

Geographical Indications in the Free Trade Agreements Signed by Asian Countries

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By

Ananthu S Hari and Raju K. D.

**Cambridge
Scholars
Publishing**



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This book first published 2024

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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ISBN (10): 1-0364-0573-7

ISBN (13): 978-1-0364-0573-1

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LIST OF SYMBOLS AND ABBREVIATIONS

AANZFTA	ASEAN-Australia-New Zealand Free Trade Agreement
ABS	Access and Benefit-Sharing
AFPQCA	Agricultural and Fishery Products Quality Control Act
AFTA	ASEAN Free Trade Area
AIC	Administrative Authorities for Industry and Commerce
AO	Appellation of Origin
APEDA	Agricultural and Processed Food Products Export Development Authority
AQSIQ	General Administration of Quality Supervision, Inspection, and Quarantine
ARIPO	African Regional Intellectual Property Organization
ASEAN	Association of Southeast Asian Nations
AUC	African Union Commission
BATFE	Federal Bureau of Alcohol, Tobacco, Firearms and Explosives
BTIA	Broad-based Trade and Investment Agreement
CBD	Convention on Biological Diversity
CEPA	India-Japan Comprehensive Economic Partnership Agreement
CETA	European Union - Canada Comprehensive Economic and Trade Agreement
CNIPA	China National Intellectual Property Administration
CPTPP	Comprehensive and Progressive Agreement for Trans- Pacific Partnership
DOST	Departments of Science and Technology
DSP	Deputy Superintendent of Police
EC	European Communities
EU	European Union
EUSFTA	European Union - Singapore Free Trade Agreement
EVFTA	European Union - Vietnam Free Trade Agreement
FAA	Federal Alcohol Administration
FAO	Food and Agriculture Organization
FGIPPM	Foreign Geographical Indication Products Protection Measures
FTA	Free Trade Agreement

GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GI	Geographical Indication
GIGA	Geographical Indication of Goods (Registration and Protection) Act, 1999
GIR	Geographical Indications Registry
HGI	Homonymous Geographical Indications
INAO	National Institute of Origin and Quality
IP	Intellectual Property
IPAB	Intellectual Property Appellate Board
JEFTA	Japan-European