ All of these bills required that “any association” of persons were provided with a civil suit in cases of false descriptions and

⁴⁵⁷ Derenberg, *supra* note 434, at 1034.

⁴⁵⁸ 1920 Act, Ch. 104, 41 Stat. 534 (repealed 1946).

⁴⁵⁹ 68th Cong. 2d Sess., §30 (1925); identical with H.R. 8637, 68th Cong., 2d Sess., §30 (1925). Joint Hearings before the Committee on Patents, 68th Cong., 2d Sess. 49-51, 117 (1925).

⁴⁶⁰ H.R. 6248, 69th Cong. 1st Sess., §30 (1926). Cf. Hearing before the House Committee on Patents, 69th Cong., 1st Sess. 10 (1926).

⁴⁶¹ H.R. 9041, 75th Cong. 1st Sess., §43 (1938), Hearing before the Subcommittee on Trade-Marks of the House Committee on Patents, 75th Cong., 3d Sess. 7 (1938).

representations.⁴⁶² However, surprisingly, this remedy is not found in the Lanham Act, as passed.⁴⁶³ Rogers refers to a neurosis of certain senators and of the Department of Justice according to which the antitrust laws and competition take precedence over IPR and everything else, even suggesting that their attitude reflected a complete ignorance of trademarks, their history, and their social values.⁴⁶⁴ Rogers supplies reflections on property rights and monopolies as well as the social value of trademarks and brands, much of which may also be applied to GIs.⁴⁶⁵ Rogers provides concepts and clear statements that address the fundamentals of industrial property rights as “nothing but reputation symbolized,”⁴⁶⁶ while “distinguishability among people is what permits civilized society to exist.”⁴⁶⁷ Rogers also notes that “responsibility is as important for trade morality as for personal morality—and responsibility here, too, depends on distinguishability.”⁴⁶⁸ The origin for trademarks and GIs can even be identified in Rogers ideas regarding their importance for trade:

The marking of goods in the Middle Ages was neither optional nor a mere right—it was an obligation. It was a part of the artisan's duty to the community to mark what he made with his name or device (and if a device, it was required to be entered in a register), so that responsibility for them could be fixed. The instances mentioned are only a few—the requirement was well-nigh universal and the more efficient and well developed a trade was, the more rigid was the application of the rule. And it has often been said by writers on the subject that the standing of any trade in the community can be gauged by the desire to identify the origin of the things it sells-by the use of identifying marks.

⁴⁶² Derenberg, *supra* note 434, at 1036.

⁴⁶³ *Id.* at 1036.

⁴⁶⁴ Rogers, *supra* note 364, at 259.

⁴⁶⁵ Edward S. Rogers, *The Social Value of Trade-Marks and Brands*, 37 TRADEMARK REP. 249 (1947).

⁴⁶⁶ *Id.* at 249.

⁴⁶⁷ *Id.* at 250.

⁴⁶⁸ *Id.* at 250.

A social institution so well established and so long in effect must have had a policy behind it and that policy, in the case of the marks on goods, was to require the person who produced them to accept full responsibility, so that if anything went wrong they could be traced back to him.

An institution so long accepted in so many countries and one which so many people believed in must have had something in it. I suggest that it is socially desirable to have trade-marks and brands on goods so that individual responsibility for them can be fixed and that producers should be encouraged to use trade-marks and brands; and that it makes good economic sense to do this.⁴⁶⁹

Derenberg provides one of the keys to understanding the missing link in the history of GIs in the United States.⁴⁷⁰ Questioning the nature of Section 44 of the Lanham Act and the Ninth Circuit doctrine of the Stauffer case,⁴⁷¹ Derenberg inquires whether the indirect protection given to United States citizens under the international convention provisions of the Act intended to create, and had in fact established, a national substantive code of unfair competition.⁴⁷² Going back to the first hearing of the Lanham Bill and other contributions, Derenberg traced back to statements by Rogers and Ladas⁴⁷³ to confirm their international approach to the establishment of a general national unfair competition law by adding Section 44(i). However, the Stauffer doctrine limited that possibility since the rationale of the court implied that the Lanham Act creates a federal cause of action for unfair competition even though unrelated to a registered trademark or trade name giving district courts jurisdiction without regard to diversity of citizenship or amount in controversy.⁴⁷⁴ The generally accepted view is, as sustained by Bunn⁴⁷⁵

⁴⁶⁹ *Id.* at 252.

⁴⁷⁰ Derenberg, *supra* note 434.

⁴⁷¹ *Stauffer v. Exley*, 184 F.2d 962 (9th Cir. 1950).

⁴⁷² Derenberg, *supra* note 434, at 1055.

⁴⁷³ *Id.* at 1056.

⁴⁷⁴ Martin S. Bogarad, *Present Status—Applicability of Federal Law to Cases Involving Unfair Competition*, 16 OHIO ST. L.J. 614, 616 (1955).

and confirmed by the *Bacardi*⁴⁷⁶ and *Prunier*,⁴⁷⁷ that Congress intended to enact a federal law of unfair competition it would have done so directly and not by reference to the protection promised to foreigners under treaties.⁴⁷⁸ In relation with unfair competition and the protection of geographic names the United States Congress only made one change to the Lanham Act to implement the TRIPS agreement—by adding to Section 2(a) a clause specifically prohibiting the use of GIs that identify a place other the origin of the goods when referring to wines and spirits, and including a grandfather clause that allowed such uses if commenced before January 1, 1996.⁴⁷⁹

Regarding indications of geographical origin or source, Rogers established the importance of GIs and discussed the need to indicate the origin of goods in his article on the Lanham Act and the social function of trademarks:

The social need of identifying people is the same as the need of identifying the things they buy. If we suppose that no merchandise could be distinguished from any other—that if were forbidden to mark any goods or put any name, label, or other identification on them—a consumer would fare badly in such a world. A producer would too. There could be no pride of workmanship, no credit for good quality, nor responsibility for bad. There would be competition, to be sure, but it would be competition to see who could make the worst goods, not the best; and he would win whose product was the cheapest, poorest, and most dishonest. It could not be otherwise. If there were no way to tell the good from the bad, why bother to sell anything but the bad—and the worse, the better? The present-day competitive desire to do better would simply be reversed, and everyone would devote his merchandising and

⁴⁷⁵ Charles Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949).

⁴⁷⁶ *Bacardi Corp. v. Domenech*, 311 U.S. 150 (1940).

⁴⁷⁷ *Maison Prunier v. Prunier's Restaurant & Café, Inc.*, 159 Misc. 551, 288 N.Y. Supp. 529 (Sup. Ct. 1936).

⁴⁷⁸ Derenberg, *supra* note 434, at 1064.

⁴⁷⁹ Uruguay Round Agreements Act to Implement GATT into United States Law, Pub. L. No. 103-465, 108 Stat. 4809, Title V. 15 U.S.C. § 1052(a) (1994).

manufacturing energies to the promotion of the worst possible type of goods. Minimum government standards might be set up, but there would be on incentive to better them.⁴⁸⁰

4.2. The Lanham Act Chapter on International Conventions and GIs

The Lanham Trademark Act recognizes the value and usefulness of trademarks and brands in the United States. Its purpose was to protect the public so it may be confident in the market and protect the owner of a trademark from misappropriation. Based on the rationales for the Lanham Act, and due to global perspectives of the minds behind its enactment, international conventions and the provision uniform protection were very relevant. For authors like Rogers⁴⁸¹ and Roberts,⁴⁸² among others, the failure of the United States to fulfill its international obligations was a constant source of irritation and embarrassment. While both of Rogers and Roberts considered certain conventions to be self-executing the issue on compliance with international commitments was a permanent concern.

At the time the Lanham Act was enacted, the United States was a party to two international agreements: (i) the Paris Union of 1883 (which had not proved important to the United States since applications for the registration of trademarks abroad were, by practice, not filed within the required six months);⁴⁸³ and (ii) the General Inter-American Convention of

⁴⁸⁰ Edward S. Rogers, *The Lanham Act and the Social Function of Trade-Marks*, 14 LAW CONTEMP. PROBLEMS 173, 257 (1949).

⁴⁸¹ Rogers, *supra* note 364, at 259.

⁴⁸² DAPHNE ROBERT & WILLIAM S. HEIN & COMPANY, *THE NEW TRADE-MARK MANUAL: A HANDBOOK ON PROTECTION OF TRADE-MARKS IN INTERSTATE COMMERCE* 111 (1947).

⁴⁸³ Mock, *supra* note 262, at 4.

Washington of 1929 (to which the United States had adhered, together with several bilateral special treaties between the main trading partners).⁴⁸⁴

The distinction between common law and civil registration countries was already relevant—not just for GIs but also trademarks, considering the legal importance of rights granted either by the material prior use or the formal application to the register.⁴⁸⁵ The fundamental theories for IPR in the common law jurisdictions of the United States and Canada were founded upon use and unfair competition. This was in opposition to the Latin American civil law jurisdictions where registration determines the title of ownership.⁴⁸⁶ Perhaps the greatest hope for a workable synthesis of the common and civil law systems lies in a combination of the two prevailing models.⁴⁸⁷

After Charles Maging, one of the executives of the International Trade-Mark Bureau at Berne, visited the United States and Canada to promote the Madrid Agreement, Mock questioned whether it would be desirable for the United States to join.⁴⁸⁸ Ladas, however, grounds his proposal to the revision of the Madrid Agreement on this fundamental distinction:

We are confronted in the world today with two contrasting legislative philosophies on trademark protection: one, under which a trademark will be allowed to go on the Register regardless of whether or not it is entitled to registration either by its inherent nature (surname, geographical word or descriptive term) or by its invasion of prior rights of others; and another, under which the Government Office, entrusted with the registration of trademarks, either through its own examination or by an opportunity given to

⁴⁸⁴ ROBERT AND WILLIAM S. HEIN & COMPANY, *supra* note 461, at 110.

⁴⁸⁵ Mock, *supra* note 262, at 4. *See also* Ladas, *supra* note 430 at 361–2.

⁴⁸⁶ Walter J. Halliday, *Inter-American Conventions for Protection of Trade-Marks*, 32 J. PAT. OFF. SOC'Y 661, 669 (1950).

⁴⁸⁷ *Id.* at 671.

⁴⁸⁸ Mock, *supra* note 262.

third parties for opposition of an application before grant, will deny registration of a trademark which should not be registered. The Scandinavian countries, British law countries, most Latin American countries, many African and Asian countries, and the United States embrace this second philosophy. The great majority of the present members of the Madrid Agreement follow the first theory. Even Germany, while examining marks from the point of view of registrability, does not object on the ground of anticipation, unless an opposition is filed.⁴⁸⁹

Two main articles by Ladas describe how the chapter on International Convention on the Lanham Act was developed.⁴⁹⁰ After Rogers' initial idea and Ladas' drafting,⁴⁹¹ the last words of Section 45 state that the intention of the Lanham Act is "to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade-names and unfair competition entered into between the United States and foreign nations."⁴⁹²

The 1956 Congress of the International Association for the Protection of Industrial Property was fundamental to the Lisbon Conference of 1958. With the participation of thirteen countries from the American continent among the total of twenty present, fourteen resolutions were adopted.⁴⁹³ However, Congress was concerned about the suppression of false indications and expressed intent to amend Article 10, inviting the Executive Committee to study the protection of indications of source and appellations of geographical origin.⁴⁹⁴ Furthermore,

⁴⁸⁹ Ladas, *supra* note 278, at 350–351.

⁴⁹⁰ Stephen Ladas, P. J. Frederico & Walter J. Derenberg, *Trade-Marks and Foreign Trade*, 38 TRADEMARK REP. 278 (1948). See also Stephen P. Ladas, *Trade-Marks and Patents in Foreign Commerce*, 37 TRADEMARK REP. 195 (1947).

⁴⁹¹ Ladas, Frederico, and Derenberg, *supra* note 490 at 278.

⁴⁹² *Id.* at 279.

⁴⁹³ Stephen P. Ladas, *Resolutions Adopted by AIPPI Congress at Washington, June 2, 1956*, 46 TRADEMARK REP. 690, 690 (1956) (concerning five problems of international protection of patents, five relating to trademarks and unfair competition, and four dealing with general matters). See also Stephen P. Ladas, *Recent Trademark Developments in Foreign Countries*, 55 TRADEMARK REP. 689 (1965).

⁴⁹⁴ Ladas, *supra* note 280, at 692.

during the Lisbon Conference to revise the Paris Convention, the United States accepted a compromise solution to use in its definition under Article 1, par. 2 the wording “including appellations of origin” instead of the previously existing “or” opposing to the “and” that would create them as a new category of rights due to its non-recognition by many jurisdictions.⁴⁹⁵

Nonetheless, the inclusion of AO in the concept of GIs implied the implicit recognition of the *sui generis* model of geographic name protection. In fact, while Ladas focused on IPR he adopted a practical approach considering the realities of the market and the protection of American business activity.⁴⁹⁶

5. GEOGRAPHICAL INDICATIONS AND THE GENERAL INTER-AMERICAN CONVENTION FOR TRADE MARK AND COMMERCIAL PROTECTION

Considered the last successful international agreement to provide a uniform standard of trademark protection throughout the Americas,⁴⁹⁷ it was the result of many conferences and previous treaties regarding the Pan-American protection of IPR.⁴⁹⁸ Six international meetings were convened and five separate conventions were adopted between 1889 and 1930 on the establishment of an agreement improving the conditions of the Paris Convention for the

⁴⁹⁵ Ladas, *supra* note 283, at 1311.

⁴⁹⁶ *Id.* at 1312.

⁴⁹⁷ Drescher, *supra* note 282, at 319.

⁴⁹⁸ Karl Fenning, *Trade Marks in Pan America as Affected by the Havana Conference 1928*, 10 J. PAT. OFF. SOC'Y 483 (1927). *See also* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, DIVISION OF INTERNATIONAL LAW & INTER-AMERICAN CONFERENCE, *CONFERENCIAS INTERNACIONALES AMERICANAS, 1889-1936: RECOPIACIÓN DE LOS TRATADOS, CONVENCIONES, RECOMENDACIONES, RESOLUCIONES Y MOCIONES ADOPTADAS POR LAS SIETE PRIMERAS CONFERENCIAS INTERNACIONALES AMERICANAS, LA CONFERENCIA INTERNACIONAL AMERICANA DE CONCILIACIÓN Y ARBITRAJE Y LA CONFERENCIA INTERAMERICANA DE CONSOLIDACIÓN DE LA PAZ; CON VARIOS DOCUMENTOS RELATIVOS A LA ORGANIZACIÓN DE LAS DEFERIDAS CONFERENCIAS* (Washington, Dotación Carnegie Para la Paz Internacional ed. 1938).

Protection of Industrial Property.⁴⁹⁹ The revision of the Pan-American Trademark Treaty, started at the 1910 Buenos Aires Convention and later finalized at Santiago de Chile in 1923, was one of the main issues on the agenda of the Sixth International Conference of American States meeting at Havana in January 1928.⁵⁰⁰ All the same, it is considered the most satisfactory agreement for international trademark protection among the countries of this hemisphere, although it has not been widely ratified.⁵⁰¹

Blaming the political nature of previous meetings, the new condition was to count with experts from participant countries technically versed in IPR.⁵⁰² As usual, part of the main debate was to abandon the idea of a separate Pan-American treaty and join the European conventions, mainly the Paris Convention and the Madrid Agreement.⁵⁰³ Relevant political context surrounded the conference in Havana, where the Argentine delegation, led by Prueyredón, challenged United States military intervention in Latin America and opposed high tariff barriers in the United States.⁵⁰⁴ With the economic depression, between the two World Wars, some of the participants, as is the case of Argentine, were very close to Europe supporting European positions on international trade⁵⁰⁵ At the time, Central America was considered an area of

⁴⁹⁹ For a complete and detailed historical and legal analysis see CHRISTINE HAIGHT FARLEY, *THE FORGOTTEN PAN-AMERICAN TRADEMARK CONVENTION OF 1929: A BOLD VISION OF EXTRATERRITORIAL MEETS CURRENT REALITIES* 18 (2013). See also Stephen P. Ladas, *Pan-American Conventions on Industrial Property*, 22 AM. J. INT'L L. 803 (1928) and Halliday, *supra* note 465.

⁵⁰⁰ Fenning, *supra* note 477, at 483.

⁵⁰¹ See STEPHEN PERICLES LADAS, *THE INTERNATIONAL PROTECTION OF TRADE MARKS BY THE AMERICAN REPUBLICS* (1929).

⁵⁰² Fenning, *supra* note 477, at 483. See also Ladas, *supra* note 499, at 819.

⁵⁰³ Fenning, *supra* note 477, at 483.

⁵⁰⁴ DAVID SHEININ, UNIVERSITY OF LONDON & INSTITUTE OF LATIN AMERICAN STUDIES, *ARGENTINA AND THE UNITED STATES AT THE SIXTH PAN-AMERICAN CONFERENCE (HAVANA 1928)* (1991).

⁵⁰⁵ *Id.* at 24.

expansion for United States' interests but this influence and increasing economic and political dependency was hardly criticized.⁵⁰⁶ However, the United States officials, although unable to control much of the conference agenda linked to their expansionist strategies, gained strong support for their positions.⁵⁰⁷ Since, by that time, most of the countries participating already believed that domestic prosperity would be tied to the continued growth of bilateral trade agreements with the United States,⁵⁰⁸ Secretary of State Hughes, and later Kellogg, established a clear strategy based on immutable agendas, avoidance of criticisms of United States expansionism, and any other controversial issue.⁵⁰⁹

Rogers and Ladas acted as the most engaged United States delegates at the conference expressing great knowledge of IPR reality in the United States but also comparative law⁵¹⁰ as well as the French protection granted to appellations of origin.⁵¹¹ Pioneering both in the introduction of protection against unfair competition and in its attempt to define a GI model

⁵⁰⁶ *Id.* at 1. In support of the Central American nations, Pueyrredon defended the sovereignty of each nation state in the hemisphere and the attacks against their independence, either those being diplomatic or armed intervention.

⁵⁰⁷ *Id.* at 2.

⁵⁰⁸ See MICHAEL L. KRENN, U.S. POLICY TOWARD ECONOMIC NATIONALISM IN LATIN AMERICA, 1917-1929 (1990).

⁵⁰⁹ Edwin C. Wilson, Division of Latin American Affairs, to Francis White, Acting Chief, Division of Latin American Affairs, Oct. 10, 1922, 710.Ela/15, RG 59, NA. See also 'Observations on the Monroe Doctrine', Address Delivered Before the American Bar Association at Minneapolis, Minnesota, Aug. 30, 1923, reproduced in Charles Evans Hughes, *The Pathway of Peace: Representative Addresses Delivered During His Term as Secretary of State (1921-1925)* (New York: Harper & Brothers, Publishers, 1925).

⁵¹⁰ Edward S. Rogers, *Informal Report of an American Delegate to an Unidentified European Congress on Comparative Law*, 26 ABA L.J. 10 (1940). An interesting contribution that goes far beyond legal concepts to stress the difficulties of comparative analysis at the time, and many of his reflections are fully valid today. Among the interesting contributions regarding language knowledge, dressing or communication codes, and customs, let me stress the following statement: "Of course, one thing you are always impressed with on the other side is the difference between their customs and ours. They won't change, and we should not. We can learn a lot from them, but not as much as they think they can teach us; and they can learn a lot from us-probably more than they think we can teach them. But to be different is not necessarily either to be better or to be worse. I have found it much better to accept things in foreign countries as they are, and not try to reform them. They can't be changed, and it is useless to try."

⁵¹¹ "Appellations d'Origine Controlées," Loi du 6 Mai 1919 Relative à la Protection des Appellations d'Origine (8 Mai 1919) Journal Officiel 4726.

without previous references,⁵¹² the Inter-American Convention has not received the well-deserved credit among scholars and practitioners and is often incomprehensively neglected.⁵¹³ Nowadays, as proposed by Christine Farley, it is astonishing that the chapter on the “Repression of False indications of Geographical Origin” (Article 23 to 28) is not considered a fundamental reference both to the United States and the European Union since it is a binding treaty in force containing an exhaustive regulation on GIs.⁵¹⁴

Farley’s research on the Pan-American Conference⁵¹⁵ helps to understand the drafting and inclusion of GI protection under the Pan-American Convention. Although none of the preceding conventions included this concept, certain facts justify its inclusion. The participation of the IPR fathers in the United States,⁵¹⁶ Rogers and Ladas, was fundamental and particularly relevant.⁵¹⁷ Ladas even drafted the documents that served as the basis for debates at the conference.⁵¹⁸ These proposals included the regulation on false indications of origin deceiving the public,⁵¹⁹ and embodied other proposals such as article 10*bis* of the Paris Convention. Following the common law tradition, and rooted in unfair competition, the United States

⁵¹² Inter-American Convention, *supra* note 373.

⁵¹³ Christine Haight Farley, *The Protection of Geographical Indications in the Inter-American Convention on Trademarks*, 6 WIPO J. 68, 70 (2014). *See also* Edward S. Rogers, *The Inter-American Convention*, XXVI BULL. U. S. TRADE-MARK ASSOC. 169, 175 (1931). (“Chapter V, dealing with the repression of false indications of geographical origin or source, is considerably more elaborate than any existing Convention and codifies the modern law on the subject.”).

⁵¹⁴ Farley, *supra* note 513, at 71.

⁵¹⁵ *Id.*

⁵¹⁶ *Id.* at 73

⁵¹⁷ *Id.*

⁵¹⁸ Rogers, *supra* note 412. Excellent description of unfair trade and false statements of the origin of the goods.

⁵¹⁹ Ladas, *supra* note 478, at 821.

proposal was the first international codified regulation on GIs.⁵²⁰ Furthermore, authors like Ladas, Rogers, and Farley agree that the rights contained under the Pan-American Convention go beyond the minimum protections mandated by the Paris Convention. In fact, considering the background of ongoing discussions under TTIP and the revision of the TRIPS Agreement, a good example and guiding reference could be the simple and general application of the Pan-American Convention without distinguishing wines and spirits from other products and providing such a level of protection.⁵²¹

Article 23 of the Pan-American Convention grants protection closer to Article 23 than Article 22 of the TRIPS Agreement, since falsehood does not need to be believable or material to be actionable.⁵²² Its broad scope grants a higher level of protection for all GIs stating that “every indication of geographical origin or source which does not actually correspond to the place in which the article, product or merchandise was fabricated, manufactured, produced or harvested, shall be considered fraudulent and illegal, and therefore prohibited.”⁵²³

Interestingly, Chapter IV on “Repression of Unfair Competition” (Articles 20-22) details GI protection explicitly dealing and is far more direct than the current languages of the Paris Convention. By the time of its enactment it even went far beyond the existing statutory law of the Pan-American signatories.⁵²⁴ Thus, the content of Article 21 was extraordinarily innovative, stating:

⁵²⁰ Farley, *supra* note 513, at 73 & 78.

⁵²¹ *Id.* at 75.

⁵²² *Id.* at 74.

⁵²³ Inter-American Convention, *supra* note 370, at Art. 23.

⁵²⁴ Farley, *supra* note 513, at 76.

The following are declared to be acts of unfair competition and unless otherwise effectively dealt with under the domestic laws of the Contracting States shall be repressed under the provisions of this Convention:

(a) Acts calculated directly or indirectly to represent that the goods or business of a manufacturer, industrialist, merchant or agriculturist are the goods or business of another manufacturer, industrialist, merchant or agriculturist of any of the other Contracting States, whether such representation be made by the appropriation or simulation of trade marks, symbols, distinctive names, the imitation of labels, wrappers, containers, commercial names, or other means of identification;

(b) The use of false descriptions of goods, by words, symbols or other means tending to deceive the public in the country where the acts occur, with respect to the nature, quality, or utility of the goods;

(c) The use of false indications of geographical origin or source of goods, by words, symbols, or other means which tend in that respect to deceive the public in the country in which these acts occur;

(d) To sell, or offer for sale to the public an article, product or merchandise of such form or appearance that even though it does not bear directly or indirectly an indication of origin or source, gives or produces, either by pictures, ornaments, or language employed in the text, the impression of being a product, article or commodity originating, manufactured or produced in one of the other Contracting States;

(e) Any other act or deed contrary to good faith in industrial, commercial or agricultural matters which, because of its nature or purpose, may be considered analogous or similar to those above mentioned.⁵²⁵

Article 24 regulates the place of origin for the purposes of the Convention and ensures even indirect protection in cases of misleading consumers provided that the geographic name is the fundamental element of the designation:

⁵²⁵ Inter-American Convention, *supra* note 370, at Chapter IV on “Repression of Unfair Competition” (Articles 20 to 22).

For the purposes of this Convention the place of geographical origin or source shall be considered as indicated when the geographical name of a definite locality, region, country or nation, either expressly and directly, or indirectly, appears on any trade mark, label, cover, packing or wrapping, of any article, product or merchandise, directly or indirectly thereon, provided that said geographical name serves as a basis for or is the dominant element of the sentences, words or expressions used.⁵²⁶

Other articles address the right to use geographical names while prohibiting individual appropriation (Article 25); the exactitude of the place of origin indicated in the geographical designation (Article 26); and even an exception to generic names due “to constant, general and reputable use in commerce” (Article 27) while providing for special and other existing remedies repress false indications of geographical origin (Article 28).

The Convention remains in effect with its ten original members,⁵²⁷ although twenty years after its ratification, disappointment remained.⁵²⁸ Rogers and Ladas suggested reasons of non-ratification—particularly by such countries as Argentina, Brazil, Chile, and Mexico, among others—claiming that conventions should include a preliminary submission of a draft to the trade organizations and the need to address relevant problems that were omitted.⁵²⁹

Later, on September 29, 1945, the United States denounced the Protocol for the Inter-American Registration of Trade-Marks establishing the Inter-American Bureau at Havana, but its denunciation did not affect the Pan-American Convention.⁵³⁰ Even today, almost a century after it was negotiated and approved, a review of provisions under the Pan-American Convention and

⁵²⁶ Inter-American Convention, *supra* note 370, at Art. 24.

⁵²⁷ The United States, Colombia, Cuba, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay and Peru.

⁵²⁸ Rogers and Ladas, *supra* note 431 at 8.

⁵²⁹ *Id.* at 14.

⁵³⁰ The Protocol ceased to be in force on November 18, 1946. The Inter-American Trade Mark Bureau, created by the Protocol, was terminated on November 2, 1949. Organization of American States, General Secretariat, Treaty Series n.15, <http://www.oas.org/juridico/english/sigs/b-8.html> (last visited Jun. 5, 2016).

the TRIPS Agreement ascertain their compatibility regarding certain minimum standards. Among those standards includes national treatment, protectable subject matter, and enforceability of registration of protected trademarks, which are still valid clauses today.⁵³¹

It is particularly important to refer to the self-executing character of the Pan-American Convention as duly described by Ladas⁵³² and the United States Supreme Court, since following its ratification it was deemed federal law:⁵³³ “[This treaty on ratification became a part of our law. No special legislation in the United States was necessary to make it effective.”⁵³⁴

Rogers had a strong conviction on the self-executing character of treaties on industrial property to the extent that their stipulations contained legal rules that did not require implementation by national law, both from a legal and a practical point of view.⁵³⁵ So did Ladas, who provided a complete analysis on the need of the self-executing nature of international agreements, particularly in the matter of IPR.⁵³⁶ In fact, in 1934, Ladas and Rogers submitted a Memorandum on the self-executing character of provisions of the Pan-American Convention to the Commissioner of Patents, which was published in the Bulletin of the United States Trademark Association in January 1935.⁵³⁷ The supremacy and self-executing of international agreements is not questioned by the U.S. representatives in international conferences on IPR.

⁵³¹ Drescher, *supra* note 282, at 327.

⁵³² Stephen P. Ladas, *The Self-Executing Character of International Conventions on Industrial Property and Their Effects on Substantive Rights*, 31 TRADEMARK REP. 5 (1941).

⁵³³ Ladas, *supra* note 490, at 198.

⁵³⁴ *Bacardi Corp. v. Domenech*, 311 U. S. 150, 161 (1940).

⁵³⁵ Ladas, *supra* note 490 at 199.

⁵³⁶ Ladas, *supra* note 532. Waggoner, *supra* note 237 at 586.

⁵³⁷ Ladas, *supra* note 532, at 5.

...should the United States adhere to future treaties or should the existing Conventions be revised as to incorporate stipulations which are not in agreement with the Lanham Act, the conclusion must be, under the same principle alluded to above, that the Convention must prevail so far as its provisions are such that they contain a rule of law enforceable by the Courts. Any doubt as to this may now be deemed to have been set at rest by the decision of the Supreme Court in *Bacardi v. Domenech* in 1940.⁵³⁸

Consequently, the protection of industrial property in the United States is based upon national legislation as supplemented by international agreements.⁵³⁹ In any case, modernization has sought to reconcile the two essential objects of international regulations on the matter—the need of stability and the need of change—and always in an attempt to reconcile and satisfy conflicting claims, demands, and interests of a world that has been the subject of dynamic development.⁵⁴⁰

6. GIS IN THE UNITED STATES LEGAL SYSTEM

Confusions and inconsistencies over terminology do not mean that GIs do not exist in the United States, but they have often been regarded merely as brands, particularly certification marks.⁵⁴¹ In fact, although it does not regulate foodstuffs or product GIs under a *sui generis* system, geographical names are protected under trademark and unfair competition law.

With the intent to learn from existing models and develop proposals that may be valid for third countries development of agricultural products, this section analyses the legal protection for GIs in the United States. There is a growing awareness of the implications of globalized food

⁵³⁸ Ladas, Frederico, & Derenberg, *supra* note 490 at 289.

⁵³⁹ Halliday, *supra* note 465 at 661.

⁵⁴⁰ Ladas, *supra* note 280 at 706.

⁵⁴¹ BARHAM ET AL., *supra* note 361, at 7.

system, its relevant transit from the farm to the table, referring crops, farmers, food processing, distribution and, fundamentally, consumers, which contributes to the discussion of GI protection in the United States.⁵⁴²

American agriculture is inspired by the self-help principle with the basic understanding that producers with particular interests should organize on their own first before taking their needs to a public body.⁵⁴³ Foodstuffs and agricultural products are mainly protected as certified and collective trademarks administered by the USPTO, with certain exceptions under Marketing Orders administered by the Agricultural Marketing Service. Other institutionalized protection restricts the use of specific names for products such as Vidalia Onions or other regionally-specific products such as the Florida Department of Citrus and the Idaho Potato Commission.⁵⁴⁴ Wines and spirits are governed by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) under the Department of Justice. As of January 24, 2003, this bureau is responsible for all inquiries about the manufacture, wholesale, and importation of alcohol and tobacco; regulating the alcohol and tobacco industries as well as the Special Occupational Tax; and the collection of the Alcohol, Tobacco, Firearms and Ammunition Excise Taxes imposed on manufactures and importers of these products.⁵⁴⁵ The Alcohol and Tobacco Tax and Trade Bureau (TTB) of the Department of the Treasury, under a certification system of label approval, offers many similarities to the European regulations.⁵⁴⁶ Two systems of protection co-exist—one political

⁵⁴² Trubek & Bowen, *supra* note 71, at 23.

⁵⁴³ BARHAM ET AL., *supra* note 361, at 20.

⁵⁴⁴ *Id.* at 16.

⁵⁴⁵ United States Department of Justice, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/> (last visited Aug 24, 2016).

⁵⁴⁶ United States Department of the Treasury, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <https://www.ttb.gov/> (last visited Aug 24, 2016).

(i.e., a state or county name) and one more ecologically based on the American Viticultural Area (AVA).⁵⁴⁷ Their economic impact is also providing positive results; Idaho Potatoes confirmed a price premium of 25¢ and estimated that the industry generated approximately \$5 billion in economic activity within the state of Idaho creating approximately 35,000 jobs.⁵⁴⁸ However, in comparison to the detailed European studies and information on many of the GI protected products, there is a lack of information and unique registration in the United States. A common methodology for evaluating the impacts of local products, mapping productions areas, or providing cost benefit analysis for product development under a GI system would be very useful to address their relevance.⁵⁴⁹

In practice, it seems that some of the main obstacles for the development of a *sui generis* GI system in the United States derive from the firm opposition of large producers and supplier groups. The expected extensions focus on rights granted to wine and spirit drinks and to foodstuff and other agricultural products, particularly cheese and meat. Furthermore, the facts demonstrate a limited participation to date by United States' farmers and producers that might qualify as GIs in the US.⁵⁵⁰ However, Idaho Potato is a good example of the complexities of protection of GIs under the legal system as well as how certain producers have been successful in their endeavors.⁵⁵¹ Evidence demonstrates that cheeses, fruits and vegetables, and grain get a

⁵⁴⁷ BARHAM ET AL., *supra* note 361, at 16.

⁵⁴⁸ *Id.* at 7.

⁵⁴⁹ *Id.* at 7–9.

⁵⁵⁰ Patrick J. Kole, Idaho Potato Commission, CHALLENGES FACING AMERICAN FOOD PRODUCERS IN PROTECTING THEIR IP IN OTHER JURISDICTIONS 5 (2014).

⁵⁵¹ U.S. Trademark Registration No. 2,403,069 (filed Mar. 17, 1997) (FAMOUS IDAHO POTATOES FAMOUS POTATOES GROWN IN IDAHO certification mark owned by Idaho Potato Commission); U.S. Trademark Registration No. 1,735,559 (filed July 21, 1991) (GROWN IN IDAHO IDAHO POTATOES certification mark

larger premium when using a GI while PDO products, which observe a more strict production protocol, obtain the highest market premiums, followed by PGI and the other more generic GI denominations.⁵⁵²

The USPTO refers to Florida oranges, Idaho potatoes, and Washington State apples as examples of domestic GIs as defined by Article 22(1) of the TRIPS Agreement, protected through the existing trademark system.⁵⁵³ Under the TRIPS Agreement, the continuous use is backed to April 15, 1984.⁵⁵⁴ Nonetheless, the TRIPS Agreement requires prohibition of GIs that suggest a mistaken origin misleading consumers.⁵⁵⁵ However, in accordance with Section 2(e)(3) of the Lanham Act,⁵⁵⁶ false GIs will only be actionable when there is clear evidence that consumers are aware of the reputation of the protected goods.⁵⁵⁷ Rogers developed on the links between trademarks, property, and producer liability, providing exhaustive analysis on social values of IPR⁵⁵⁸ and stating that “responsibility is as important for trade morality as for personal morality—and responsibility here, too, depends on distinguishability.”⁵⁵⁹

owned by State of Idaho Potato Commission); U.S. Trademark Registration No. 943,815 (filed June 7, 1971) (PREMIUM PACKED IDAHO POTATOES certification mark owned by State of Idaho).

⁵⁵² Deselnicu et al., *supra* note 160, at 20.

⁵⁵³ United States Patent and Trademarks Office, GEOGRAPHICAL INDICATION PROTECTION IN THE UNITED STATES, 1 (2015).

⁵⁵⁴ TRIPS Agreement, *supra* note 8.

⁵⁵⁵ *Id.*

⁵⁵⁶ 15 U.S.C. § 1052(e)(3).

⁵⁵⁷ Farley, *supra* note 6, at 81 & 82 (providing a good hypothetical use of “Bombay” in connection with watches not made in the suggested geographical origin, clearly misleading under TRIPS Agreement rules but doubtfully so in the United States since consumer perception of the existing association between watches and Bombay should be determined).

⁵⁵⁸ Rogers, *supra* note 444.

⁵⁵⁹ *Id.* at 250.

6.1. Wine Protection in the United States System

GIs are considered an alien European legal concept when compared to the law in the United States where other means were established to protect agricultural knowledge.⁵⁶⁰

Viticultural regulation is a matter of federal law in the United States due to historical as well as taxation purposes.⁵⁶¹

6.1.1. American Viticultural Area (AVA)

Origin of wines and spirits in the United States is recognized through a special concept of AVAs that are very similar to European models of GI protection. As delimited grape-growing regions have distinguishing features, as described in the Code of Federal Regulations (CFR), AVAs are designations allowing vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in specific areas its geographic origin.⁵⁶² There are 237 approved AVAs—including 128 in California⁵⁶³ — that require specific elements for approval including substantive documentation and evidence for name usage, boundary delineations, distinguishing features of the area, and a written boundary description

⁵⁶⁰ Jim Chen, *A Sober Second Look at Appellations of Origin: How the United States Will Crash France's Wine and Cheese Party*, 5 MINN. J. GLOBAL TRADE 29, 58 (1996).

⁵⁶¹ *Id.* at 42 & 43.

⁵⁶² American Viticultural Areas created under the Authority of the Federal Alcohol Administration Act, T.D. TTB-90, 76 Fed Reg 3500 (Jan. 20, 2011) (amending 27 C.F.R. §205). For detailed information, general provisions, AVA Petitions and approved AVAs, see ELECTRONIC CODE OF FEDERAL REGULATIONS, Title 27: Alcohol, Tobacco Products and Firearms E-CFR: TITLE 27: ALCOHOL, TOBACCO PRODUCTS AND FIREARMS ELECTRONIC CODE OF FEDERAL REGULATIONS, <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=057f99d792668247a3c45b4699417291&rgn=div5&view=text&node=27:1.0.1.1.7&idno=27> (last visited Aug 24, 2016).

⁵⁶³ Alcohol and Tobacco Tax and Trade Bureau, WINE APPELLATIONS OF ORIGIN, <https://www.ttb.gov/appellation/index.shtml#definition> (last visited Aug 26, 2016).

with accompanying United States Geological Survey maps.⁵⁶⁴ As a fundamental part of the system, TTB publishes complete information for each AVA in the Federal Register to solicit public comments.⁵⁶⁵ Consequently, AVAs are established through public rulemaking after filing a petition and obtaining public approval requiring: (i) confirmation that the name of the AVA is locally and/or nationally known as referring to the area specified in the file application; (ii) historical or current information providing that the boundaries of the AVA are duly specified; (iii) evidence relating to the geographical features including climate, soil, elevation, product characteristics and any other element which distinguish the singular viticultural area; and (iv) the specific boundaries of the AVA, based on the United States Geological Survey maps of the largest applicable scale.⁵⁶⁶

Consequently, a minimum percentage of the wine must be produced from grapes grown in the named AVA. Therefore, wine is directly linked to its AVA. Although there are no specific requirements regarding practices and wine production, the criterion of viticultural distinctiveness would qualify all AVAs as GIs. Notwithstanding the different terminology being used, the U.S. system does not provide with just indications of provenance but with real GIs.⁵⁶⁷ The reputation of AVA wines varies widely, from Napa Valley, which stands at the pinnacle of global recognition, to many other relatively known wines.⁵⁶⁸

⁵⁶⁴ *Id.* The AVA Manual for Petitioners assists persons who wish to petition TTB for the creation or modification of an AVA, including guidance on how to prepare a petition, collect and evaluate information on distinguishing features.

⁵⁶⁵ *Id.* at § 8.14 AVA rulemaking process.

⁵⁶⁶ *Id.* at §9.12 AVA petition requirements.

⁵⁶⁷ BARHAM ET AL., *supra* note 361, at 28–31.

⁵⁶⁸ RICHARD MENDELSON & ZACHARY WOOD, ORIGIN PAPER: GEOGRAPHICAL INDICATIONS IN THE UNITED STATES: DEVELOPING A PRELIMINARY LIST OF QUALIFYING PRODUCT NAMES 2 (2013).

Despite opposition in the United States to formally recognize GIs for wines or other products, an important amendment was made to the system to comply with Article 23(1) of the TRIPS Agreement prohibiting the use of GIs for wines and spirits not originating in the named places. Compliance with Article 23(2) of the TRIPS Agreements mandated the refusal or invalidation of registrations—*ex officio*—of a trademark for wines or spirits containing or consisting of a GI, including translations and expressions such as kind, type, style, or imitation. Congress amended the Lanham Act following the adoption of the TRIPS Agreement to prohibit the registration by the USPTO of a trademark which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods. Section 43(a) of the Lanham Act prohibits false designation of origin and therefore complies with the requirements of the TRIPS Agreement,⁵⁶⁹ but denies absolute protection.⁵⁷⁰

6.1.2. Political Wine Appellations

Appellations of origin based on political boundaries are allowed in the United States system permitting boundaries of no more than three contiguous States or counties in the same State and requiring that 75% of the grapes grow within the named area.⁵⁷¹ As with GIs, political wine appellations are governed by specific laws and regulations regarding the composition, method of manufacture, and designation made in the place of origin:⁵⁷²

1. Not less than 75% of the volume of the wine is derived from grapes (or other agricultural commodity) grown in the labeled appellation of origin.

⁵⁶⁹ 15 U.S.C. § 1125(a)(1) (2006).

⁵⁷⁰ BARHAM ET AL., *supra* note 361, at 28–31.

⁵⁷¹ 27 C.F.R. § 9.12(a)(1); 27 C.F.R. § 4.25.

⁵⁷² *Id.*

2. The wine is fully finished (except for cellar treatment and/or blending which does not alter the class and type of the wine) in the labeled appellation of origin EXCEPT THAT in the case of a state appellation of origin, the wine is fully finished (except for cellar treatment and/or blending which does not alter the class and type of the wine) in the labeled state or an adjacent state. The wine conforms to the laws and regulations of the labeled appellation of origin governing the composition, method of production and designation of wine produced in the labeled appellation area.⁵⁷³

There are also requirements for imported goods to the United States, specifically the recognition of appellations of origin for foreign wines:

For Imported Wine, with a country, foreign equivalent of a state or foreign equivalent of a county appellation of origin:

1. Not less than 75% of the volume of the wine is derived from grapes (or other agricultural commodity) grown in the labeled appellation of origin.
2. The wine conforms to the requirements of the foreign laws and regulations governing the composition, method of production and designation of wine available within the country of origin.⁵⁷⁴

Quality and uniqueness is not a requirement under state or county name appellations.

This particular kind of protected name may contain viticulturally distinguishing relevant common physical features but only on a case-by-case basis.⁵⁷⁵

A recent example of this tendency is Tennessee whiskey.⁵⁷⁶ Legally included in NAFTA,⁵⁷⁷ its definition requires that Tennessee whiskey be “a straight Bourbon Whiskey authorized to be produced only in the State of Tennessee.” Consequently, the State of Tennessee

⁵⁷³ Alcohol and Tobacco Tax and Trade Bureau, *supra* note 542.

⁵⁷⁴ *Id.*

⁵⁷⁵ MENDELSON & WOOD, *supra* note 547, at 3.

⁵⁷⁶ Reid Wilson, Fight over Tennessee Whiskey Spills into International Booze Business, WASHINGTON POST, (Mar. 19, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/03/19/fight-over-tennessee-whiskey-spills-into-international-booze-business/>.

⁵⁷⁷ NAFTA Agreement, Annex 313: “Distinctive products.”

regulates quality and production standards, including the requirements for bourbon together with the Lincoln County process that particularly involves maple charcoal filtering. In accordance with TTB, but also with any other EU GI system, Tennessee whiskey is “a drink made of fermented mash comprised of at least 51 percent corn, aged in new barrels of charred oak, filtered through charcoal and bottled at 40 percent alcohol, or higher, by volume.”⁵⁷⁸

6.1.3. Generic, Non Generic, and Semi-Generic Products in the United States

Place names in the United States are classified into three different classes: (i) generic, (ii) semi-generic, and (iii) non-generic. The first category mainly refers to wines that, while originally having geographical significance, now merely designate a class or type of wine, and therefore have lost their uniqueness and can be used on labels without any indication of origin—generic wine. Examples of generic names include sake and vermouth. Semi-generic⁵⁷⁹ names are those that retain their original geographic linkage and also indicate a type of wine under TTB regulations.⁵⁸⁰ There are sixteen authorized semi-generic names.⁵⁸¹ Under these regulations, the

⁵⁷⁸ United States Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau, DISTILLED SPIRITS, <https://www.ttb.gov/spirits/index.shtml> (last visited Aug 26, 2016).

⁵⁷⁹ See 27 C.F.R. § 4.24 (2000) (“A name of geographic significance, which is also the designation of a class or type of wine, shall be deemed to have become semigeneric only if so found by the appropriate ATF officer.”).

⁵⁸⁰ 27 C.F.R. § 4.21 (2000).

⁵⁸¹ 27 C.F.R. § 4.24(b) (2000). See also Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau, INDUSTRY CIRCULAR N.2006-1, IMPACT OF THE U.S./EU WINE AGREEMENT ON CERTIFICATES OF LABEL APPROVAL FOR WINE LABELS WITH A SEMI-GENERIC NAME OR RETSINA (2006), https://www.ttb.gov/industry_circulars/archives/2006/06-01.html (last visited Aug 26, 2016). (“Angelica (U.S.), Burgundy (France), Claret (France), Chablis (France), Champagne (France), Chianti (Italy), Haut Sauterne (France), Hock (Germany), Malaga (Spain), Marsala (Italy), Madeira (Portugal), Moselle (France), Port (Portugal), Rhine Wine (Germany), Sauterne (France), Sherry (Spain) and Tokay (Hungary). Retsina (Greece) is a class of wine and is not a semi-generic name; however, under the terms of the Agreement, it is treated the same as the semi-generic names.”). The use of all of the names except “Angelica” were affected by the Agreement on Trade in Wine signed on March 10, 2006 since the United States committed to seek to change the legal status of the above names—with the exception of Angelica, which is a U.S. wine and therefore not included in the Agreement—to restrict their use solely to wine originating in the applicable EU member state, except as provided for under the “grandfather” provision excepting certain non-EU wines labeled with one of the above names provided the applicable label was

use of a semi-generic name, such as “champagne,” must identify the place of origin—this includes the paradoxical reference to “California Champagne.” The third category, non-generic names, are those that can only be used to designate wines of the origin indicated by such name or that become distinctive designations due to their reputation and, therefore, known to the consumer. Under TTB regulations, non-generic distinctive designations suffice as class and type names in their own right since they are known in the market. Other non-generic designations that are not sufficiently well recognized in the United States must be duly described on the label. This distinction is not easily understood and the explanation provided by Elizabeth Barham, the main promoter of American Origin Product, is that Subpart C of Part 12 lists only “examples” of foreign non-generic names rather than a comprehensive list, as is the case for Subpart D concerning foreign distinctive designations.⁵⁸²

The generic categorization concept, examining the factual understanding and knowledge by consumers of a given mark, was originally stated by Judge Learned Hand, then developed case by case,⁵⁸³ and, finally, codified in the Lanham Act.⁵⁸⁴ It recognizes that misrepresentations relating to a product’s geographical origin, regardless of genericness, may constitute a commercial tort.⁵⁸⁵ In *Central Hudson Gas v. Public Service Commission*,⁵⁸⁶ the Court emphasized that commercial speech is entitled to a lesser degree of protection than are other

approved on a certificate of label approval (COLA) or certificate of exemption issued before the date of signature. The legislative proposal that effected the change in legal status of the names was included in the Tax Relief and Health Care Act of 2006 that was enacted on December 20, 2006.

⁵⁸² BARHAM ET AL., *supra* note 361, at 31–2.

⁵⁸³ Synder, *supra* note 393, at 1309–12 (interesting analysis on case law on the matter regarding European GIs).

⁵⁸⁴ 15 U.S.C. § 1064; *Bayer Co. v. United Drug Co.*, 272 F. 505, 509 (S.D.N.Y. 1921).

⁵⁸⁵ 15 U.S.C. § 1125 (2006).

⁵⁸⁶ 447 U.S. 557, 563 (1980).

forms of expression developing a four-part test under which the constitutionality of commercial speech regulation may be analyzed.⁵⁸⁷ Including questioning about whether the speech at issue: (i) concerns “lawful activity” and is not “misleading,” (ii) is of “substantial government interest,” (iii) “directly advances the governmental interest asserted,” and (iv) the regulation “is not more extensive than is necessary to serve that interest,” and therefore the party seeking to uphold it carries the burden of justification.⁵⁸⁸

TTB even provides for a comprehensive virtual warehouse for United States and foreign appellations of origin.⁵⁸⁹ For European GIs, TTB consults with governments, “re-evaluating the means by which information is provided about foreign appellations of origin that fall outside of established international trade agreements.”⁵⁹⁰ TTB regulations require that imported wine labeled with a foreign appellation of origin conforms to the requirements of the foreign laws and regulations governing the composition, method of production, and designation of wines available for consumption within the country of origin.⁵⁹¹

Ladas’ remarks on generic trademarks are particularly applicable to valuable GIs:

The economic value that trademarks represent in national and international trade in the present day world is well-known. They are a growing asset, whilst patents are a diminishing one with the passage of years. But this asset is a delicate one and requires considerable care if it is not to be fatally impaired and finally destroyed. The dangers to which a trademark is exposed are many,

⁵⁸⁷ Synder, *supra* note 393, at 1314.

⁵⁸⁸ *Id.* at 1314.

⁵⁸⁹ Alcohol and Tobacco Tax and Trade Bureau, *supra* note 542. (“Generally, with two exceptions, any one of the types of appellations (i.e., a country, state, etc.) may be used when an appellation is required. The two exceptions are: Wine labeled with a vintage date: the appellation of origin must be a state (or foreign equivalent), multi-state (U.S. wine only), county (or foreign equivalent), multi-county (U.S. wine only) or viticultural area; and Wine labeled as ‘estate bottled’: the appellation of origin must be a viticultural area.”).

⁵⁹⁰ *Id.*

⁵⁹¹ Alcohol and Tobacco Tax and Trade Bureau, *supra* note 542.

deriving from the owner's acts of omission as well as commission. Permitting encroachments of the rights in a trademark by imitations; licensing the use of a trademark without control of the use by the Licensee; lowering the standards of the products identified by the trademark-are some of the causes which may destroy it.⁵⁹²

Most remarkable, however, is the danger of the loss of a trademark resulting from the very success and popularity of a product. Its meaning as a symbol of a particular source may be destroyed through its transformation into a generic term. The language passes often from the particular into the general and invades trademark rights, even if the owner is not indifferent or unwilling to stop this development.⁵⁹³

6.1.4. 2006 Agreement on Trade in Wine

Since United States exports to the European Union in 2004 were over \$487 million while imports exceeded \$2.3 billion, the European Union and the United States negotiated the mutual acceptance of winemaking practices and addressed a number of labeling issues to create market certainty.⁵⁹⁴ In March 2006, the United States and the European Union entered into an agreement intended to address differences concerning winemaking practices. The aim of the agreement was to allow exports to Europe and regulating the labeling of a wine's place of origin particularly in relation with the semi-generic in the United States to provide protection for European GIs.⁵⁹⁵

⁵⁹² Stephen P. Ladas, *Trademarks in International Trade and Their Safeguard*, 50 TRADEMARK REP. 1, 1 (1960).

⁵⁹³ *Id.*

⁵⁹⁴ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, TRADE FACTS 2, 1 (2005), https://www.ttb.gov/pdf/agreements/trade_facts.pdf (last visited Aug 26, 2016).

⁵⁹⁵ Agreement Between the United States of America and the European Community on Trade in Wine, Mar. 10, 2006, available at <http://tcc.export.gov/wcm/groups/tradedataanalysis/@tcc/documents/tradeagreement/euwineagreementtext.pdf> [hereinafter Wine Agreement].

European wine producers, however, disagreed with the acceptance of production practices and the agreement on semi-generic wines.⁵⁹⁶ But the agreement provided a stable market with the recognition of existing winemaking practices and even a consultative process for accepting new ones. Consequently, the European Union traded away its two largest bargaining chips—acceptance of United States production practices and loosening of certification standards—for a grandfather clause that ratifies the continued use of semi-generic terms by the greatest abusers of these terms.⁵⁹⁷

Actually, while the agreement limited the use of semi-generic names in the United States, certain names of origin were accepted and simplifications of certification requirements were applied. Under Article 7 of the bilateral Trade in Wine Agreement, the United States agreed to recognize certain European names of origin, identified in Annex IV of the Agreement. Rather than create any property right in semi-generic terms or change its legal status, which would contravene the Lanham Act, the Trade in Wine Agreement merely creates heightened labeling regulations to be enforced by the TTB.⁵⁹⁸ Article 7 was designed to prevent European GIs from becoming generic terms in the United States, since names of quality wines produced in specified regions listed in Annex IV may only be used to designate wines of the origin indicated by such a name.⁵⁹⁹ As a consequence of the compromises between both partners, Napa Wine became the

⁵⁹⁶ Since 1983, the European Union was renewing short-term derogations from their regulations for wine made in the United States without using practices approved in Europe. See Commission Regulation (EEC) No. 205/84 of 26 January 1984 laying down transitional measures applicable in respect of the 1983/84 wine-growing year concerning the payment of aid for the distillation of fortified wine, O.J. (L 22), 27-28.

⁵⁹⁷ Brian Rose, *No More Whining About Geographical Indications: Assessing the 2005 Agreement Between the United States and the European Community on the Trade in Wine*, 29 HOUS. J. INT'L L. 731, 767-768 (2006).

⁵⁹⁸ Synder, *supra* note 393, at 1318.

⁵⁹⁹ Rose, *supra* note 576, at 761.

first wine region from the United States to receive GI recognition within the European Union and in May 2007.⁶⁰⁰

The agreement establishes a grandfather clause to protect the use of semi-generic terms on labels for wines bearing the brand name for which, before the Trade in Wine Agreement was signed, the Secretary of the Treasury had already issued the Certificate of Label Approval (COLA). From the international perspective, this could be a positive precedent under United States law for ongoing negotiations to achieve a successful agreement under TTIP and the TRIPS Agreements. However, the viability of future claw back regarding GIs will require European compromises and concessions.⁶⁰¹ Given the United States' reluctance to accept the TRIPS Agreement regarding GIs, the Trade in Wine Agreement is considered a notable step towards compliance with international rules established under the WTO and an important legal reference for the regulation of a new model of GIs.⁶⁰²

6.2. Certification Marks, Collective Marks, and Famous Trademarks

Certification marks and collective marks are entitled to the same protections as traditional trademarks.⁶⁰³ Both of these legal figures provide that GI protection can be obtained in the United States at the USPTO. Furthermore, in spite of the existing presumption of validity of

⁶⁰⁰ European Commission, Agriculture and Rural Development, *supra* note 84.

⁶⁰¹ Synder, *supra* note 393, at 1319 & 1320.

⁶⁰² Rose, *supra* note 576, at 764.

⁶⁰³ 15 U.S.C. §1054 (2006) (“Subject to the provisions relating to the registration of trademarks, so far as they are applicable, collective and certification marks, including indications of regional origin, shall be registrable under this chapter, in the same manner and with the same effect as are trademarks.”).

registration, protection can be claimed in court preventing others from infringement proving that the GI is not generic.⁶⁰⁴

A fundamental matter for trademarks in the United States is immediate availability of protection upon use or the need for evidence of having gained “secondary meaning”⁶⁰⁵ distinctiveness among consumers.⁶⁰⁶ The initial reluctance to protect geographic marks under the Lanham Act changed when courts began to develop the “goods-place association” test, making it difficult for trademark examiners to deny applications for immediate registration on geographic terms.⁶⁰⁷ However, with NAFTA and the TRIPS Agreement in force, Congress expressed that “primarily geographically deceptively misdescriptive” marks, which were previously registrable upon evidence of secondary meaning, could not be registered.⁶⁰⁸

6.2.1. Certification Marks

GI protection in the United States is mainly done through certification marks, a particular kind of trademarks with the legal capacity to certify not just the regional or other origin of the product, but also the material, mode of manufacture, quality, accuracy or other features of goods or services, as established in Section 2(e)(2) of the Lanham Act.⁶⁰⁹ Among its advantages, certified names, which typically include geographic terms, do not require prior

⁶⁰⁴ See *Institut National des Appellations d'Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d (BNA) 1875, 1885 (T.T.A.B. 1998) (holding that "cognac" is a common law certification mark).

⁶⁰⁵ See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (finding that “marks which are merely descriptive of a product . . . do not inherently identify a particular source, and hence cannot be protected. However, descriptive marks may acquire the distinctiveness which will allow them to be protected under the [Lanham] Act. . . . This acquired distinctiveness is generally called ‘secondary meaning.’”).

⁶⁰⁶ Brauneis & Schechter, *supra* note 425, at 2.

⁶⁰⁷ *Id.* at 3.

⁶⁰⁸ *Id.* at 4.

⁶⁰⁹ 15 U.S.C. § 1127 (2006).

commercialization providing “acquired distinctiveness.”⁶¹⁰ This is also referred to as “secondary meaning” distinctiveness in relation to products while the primary meaning is linked to the place of origin. There is a clearly established incompatibility between the holder of a certificate trademark and the producer.⁶¹¹ Acting as seals of approval for certifying the features of products under the certificated trademark, additional quality standards linked to geographical origin are a possibility under the legislation in force.⁶¹² Therefore, while certification marks cover a broad range of products, from agricultural to business services, they do not categorically meet the essential factors for recognition as GIs.⁶¹³

A certification mark is any word, name, symbol, or device used by a party other than the owner of the mark to certify some aspect of the third parties’ goods or services.⁶¹⁴ It may be used to indicate: i) region or other origin; ii) material, mode of manufacture, quality, accuracy, or other characteristics of the goods or services; or iii) that the work or labor on the goods/services was performed by a member of a union or other organization.⁶¹⁵

Section 4 of the Lanham Act refers their registrability:

Subject to the provisions relating to the registration of trademarks, so far as they are applicable, collective and certification marks, including indications of regional origin, shall be registrable under this chapter, in the same manner and with the same effect as are trademarks, by persons, and nations, States, municipalities, and the like, exercising legitimate control over the use of the marks sought to be registered, even though not possessing an industrial or commercial establishment, and when registered they shall be

⁶¹⁰ 15 U.S.C. § 1052(e)(2) (2006). *See also* United States Patent and Trademarks Office, *supra* note 532, at 5.

⁶¹¹ 15 U.S.C. §1064(5)(B).

⁶¹² MENDELSON & WOOD, *supra* note 547, at 3.

⁶¹³ *Id.* at 3.

⁶¹⁴ 15 U.S.C. §1057 (2006).

⁶¹⁵ United States Patent and Trademarks Office, *supra* note 532 at 2.

entitled to the protection provided in this chapter in the case of trademarks, except in the case of certification marks when used so as to represent falsely that the owner or a user thereof makes or sells the goods or performs the services on or in connection with which such mark is used. Applications and procedure under this section shall conform as nearly as practicable to those prescribed for the registration of trademarks.⁶¹⁶

However, in accordance with Section 2, no trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration with the exception of primarily geographically descriptive or deceptively misdescriptive marks, which:

(e) Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 1054 of this title, (3) when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them, (4) is primarily merely a surname, or (5) comprises any matter that, as a whole, is functional.⁶¹⁷

Certification trademark holders must comply with certain requirements to maintain USPTO registration and avoid cancellation on grounds that the registrant (i) does not control the certification mark, (ii) engages in the production or marketing of any goods or services under its own certification mark, (iii) permits the use of the certification mark for purposes other than to certify, or (iv) discriminately refuses to certify the goods or services of any person who maintains the standards or conditions.⁶¹⁸

⁶¹⁶ 15 U.S.C. §1054 (2006).

⁶¹⁷ 15 U.S.C. §1052(e) (2006).

⁶¹⁸ 15 U.S.C. §1064(5) (2006).

Certain limitations from the certification trademarks have been argued in relation to GIs,⁶¹⁹ but, again, trademark and GIs are legal figures of a different nature and any pure comparison may drive to misunderstanding and confusion if it is not adequately done considering context and realities beyond concepts. The Hawaiian coffee industry is an example that explains these inconsistencies of the system. The Hawaii Department of Agriculture holds certification marks for “100% Hawaii Coffee” and similar certification marks for six other coffees growing regions in the state, such as 100% Kona Coffee or 100% Maui Coffee.⁶²⁰ However, the model may not be trusted nor sustainable due to limitations such as the fact that the owner of the trademark cannot produce or market its product, or in this particular case the state’s coffee labeling law permits the use of geographic origin names on coffee packages with only 10% genuine content—under the 100% certification trademarks. As a consequence, a European GI willing to be protected in the United States is required to establish an organization that owns the certification mark but does not use it.⁶²¹

In the United States, a governmental body or a body operating with governmental authorization exercises control over the use of a geographical term as a certification mark. This body aims to preserve the freedom of all persons to use the term under compliance of its requirements and prevents abuses or illegal uses which would be detrimental to all those entitled to use the certification mark.⁶²² Generally speaking, a private individual is not in the best

⁶¹⁹ BARHAM ET AL., *supra* note 361, at 24.

⁶²⁰ *Id.* at 37.

⁶²¹ *Id.* at 39.

⁶²² United States Patent and Trademarks Office, *supra* note 532, at 3.

position to fulfill these objectives satisfactorily and, therefore, the government of a region is the logical authority to control the use of the name in the region.⁶²³

6.2.2. *Collective Marks*

Collective marks are trademarks used by the members of a cooperative, an association or other collective group or organization imposing its own rules, but unlike a certification mark, only the registrant and its members can use collective trademarks.⁶²⁴ All members of the group use the mark and thus no one member can own the mark while the collective organization holds title to the collectively used mark for the benefit of all members of the group.⁶²⁵ For instance, an agricultural cooperative of produce sellers is an example of a collective organization—which does not sell its own goods or render services—that promotes the goods and services of its members through a collective mark.⁶²⁶

There are two types of collective marks in the United States: (i) collective trademarks or collective service marks and (ii) collective membership marks. The Trademark Trial and Appeal Board, USPTO administrative tribunal, explained the distinction as follows:

A collective trademark or collective service mark is a mark adopted by a “collective” (i.e., an association, union, cooperative, fraternal organization, or other organized collective group) for use only by its members, who in turn use the mark to identify their goods or services and distinguish them from those of non-members. The “collective” itself neither sells goods nor performs services under a collective trademark or collective service mark, but the collective may advertise or otherwise promote the goods or services sold or rendered by its members under the mark.

⁶²³ *Id.* at 3.

⁶²⁴ 15 U.S.C. § 1127 (2006).

⁶²⁵ United States Patent and Trademarks Office, *supra* note 532, at 5.

⁶²⁶ *Id.* at 5.

A collective membership mark is a mark adopted for the purpose of indicating membership in an organized collective group, such as a union, an association, or other organization. Neither the collective nor its members uses the collective membership mark to identify and distinguish goods or services; rather, the sole function of such a mark is to indicate that the person displaying the mark is a member of the organized collective group.⁶²⁷

6.2.3. *Famous Marks*

The protection of a distinctive trademark—where distinctiveness is either inherent or acquired—is granted by Federal Trademark Dilution Act (FTDA).⁶²⁸ The novel concept of “geographical distinctiveness” was developed by the TTAB⁶²⁹ and Brody suggests that it provides sufficient legal basis to trigger protection under the dilution provisions of the Lanham Act.⁶³⁰ The benefits granted by the FTDA should be available for GIs, as for any distinctive famous marks grounded on geographical distinctiveness, provided that other requirements for dilution protection are met.⁶³¹ Despite the parallel “likelihood of confusion” and “false advertising” provisions of the Lanham Act, Brody proposes the criteria to determine famous and distinctive character.⁶³² The 2006 amendments to the FTDA now expressly protects “a famous mark that is distinctive, inherently or through acquired distinctiveness,”⁶³³ and includes other

⁶²⁷ *Aloe Creme Laboratories, Inc. v. American Society for Aesthetic Plastic Surgery, Inc.*, 192 U.S.P.Q. 170, 173 (T.T.A.B. 1976).

⁶²⁸ 15 U.S.C. § 1125(c)(1), as amended by the Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2, 120 Stat. 1730.

⁶²⁹ *Tea Bd. of India v. Republic of Tea, Inc.*, 80 U.S.P.Q.2d 1881 (T.T.A.B. 2006).

⁶³⁰ Brody, *supra* note 9, at 906.

⁶³¹ *Id.* at 928.

⁶³² *Id.* at 911.

⁶³³ 15 U.S.C. § 1125(c)(1).

important references that clear away potential obstacles for application of the Lanham Act's dilution provisions to GIs.⁶³⁴

6.3. Marketing Orders and Country of Origin Labeling

The United States Department of Agriculture may provide marketing orders for fruits, vegetables, and crops but these provide GI-like protection only in limited circumstances and are available only for products from the United States.⁶³⁵ Marketing agreements and orders are binding regulations initiated by an industry to provide stable markets for dairy products, fruits, vegetables, and specialty crops in the specified geographical area.⁶³⁶

As a protective system to ensure a reasonable minimum price for farmers while providing agricultural policies similar to those established in the European Union, the notable public intervention protecting farmers is questioned under the WTO by third countries. European and U.S. agriculture are seen as highly protected and exports of agricultural product is a main concern.⁶³⁷ Particularly important in the dairy sector, Marketing Orders also refer to the main commodities among fruits and vegetables, regulating markets and production.

Similarities with the European Agriculture Policy are also found in initiatives such as the Country of Origin Labeling (COOL).⁶³⁸ As a labeling law, COOL require retailers and market stakeholders to inform consumers regarding the source of certain food products, including meats

⁶³⁴ Brody, *supra* note 9, at 922.

⁶³⁵ BARHAM ET AL., *supra* note 361, at 27.

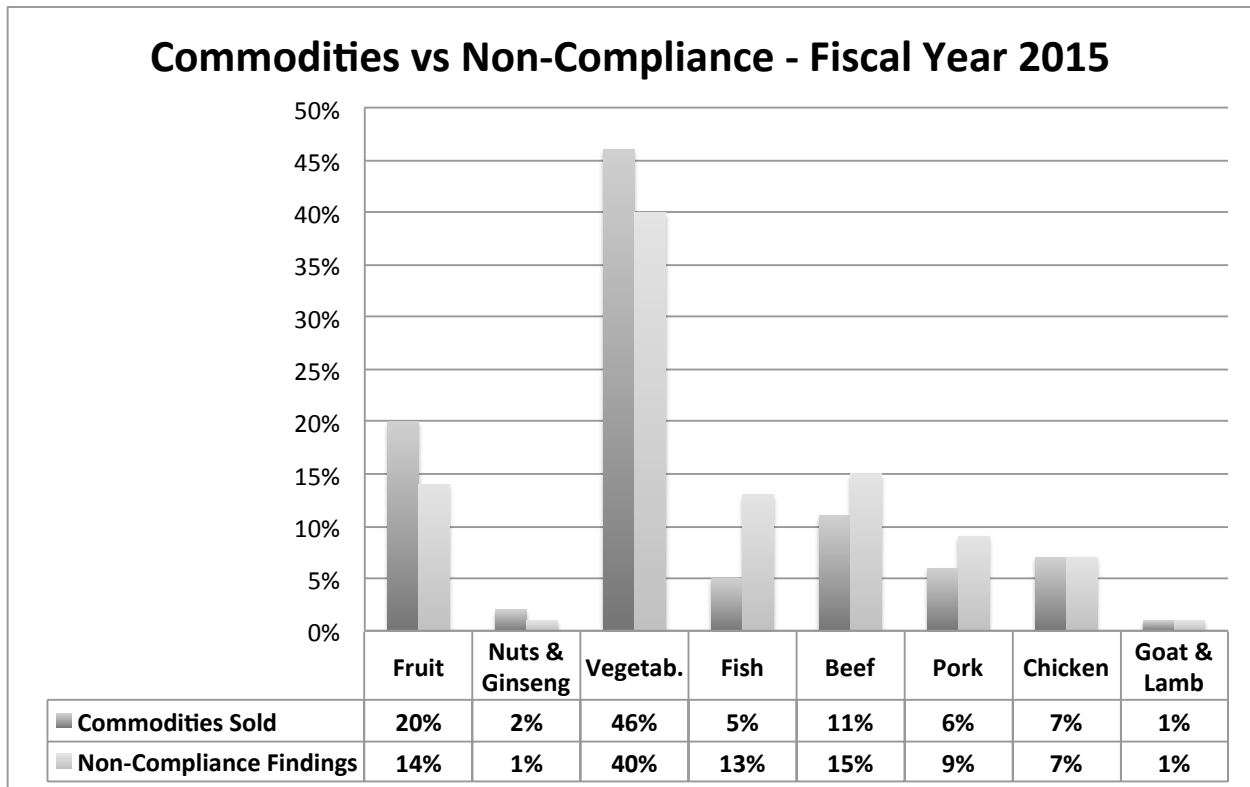
⁶³⁶ United States Department of Agriculture, MARKETING ORDERS AND AGREEMENTS, <https://www.ams.usda.gov/rules-regulations/moa> (last visited Aug 27, 2016).

⁶³⁷ FRED H. SANDERSON, AGRICULTURAL PROTECTIONISM IN THE INDUSTRIALIZED WORLD (2016).

⁶³⁸ United States Department of Agriculture, COUNTRY OF ORIGIN LABELING (COOL), <https://www.ams.usda.gov/rules-regulations/cool> (last visited Aug 27, 2016).

(lamb, goat, and chicken), wild and farm-raised fish and shellfish, fresh or frozen fruits and vegetables, peanuts, pecans, macadamia nuts, and ginseng.⁶³⁹ In 2015, approximately 1,055,966 (96%) of all covered commodities sold at retail were COOL compliant.⁶⁴⁰ However, the review compliance rating shows a 45% of compliance deficiency and 22% critical weakness, so the efficiency of the system has room for development and improvement.⁶⁴¹ The measures of non-compliance in comparison to the percentage of each category regarding the total commodities sold provide interesting data on the model.

Figure 6: Commodities versus Non-Compliance with COOL Requirements



Source: United States Department of Agriculture, Retail Compliance Data Fiscal Year 2015.

⁶³⁹ *Id.*

⁶⁴⁰ UNITED STATES DEPARTMENT OF AGRICULTURE, COUNTRY OF ORIGIN LABELING. RETAIL COMPLIANCE DATA FISCAL YEAR 2015 (2016).

⁶⁴¹ *Id.* at 1.

Interestingly, the assessment criteria for non-compliance with COOL are very much related to GIs systems such as identification of the product (58%), no production step (19%) or method of production identified (7%), and even unacceptable regional designation (2%).⁶⁴²

On May 18, 2015, the WTO Appellate Body issued its compliance report on a case about country of origin labeling requirements in to the United States.⁶⁴³ The report⁶⁴⁴ concluded that the amended version of the COOL regime continues to discriminate against livestock and meat imported from Canada and Mexico, confirming the bulk of an earlier compliance panel's findings. Ultimately, however, the panel did not make a definitive conclusion on whether the amended COOL measure is an unnecessary international trade barrier.⁶⁴⁵

7. UNDERSTANDING THE FUTURE OF GEOGRAPHICAL INDICATIONS BASED ON LADAS, ROGERS, AND FARLEY'S CONTRIBUTIONS

From previous sections it can be concluded that the relevant contribution on the regulation of GIs by the IPR fathers under the self-executing Pan-American Convention and its regulation under unfair competition law within the Lanham Act, together with the background of the United States legal system, provides for specific the joint elements to be considered. These are: (i) a geographic name with reputation; (ii) a false use of the place of origin; (iii) a

⁶⁴² *Id.* at 2.

⁶⁴³ Panel Report, United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/386 and Corr.1 (Nov. 18, 2011).

⁶⁴⁴ WTO APPELLATE BODY, WT/DS384/AB/RW AND WT/DS386/AB/RW, UNITED STATES: CERTAIN COUNTRY OF ORIGIN LABELING (COOL) REQUIREMENTS. RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA AND MEXICO (101AD). (The Appellate Body issued the Report in the form of a single document constituting two separate Appellate Body Reports: WT/DS384/AB/RW; and WT/DS386/AB/RW).

⁶⁴⁵ *Id.*

commercial damage, harm or injury to the owner; and (iv) fraud or misleading the consumers.⁶⁴⁶ The contribution of Ladas, Rogers, and Farley demonstrates that United States has protected GIs under common law unfair competition principles and, despite the complexities of the legal concept of geographical names and the difficulties to codify such a system, there is no historical opposition to such protection since a means for protection already exists.⁶⁴⁷ However, after over seven decades of existence, the Lanham Act has yet to be transformed into a catchall statute covering all causes of action related to unfair competition.⁶⁴⁸ That is probably why the two fathers of IPR in the United States already addressed the main solution to this problem long ago:

The only practical and effective method of adopting uniform solutions of these problems or of establishing harmony between the legislations of the various countries on these questions is the adoption of an Inter-American Trade-Mark Convention with suitable stipulations.⁶⁴⁹

The protection of GIs is essentially related to trade and global economics affected by the reality of worldwide interdependence, the international protection of IPR, and strong economic interests.⁶⁵⁰ IPR is increasingly important and the development of institutions and regulatory frameworks on the matter are taking over private organizations such as the International Association for the Protection of Intellectual Property (AIPPI).⁶⁵¹ Solutions have to be found that

⁶⁴⁶ Farley, *supra* note 513 at 77.

⁶⁴⁷ *Id.*

⁶⁴⁸ Horwitz & Levi, *supra* note 400 at 72.

⁶⁴⁹ Rogers & Ladas, *supra* note 431 at 13.

⁶⁵⁰ Goldberg, *supra* note 87 at 151.

⁶⁵¹ See Stephen P. Ladas, *The Convention Establishing the World Intellectual Property Organization*, 2 J. WORLD TRADE L. 684 (1968).

consider the interest of developing countries and avoid the risk of dilution to ensure the necessary strengthening of the protection of GIs in the channels of international trade.⁶⁵²

The main feasible proposals to reinforce protection of GIs in the United States refers to a more active role in policing registration and protection of certification marks by the USPTO providing internal and external guidelines.⁶⁵³ U.S. experts recommend the extension of certification mark protection to products that use expressions such as kind, type, style, imitation or the like, as requested for GIs under the TRIPS Agreement and desired by the European Union.⁶⁵⁴ And among existing proposals is the allowance to certification marks owners to directly market their own products.⁶⁵⁵ Furthermore, the reduction of the prohibitive cost of opposition and enforcement proceedings also constitutes a priority particularly to foreign owners of certification and collective trademarks, ideally claiming the award of attorneys' fees and costs to the prevailing party in the proceedings.⁶⁵⁶ However, the establishment of a new class of certification marks that allows self-certification, specifically for GIs as "Class C" under the Lanham Act, would eliminate the rationale of such marks in the United States since the certifier's independence and detachment could not be granted.

Whether such a regulation ever occurs, consumers should be assured that GIs are distinctively and recognizably different than other similar products.⁶⁵⁷ Even subjective consumer

⁶⁵² Walter J. Derenberg, *The Problem of Trademark Dilution and the Antidilution Statutes*, 44 CALIF. L. REV. 439, 488 (1956).

⁶⁵³ BARHAM ET AL., *supra* note 361, at 44. Currently, TTB and AFT offer public guidance to help industry members understand and comply with applicable rules and regulations; Treasury Decision, Industry Circulars, and formal interpretations of TTB and AFT regulations. *See* Alcohol and Tobacco Tax and Trade Bureau, *supra* note 542.

⁶⁵⁴ BARHAM ET AL., *supra* note 361, at 45.

⁶⁵⁵ *Id.*

⁶⁵⁶ *Id.*

⁶⁵⁷ *Id.* at 46.

understanding of most geographic terms is considered misplaced due to uncertainty and instability as well as doctrinal approaches that criticize the goods-place association test and advocate for an objective component to better protect the interests of competitors.⁶⁵⁸ The fundamental question is whether competitors use the applicant's geographical term in such a way that consumers would understand it describes the particular location and, if so, whether the applicant should be put to the market test of secondary meaning distinctiveness before obtaining trademark protection and a registration for use.⁶⁵⁹

The leading WTO case on GIs, the Budweiser Case,⁶⁶⁰ provides interesting solutions when GIs and trademark are in conflict. Because of a protected GI for a Czech beer originating in "Budejovicky," translated as "Budweiser" in the German language and duly protected under European Law, Anheuser-Busch was originally not allowed to use the name "Budweiser" in the European Union. Arguing the pre-existence of trademark, the United States brought the case to the WTO Dispute Settlement Body that concluded the possibility of using the "Budweiser" trademark and the European Union amended Regulation 2081/92 to comply with the requirement under TRIPs to allow equal registration access for GIs. However, the decision declared that GI protection for agricultural products is permissible on an international level. Furthermore, it was relevant that Article 24(5) of the TRIPs Agreement established the boundaries between the two coexisting but separate forms of IPR.⁶⁶¹

⁶⁵⁸ Brauneis & Schechter, *supra* note 425, at 4.

⁶⁵⁹ *Id.* at 67.

⁶⁶⁰ Panel Report, *European Communities-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS 174/R (Mar. 15, 2005) [hereinafter Budweiser Case].

⁶⁶¹ *Id.* at ¶ 7.583.

Considered an unsustainable position,⁶⁶² improving United States regulation on GIs would avoid the “logistical nightmare of totally overhauling the current system”⁶⁶³ allowing consumers to find authentic products and limiting free-riding on the reputations of GI owners.⁶⁶⁴ A presumption of non-genericness for GIs that are self-regulated, certified, and controlled by an umbrella organization to ensure product quality together with an increased policing role of the Federal Trade Commission regarding deceptive geographical marketing would strengthen domestic GI protection in the United States.⁶⁶⁵ When joint interests are at stake, as is the case of Chinese misappropriation of United States and European wines trademarks and GIs, common solutions and even proposal for a GI register seem easier to achieve.⁶⁶⁶

Calboli, one of the main researchers in the field, strongly supports a new type of IPR for GIs⁶⁶⁷ based on two main arguments: (i) GIs permit local producers to convey accurate information about the geographical qualities and origin of their products and (ii) GIs promote local development.⁶⁶⁸ Calboli concludes that, although the GI debate today is primarily about

⁶⁶² Waggoner, *supra* note 237, at 595.

⁶⁶³ Emily Nation, *Geographical Indications: The International Debate Over Intellectual Property Rights for Local Producers*, 82 U. COLO. L. REV. 959, 1002 (2011).

⁶⁶⁴ *Id.* at 1003.

⁶⁶⁵ *Id.* at 1004–7.

⁶⁶⁶ See Laura Zanzig, *The Perfect Pairing: Protecting US Geographical Indications with a Sino-American Wine Registry*, 88 WASH. L. REV. 723 (2013).

⁶⁶⁷ Irene Calboli, *Geographical Indications of Origin at the Crossroads of Local Development, Consumer Protection and Marketing Strategies*, 46 INT'L REV. INTEL. PROP. & COMPET. L 760 (2015). (The author restates the arguments made in two previous publications: “*In Territorio Veritas? Bringing Geographical Coherence into the Ambiguous Definition of Geographical Indications of Origin*,” 6 WIPO Journal 57 (2014); and “*Of Markets, Culture, and Terroir: The Unique Economic and Culture-Related Benefits of Geographical Indications of Origin*,” in RESEARCH HANDBOOK IN INTERNATIONAL INTELLECTUAL PROPERTY, 433 (Daniel Gervais, ed., 2015).

⁶⁶⁸ Calboli, *supra* note 85, at 1.

international trade and market access, scholars should advocate for a stricter enforcement of the “terroir” and therefore the territorial linkage between GIs and the place of origin.⁶⁶⁹

Some lobbies, such as the American Origin Products Association,⁶⁷⁰ also aim to recognize AOP as a category of product and IPR, protect them from abuses and fraud, promote local products, and increase sales along with research from the AOP Research Foundation.⁶⁷¹

The proposed criteria for establishing a GI system in the United States as a separate class of certification marks to bring its regulation into conformity with the TRIPS Agreement mainly addresses product uniqueness, reputation, and link with the geographical area of origin.⁶⁷²

Farmer-owned brands are also supported by studies laying out economic arguments emphasizing importance.⁶⁷³ With a practical approach, and a very detailed study on the subject matter of this research, Mendelson and Wood provide a preliminary list of candidate GIs assembled based on existing AVAs, state and county appellations, and registered certification marks.⁶⁷⁴ The examination of 5,810 registered certification marks,⁶⁷⁵ and all existing AVAs,

⁶⁶⁹ *Id.* at 3.

⁶⁷⁰ American Origin is a 501 c6 Trade Association under U.S. Law with members such as the California Dried Plum Board, Cuatro Puertas (NM Native Chiles), Ginseng Board of Wisconsin, Idaho Potato Commission, Kona Coffee Farmers Association, Maine Lobstermen's Association, MO Northern Pecan Growers LLC, Napa Valley Vintners, Vermont Maple Sugar Makers. Elizabeth Barham, AMERICAN ORIGIN PRODUCTS AND SUSTAINABLE RURAL DEVELOPMENT (2014).

⁶⁷¹ American Origin Products Research Foundation, AMERICAN ORIGIN PRODUCTS RESEARCH FOUNDATION AMERICAN ORIGIN PRODUCTS RESEARCH FOUNDATION, <http://www.aopr.org/> (last visited Aug 25, 2016).

⁶⁷² TARA CAPSUTO, CRITERIA FOR U.S GEOGRAPHIC INDICATIONS 22, 11 (2012), http://www.origin-gi.com/images/stories/PDFs/English/papers/Tara_Capsuto_OriGin_paper_May_2012.pdf (last visited Aug 8, 2016).

⁶⁷³ Dermot J. Hayes, Sergio H. Lence & Andrea Stoppa, *Farmer-owned Brands?* 20 AGRIBUSINESS 269, 269 (2004). (Case studies involve Parma Ham, Brunello di Montalcino wine, Vidalia onions, and a third-party verification organization).

⁶⁷⁴ MENDELSON & WOOD, *supra* note 547.

⁶⁷⁵ *Id.* at 4. (Narrowed to 319 certification marks, the authors concluded that approximately fifty-one candidate GI's were likely to meet the criteria for inclusion).

provide very interesting arguments and conclusions on the consequences of a system that, until now is not considering quality, reputation and other product features.⁶⁷⁶

As in Europe the potential and benefit of a GI model are clearly addressed, Mendelson and Wood's study also considers the challenges to provide proper assessment of the impact of agricultural quality products within the existing U.S. regulatory framework.⁶⁷⁷ Others question the possibility of creating a similar system to preserve and generate locally-based foodstuff in the United States or the adaptation of the concept of "terroir" to American producers. The positive conclusion is based on the resurgence in farmers' markets all over the country as well as existing investment, quality, and culinary models together with values-based labeling initiatives.⁶⁷⁸

The absence of reliable quality signals is one of the chief impediments to improving the food system while granting quality and safety since producers have no incentive to invest in improving their products if there is no predictable return on their investments.⁶⁷⁹ Consequently, to produce consistently safe, high-quality food without increasing the costs is the goal of any systemic improvement in food safety in the United States.⁶⁸⁰ With the new regulatory regime for food safety passed in January 2011, the Food Safety Modernization Act (FSMA),⁶⁸¹ described as the most extensive revision of food safety regulations since the 1930s, responds to reasons of risk reduction and political precaution.⁶⁸² Beyond the interests of the United States and Europe, one

⁶⁷⁶ *Id.* at 9.

⁶⁷⁷ *Id.* at 9.

⁶⁷⁸ Trubek & Bowen, *supra* note 71, at 28.

⁶⁷⁹ Stearns, *supra* note 207, at 256.

⁶⁸⁰ *Id.* at 275.

⁶⁸¹ Pub. L. No. 111-353, 124 Stat. 3885 (Jan. 4, 2011).

⁶⁸² TEKUNI NAKUJA & WILLIAM A. KERR, WAS FOOD SAFETY DECLINING?: ASSESSING THE JUSTIFICATION FOR THE US FOOD SAFETY MODERNISATION ACT 13 (2013).

of the fundamental weaknesses of GI regulations and the TRIPS agreement lies with the North-South divide and the failure of IPR to reflect values and priorities that are not manifestly dominant in post-modern economies searching for a same destination of global consumerism.⁶⁸³

This section concludes with Ladas' words on diversity, development and spiritual quality, confirming the United States commitment regarding global protection of IPR:

May I now conclude with a final observation. The peoples of the earth differ widely in physical resources or tangible things. But for thousands of years, particular kinds of goods have moved from regions of relative abundance to regions of relative scarcity. We also rely on human resources. There are dynamic in character and respond more readily to human wants or social objectives.

Today international production of goods has come to be a primary means by which the activities of one are respond to the demands of another. Thus, international trade has the attributes of historical persistence and the quality of future permanence. The strains and upheavals of the times are not the expression of some immutable law of life. Although it ebbs and flows—with small advances and spectacular setbacks, the broad direction of our world is unmistakable—a huge adjustment of human relations on a worldwide basis and a limitless need for reaching out to every corner of the world for its unique contributions.

We in America, particularly, who pride ourselves for the achievements of our age, cannot be its prisoners. We rely on our scientist and technicians to lead us in the ceaseless adventure of man in widening the boundaries of knowledge and, in the process, changing human life for the whole world. We are indeed an inseparable part of the world. We do realize that a prosperous Africa, and Asia with a higher standard of living, and a Latin America with a wider diffusion of purchasing power, are an indispensable requirement in the context of our enduring national interest and welfare.

Thus we shall meet the challenge of our times and endow our affluence and power with a spiritual quality.⁶⁸⁴

⁶⁸³ Ruth L. Okedui, *The International Intellectual Property Roots of Geographical Indications*, 82 CHI.-KENT L. REV. 1329, 1365 (2007).

**CHAPTER 4: CHANGING UNFAIR TRADE SYSTEMS AND ENSURING
DEVELOPMENT THROUGH GEOGRAPHICAL INDICATIONS. THE CASE OF
BELIZE: BANANA REPUBLICS REVOLUTION**

**1. IT POSSIBLE TO CHANGE TRADE RULES FOR BANANAS IN ORDER TO
INCREASE THE VALUE RECEIVED BY LOCAL PRODUCERS?**

International trade rules are to be applied to current realities and the needs of agricultural products in developing countries should be considered beyond European and United States standards and interests. To understand tangible but complex developments concerns, it is useful to study a fundamental economic and social sector, such as bananas in Belize, that can explain the practicalities and problems with GIs for quality and food products. GIs do not only concern well-known Parma cheese or Champagne, but also other agricultural products—foodstuff and even crafts—that may impact local development due to uniqueness and particular qualities. Linking GI models with development is one of the aims of this dissertation. Therefore, this chapter analyses Belizean bananas and compares current commodity markets with the feasibility a new model of production for developing countries to ensure quality, local added value duly distributed, sustainability, better market conditions, and access to their products.

Bananas—as with many other agricultural products originating in developing countries—have been distributed through a system of unfair trade for too long. Prices, duties, quotas, sanitary and phytosanitary measures, quality requirements, and even the political and socio-

⁶⁸⁴ Ladas, *supra* note 1, at 175.

economic conditions in the “Banana Republics,”⁶⁸⁵ hinder development and negatively affect local growers, workers, and communities. Out of an estimated value of 100 units per banana, the distribution of profits among those participating in the business is 1.5% for plantation workers, 10% for growers or owners, 31% for the international trading company, and 17% for ripeners or distributors with the biggest percentage, 40%, gained by the retailer.⁶⁸⁶ The price distribution along the banana value chain has been deeply studied⁶⁸⁷ and the evidences of the model are critical,⁶⁸⁸ since banana production, for too many years, has been subject to the strong bargaining power of large-scale retailers.⁶⁸⁹ Far from fair trade standards,⁶⁹⁰ legal solutions are to be based

⁶⁸⁵ The now spread concept of “Banana Republic” to describe the fictional Republic of Anchuria was coined by O. Henry, an American writer (whose real name was William Sydney Porter) in the book *Cabbages and Kings*. Beyond the image of a tropical, agrarian country, it refers to the fruit companies from the United States that came to exert extraordinary influence over the politics of Central America by the end of the 19th century, and particularly a quote from the short story “The Admiral,” Chapter 8, (“Salaries!” exclaimed the collector, with hands raised; “Válgame Dios! not one centavo of my own pay have I received for the last seven months. The pay of an admiral, do you ask? Quien sabe? Should it be less than three thousand pesos? Mira! you will see a revolution in this country very soon. A good sign of it is when the government calls all the time for pesos, pesos, pesos, and pays none out.”), O. HENRY, *CABBAGES AND KINGS*, (1904). Even the Cambridge Dictionary has a definition for the political concept of a Banana Republic as: “a small country, especially in South and Central America, that is poor, corrupt, and badly ruled,” <http://dictionary.cambridge.org/dictionary/english/banana-republic> (last visited Oct. 30, 2015).

⁶⁸⁶ See Pedro Morazán, *A SNAPSHOT OF THE BANANA TRADE: WHO GETS WHAT?* 16 (2010), <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN> (last visited Oct. 28, 2015). (Recent studies establish that the total value of bananas earned by retailers is between 36% and 43%), see BASIC, *BANANA VALUE CHAINS IN EUROPE AND THE CONSEQUENCES OF UNFAIR TRADING PRACTICES*, 51, 29 (2015), http://www.imvf.org/ficheiros/file/banana_value_chain_research_final_web.pdf (last visited Mar. 14, 2016).

⁶⁸⁷ See FOOD AND AGRICULTURE ORGANIZATION, *BANANA MARKET REVIEW AND BANANA STATISTICS 2013-2014* 8 (2014). See also BASIC, *BANANA VALUE CHAINS IN EUROPE AND THE CONSEQUENCES OF UNFAIR TRADING PRACTICES*, *supra* note 665.

⁶⁸⁸ Morazán, *supra* note 665, at 15. According to a study of the British Competition Commission a market share of 8% of food retailers is sufficient to create “demand power” that significantly affects the competitiveness of suppliers and distorts the competition among suppliers and retailers.

⁶⁸⁹ *Id.* at 16.

⁶⁹⁰ Fairtrade standards are designed to support the sustainable development of small producer organizations and agricultural workers in the poorest countries in the world at Fairtrade International. See generally FAIRTRADE INTERNATIONAL (FLO): AIMS OF FAIRTRADE STANDARDS, <http://www.fairtrade.net/standards/aims-of-fairtrade-standards.html> (last visited May 7, 2016).

on a fundamental principle of equitable dealing and should be enforceable and binding.⁶⁹¹

Building increased and constant price stability and equity along the supply chain is one of the flagship principles of sustainable development in agriculture, generally due to historic associations between commodity production and poverty.⁶⁹²

Banana—the world’s most popular fruit with an average yearly consumption per person estimated of more than 100 units—is the single biggest profit-making item sold on grocery shelves and frequently a weapon of choice in price wars between major supermarkets.⁶⁹³ Over the last few years, supermarkets have pushed banana prices to ridiculously low levels to attract consumers.⁶⁹⁴ However, banana growers and workers around the world are then being squeezed since, in the last decade, the retail price fell 40% while the cost of production doubled.⁶⁹⁵ Thus, banana farmers and workers are caught in between two strong systemic trends: on one side there is the pressure on prices driven from consumer markets and, on the other side, there is the ever increasing costs of production as well as predatory competition among banana producing

⁶⁹¹ CONSUMERS INTERNATIONAL, THE RELATIONSHIP BETWEEN SUPERMARKETS AND SUPPLIERS: WHAT ARE THE IMPLICATIONS FOR CONSUMERS? SUMMARY OF THE MAIN REPORT 12, 2 (2012).

⁶⁹² JASON POTTS ET AL., THE STATE OF SUSTAINABILITY INITIATIVES REVIEW 2014: STANDARDS AND THE GREEN ECONOMY 114 (2014), <http://scanprogram.org/sci/ssi/> (last visited Aug 14, 2016).

⁶⁹³ FAIRTRADE FOUNDATION, BRITAIN’S BRUISING BANANA WARS, WHY CHEAP BANANAS THREATEN FARMERS’ FUTURES 80, 13 (2014), <http://www.fairtrade.org.uk/>. See also, BASIC, BANANA VALUE CHAINS IN EUROPE AND THE CONSEQUENCES OF UNFAIR TRADING PRACTICES, *supra* note 665, at 5. (The consumption per capita differs significantly between European countries, ranging from less than 5 kg/person/year in Poland up to more than 17 kg/person/year in the United Kingdom, with an average consumption of 10 kg/person/year in the twenty-eight Members States of the European Union).

⁶⁹⁴ *Banana Link, Who earns what from field to supermarket?*, <http://www.bananalink.org.uk/who-earns-what-from-field-to-supermarket> (last visited Dec 8, 2015). See also, BASIC, BANANA VALUE CHAINS IN EUROPE AND THE CONSEQUENCES OF UNFAIR TRADING PRACTICES, *supra* note 665, at 5, 25 and 26. Consumer prices have increased slightly since 2001, except in the UK, where a banana price war between retailers has halved consumer prices, while wholesale prices have decreased by almost 25%. Retailers have increased their share of the banana value in most countries to between 36% and 43%, although the UK is a different case due to its particular market features.

⁶⁹⁵ FAIRTRADE FOUNDATION, *supra* note 672, at 5.

countries.⁶⁹⁶ Furthermore, the concentration of large producers hinders wealth distribution of such an important commodity.⁶⁹⁷ Consequently, a decline in import prices has been transferred to all major countries supplying Europe, where the value left at origin has fallen by 20% to 50% due to significant increases in both production and living costs.⁶⁹⁸

Bananas are economically and socially important, without any doubt, and are the fourth most important source of nutrition for the global population, following only rice, wheat, and corn.⁶⁹⁹ India, the major producer, does not even export a single banana due to the high demand of its own internal market.⁷⁰⁰ However, the European Union and the United States, as the main international consuming regions,⁷⁰¹ regulate the global banana market. Even today, the interests within these marketplaces and the main multinational companies have established an unfair trade system that needs to be changed.⁷⁰² With around 18% of the worldwide crop of 139 million tons,

⁶⁹⁶ OXFAM DEUTSCHLAND, BUREAU D'ANALYSE SOCIÉTALE POUR UNE INFORMATION CITOYENNE, ANALYSIS OF GERMAN BANANA VALUE CHAIN AND IMPACT ON SMALL FARMERS AND WORKERS 42, 31 (2014).

⁶⁹⁷ One-third of the production of bananas in ACP countries is in the hands of a single company developing its business in Cameroon and Ivory Coast. The Dominican Republic is a positive exception with over 1,800 small and medium size growers with clear strategy based on organic bananas. In the case of Cameroon, banana exports had reached 199,000 tons by September 2015. The company Plantations du Haut Penja (PHP), a Cameroonian subsidiary of the Fruit Company of Marseilles, remains the market leader, marketing 117,000 tons, around 60% of exports. While the state-owned Cameroonian Development Corporation (CDC), exported only 81,000 tons in the first nine months of the current year, Cameroon banana exports reach 200,000 tons. FRESHPLAZA: GLOBAL FRESH PRODUCE AND BANANA NEWS, <http://www.freshplaza.com/article/150248/Cameroon-banana-exports-reach-200,000-tonnes> (last visited Mar 17, 2016).

⁶⁹⁸ BASIC, BANANA VALUE CHAINS IN EUROPE AND THE CONSEQUENCES OF UNFAIR TRADING PRACTICES, *supra* note 665, at 5.

⁶⁹⁹ Food and Agriculture Organization, FAOSTAT, <http://faostat.fao.org/site/567/default.aspx#ancor> (last visited Feb 5, 2016).

⁷⁰⁰ FOOD AND AGRICULTURE ORGANIZATION, *supra* note 666, at 1–4.

⁷⁰¹ Food and Agriculture Organization, *supra* note 678. Out of a banana export market of 18 million tons, almost 10 million are destined for the European Union and the United States.

⁷⁰² Wei-en Tan, *State-Centric Realism Eclipsed: TNCs as the Rising Powerful Actors in the Age of Trade Liberalization*, 8 J. POLITICS & L. 223 (2015) (studying the concerns regarding the distribution being highly asymmetrical in the field of international trade and the owner of such power is usually not sovereign states, considering that the success in the global trade is dependent on Multinationals, not on sovereign states in the most of time, and many states are losing control of their autonomy and also losing control over the domestic trade affairs).

India is the leader among the ten main banana producing countries that altogether provide two-thirds of the total world production.⁷⁰³ Total world exports of around 18 million tons are only 12% of total global production.⁷⁰⁴ The concentration increases in relation to international markets since two-thirds of the exports are generated by only five countries, dominated by Ecuador with 29% of the world total.⁷⁰⁵

In July 2014, the European Commission adopted a Communication on tackling unfair trading practices (UTPs)⁷⁰⁶ in the food supply chain. UTPs are practices that deviate grossly from good commercial conduct and are contrary to good faith and fair dealing, which are unilaterally imposed by one trading partner on another. The Communication encouraged operators in the European food supply chain to participate in voluntary schemes aimed at reducing UTPs and promoting best practices. Recently, a Commission report concentrated on the existing frameworks for tackling UTPs with two main elements:⁷⁰⁷ (i) an assessment of the existing regulatory and enforcement frameworks in the European Member States; and (ii) an assessment of the impact of the voluntary European Union-wide Supply Chain Initiative (SCI) and the national SCI platforms that have been set up. But, are they applicable to imported commodities from developing countries? Is this newly opened debate and the instruments available also valid to those beyond European border? International concerns require global

⁷⁰³ FOOD AND AGRICULTURE ORGANIZATION, *supra* note 666, at 1–4.

⁷⁰⁴ *Id.* at 1–4.

⁷⁰⁵ *Id.* at 1–4.

⁷⁰⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling Unfair Trading Practices in the Business-to-Business Food Supply Chain, COM (2014) 472 final (Jul. 15, 2014).

⁷⁰⁷ Report from the Commission to the European Parliament and the Council on Unfair Business-to-Business Trading Practices in the Food Supply Chain, COM (2016) 32 final (Jan. 29, 2016).

solutions and examining the banana industry can help approach this matter through a critical but constructive legal analysis.

Since early 2010, a consortium of European civil society organizations have been campaigning under the banner “Make Fruit Fair” to raise awareness on the social and environmental issues related to banana production and trade.⁷⁰⁸ A recent study of the campaign shows how increasing market power and UTPs of European supermarkets affects small banana farmers and plantation workers.⁷⁰⁹ Evaluating banana value chains in Europe,⁷¹⁰ the study examines UTPs between fruit buyers in Europe and banana producers in exporting countries, the consequences for farmers and workers, and the relationship with prices in European markets.⁷¹¹ Among those, the first and foremost goal of UTPs is to accelerate the disappearance of small banana growers, which often cannot afford to remain in business because of low profitability.⁷¹² Proposed solutions include certification and regulation, together with high expectations on the outcomes of the World Banana Forum and fair trade.⁷¹³

The question to be addressed is the feasibility of changing the existing state of the play and transforming fruit commodities into a better and more equitable tool for development. The aim of the banana case study in this GI dissertation is to provide a global overview of the current challenges of the international banana trade and provide a new regulatory model to achieve a

⁷⁰⁸ MAKE FRUIT FAIR, <http://makefruitfair.org/> (last visited Mar 17, 2016).

⁷⁰⁹ BASIC, BANANA VALUE CHAINS IN EUROPE AND THE CONSEQUENCES OF UNFAIR TRADING PRACTICES, *supra* note 665.

⁷¹⁰ *Id.* at 3. (Including UK, Portugal, Malta, Italy, France, Germany, Austria, Czech Republic, Hungary, Poland, Latvia, and Romania).

⁷¹¹ *Id.* at 3.

⁷¹² *Id.* at 40.

⁷¹³ MAKE FRUIT FAIR, *supra* note 705.

better value distribution and other development aims. It is not easy to understand the current applicable rules and explain the lack of international reaction to some of the main concerns addressed by producing countries. Consequently, local and international rules must be established to ensure sustainability of the banana industry, market access, and adequate and fair distribution of value. This case study will develop on the fundamental role played by the European Union and the United States as large banana importers, existing IPR and GI regimes, international trade and association agreements, and the special relevance of the TTIP⁷¹⁴ as the most important bilateral trade agreement ever negotiated and a possible extension of GIs regulation under the TRIPS Agreement.

As the main importers, the global market of bananas is determined by the trade policies of the partners establishing the TTIP. Any decision under new bilateral partnerships may have a relevant impact on the already fragile existing consensus. In fact, pursuant to the Geneva Agreement on Trade in Bananas—signed in December 2009 and concluded between the European Union and the Latin American banana suppliers with support from the United States—a temporary solution was forced. The import tariffs for Latin American countries were progressively reduced and African, Caribbean, and Pacific Group of States (ACP) countries would have no choice but accept and initiate a race to adapt to the new market circumstances.⁷¹⁵

⁷¹⁴ For the importance of Europe *see* European Commission Impact Assessment Report on the future of European Union-US trade relations Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America, SWD (2013) 68 final (Mar. 3, 2013). For the United States perspective, *see* RAYMOND J. AHEARN, US-EU TRADE AND ECONOMIC RELATIONS: KEY POLICY ISSUES FOR THE 112TH CONGRESS 19 (2012).

⁷¹⁵ European Commission, BANANA ACCOMPANYING MEASURES (BAM). SUPPORTING ACP COUNTRIES IN ADJUSTING TO NEW TRADE REALITIES. QUESTIONS AND ANSWERS, EUROPEAN COMMISSION, MEMO/10/83, (MAR. 17, 2010), http://europa.eu/rapid/press-release_MEMO-10-83_en.htm?locale=en (last visited Oct 23, 2015). The Geneva Agreement was established in 2009 and the BAM Program has started to be practically implemented in 2015, but the levels of commitment of funds is really low.

Furthermore, initiatives of the European BAM Program were late and insufficient to compensate the new tariff reductions under bilateral and regional trade agreements granting to banana producers a lower rate of €75 per ton.⁷¹⁶ Many issues are on the table and a new debate opens the gate for proposals and solutions to make bananas much more than just a commodity but rather turn the banana industry into a key and comprehensive development tool both locally—providing equitable, structured and more social economies—and internationally through fairer and more equitable rules on trade.

Under the Lomé and Cotonou Agreements, Belize's export of bananas—like all other ACP countries—benefited from preferential trade arrangements to access the European market. This regime was reinforced by the 2007 European Partnership Agreement (EPA) concluded with a decision to implement a duty free quota free system for ACP bananas compatible with world trade regulations. At the same time, in accordance with the commitments under the Geneva Agreement on Trade in Bananas, the European Union agreed to eliminate the quotas on the Latin American Most Favored Nations (MFN) banana suppliers and apply only a schedule of tariffs with progressive reductions. But, beyond the Geneva Agreement, an Association Agreement was signed between the European Union and Central America, and later with other countries, in which one of the benefits granted is a program reducing the banana tariff from the original €176 per ton in 2006 to only €75 per ton in 2020.

⁷¹⁶ DAVID VANZETTI, SANTIAGO FERNÁNDEZ DE CÓRDOBA & VERONICA CHAU, BANANA SPLIT: HOW EUROPEAN UNION POLICIES DIVIDE GLOBAL PRODUCERS 27 (2005). (“Quantitative analysis using a bilateral trade model suggests that if the European Union were to remove its import quotas but leave intact the €75/tonne preferential tariff on non-ACP exports, traditional ACP countries would see their global exports just maintained, while Côte d'Ivoire, Cameroon and, to a lesser extent, non-ACP countries would enjoy significant increases. However, welfare in traditional ACP countries would fall by €37 million as a result of losses in quota rents. A tariff of €230/tonne on imports, as recently proposed by the European Commission, would reduce the welfare losses in traditional ACP countries by more than half but would prevent growth in exports in non-ACP countries. The results confirm that current European Union policies are poorly targeted and inefficient, and that there are better means of assisting producers in the high-cost countries.”).

The banana industry in Belize provides a thoughtful analysis on the subject matter and a great reference to understand the relevance of a new regulatory model. Originally part of the Mayan Empire of Central America, the country changed hands between Spain and Britain until becoming the British Honduras in 1862.⁷¹⁷ It was renamed Belize in 1973, and finally gained independence in 1981—a new country retaining a British legal system in the Caribbean and Central America that was strongly linked both to Europe and the United States due to political, social, and economic factors.⁷¹⁸ Belize is a member of the Caribbean Community (CARICOM),⁷¹⁹ the Community of Latin American and Caribbean States (CELAC),⁷²⁰ and the Central American Integration System (SICA).⁷²¹ It is the only country to hold full membership in all three regional organizations and serves as an excellent example to test innovative legal proposals and consider the impact of agreements under TTIP in the banana industries of developing countries. In fact, considering the expected continuous decrease on international tariffs and quotas within a highly regulated banana markets, the consequences are tremendous to

⁷¹⁷ See O. NIGEL BOLLAND, *BELIZE: A NEW NATION IN CENTRAL AMERICA* (1986).

⁷¹⁸ *Id.*

⁷¹⁹ Belize joined in May 2014. The Caribbean Community and the Caribbean Common Market replaced the Caribbean Free Trade Association on May 1, 1974. The Treaty of Chaguaramas establishing the Caribbean Community including the Caribbean Common Market was signed by Barbados, Guyana, Jamaica and Trinidad and Tobago on July 4, 1973, in Trinidad and Tobago and it came into effect on August 1, 1973. Under Article 3 of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, in force since February 4, 2002, members consist of: (a) Antigua and Barbuda, (b) The Bahamas, (c) Barbados, (d) Belize, (e) Dominica, (f) Grenada, (g) Guyana, (h) Jamaica, (i) Montserrat, (j) St. Kitts and Nevis, (k) Saint Lucia, (l) St. Vincent and the Grenadines, (m) Suriname, and (n) Trinidad and Tobago. For treaties, see generally <https://treaties.un.org> (last visited Nov 30, 2015) and in the case of CARICOM, see particularly <http://www.caricom.org> (last visited Nov 30, 2015).

⁷²⁰ CELAC is an intergovernmental mechanism for dialogue and political agreement which includes permanently thirty-three countries in Latin America and the Caribbean to promote regional integration and sustainable development and political cooperation, <http://www.celacinternational.org> (last visited Nov 30, 2015).

⁷²¹ On December 13, 1991, the Central American Integration System (SICA), was formed with the signing of the Tegucigalpa Protocol, which amended the Charter of the Organization of Central American States (ODECA) of 1962, created by the States of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, Belize and The Dominican Republic joined as full members in 2013, <http://www.sica.int> (last visited Nov 30, 2015).

the Caribbean countries, placing them in a critical situation. The lack of competitiveness, the reduction of the price per box of banana⁷²² and even harder conditions in the near future along with dependence on an exclusive buyer is provoking a necessary reaction, both locally and internationally, to facing a presumably dark future; the disappearance of banana productions have already started in the region.⁷²³ Actually, ACP countries including Dominica, Jamaica, Somalia, St. Lucia, and St. Vincent saw banana exports drop between the beginning of the past decade and 2006 by more than 80% (from 411,000 to 65,000 tons).⁷²⁴ Only Belize, Cameroon, Côte d'Ivoire, Dominican Republic and Suriname were able to keep their production.⁷²⁵ Since the introduction of the Single European Market in 1993—and the subsequent reforms of the European Union banana imports regime, which led to a substantial erosion of preferences given to ACP countries—the Dominican Republic has remained the only Caribbean country with significant banana exports.⁷²⁶

The impact of trade agreements and market regulations force an understanding and reaction to banana growers in developing countries. TTIP, EPA, trade agreements and regulatory frameworks, as any other legal text, make sense when considering impact beyond traditional borders and taking into account the global interests. A fresh view of the banana industry and the case of Belize will reinforce the debate on the establishment of a fair system to facilitate development. As a matter of fact, the aim of this academic contribution is not just to raise

⁷²² BASIC, BANANA VALUE CHAINS IN EUROPE AND THE CONSEQUENCES OF UNFAIR TRADING PRACTICES, *supra* note 665, at 16. Just to make a comparison, the average consumer price of bananas in Europe, as the main fresh fruit imported from outside Europe, is 25% lower than that of the most consumed local fruit, apples.

⁷²³ *Id.* at 40.

⁷²⁴ Giovanni Anania, *How Would a WTO Agreement on Bananas Affect Exporting and Importing Countries*, 21 ICTSD ISSUE PAPER 39, 5 (2009).

⁷²⁵ *Id.*

⁷²⁶ FOOD AND AGRICULTURAL ORGANIZATION, BANANA MARKET REVIEW 2013-2014, 1 (2015).

awareness on the importance of bananas for development but also to provide grounds and proposals for a regulatory model and future granting sustainability and competitiveness.

2. THE COMPLEX REGULATION OF INTERNATIONAL BANANA TRADE AND ACP COUNTRIES PREFERENCES TO ACCESS THE EUROPEAN AND UNITED STATES' MARKET

Bananas, as the most relevant and international fruit, constitute a dynamic but complex market. World production has expanded exponentially since the early 1990s, from around 50 million tons to 81.3 million tons in 2007,⁷²⁷ and 139.2 million tons in 2012.⁷²⁸ In 2013, the global banana trade surpassed 17 million tons exported worldwide to reach a new peak that was 6.1% higher than the previous year.⁷²⁹ Currently, Latin American and Caribbean countries are the main global banana exporters—particularly Ecuador, which annually supplies 5.3 million tons. Guatemala and Honduras also are notably increasing their production aided by the preferential tariffs granted by the European Union.⁷³⁰ The three largest banana importers in the world—the European Union (4.80 million tons or 29% of the market), the United States (4.38 million tons or 26% of the market), and the Russian Federation (1.30 million tons or 8% of the market)—all showed permanent growth in banana imports at 7%, 7.6%, and 5.3 %, respectively.⁷³¹

The banana trade flows show a clear pattern induced by current European Union and United States import regimes. Virtually all ACP exports are directed towards the European

⁷²⁷ Morazán, *supra* note 665, at 1.

⁷²⁸ FOOD AND AGRICULTURE ORGANIZATION, *supra* note 666.

⁷²⁹ *Id.* at 1.

⁷³⁰ *Id.* at 1.

⁷³¹ *Id.* at 2.

Union, while Latin American MFN countries export bananas to Europe, Russia, and North and South America.⁷³² As specifically noted by FAO, the share of “dollar” bananas consumed in Europe is 69.2%, while consumption of those imported from the ACP countries accounted for 19.5%.⁷³³

Unfortunately for producers, import prices have not increased. Despite the strong demand, the recovery of Ecuadorian production as well as plentiful supplies from Central America has impeded a better price for ACP producers. The average import remained at \$800 per ton, but in euros the price declined from the exceptionally high level of €623 per ton registered in 2012 to €603 in 2013, dropping below €600 in September that year and remaining low for the remaining months of the year.⁷³⁴ Beyond the price reduction, the negative impact of Euro/U.S. Dollar depreciation had a tremendous economic impact for exports to Europe. The exchange rate of \$1.38 at the end of 2013 dropped to \$1.09 by the end of 2015; with a value decrease of almost thirty percent, the impact on producers is extremely high.⁷³⁵

Within a highly competitive international context, the European Union has evidenced a permanent concern on ACP banana producers facilitating access market and considering development issues. Relations with the ACP countries are longstanding, since the first Convention of Yaoundé in 1963,⁷³⁶ and later reinforced with the development of the Lomé

⁷³² Morazán, *supra* note 665, at 3.

⁷³³ FOOD AND AGRICULTURE ORGANIZATION, *supra* note 666, at 3.

⁷³⁴ *Id.* at 4.

⁷³⁵ European Central Bank, EURO-USD EXCHANGE RATES, <https://www.ecb.europa.eu/stats/exchange/eurofxref/html/eurofxref-graph-usd.en.html> (last visited Mar 22, 2016).

⁷³⁶ YAOUNDÉ CONVENTION, EUROPEAN ECONOMIC COMMUNITY AND AFRICAN STATES, MADAGASCAR AND MARURITIUS, (1963), http://www.epg.acp.int/fileadmin/user_upload/YaoundeI.pdf.

Convention in 1975.⁷³⁷ Permanent agreements have been established in a continuous joint effort to face certain fundamental common challenges. The historical evolution of the relationship between Europe and the ACP countries shows that it has not happened in isolation,⁷³⁸ but, on the contrary, has taken into account the progress and evolution of the overall international context.⁷³⁹ Consequently, The European Union maintains privileged political, trade, and development cooperation relations with ACP countries under the revised ACP-European Union Partnership Agreement signed in Cotonou on June 23, 2000.⁷⁴⁰

Obviously the unbroken ties kept with some European Union Member States enhanced the Caribbean-European Partnership for member countries—including Belize. As former colonies, overseas countries and territories, and outermost regions associated with the European Union, Caribbean countries maintain strong economic and political relation with Europe. Consequently, the Cotonou Agreement and the CARIFORUM-European Union Economic Partnership Agreement⁷⁴¹ are fundamental for international trade in the region.

⁷³⁷ LOMÉ CONVENTION, EUROPEAN ECONOMIC COMMUNITY AND AFRICAN, CARIBBEAN, AND PACIFIC COUNTRIES, (1975), http://www.eurostudium.uniroma1.it/documenti/cooperazione/Lome_convention.pdf.

⁷³⁸ Dominique David, *Years of Europe-ACP Relationship*, 23 ACP-EUROPEAN UNION PARTNERSH. AGREEM. SIGNED COTONOU ON 11–14, 11 (2000), http://ec.europa.eu/development/body/publications/courier/courier_acp/en/en_011.pdf.

⁷³⁹ For a detailed study, see Lionel Fontagné, David Laborde & Cristina Mitaritonna, *An Impact Study of the European Union-ACP Economic Partnership Agreements (EPAs) in the Six ACP Regions*, (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1194965 (last visited Dec 8, 2015).

⁷⁴⁰ COTONOU AGREEMENT, EUROPEAN COMMUNITY AND ITS MEMBER STATES AND THE MEMBERS OF THE AFRICAN, CARIBBEAN AND PACIFIC GROUP OF STATES, O.J. L 317, 15.12.2000, P. 3–353 (2000).

⁷⁴¹ ECONOMIC PARTNERSHIP AGREEMENT (EPA), EUROPEAN COMMUNITY AND ITS MEMBERS STATES AND CARICOM COUNTRIES, O.J. L 289, 30.10.2008, P. 3–1955.

The Caribbean Basin Economic Recovery Act (CBERA),⁷⁴² adopted in 1983 established a legal framework for relationships with the United States, providing unilateral duty-free access for most goods to the United States market to 24 beneficiary countries in Central America and the Caribbean. The effect of CBERA on the United States economy is negligible, representing a minor share of 0.5% of the total value of United States merchandise imports.⁷⁴³ The U.S.-Caribbean Trade Partnership Act (CBTPA), which first entered into force on October 1, 2000, expanded the list of duty-free products and offered more market access opportunities to CBTPA-eligible countries, such as Belize. The Caribbean Basin Economic Recovery Expansion Act of 1990, made permanent by NAFTA and Mexico exports to the United States, really had an economic impact. However, under the 2000 CBTPA, certain exports from the region continue to receive preferential status that will likely be replaced by bilateral free trade agreements, and possibly by the proposed Free Trade Area of the Americas.

Both the European Union and the United States thus provide duty-free access to imports from Belize. Under the EPA, imports of all agricultural products into the European Union from Belize are duty-free, with exceptions for rice and sugar⁷⁴⁴ (although a transitional safeguard mechanism remains available if there is risk of serious damage to the European Union sugar industry). The issue is that these benefits are spreading to other non-ACP countries, particularly regarding bananas, placing Belize in the need to compete and adapt quickly to an open market.

⁷⁴² The Caribbean Basin Economic Recovery Act was enacted in 1983 as part of the Caribbean Basin Initiative. CBERA was intended to encourage economic growth and development in the Caribbean Basin countries by promoting increased production and exports of nontraditional products.

⁷⁴³ UNITED STATES INTERNATIONAL TRADE COMMISSION, CARIBBEAN BASIN ECONOMIC RECOVERY ACT: IMPACT ON U.S. INDUSTRIES AND CONSUMERS AND ON BENEFICIARY COUNTRIES. 21ST REPORT 2011-12 164, ix, Executive Summary (2013).

⁷⁴⁴ Many of the European Union's ACP trading partners already had duty-free and quota-free access to the European Union market under the "Everything but Arms" (EBA) scheme for the world's least-developed countries (LDCs).

Under current regional and international context, and as a compulsory request from the European Union, the European Union-Belize Cooperation Strategy for the period 2008-2013 focused on rural development.⁷⁴⁵ Under the Accompanying Measures for ACP Sugar Protocol Countries,⁷⁴⁶ the European Union supported Belize in improving the efficiency of cane production and processing, as well as economic diversification. In addition, under the Special Framework of Assistance to ACP Banana Producing Countries,⁷⁴⁷ the goals of the cooperation are to assist the region in a shift from over-dependency on commodity exports to focus on services and integration into the global economy. The 10th European Development Fund (EDF)⁷⁴⁸ included programs to assist the most vulnerable people with economic reforms as well as social issues, such as the fight against illegal drugs, as well as strengthen non-state actors and skills within regional institutions.

In November 2012, the European Union and the Caribbean states adopted the new Joint Caribbean-European Union Partnership Strategy.⁷⁴⁹ This Strategy enhanced Caribbean-European

⁷⁴⁵ EUROPEAN COMMISSION, BELIZE: EUROPEAN COMMUNITY COUNTRY STRATEGY PAPER AND NATIONAL INDICATIVE PROGRAMME FOR THE PERIOD 2008 - 2013 (2008).

⁷⁴⁶ The Accompanying Measures for Sugar Protocol countries (AMSP) program (2007-13) was set up following the reform in 2006 of the EU's sugar regime. It was designed to support the adaptation process of eighteen Sugar Protocol countries traditionally exporting sugar to the EU. REGULATION (EC) NO 1905/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 18 DECEMBER 2006 ESTABLISHING A FINANCING INSTRUMENT FOR DEVELOPMENT COOPERATION, O.J. (L 378) 41 (2006).

⁷⁴⁷ COUNCIL REGULATION (EC) NO 215/2008 OF 18 FEBRUARY 2008 ON THE FINANCIAL REGULATION APPLICABLE TO THE 10TH EUROPEAN DEVELOPMENT FUND, O.J. (L 78), 19.3.2008, P. 1–34.

⁷⁴⁸ Communication from the Commission to the Council and the European Parliament, Biennial Report on the Special Framework of Assistance for Traditional ACP suppliers of Bananas, COM (2010) 103 final, not published in the Official Journal. Each EDF is concluded for a period of several years: 1st EDF: 1959-1964; 2nd EDF: 1964-1970 (Yaoundé I Convention); 3rd EDF: 1970-1975 (Yaoundé II Convention); 4th EDF: 1975-1980 (Lomé I Convention); 5th EDF: 1980-1985 (Lomé II Convention); 6th EDF: 1985-1990 (Lomé III Convention); 7th EDF: 1990-1995 (Lomé IV Convention); 8th EDF: 1995-2000 (Lomé IV Convention and the revised Lomé IV); 9th EDF: 2000-2007 (Cotonou Agreement); 10th EDF: 2008-2013 (Revised Cotonou Agreement); 11th EDF: 2014-2020 (Revised Cotonou Agreement).

⁷⁴⁹ EUROPEAN COMMISSION, JOINT COMMUNICATION TO THE COUNCIL. JOINT EUROPEAN UNION-CARIBBEAN PARTNERSHIP STRATEGY, JUNE 26, 2012 (2012) 18.

Union relations and broadened engagement by adding a political pillar to the traditionally development and trade cooperation-based relationship. It was aimed at rethinking, repositioning, and refocusing the partnership in order to maximize the benefits of the special bi-regional relationship.

As Belize attempts to address its lack of export competitiveness, inefficient production patterns, and high costs of doing business, it will be faced with new challenges and opportunities. Therefore, a vision of sustained international competitiveness in the export performance of value-added and niche products and services contributes to the achievement of national development and poverty reduction plan.

3. UNDERSTANDING THE UNITED STATES – EUROPEAN UNION BANANA WAR AND ITS TERRIBLE CONSEQUENCES TO THE ACP BANANA GROWERS

The economic importance of the banana market in the United States and the European Union is evident for most developing countries and contributes to the history of trade disputes.⁷⁵⁰ Initially, the European Union, through the founding treaties and particularly the Banana Protocol of the Treaty of Rome,⁷⁵¹ allowed Member States to restrict banana imports. The Common Market Organization for Bananas (CMOB) established in 1993,⁷⁵² regulated this matter for the first time as a unique combination of tariff elements—combining pure tariffs, quota rates, and *de*

⁷⁵⁰ *Communication from the Commission to the Council and the European Parliament - Biennial Report on the Special Framework of Assistance for Traditional ACP Suppliers of Bananas*, at 1, COM (2010) 103 final (Mar. 17, 2010), not published in the Official Journal.

⁷⁵¹ Treaty Establishing the European Economic Community, Mar. 25, 1957, Banana Protocol, 298 U.N.T.S. 11, at 162 [hereinafter EEC Treaty]. Article 15 established that “Imports, coming from third countries, of unroasted coffee into Italy and the Benelux countries, on the one hand, and of bananas into the Federal Republic of Germany, on the other hand, shall benefit from tariff quotas under the conditions laid down in the Protocols annexed to this Convention.”

⁷⁵² Council Regulation (EEC) No 404/93 of Feb. 13, 1993 on the common organisation of the market in bananas, O.J. (L 47), 1–11.

facto prohibitions, together with provisions for preferential trade. Since then, three phases have been clearly distinguished:⁷⁵³ (i) 1993-1999, when the first regime applicable to all European Union member countries was introduced and challenged at the WTO and the first modifications were made with changes to the methods for delivery of import licenses; (ii) 1999-2005, when transition to a “tariff only” regime occurred; (iii) 2006-2009, where the EPAs were signed as well as the “Geneva Agreement” of 2009, and a web of multilateral and bilateral agreements that the European Union signed with Latin American banana producers—including Colombia, Peru, Ecuador and Central American countries. The European Union has had a noticeable effect on the banana market.

As a consequence of the established regimes, the European Union banana market has traditionally been supplied by three different groups: (i) domestic production, (ii) ACP exports, and (iii) MFN countries, originating mainly Central and Southern America. European Union policy has been extremely controversial since its creation due to its importance and impact on the global market.⁷⁵⁴ The 1993 regime imposed costly resource transfers from one group of underdeveloped nations to another and it is estimated that Latin American nations incurred a cost of \$0.32 for every dollar of aid reaching preferred suppliers (\$98 million a year).⁷⁵⁵

Bananas grown within the European Union accounted in 2012 for about 12.6% of total European Union consumption. They are produced primarily in the outermost regions situated in tropical or sub-tropical areas, as well as approximately 1% of total European Union production

⁷⁵³ MASSIMILIANO CALI, RODERICK ABBOTT & SHEILA PAGE, *THE EUROPEAN UNION BANANA REGIME: EVOLUTION AND IMPLICATIONS OF ITS RECENT CHANGES* (2010).

⁷⁵⁴ Chacón-Cascante and Crespi, *supra* note 729, at 118.

⁷⁵⁵ *Id.* at 122.

in Cyprus, Greece, and continental Portugal. The reform of the CMOB⁷⁵⁶ came against the background of the new European Union import arrangements for bananas, global trade negotiations, a new generation of partnership agreements with the ACP countries, and the renewal of the EU's policy towards its outermost regions as well as the POSEI program specifically dedicated to supporting their agriculture.⁷⁵⁷

The regime introduced by the European Union in 2006 was based on a tariff-only system and established a MFN tariff of €176 per ton for imported bananas.⁷⁵⁸ At that stage, ACP banana suppliers continued benefitting from duty-free access within a maximum limit of 775,000 tons. The reform aims were: to ensure a fair standard of living for the agricultural community in regions where bananas were produced while stabilizing public expenditure; to align the regime with the main principles of agricultural reform—sustainability, competitiveness, market-orientation—and enforce the respect of the European Union's international obligations; to adequately take into account the particularities of producing regions; and to simplify the management of the regime.

In the case of ACP countries, the compensatory aid scheme for banana growers, in force since 1993, was abolished at the end of 2006 and, in 2007, an additional envelope of €278.8

⁷⁵⁶ Council Regulation (EC) No. 2013/2006 of Dec. 19, 2006 amending Regulations (EEC) No 404/93, (EC) No 1782/2003 and (EC) No 247/2006 as regards the banana sector, O.J. (L 384), 13–19.

⁷⁵⁷ Council Regulation (EC) No. 247/2006 of Jan. 30, 2006, and Amending Acts, laying down specific measures for agriculture in the outermost regions of the Union. (The Outermost Regions (OR) are called “outermost” due to their geographical remoteness from Europe and are listed in Article 349 of the Treaty on the Functioning of the EU: the French Overseas Departments (OD): Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin; the Azores and Madeira (Portugal); AND the Canary Islands (Spain)).

⁷⁵⁸ Council Regulation (EC) No. 1964/2005 of Nov. 29, 2005 on the tariff rates for bananas, O.J. (L 316), 1–2.

million for banana aid was added to the funds for the POSEI scheme,⁷⁵⁹ which supports agricultural production in the outermost regions of the EU.

The treatment of the European Union to the import of bananas from ACP countries, preferring those originating from Latin America, caused “Banana War” or “Banana Split.”⁷⁶⁰ Known as one of the longest running disputes in the multilateral trading system,⁷⁶¹ bananas generated litigation among the widest range of the entire WTO membership, led by the European Union on one side and several American States with the support of the United States, on the other. As a Member of the WTO, the European Union is bound by the central obligation to treat all other WTO Members equally under the MFN principle but agreements with third countries commit to special treatment. Actually, particularly in the field of bananas, the tension between non-discriminatory and preferential treatment is as old as the European Union itself.⁷⁶²

⁷⁵⁹ Commission Regulation (EC) 793/2006 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, O.J. (L 145). Other related acts and rules of application are Commission Decision 2007/609/EC of 10 September 2007 on the definition of the measures eligible for Community financing in the programmes for the control of organisms harmful to plants and plant products in the French overseas departments, in the Azores and in Madeira, O.J. (L 242); Commission Decision 2009/126/EC on the Community’s financial contribution to a programme for the control of organisms harmful to plants and plant products in the French overseas departments for 2009, O.J. (L 44); and Commission Regulation (EC) 792/2009 laying down detailed rules for the Member States’ notification to the Commission of information and documents in implementation of the common organisation of the markets, the direct payments’ regime, the promotion of agricultural products and the regimes applicable to the outermost regions and the smaller Aegean islands, O.J. (L 228).

⁷⁶⁰ Steve Peers, *Banana Split: WTO Law and Preferential Agreements in the EC Legal Order*, 4 EUR. FOREIGN AFF. REV. 195 (1999). Peter Clegg, *Banana splits and policy challenges: The ACP Caribbean and the fragmentation of interest coalitions*, 79 EUR. REV. LAT. AM. CARIBB. STUD. 27 (2005). Aisha L. Joseph, *Banana Split: Has the Stalemate Been Broken in the WTO Banana Dispute-The Global Trade Community’s A-Peel for Justice*, 24 FORDHAM INT’L L.J. 744 (2000). Bozena Ziedalski, *World Trade Organization and the Transatlantic Banana Split, The*, 5 NEW ENG. INT’L & COMP. L. ANN. 303 (1999).

⁷⁶¹ Eckart Guth, *The End of the Bananas Saga*, 46 J. WORLD TRADE 1 (2012) (describing the numerous attempts to find a solution to this trade conflict through the WTO-Dispute Settlement Mechanism and analyzes the legal, economic, political and procedural aspects of the negotiations assessing the possible benefits).

⁷⁶² Peers, *supra* note 739, at 195.

Eighteen years after the establishment of the unique banana regulation, and many disputes,⁷⁶³ the European Union and ten Latin-American countries concluded the “Geneva Agreement on Trade in Bananas” (GATB) on December 15, 2009⁷⁶⁴ where the European Union agreed to gradually reduce tariffs. Provisionally applied by the European Union since June 2010, GATB entered into force on May 1, 2012 triggering an obligation for the European Union to submit the new tariff line at the WTO for certification, in accordance with the procedure for formally modifying a schedule of tariff concessions.⁷⁶⁵ The certification of the European Union banana tariff line was launched on July 27, 2012. The new European Union banana tariffs replaced the former entry in the European Union schedule by virtue of an act of the WTO Director General on October 27, 2012. Two weeks after the certification of GATB, the relevant parties to the agreement notified the Dispute Settlement Body that they reached a mutually agreed solution to end the disputes.⁷⁶⁶ Finally, on November 8, 2013, the European Union and the Latin American banana producing countries signed the agreement and the “Banana War” ended. The WTO Geneva Agreement on trade in bananas thus ended the long-running disputes, however, its consequences considerably impacted the market.

The agreement consists of three main components:⁷⁶⁷

⁷⁶³ For a detailed chronology of the banana disputes in GATT/WTO WTO, *see* PRESS RELEASES, LAMY HAILS ACCORD ENDING LONG RUNNING BANANA DISPUTE, PRESS/591 (2009), https://www.wto.org/english/news_e/pr591_e.htm (last visited Jan 8, 2016).

⁷⁶⁴ GENERAL COUNCIL WTO, GENEVA AGREEMENT ON TRADE IN BANANAS. COMMUNICATION FROM BRAZIL, COLOMBIA, COSTA RICA, ECUADOR, EUROPEAN UNION, GUATEMALA, HONDURAS, MEXICO, NICARAGUA, PANAMA, PERU AND THE BOLIVARIAN REPUBLIC OF VENEZUELA (2009).

⁷⁶⁵ *Id.*

⁷⁶⁶ *Id.*

⁷⁶⁷ Morazán, *supra* note 665, at 6.

- Tariff reductions under an agreed schedule for MFN banana exporters cutting from €176 per ton to €114 by 2017.
- The tariff will then fall successively again at the start of each year for seven years— from €143 to €114, starting on January 1, 2011.
- In addition, the agreement requires the European Union to freeze cuts for up to two years if WTO members do not conclude talks on agriculture in the Doha Round by the end of 2013.⁷⁶⁸

Therefore, reductions in the European Union banana import tariffs are the result of the negotiated settlement of challenges at the WTO stopping further legal action through the Dispute Settlement Mechanism. It is important to note that the Appellate Body decisions continually ruled against the European CMOB. The BAM Program was then established with a budget of €190 million to help ACP countries adjust and build on previous support to help tackle the Geneva agreement consequences.⁷⁶⁹ The long existing differences between “dollar” banana countries influenced by the United States that developed business in North America and the ACP producers maintaining strong links with Europe were finally brought to the trade table to find a compromise.

Moreover, in 2010 the European Union concluded trade agreements with Colombia and Peru as well as the Association Agreement with six Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama). In July 2014, a similar agreement was

⁷⁶⁸ *Id.* at 7.

⁷⁶⁹ *Id.* at 8.

reached with Ecuador.⁷⁷⁰ In all of these agreements, the provisions on bananas were priority. As a matter of fact, and considering previous aid schemes to compensate for loss of export earnings and to provide finance for restructuring to ACP banana producers have been hardly questioned. As a matter of fact, direct compensation often served to aggravate dependence and delay reform rather than facilitate adjustment.⁷⁷¹

For well over a century, the main fruit multinationals companies have affected every level of social, economic, and political history in Latin America.⁷⁷² Much has been written on the tremendous influence in the region of the United Fruit Company, and others that followed.⁷⁷³ From participation in military coups against opposing governments to dictating national policies, banana companies have controlled far more than just their main fruit commodity. Multinational trading companies, and in particular the three largest banana traders (Chiquita, Dole, and Del Monte), historically exerted substantial market power on the purchasing side, engaging in production, transport, and marketing of bananas.⁷⁷⁴ However, the scope of their operations and their influence over the banana trade has decreased—from the 1980s when they controlled

⁷⁷⁰ GIOVANNI ANANIA, IMPLICATIONS OF TRADE POLICY CHANGES FOR THE COMPETITIVENESS OF ECUADORIAN BANANA EXPORTS TO THE EUROPEAN UNION MARKET 37 (2011).

⁷⁷¹ IAN GILLSON, ADRIAN HEWITT & SHEILA PAGE, FORTHCOMING CHANGES IN THE EUROPEAN UNION BANANA/SUGAR MARKETS: A MENU OF OPTIONS FOR AN EFFECTIVE EUROPEAN UNION TRANSITIONAL PACKAGE 84, 77 (2004).

⁷⁷² Mahamat K. Dodo, *Multinational Companies in Global Banana Trade Policies*, 5 FOOD PROCESS. TECH. 1 (2014) (expanding on the changing role of the multinational companies in global banana trade, and concludes with the industry outlook and the new role of the retail supermarket chains in international banana trade).

⁷⁷³ MARCELO BUCHELI, BANANAS AND BUSINESS: THE UNITED FRUIT COMPANY IN COLOMBIA, 1899-2000 (2005) ; STEVE STRIFFLER & MARK MOBERG, BANANA WARS: POWER, PRODUCTION, AND HISTORY IN THE AMERICAS (2003).; STEVE STRIFFLER, IN THE SHADOWS OF STATE AND CAPITAL: THE UNITED FRUIT COMPANY, POPULAR STRUGGLE, AND AGRARIAN RESTRUCTURING IN ECUADOR, 1900–1995 (2001) ; Marcelo Bucheli, *Multinational Corporations, Totalitarian Regimes and Economic Nationalism: United Fruit Company in Central America, 1899–1975*, 50 BUS. HIST. 433 (2008), <http://www.tandfonline.com/doi/full/10.1080/00076790802106315> (last visited Jun 16, 2016).

⁷⁷⁴ THE CHANGING ROLE OF MULTINATIONAL COMPANIES IN THE GLOBAL BANANA TRADE, 4, 1 (2014), <http://www.fao.org/docrep/019/i3746e/i3746e.pdf>.

almost two-thirds (65.3%) of global banana exports, to 2013 where they controlled only about one-third (36.6%).⁷⁷⁵ The market is being progressively opened since other companies now account for over half of all banana exports while the share of the top five companies recently dropped to 44.4%, after managing over 70% only a decade ago.⁷⁷⁶

One big change was the Brazilian purchase of Chiquita Brands International, Inc. (“Chiquita”). Chiquita, along with the Cutrale and Safra Groups (“Cutrale-Safra”), announced in January 2015 the completion of the transactions under which Cutrale-Safra acquired Chiquita via its affiliate, Cavendish Acquisition Corporation.⁷⁷⁷ The entrance of new stakeholders, and the importance of NGOs, fair trade institutions and multilateral research groups such as the World Banana Forum,⁷⁷⁸ created a proper social and economic environment to develop a legal system that may bring added value of banana back to the legitimate owners.⁷⁷⁹

A couple decades ago, any changes to the industry seemed almost impossible. The state of world affairs promoted transnational corporation due to low transaction costs, globalization and a decrease in trade barriers. Therefore, multinational companies could only be fought

⁷⁷⁵ *Id.* at 1.

⁷⁷⁶ *Id.*

⁷⁷⁷ The European Commission approved, under the European Union Merger Regulation, the acquisition of Chiquita Brands International by the two Brazilian groups Cutrale and Safra. Cutrale is active worldwide in the distribution of orange juice and orange by-products and Safra consists of a group of companies dedicated to financial services. After careful review, the Commission concluded that the proposed acquisition would not raise competition concerns, because of the minimal overlaps between the activities of Chiquita and Cutrale while Safra is not active in the same fields. The transaction was examined under the simplified merger review procedure and complete information is available on the Commission's competition website (http://ec.europa.eu/competition/index_en.html), in the public register under the case number M.7453.

⁷⁷⁸ THE WORLD BANANA FORUM (WBF), http://www.fao.org/economic/worldbananaforum/wbf-aboutus/en/#.VrPvUfE_dlp (last visited Feb 5, 2016).

⁷⁷⁹ Paulette L. Stenzel, *Mainstreaming Fair Trade and Resulting Turmoil: Where Should the Movement Go from Here*, 37 WM. & MARY ENVTL. POL'Y REV. 617–73 (2012). This article, among others, provides a definition of Fair Trade, outlines its history, and explains how its certification system has evolved demonstrating that Fair Trade promotes sustainability in each of the three legs of the Triple Bottom Line.

through government regulations reallocating the land to producers since it was not viable for individual producers in Latin America to compete.⁷⁸⁰ However, now the markets seem to be changing due to the demands by consumers as corporate social responsibility is being widely considered an important consumer goal.⁷⁸¹ While Chiquita is the main importer to Europe—followed by Dole, Fyffes, and Del Monte—there are three other competitors with over 200,000 tons of banana imports per year: Noboa from Ecuador, the UK retailer Tesco, and Compagnie Fruitière, which is the main supplier of African bananas.⁷⁸² Thirteen companies are importing over 20,000 tons per year,⁷⁸³ and, increasingly, the players importing less than 20,000 tons per year are more numerous, such as Banacol, Aquigrut, N.Smyth, Banalat, or Agrofair.⁷⁸⁴

With the end of the “Banana War” in 2012 between the European Union and the United States as well as the Latin American banana producing countries, the gradual reduction of MFN tariffs is impacting the market. Furthermore, due to trade and association agreements, European duties on bananas from Colombia, Peru, and Central American⁷⁸⁵ countries have been reduced

⁷⁸⁰ The Viability of the World Banana Market for Independent Producers in Guatemala and Other Latin American Nations, ETHICS OF DEVELOPMENT IN A GLOBAL ENVIRONMENT (1999), http://web.stanford.edu/class/e297c/war_peace/americas/hviability.html (last visited Feb 7, 2016).

⁷⁸¹ Jonathan Bellish, *Towards a More Realistic Vision of Corporate Social Responsibility Through the Lens of the Lex Mercatoria*, 40 DENV. J. INT'L L. & POL'Y 548 (2011).

⁷⁸² BASIC, BANANA VALUE CHAINS IN EUROPE AND THE CONSEQUENCES OF UNFAIR TRADING PRACTICES, *supra* note 665, at 23.

⁷⁸³ *Id.* at 23. The thirteen companies include De Groot (Belgium and the Netherlands); Univeg (Germany and Belgium); Winfresh (UK), Interbanana (Denmark and Sweden); Cobana, Durbeck and AFC (Germany), Fresca Group (UK and Germany); Global Pacific Produce (UK), and Uniban (UK and Italy).

⁷⁸⁴ BASIC, BANANA VALUE CHAINS IN EUROPE AND THE CONSEQUENCES OF UNFAIR TRADING PRACTICES, *supra* note 665, at 24.

⁷⁸⁵ The European Union and six Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) reached a free trade agreement on May 16, 2010 to liberalize the trade in bananas in order to reduce duties on bananas to €75 over 10 years. Given the fact that Costa Rica, Guatemala, and Panama are already increasing their banana export market share, it is likely that the reduction to €75 Euros/ton will significantly increase banana exports to the EU.

from €124 per ton in 2013 in pursuit of €75 per ton by 2020.⁷⁸⁶ ACP banana supplier's benefit from duty and quota free access to the European Union market under the EPAs but their competitiveness is not evident even considering the reduction of tariffs. As a consequence, Ecuador is currently the only major supplier to the European Union market without preferential market access for bananas, although under the European Union-Andean Trade Agreement they have €1 per ton above the preferential tariff rate given by the European Union to the Central American countries. Colombia, Ecuador and Peru will obtain these preferential tariffs after 2019.⁷⁸⁷

The International Center for Trade and Sustainable Development (ICSTD) forecasted that one-third of the benefits resulting from the preferences granted by the European Union within the EPA context would be eroded with terrible effect for banana producers.⁷⁸⁸ In 2010 the estimation was already quite accurate considering that ACP banana exports would decrease by up to 14% whereby Caribbean exporters were likely to be worst affected.⁷⁸⁹ At the end of the “Banana War,” the European Union announced that devastating effects were expected for the Caribbean Islands. Even though a detailed assessment of possible social and economic impacts was not yet available, the estimations were already considering the impact that is now a reality.⁷⁹⁰ Considering that the international banana trade is managed by a group of countries and companies whose economic and commercial interests are still clearly competing against one

⁷⁸⁶ Morazán, *supra* note 665, at 6.

⁷⁸⁷ FOOD AND AGRICULTURE ORGANIZATION, *supra* note 666, at 6 & 7.

⁷⁸⁸ Anania, *supra* note 703, at 16.

⁷⁸⁹ *Id.* at 16.

⁷⁹⁰ Morazán, *supra* note 665, at 8.

another the current regulatory framework place producers in a very difficult position.⁷⁹¹ The grassroots efforts to present this dispute as a war between “good” and “bad” bananas—depending on worker conditions and social impact—served primarily to mask the underlying inequity of the global trading system and to delay critiques necessary to make the system work towards its promise of a better life for all and fair commerce of bananas.⁷⁹²

4. THE IMPORTANCE OF THE BANANA INDUSTRY TO BELIZE

The World Banana Forum works to create banana production and trade that are sustainable from environmental, social, and economic perspectives.⁷⁹³ Its mission is also to guarantee that every actor in the supply chain, from producers to retailers, receives a fair price that covers costs and ensures a reasonable profit margin.⁷⁹⁴ From this global perspective, and considering the importance of tropical fruit production for developing countries, it is important to understand its relevance for Belize.

Formerly the last colony of the United Kingdom on the American continent, Belize gained its independency in 1981. This English speaking country shows strong historical and socio-political links with the Caribbean island-states being full member of the Caribbean Community (CARICOM) founded in 1973, and since 1990 after joining the Organization of American States it became—politically as well as economically—more synchronized with its

⁷⁹¹ Dodo, *supra* note 751, at 7.

⁷⁹² Ibrahim J. Gassama, *Good Bananas, Bad Bananas: Hard Lessons from a Soft War*, 104 AM. SOC'Y INT'L L. 469, 472 (2010).

⁷⁹³ Food and Agriculture Organization, *supra* note 757.

⁷⁹⁴ *Id.*

neighbors even taking part in the Central American Integration System (SICA).⁷⁹⁵ In 1960, Belize was the second-poorest country in the region and now its economic data place the Caribbean countries near Costa Rica and Panama, although since 2004, economic growth has been sluggish, barely above the rate of population growth, implying that reactivating economic growth is a central development challenge for the country.⁷⁹⁶

Belize is located in Central America and the Caribbean, with a total land area of 22,963 km² and a population of 312,698 inhabitants that is multi-cultural and linguistically diverse—mestizo (50%), Creole (25%), Mayan (10%), Garifuna (6%), and other (9%). Today, agriculture remains the primary economic sector in terms of income generation, employment, food security, and poverty alleviation, contributing 12% to GDP, 66% of foreign exchange earnings, and engaging over 25% of the labor force in 2010.⁷⁹⁷ Key social indicators demonstrate that Belize has made either slow progress or regressed in achieving certain national and international development targets, such as poverty reduction and educational attainment, while significant interventions are needed to achieve growth in employment, and improvement in human development.⁷⁹⁸

Agriculture, in particular the banana industry, is critical to the Belizean economy. For decades, Belize's main exports have been commodities with access to preferential markets—namely sugar, citrus, and bananas—and therefore the economy is still primarily dependent on its

⁷⁹⁵ See BOLLAND, *supra* note 696.

⁷⁹⁶ John Horton et al., *Towards a Sustainable and Efficient State: The Development Agenda of Belize*, INTER-AM. DEV. BANK 265, 3 (2010), <http://publications.iadb.org/handle/11319/385> (last visited Oct 28, 2015).

⁷⁹⁷ Belize Facts and Figures: The Population of Belize, <http://belizeinfocenter.org/belize-facts-and-figures-the-population-of-belize/> (last visited Feb 7, 2016).

⁷⁹⁸ MINISTRY OF AGRICULTURE AND FISHERIES AND MINISTRY OF ECONOMIC DEVELOPMENT, COMMERCE, INDUSTRY AND CONSUMER PROTECTION, *BELIZE COUNTRY STRATEGY FOR THE BANANA INDUSTRY AND THE SOCIO ECONOMIC DEVELOPMENT OF STANN CREEK AND NORTHERN TOLEDO DISTRICTS 2011-2016*, 4 (2011).

major agricultural exports.⁷⁹⁹ As Jamaican Prime Minister Percival J. Patterson explained to Bill Clinton, President of the United States, bananas are to the Caribbean countries what cars are to Detroit.⁸⁰⁰

The Belizean banana industry is fundamental to the country's economy through its contribution to GDP, foreign exchange earnings, and direct injection of money into the local economy of southern Belize with a contribution over \$40 million.⁸⁰¹ The industry incorporates farms within the Stann Creek and Toledo districts known as the "Banana Belt" and numerous communities depend entirely on banana income including the villages of Independence, Bella Vista, San Roman, Santa Rosa, Red Bank, Georgetown, Bladen, San Juan, San Isidro, San Pablo and Trio, with a combined population estimated at over 15,000 people.⁸⁰² With a ratio of one person employed for every two acres under production, it is estimated that the industry directly employs about 3,500 workers.⁸⁰³ That is about 32% of the employed labor force of the Stann Creek District, fully dependent on wage earners from the banana industry to provide for livelihood including food, housing, clothing, education and health.⁸⁰⁴ It is estimated that every

⁷⁹⁹ *Id.* at 4, Executive Summary.

⁸⁰⁰ OFFICE OF THE FEDERAL REGISTER, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, WILLIAM J. CLINTON. BOOK 1, JANUARY 1 TO JUNE 30, 589 (1997).

⁸⁰¹ European Commission, ACTION FICHE FOR BELIZE, BANANA ACCOMPANYING MEASURES 2012. CRIS NUMBER 2012/23809, BAM 2012 ALLOCATION, 2.

⁸⁰² MINISTRY OF AGRICULTURE AND FISHERIES AND MINISTRY OF ECONOMIC DEVELOPMENT, COMMERCE, INDUSTRY AND CONSUMER PROTECTION, *supra* note 777, at 5.

⁸⁰³ CARLO BORGE & GIUSEPPE TOMASIN, REPORT ON OPERATIONAL EFFICIENCY IN THE BANANA INDUSTRY, SHORT TERM MISSION, TECHNICAL ASSISTANCE TEAM (TAT) TO SUPPORT THE IMPLEMENTATION OF THE BANANA ACCOMPANYING MEASURES (BAM) 2012 AND 2013 IN BELIZE 72, 19 (2014).

⁸⁰⁴ MINISTRY OF AGRICULTURE AND FISHERIES AND MINISTRY OF ECONOMIC DEVELOPMENT, COMMERCE, INDUSTRY AND CONSUMER PROTECTION, *supra* note 777, at 20.

US\$1 million in the base revenue of the banana industry provides about \$400,000 of regular income to households in the Banana Belt, contributing to the local economy.⁸⁰⁵

As previously noted, current changes in the global trade regime challenge Belize to become more competitive in banana exports due to the erosion of preferential markets, which can have detrimental effects. Two studies were commissioned to establish the national strategy and comprehensively analyze the banana industry and the socio-economic situation of the area of southern Belize predominated by the banana sector.⁸⁰⁶

In the 1970s, the banana industry was organized into a tenant-farmer arrangement that was supervised by a statutory board, the Banana Control Board (BCB), with government investment in basic infrastructure and securing favorable market arrangements. The history of banana industry in Belize is complex and plenty of recurrent bankruptcies and rescues alternating involvement of private and public sector and cooperatives. The banana industry is a compact industry organized into a single growers' association, the Banana Growers Association (BGA), and all farms are owned by private entrepreneurs; however, seven farms, grouped under the Go Banana brand, are owned by the Belize Bank due to insolvency of previous owners. Go Banana is technically managed by a group of professionals of Project Management Services belonging to Fyffes, the exclusive buyer of the industry.⁸⁰⁷ Currently, there are 25 farms located in the South Stann Creek and Toledo Districts numbered from 1 to 27⁸⁰⁸ distributed among ten owners⁸⁰⁹ with

⁸⁰⁵ RIGOBERTO STEWART AND VERONICA BROOMS, A BANANA COMPETITIVENESS STRATEGY FOR BELIZE. FINAL DRAFT 133, 1 (2011).

⁸⁰⁶ MINISTRY OF AGRICULTURE AND FISHERIES AND MINISTRY OF ECONOMIC DEVELOPMENT, COMMERCE, INDUSTRY AND CONSUMER PROTECTION, *supra* note 777, at 4, Executive summary.

⁸⁰⁷ BERGE & TOMASIN, *supra* note 782, at 12.

⁸⁰⁸ Farms number 23 and 24 do not exist since they merged with other farms.

a total of 7,243 acres producing nearly 100 thousand tons and over 5,000,000 boxes in 2013; current production amounts are similar.⁸¹⁰

In previous years, based on the average price of bananas from Belize, a farmer needed to produce 500-700 boxes per acre per year to break even but the poor performance of certain farms affected the overall industry results. The key stakeholders in the industry recognize that the industry can become more competitive and sustainable, mainly by increasing yields to over 850-1,000 boxes per acre. But, with market uncertainties and a single purchaser for the last two decades, the efforts may concentrate on both increasing net production (cost-benefit) and improving quality. Although the theoretical roadmap seems to be clear through a constant increase in efficiency and a steady reduction in production costs,⁸¹¹ the threats generate opportunity for change in the trading system for bananas.

In the Caribbean banana market, exports continue to be dominated by the Dominican Republic.⁸¹² In 2013, the Dominican banana exports reached 417,000 tons, keeping a good competitive position in the market while the reduction in other Caribbean countries is really significant. Other Caribbean countries—primarily Saint Lucia and Jamaica—have not exported a significant amount of bananas since 2008.⁸¹³ While it is difficult to keep ACP exports to the

⁸⁰⁹ In accordance with the BGA Register, the growers are Go Bananas Ltd., owned by Belize Bank (Farms 1, 2, 3, 6, 10, 11 and 12), Eugene Zabaneh (Farms 4, 15 and 16), Tropical Agriculture Produce Ltd (Farm 9), Meridiam Enterprises Ltd (Farms 5, 25, 26 and 27), Antonio Zabaneh (Farms 7 and 8), Francisco Cruz (Farm 13), Roger Strickland (Farms 14 and 20), Filiberto Castañeda (Farms 17 and 18), Elroy Foreman (Farm 19) and Alvaro Murray (Farms 21 and 22). Banana Growers Association, REGISTER OF MEMBERS OF THE BANANA GROWER ASSOCIATION AND RESPECTIVE PRODUCTIVE AREAS (2014).

⁸¹⁰ Dominique David, BAM PROGRAMME: RAPID FARM APPRAISAL BANANA FARMS, BELIZE (DRAFT), NOT PUBLISHED, 1 (2015).

⁸¹¹ MINISTRY OF AGRICULTURE AND FISHERIES AND MINISTRY OF ECONOMIC DEVELOPMENT, COMMERCE, INDUSTRY AND CONSUMER PROTECTION, *supra* note 777, at 28.

⁸¹² FOOD AND AGRICULTURE ORGANIZATION, *supra* note 666, at 1.

⁸¹³ *Id.* at 1.

European Union sustainable considering the increase of dollar bananas,⁸¹⁴ European statistics demonstrate that Belize has been consistent in market exports with tonnages progressively increasing from 73,207 in 2006 to 100,707 in 2014.⁸¹⁵ The United Kingdom is the main export market for Belize, with some minor exports to Spain, while Fyffes is the principal marketer of Belize banana.

Although there is a serious commitment in Belize to comply with quality standards and certifications bodies, there is no production of organic bananas. Whereas the demand for conventional bananas remained flat over the first decade of the twenty-first century, the demand for organic bananas increased markedly. Just in the United States, between 2000 and 2010, organic banana imports grew fourfold—from 27,000 tons to over 123,000 tons.⁸¹⁶

5. THE BANANA ACCOMPANYING MEASURES (BAM) PROGRAMME

The European presence in Belize is undeniable and a good example is the Special Framework of Assistance established to assist ACP banana producers become more competitive from 1999 to 2008.⁸¹⁷ With two main components in the Country Strategy Paper for the 2008-2013 period, financing focused on direct support to improve banana production and marketing as

⁸¹⁴ Daniel Vanderelst & Lucie Zolichova, EUROPEAN UNION BANANA SECTOR, 6 (2015), http://ec.europa.eu/agriculture/fruit-and-vegetables/product-reports/bananas/reports/market-2015_en.pdf.

⁸¹⁵ Eurostat European Union-28, BANANA SUPPLY IN THE EUROPEAN UNION. DATA EXTRACTED ON 4 MARCH FROM COMEXT (ACP & DOLLAR ZONES) (2015), http://ec.europa.eu/agriculture/fruit-and-vegetables/product-reports/bananas/statistics/supply_en.pdf (production has progressively increased as follows: 73,207 tons (2006), 62,357 tons (2007), 82,149 tons (2008), 79,799 tons (2009), 78,817 tons (2010), 71,064 tons (2011), 99,288 tons (2012), 96,763 tons (2013), and 100,707 tons (2014)).

⁸¹⁶ EDWARD EVANS & FREDY BALLEEN, BANANA MARKET. Original publication date February 2012. Reviewed January 2015 5 (2015), <http://edis.ifas.ufl.edu/fe901> (last visited Oct 23, 2015).

⁸¹⁷ Full information can be found in the official website of the European Union collecting all documents, on the Special Framework of Assistance for Traditional ACP Suppliers of Bananas and other initiatives, http://eeas.europa.eu/delegations/jamaica/eu_jamaica/development_cooperation/sfa/index_en.htm (last visited Feb 7, 2016).

well as provision of social infrastructure for the banana workers and their communities. Consequently, it included similar objectives to those now contained in the BAM Program and previous initiatives that evaluated the impact of European Union policies on ACP economies.⁸¹⁸ In fact, the European Union accepts responsibility to help ACP countries adapt to the effects of changes in its import regime, for instance, by funding the Special System of Assistance from 1994 to 1999. The overall objective of European Union Regulation 2686/94 was to help traditional ACP banana producers adapt to new market conditions following the establishment of a common organization of the banana market providing greater access to bananas from non-ACP sources (“dollar” bananas) and for easier movement of bananas among European Union countries.⁸¹⁹

The objective of the Banana Accompanying Measures (BAM)⁸²⁰ is to facilitate certain ACP⁸²¹ countries’ adjustment to a new trading environment, foster competitiveness, and encourage diversification. BAM has to be understood as part of the 2009 Geneva Agreement on Trade in Bananas to address challenges in the context of changing trade arrangements, notably liberalization of the MFN tariff.⁸²² Solid legal grounds establish a financing instrument for development cooperation and achieving the expected aims take into account the results of, and

⁸¹⁸ GILLSON, HEWITT, & PAGE, *supra* note 750.

⁸¹⁹ COUNCIL REGULATION (EC) NO 2686/94, Establishing a Special System of Assistance to Traditional ACP Suppliers of Bananas O.J. (L 286) 1-4, Art. 3.

⁸²⁰ Detailed info in the European Union website https://ec.europa.eu/europeaid/sectors/food-and-agriculture/sustainable-agriculture-and-rural-development/bam_en (last visited Nov 3, 2015).

⁸²¹ The BAM Program finances projects in Belize, Cameroon, Côte d’Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, and Suriname, *Regulation (EU) No 1341/2011 of the European Parliament and of the Council of 13 December 2011 amending Regulation (EC) No 1905/2006 Establishing a Financing Instrument for Development Cooperation*, O.J. (L 347) Annex IIIa (Main ACP Banana-Supplying Countries).

⁸²² *Id.* at 34.

experiences gained through, previous European initiatives such as the Special System of Assistance and the Special Framework of Assistance.⁸²³ This works to improve the living standards and conditions of people in banana-growing areas and in banana value chains, as well as ensure compliance with labor and occupational health and safety standards, and other concerns.⁸²⁴ However, governance of the program lacked adequate stakeholder involvement on the steering committee as participation was restricted to a few key Ministries and representatives of the industry while civil society of the banana dependent areas was excluded.⁸²⁵

With an initial budget of €190 million, indicative country allocations are estimated by applying a methodology in an objective and uniform manner that takes account of the importance of the banana sector as well as the economic and developmental realities of each eligible beneficiary.⁸²⁶ The European Commission fixed the maximum indicative amount available to each eligible ACP banana-supplying country on the basis of (a) the level of trade in bananas with the European Union—where the average of the three highest annual tonnages over the last five years preceding 2010 were taken into account; (b) the importance of banana exports to the European Union economy, measured by taking the value of the European Union banana imports as a percentage of the country’s gross national income over the last three years preceding 2010; and (c) the level of development, whereby lower levels of development as recorded in the UN’s

⁸²³ The European Union supported the sector through the Banana Support Programme which implements the resources of Special Framework Agreement (1999-2008) totaling to €24.6 million. Under the competitiveness component, farmers were provided amongst others with inputs such as fertilizers, nematicides, and meristems to the farmers as well as with the related extension service. It seems, therefore, crucial to address remaining constraints and to build proposals on previous experiences. A detailed budget distribution and summary of European Union funded interventions can be found in MINISTRY OF AGRICULTURE AND FISHERIES AND MINISTRY OF ECONOMIC DEVELOPMENT, COMMERCE, INDUSTRY AND CONSUMER PROTECTION, *supra* note 777, at 17.

⁸²⁴ Regulation (EU) No 1341/2011, *supra* note 821, at 34.

⁸²⁵ European Commission, *supra* note 780, at 6.

⁸²⁶ *Id.* at 40 (Commission Statement for the Banana Accompanying Measures (BAM) Programme within the Development Cooperation Instrument (DCI)).

Human Development Index over the period 2005-2007 in the ACP country concerned positively reflected the allocation.⁸²⁷ In Belize, the available amount is €13,280,000 (with an additional €1,000,000 from the Government of Belize and a maximum of €980,000 from the beneficiaries of the grants).⁸²⁸

The European Union Multi-Annual Support Strategy (MSS) was developed in an intensive consultation process involving stakeholders and key ministries, in line with the Belizean National Adaptation Strategy. The MSS responds to the overall objective—as established in the Financing Agreement between the European Union and the Government of Belize⁸²⁹ and its Action Fiche—to foster social and economic development leading to the reduction of poverty, focusing on workers and their families, in the banana belt.

To face the difficulties of this challenging transition to a new competitive regime, the European Union continues its longstanding financial support to the banana sector in Belize through the BAM Program, fostering social and economic development contributing to the reduction of poverty as well as focusing on workers and their families in the Stann Creek and Northern Toledo Districts of Belize. The three specific objectives are: (a) increasing the efficiency of banana production, while decreasing the environment impact of the industry; (b) improving economic and social development; and (c) strengthening the existing policy and institutional framework.⁸³⁰ As a consequence, the expected results of the BAM Program were

⁸²⁷ *Id.* at 36, Art. 17a 2.

⁸²⁸ European Commission, *supra* note 780, at 1; European Commission, TECHNICAL AND ADMINISTRATIVE PROVISIONS TO THE FINANCING AGREEMENT BETWEEN THE EUROPEAN COMMISSION AND THE GOVERNMENT OF BELIZE, BANANA ACCOMPANYING MEASURES FOR BELIZE, N^oBAN/2012/023-809, ANNEX II, 1 (2012).

⁸²⁹ European Commission, FINANCING AGREEMENT BETWEEN THE EUROPEAN COMMISSION AND THE GOVERNMENT OF BELIZE, BANANA ACCOMPANYING MEASURES FOR BELIZE, N^oBAN/2012/023-809 (2012).

⁸³⁰ European Commission, *supra* note 807, at 4.

clearly defined together with the main activities to be carried out.⁸³¹ The approach is intended to balance the need to enhance the competitiveness of the industry with the desire to improve the living and economic conditions of workers, their families, and their communities.⁸³²

Increasing the efficiency of banana production, while decreasing the environment impact of the industry (the first objective) is implemented through three main activities:⁸³³

- Several call(s) for proposals targeting banana growers and banana growing entities (€4.9 million with a co-financing by the selected applicants of a minimum of 20% of the European Union contribution) that may include actions aiming at: improving land clearing and preparation so that replanting takes place according to best practices; paying particular attention to good forest and land management; upgrading farm infrastructure such as cableways, packing sheds, administration buildings and irrigation systems to reduce production costs and preserve banana qualities while improving working conditions; developing agricultural best practices to decrease the environmental impact of the industry (composting, recycling, improved waste and water management); and strengthening disease/pest management, which will result in a more resilient and environmentally sensitive industry while reducing worker exposure to pesticides.
- Program-estimates passed by the Ministry of Agriculture and aimed at: supporting the capacity strengthening of the BGA with €1.7 million; focusing on the support to Sigatoka management, control and to adopt an improved scientific approach to

⁸³¹ *Id.* at 5–10.

⁸³² European Commission, *supra* note 780, at 7–11.

⁸³³ European Commission, *supra* note 807, at 6–8.

disease; changing the BGA's commercial and research structure; and reinforcing other important capacities (upgrading a best practice manual and provision of training and sensitization, improving BGA's marketing and negotiation skills, and supervising the provision of credit at affordable rates, among others).

- Electrification of farms and villages (€1.5 million), through a direct grant awarded to Belize Electricity Limited (BEL) to connect twenty-two farms and villages in the Banana Belt to the national electricity grid.

To meet the second objective—improving economic and social development—activity is focused on upgrading roads (€2 million) and improving the quality of education (€1 million complemented by €0.2 million by the Government of Belize).⁸³⁴ Meanwhile, the third objective—strengthening implementation capacity as well as the policy and institutional framework—is an investment of €1.3 million complemented by an estimated €0.5 million contribution from the Government of Belize. Interesting legislative and strategic matters are also included, such as a regulatory framework for the banana industry and actions in fundamental areas for sustainability (credit, access, good practices, etc.).⁸³⁵

For a brief comparison, the general objective in other areas, such as the Dominican Republic, is to achieve sustained growth in production and exports of the agricultural sector, providing increased income for producers and exporters and contributing to employment, poverty reduction, rural development, and social and economic stability. However, the specific objective is “to address the underlying weakness in the agricultural sector relating to commercial competitiveness and low productivity, through strengthening of entrepreneurial and

⁸³⁴ *Id.* at 8, 9.

⁸³⁵ *Id.* at 9, 10.

technological development and innovation, implementation of quality standards, improvement of physical infrastructure, development of agricultural information systems and enhancement of risk management systems.”⁸³⁶ The expected results are addressed with very precise parameters to assess achievement, such as increasing the share of banana farmers who produce seven tons per acre from 23% to 80% in order to measure the enhancement of productivity, increasing the contribution of non-banana crops to GDP from 8% to 10%, or increasing metric tons of export volume by 25% by 2018.⁸³⁷

6. REGULATORY MODELS ON BANANA PRODUCTION AND EXPORT

Growers and NGOs claim that bananas are more regulated than arms despite this product being crucial to the livelihoods of millions of people and a major source of export revenue for many developing countries.⁸³⁸ Among the exhaustive banana industry regulations the primary reference is to the WTO and Uruguay Round Agreement on Agriculture to reform banana trade and make policies more market oriented improving the predictability of global pricing, the Agreement on the Application of Sanitary and Phytosanitary Measures, the *Codex Alimentarius*, and plenty of other regional and national rules affecting a fundamental market for development. In fact, the effect of the rules-based Multilateral Trading System has been underestimated.⁸³⁹

⁸³⁶ Ministry of Agriculture and Fisheries, BANANA ACCOMPANYING MEASURES, DOMINICA, <http://nao.dm/index.php/projects/present-projects/10-banana-accompanying-measures> (last visited Oct. 23, 2015).

⁸³⁷ *Id.*

⁸³⁸ Joseph A. McMahon, *The EC Banana Regime, the WTO Rulings and the ACP–Fighting for Economic Survival?*, 32 J. WORLD TRADE 101 (1998), <http://www.kluwerlawonline.com/document.php?id=TRAD1998033>.

⁸³⁹ Chiedu Osakwe, *Developing Countries and GATT/WTO Rules: Dynamic Transformations in Trade Policy Behavior and Performance*, 20 MINN. J. INT'L L. 365, 430 (2011).

Most of the existing regulatory framework originated in import markets where the interest of banana producers and exporters are not considered.

As a consequence, developing countries suffer from international trade regulations due to the combination of domestic pressures to respond to crises or national priorities, compliance with systemic trading rules, adjustments to commitments from successive rounds of trade liberalization, and implementation of domestic reforms pursuant to WTO and other commitments.⁸⁴⁰ The relationship between developed and developing countries is captured by the situation in the Doha Round—a complex game explained by historic shifts in the global balance of trade and economic power.⁸⁴¹ There is a challenge in determining the role that law and authority sponsored by corporate capitalism play in the history of the banana industry.⁸⁴² Nowadays, multilateralism is extremely difficult due to both the amount of members in the WTO⁸⁴³ and the development of legal instruments by the European Union and the United States to achieve their goals determining the future of countries such as Belize.⁸⁴⁴ Furthermore, the failure of WTO negotiations in recent meetings demonstrates the lack of political will to dismantle protectionist tools and create a truly fair and development oriented trade structure.⁸⁴⁵

⁸⁴⁰ *Id.* at 366.

⁸⁴¹ *Id.* at 433.

⁸⁴² Upendra D. Acharya, *Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?*, 36 B.C. INT'L & COMP. L. REV. 937, 939 (2013).

⁸⁴³ Rafael Leal-Arcas, *The Fragmentation of International Trade Law: Is Now the Time for Variable Geometry?*, 12 J. WORLD INVEST. TRADE 145 (2011).

⁸⁴⁴ CALBOLI & LEE, *supra* note 9 (exploring how the rise of international trade and globalization has changed the way trademark law functions in a number of important areas, including protection of well-known marks, parallel imports, and enforcement of trademark rights again).

⁸⁴⁵ Destaw A. Yigzaw, *WTO Agricultural Trade and the Unfulfilled Promise of Development*, 11 S.C. J. INT'L BUS. 163, 224 (2014).

Consequently, as an apparent counterpoint to globalization, food system localization is often assumed to be a good, progressive, and desirable process.⁸⁴⁶

The legal paradigms underpinning international trade have undergone significant change resulting in dramatically depreciated Caribbean commercial interests.⁸⁴⁷ With developing countries reluctant to object,⁸⁴⁸ their concerns are not heard and the Caribbean cannot compete politically, economically, or strategically with larger members. Currently, the WTO leaves developing countries in a position where their participation is marginalized and they are not often a part of proceedings.⁸⁴⁹ This is a disadvantage at the WTO,⁸⁵⁰ and even worse, it's a disadvantage in relationships with the two major economic players—the European Union and the United States. As the Director of the WTO Accessions Division wrote, the GATT's legal relationship with developing countries consists primarily of a history of demands for special status, which badly served developing countries and compromised MFN obligations.⁸⁵¹ Sovereignty, understood as supreme and independent power or authority in international relations, is a difficult option for small independent states.⁸⁵² WTO jurisprudence demonstrates

⁸⁴⁶ Hinrichs, *supra* note 5 (illustrating the potential tension between defensiveness and diversity in food system localization in a case study on the shifting meaning of “local Iowa food”).

⁸⁴⁷ Clegg, *supra* note 739, at 30.

⁸⁴⁸ Developing country status in the WTO is by self-designation and least-developed countries (LDCs) are recognized as a legal sub-category of developing countries. See WTO, *Who are the Developing Countries in the WTO?*, http://www.wto.org/english/tratop-e/devel_e/dlwho-e.htm (last visited Feb. 6, 2016).

⁸⁴⁹ Karen E. Bravo, *Challenges to Caribbean Economic Sovereignty in a Globalizing World*, 20 INDIANA UNIV. ROBERT H MCKINNEY SCH. L. RES. PAP. 33, 43 (2011).

⁸⁵⁰ Clegg, *supra* note 739, at 35.

⁸⁵¹ Osakwe, *supra* note 818, at 366.

⁸⁵² Acharya, *supra* note 821, at 969. (“At the same time, this corporate capitalism-centric hegemonic international law and globalization brings global disorder-global financial meltdown, global Occupy Wall Street movements, and possible exacerbation of terrorism-and a desired illusion among hegemon, quasihegemon, and non-hegemon states that they still possess sovereign power while basically hosting a service to corporate capitalism and inviting class warfare, even within stable societies.”).

that special and differential treatment has not undermined the foundational principle of non-discrimination,⁸⁵³ but certain decisions—such as those affecting ACP bananas—are not understood considering both their economic impact and the background of developing countries. The banana challenges demonstrate the effects of power disparities both with respect to geographic and population size as well as to economic dimension and influence.⁸⁵⁴ As in other parts of the world, the current limitation of Caribbean countries impede the adequate protection of the state's domestic economy.⁸⁵⁵

There is a *fin de siècle* air surrounding the Lomé Convention and ACP special treatment.⁸⁵⁶ The European Union and ACP negotiators are discussing how to adjust the Convention to comply with WTO rules. Currently, as a consultation paper on the future of the European Union-ACP partnerships establishes, the review of relations is taking place in a fast changing and increasingly multipolar world where the forces governing the global transformation that started in the early 1990s are reshaping the world strongly and rapidly.⁸⁵⁷ Meanwhile, in the last decade, due to the delays under Doha and the need to develop its role in the global trade,⁸⁵⁸ the European Union has launched a new generation of FTAs affecting not just

⁸⁵³ Osakwe, *supra* note 818, at 432 (referring to Appellate Body Report, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/ABIR (Apr.7, 2004).

⁸⁵⁴ Bravo, *supra* note 828, at 55 (discussing some illustrative challenges to economic and sovereignty developing how the Caribbean has responded to these challenges).

⁸⁵⁵ *Id.* at 34.

⁸⁵⁶ Peers, *supra* note 739, at 235.

⁸⁵⁷ EUROPEAN COMMISSION & HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY, TOWARDS A NEW PARTNERSHIP BETWEEN THE EUROPEAN UNION AND THE AFRICAN, CARIBBEAN AND PACIFIC COUNTRIES AFTER 2020 16, 2 (2015).

⁸⁵⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Global Europe Competing in the World-A Contribution to the EU's Growth and Job Strategy, at 10, COM (2006) 567 final (Oct. 4, 2006) [hereinafter Global Europe]; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Trade, Growth and World Affairs: Trade Policy as a Core

banana.⁸⁵⁹ Consequently, with an effective recalibration, the European Union trade policy has undergone a major change—from a policy of strict multilateralism towards selected bilateralism with economic growth as the main aim of the common commercial policy.⁸⁶⁰

In the case of Belize, the relationship with the United Kingdom was institutionalized with the creation of the Banana Advisory Committee in 1973, which oversaw banana imports into the UK. The fundamental strength of this relationship was sustained when the UK joined the European Community.⁸⁶¹ The market has driven the banana industry in accordance with the requirements of Fyffes, Irish company, and one of the main actors in the international banana market. As the sole Belizean banana buyer for many years, running several farms on behalf of the Belize Bank with over 30 workers in the Stann Creek and Toledo Districts, the Irish company's decisions have ruled Belizean banana production and export. The existing Banana Act⁸⁶² is not applied and there is no involvement of the Belizean government in banana development, which is limited to the management of the European BAM Program resources through the National Authorizing Office (NAO). Furthermore, the main multilateral institutions do not want to work with the banana industry. Consequently, the country strategy from the Inter-American Development Bank does not include bananas⁸⁶³ and the recent diagnostic from the World Bank indicates that the most binding constraints on growth in Belize are the lack of

Component of the EU's 2020 Strategy, at 9-10 COM (2010) 612 final (Nov. 9, 2010) [hereinafter Trade, Growth and World Affairs].

⁸⁵⁹ Rigod, *supra* note 364, at 292.

⁸⁶⁰ *Id.* at 305.

⁸⁶¹ Clegg, *supra* note 739, at 27.

⁸⁶² BANANA INDUSTRY ACT. CHAPTER 205. REVISED EDITION 2000, (2000), <http://www.belizelaw.org/web/lawadmin/index2.html> (last visited Feb 14, 2016). The Laws of Belize, Revised Edition 2000, are organized in seven volumes, thirty-four titles, and 341 Chapters.

⁸⁶³ INTER-AMERICAN DEVELOPMENT BANK, IDB COUNTRY STRATEGY WITH BELIZE 2013-2017 (2013), <http://www.iadb.org/en/countries/belize/country-strategy,1083.html> (last visited Feb 14, 2016).

structural reforms. These include the persistence of trade barriers, a lack of credit and financing, and other interesting observations.⁸⁶⁴

On November 2015, banana producers from African, Caribbean and Pacific (ACP) countries—including Belize, Cameroon, Côte d’Ivoire, Dominican Republic, Ghana and Suriname—met with ACP Ambassadors in Brussels to discuss the crucial role of banana production and trade for the ACP region, and express disagreement with the results of the BAM Program and the impact of reduced tariffs on competitor’s bananas. The Geneva Agreement of 2009, justified the compensatory measures under BAM worth up to €200 million (finally €190 million) and established a tariff reduction schedule to set banana tariffs at €114 per ton for all MFN in 2019. However—in parallel, and faster—Central American and Andean Pact countries obtained a landing duty previously referred of €75 per ton through bilateral agreements with the European Union. This benefits allows Latin American countries to save over €700 million on customs duties. This is negatively affecting banana exports to Europe from the ACP region, which is struggling to remain competitive at the international level.⁸⁶⁵

Under this negative global context, together with the underlying structural problems linked to production yield and costs, the banana industry recently suffered commercial and natural factors. There was the worst flooding of the last decade after a season of exceptional drought, and the decision of Fyffes—forced by the United States—not to buy bananas from

⁸⁶⁴ WORLD BANK GROUP, CARIBBEAN COUNTRY MANAGEMENT UNIT, BELIZE SYSTEMATIC COUNTRY DIAGNOSTIC 106, 35 (2016), <http://documents.worldbank.org/curated/en/2016/02/25875161/belize-systematic-country-diagnostic> (last visited Feb 14, 2016).

⁸⁶⁵ The author was a member of the mission to Brussels representing the ACP Banana Producers and is privy to private information and data not yet publicly available.

certain farms,⁸⁶⁶ as well as temporary quality problems with the bananas, which negatively impacted the banana industry.⁸⁶⁷ Furthermore, increasing demands from Fyffes on growers, as well as the continuing reduction on the price per box, led to tensions in the industry that are challenging the long existing commercial relationship. Paradoxically, the difficult situation for the banana industry in Belize notably diverges from the excellent global results presented by the multinational company trading with Belizean and other bananas, Fyffes, to their investors.⁸⁶⁸

Consequently, it is a crucial and transitional period for a vital economic sector in Belize, after other previous catastrophes and difficult times affecting the banana industry in the last forty years. Furthermore, there is a lack of interest by the Central Government based on previous negative experiences in the area while the Stann Creek and Toledo Districts exist in opposition territory. Main stakeholders strongly question the (lack of) success—and investment—foreseen in the Belize Country Strategy for the Banana Industry 2011 – 2016 drafted by the Ministries of Economic Development, Commerce, Industry and Consumer Protection, and Agriculture and Fisheries with a total budget of \$50,807,500.⁸⁶⁹ High priorities of this report include the envisaged “Operational Framework for Development of the Banana Industry” (\$18,025,000),⁸⁷⁰

⁸⁶⁶ Precisely John Zabaneh’s farms (Meridian Enterprise Ltd, farms 5, 25, 26, and 27, a total of 1,198,00 Acres, 16% of the total acreage and 13% of the banana production). Confidential information provided by the Banana Growers Association.

⁸⁶⁷ *Id.*

⁸⁶⁸ FYFFES PLC, INTERIM RESULTS FOR SIX MONTHS ENDED 30 JUNE 2015 22 (2015), <http://investors.fyffes.com/fyffesplc/en/resultsandpresentations> (last visited Feb 14, 2016). *See also* Fyffes PLC, INTERIM RESULTS FOR INVESTORS (2015), <http://investors.fyffes.com/fyffesplc/uploads/finreports/interims-270815.pdf> (last visited Feb 14, 2016). The results present during the period 2008-2014 an EBITDA absolute increase of 156% and 186% earning per share, keeping the number 1 market position in the European Union with 300 million boxes of bananas and number 4 market spot in the United States with 250 million boxes.

⁸⁶⁹ MINISTRY OF AGRICULTURE AND FISHERIES AND MINISTRY OF ECONOMIC DEVELOPMENT, COMMERCE, INDUSTRY AND CONSUMER PROTECTION, *supra* note 777, at 39.

⁸⁷⁰ *Id.* at 37.

the establishment of a “Credit Fund” (\$5,000,000)⁸⁷¹ or the direct investment on “Banana Farms” (\$4,727,500).⁸⁷² There is a clear perception from all stakeholders with regard competitiveness in the industry and the consideration that it cannot be achieved if the necessary investments are not implemented.

Following recent November 2015 elections, the United Democratic Party (UDP) remains in power with 71,452 (50.52%)—19 seats—while the People’s United Party (PUP) holds 67,566 (47.77%)—12 seats. However, in the Stann Creek and Toledo Districts the PUP won 3 of the 4 assigned seats—Dangriga, Frank Mena (UDP); Stann Creek West, Rodwell Ferguson (PUP); Toledo West, Ruben Oscar Requena (PUP); and Toledo East, Mike Espat (PUP).⁸⁷³ No political changes took place so the situation will probably remain as it is. However, a clear strategy addressing current national and international challenges, as well as the real needs of the banana industry should be supported by the establishment of an economic, social and political consensus. Connected with a proper legal framework granting a competitive and efficient public-private partnership, this strategy may ensure a prosperous future for the banana industry. A solid strategy to increase production yield and competitiveness as well as the development of a BGA partnership with the Government of Belize and the establishment of the legal framework to develop a GI are fundamental for the future of the banana industry.

⁸⁷¹ *Id.* at 38.

⁸⁷² *Id.*

⁸⁷³ GOVERNMENT OF BELIZE, ELECTIONS AND BOUNDARIES DEPARTMENT, GENERAL ELECTIONS, 4TH NOVEMBER, 2015 (2015), http://www.elections.gov.bz/modules/article_publish/files/files_5642697523a16.pdf (last visited Feb 14, 2016).

7. GIS FOR BANANAS AND THE SUMMARY OF THE CHALLENGES FACED IN BELIZE

The Caribbean region may consider it best interests for the future considering the developments of TTIP negotiations. After the European Union Agreements with Mexico,⁸⁷⁴ Canada,⁸⁷⁵ and South Korea,⁸⁷⁶ which produced very positive and enlightening experiences on GIs, the Caribbean is seeking better conditions with its main trade partners: the United States and the European Union. Beyond preferential access to certain products, WTO trends and bilateral agreements define a model for agricultural export, commodities, and development. Although the negotiation capacity for small countries seems very limited, it is feasible to find potential opportunities for key products such as bananas.

Unfortunately, Caribbean legislation on GIs⁸⁷⁷ is grounded on a shortsighted trademark model. Belize has been a member of the WTO since January 1995 and is fully compliant with the

⁸⁷⁴ Mexico and the European Union are exploring the options for a comprehensive and ambitious modernization of the trade pillar of the EU-Mexico Agreement. The Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, was signed in Brussels on Dec. 8, 1997. Council Decision 2000/658/EC of 28 September 2000 concerning the conclusion of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part. O.J. (L 276), 44. The trade liberalization provisions were laid down in Decision No. 2/2000 of the European Union-Mexico Joint Council established by the Agreement. Decision 2/2000 of the European Community and Mexico Joint Council of 23 March 2000. Joint Declarations, O.J. (L 157), 10.

⁸⁷⁵ The Canada-European Union summit on Sept. 26, 2014 in Ottawa marked the end of the negotiations of the European Union-Canada trade agreement (CETA) that will remove over 99% of tariffs between the two economies and create sizeable new market access opportunities in services and investment. The text of the agreement will now undergo a legal scrubbing followed by a translation into all official languages of the EU. At a later stage, the agreement will need to be approved by the Council and the European Parliament.

⁸⁷⁶ The European Union-South Korea Free Trade Agreement entered into force in July 2011 as the first of a new generation of agreements and the EU's first trade deal with an Asian country. Council Decision 011/265/EU of 16 Sep. 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, O.J. (L 127), 1.

⁸⁷⁷ See EUROPEAN COMMISSION, EU-SOUTH KOREA FREE TRADE AGREEMENT: A QUICK READING GUIDE (2010), http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145203.pdf (last visited Jan 15, 2014). GEOGRAPHICAL INDICATIONS (AMENDMENT) ACT, 2008 (DOMINICA, ACT 13 OF 2008). LOI N°N ZOTERO_ITEM CSL_CITATION

TRIPS Agreement. However, despite the EPA and TRIPS commitments, Belize does not have *sui generis* legislation for GIs. Now, under the compromises in Article 145A.2 of the EPA, the signatory CARIFORUM States should have established a system of protection of GIs in their respective territories no later than January 1, 2014.⁸⁷⁸ In fact, as the first trade agreement of its kind concluded between the European Union and one of the existing ACP states, the EPA is presented as a symbol of a new era with a mature trading relationship encompassing not just a trade in goods regime, but also trade in services, trade-related issues, and development cooperation with an overall forced transition to a new and more competitive trade model under WTO rules.

As established at the EPA, the European Union Party and the Signatory CARIFORUM States shall, no later than January 1, 2014, commence negotiations aimed at an agreement on the protection of GIs in their respective territories, without prejudice to any individual request for protection that may have been filed directly. Therefore, there is a clear commitment to establish a *sui generis* system of GI protection stronger than the system in place to register GIs under Section 58 of the Trade Marks Act, Chapter 257 as “certification marks.” Unfortunately, the existing level of protection and the impact for agricultural development is not what is expected from such a system. However, it seems to be the only legal instrument for granting a certain protection due to the absence of the adequate legislation. There is a need to develop a proper legal framework for agricultural quality protection and market access of Belizean products.

{"CITATIONID": "TMS3 (TRINIDAD AND TOBAGO, MODIFION {"CITATIONID": "TMS3MwQF", . PROCLAMATION S.I. 2001, NO. 22 OF FEBRUARY 16, 2001 OF THE GEOGRAPHICAL INDICATIONS ACT, (BARBADOS, ACT 1998-22). PROTECTION OF GEOGRAPHICAL INDICATIONS ACT, 1999 (DOMINICA, ACT 13 OF 1999). THE PROTECTION OF GEOGRAPHICAL INDICATIONS ACT, 2004 (JAMAICA, ACT 5 OF 2004).

⁸⁷⁸ ECONOMIC PARTNERSHIP AGREEMENT (EPA), EUROPEAN COMMUNITY AND ITS MEMBERS STATES AND CARICOM COUNTRIES, *supra* note 720.

Currently, the list of potential GIs provided by the Belizean Intellectual Property Office (BELIPO), covering forty-four products, including the banana along with other products relevant for the country and its development. The exhausted regulation of GIs within the EPA and the commitments of Belize to develop its regulation at the national level may provide an opportunity to develop a proper framework for its agricultural industries, with bananas as a leading product of reference. In fact, as established in the EPA, a GI offers much more than a trademark and may contribute to the adequate public-private partnership required to face the main challenges of the banana industry.

On December 3, 2015, the Directorate General for Foreign Trade presented a GIs draft bill for Belize seeking feedback on its proposal; not including a proper legal concept, most of its content refers to the “use” of GIs. With forty-four articles, structured in five parts—preliminary, protection, registration, offences and civil proceedings—as well as miscellaneous provisions, the proposed piece of legislation is inspired by other laws in the region and seems to be looking to the past instead of to the future.

First of all, GIs, as a legal concept, do not exist in Belize nor in the Caribbean. Therefore, the first concern should be to clarify the aim of an act regulating GIs. Should it be to develop a legal tool for agricultural development or just a mere compliance with the EPA obligation to protect the use of existing European Union GIs in Belize? As most of the existing legislation was drafted in the Caribbean, this draft mainly focuses on the protection of the “use” of GIs. Furthermore, the extended—and often intended—confusion between GIs and trademarks is clearly recognized. Just the process to register a GI and limit the registration validity for a period of 10 years evidences that GIs are often considered equivalent to a brand or a trademark while

the legal grounds and concept actually make them completely different. This wrong approach affects the level of protection granted and also establishes an inefficient system that mainly grants remedies to foreign GIs (Europe Union) and trademarks (United States).

Considering the particularities of the BGA and the banana industry, the methodology and approach to any changes of the status quo have to be carefully considered. In order to propose amendments to the law or include new GI legislation, it is necessary to understand the priorities and the needs of Belize to establish proper protection of agricultural products in commerce⁸⁷⁹ to leverage it as a source of sustainable competitive advantage into the future.⁸⁸⁰ A quality protection scheme, such as GIs, must protect not just bananas but also other important agricultural sectors in Belize (sugar, citrus, or cocoa). It also should establish means for their development (insurance, credit, quality standards) including the proper legal and political framework. Besides, as established in Article 145 A.3, the aim of the EPA and the mission to the CARIFORUM - EC Trade and Development Committee is to achieve effective implementation and exchange information on legislative and policy developments on GIs,⁸⁸¹ since CARIFORUM accepts the need for a clear legal framework on GIs.⁸⁸² In fact, there is an increasing demand for a separate legal framework, both internationally and nationally, to protect traditional knowledge and GIs from misappropriation.⁸⁸³

⁸⁷⁹ Barjolle & Sylvander, *supra* note 193.

⁸⁸⁰ AGARWAL & BARONE, *supra* note 165, at 19.

⁸⁸¹ ECONOMIC PARTNERSHIP AGREEMENT (EPA), EUROPEAN COMMUNITY AND ITS MEMBERS STATES AND CARICOM COUNTRIES, *supra* note 720.

⁸⁸² *Id.* at 145.

⁸⁸³ N. S. GOPALAKRISHNAN, P. S. NAIR & A. K. BABU, EXPLORING THE RELATIONSHIP BETWEEN GEOGRAPHICAL INDICATIONS AND TRADITIONAL KNOWLEDGE: AN ANALYSIS OF THE LEGAL TOOLS FOR THE PROTECTION OF GIs IN ASIA 49 (2007).

The magnum opus of Scottish economist and moral philosopher Adam Smith describes what builds a nation's wealth and inspires most developed nations. This text also refers to the fundamental matter of the real and nominal price of commodities contrasting this notion of wealth, in terms of production, with that of the Mercantilists, who defined wealth in terms of gold and silver.⁸⁸⁴ Since production yield and competitiveness are the private aims of the banana industry in Belize, it is important to establish a system that ensures distribution of wealth and development in the country beyond a small group of farmers, companies—some of them international—and the Belize Bank, which own most of the land and therefore also the direct profit of the banana industry.

The concept of GIs, and the legal rationale for protection, has been the subject of heated international debates. The European Union is the main global promoter of GIs and the provision of arguments grounding the benefits of the model—while respecting certain existing rights and generic names in other jurisdictions—should be sufficiently convincing. However, it is clearly understood that among IPR, GIs may work when they are complemented by sustainable agricultural policies and rural development policies. These public policies, plus financing and insurance, together with others such as food safety regulations, local development, or anti-trust policies, are crucial in the optimization of the positive effects of GIs.⁸⁸⁵ The economic rationale derives from the fact that place of origin may be used as a quality signal⁸⁸⁶ providing added value to the territory.⁸⁸⁷ Furthermore, the characterization of local know-how and skills as well

⁸⁸⁴ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776).

⁸⁸⁵ Barjolle, Paus, & Perret, *supra* note 54, at 12.

⁸⁸⁶ Bramley & Kirsten, *supra* note 65, at 88.

⁸⁸⁷ For an excellent guide on the process of establishing a GI, *see* PACCIANI ET AL., *supra* note 205.

as the relationship with scientific and technological knowledge raises the issue of tradition,⁸⁸⁸ which is fundamental for cultural diversity in global communities.

The intention of any farmer is to make a better living out of the difficult business of agriculture. A banana grower appreciates the land and its products, but needs to sell these products at the best possible price while reducing production costs. These uncontested assumptions, sounding as cost benefit analysis and market driven thoughts, are, in certain areas, affected by external elements such as direct public aid to agriculture, regulations and tariffs, sanitary and phytosanitary measures, technical barriers to trade, and many others that are as important as traditional meteorological, land, and water conditions. The challenges are grounded on the evident inelastic nature of demand in agriculture since the demand for food is not just market-based and farmers are mainly price-takers in the food system. Certain authors conclude that GIs are the result of a process whereby collective reputation is institutionalized, which functions as protective measures for both consumers,⁸⁸⁹ addressing information asymmetries and quality, and producers, protecting reputation as an asset.⁸⁹⁰ As a matter of fact, GIs are considered an effective certification tool for high-quality products attempting to overcome the information problem facing consumers when quality cannot be readily ascertained prior to purchase.⁸⁹¹ As previously noted, the association between product quality and its area of geographical origin is not arbitrary. Experienced producers—notably, Dole and Chiquita, but

⁸⁸⁸ LAURENCE BÉRARD MARCHENAY, PHILIPPE & CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE (FRANCE), FROM LOCALIZED PRODUCTS TO GEOGRAPHICAL INDICATIONS. AWARENESS AND ACTION 32 and 55 (2008). See also Rizo, *supra* note 141.

⁸⁸⁹ For a welfare analysis of the market for a credence attribute under different assumptions with respect to the strength of consumer preferences, the existence of voluntary versus mandatory standards, and the credibility of third party certification, see Hobbs et al., *supra* note 125.

⁸⁹⁰ Bramley & Kirsten, *supra* note 65, at 77.

⁸⁹¹ Moschini, Menapace, & Pick, *supra* note 127, at 811.

also Fyffes⁸⁹²—have been successful in using traditional branding strategies to sell commoditized products.⁸⁹³

Many have studied the benefits and costs of food labeling and quality to access markets and increase the added value in agricultural products through GI strategies, an important option along with increasing production and reducing cost for Belizean bananas.⁸⁹⁴ Collective-quality promotion⁸⁹⁵ can be a successful way forward for Belizean banana growers to ensure sustainability. Consequently, there are solid arguments in favor of GIs regarding capacity to promote rural development as an effective marketing tool and obtain premium prices for their products in exchange for guarantees offered to consumers on production origin, methods, and quality. With the aim of a better redistribution of added value in the production chain directly linked to the origin of the product, other important benefits include the encouragement of biodiversity, local knowledge, natural resources, and the offer of unique and different products.⁸⁹⁶ In Belize, the relevance of a GI to reinforce national pride to local—particularly in the Stann Creek and Toledo Districts—and national identity through domestic products may have a fundamental impact on development. The protectionist and limiting elements often criticized by those against GIs and the bureaucracy and administrative burdens of such a system, together with the complex coexistence with trademarks, make this legal tool costly and

⁸⁹² Fyffes logo includes the name Belize—with a smaller size under its own brand—and identifies Belizean bananas in European markets.

⁸⁹³ AGARWAL & BARONE, *supra* note 165, at 1.

⁸⁹⁴ Compare RUSSO, *supra* note 2., BARHAM ET AL., *supra* note 361. with VANZETTI, FERNÁNDEZ DE CÓRDOBA, AND CHAU, *supra* note 695.

⁸⁹⁵ MARETTE, *supra* note 69, at 21.

⁸⁹⁶ O'CONNOR AND COMPANY, EUROPEAN LAWYERS, GEOGRAPHICAL INDICATIONS AND THE CHALLENGES FOR ACP COUNTRIES. A DISCUSSION PAPER 17 (2005), <http://agritrade.cta.int/en/content/view/full/1794> (last visited Mar 25, 2014).

dependent on public involvement and collective participation. Many consider European Union policy makers may have “overshot” the establishment of the GI framework by creating a decision-making apparatus that is likely to result in excessive quality.⁸⁹⁷ Better and simplified legislation as well as clearer institutional regulation is needed and the European Commission should pursue further action on European and international impact assessments incorporating independent quality control, reduction of administrative costs, technical simplification, and co-regulation.⁸⁹⁸

Undifferentiated products versus quality for commodities is a permanent debate in exporting countries such as Belize. For most consumers, the capacity to distinguish bananas is not just a question of size, color, or taste—the origin is becoming more important every day. However, the world banana market has always been heavily globalized and buyers have quite easily shifted from one origin to another, and from one supplier to another, while keeping consistent quality bananas.⁸⁹⁹ Tariffs and quotas, particularly in the European market, play a crucial role while the distinction between internal, ACP, and dollar bananas drives pricing and consumer choices.⁹⁰⁰ Although a banana is a banana, and for many it is an undifferentiated good, certain important differences are appreciated not just regarding external features but also nutrition and other particular qualities. It is a fruit with exceptional nutritional properties⁹⁰¹ and

⁸⁹⁷ Pierre Mérel & Richard J. Sexton, *Will Geographical Indications Supply Excessive Quality?*, 39 EUR. REV. AGRIC. ECON. 567, 586 (2012).

⁸⁹⁸ WIJNANDS AND VAN DER MEULEN, *supra* note 199, at 16.

⁸⁹⁹ OXFAM DEUTSCHLAND, BUREAU D’ANALYSE SOCIÉTALE POUR UNE INFORMATION CITOYENNE, *supra* note 675, at 4.

⁹⁰⁰ For a good historical overview, *see* Chacón-Cascante & Crespi, *supra* note 729.

⁹⁰¹ *See* Pereira A & Maraschin M, *Banana (Musa spp) from Peel to Pulp: Ethnopharmacology, Source of Bioactive Compounds and its Relevance for Human Health.*, 160 J. ETHNOPHARMACOL. 149 (2015).

also with acclaimed therapeutic uses,⁹⁰² cultivating widely throughout the tropics as source of food and income for people. As a matter of fact, effective product differentiation expands sales, increases the value of the banana, and creates the necessary conditions to increase the share of the value captured by actors at the other end of the chain. Sales of organic, Fair Trade, and dual certified (organic and Fair Trade) bananas have consistently increased since some large retailers decided to promote Fair Trade bananas in response to growing consumer concern about the exploitation of plantation workers and smallholder producers by large multinational companies.⁹⁰³

Among the new developments and instruments to fight corruption and unfair trade, legislation is being developed on corporate complicity liability that defines the line between merely doing business with a bad actor and acts that give rise to substantial effect on the commission of human rights violations where the corporation had the relevant knowledge. Clarity about the broad features of the test to be applied in order to determine the objective and mental elements of corporate complicity liability is an important step towards setting the framework that should guide the debate on corporate complicity liability and corporate due diligence responsibilities.⁹⁰⁴

In Belize, due to its contractual commitments with Fyffes, safety and quality standards are significantly more stringent and costly than the legal ones requested by importing countries.

⁹⁰² See also KP Sampath Kumar & Debjit Bhowmik, *Traditional and Medicinal Uses of Banana*, 1 J. PHARMACOGN. PHYTOCHEM. (2012).

⁹⁰³ Giovanni Anania, *Developments in Global Value Chains for Bananas: Trade Policies, Multinationals, Shipping Modes and Product Differentiation: The case of Cameroon Exports*, [http://europa.uniroma3.it/centrorossidoria/docs/public/Anania2c%20incomplete%20draft%20paper%20\(30.9.14\).pdf](http://europa.uniroma3.it/centrorossidoria/docs/public/Anania2c%20incomplete%20draft%20paper%20(30.9.14).pdf) (last visited Feb 11, 2016).

⁹⁰⁴ Sabine Michalowski, *Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those that Trigger Corporate Complicity Liability*, 50 TEX. INT'L L.J. 403, 464 (2015).

These high standards and the amount of regulation on bananas constitute a barrier to entry for small growers and originate from a series of factors, some related to the characteristics of the specific farm, others to the socio-economic and institutional environment. For instance, effective technical assistance and access to inputs are often provided by the buyer of the bananas or by the farm's cooperative.⁹⁰⁵ Few changes have been observed in the last years and the industry remains concentrated in the hands of a few existing producers, excluding newcomers.

Recognizing the economic and social relevance of the banana industry, in countries such as Ecuador or Costa Rica there exist a clear intention to build on an “integrated policy action plan,”⁹⁰⁶ defined and developed by the government and with the involvement of all relevant stakeholders. This plan should first identify the public goals to be achieved then draw up all public policy interventions and identify the contribution expected by the public sector as well as each of the social groups involved.⁹⁰⁷

Considering the tariff reduction to dollar bananas and the current situation of global banana markets, opinions regarding the capability of ACP exporters to continue expanding at a sustained rate exports and their share of the European Union market differ. While many possibilities exist to improve production technologies and expand land allocated to banana production, problems related to the strength of public institutions and physical infrastructures, together with competitiveness, are the main factors constraining the expansion of exports in many ACP countries.⁹⁰⁸ But it would not be advisable to rely just on government regulation to

⁹⁰⁵ Anania, *supra* note 882, at 10.

⁹⁰⁶ ANANIA, *supra* note 749, at 14.

⁹⁰⁷ *Id.*

⁹⁰⁸ ANANIA, *supra* note 749, at 35.

make decisions regarding fair trade;⁹⁰⁹ it is important to also consider the role of international cooperation and programs such as BAM that may be extraordinarily important.

8. MAIN CURRENT CHALLENGES OF THE BELIZEAN BANANA INDUSTRY

8.1. Competitiveness, Increasing Yield and Efficiency of Banana Production

The export basket of Belize remains limited to a few products mainly of agricultural origin such as bananas, citrus and sugar, as well as shrimps and some marine exports largely under preferential market arrangements involving the European Union, the United States, and Canada. Consequently, agriculture—and particular the banana industry—is critical to the Belizean economy. Banana exports are bound by contract with Fyffes, national and international aids to the Industry, and preferential access to the European Union. These policies provide market price support. Higher production costs in Belize, when compared with neighboring countries, indicate a significant transfer from consumers to agriculture producers.⁹¹⁰ In fact, most support to agriculture is provided by tariff protection and import controls through discretionary import licenses, along with the regulation of production and trade by various official agencies.

In the international markets, pricing in commodities is highly competitive. The banana industry is clear evidence of a value chain in which the relationship between production cost and the price paid by consumer is not sustainable.

⁹⁰⁹ Stenzel, *supra* note 758, at 669.

⁹¹⁰ BGA internal information.

8.2. Legal Framework and Institutional Setting

The general legal framework is not facilitating business development in Belize in general, and in the banana industry in particular since the production is concentrating in a few growers and forty percent of the production remains under receivership. Belize ranked 106th (2014) and 120th out of 189 in the 2016 World Bank Report on Doing Business,⁹¹¹ which was established to determine how easy, or difficult, it is for a local entrepreneur to open and run a business when complying with relevant regulations. However, the rates related to business activity in general are improving; Belize ranked 161st in 2013, 167th in 2014, and 159th in 2016.⁹¹² However, in other relevant areas, such as getting credit, the ranking decreased; Belize fell from 136th to 162nd in 2016.⁹¹³

The legal system in Belize was adopted at the same time that the European strategy was created for the Belizean banana industry to increase production and enhance competitiveness upon the basis of the Banana Support Programme 1999-2009 (BSP).⁹¹⁴ With a ten year programming period to assist Belize to come to terms with the increased liberalization of the banana regime and the eventual removal of the preferential access to the European Union market, the BSP included most of the specific objectives now contained in the BAM Program. This includes improving the competitiveness of the banana industry and improving the living

⁹¹¹ WORLD BANK, DOING BUSINESS 2016: MEASURING REGULATORY QUALITY AND EFFICIENCY, 188 (Washington DC: World Bank ed. 2015), <http://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-0667-4> (last visited May 11, 2016).

⁹¹² *Id.* at 188.

⁹¹³ *See also* World Bank, DOING BUSINESS, MEASURING BUSINESS REGULATIONS, <http://www.doingbusiness.org/> (last visited May 11, 2016).

⁹¹⁴ European Union, European External Action Service (EEAS), BELIZE, EUROPEAN BANANA SUPPORT PROGRAMME, http://eeas.europa.eu/delegations/jamaica/projects/list_of_projects/18439_en.htm (last visited May 11, 2016).

conditions of banana farmers. In fact, the BSP provided some 1,230 households better access to health care through health clinics at Bella Vista and San Juan; it helped over 400 students increase classroom space and sanitary facilities in five primary schools; it developed a new water supply system that provides water to an additional 280 people. Furthermore, it increased production yields from an average 400 boxes per acre to 680 (2008) and production levels up to 4,359,385 boxes (80.650 tons) on 6,300 acres. As a matter of fact, exports to Europe increased by 24% in the period of 1999-2008 while most of the other Caribbean countries experienced an inverse trend.⁹¹⁵

The main domestic legislation currently regulating agricultural products includes the Banana Industry Act of 2000⁹¹⁶ (which set up the Banana Control Board to regulate the banana industry), the Citrus (Processing and Production) Act,⁹¹⁷ the Sugar Industry Act of 2001,⁹¹⁸ the Sugar Industry Development Fund Regulations of 2003,⁹¹⁹ and the Sugar Industry Control Regulations of 2003.⁹²⁰

With the original text from December 2, 1972 and the most recent consolidated version of the Banana Act of December 31, 2000; "...subject to the provisions of this Act, no person shall plant, grow, cultivate or otherwise be responsible for bananas in any designated area except in accordance with the terms and conditions of a valid license issued to him by the Board..." The purposes of the Board are to promote, foster and encourage the development of the banana

⁹¹⁵ *Id.*

⁹¹⁶ BANANA INDUSTRY ACT. CHAPTER 205. REVISED EDITION 2000, *supra* note 841.

⁹¹⁷ BELIZE LEGAL INFORMATION NETWORK ONLINE, <http://www.belize-law.org/web/lawadmin/index2.html> (last visited May 11, 2016).

⁹¹⁸ *Id.*

⁹¹⁹ *Id.*

⁹²⁰ *Id.*

industry and the export of bananas; to regulate and control the production, marketing and exporting of bananas; to produce bananas alone or in association with others; and to carry out other functions including placing bananas on the market. In accordance with the Banana Act, the Minister of Agriculture may declare any area of the country to be a designated area for the purposes of this Act. However, the banana industry is currently run by the private sector and highly commercialized. It is characterized by a small number of relatively large plantations, all located in the Stann Creek and Toledo Districts in the southern part of the country. The BGA is responsible for coordinating the production and the sale of bananas, ensuring marketing and accounts management with buyer, implementing disease control, recommending quality production standards, and giving agronomic advice to the farmers. It also distributes small inputs related to post-harvest and packing. At present no one can export bananas except the BGA and all growers must comply with its regulations if they want to export. BGA buys the banana from the growers, sells it to the multinational marketing company Fyffes, and subsequently pays the growers, deducting a fee for its services.⁹²¹

The Banana Industry Act is not currently in effect and the BGA leads the banana industry. The BGA was created under Section 21 and its objectives set out in Section 22 while other matters regarding the Association are regulated by Sections 23 to 35. It is currently the main institution overseeing the management and development of the banana industry while the Board foreseen in the Act is no longer active.

Considering the case law of the Supreme Court in Belize the agricultural model of exclusivity granted to certain product associations in Belize for citrus, sugar and bananas is

⁹²¹ BGA internal information.

illegal.⁹²² In October 2007, mandatory “cess” payments to the Citrus Growers Association were ruled unconstitutional and in March 2010, the Supreme Court established that certain aspects of the Citrus Industry Act violated the constitution. Finally, on June 8, 2010, the Supreme Court ruled that certain aspects of the Sugar Industry Act were also in violation of the Constitution.⁹²³ Both of the cases were grounded on the monopolistic situation of such associations. The conclusion refer the protectionism practiced through agricultural organizations and it is clearly abolished:

I grant and declare that the operation and effect of the provisions of Sections 7(1), 7(2) and 37(1) of the Citrus (Processing and Production) Act are ultra vires the Belize Constitution in that they contravene the Claimants’ rights, conferred by Section 13(1) of the Belize Constitution, not to be hindered in the enjoyment of their freedom of association.

I grant and declare that the operation and effect of the provisions of Sections 7(1), 7(2) and 37(1) of the Citrus (Processing and Production) Act are ultra vires the Belize Constitution in that they contravene the Claimants’ rights, conferred by Section 15(1) of the Belize Constitution, not to be denied the opportunity to gain a living by work which they freely chose.⁹²⁴

8.3. Stability: Insurance and Credit

Hopefully, the sustainability of the banana industry can be achieved under certain financial conditions. In particular, the industry is in urgent need of capital and insurance to reduce development risks. With high commercial interest rates and a lack of proper insurance coverage the future of the industry cannot be guaranteed. Furthermore, competition with

⁹²² Supreme Court of Belize, SUPREME COURT JUDGMENTS, <http://www.belizejudiciary.org/web/judgements2/> (last visited May 11, 2016).

⁹²³ *Id.*

⁹²⁴ Hon. Just. Minnet Hafiz-Bertram, *H.T.A. Bowman Ltd. et al. v. Citrus Control Board et al.*, 2010, 30 (2010), http://www.belize-law.org/web/supreme_court/judgements/Hafiz%202011/HTABowmanetalv.AttorneyGeneraetal.pdf (last visited May 12, 2016).

producers from the so-called dollar banana countries is impossible due to current difficulties accessing credit. Short- and medium-term loans from local banks are offered at a 12-18% interest rate, but the repayment schedule is too short to be useful for capital investments or modernization of the equipment used in the fields and longer term repayment schedule are not available.⁹²⁵ This important financial limitation hinders development in the banana industry growers are forced to reinvest any profits if they may have them. As a consequence, less than positive results for the productivity of the farms will not achieve the expected levels of competitiveness.

Agriculture, including the banana industry, is particularly exposed to the risk of hurricanes, which are an occasional threat to production and exports in Belize. Since 1930, there have been sixteen hurricanes, eight of which were major ones that have either made landfall in Belize or passed close enough to cause damage and/or loss of life. Additionally, seventeen systems made landfall in Belize as tropical storms. In recent years, agriculture production was affected by Hurricane Iris (2001), Hurricane Dean (2007), and Hurricane Richard (2010) with an impact of 831 homes either partially or completely damaged across fifty-five communities and a damage estimate at \$24.6 million with \$17.35 million in losses to agriculture.

In fact, improved financial support for the local market and proper insurance coverage are not only important demands but also a pillar for the development of the banana industry. Belize is served by a small number of national banks with limited capitalization, a minor presence of international banks, and very little intervention by development banks. This situation clearly precludes the establishment of any viable credit scheme. The lack of affordable credit

⁹²⁵ BGA Internal information.

contributes to an uncertain, volatile environment for private sector development, which forces many farmers to manage the risk via diversification into other activities such as shrimp farming, tourism, and citrus farming.⁹²⁶ Consequently, the cost of borrowing from these banks is relatively high. There are several credit unions, with limited capacity and resources, but their number has significantly decreased since 2004 and there have been no changes to laws governing domestic and offshore banks or insurance companies.

The banking and insurance sectors are characterized by a significant foreign presence as well as a distinct separation between domestic and offshore activities. The domestic banking sector comprises five commercial banks, most of which are foreign-owned, and fourteen credit unions. The value of total deposits in domestic banks is BZ\$0.99 billion (at the end of March 2010); Belize Bank has the largest share (around 37% of total deposits), followed by Scotiabank Belize Ltd. (around 26%). The total value of deposits in credit unions is BZ\$197 million, with around 68% invested in the Holy Redeemer Credit Union. The domestic insurance industry includes thirteen insurance companies and one association of underwriters.⁹²⁷ With respect to the offshore sector, there are eight international banks and fourteen international insurance companies.⁹²⁸ Active government agencies providing financial services include the Development Finance Corporation, until recently the Small Farmers and Business Bank (in existence but not

⁹²⁶ BGA Internal information.

⁹²⁷ Belize Credit Union League; Blue Creek Credit Union; Citrus Growers and Workers Credit Union; Civil Service Credit Union; Evangel Credit Union; Holy Redeemer Credit Union; La Inmaculada Credit Union; Mount Carmel Credit Union; Police Credit Union; St. Francis Xavier Credit Union; St. John's Credit Union; St. Martin's Credit Union; Toledo Teacher's Credit Union; Wesley Credit Union.

⁹²⁸ American Life Insurance Co. (USA); Atlantic Insurance Company (Honduras); Casualty & General Insurance Co. (Jamaica); Guardian Life Ltd. (Trinidad); Guardian General Insurance Company (Trinidad); Home Protector Insurance Co. (Belize); Insurance Corporation of Belize (Belize); Island Heritage Insurance Co. (Cayman Islands); RF&G Insurance Company (Belize); RF&G Life Insurance Company (Belize); Savior Capital Life Insurance Company (Barbados); United Insurance Company (Barbados); CUNA Mutual Insurance Company (USA); and Lloyds (UK).

currently providing loans), and the Government Savings Bank. The company, Go Bananas, demonstrates the specific financial problems this situation creates. The company is currently in receivership due to its remaining debts and with a production being mainly dedicated to repay the interest of the remaining credit.

Insurance and credit seem to be some of the main concerns of the Belizean banana industry as with many other agriculture-focused developing countries. This is particularly significant in the Caribbean where the question is not *whether* a hurricane—or other environmental catastrophe—will happen but *when* it will happen. There is a clear certainty that it will take place unexpectedly.

In October 2001, Belize was hit by forceful Hurricane Iris.⁹²⁹ Iris totally destroyed many plantations and, though the banana farms had insurance, it only covered part of the expenses. For instance, the Caribbean Farming Group incurred direct or indirect losses as a consequence of the hurricane of over \$8 million on top of the amount recovered from the insurance companies.⁹³⁰ According to farmers, the banana industry still has not recovered from the financial devastation caused by Hurricane Iris in 2001 and is still suffering the consequences. The negative impact of accumulated natural disasters (Hurricane Keith, Tropical Storm Chantal, and Hurricane Iris) caused more than \$200 million in damages to the sector.⁹³¹ Credit needs to cater to the unique

⁹²⁹ In the evening of Monday, October 8, 2001, Hurricane Iris hit the south of Belize making landfall near Independence in the Stann Creek district. With sustained winds of over 140 mph, destruction was immense and approximately 775,000 acres (310,000 ha) were severely affected by the force of the hurricane. http://biological-diversity.info/hurricane_iris.htm (last visited, Mar. 1, 2016). See ROBERT E. GAMMONS, IRIS: A HURRICANE IN PARADISE (2010).

⁹³⁰ CARRIBBEAN FARMING LTD., CARIBBEAN FARMING LIMITED, A SHORT INTRODUCTION 12, 8 (2003), <http://www.fcl-ltd.com/sitebuildercontent/sitebuilderfiles/CaribbeanFarming.pdf> (last visited Mar 1, 2016).

⁹³¹ MINISTRY OF AGRICULTURE & FISHERIES, GOVERNMENT OF BELIZE, THE NATIONAL FOOD AND AGRICULTURE POLICY (2002-2020). NO FARMER = NO FOOD 63, 8 (2003).

characteristics of farmers by reforming administrative stipulations for its management, such as decentralization, collateral, repayment, supervision, and insurance against risk and uncertainty.⁹³²

There is a strong relationship between insurance and credit. Five manuals were prepared by the International Finance Corporation (IFC)⁹³³ for the development of agri-insurance markets where the public and private sectors work together in partnership, such as the one envisaged for Belize. The Global Index Insurance Facility (GIIF)⁹³⁴ is a multi-donor trust fund with the objective of expanding the use of index insurance as a risk management tool in agriculture, food security, and disaster risk reduction. Its strategy relies on support and participation from both private sector and governments to build sustainable index insurance markets and promote innovative insurance solutions. In the Latin America and the Caribbean,⁹³⁵ on the private sector side, the GIIF and IFC Team funds the development of index insurance products with local and regional insurance companies who then sell the products.⁹³⁶ In the public sector, the GIIF and WB Team work closely with governments on policy issues to enable a legal and regulatory

⁹³² *Id.* at 22.

⁹³³ IFC, as member of the World Bank Group, is the largest global development institution focused exclusively on the private sector in developing countries. *See* International Finance Corporation, World Bank Group, http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new (last visited Mar 2, 2016).

⁹³⁴ Overview of Global Index Insurance Facility: Index Insurance Forum, <http://www.indexinsuranceforum.org/overview-global-index-insurance-facility> (last visited Mar 2, 2016).

⁹³⁵ Projects by regions. Index Insurance Forum, <http://www.indexinsuranceforum.org/projects/by-region> (last visited Mar. 2, 2016).

⁹³⁶ Microinsurance Catastrophe Risk Organisation (MiCRO - Haiti), http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/financial+markets/retail+finance/insurance/micro (last visited Mar. 2, 2016).

environment for index insurance. Good examples of insurance coverage can be found in Jamaica,⁹³⁷ the Dominican Republic,⁹³⁸ and Haiti.⁹³⁹

In 2007, the Caribbean Catastrophe Risk Insurance Facility (CCRIF) was formed as the first multi-country risk pool in the world, and was the first insurance instrument to successfully develop parametric policies backed by both traditional and capital markets.⁹⁴⁰ Initially designed as a regional catastrophe fund for Caribbean governments to limit the financial impact of devastating hurricanes and earthquakes, the CCRIF was restructured in 2014 into a segregated portfolio company to facilitate expansion into new products and geographic areas. It is now known as CCRIF SPC and enables Central American countries to formally join the risk pool. An appropriate policy response, thus, might be to implement procedures that would act as a brake on this tendency. This could include consumer representatives—or ministerial departments in charge of consumer protection—systematically in charge of developing and managing GI specification rules as an alternative to the current producer-driven system.⁹⁴¹

8.4. Quality and Certification

The Rainforest Alliance is an international non-profit organization that works to conserve biodiversity and ensure sustainable livelihoods by transforming land-use practices, business

⁹³⁷ Feasibility study for macro and meso-level index insurance - Jamaica: Index Insurance Forum, <http://www.indexinsuranceforum.org/project/feasibility-study-macro-and-meso-level-index-insurance-jamaica> (last visited Mar. 2, 2016).

⁹³⁸ Feasibility study for macro and meso-level index insurance - Dominican Republic: Index Insurance Forum, <http://www.indexinsuranceforum.org/project/feasibility-study-macro-and-meso-level-index-insurance-dominican-republic> (last visited Mar. 2, 2016).

⁹³⁹ Capacity building - Haiti: Index Insurance Forum, <http://www.indexinsuranceforum.org/project/capacity-building-haiti> (last visited Mar. 2, 2016).

⁹⁴⁰ The Caribbean Catastrophe Risk Insurance Facility, <http://www.ccrif.org/> (last visited Mar. 2, 2016).

⁹⁴¹ Mérel & Sexton, *supra* note 876, at 12.

practices and consumer behavior. The Rainforest Alliance certified seal is an internationally recognized symbol of environmental, social and economic sustainability that helps both businesses and consumers do their part to ensure a brighter future for us all, as they refer in their own webpage.⁹⁴² At this stage the commitments of the BGA are unknown but it seems there are ongoing initiatives to obtain Rainforest Alliance certification and auditing services at the request of Fyffes.

Certification, verification, and validation of any kind must be a tool, and not an aim, for the banana industry of Belize. Therefore, certification processes serve as a means to improve production and quality, distinguish the industry in the market, and obtain a better reputation that may help the BGA and farmers obtain better sales prices. Considering the difficulties and trends of the market, a cost-benefit analysis is required since the main stakeholders consider that most of the effort should focus on improving production, increasing yields, and reducing cost. The goal is to obtain profit, invest in the future of the industry, provide better socio-economic conditions for the farmers and workers, and guarantee sustainability beyond the contract with Fyffes.

However, Rainforest Alliance certification is not the only existing option—although it is important since it was demanded by Fyffes. Fierce supermarket price wars in the European Union have forced down the price of loose bananas, making them cheaper now than 20 years ago. While shoppers benefit from this race to the bottom, cheap bananas spell disaster for the four million families in the developing world who depend on the banana trade for their livelihood. With the new international legal framework for trade on bananas and increased

⁹⁴² RAINFOREST ALLIANCE, <http://www.rainforest-alliance.org/about> (last visited Jun 19, 2016).

competition with Latin American countries, Belize must define a strategy based on the quality of its agricultural product. In fact, the Transatlantic Trade and Investment Partnership (TTIP), currently being negotiated between the United States and the European Union will certainly find a global solution for the protection of GIs, thereby establishing an important tool for accessing international markets. Consequently, there is a clear tendency to move towards quality schemes on agricultural production and provide them with proper international legal protection

Actually, in the case of Belize, the Economic Partnership Agreement (EPA) includes certain important obligations that should have been achieved by January 2014. Title IV on trade-related issues includes a chapter on competition and one on innovation and intellectual property.” Section 2 of the second chapter, as well as Article 139 detailing “Nature and Scope of Obligations,” discuss GIs.

4. In addition and without prejudice to their existing and future international obligations, the EC Party and the Signatory CARIFORUM States shall give effect to the provisions of this Section and ensure their adequate and effective implementation no later than 1 January 2014 unless the CARIFORUM-EC Trade and Development Committee determines otherwise taking into account the development priorities and levels of development of the Signatory CARIFORUM States. The EC Party and the Signatory CARIFORUM States shall be free to determine the appropriate method of implementing the provisions of this Section within their own legal system and practice.⁹⁴³

In 2011, CORBANA in Costa Rica finally succeeded in protecting bananas with a GI—identifying a certain territory whereby its quality, reputation, or other feature is attributable to its specific geographic origin.⁹⁴⁴ In addition, it informs consumers on the origin of the product, its quality and prestige. This seal serves to emphasize the added value by differentiation, enabling

⁹⁴³ EPA Agreement, Art. 139.

⁹⁴⁴ Corbana, DOCUMENTOS CON EL MARCO NORMATIVO PARA EL FUNCIONAMIENTO DE CORBANA, <https://www.corbana.co.cr/categories/normativa> (last visited Apr 5, 2016).

the fruit to obtain better prices.⁹⁴⁵ This GI positions Costa Rican bananas as a socially and ethically responsible product. Costa Rica becomes the first country in Central America, and the second country in Latin America, to export bananas with a GI. Belize could follow a similar model, which may help not just with exports but also with the development of land use and other internal regulations.

Consumers are increasingly making purchasing decisions based on perceptions of origin of the products, uniqueness, quality, social and environmental impact, and value. Therefore, GI registered products are relevant particularly in developed countries since they imply a differentiation and therefore competitive reputation. It also demonstrates a sustainable banana industry, local development, and improvement in the means of production while conserving traditions and cultures. Consequently, GIs may offer appropriate tools for the expected public-private partnership needed in Belize.

Article 145 of the EPA discusses GIs and includes:

2. The Signatory CARIFORUM States shall establish a system of protection of geographical indications in their respective territories no later than 1 January 2014. The Parties shall cooperate through the CARIFORUM-EC Trade and Development Committee in accordance with the provisions of Article 164(2) towards the development of geographical indications in the territories of the CARIFORUM States. To this end, and within six months from the entry into force of the Agreement, the CARIFORUM States shall submit to the consideration of the CARIFORUM EC Trade and Development Committee a list of prospective Geographical Indications originating in the CARIFORUM States for its discussion and comments.

Furthermore, Belize has been a member of the World Trade Organization since January 1995 and is fully compliant with the TRIPS agreement.⁹⁴⁶ Nowadays, and despite the EPA and

⁹⁴⁵ *Id.*

⁹⁴⁶ WTO, Members and Observers, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited May. 8, 2016).

the TRIPS commitments, Belize does not have *sui generis* legislation for GIs. In accordance with EPA implementation, the national institutions⁹⁴⁷ involved in the development of GIs are working on the development of a proper legal framework for agricultural quality protection and market access of Belizean products.

8.5. Local Development, Workers Conditions and Rights

Granting a new model for sustainable agricultural production for Belize will continue to increase development in order to improve the business and working conditions. In fact, the Country Strategy Paper (CSP) presenting the framework governing European Union cooperation with Belize from 2008 to 2013 established Belize's aim to achieve a greater standard of living for its people.⁹⁴⁸

Through the collective and inclusive approach, the GI system provides a unique opportunity to engage local resources⁹⁴⁹ in regional development strategies. However, there is a challenge to ensuring a representative industry organization and avoiding the danger that the larger farmers capture all benefits.⁹⁵⁰ Increased awareness, the involvement of trade organizations and the government, and the implementation of proper IPR laws have the potential for producers to gain the benefits of GI protection in the long run.⁹⁵¹

⁹⁴⁷ Belize Intellectual Property Office; Solicitor General's Office; Ministry of Trade, Investment Promotion, Private Sector Development and Consumer Protection; Ministry of Natural Resources and Agriculture; Belize Bureau of Standards; Belize Agricultural Health Authority and National Institute of Culture and History

⁹⁴⁸ EUROPEAN COMMISSION, *supra* note 724.

⁹⁴⁹ GEOGRAPHICAL INDICATIONS FOR FOOD PRODUCTS: INTERNATIONAL LEGAL AND REGULATORY PERSPECTIVES, (2008).

⁹⁵⁰ *See e.g.*, for South Africa, Bramley & Kirsten, *supra* note 65, at 89.

⁹⁵¹ *See e.g.*, for India, Thailand, Malaysia, Singapore, Indonesia, Jordan, China and Pakistan, GOPALAKRISHNAN, NAIR, AND BABU, *supra* note 862, at 6.

Developing countries would participate as exporters in such a system, to the extent that their exports could benefit from protection in importing countries. Developing countries could even be given an element of special and differential treatment through efforts to encourage such product differentiation based on quality as a way of expanding exports.

The Banana Growers Association is leading the development of a Belizean Banana Strategy.⁹⁵² The main objectives are to ensure higher production and establish a proper regulatory framework to guarantee its future grounded by a public-private partnership to obtain financing, insurance, and credit. Its mission states that “Banana Growers, work for quality, fair and equitable production and trade of Belizean Bananas, as a fundamental Industry for Belize's future based on environmental, social and economic sustainability to contribute to the development of the country.”⁹⁵³ The vision intends to “supply unique and high quality Belizean Bananas to the market at a fair price to be globally distinguished, be competitive and lead the socio-economic development of Belize.”⁹⁵⁴

The main aims were established in accordance with previous demands and present needs, including:

- (1) To be more competitive in terms of volume, cost, and quality in order to achieve maximum final customer satisfaction and comply with the specific and measurable objectives as an efficient and ambitious agricultural production;
- (2) To be sustainable and internationally recognized as the leading and preferred supplier of banana, with a solid and strong production and marketing system; and

⁹⁵² Currently under review but with a clear consensus among the banana growers.

⁹⁵³ BGA Strategy (under internal consultation, not published).

⁹⁵⁴ *Id.*

(3) To provide the banana market with a unique model ensuring labor and social rights, together with the highest environmental standards and food safety.⁹⁵⁵

With the public–private partnership, and backed by the main institutions involved in banana growing, as well as with the development of an innovative GI regulation, Belizean bananas are to be distinguished and branded in order to identify them as a product with a reputation⁹⁵⁶ and unique qualities due to their origin, their use of a production system granting workers’ rights, and other particular features. As a main asset in Belize, bananas—deeply rooted in its tradition, culture, and geography—create value and support rural development. Its proper recognition and regulation will facilitate investments and resource development required to face current and future challenges.

Recent strategies and initiatives originating from the government⁹⁵⁷ and the European Union,⁹⁵⁸ have been able to sustain the banana industry. However, the fact of being just a few amount of (rich) growers versus other industries with hundreds (citrus) or even thousands (sugar) has kept public authorities away and the distance has increased in the previous years. Consequently, the importance of the banana industry for the country is not duly reflected in international planning or evaluating documents drafted by organizations such as the World

⁹⁵⁵ *Id.*

⁹⁵⁶ Belizean Bananas are among examples of products with acquired recognition and reputation worthy of GIs protection in ACP countries together with bananas from Grenada, tea from Kenya, Kilimanjaro coffee from Tanzania, Chipinga coffee from Zimbabwe, Guinean pineapples, Argane oil from Morocco, shea butter from Burkina Faso, white honey from Cameroon, fabrics of Korhogo from Côte d’Ivoire, specific chillies and pickles from Rodrigue Island (Mauritius), Mananara vanilla from Madagascar, and many others, *see* O’CONNOR AND COMPANY, EUROPEAN LAWYERS, *supra* note 875, at 15.

⁹⁵⁷ MINISTRY OF AGRICULTURE AND FISHERIES AND MINISTRY OF ECONOMIC DEVELOPMENT, COMMERCE, INDUSTRY AND CONSUMER PROTECTION, *supra* note 777.

⁹⁵⁸ DOMINIQUE DAVID & JEAN-YVES BALITEAU, PROMOTING SUSTAINABLE DEVELOPMENT IN THE TRADITIONAL BANANA GROWING AREAS OF SOUTHERN BELIZE AND ALLEVIATING POVERTY 100 (2008). Also *see* RIGOBERTO STEWART AND VERONICA BROOMS, *supra* note 784.

Bank⁹⁵⁹ or the Inter-American Development Bank.⁹⁶⁰ The difficult situation in other Caribbean countries and the hard competition in global banana markets envisage a dark future. The prime factor for growers is to achieve competitiveness by increasing product yields to economically sustainable levels through the improvement of infrastructure and the implementation of optimum agronomic practices. However, it cannot be achieved without substantial changes to the governance of the banana industry and a reasonable implication from the government. The banana strategy being currently drafted is extremely practical but its success depends entirely on the legal framework and the banana growers' will to initiate structural changes and long-term decisions. First, most banana growers should agree on the fundamental issues and the strategy for execution.⁹⁶¹

⁹⁵⁹ WORLD BANK GROUP, CARIBBEAN COUNTRY MANAGEMENT UNIT, *supra* note 843.

⁹⁶⁰ INTER-AMERICAN DEVELOPMENT BANK, *supra* note 842.

⁹⁶¹ During the last few months they have agreed on developing the Strategy and the mission, vision and main aims and grounds for the Strategy. They are really concerned about the challenges but any changes may be observed with precaution and certain reluctant attitudes from some.

CHAPTER 5: FEASIBILITY OF AN EFFECTIVE INTERNATIONAL REGULATION OF GEOGRAPHICAL INDICATIONS: THE CHALLENGES OF TTIP AND THE TRIPS AGREEMENT

1. CAN WE EXPECT A DEEP UNITED STATES-EUROPEAN UNION LOOK INTO THE EYES AND A WINE TOAST WITH A GEOGRAPHICAL INDICATION WITHIN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP OR THE TRIPS AGREEMENT?⁹⁶²

It is not easy to explain why the best chocolate industries are in countries that do not produce cocoa beans.⁹⁶³ And many may wonder why coffee does not receive the same international legal protections—and local economic and social profit and impact—that wine receives.⁹⁶⁴ Commodities, food quality, market access, distribution of profits, and many other interesting development and IPR protection concerns should be priority areas in trade negotiations since we have to ameliorate this strange planet in which many are hungry while

⁹⁶² Inspired in a photo published by Reuters at the beginning of TTIP negotiations when German Chancellor Angela Merkel and U.S. President Barack Obama raised their glasses in a toast during a dinner at the Charlottenburg Castle in Berlin on June 19, 2013. At that moment, the situation was tense due to recently-leaked details by Edward Snowden about Washington spying on its European allies; Obama is looking down to avoid the straight look of the European leader while holding a glass of white wine, probably protected by a European Geographical Indication under European Law but just a trademark in the United States. <http://in.reuters.com/article/2013/07/04/usa-security-obama-merkel-idINDEE96303S20130704> (last visited Sep 26, 2015).

⁹⁶³ The five main manufacturers of chocolate in the world are to be found in the United States, Europe, and Japan: Mars Inc. (USA), Mondelez International Inc. (USA), Ferrero Group (Italy), Nestlé S.A. (Switzerland), and Meiji Holdings Co. Ltd. (Japan) and Ferrero Group (Italy), *see* <http://www.icco.org/about-cocoa/chocolate-industry.html> (last visited Sep 26, 2015). In accordance with the new version of FAOSTAT the main cocoa beans producing countries indicate their percentage of production over the world total are Ivory Coast (34%), Indonesia (15%), Ghana (15%), Nigeria (9%) and Cameroon (6%), *see* <http://faostat3.fao.org/faostat-gateway/go/to/home/E> (last visited Sep 26, 2015).

⁹⁶⁴ 90% of the world's coffee production takes place in developing countries—Brazil, Vietnam, Columbia, Indonesia and Ethiopia the main producers. Its consumption, however, takes place in industrialized nations. *See* <http://faostat3.fao.org/faostat-gateway/go/to/home/E> (last visited Sep 26, 2015). France, Italy, Spain and the United States generate almost half of the wine production in the world http://www.wineinstitute.org/files/2010_World_Wine_Production_by_Country.pdf (last visited Sep 26, 2015).

countless others suffer obesity.⁹⁶⁵ After all, the world is changing and certain existing frameworks need to be rethought in order to allow progress in the less developed areas, such as sustainable agriculture and fair trade.

Variety and quality can be valuable assets not just when referring to cheeses, meats, oils, fruits, wine, spirits, and even handicrafts and traditional specialties, but also for certain commodities and local products in developing countries. Considering that more than twenty years have passed since the TRIPS Agreement was introduced, the “market of lemons” theory and the problem of quality uncertainty and information asymmetry should lead the United States and the European Union to a reasonable regulatory approach under TTIP. Food quality recognition, market access and the potential local distribution of economic benefits highly depend on international trade law.⁹⁶⁶ The agreement between the transatlantic partners and main stakeholders in global trade on goods and services is fundamental to unblock the TRIPS Agreement on GIs with global consequences. *Prima facie*, now, regarding GI protection and paraphrasing Mock, editor of the Trademark Reporter, the main publication on IPR in the U.S. at the time, when a similar debate took place when trademark legislation was debated in the United States “any movement to extend the scope of international law should have the approval of all

⁹⁶⁵ Regarding hunger, see FOOD AND AGRICULTURE ORGANIZATION, HUNGER MAP 2014, <http://www.fao.org/3/a-i4033e.pdf> (last visited Aug 27, 2016). (“About 805 million people—one in nine of the world’s population—were chronically undernourished in 2012-14, with insufficient food for an active and healthy life. This number has fallen by 100 million over the last decade and by 209 million since 1990-92.”). In relation with obesity, the worldwide prevalence of obesity nearly doubled between 1980 and 2008 in the European Region, see World Health Organization, DATA AND STATISTICS (2016), <http://www.euro.who.int/en/health-topics/noncommunicable-diseases/obesity/data-and-statistics> (last visited Aug 28, 2016). In the United States more than two-thirds of adults were overweight or obese (68.6%) in 2012, see The State of Obesity, OBESITY RATES AND TRENDS, <http://stateofobesity.org/rates/> (last visited Aug 28, 2016).

⁹⁶⁶ Cotton, *supra* note 224, at 1298.

right-minded men and it would be a captious critic indeed who would object to the new agreement unless there exist very cogent reasons against it.”⁹⁶⁷

Europe holds most of registered GIs, which links the reputation for product quality to its geographical origin and serve as a fundamental instrument for the implementation of its Common Agricultural Policy.⁹⁶⁸ Considered by some as a modern form of agricultural protectionism GI systems cause certain sensible doubts. Furthermore, the bilateral negotiation between the European Union and the United States is seen as protectionist by third countries and with many different groups internally opposed to TTIP. But most criticism is entirely sensible rather than just reasonable.⁹⁶⁹ Existing commercial rules, history, and economic reasoning provide arguments to understand the current state of affairs. Howbeit, while 805 million people in the world do not have enough to eat,⁹⁷⁰ sustainable systems for food security and nutrition, but also for the redistribution of added value to developing regions, seem to be imperative. Accordingly, it is necessary to go beyond perceptions of food as just a fungible commodity in order to understand GIs both as an essential source of income and as a fundamental tool for development beyond its IPR features. Perhaps food markets are not just to be led by the invisible hand proposed by Adam Smith,⁹⁷¹ as a certain amount of intervention has always been

⁹⁶⁷ Mock, *supra* note 262, at 3.

⁹⁶⁸ See VICTOR MOSOTI & AMBRA GOBENA, *INTERNATIONAL TRADE RULES AND THE AGRICULTURE SECTOR: SELECTED IMPLEMENTATION ISSUES* (Rome, Italy: FAO ed. 2007). See also TIM JOSLING, *DEVELOPED-COUNTRY AGRICULTURAL POLICIES AND DEVELOPING-COUNTRY FOOD SUPPLIES: THE CASE OF WHEAT* (1980).

⁹⁶⁹ Tim Worstall, *Opposition To TTIP And Ceta Comes From The Howling Untruths Of Campaigners, Nothing Else*, FORBES, 2016, <http://www.forbes.com/sites/timworstall/2016/09/23/opposition-to-ttip-and-ceta-comes-from-the-howling-untruths-of-campaigners-nothing-else/#cc2ef20302bc> (last visited Nov 7, 2016).

⁹⁷⁰ FOOD AND AGRICULTURE ORGANIZATION, *supra* note 943.

⁹⁷¹ SMITH, *supra* note 863.

required for agriculture and is even needed at this stage to compensate for the past and approach the future.⁹⁷²

Disproportionate food demands, together with the technological gap permanently increasing between developed and developing areas, make us rethink the implementation of IPRs, and particularly GIs.⁹⁷³ Although patent and trademark law are extremely important, in jurisdictions where the private property, capital, or technology is the privilege of just a few, IPRs do not receive any sympathy. Yet, the social and economic community impacts of GIs could be widely accepted due to its influence on local development. But even although there are a wide range of products globally that could benefit to the concept of a GI, only a few are duly protected.⁹⁷⁴ The law on GIs—as regulations on other subject matters, such as trademarks, property, or contracts—seeks to provide and satisfy the whole scheme of interests pressing for recognition and satisfaction in each instance with the least possible sacrifice.⁹⁷⁵ These concerns may guide us in order to be able not just to justify the feasibility of an effective regulation on GIs within the TTIP negotiations but also to provide legal options to make it acceptable for all.

Skepticism on any regulation originating from developed countries is understandable considering the uneven evolution of trade in developing areas, which have always faced difficulties such as tariffs, quotas, and many other barriers due to limitations and weak bargaining power in trade agreements. As a matter of fact, any legal concept including the

⁹⁷² Stearns, *supra* note 207, at 247. (Provides an excellent analysis in the chapter on the impossibility of a free market for safe food).

⁹⁷³ See Wilkinson, Hannah, & Scott, *supra* note 232. See also William E. Keating, *The Doha Round and Globalization: A Failure of World Economic Development?*, (2015), http://academicworks.cuny.edu/hc_sas_etds/7 (last visited Aug 8, 2016).

⁹⁷⁴ E.g., Kelly Lissandra Bruch & Homero Deives, *A Relação entre os Signos e o Vinho na História*, 1 REV. JURÍD. CESUCA 151, 170 (2013).

⁹⁷⁵ Rogers and Ladas, *supra* note 431 at 9.

intervention and control of the state in economy and implying agricultural regulation generates disagreements and opposing views. Developing countries, due to the lack of traditional techniques and skills together with the inability to invest in research, are heavily dependent on foreign know-how and IPR. Therefore, any proposal for the establishment of new international trade rules should consider the needs of those lagging behind but also the intrinsic difficulties in developing country governance where inequality and concentration of economic and political power may hinder any effort for socially efficient development models.⁹⁷⁶ Nevertheless, rapidly increasing changes of the global political and economic paradigms demand international legal solutions with a broader acceptance. In fact, the World Economic Forum recognizes that our world is an interconnected system straining under the burden of its own complexity where the Fourth Industrial Revolution and other factors combine to make the global environment more unpredictable and difficult to navigate.⁹⁷⁷

Absolute power and privileges were overcome with the arrival of democracies to foster equality and liberty. Nowadays the regulation of certain highly strategic areas in developed countries, such as agriculture, is facing the challenges of global competition, free trade, market access exigencies and sustainable development. As once fought for democracy, developed and democratic nations may contribute to development through the establishment of adequate legal frameworks on international trade. Therefore, TTIP—within the increasing waves towards trade facilitation—constitutes an opportunity to move forward in the establishment of fair and modern rules on GIs to be accepted and applicable worldwide. Considering the limitations of a system

⁹⁷⁶ As a father of IPR Law in the United States, Stephen Ladas always emphasized the need for the development of a international balanced legislation, *see e.g.*, Ladas, *supra* note 441, at 160.

⁹⁷⁷ WORLD ECONOMIC FORUM, ANNUAL REPORT 2015-2016 44, 3 (2016), <https://www.weforum.org/reports/annual-report-2015-2016> (last visited Nov 6, 2016).

based on the sovereignty of the State, the obsolete international institutions established after World War II, and the stagnation of the Doha Round, the United States and the European Union must consider the global effect of their partnership and its legal and economic impact beyond their own particular and bilateral interests.

Unfortunately, common sense is often the less common of the senses, and the importance of lobbies and outstanding interests may influence legislation and political decisions in the wrong direction. Hence, this chapter provides a summary of collected background data, legal considerations, and proposals for political leaders and main stakeholders in the United States and the European Union to understand that a GI agreement is feasible and fundamental for bilateral and global trade development. In fact, understanding GIs requires accepting the relevance of diversity and quality as a tool for development. A humanist and influential figure of the Renaissance, Michel de Montaigne, is singlehandedly responsible for popularizing the essay as a literary form, openly claiming that “the most universal quality is diversity”⁹⁷⁸ when questioning the exploration of America. And both—the United States and the European Union—are aware of the importance of this concept applied to human beings but also to agricultural products when dealing with new regulatory proposals.

GIs identify the origin, quality, reputation, and other characteristics of products; the TTIP negotiations will address this issue with global consequences. The international community remains deeply divided, with no agreement in sight, regarding the regulation of GIs. Its international protection is a sensitive and controversial issue and legal methods used to protect these types of products diverge considerably. The transatlantic agreement will regulate this issue

⁹⁷⁸ MICHEL DE MONTAIGNE, *LES ESSAIS DE MONTAIGNE: RÉIMPRIMÉS SUR L'ÉDITION ORIGINALE DE 1588, AVEC NOTES, GLOSSAIRE ET INDEX*, 161 (1875).

to reinforce the coherence of the international system for the protection of GIs and ensure synergy between the multilateral trading system established under the TRIPS Agreement. Mutually understanding the technicalities of both legal systems, plus the main issues internationally raised on the topic, may facilitate the existence of an effective global regulation. Therefore, over the existing regulations in the United States and the European Union as well as the positive precedents of recent trade agreements, exist key fundamentals for legally building a consensual GI framework that considers the interest of developing countries.

2. THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AS THE SUMMIT OF POLITICAL AND ECONOMIC RELATIONS BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

Diplomatic relations between the United States and the European Union have existed since the establishment of the European Coal and Steel Community in 1951. Relations increased after the fall of the Berlin Wall in 1989 with the Transatlantic Declaration in 1990 initiating a regular political dialogue.⁹⁷⁹ The Transatlantic Agenda, launched in 1995, contained four broad objectives that are still extremely relevant: promoting peace, stability, democracy, and development around the world; responding to global challenges; contributing to the expansion of world trade and closer economic relations; and building bridges across the Atlantic.⁹⁸⁰ As a step forward, the Transatlantic Economic Partnership initiated in 1998 aimed to increase trade and investment by tackling regulatory barriers and fostering mutual recognition.⁹⁸¹ In the last decade,

⁹⁷⁹ European Union, External Action, EU RELATIONS WITH THE UNITED STATES OF AMERICA, http://eeas.europa.eu/us/index_en.htm (last visited Aug 16, 2016).

⁹⁸⁰ *Id.*

⁹⁸¹ *Id.*

with the establishment of the Transatlantic Economic Council in 2007, convergence provided the guidance to develop the Transatlantic Business Dialogue.⁹⁸² Since June 2013, the TTIP negotiations have been developing anticipating an ambitious, comprehensive, and high-standard trade and investment agreement between the United States and the European Union in a joint effort to promote international competitiveness, jobs, and growth.⁹⁸³ This new challenge may open a new era of world trade and IPR with GI protection is one of the main areas to be reinforced. It remains to be seen if the parties will succeed in identifying the “sweet spot,” an agreement on GIs that will be acceptable to both sides.⁹⁸⁴

The main question is the feasibility of a solid regulation under TTIP based on an agreement between the United States and the European Union on GIs.⁹⁸⁵ To most Americans, as long as the characteristics of the cheese or the wine remain consistent with taste and material expectations, it is not important who makes it or where it comes from.⁹⁸⁶ If negotiators are to learn anything from the demise of the ACTA,⁹⁸⁷ openness and transparency should be the key strategy for the TTIP as negotiators prepare to draft the text on IPR in a way that convinces

⁹⁸² *Id.*

⁹⁸³ *Id.*

⁹⁸⁴ Alan Matthews, GEOGRAPHICAL INDICATIONS (GIS) IN THE US-EU TTIP NEGOTIATIONS CAP REFORM.EU (2014), <http://capreform.eu/geographical-indications-gis-in-the-us-eu-ttip-negotiations/> (last visited Aug 9, 2016).

⁹⁸⁵ Zacher, *supra* note 90.

⁹⁸⁶ See Leigh Ann Lindquist, *Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT'L & COM. L. 309, 342-43 (1999).

⁹⁸⁷ ACTA was negotiated by the European Union and its member states, the US, Australia, Canada, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea and Switzerland to improve the enforcement of anti-counterfeiting law internationally. This was the first time that Parliament exercised its Lisbon Treaty power to reject an international trade agreement. 478 MEPs voted against ACTA, 39 in favour, and 165 abstained, on July 4, 2012.

stakeholders and the public at large that the TTIP is an endeavor worthy of widespread support.⁹⁸⁸

The evolution of legislative positions regarding GIs in the European Union and the United States may open a new scenario not just between the partners but also globally. Much has been written on the differences and difficulties to bring together the existing GI system, in some cases as completely opposed and irreconcilable.⁹⁸⁹ Scott Danner describes the uncertain place of GIs under United States law and analyzes the history of the GI dispute that led to the adoption of the Wine Agreement.⁹⁹⁰ But, as previously mentioned, the Wine Agreement did not solve many of the pending issues and its development raised new concerns that have been duly developed by Brian Rose,⁹⁹¹ Jeff Young,⁹⁹² and Daniele Giovanucci.⁹⁹³ In any case, farmers and local producers demand solid ground for legal solutions to existing problems regarding the compatibility of GIs protection in both systems. Considering agricultural needs, Tim Josling stands to the benefit from such a trade and investment agreement, how long it might take, and what factors might influence its acceptability to legislators.⁹⁹⁴ Michelle Agdomar expressly refers to the need to shift the debate on GIs in order to deal with pending issues such as the form of multilateral and national registers, the consequences of registration, the duration of renewals,

⁹⁸⁸ Duncan Matthews, *Negotiating the IP Chapter of an EU–US Transatlantic Trade and Investment Partnership: Let’s Not Repeat Past Mistakes*, 44 INT’L REV. INTELL. PROP. & COMPET. L. 491 (2013).

⁹⁸⁹ Chen, *supra* note 539.

⁹⁹⁰ Danner, *supra* note 394.

⁹⁹¹ Rose, *supra* note 576.

⁹⁹² Young, *supra* note 395.

⁹⁹³ Giovannucci, Barham, and Pirog, *supra* note 70.

⁹⁹⁴ Tim Josling & Christophe Crombez, *The Political Economy of Transatlantic Free Trade* (2013).

and the modifications and withdrawals of notifications.⁹⁹⁵ The debate has been opened for a long time but many support finding an agreement on this matter.

The United States Congress—including 177 members (out of 441) of the United States House of Representatives⁹⁹⁶ and fifty-five senators (out of 100)⁹⁹⁷—voiced concern regarding “Common Food Names” concerns to United States Trade Representative Michael Froman and Agriculture Secretary Tom Vilsack over the European Union proposal to include GIs in the TTIP. Active lobbies, representing mainly the dairy and meat sector, are leading the opposition to include industrial protection for product names linked to origin claiming that the EU's action is directed not just at the United States but also at dozens of other nations around the globe. In its remarks, urging aggressive work against European Union efforts, Congress mainly refers to GIs as a barrier to trade granting Europeans exclusive market access and imposing restrictions on the use of many common food names. Congress is concerned that potential abuse of GIs threatens sales and exports of a number of United States agricultural products. And the European Parliament and the U.S. Congress are key players in the approval of any agreement of such importance. As a matter of fact, the favorable support of the House of Representative and the Senate are fundamental although the Trade Promotion Authority (TPA) also referred as the “fast

⁹⁹⁵ Michelle Agdomar, *Removing the Greek from Feta and Adding Korbel to Champagne: The Paradox of Geographical Indications in International Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 541 (2007).

⁹⁹⁶ Congress of the United States, LETTER ON CHEESE FOCUS TO AGRICULTURE SECRETARY VILSACK AND U.S. TRADE REPRESENTATIVE FROMAN SIGNED BY 177 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVE (2014).

⁹⁹⁷ United States Senate, *supra* note 321. United States Senate, LETTER ON MEAT FOCUS TO AGRICULTURE SECRETARY VILSACK AND U.S. TRADE REPRESENTATIVE FROMAN BY 50 SENATORS (2014).

track negotiating authority” allows the President to present agreements to Congress for an assent vote preventing Congress from filibustering or amending TTIP.⁹⁹⁸

On the European side, the Commission declared that it aims to secure enhanced protection for European Union GIs in the United States as a mean of guaranteeing improved market access. The European Parliament reinforced the necessity of inclusion of GIs in TTIP stressing it specifically as a political priority.⁹⁹⁹ This constitutes a particularly important fact in the negotiation and legislative process for the transatlantic agreement. Parliamentary approval is a must after the experience of ACTA where the United States refused to give its consent to the European Union's interim agreement on banking data transfers to the United States via the SWIFT network, amid concerns for privacy, proportionality, and reciprocity.¹⁰⁰⁰ The new provision established in Article 218.6 of the Treaty for the Functioning of the European Union increased the European Parliament's competences from a consultative role to the recognition of

⁹⁹⁸ President Obama called on Congress to grant him TPA in his State of the Union address on Jan. 28, 2014. Bipartisan legislation to renew it was introduced on Jan. 9, 2014 to Congress but the lack of transparency in the negotiation, lobbies actions and the opposition of Democrat members both in the House and the Senate is causing considerable concerns. The White House, PRESIDENT BARACK OBAMA'S STATE OF THE UNION ADDRESS WHITEHOUSE.GOV (2014), <https://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> (last visited Aug 16, 2016).

⁹⁹⁹ The exact wording is: “stressed that intellectual property is one of the driving forces of innovation and creation and a pillar of the knowledge-based economy, and that the agreement should include strong protection of precisely and clearly defined areas of intellectual property rights (IPRs), including geographical indications, and should be consistent with existing international agreements; believes that other areas of divergence relating to IPRs should be resolved in line with international standards of protection,” Vital Moreira on behalf of the Committee on International Trade, European Parliament, MOTION FOR A RESOLUTION TO WIND UP THE DEBATE ON THE STATEMENTS BY THE COUNCIL AND THE COMMISSION PURSUANT TO RULE 110(2) OF THE RULES OF PROCEDURE ON EU TRADE AND INVESTMENT NEGOTIATIONS WITH THE UNITED STATES OF AMERICA (2013/2558(RSP)) (2013). Expressly includes, in conformity with the Treaty of Lisbon, “that Parliament will be asked to give its consent to the future TTIP agreement, as stipulated by the Treaty on the Functioning of the European Union, and that its positions should therefore be duly taken into account at all stages.”

¹⁰⁰⁰ The resolution rejecting the agreement was approved on February 10, 2010, 10 by 378 votes to 196, with 31 abstentions. In the September 2009 resolution, the Parliament demanded that the accord should fully respect the rights of European Union citizens with regard to personal data protection. The data, they said, should be gathered “only for the purposes of fighting terrorism” and “the right balance” must be struck between security measures and the protection of civil liberties. The resolution calls for “the same judicial redress mechanisms as would apply to data held within the EU, including compensation in the event of unlawful processing of personal data.”

veto power over the conclusion of international agreements.¹⁰⁰¹ Obviously, with a profound impact on the European institutional balance of power, the legal recognition of its increasing involvement in the European Union foreign affairs has relevant consequences for TTIP negotiations. As Stephen Ladas, used to note when analyzing the European common market development, “an international regime, which favors large industrial organizations and discriminates against individual inventors and small business, is unsound economically, socially and politically.”¹⁰⁰² Consequently the importance of GIs for the European Parliament at this precise moment is fundamental to bring the European Union back to its values and closer to its citizens.

The conflict between United States law and international treaties on GIs is not an issue of IPR infringement and being considered as a pirate nation¹⁰⁰³ but a matter of global responsibility. The key is how to find a way forward to facilitate trade and development, both bilaterally and at the existing multilateral forum. Extending Article 23 enhanced protection under the TRIPS Agreement for wines and spirits to all products will not necessarily resolve the dispute in the WTO since an agreement must be reached on the proprietary nature of GIs to adopt a uniform system.¹⁰⁰⁴ With a timetable that underestimated the complexity of the negotiations, TTIP will

¹⁰⁰¹ For assessing the impact on the international institutional balance of power on the European Union external relations, see MARIA ROMANIELLO, THE INTERNATIONAL ROLE OF THE EUROPEAN PARLIAMENT: THE SWIFT AFFAIR AND THE “RE-ASSESSED” EUROPEAN INSTITUTIONAL BALANCE OF POWER 97, http://www.on-federalism.eu/attachments/156_download.pdf (last visited Dec 23, 2013).

¹⁰⁰² Stephen P. Ladas, *Common Market Patent and Trademark Treaties Open or Closed*, 51 TRADEMARK REP. 1203, 1208 (1961). The reference to GIs is introduced by the author.

¹⁰⁰³ Farley, *supra* note 6, at 73.

¹⁰⁰⁴ Staten, *supra* note 253, at 245.

probably require an extended agenda that will go beyond 2017, after a new president is elected in the United States and certain important elections take place in Europe.¹⁰⁰⁵

3. TRANSATLANTIC AND THE TRIPS AGREEMENT DEBATE ON GEOGRAPHICAL INDICATIONS.

Since June 1998, when the proposal for a notification and registration system under Article 23(4) TRIPS Agreement was first proposed by the European Union,¹⁰⁰⁶ modification of international regulations on GIs has been on the negotiation table.¹⁰⁰⁷ Claiming for a universal binding system to all WTO members regardless of existing exceptions under Article 24 the aim is to obtain a commonly accepted legal framework¹⁰⁰⁸ During the Doha Round, a new proposal was submitted by the European Union that offered a longer period to challenge GIs and facilitate the revision of the TRIPS Agreement.¹⁰⁰⁹ However, those opposing any expansion of GIs argued against the new proposal intended to develop a simple, voluntary, non-binding notification and registration system with a searchable online database.¹⁰¹⁰ Opposition to GI expansion was

¹⁰⁰⁵ European Commission, *State of Play of the Negotiations*, http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/process/#_state-of-play (last visited Oct 31, 2016)

¹⁰⁰⁶ WTO Proposal, *Multilateral Register of Geographical indications for Wines and Spirits Based on Article 23-4 of the TRIPS Agreement*, IP/C/W/107 (Jul. 28, 1998) [hereinafter 1998 EU Proposal].

¹⁰⁰⁷ See Burkhardt Goebel, *Geographical Indications and Trademarks-The Road from Doha*, 93 TRADEMARK REP. 964 (2003). One decade later, and after numerous court decisions, but mainly two milestones cases under public international law, the author refers clear guiding principles for resolving conflicts between GIs and trademarks. See also Goebel & Groeschl, *supra* note 6.

¹⁰⁰⁸ 1998 EU Proposal, *supra* note 1006, at 2-3.

¹⁰⁰⁹ WTO Proposal, *Implementation of Article 23.4 of the TRIPS Agreement Relating to the Establishment of a Multilateral System of Notification and Registration of Geographical Indications*, IP/C/W/107/Rev.1, at 4-5 (Jun. 22, 2000) [hereinafter 2000 EU Proposal].

¹⁰¹⁰ WTO Proposal, *Proposal for a Multilateral System for Notification and Registration of Geographical Indications for Wines and Spirits based on Article 23.4 of the TRIPS Agreement*, TN/IP/W/5 (Oct. 23, 2002) (Communication from Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, Philippines, Chinese Taipei, and the United States).

reinforced by the United States and Canada, which supported the new wine producers and cellars competing with older European wines.¹⁰¹¹

Negotiations for enhanced GI protection under the TRIPS Agreement need to face issues on the table in a chronological order and start with the establishment of a multilateral register for wines and spirits by narrowing Article 24 exceptions. After that, negotiations should proceed to extend the protection granted under Article 23 to other goods and, finally, achieve the expected goal for the European Union of including all GIs in the register.¹⁰¹² With political will, hard work, and a preliminary agreement under TTIP, the Doha Round may reinforce such a deep and necessary reform under the TRIPS Agreement with global consequences.¹⁰¹³

Hong Kong¹⁰¹⁴ and the International Trademarks Association (INTA)¹⁰¹⁵ introduced a compromise proposal where the presumption requested by the European Commission would apply on a voluntary basis to those countries that elected to participate in the system and provide *prima facie* evidence for protection in the country of origin and judicial opposition when challenged.¹⁰¹⁶ The proposal incorporated a rebuttable presumption in favor of GI owners in relation with ownership, in compliance with the definition of Article 22 of the TRIPS Agreement and the protection granted in the country of origin. INTA recommended a system that would

¹⁰¹¹ WTO Proposal, *Multilateral System of Notification and Registration of Geographical Indications for Wines (and Spirits)*, TN/IP/W/6 (Oct. 29, 2002) (Communication from Argentina, Australia, Canada, Chile, New Zealand, and the United States).

¹⁰¹² Waggoner, *supra* note 237, at 592.

¹⁰¹³ *Id.* at 592.

¹⁰¹⁴ WTO Proposal, *Multilateral System of Notification and Registration of Geographical Indications Under Article 23.4 of the TRIPS Agreement*, TN/IP/W/8 (Apr. 23, 2003) [hereinafter 2003 WTO Proposal] (Communication from Hong Kong, China).

¹⁰¹⁵ INTA, *Establishment of a Multilateral System of Notification and the Registration of Geographical Indications for Wines and Spirits pursuant to TRIPS Article 23 (4)*, (Apr. 2003), [hereinafter 2003 WTO INTA Proposal] available at http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_sfo_03/wipo_geo_sfo_03_11.pdf.

¹⁰¹⁶ 2003 WTO Proposal, *supra* note 1014, at 2.

follow Madrid or Patent Cooperation Treaty (PCT) approaches including (i) notification and registration through an international body, (ii) *ex officio* examination of protectability in the country of protection, (iii) refusal and opposition on the basis of prior trademark rights, and (iv) the ability to challenge the registration in the national courts.¹⁰¹⁷

Just before the Cancun meeting, in August 2003, the “claw back” claim of recognition of forty-one European GIs was on the table claiming international protection. To justify the establishment of a multilateral register of GIs as well as the extension of protection to products other than wines and spirits, the European Union provided the abused shortlisted regional quality products. With misleading cases of unfair trade on well-known GIs, Europeans aimed to prevent current non-abused GIs from future usurpation of GIs names together with their translations.¹⁰¹⁸

The European Union emphasized the protection and extension of GIs and argued the potential benefits for developing countries. However, for the investment in reputation products such as coffees, teas, or chocolates is already happening under certification law regimes and the main intention behind European proposals is to secure more extensive monopoly rents to developed “agroalimentaire” industries.¹⁰¹⁹ The ironic paradox was to seek extension of TRIPS

¹⁰¹⁷ 2003 WTO INTA Proposal, *supra* note 1015, at 6.

¹⁰¹⁸ The first list included 22 wines and spirits: Beaujolais; Bordeaux; Bourgogne; Chablis; Champagne; Chianti; Cognac; Grappa di Barolo, del Piemonte, di Lombardia, del Trentino, del Friuli, del Veneto, dell'Alto Adige; Graves; Liebfrau(en)milch; Malaga; Marsala; Madeira; Médoc; Moselle; Ouzo; Porto; Rhin; Rioja; Saint-Emilion; Sauternes; and Jerez, Xerez. And 19 other agricultural products and foodstuffs: Asiago; Azafrán de la Mancha; Comté; Feta; Fontina; Gorgonzola; Grana Padano; Jijona y Turrón de Alicante; Manchego; Mortadella Bologna; Mozzarella di Bufala Campana; Parmigiano Reggiano; Pecorino Romano; Prosciutto di Parma; Prosciutto di San Daniele; Prosciutto Toscano; Queijo São Jorge; Reblochon, and Roquefort. Press Release, European Commission, WTO Talks: EU Steps up Bid for Better Protection for Regional Quality Products (Aug. 28, 2003), *available at* http://europa.eu/rapid/press-release_IP-03-1178_en.htm?locale=en (last visited Aug. 8, 2016).

¹⁰¹⁹ Hughes, *supra* note 39, at 385.

while being challenged on non-compliance.¹⁰²⁰ Although the panel legitimated a legal system in which new GIs can adversely impact established trademarks, the European Union quality schemes system was changed in 2006.¹⁰²¹

The remaining conflict between the United States and the European Union—mainly due to strong lobbying by the dairy and meat sectors—is hindering the global potential of GIs. On the opposite side, the main international organizations with responsibilities on agricultural development are fostering its development throughout legal frameworks and guides. Examples are available at WIPO,¹⁰²² FAO,¹⁰²³ the United Nations Industrial Development Organization (UNIDO),¹⁰²⁴ UNCTAD,¹⁰²⁵ the International Trade Center,¹⁰²⁶ the Inter-American Institute for Cooperation on Agriculture (IICA),¹⁰²⁷ the Technical Centre for Agricultural and Rural Cooperation (CTA),¹⁰²⁸ the Centre National de la Recherche Scientifique,¹⁰²⁹ and the

¹⁰²⁰ Panel Report, *European Communities-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005) [hereinafter WTO Panel Report on Origins Regulations].

¹⁰²¹ Hughes, *supra* note 39, at 323–30.

¹⁰²² WIPO, *supra* note 219. *See also* WIPO, WORLD INTELLECTUAL PROPERTY INDICATORS (2014).

¹⁰²³ DOMINIQUE BARJOLLE AND EMILIE VANDECANDELAERE, *supra* note 363. *See also* VANDECANDELAERE ET AL., *supra* note 3. *And* DAMARY AND VANDECANDELAERE, *supra* note 19.

¹⁰²⁴ RUSSO, *supra* note 2.

¹⁰²⁵ RANGNEKAR, *supra* note 101.

¹⁰²⁶ GIOVANNUCCI ET AL., *supra* note 19.

¹⁰²⁷ INTER-AMERICAN INSTITUTE FOR COOPERATION ON AGRICULTURE (IICA), CALIDAD DE LOS ALIMENTOS VINCULADA AL ORIGEN Y LAS TRADICIONES EN AMÉRICA LATINA: ESTUDIO DE CASOS (Tegucigalpa, Honduras: IICA ed. 2008).

¹⁰²⁸ ISOLINA BOTO & SUZANNE PHILLIPS, THE GEOGRAPHY OF FOOD: RECONNECTING WITH ORIGIN IN THE FOOD SYSTEM 63 (2013), <https://brusselsbriefings.files.wordpress.com/2013/04/cta-reader-31.pdf> (last visited Jul 26, 2016). *See also* MONIQUE NGO BAGAL & MASSIMO VITTORI, PRACTICAL MANUAL ON GEOGRAPHICAL INDICATIONS FOR ACP COUNTRIES (2011). *And* MICHIEL KUIT & YUCA WAARTS, SMALL-SCALE FARMERS, CERTIFICATION SCHEMES AND PRIVATE STANDARDS: IS THERE A BUSINESS CASE?: COSTS AND BENEFITS OF CERTIFICATION AND VERIFICATION SYSTEMS FOR SMALL-SCALE PRODUCERS IN COCOA, COFFEE, COTTON, FRUIT AND VEGETABLE SECTORS (2014), http://publications.cta.int/media/publications/downloads/1823_PDF.pdf (last visited Jul 27, 2016).

¹⁰²⁹ BÉRARD AND CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE (FRANCE), *supra* note 867.

Organization for Economic Co-operation and Development.¹⁰³⁰ Some of these include collaboration with OriGin and the American Origin Products¹⁰³¹ among many others.¹⁰³²

Conceptual and legal differences between the main international trade partners and the approach to bilateral free trade agreements are negatively affecting GIs but economic, social, and political analysis, as well as conviction on the potential of GI protection, are objectively grounded.

A comprehensive worldwide recognition and protection of local quality products under a global legal framework is one of the main arguments in favor of GIs after the opportunity opened by the TRIPS Agreement. The proposals promoting GIs advocate local development, product quality improvement, and the provision of diverse and better consumer choices while fostering competition. Many examples and models exist, such as the Australian wine case where the dynamic industry kept its own identity, gained market shares, and beat European competitors.¹⁰³³

Considering the difficulties of global trade negotiations, GIs are also seen as a bargaining strategy to facilitate agricultural reforms including reductions on tariffs and subsidies.¹⁰³⁴ Even the United States would benefit from an agreement with the European Union on GIs that facilitates the vital advancement of the Doha Round, avoiding costs and providing consistency and direction on GI matters.¹⁰³⁵ Many would support an agreement on GIs that considers global interest as a real and positive sign regarding IPR promotion and benefits for all. Developing

¹⁰³⁰ LUCATELLI, *supra* note 86.

¹⁰³¹ BARHAM ET AL., *supra* note 361.

¹⁰³² O'CONNOR AND COMPANY, EUROPEAN LAWYERS & INSIGHT CONSULTING, GEOGRAPHICAL INDICATIONS AND TRIPS: 10 YEARS LATER... A ROADMAP FOR EU GI HOLDERS TO GET PROTECTION IN OTHER WTO MEMBERS 436 (2006), http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_135088.pdf (last visited Jan 9, 2014). LAURENCE BÉRARD & PHILIPPE MARCHENAY, *PRODUITS DE TERROIR: COMPRENDRE ET AGIR* (Bourg-en-Bresse, France: CNRS ed. 2007). *See also* PACCIANI ET AL., *supra* note 205.

¹⁰³³ Calboli, *supra* note 85, at 201.

¹⁰³⁴ Waggoner, *supra* note 237, at 590.

¹⁰³⁵ *Id.* at 591.

countries often believe that the European Union and the United States only seek to multilateralize and enforce IPR to protect its own economic interests.¹⁰³⁶ Many against GIs argue that it promotes monopoly, however, the monopoly argument is unreasonable since a similar product may always be placed in the market providing more possibilities to the consumer and increasing competition.¹⁰³⁷ There are also disagreements based on lost sales and modifications that may be required under a regulatory reform on GIS, however, confusion and negative effects may be mitigated by a transitional period.

Impacts need to be assessed and temporary measures implemented to reduce harmful effects of enhanced GI protection, allow adjustment in the market, and process any action affecting new names, labels, designs, or packaging to reeducate clients.¹⁰³⁸ Furthermore, consumers may choose cheaper products duly identified instead of usually more expensive foreign GIs because they are familiar with local products and there is a lower cost. Actually, wine protected under GIs lost market share in the United States to non-GI competitors,¹⁰³⁹ providing useful data and arguments determining the importance of consumers and local needs when discussing GI models.

Along with administrative cost, certain critiques are exaggerated when compared to any other process of IPR multilateralization.¹⁰⁴⁰ With approximately 175 geographic-oriented certification marks in the United States, most of them related to the production or processing of agricultural products—Florida® citrus, Vidalia® onions, and Idaho® potatoes, the average

¹⁰³⁶ *Id.* at 592.

¹⁰³⁷ *Id.* at 589.

¹⁰³⁸ *Id.* at 587.

¹⁰³⁹ Hughes, *supra* note 39, at 346.

¹⁰⁴⁰ Waggoner, *supra* note 237, at 588.

registration fee typically exceeds \$10,000. This fee plus the maintenance cost may be prohibitive.¹⁰⁴¹ For instance, in the Idaho Potato Commission, the licensing and compliance monitoring system has an annual cost of in excess of \$200,000.¹⁰⁴² Therefore, awareness of the existing administrative costs and potentially unaffordable legal defense fees in the United States for most foreign GIs, more reasonable tariffs should be internationally agreed while ensuring quality and distinctiveness certification.

Regarding substance, a good and acceptable agreement consistent with the existing TRIPS Agreement should include: (i) a transatlantic regulation including mutual recognition of GIs and registration bodies, (ii) determination of generic products, and (iii) a five- to ten-year phase-out of formerly “generic” product identifications inconsistent with GIs.¹⁰⁴³ The issues on the tables have already been summarized in the European Union proposal discussed below. A more practical approach from the European Union is assimilating foodstuffs and wines but also considering existing rights, grandfather clauses, and development based on proposals already agreed under CETA.

4. EUROPEAN UNION PROPOSAL ON AGRICULTURE AND GIS IN TTIP

The European Commission once again emphasized the protection of GIs as a key priority under TTIP after the fourteenth negotiation round that took place in Brussels during July

¹⁰⁴¹ BARHAM ET AL., *supra* note 361, at 33.

¹⁰⁴² *Id.* at 34–5.

¹⁰⁴³ ERIC TRACHTENBERG, A TRANSATLANTIC PARTNERSHIP, AGRICULTURAL ISSUES. DIFFERENT VISIONS, A COMMON DESTINY 30, 16 (2012).

2016.¹⁰⁴⁴ From the beginning, the European Union relied on its extensive *acquis* and the *sui generis* system for the protection of agricultural quality schemes, wines, and spirits.¹⁰⁴⁵ GIs have been pushed among the priority areas of agriculture and intellectual property since the European Commission recognizes that IPR-intensive sectors account for around 39% of European Union GDP (€4.7 trillion annually) and up to 35% of all European jobs.¹⁰⁴⁶ Six main target were established for the negotiations to include GIs in the TTIP: (i) appropriate level of protection for EU GIs, (ii) administrative enforcement, (iii) establishment of a list of directly protected GIs, (iv) specific arrangements for certain GIs, (v) exclusive protection for seventeen European wine names, and (vi) protection for additional European spirit drinks.¹⁰⁴⁷

In March 2016, the European Union shared a specific proposal on GIs to be included in TTIP,¹⁰⁴⁸ which clearly reflects the relevance of CETA¹⁰⁴⁹—finally signed in October 2016.¹⁰⁵⁰ The rationale is the creation of a separate, appropriate, better, and specific regulatory legal framework for bilateral trade between the European Union and the United States to facilitate the export and import of agricultural goods.¹⁰⁵¹ Trade in agricultural goods between the partners in

¹⁰⁴⁴ PUBLIC REPORT OF THE 14TH ROUND OF NEGOTIATIONS FOR THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP, 15 (2016), http://trade.ec.europa.eu/doclib/docs/2016/august/tradoc_154837.pdf (last visited Aug 8, 2016).

¹⁰⁴⁵ EUROPEAN COMMISSION, INTELLECTUAL PROPERTY EU POSITION PAPER 4, 3 (2015), http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153331.7%20IPR%20EU%20position%20paper%2020%20March%202015.pdf (last visited Aug 8, 2016).

¹⁰⁴⁶ *Id.* at 2.

¹⁰⁴⁷ *Id.* at 4.

¹⁰⁴⁸ EUROPEAN COMMISSION, AGRICULTURE AND GEOGRAPHICAL INDICATIONS (GIS) IN TTIP: A GUIDE TO THE EU'S PROPOSAL 10 (2016), http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154372.pdf (last visited Aug 8, 2016).

¹⁰⁴⁹ *Id.* at 9 and 10.

¹⁰⁵⁰ European Commission, European Union – Canada Comprehensive Economic and Trade Agreement (CETA) http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm (last visited Oct 31, 2016).

¹⁰⁵¹ EUROPEAN COMMISSION, *supra* note 1026, at 3.

2015 was over €31 billion with a surplus for the European Union of over €7 billion due to high-value added products—mainly wine and spirits.¹⁰⁵² The main concerns for the European Union, specifically addressed in the proposal, are lower levels for protection of agricultural products in the United States; high fees and expenses for registration for European GIs under the trademark regime; the prohibitive cost of preventing and challenging abuses due to the absence of enforcement by administrative action; the issue of prior trademarks with same or similar names with no genuine link to the geographical origin; and the impossibility of protection for certain GIs that are considered generic names in the United States.¹⁰⁵³ The opposition by lobbies in the United States remains and a group of senators has expressed their concern to U.S. Trade Representative, Michael Froman, grounded on a \$12 billion agricultural trade deficit with the European Union in 2015 asking for the removal of “non-science based regulatory barriers” together with the removal and reduction of tariffs on agricultural products.¹⁰⁵⁴ However, the content and tone is not as contentious as before. Phrases like “fight the growing GIs,” “make clear that U.S. will reject any proposal in the TTIP negotiations,” or “continue to work aggressively” were stated against any European effort on the matter.¹⁰⁵⁵

The European Commission suggested that the Chapter on Agriculture should include wines and spirits and possible provisions on non-tariff issues (previously tabled separately), and that both the Chapter on Agriculture and the Chapter on IPR should contain references to

¹⁰⁵² *Id.* at 3. Total trade represented €616 billion in 2015, with a total surplus for the European Union of €123 billion for trade in goods. European Union producers exported €3.3 billion worth of wine to the US and €5.3 billion in spirit drinks (including beer), recording a positive trade balance of €7.3 billion.

¹⁰⁵³ *Id.* at 10.

¹⁰⁵⁴ United States Senate, Committee on Agriculture, Nutrition and Forestry, UNITED STATE SENATORS LETTER TO UNITED STATES TRADE REPRESENTATIVE (2016), http://www.nmpf.org/files/TTIP_Letter_Froman.pdf (last visited Aug 8, 2016).

¹⁰⁵⁵ United State Senate, *supra* note 321. *See also* Congress of the United States, *supra* note 974.

provisions on GIs.¹⁰⁵⁶ Beyond liberalization and elimination of subsidies, the objective for the European Union is to develop cooperation bilaterally but also in multilateral *fora*,¹⁰⁵⁷ establishing “a platform for a bilateral policy dialogue on agriculture to review challenges faced domestically and globally.”¹⁰⁵⁸

For many, the approach to trademark law and the association of IPR rights to protect either producer or consumers have divided doctrinal studies and the international community.¹⁰⁵⁹ A general distinction is considered between “institutionalized” protections under a *sui generis* system or protection in their respective countries, and “recognized” GIs. All “institutionalized GIs” are “recognized GIs,” but not all “recognized GIs” are “institutionalized GIs” as not all countries provide special legislation granting a *sui generis* system of protection.¹⁰⁶⁰ The European approach pretends to extend its *sui generis* system bilaterally and to all WTO members, including: (i) a public register listing protected GIs and open to foreign GI registrations; (ii) an administrative process to verify quality, reputation and other characteristics of the GI attributable to its geographical origin, (particularly where product specifications constitute a technical requirement that the exclusive product a registered GI shall correspond to and that may only be amended by due administrative decision); (iii) enhanced protection as established in Article 23 of the TRIPS Agreement; (iv) co-existence between GIs and prior

¹⁰⁵⁶ EUROPEAN COMMISSION, *supra* note 1026, at 4.

¹⁰⁵⁷ *Id.* at 4.

¹⁰⁵⁸ *Id.* at 5.

¹⁰⁵⁹ Staten, *supra* note 253, at 76–7 (providing the “Budweiser” practical example to demonstrate these different approaches. While in the United States the property right is recognized due to its use by beer drinkers as a source identifier, in Europe, and particularly in the European region of Budweiser, the GI protection has always been associated to beer production).

¹⁰⁶⁰ RUSSO, *supra* note 2, at 6.

trademarks that avoids misleading consumers; and (v) enforcement of protection through appropriate administrative action by public authorities.¹⁰⁶¹

Strategically, the European Union separate wines and spirits from other agricultural and foodstuff products, requiring a specific section in TTIP to ensure a stable and predictable bilateral legal scheme.¹⁰⁶² Aiming to update previous existing agreements¹⁰⁶³ as well as improve and create a comprehensive legal framework,¹⁰⁶⁴ the request includes the exclusive protection to legitimate producers of seven European wine names—so-called semi-generics—and twenty-two additional spirit drink names currently used on the United States territory,¹⁰⁶⁵ envisaging the establishment of a Committee on trade in wines and spirit drinks.¹⁰⁶⁶

Grounded on its economic value,¹⁰⁶⁷ the European Union even submitted the structure of a possible GI text,¹⁰⁶⁸ including its priorities and request the highest level of protection for a

¹⁰⁶¹ European Commission, OUTLINE OF TEXT ON GEOGRAPHICAL INDICATIONS (2016), http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154385.%20Paper%20-%20GIs%20skeleton%20FINAL.pdf (last visited Aug 8, 2016).

¹⁰⁶² EUROPEAN COMMISSION, *supra* note 1026, at 5.

¹⁰⁶³ Agreement between the European Community and the United States of America on trade in wine of 8 March 2006 (OJEC L87 of 24 March 2006) and Agreement in the form of exchange of letters between the European Community and the United States on the mutual recognition of certain distilled spirits/spirit drinks of 25 March 1994 (OJEC L 157 of 24 June 1994).

¹⁰⁶⁴ EUROPEAN COMMISSION, *supra* note 1026, at 7. (Not just the content but also its legal status since the existing agreements were not approved by Congress and now TTIP requires its approval, as it does for the European Council, that had already approved previous agreements on wine and spirits).

¹⁰⁶⁵ *Id.* at 6 and 7. (The wines included are: Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry and Tokay. Regarding spirit drinks, the eight spirit names—six Europeans and two for the United States—protected by the Agreement on distilled spirit/spirit drinks of 1994 will be included together with twenty-two new European names).

¹⁰⁶⁶ *Id.* at 7.

¹⁰⁶⁷ *Id.* at 8 and 9. (GI account for 25-30% of EU trade in processed agricultural products and GI exports outside the European Union represent over €15 billion with wine GIS up to 80% of total wine exports and practically all spirits exports are also protected under a GI. The United States, accounting for 30% of agricultural imports from the EU is the leading market for GI exports).

short list of 201 European GIs, claiming the prohibition of their use even when the consumer is not misled.¹⁰⁶⁹ Therefore, protection should be granted against geographic names when the true origin of the product is indicated, translated names and the use of expressions such as “kind,” “type,” “style,” “imitation,” or the like.¹⁰⁷⁰ And, to ensure enforcement, administrative measures should be provided in addition to judicial means.¹⁰⁷¹

The initial shortlisted GIs¹⁰⁷² were selected by the European Commission in coordination with the Member States based on objective criteria such as economic relevance and the current IPR situation in the United States’ market.¹⁰⁷³ In relation with existing indications, trademarks, and generic names, the proposal addresses ad hoc solutions to be found when GIs conflict with prior uses.¹⁰⁷⁴ The initial list contains seventy-seven GIs on cheeses—38% of the total GIs specifically referred—when only 34%-58% of the 172 GIs included were claimed under CETA,¹⁰⁷⁵ 19%-32% out of sixty GIs within the KOREU,¹⁰⁷⁶ and 12%-27% of 219 GIs in the Central America Association Agreement.¹⁰⁷⁷ As one of the main practical areas of conflict due to the strong opposition from the main dairy lobbies both in Canada and the United States, cheese seem to be a crucial point that may determine the outcome of the negotiations.

¹⁰⁶⁸ European Commission, *supra* note 1039. (“This outline of text was tabled by the European Union for discussion with the US and then made public on 21 March 2016. The actual text in the final agreement will be a result of negotiations between the EU and US.”).

¹⁰⁶⁹ EUROPEAN COMMISSION, *supra* note 1026, at 9.

¹⁰⁷⁰ *Id.*

¹⁰⁷¹ *Id.*

¹⁰⁷² It is considered an open list that could be expanded in the future, *see id.* at 9.

¹⁰⁷³ *Id.*

¹⁰⁷⁴ *Id.*

¹⁰⁷⁵ Annex 20-A Part A.

¹⁰⁷⁶ Annex 10-A Part A.

¹⁰⁷⁷ Annex 17 Part A.

5. THE NEW CONCEPT OF CERTIFIED GEOGRAPHICAL INDICATIONS: ENSURING QUALITY IN A GLOBAL CONCEPT

GIs are multi-functional and their social, economic, and legal aspects embody the concept of globalization and local development. Protected products participate in global markets while supporting local cultures and economies.¹⁰⁷⁸ Consequently, GI protection values and aims are in full accordance with the European Union motto “United in Diversity”¹⁰⁷⁹ and the culture, history and tradition of the United States. With the two coexisting legal regimes to protect GIs, many countries—notably Members States of the European Union—define and treat GIs as a distinct type of IPR (as established in the TRIPS Agreement) and insist on further regulations due to its importance for agricultural development. Others, notably following the example of the United States, consider GIs as a subcategory of trademarks. Much has been written on these differences from every possible approach addressing the legal nature of the complex concept of GIs. However, its future may depend on agreements subscribed under the TTIP, the development of Articles 22-24 of the TRIPS Agreement, or a new international instrument providing a global framework of protection.

As worldwide consumers demand high-quality food products, labeling and GIs may facilitate market access for certain products and contribute to increased public information and awareness.¹⁰⁸⁰ Nonetheless, GI systems are not homogeneous between countries and can be used

¹⁰⁷⁸ GIOVANNUCCI ET AL., *supra* note 19, at xvii, Executive Summary.

¹⁰⁷⁹ European Commission, EUROPA, THE EU MOTTO, https://europa.eu/european-union/about-eu/symbols/motto_en (last visited Aug 1, 2016). (“It signifies how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions and languages.”)

¹⁰⁸⁰ Dominique Barjolle, Sophie Reviron & Chappuis, J.M., *Organization and Performance of the Origin Labeled Food Alliances*, in FOCUS ON AGRICULTURAL ECONOMICS 91 (A.R. Bellows, ed., 2005).

as trade barriers against competition. Important regulatory and cultural differences between the European Union and the United States on the registration and protection of GIs led to the formation of a WTO dispute settlement panel leading to the new European rules enacted in 2006.¹⁰⁸¹ Given the potential for GI labels to supply consumer information, a positive political context is provided for the negotiations under the Doha Round and can promote development. Therefore, the European Union is attempting to incorporate other features of its system of GI protection into the TRIPS system, often finding opposition from those that do not consider them as a tool for development and effective fair trade. In fact, due to its economic, cultural, and social consequences, proper GIs grant protection to a community rather than individual right holders. Thus, the fundamental need for national, regional, and international political strategies and trade agreements to establish legal frameworks that allow local producers and the market to benefit from the uniqueness and commercial added value of the product. Since no progress has been made at the international level, due to the strong opposition notably from the United States, and since the Doha Development Round remain stalled, the European Union sought to pursue its objectives through alternative legal mechanisms. The concept of “TRIPS-Plus”¹⁰⁸² expanded to all external actions in order to ensure international protection of GIs. Among these, a wide variety can be found including stand-alone agreements on GIs such as the case of China;¹⁰⁸³

¹⁰⁸¹ Appellate Body Report, *European Communities - Trademarks and Geographical Indications*, WT/DS174/R (Mar. 15, 2005).

¹⁰⁸² Despite the Doha Declaration, many developing countries have been coming under pressure to enact or implement even tougher or more restrictive conditions on their IPR than the standards required by the TRIPS Agreement. Many consider that will seriously compromise the ability of developing countries to use TRIPS flexibilities for development objectives.

¹⁰⁸³ China's accession to the WTO in December 2001 was a major step. It required China to take bold reforms and liberalise important parts of its economy. The Scientific and Technological Agreement between the People's Republic of China and the European Union was signed in 1998 and renewed in 2004 and 2009. It provides a framework for cooperative scientific and technological research and development activities between the European

traditional bilateral agreements on areas of particular interest such as wine and spirits;¹⁰⁸⁴ commitments to cooperate in economic and partnership agreements negotiations with African and Caribbean countries such as the case of Belize;¹⁰⁸⁵ specific agreement with neighboring countries;¹⁰⁸⁶ and particularly through the negotiation of comprehensive and ambitious free trade

Union and China. One of the Agreement's principles stipulates that cooperative activities shall be conducted on the basis of appropriate protection of IPR. Agreement for Scientific and Technological Cooperation between the European Community and the Government of the Peoples's Republic of China, O.J. (L 6). Besides, regarding GIs the European Union-China Geographical Indications "10 plus 10" project protected ten famous European food names in China while in parallel, the European Commission examined and registered ten Chinese food names including "Pinggu da Tao" (peach) and "Dongshan Bai Lu Sun" (asparagus), which received protected status in the European Union as Geographical Indications. The pilot project started in July 2007 and ended in 2012. In terms of value, China is among the five most important export markets of European GI products with a total value in 2010 exports to China over €650 million, European Commission Press Releases, EU-CHINA GEOGRAPHICAL INDICATIONS – "10 PLUS 10" PROJECT IS NOW COMPLETE (2012), http://europa.eu/rapid/press-release_IP-12-1297_en.htm (last visited May 13, 2016).

¹⁰⁸⁴ On September 1, 2010, the 2008 Wine Trade Agreement between Australia and the European Communities requiring Australia to comply with the European GI system with respect to wine products, went into effect. This agreement replaces another one signed in 1994 between the two wine powers and protects eleven of the EU drink labels and 112 of the Australian GIs. *See* Agreement Between the European Community and Australia on Trade in Wine, 2009 J.O. L/28, 3.

¹⁰⁸⁵ EUROPEAN COMMISSION, THE CARIFORUM-EU ECONOMIC PARTNERSHIP AGREEMENT (EPA). A NEW PARTNERSHIP FOR TRADE AND DEVELOPMENT. FACTSHEET: HOW THE EU IS PUTTING THE EPA INTO PRACTICE 9 (2012).

¹⁰⁸⁶ *See* Andreas Marchetti, *The European Neighbourhood Policy*, 158 FOREIGN POLICY EU'S PERIPHERY ZEI DISCUSS. PAP. C 29 (2006), http://aei.pitt.edu/6830/01/dp_c158Marchetti.pdf (last visited May 13, 2016).

and association agreements (e.g. Canada,¹⁰⁸⁷ Singapore,¹⁰⁸⁸ South Korea,¹⁰⁸⁹ Central America,¹⁰⁹⁰ and the Andean Community¹⁰⁹¹).

The 2008 Wine Agreement between Australia and the European Union is also an adaptable model for future trade negotiations since it maintains four essential elements to preserving domestic wine production while constructing an international wine market. The Agreement: (i) establishes GI protection for local wine products, (ii) recognizes domestic wine processes and terminology, (iii) creates a transitional stage during which previously-used GIs will be “phased out,” and (iv) allows for future alterations among the two world wine powers.

¹⁰⁸⁷ See Morin and Duchesne, *supra* note 56. See also GOVERNMENT OF CANADA, *supra* note 327.

¹⁰⁸⁸ The European Union and Singapore have initialled the text of a comprehensive free trade agreement on 20 September 2013. The draft agreement needs now to be agreed upon by the European Commission and the Council of Ministers, before being ratified by the European Parliament. European Commission, COMMISSION PROPOSAL FOR CONCLUSION, SIGNATURE AND PROVISIONAL APPLICATION OF THE EU-SINGAPORE FREE TRADE AGREEMENT, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/> (last visited May 13, 2016).

¹⁰⁸⁹ The European Union-South Korea Free Trade Agreement (FTA) entered into force in July 2011 and is the first completed agreement in a new generation of Free Trade Agreements launched by the European Union in 2007. COUNCIL DECISION 011/265/EU OF 16 SEP. 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, *supra* note 855. See also EUROPEAN COMMISSION, *supra* note 351.

¹⁰⁹⁰ The European Union and the Central American region concluded a new Association Agreement, signed on June 29, 2012. The trade pillar of the Association Agreement has been provisionally applied since August 1, 2013 with Honduras, Nicaragua and Panama, since October 1 with Costa Rica and El Salvador, and since December 1, 2013 with Guatemala. Decisión del Consejo, de 25 de junio de 2012, Relativa a la Firma, en Nombre de la Unión Europea, del Acuerdo por el que se establece una Asociación entre la Unión Europea y sus Estados miembros, por un lado, y Centroamérica, por otro, y a la Aplicación Provisional de su parte IV Relativa al Comercio, 2012/734, OJ L 346, 15 Dec. 2013, 1-2. See also European Commission, EUROPEAN UNION-CENTRAL AMERICA ASSOCIATION AGREEMENT, <http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-america/> (last visited May 13, 2016).

¹⁰⁹¹ In June 2012 the European Union signed an ambitious and comprehensive Trade Agreement with Colombia and Peru. The agreement is provisionally applied with Peru since 1 March 2013 and with Colombia since 1 August 2013. See EUROPEAN COMMISSION, ANNUAL REPORT ON THE IMPLEMENTATION OF THE EUROPEAN UNION - COLOMBIA/PERU TRADE AGREEMENT COM (2014) 718 final, Brussels 4 Dec. 2014. In July 2014 negotiations were concluded for the accession of Ecuador to the Trade Agreement with Colombia and Peru, European Commission, ANDEAN COMMUNITY - EUROPEAN COMMISSION TRADE AGREEMENT, <http://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/> (last visited May 13, 2016).

Most notably, the Agreement also recognizes that Australian vintners may no longer produce wines with European GIs and awards complete legal protection to quality wines.

Complete questioning and development of the main topics on GIs were studied under CETA and KOREU.¹⁰⁹² Global studies on international legal and regulations of GIs are providing not just a clear picture of the main concerns but also innovative solutions. Treating GIs as private rights by the WTO, just like trademarks, prevents its use for protectionist purposes and runs counter to the traditional view that GIs constitute a communal right.¹⁰⁹³

A detailed analysis and interpretation of the definition within the TRIPS Agreement must be the point of departure to obtain results at a global level. Nonetheless the previous chapters provide an adequate understanding of the trade rules that apply to the recognition, protection, and enforcement of GIs as well as competing legal terminology. From a shared European and United States perspective, the importance of global recognition for local development adds to the conceptual debate.¹⁰⁹⁴ Place-based intellectual property strategies for traditional and local agricultural products, and therefore acting locally to participate globally, seem to be the right approach to move forward with a comprehensive vision of GI protection.¹⁰⁹⁵

¹⁰⁹² Agdomar, *supra* note 973.

¹⁰⁹³ GEOGRAPHICAL INDICATIONS FOR FOOD PRODUCTS, *supra* note 927 (focusing primarily on the Reports of the Panels in the WTO disputes brought by Australia and the United States against the European Communities, it explores the meaning of the TRIPS Article 22 and Article 24 commitments, especially as they concern the definition of the term GI and national and most favored nation treatment).

¹⁰⁹⁴ LABELS OF ORIGIN FOR FOOD: LOCAL DEVELOPMENT, GLOBAL RECOGNITION, (Elizabeth Barham & Bertil Sylvander eds., 2011).

¹⁰⁹⁵ Teshager W. Dagne, *Place-based Intellectual Property Strategies for Traditional and Local Agricultural Products: Acting Locally to Participate Globally in a Rightbased Approach*, 17 DRAKE J. AGRIC. L. 565 (2012). See also Nation, *supra* note 642.

GI research involve a variety of disciplinary fields, such as economics, sociology, geography, agronomy, technology, and law.¹⁰⁹⁶ The most widely explored topics refer to the role of localized production in the definition of territory, local development, and tourism together with: economic issues related to quality and protection; the different conventions arising from local production; the links between quality, origin, territory, and competitiveness; and the interactions between stakeholders, the markets, and the economic organization of local industries and supply chains.¹⁰⁹⁷ Costs and time deployed to build trust breed inertia in agents/institutions, which locks in existing governance structures.¹⁰⁹⁸ Most studies refer to the elements defining the multiple connectedness of food products to their places of origin can be comprised in four separate “originality” factors: (i) territoriality, or physical connectedness of supply chain activities to the place; (ii) typicity,¹⁰⁹⁹ or place-specific details of supply chain practices and artifacts; (iii) traditionality, or rootedness of supply chain practices in place-bound history; and (iv) communality, or the sharing of experience and practices by the supply chain actors.¹¹⁰⁰ Actually, the higher the degree of originality, the less vulnerable a product is to replication elsewhere.¹¹⁰¹

To obtain a valid international legal concept that may find consensus, it is necessary to establish clear criteria and standards on the subject matter. The broad concept of GIs currently

¹⁰⁹⁶ BÉRARD AND CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE (FRANCE), *supra* note 867, at 5.

¹⁰⁹⁷ *Id.* at 5.

¹⁰⁹⁸ RANGNEKAR, *supra* note 68, at 22.

¹⁰⁹⁹ Translation of the Italian concept “Tipici” to express a unique type of product. *See* PACCIANI ET AL., *supra* note 205. *See also* ARFINI, BELLETTI, AND MARESCOTTI, *supra* note 131. Regarding the links between typical products and reputation *see* Belletti, *supra* note 69.

¹¹⁰⁰ Hielke S. Van Der Meulen, *A Normative Definition Method for Origin Food Products*, ANTHROPOL. FOOD 12, 17 (2007).

¹¹⁰¹ *Id.* at 18.

refers to such a large variety of ideas that it creates confusion and misunderstanding. From the idea of the indication of source or place names to the highest level of European protected designations of origin, a variety of similar concepts are referred as country of origin labeling (COOL), geographically deceptively misdescriptive mark, or marks indicative of conditions of origin (MICO), among many others.

The legal essence of GIs derives from the recognition of existing unique, typical, authentic, traditional, and particular features in agricultural products and foodstuffs. As a matter of fact, the product has been, is and will be permanently linked to its geographic origin, “terroir,” since its characteristics, quality and reputation are given by the unique conditions of the place of origin. Linking GI products with origin is a fundamental part of the legal concept but it is necessary to consider the needs of developing countries over the protectionist European reasoning. As previously noted, the concept of GIs must be legally adapted to include intrinsic rights to the goods nature and origin. Similar concepts exist in the United States, such as AVAs, COOL, or COLA.¹¹⁰² Therefore, the definition of the area of origin of the product—the fundamental link providing specific and unique organoleptic features grounding distinctiveness and quality—together with the establishment of a local development plan demonstrating economic, social, cultural, and environmental impact through proper organizations and rules, may be the grounds to build a functional GI model.

The general concept on GIs, which found consensus under the TRIPS Agreement two generations ago referred to given qualities, reputation, or other characteristics essentially originating and attributable to their geographical origin. It specifically focused on “indications

¹¹⁰² Alcohol and Tobacco Tax and Trade Bureau, TTB WEB SITE. LABELING. COLAS ONLINE, <https://www.ttb.gov/labeling/colas.shtml> (last visited Nov 8, 2016). (Providing with the Online TTB's system for completing the Federal label certification and approval process for COLAs “Certificates of Label Approval”).

which identify a good as originating in the territory of a Member (of the WTO), 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.”¹¹⁰³

The most recent European regulation on quality schemes for agricultural products and foodstuffs distinguishes “designation of origin” and “geographical indications.”¹¹⁰⁴ The fundamental difference is that all production steps for “designations of origin” take place in a defined geographical area or exclusively provide its quality or particular characteristics.¹¹⁰⁵ GIs do not include exclusivity and only require that one of the production steps take place in the place of origin.¹¹⁰⁶ As previously noted, the most appropriate legal figure to protect GIs in the United States is certification trademarks¹¹⁰⁷ requiring the certified compliance of certain established standards.

The term “certification mark” means any word, name, symbol, or device, or any combination thereof—

(1) used by a person other than its owner, or

(2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this Act, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person’s goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.¹¹⁰⁸

¹¹⁰³ TRIPS Agreement, *supra* note 8, at Art. 22.

¹¹⁰⁴ EU Agricultural Products and Foodstuff Regulation, Art. 5.

¹¹⁰⁵ *Id.*

¹¹⁰⁶ *Id.*

¹¹⁰⁷ U.S. Trademark Act of 1946, 15 United States Code (U.S.C.) §1054 (Section 4 of the Lanham Act).

¹¹⁰⁸ 15 U.S.C. §1127

Accordingly, there are three non-mutually exclusive types of certification marks: (i) marks used to indicate regional or other origin of the goods or services; (ii) marks used to indicate material, mode of manufacture, quality, accuracy or other characteristics of the goods or services; and/or (iii) marks used to indicate that the work or labor on the goods or services was performed by a member of a union or other type of organization.

Long discussions and models of reference have been studied but differences in international legal instruments still remain hindering the potential of GIs. Considering the practicalities of cases, such as the study on Belizean bananas, certain developments are required not just to find consensus but also to ensure quality certification as well as local impact. The particular political and economic circumstances in third countries often hinder local products protection and development due to the lack of agriculture public policy.

More than twenty years have passed since the hard fought compromise was reached to introduce GIs in the TRIPS Agreement.¹¹⁰⁹ Despite the obligation established under Article 24 to continue negotiations to increase protection on the subject matter and the requirement of a permanent review of its implementation, no further development have taken place. Certain innovative conceptual considerations and practical solutions may facilitate understanding and consequently further development on the global protection of GIs.

As Rangnekar concluded, this debate is unlike most other debates at the TRIPS Council because the *demandeurs* include developing countries and there is a complex division between members.¹¹¹⁰ Meanwhile, the European Union and other allies keep seeking an extension on GI protection under the TRIPS Agreement considering that the limited protection granted by Article

¹¹⁰⁹ Waggoner, *supra* note 237, at 578.

¹¹¹⁰ RANGNEKAR, *supra* note 101, at 37.

22, as compared to Article 23, entails several deficiencies that need to be addressed. Developing countries consider that granting special protection for wines and spirits under Article 23 favors developed countries. They also maintain that there is no justification for such a unique protection distinction in the field of IPR since all other legal instruments—such as patent, trademark, or copyright—do not allow them.¹¹¹¹ On the other side, not being prohibited by Article 22, the permission to use GIs accompanied by expressions such as “style,” “type,” “kind,” “imitation,” or the like place GIs from developed countries at risk of becoming generic terms and coexisting with trademarks.¹¹¹² Furthermore, free riding through unfair competition allows producers to benefit from the use of GIs by arguing that it is not misleading to the consumer.¹¹¹³ The opposition to the differential treatment is also grounded on the rights of legitimate owners to prevent misappropriation when their GIs are usurped.¹¹¹⁴ Different perspectives and strong arguments are provided but the initial global regulation under the TRIPS Agreement is no longer satisfactory nor sufficient for those willing to develop such a potential tool to protect and reinforce local products. As trademarks were necessary in the United States, GIs are indispensable now for global local and agricultural development.

If there is any idea to be found in this rather rambling discussion, it is one which I should like to have you revolve in your minds. Let us consider the basis of trade-mark infringement and the broader subject of unfair competition as wrongs based on misrepresentation or misappropriation, rather than to spend time in searching for a right of property and having trouble in recognizing it when we’ve tracked it down. But if you *must* have a property right, you might think of it as the right of every businessman to a remedy when his reasonable expectation

¹¹¹¹ Staten, *supra* note 253, at 228.

¹¹¹² *Id.* at 27.

¹¹¹³ *Id.* at 227.

¹¹¹⁴ Banerjee and Majumdar, *supra* note 250, at 660.

of custom is artificially interfered with. This get us back to the question of fact in each case, and, that, I think, is where we belong.¹¹¹⁵

The negotiations under the Doha Round regarding GIs exclusively focus on the creation of a multilateral register for geographical indications for wines and spirits. However, GI extension of the higher level of protection granted to wines and spirits is considered an “implementation” issue and Members differ over whether this issue is part of the negotiation.¹¹¹⁶ A second implementation issue is the relationship of patents for genetic material disclosure and traditional knowledge between the United Nations Convention on Biological Diversity and the TRIPS Agreement.¹¹¹⁷ In 2008, WTO members requested a procedural decision to negotiate these issues in parallel.¹¹¹⁸ Nonetheless, positions remain largely unchanged as the WTO and opponents keep arguing that the mandate is to negotiate the multilateral register. But the compromise among over one hundred WTO Members and the modification of the original European Union proposal on the multilateral register currently opens a door to hope.¹¹¹⁹

Again, the misleading test and the analysis of the knowledge of the consumer of the GI hinders its enforcement and therefore limits its scope of protection due to the uncertainty at the international level generated by the evidence required.¹¹²⁰ While the misleading prohibition for wine and spirits constitutes a *per se* prohibition, a plaintiff defending a GI carries the burden of

¹¹¹⁵ Rogers, *supra* note 75, at 341.

¹¹¹⁶ World Trade Organization, DOHA DEVELOPMENT AGENDA. BRIEFING NOTES ON INTELLECTUAL PROPERTY: GEOGRAPHICAL INDICATIONS AND BIODIVERSITY, https://www.wto.org/english/tratop_e/dda_e/status_e/gi_e.htm (last visited Aug 8, 2016).

¹¹¹⁷ *Id.* See also Laurence R. Helfer, *Regime Shifting: the TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004).

¹¹¹⁸ World Trade Organization, Trade Negotiations Committee, *Draft Modalities for TRIPS Related Issues*, TN/C/W/52 (Jul. 18, 2008).

¹¹¹⁹ WTO, *supra* note 1116.

¹¹²⁰ Staten, *supra* note 253, at 228.

proof. Finally, the cost for an inefficient system could also be argued to justify the extension of the protection of GIs under TTIP.

As a consequence, the concept of GIs may include certification and registration as fundamental requirements together with the expected local impact and in compliance with fair trade rules. Thus a proposal for a new comprehensive concept on GIs would read as follows:

*Duly certified and registered indications which identify a good as originating in the territory of a Member (of the WTO), 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 while being produced under fair trade rules and contributing to economic, social and cultural local development.*¹¹²¹

This concept would facilitate acceptance by the United States and developing countries due to the development of this new GI concept and the aims of existing trade agreements.

Negotiations for the creation of a multilateral register for wines and spirits began in July 1997 and were reinforced at the Fourth Ministerial Conference in Doha that included a mandate for additional negotiations on the protection of GIs.¹¹²² Regarding the best regulatory system, many motions recommend securing rights through GI registration and the presumption granting protection for registered products. Most recent proposals require member states seek international protection of GIs and notify the WTO Secretariat so they would be published and notified providing an eighteen months revision process to solve possible disputes on the application.¹¹²³ The United States and other jurisdictions support enacting a system to notify GIs

¹¹²¹ Based on the TRIPS Agreement definition under Article 22, the italic wording is proposed by the author to establish a GIs concept valid for the United States Certification Trademarks and the European model of GIs.

¹¹²² World Trade Organization, Ministerial Declaration of 14 November 2001 [hereinafter Doha Ministerial Declaration], WT/MIN(01)/DEC/1, 411 L.M. 746 (2002), available at <http://www.wto.org/>.

¹¹²³ 1998 EU Proposal, *supra* note 1006 at 5.

in a database on a voluntary basis.¹¹²⁴ Hong Kong and the International Trademark Association (INTA)¹¹²⁵ proposed a registration system based on the presumption that member states should communicate GIs but notifications would only be examined on formal grounds and the entry into the Register would create *prima facie* evidence of ownership, conformity to the definition included in the TRIPS Agreement, and existence of the protection in the country of origin.¹¹²⁶ Consequently, the European Union proposal presuming GI protection base on registration seems to be the best option while granting the exception of that rule for those countries that lodged a reservation. The spirit of the TRIPS Agreement and the aims of the protection of GIs encourage WTO members to create a complete and binding registration system that extends beyond wines and spirits.¹¹²⁷

Certification and standardization of quality GIs may be the way forward considering the positive experience of models from the United States and European Union. Every agricultural product and foodstuff requires continuous review of growth and production procedures as well as strategies to foster local development and be in the market with a distinctive identity. The GI concept must be built upon the existing model of certification trademarks to ensure quality compliance and local development. The drawing of a certification mark application in the United

¹¹²⁴ U.S. Proposal, TN/IP/W/10 dated April 1, 2005 and the latest revision of the latter (TN/IP/W/10/Rev.2 dated July 24, 2008) with Costa Rica, Guatemala, Japan, Korea, Nicaragua, Paraguay and Suouth Africa as additional sponsors.

¹¹²⁵ Hong Kong proposal, TN/IP/W/8 dated April 23, 2003

¹¹²⁶ Fusco, *supra* note 182, at 212.

¹¹²⁷ Waggoner, *supra* note 237, at 580.

States providing with the expected GI protection is subject to the same standards used in relation to the examination of trademark and service mark drawings.¹¹²⁸

Examining attorneys may raise certain issues regarding certification marks, such as the meaning of a particular term to a particular industry or its application to certified goods and services, the translation of a foreign term, the transliteration and translation of non-English characters, the improper use of a registration symbol or the certification program itself.¹¹²⁹ The lack of common standards and legal requirements as well as a unique registration system adds complexity and inefficiency to the international system of protection.

An application for GI certification, as with trademarks, should contain a separate and reasonably detailed statement of the characteristics, standards, or other features of the agricultural goods to be certified, revealing the nature of the certification¹¹³⁰ and the system of verification.¹¹³¹ As with the IPR system in the United States, the certification GI must identify the specific qualities or characteristics of the certified goods.¹¹³² Further research is necessary to examine the establishment of common standards and requirements for the description of certification GIs.

The exercise of legitimate control over a certification GI, or certification trademark, is one of the fundamental principles taken from the U.S. system.¹¹³³ Therefore, evidence is needed to support the application statement regarding the exercise of control over the use of the mark

¹¹²⁸ Trademark Manual of Examining Procedure (TMEP) §§807 et seq., USPTO, <https://www.uspto.gov> (last visited Nov. 5, 2015).

¹¹²⁹ *Id.*

¹¹³⁰ 37 C.F.R. §2.45

¹¹³¹ 15 U.S.C. §§1051(a)(3) and 1051(b)(3); 37 C.F.R. §§2.32(b) and 2.33(a)

¹¹³² *Id.*

¹¹³³ 15 U.S.C. §1126(e) (Section 44(e) of the Lanham Act).

and the impact on local development.¹¹³⁴ However, the requirement of the initial date of use should be amended to recognize historical existence and distinctiveness of the agricultural product or foodstuff.¹¹³⁵

Within the United States, primarily geographic terms are registered as complete or part of a certification mark. GIs can be registered even without a disclaimer or a resort to secondary meaning when they are used to certify the origin and the public understands that goods come only from a certain region of origin.¹¹³⁶ However, marks that are geographically deceptive may not be registered as a certification mark of regional origin.¹¹³⁷ The European Union currently proposes the GI system from Article 22 of the TRIPS Agreement in its proposal to include GIs under TTIP.¹¹³⁸ The main objectives for the European Union in the field of GIs are: (i) ensuring general regulation for GIs and specific protection for a short list covering 201 food GIs and twenty-two names of spirits in addition to the six spirits and seventeen semi-generic names already covered by the 1994 EU-U.S Wine Agreement;¹¹³⁹ (ii) providing a level of protection that prohibits the use of a GI even when the consumer is not misled;¹¹⁴⁰ (iii) adding

¹¹³⁴ 37 C.F.R. §2.61(b).

¹¹³⁵ 37 C.F.R. §2.20; 37 C.F.R. §2.71(c); TMEP §903.05.

¹¹³⁶ U.S. Legislation prohibits registration of primarily geographically descriptive terms (or symbols) but specifically excepts “indications of regional origin” registrable under Section 4 of the Lanham Act, 15 U.S.C. §1054, *See* Section 2(e)(2), 15 U.S.C. §1052 (e)(2). *See also Institut National Des Appellations D’Origine v. Brown-Forman Corp.*, 47 USPQ2d 1875 (TTAB 1998).

¹¹³⁷ *Id.*

¹¹³⁸ European Commission, *supra* note 1061, at 1.

¹¹³⁹ *See* European Commission, *supra* note 1063. *See also* European Commission, *supra* note 1048, at 9. (The European Commission in coordination with EU Member States established GI short lists taking into account objective criteria such as the economic relevance and the IPR situation in the U.S. market. Anyhow, the EU seeks to establish the principle of an open list and the initial list of names could be expanded).

¹¹⁴⁰ *Id.*, (i.e. when the true origin of the product is indicated, the GI name is accompanied with expressions such as “kind,” “type,” “style,” “imitation,” or the like; or the name is translated).

administrative enforcement in addition to judicial means;¹¹⁴¹ and (iv) finding ad hoc solutions on GIs conflicting with generic names, prior uses, or prior trademarks.¹¹⁴² The conceptual acceptance of the TRIPS Agreement was already included in agreements between the European Union and Canada as well as Central America.¹¹⁴³ However, most other European Union trade agreements provide with the EU GIs concepts referring its own regulations, such as the specific reference under Article 10.18 of the agreement with South Korea directly address the European and South Korea agricultural quality product rules.¹¹⁴⁴ But even the United States has accepted a concept with similar terminology under Article 18.1 of the Trans-Pacific Partnership Agreement where GIs are considered an innovative section without precedent.¹¹⁴⁵ With Canada and Mexico regulating GIs, both its NAFTA partners are now willing to find a common playing field with the European Union. While it is a recent development in Canada, Mexico has traditionally protected GIs since 1942 and provides two alternative forms of protection: collective marks and appellations of origin.¹¹⁴⁶

¹¹⁴¹ *Id.*

¹¹⁴² *Id.*

¹¹⁴³ *CETA Agreement*, Art. 20.16, Definitions; *EU-Central America Association Agreement*, Art. 242 General Provisions.

¹¹⁴⁴ *EU-South Korea Free Trade Agreement*, Art. 10.18, Recognition of GIs for agricultural products and foodstuffs and wines. (The concept of GIs based on existing regulation in the European Union, precisely Council Regulation (EC) No 510/2006, with its implementing rules, for the registration, control and protection of GIs of agricultural products and foodstuffs in the European Union, and Council Regulation (EC) No 1234/2007 on the common organisation of the market in wine; and South Korea refers the Agricultural Products Quality Control Act, with its implementing rules).

¹¹⁴⁵ *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam*, signed Feb. 4, 2016 [2016] ATNIF 2 (not yet in force).

¹¹⁴⁶ *IMPI, Instituto Mexicano de la Propiedad Industrial*, <http://www.gob.mx/impi> (last visited, Jun. 23, 2015).

Furthermore, the protection requested by the European Union in the new TTIP proposal is assimilated to the level of protection in Article 23.1 of the TRIPS Agreement.¹¹⁴⁷ Previous trade agreements included a detailed protection ensuring European Union priorities, such as the use linked to the true place of origin, consumer misleading, or unfair competition within the meaning of Article 10bis of the Paris Convention. In fact, the protection is provided even where the true origin of the product is indicated or the GI is used in translation or accompanied by expressions such as “kind,” “type,” “style,” “imitation” or the like.¹¹⁴⁸

¹¹⁴⁷ EU GI Proposal in TTIP at 1.

¹¹⁴⁸ *CETA Agreement*, Art. 20.19, Protection for Gis listed in Annex 20A; *EU-South Korea Free Trade Agreement*, Art. 10.21, Scope of Protection; and *EU-Central America Association Agreement*, Art. 244, System of Protection.

Table 3: Comparative Regulatory Analysis on GIs: Definition and Protection (I)

	EU-US TRANSATLANTIC TRADE AGREEMENT	EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT
	Negotiations	Negotiations Closed - 2014 Legal Review Completed - 2016 Signed - 2016 and In Force - 2017 (expected)
	<i>Proposal (Mar. 2016)</i>	<i>Chap. 20 IPR and Annexes 20 A, B and C</i>
D E F I N I T I O N S	<p>GIS are defined as in TRIPS art 22.1.</p> <p>Right of use: any operator complying with the technical specifications is entitled to use the GI.</p> <p>Wines and spirit drinks in a separate comprehensive section.</p>	<p>Art.20.16 Definitions: GI means an indication which identifies an agricultural product or foodstuff as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin; and product class means a product class listed in Annex 20.</p>
P R O T E C T I O N	<p>Parties commit to provide to the GIs of the other Party a level of protection as set as in art. 23.1 of TRIPS.</p>	<p>Art.20.19. Protection for GIs listed in Annex 20A: 2. Each Party shall provide the legal means for interested parties to prevent (a) the use of a GI of the other Party listed in Annex 20-A that either: (i) does not originate in the place of origin specified in Annex 20-A for that GI; or (ii) does originate in the place of origin specified in Annex 20-A for that GI but was not produced or manufactured in accordance with the laws and regulations of the other Party that would apply if the product were for consumption in the other Party; (b) 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; and (c) any other use which constitutes an act of unfair competition within the meaning of Article 10 bis of the Paris Convention for the Protection of Industrial Property (1967) done at Stockholm on 14 July 1967. 3. The protection referred to in subparagraph 2(a) shall be provided even where the true origin of the product is indicated or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.</p>

Table 4: Comparative Regulatory Analysis on GIs: Definition and Protection (II)

	EU-SOUTH KOREA FREE TRADE AGREEMENT	EU-CENTRAL AMERICA ASSOCIATION AGREEMENT
	Signed - 2010 Provisional Application - 2011 In Force - 2015	Signed in 2012 Provisional Application 2013
	<i>Chap. 10 IPR and Annexs 10 A and B</i>	<i>Part IV Trade- Tit.VI IPR and Annexes 17 A&B</i>
D E F I N I T I O N S	<p><u>Art.10.18. Recognition of GIs for agricultural products and foodstuffs and wines:</u> No proper definition. Concept of GIs based on existing regulation in the European Union (Council Regulation (EC) No 510/2006, with its implementing rules, for the registration, control and protection of GIs of agricultural products and foodstuffs in the European Union, and Council Regulation (EC) No 1234/2007 on the common organisation of the market in wine) and South Korea (Agricultural Products Quality Control Act, with its implementing rules).</p> <p><u>Art 10.19</u> for wines, aromatised wines and spirits (also national laws).</p>	<p><u>Art.242 General Provisions:</u> 1. The following provisions apply to the recognition and protection of GIs which originate in the territories of the Parties.</p> <p>2. For the purposes of this Agreement, GIs are indications which identify a good as originating in the territory of a Party, 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.</p>
P R O T E C T I O N	<p><u>Art.10.21 Scope of Protection:</u> 1. GIs shall be protected against:</p> <p>(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;</p> <p>(b) the use of a GI identifying a good for a like good (56) not originating in the place indicated by the GI in question, even where the true origin of the good is indicated or the GI is used in translation or transcription or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like; and</p> <p>(c) any other use which constitutes an act of unfair competition within the meaning of Article 10 bis of the Paris Convention.</p>	<p><u>Art.244 System of Protection:</u> 1. The Parties shall maintain or have established systems for the protection of GIs in their legislation, by the entry into force of this Agreement.</p> <p>2. The legislation of the Parties shall contain elements such as:</p> <p>(a) a register listing protected GIs.</p> <p>(b) an administrative process of verification.</p> <p>(c) the registered name correspond to a specific product.</p> <p>(d) control provisions.</p> <p>(e) a right to use the protected name.</p> <p>(f) a procedure involving publication of the application that allows the legitimate interests of prior users of names, whether those names are protected as a form of intellectual property or not, to be taken into account.</p>

Even in the exception to protection, the European Union is providing more flexibility in its TTIP proposal. It is accepting prior-use for products legally marketed in a continuous manner and accepting the coexistence between GIs with plant varieties or animal breed names. It is also accepting treatment of compound names and translations in relation to genericness accepting preexisting rights. It is finally willing to achieve an agreement offering *ad hoc* solutions for other possible conflicts.¹¹⁴⁹

One of the most controversial issues is the potential degeneration of GIs into generic terms; therefore, this extension must be studied and compared along with the exception in Article 24(6) of the TRIPS Agreement, which specifically refers to wines and spirits.¹¹⁵⁰ Techniques to prevent GIs from becoming generic names are proposed, such as a legal prohibition similar to Article 4 of the Madrid Agreement, a defense of goods avoiding deceptive or misleading competition similar to Article 23(1) of the TRIPS Agreement, and a prohibition of registration when a trademark is mainly geographically descriptive.¹¹⁵¹ Consequently, the evolution of the European Union accepting case by case analysis and existing rights facilitates negotiation upon the basis set on the CETA Agreement. In KOREU, the protection of a GI was granted, without prejudice, to the continued use of a trademark existing before the date of the application for protection or recognition of the GI but provided that no ground for the trademark invalidity or revocation existed in the legislation of the party concerned.¹¹⁵² The drafting of the EU-Central America Association Agreement protected existing and continuous similar uses in good

¹¹⁴⁹ EU GI Proposal in TTIP at 1&2.

¹¹⁵⁰ Conrad, *supra* note 261, at 38.

¹¹⁵¹ *Id.* at 39.

¹¹⁵² *EU-South Korea Free Trade Agreement*, Art. 10.21.5.

faith.¹¹⁵³ The new consensus reached within CETA provides a satisfactory solution for the two previously confronted models. Among the solutions proposed are. (i) transitionals periods for meats and cheeses;¹¹⁵⁴ (ii) the maintenance of prior trademarks rights in good faith;¹¹⁵⁵ (ii) the use of translated and common names identical to GIs;¹¹⁵⁶ (iii) the right to use a person's name, and (iv) to register in Canada a trademark that would not mislead the public as to the geographical origin of the goods.¹¹⁵⁷

With CETA, the European Union is willing to accept the status quo of certain product trademarks and therefore respect local interests facilitating the overall acceptance of the concept of GIs and the feasibility of developing its food quality model. A comparative analysis of CETA, previous agreements, and the European Union's TTIP proposal demonstrate progress and, with the acceptance of Canada, some of the proposed solutions may be discussed with the United States. In case of agreement, GIs may expand regionally in the NAFTA area since Mexico already has a complete system in force regulating *sui generis* GIs.¹¹⁵⁸ Long references to complex and prohibitive measures and remedies have been changed in the European Union's TTIP proposal for enforcement. Now, it requests legal means and administrative actions to prevent non-authorized use of products not originating in the place of origin or not in line with the technical specifications.¹¹⁵⁹ Previously, CETA included a very detailed administrative action

¹¹⁵³ EU-Central America Association, Art. 245.4.

¹¹⁵⁴ *CETA Agreement* at Art. 20.21.3&4.

¹¹⁵⁵ *Id.* at Art. 20.21.5.

¹¹⁵⁶ *Id.* at Art. 20.21.7.

¹¹⁵⁷ *Id.* at Art. 20.21.10&11.

¹¹⁵⁸ Reglamento de la Ley de la Propiedad Industrial (texto refundido publicado en el DOF el 10 de junio de 2011) (2011)

¹¹⁵⁹ EU GI Proposal in TTIP at 2.

to prohibit misleading and deceptive actions,¹¹⁶⁰ together with border measures¹¹⁶¹ and other remedies.¹¹⁶² KOREU extended the enforcement to provisional and precautionary measures,¹¹⁶³ injunctions,¹¹⁶⁴ and even criminal enforcement of GIs and design counterfeiting.¹¹⁶⁵

¹¹⁶⁰ *CETA Agreement* at Art. 20.19.4.

¹¹⁶¹ *Id.* at Art. 20.43.

¹¹⁶² *Id.* at Art. 20.48.

¹¹⁶³ *EU-South Korea Free Trade Agreement*, Art. 10.46.

¹¹⁶⁴ *Id.* at Art. 10.48.

¹¹⁶⁵ *Id.* at Art. 10.55.

Table 5: Comparative Regulatory Analysis on GIs: Exceptions and Enforcement (I)

	EU-US TRANSATLANTIC TRADE AGREEMENT	EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT
	Negotiations	Negotiations Closed - 2014 Legal Review Completed - 2016 Signed - 2016 and In Force - 2017 (expected)
	<i>Proposal (Mar. 2016)</i>	<i>Chap. 20 IPR and Annexes 20 A, B and C</i>
E X C E P T I O N S	<p>Prior-use: transitional period up to [X] years for products legally marketed in continuous manner for at least [Y] year.</p> <p>Treatment of compound names and translations in relation to genericness: in the case of a translation of a GI identical with or containing within it a common name for a given product, or a GI not identical with but containing within it such a term, the GI protection does not prejudice the right of any person to use that term in association with that product.</p> <p>Coexistence between GIs and plant varieties / animal breeds' names.</p> <p><i>Ad hoc</i> solutions for other possible conflicts.</p>	<p>Art.20.21. Exceptions: 3. GIs shall not prevent the use with regard to products in the class of "fresh, frozen and processed meats" for at least five years preceding the date of 18 October 2013, with a transitional period of five years.</p> <p>4. GIs shall not prevent the use with regard to products in the classes of "dry-cured meats" and "cheeses", respectively, for at least ten years preceding the date of 18 October 2013, with a transitional period of five years.</p> <p>5. Maintenance of prior trademarks rights in good faith on the date of signing of this Agreement.</p> <p>7. Right to used translated and common names identical to GIs</p> <p>8. Coexistence between GIs and plant varieties / animal breeds' names.</p> <p>10-11. Right of any person to use person's name, or to register in Canada a trademark that would not mislead the public as to the geographical origin of the goods.</p>
E N F O R C E M E N T	<p>Reference to legal means/administrative actions to prevent non authorized use, in relation to products not originating in the place of origin or not in line with the technical specifications.</p>	<p>Art.20.19: 4. Enforcement by administrative action to prohibit a person from manufacturing, preparing, packaging, labelling, selling or importing or advertising a food commodity in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its origin.</p> <p>5. Each Party will provide for administrative action in respect of complaints related to the labelling of products, including their presentation, in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding their origin.</p> <p>Art.20.43. Border Measures and Art.20.48.</p> <p>Remedies:Each Party shall provide that its competent authorities have the authority to order the destruction of goods that the goods are infringing (...).</p>

Table 6: Comparative Regulatory Analysis on GIs: Exceptions and Enforcement (II)

	EU-SOUTH KOREA FREE TRADE AGREEMENT	EU-CENTRAL AMERICA ASSOCIATION AGREEMENT
	Signed - 2010 Provisional Application - 2011 In Force - 2015	Signed in 2012 Provisional Application 2013
	<i>Chap. 10 IPR and Annexes 10 A and B</i>	<i>Part IV Trade- Tit.VI IPR and Annexes 17 A&B</i>
E X C E P T I O N S T O P R O T E C T I O N	<p>10.21: 5. The protection of a GI under this Article is without prejudice to the continued use of a trademark before the date of the application for protection or recognition of the GI, provided that no grounds for the trademarks invalidity or revocation exist in the legislation of the Party concerned.</p>	<p>Art 245 Established GIs: 4 For GIs other than wines and spirit drinks, nothing in this Agreement shall be construed to require a Party to prevent continued and similar use of a particular GI of the other Party in connection with goods or services by any of its nationals or domiciliaries who have used that GI in good faith and in a continuous manner with regard to the same or related goods or services, in the territory of that Party before the date of entry into force of this Agreement.</p>
E N F O R C E M E N T	<p>Art.10.22 Enforcement of Protection: The Parties shall enforce the protection provided for in Articles 10.18 through 10.23 on their own initiative by appropriate intervention of their authorities. They shall also enforce such protection at the request of an interested party. Section C Enforcement of intellectual property rights.</p> <p>Art.10.46: Provisional and Precautionary Measures.</p> <p>Art.10.48: Injunctions.</p> <p>Art.10.55: Criminal Enforcement on GIs and designs counterfeiting.</p>	<p>Art.250 Dispute Settlement: No Party shall have any recourse to challenge the final decision issued by a national or regional competent authority regarding the registration or protection of a GI, under Title X (Dispute Settlement) of Part IV of this Agreement. Any claim against the protection of a GI shall be conducted under the available judicial instances established under each Party's domestic or regional legislation.</p>

Homonymous names—a group of words that shares the same pronunciation but different meanings—may mislead consumers. Again, practical principles and conditions ensuring equitable treatment are applied for the use of wholly or partially homonymous GIs.¹¹⁶⁶ This model was included in the Agreement with Canada also protecting GIs when negotiating with third parties and homonymous names may be affected.¹¹⁶⁷ With South Korea, the Agreement even foresees a Working Group on GIs to decide on the practical conditions of use under which homonymous GIs will be differentiated.¹¹⁶⁸

Pre-existing trademarks and grandfathering clauses seem to be one of the main concerns, particularly for common law jurisdictions where GIs were never established under a *sui generis* legal framework. Since many product names traveled to new countries with emigrants willing to grow and produce similar products, certain names linked to a geographical origin have been protected as trademarks. Today, European demands and expectations to prioritize GIs over trademark is limited to a very specific list that is adapted with every trade agreement depending on each GI product and market circumstances.

Parties ensure ex-officio refusal of subsequent trademarks but also the coexistence between subsequent GIs and prior ones.¹¹⁶⁹ Even well-known trademarks used over a significant period of time constitute a ground for rejecting GI protection if it is liable to mislead the consumer on the true identity of the product.¹¹⁷⁰ Previous agreements already contain these rules and facilitate the application of the fundamental principle of “*prior in tempore, potior in iure*”—

¹¹⁶⁶ EU GI Proposal in TTIP at 2.

¹¹⁶⁷ *CETA Agreement* at Art. 20.20.

¹¹⁶⁸ *EU-South Korea Free Trade Agreement*, Art. 10.21.3.

¹¹⁶⁹ EU GI Proposal in TTIP at 2.

¹¹⁷⁰ *Id.*

who is first in time is preferred in right—but, as happened with the Madrid System for trademarks, a unique international certification and registration framework for GIs would reinforce the protection of such industrial rights.¹¹⁷¹

Agricultural quality products need a one-stop solution for registering and managing GIs, as it is happening with trademarks worldwide.¹¹⁷² The registration system must be similar and compatible with the existing Madrid system available for trademarks where applications may be carried out through national and regional IP offices, with formal and substantive examination and information is freely and fully available is convenient and cost-effective.¹¹⁷³ Unfortunately, the Lisbon system mainly focuses on international appellations of origin and, despite the aims and similarities with the Madrid system, its impact is very limited.¹¹⁷⁴ With only twenty-eight contracting parties, an appellation of origin grants protection in all member countries after it is registered in the international register, without any need for renewal, for as long as the appellation is protected in the country of origin.¹¹⁷⁵ However, it is feasible to build upon existing system with a broader consensus on the GI concept providing registration and even an interconnected global system of information with trademarks.

¹¹⁷¹ WIPO, *Madrid – The International Trademark System*, <http://www.wipo.int/madrid/en/> (last visited Jun. 4, 2016)

¹¹⁷² *Id.* The Madrid System allows to manage and register trademarks in 98 members through one centralized system.

¹¹⁷³ *Id.*

¹¹⁷⁴ WIPO, *Lisbon – The International System of Appellations of Origin*, <http://www.wipo.int/lisbon/en/> (last visited Jun. 4, 2016)

¹¹⁷⁵ *Id.*

Table 7: Comparative Regulatory Analysis on GIs: Homonymous Names. Trademarks (I)

	EU-US TRANSATLANTIC TRADE AGREEMENT	EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT
	Negotiations	Negotiations Closed - 2014 Legal Review Completed - 2016 Signed - 2016 and In Force - 2017 (expected)
	<i>Proposal (Mar. 2016)</i>	<i>Chap. 20 IPR and Annexes 20 A, B and C</i>
H O M O N Y M O U S N A M E S	Principles for the use of wholly or partially homonymous GIs in the territories of the parties. Each Party determines practical conditions as to differentiate homonymous indications, ensuring equitable treatment and that consumers are not misled.	Art.20.20. Homonymus GIs: 1. In the case of homonymous GIs of the Parties for products falling within the same product class, each Party shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled. 2. If a Party, in the context of negotiations with a third country, proposes to protect a GI identifying a product originating in the third country, if that indication is homonymous with a GI of the other Party listed in Annex 20-A and if that product falls within the product class specified in Annex 20-A for the homonymous GI of the other Party, the other Party shall be informed and be given the opportunity to comment before the GI becomes protected.
T R A D E M A R K S	Parties ensure ex-officio refusal of subsequent trademarks. Parties provide coexistence between subsequent GIs and prior TMs. Prior TMs can continue to be used and renewed. Well known trademarks during a significant period of time constitute a ground for rejecting GIs, if the GI protection is liable to mislead the consumer on the true identity of the product.	Art.20.19: 6.The registration of a trademark which contains or consists of a GI of the other Party listed in Annex 20-A shall be refused or invalidated, ex officio if a Party's legislation so permits or at the request of an interested party, with respect to a product that falls within the product class specified in Annex 20-A for that GI and that does not originate in the place of origin specified in Annex 20-A for that GI. Art.20.21: 2. Notwithstanding Articles 20.19.2 and 20.19.3, the protection of the GIs listed in Part A of Annex 20-A and identified by one asterisk shall not prevent the use in the territory of Canada of any of these indications by any persons, including their successors and assignees, who made commercial use of those indications with regard to products in the class of "cheeses" preceding the date of 18 October 2013 (For greater certainty, this paragraph applies equally to the term "Feta").

Table 8: Comparative Regulatory Analysis on GIs: Homonymous Names. Trademarks (I)

	EU-SOUTH KOREA FREE TRADE AGREEMENT	EU-CENTRAL AMERICA ASSOCIATION AGREEMENT
	Signed - 2010 Provisional Application - 2011 In Force - 2015	Signed in 2012 Provisional Application 2013
	<i>Chap. 10 IPR and Annexes 10 A and B</i>	<i>Part IV Trade- Tit.VI IPR and Annexes 17 A&B</i>
H O M O N Y M O U S N A M E S	Art.10.21: 3. If GIs of the Parties are homonymous, protection shall be granted to each indication provided that it has been used in good faith. The Working Group on GIs shall decide the practical conditions of use under which the homonymous GIs will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled. If a GI protected through this Agreement is homonymous with a GI of a third country, each Party shall decide the practical conditions of use under which the homonymous GI will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.	Art.248 Relationship Between GIs and Trademarks: 4. For geographical indications other than wines and spirit drinks, nothing in this Agreement shall be construed to require a Part to prevent continued and similar use of a particular geographical indication of the other Party in connection with goods or services by any of its nationals or domiciliaries who have used that GI in good faith and in a continuous manner with regard to the same or related goods or services, in the territory of that Party before the date of entry into force of this Agreement.
T R A D E M A R K S	Art.10.23. Relationship with Trademarks: 1. The registration of a trademark that corresponds to any of the situations referred to in Article 10.21.1 in relation to a protected GI 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 GI in the territory concerned. 2. For the purposes of paragraph 1: (a) for GIs referred to in Articles 10.18 and 10.19, the date of application for protection or recognition shall be the date when this Agreement enters into force; and (b) for GIs referred to in Article 10.24, the date of application for protection or recognition shall be the date of a Party's receipt of a request by the other Party to protect or recognise a GI.	Art.248 Relationship Between GIs and Trademarks: 1. The legislation of the Parties shall ensure that the application for registration of a trademark which corresponds to any of the situations listed in Article 246 for like products is refused where such application for registration is submitted after the date of application for registration of the GI in the territory concerned. 2. Similarly, the Parties may, in accordance with their domestic or regional legislation, establish the grounds for rejecting the protection of GIs, including the option not to grant protection to a GI where, in the light of a reputed or well-known trademark, protection is liable to mislead consumers as to the true identity of the product. 3. The Parties shall maintain the legal means for any natural or legal person having a legitimate interest, to request the cancelation or invalidation of a trademark or a GI giving reasons for such request.

Territoriality seems to be critical to solve the issues of genericness. Therefore, legal solutions and the comprehensiveness of the regulatory framework will determine acceptance of

generic names.¹¹⁷⁶ The current priority seems to be ensuring protection as established in Article 23 of the TRIPS Agreement, regardless of the misleading factor and without the burden of proof.¹¹⁷⁷ Nonetheless, there is a clear tendency to provide consumers with clear information and labeling without prejudice to the rights of any person to use territorial terms. Most European Union trade agreements containing IPR protection included the prohibition of misleading information on the true origin of a GI through translation, transcriptions, or indications accompanied by expressions such as “kind,” “type,” “style,” “imitation,” or the like.¹¹⁷⁸ Therefore, the general rule is to impede any practice that misleads the consumer as to the true origin of the product or any other use that constitutes an act of unfair competition in the manner set forth in Article 10bis of the Paris Convention and Article 23.1 of the TRIPS Agreement.¹¹⁷⁹ No goods should indicate or suggest that they originate in a geographical area other than the true place of origin. Otherwise, the goods mislead the public as to geographical origin.¹¹⁸⁰

¹¹⁷⁶ EU GI Proposal in TTIP at 2.

¹¹⁷⁷ *Id.*

¹¹⁷⁸ *CETA Agreement*, Art. 20.21; *EU-South Korea Free Trade Agreement*, Art. 10.21; *EU-Central America Association Agreement*, Art. 246.

¹¹⁷⁹ *Id.*

¹¹⁸⁰ *Id.*

Table 9: Comparative Regulatory Analysis on GIs: Generic Names (I)

	EU-US TRANSATLANTIC TRADE AGREEMENT	EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT
	Negotiations	Negotiations Closed - 2014 Legal Review Completed - 2016 Signed - 2016 and In Force - 2017 (expected)
	<i>Proposal (Mar. 2016)</i>	<i>Chap. 20 IPR and Annexes 20 A, B and C</i>
G E N E R I C N A M E S	<p>Criteria for establishing genericness, based on the principle of territoriality [existing situation in areas of consumption and relevant legal acts].</p> <p>Prohibition of subsequent genericness in the non-originating country.</p>	<p><u>Art.20.21</u>: 7. If a translation of a GI is identical with or contains within it a term customary in common language as the common name for a product in the territory of a Party, or if a GI is not identical with but contains within it such a term, the provisions of this Sub-section shall not prejudice the right of any person to use that term in association with that product in the territory of that Party.</p>
M I S L E A D I N G N A M E S	<p>The intention of the European Commission is to ensure protection as established in Art.23 of the TRIPS Agreement regardless of the misleading factor and without the burden of proof.</p>	<p><u>Art20.21</u>:1. Notwithstanding Articles 20.19.2 and 20.19.3, Canada shall not be required to provide the legal means for interested parties to prevent the use of the terms listed in Part A of Annex 20-A and identified by one asterisk when the use of such terms is accompanied by expressions such as "kind", "type", "style", "imitation" or the like and is in combination with a legible and visible indication of the geographical origin of the product concerned.</p>

Table 10: Comparative Regulatory Analysis on GIs: Generic Names (II)

	EU-SOUTH KOREA FREE TRADE AGREEMENT	EU-CENTRAL AMERICA ASSOCIATION AGREEMENT
	Signed - 2010 Provisional Application - 2011 In Force - 2015	Signed in 2012 Provisional Application 2013
	<i>Chap. 10 IPR and Annexs 10 A and B</i>	<i>Part IV Trade- Tit.VI IPR and Annexes 17 A&B</i>
G E N E R I C N A M E S	Art.10.21: 2. This Agreement shall in no way prejudice the right of any person to use, in the course of trade, that person’s name or the name of that person’s predecessor in business, except where such name is used in such a manner as to mislead consumers.	Art 245: 2. A GI which has been granted protection in one of the Parties, cannot, in that Party, be deemed to have become generic, as long as it is protected as a GI in the Party of origin. 3. Where a GI contains within it a name which is considered generic in a Party, the use of that generic name on the appropriate good in that Party shall not be considered to be contrary to this Article. 4. For GIs other than wines and spirit drinks, nothing in this Agreement shall be construed to require a Party to prevent continued and similar use of a particular GI of the other Party in connection with goods or services by any of its nationals or domiciliaries who have used that GI in good faith and in a continuous manner with regard to the same or related goods or services, in the territory of that Party before the date of entry into force of this Agreement.
M I S L E A D I N G N A M E S	Art.10.21: (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 GI identifying a good for a like good (56) not originating in the place indicated by the GI in question, even where the true origin of the good is indicated or the GI 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. Footnote 56:For all goods, the term ‘like good’ shall be interpreted in line with Article 23.1 of the TRIPS Agreement relating to the use of a GI identifying wines for wines not originating in the place indicated by the GI in question or identifying spirits for spirits not originating in the place indicated by the GI in question.	Art.246 Protection Granted: 1. Protected GIs shall as a minimum be protected 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 protected GI for the same products that are not originating from the designated place of the GI in question even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as ‘style’, ‘type’, ‘imitation’, ‘like’ or similar; (c) any other practice that misleads the consumer as to the true origin of the product or any other use that constitutes an act of unfair competition in the manner set forth in Article 10 bis of the Paris Convention.

Examination, opposition, and cancellation of GIs are administrative processes required for approval and registration of GIs they need clearer international regulation and harmonized standards. The European Union requests transparent GI administrative processes under TTIP and a clear ground for opposition to be assessed. Of particular concern are conflicts with names of plant varieties and animal breeds; wholly or partially homonymous names; well-known trademarks, commercial names that have been legally on the market for a certain number of years, and generic names.¹¹⁸¹

While the life of GI protection is indefinite—there is no need to apply for renewal every ten years, as is the case for trademarks—there exists an obligation of use. Nonetheless, cancellation of GIs is possible in the originating territory if compliance with specifications are not ensured or if no product is placed on the market for a certain number of years.¹¹⁸²

Consequently, GI owners must communicate whether a GI is no longer protected or if it falls into disuse in the place of origin.¹¹⁸³ As it stated in the EU-Central America Association Agreement, the Parties shall maintain the legal means for any natural or legal person having a legitimate interest, to request the cancelation or invalidation of a trademark or a GI giving reasons for such request.¹¹⁸⁴ Effective, transparent, and practical administrative processes—together with a proper system of remedies, monitoring, and control of registered certification GIs—seems to be fundamental to ensure compliance, validity, and use.

¹¹⁸¹ EU GI Proposal in TTIP at 2.

¹¹⁸² *Id.*

¹¹⁸³ *Id.*

¹¹⁸⁴ *EU-Central America Association Agreement*, Art. 248.3.

Table 11: Comparative Regulatory Analysis on GIs: Examination (I)

	EU-US TRANSATLANTIC TRADE AGREEMENT	EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT
	Negotiations	Negotiations Closed - 2014 Legal Review Completed - 2016 Signed - 2016 and In Force - 2017 (expected)
	<i>Proposal (Mar. 2016)</i>	<i>Chap. 20 IPR and Annexes 20 A, B and C</i>
E X A M P L E S O P P O S I T I O N S A N D	<p>Examination of GIs of the other Party, on the basis of transparent administrative processes.</p> <p>Opposition procedure on the basis of an established set of grounds for opposition, to be assessed by each Party in relation to its territory, and namely conflicts with: names of plant varieties and animal breeds; wholly or partially homonymous names; well-known trademarks, commercial names that have been legally on the market for at least [X] years and generic names.</p>	<p>Art.20.21. Exceptions: 9. Request in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Party or after the date of registration of the trademark.</p>
C A N C E L L A T I O N	<p>Cancellation of GIs is possible in the originating territory if compliance with specification not ensured or if no product is placed on the market for at least X years</p> <p>Obligations for the parties to communicate GI that ceased to be protected in its place of origin or fall into disuse in the place of origin.</p>	<p>20.19: 7. There shall be no obligation under this Sub-section to protect GIs which are not or cease to be protected in their place of origin, or which have fallen into disuse in that place. If a GI of a Party listed in Annex 20-A ceases to be protected in its place of origin or falls into disuse in that place, that Party shall notify the other Party and request cancellation.</p>

Table 12: Comparative Regulatory Analysis on GIs: Examination (II)

	EU-SOUTH KOREA FREE TRADE AGREEMENT	EU-CENTRAL AMERICA ASSOCIATION AGREEMENT
	Signed - 2010 Provisional Application - 2011 In Force - 2015	Signed in 2012 Provisional Application 2013
	<i>Chap. 10 IPR and Annexs 10 A and B</i>	<i>Part IV Trade- Tit.VI IPR and Anexxes 17 A&B</i>
E X A M P L E O P P O S I T I O N S A N D C A N D I D	<p>Art.10.24 (footnote 57): If a proposal is made by:</p> <p>(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</p> <p>(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 footnotes of Article 10.19,</p> <p>to add a name of origin to this Agreement which has been recognised by either Party as a GI 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 GI can be added to this Agreement pursuant to this Sub-section.</p>	<p>Art.245 Established GIs: By the entry into force of this Agreement, the Parties shall:(35) (a) have finalised the opposition and examination procedures, at least with respect to those GI applications listed in Annex XVII (List of Names to be Applied for Protection as GIs in the Territory of the Parties) that were not opposed or for which any opposition was rejected due to formal reasons in the course of national registration proceedings; (b) have initiated the procedures for protecting the GIs listed in Annex XVII and the time periods for submitting oppositions have expired, with respect to those GI applications listed in Annex XVII that were opposed, and the oppositions were found to be prima facie meritorious in the course of national registration proceedings; (c) protect the GIs that have been granted protection as such, according to the level of protection established in this Agreement. 2. The Association Council at its first meeting shall adopt a decision including in Annex XVIII all names from Annex XVII that have been protected as GIs.</p> <p>Footnote 35. The obligations are fulfilled when (a) the administrative decision rejects the registration of the name; or (b) the administrative decision is challenged under the instances established under domestic legislation.</p>
C A N D I D	<p>Art.10.25 Working Group on GIs: 3. The Working Group may decide:</p> <p>(b) to modify (58) the Annexes referred to in subparagraph (a) to remove individual GIs that cease to be protected in the Party of origin (59) or that, in accordance with the applicable legislation, no longer meet the conditions to be considered a GI in the other Party;</p> <p>Footnotes 58 and 59: Refer the sole responsibility of the Party where a GI originates.</p>	<p>Art.248: 3. The Parties shall maintain the legal means for any natural or legal person having a legitimate interest, to request the cancellation or invalidation of a trademark or a GI giving reasons for such request.</p>

Finally, attention must be given to the specifically selected GIs that are short listed and included in each one of the trade agreements negotiated by the European Union. The European Commission established GI short lists, in coordination with Member States, by taking into

account objective criteria and economic relevance.¹¹⁸⁵ There are sixty EU GIs but only one GI for a South Korean spirit;¹¹⁸⁶ the European Union has 219 GIs compared to only ten local GIs in Central America;¹¹⁸⁷ while the European Union boasts 172 GIs versus Canada does not have a single GI;¹¹⁸⁸ and, finally, there are 201 EU foodstuff GIs—including seventy-seven cheeses—seventeen EU GIs for wine and twenty-two for spirit drinks are to be negotiated under TTIP.¹¹⁸⁹ Cheese-related GIs are the main concern in the United States¹¹⁹⁰ but the relevance of GI for a variety of products should not be hindered just because of dairy products. Consequently, solutions are to be found studying each conflict of trademarks and GIs on an individual basis.

Trade agreements currently establish institutionalized bodies to amend GI lists by adding new GIs or by removing GIs that have ceased to be protected in the place of origin. Joint Committees,¹¹⁹¹ Working Groups, or even the Association Council, together with specific clauses on the addition of new GIs, are established to ensure developments on the agreements and announce the potential for the protection of agricultural quality products in the future.

¹¹⁸⁵ EUROPEAN COMMISSION, *supra* note 1026, at 9.

¹¹⁸⁶ *EU-South Korea Free Trade Agreement*, Annexes 10-A Part A & B.

¹¹⁸⁷ *EU-Central America Association Agreement*, Annexes 17 Part A & B.

¹¹⁸⁸ *CETA Agreement*, Annexes 20-A Part A & B.

¹¹⁸⁹ *EU Proposal in TTIP*.

¹¹⁹⁰ *See* Consortium for Common Food Names, *supra* note 52.

¹¹⁹¹ *CETA Agreement* (Art. 20.22) and *EU Proposal in TTIP*, *EU-South Korea Free Trade Agreement* (Art. 10.24 and Art. 10.25), *EU-Central America Association Agreement* (Art. 247).

Table 13: Comparative Regulatory Analysis on GIs: List of GIs (I)

	EU-US TRANSATLANTIC TRADE AGREEMENT	EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT
	Negotiations	Negotiations Closed - 2014 Legal Review Completed - 2016 Signed - 2016 and In Force - 2017 (expected)
	<i>Proposal (Mar. 2016)</i>	<i>Chap. 20 IPR and Annexes 20 A, B and C</i>
L I S T O F G I S	<p>Annex I.- EU Gis. 201 EU GIs, 77 Cheeses; 6 AT, 2 BE, 1 CY, 6 CZ, 20 DE, 2 DK, 25 ES, 41 FR, 20 GR, 1 HU, 2 IE, 41 IT, 4 NL, 3 PL, 18 PT, 1 RO, 1 SE, 7 KU.</p> <p>17 European GIs for wine and 22 for Spirit Drinks</p>	<p>Annex 20-A Part A: 172 EU GIS, 58 cheeses, 2 CZ, 14 DE, 1 DK, 16 GR, 1 CY, 27 ES, 42 FR, 41 IT, 2 HU, 3 AT, 20 PT, 2 NL, 1 SE, 1 RO.</p> <p>Annex 20-A Part B: No Canadian Gis included in Annex 20-A Part B.</p> <p>Annex 20-B Part A: Valencia Orange Orange Valencia Valencia; Black Forest Ham Jambon Foret Noire; Tiroler Bacon Bacon Tiroler (The use of spelling variations in English or French shall be permitted, including "Tyrol", "Tiroler", "Tyroler", and "Tirolien"); Parmesan; Bavarian Beer Biere Bavaroise; Munich Beer Biere Munich; St. George Cheese Fromage St-George[s].</p> <p>Annex 20-B Part B: The term "comté" in association with food products when used to refer to a county (for example "Comté du Prince-Edouard"; "Prince Edward County"; "Comté de Prescott- Russell"; "Prescott-Russell County").</p> <p>The term "Beaufort" in association with cheese products, produced in the proximity of the geographical place called "Beaufort range", Vancouver Island, British Columbia.</p>
	<p>Parties may decide by consensus in the context of a specific Committee under the Agreement to amend GI lists by adding new GIs or by removing GIs which have ceased to be protected in the place of origin</p> <p>Criteria and procedure: same criteria and same procedure as per GI in the initial list.</p>	<p>Art.20.22 Ammendments: 1. The CETA Joint Committee, acting by consensus and on a recommendation by the CETA Committee on GIs, may decide to amend Annex 20-A by adding or removing GIs.</p> <p>2. A GI shall not be added if it is a name listed in the relevant Register of the European Union with a status of "Registered", in respect of a Member State of the European Union.</p> <p>3. A GI identifying a product originating in a particular Party shall not be added to Annex 20-A:</p> <p>(a) if it is identical to a trademark that has been registered in the other Party in respect of the same or similar products, or to a trademark in respect of which in the other Party rights have been acquired through use in good faith and an application has been filed in respect of the same or similar products;</p> <p>(b) if it is identical to the customary name of a plant variety or an animal breed existing in the other Party; or</p> <p>(c) if it is identical with the term customary in common language as the common name for such product in the other Party.</p>

Table 14: Comparative Regulatory Analysis on GIs: List of GIs (II)

	EU-SOUTH KOREA FREE TRADE AGREEMENT	EU-CENTRAL AMERICA ASSOCIATION AGREEMENT
	Signed - 2010 Provisional Application - 2011 In Force - 2015	Signed in 2012 Provisional Application 2013
	<i>Chap. 10 IPR and Annexes 10 A and B</i>	<i>Part IV Trade- Tit.VI IPR and Annexes 17 A&B</i>
L I S T O F G I S	<p>Annex 10-A Part A: 60 EU GIS, 19 cheeses, 2 AT, 5 CZ, 12 FR, 2 DE, 3 GR, 1 HU, 16 IT, 1 PT, 18 ES. Annex 10-A Part B: 64 South Korean GIS. Annex 10-B Part A Sect. 1 and 2: 80 EU Wine GI, 21 FR, 4 DE, 2 GR, 1 HU, 21 IT, 7 PT, 2 RO, 1 SK, 21 ES and 25 EU Spirits Gis. Annex 10-A Part B: 1 SouthKorean Spirit GI.</p>	<p>Annex 17 Part A: 219 EU GIS, 27 cheeses, 5 CZ, 3 DK, 12 DE, 2 IE, 14 GR, 53 ES, 43 FR, 44 IT, 5 CY, 1 LT, 4 HU, 3 AT, 3 PL, 14 PT, 8 RO, 1 SK, 2 FI, 2 SE, 1 GB. Annex 17 Part B: 10 CA GIS, 5 coffees, 1 cheese, 1 CR, 2 SV, 2 GT, 2 HN, 2 NI, 1 PA.</p>
N E W G I S	<p>Art.10.24 Addition of GIs: 1. The European Union and Korea agree to add GIs to be protected to the Annexes 10-A and 10-B in accordance with the procedure set out in Article 10.25. 2. The European Union and Korea agree to process, without undue delay, the other's requests for adding GIs to be protected to the Annexes. 3. A name may not be registered as a 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. Art.20.25: 1. The Working Group on GIs established pursuant to Article 15.3.1 (Working Groups) shall meet, as mutually agreed or upon request of a Party, for the purpose of intensifying cooperation between the Parties and dialogue on GIs. The Working Group may make recommendations and adopt decisions by consensus. 2. The location of the meeting shall alternate between the Parties. The Working Group shall meet at a time and a place and in a manner which may include by videoconference, mutually determined by the Parties, but no later than 90 days after the request.</p>	<p>Art.247: 1. The Parties agree on the possibility of adding additional GIs for wines, spirits, agricultural products and foodstuffs to be protected on the basis of the rules and procedures established in this Title, as applicable. Such GIs, following their successful examination by the competent national or regional authorities, shall be included in Annex XVIII (Protected GIs) in accordance with the relevant rules and procedures for the Association Council. 2. The date of application for protection shall be the date of the transmission of a request to the other Party to protect a GI provided that the formal requirements for such applications are fulfilled.</p>

6. CONCLUSIONS

International Conventions and the TRIPS Agreement have been more ambitious and efficacious in language and purpose than in accomplishment. Their application has often floundered on the hard facts of nationalism and local legislation.¹¹⁹² The position of the United States is unsustainable and unreasonable since the world is increasingly recognizing the value provided by GIs while developed and developing countries benefit from strong bilateral and multilateral protections.¹¹⁹³ And the European Union's intent to link GIs to "terroir," as the cornerstone of GIs, requires a new global vision and further improvements considering the interest of developing countries on the potential of GIs.¹¹⁹⁴

Trade agreements on GIs are not sufficient. A proper regulatory framework should be both included in TTIP and a revised TRIPS Agreement. Otherwise, impairment of benefits, the denial of access market, and other negative impacts will derive into compensation considering existing TRIPS and NAFTA rules.¹¹⁹⁵

This dissertation analyzes the GI concept and existing regulatory framework considering both the IPR tradition in the United States and the European Union developments through trade agreements. After examining the Belizean production of bananas, there is a clear need to include the dimensions of certification, registration, and local impact in any analysis and recognize GI protection as a fundamental tool for developing countries.

¹¹⁹² Mock, *supra* note 262, at 4.

¹¹⁹³ Waggoner, *supra* note 237.

¹¹⁹⁴ See DEVELOPING GEOGRAPHICAL INDICATIONS IN THE SOUTH, *supra* note 64.

¹¹⁹⁵ CRINA VIJU, MAY T. YEUNG & WILLIAM A. KERR, GEOGRAPHICAL INDICATIONS, BARRIERS TO MARKET ACCESS AND PREFERENTIAL TRADE AGREEMENTS (2012).

There are sufficient international legal grounds to build on a common system of protection under the concept of Certification GIs considering the needs of a global register together with fair trade rules and the contribution to local development. This concept brings together the main features of GIs and certification trademarks, providing not just uniqueness and specific quality features but also a fair system of production. Furthermore, the recognition of valuable agricultural assets linked to the place of origin must ensure sustainability and a clear geographical, environmental, economic, social and cultural impact.

Duly certified and registered indications which identify a good as originating in the territory of a Member (of the WTO), 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 **while being produced under fair trade rules and contributing to economic, social and cultural local development.**

EU-CETA and EU-KOREU experiences, added to the United States Trans-Pacific Partnership (TPP), and previous trade agreements subscribed by the European Union with Mexico and Central America, among many others, provide proper solutions to the main concerns on GIs. The main objectives for the European Union in the field of GIs may be achieved under TTIP and a revision of the TRIPS Agreement. But this regulatory change must look beyond granting protection to European Union selected GIs by adding administrative enforcement and finding ad hoc solutions on GIs conflicting with generic names, prior uses, or prior trademarks. This dissertation proposes a new GI concept that considers the needs and intrinsic difficulties in developing countries to contribute to local development, market access, and fair trade.

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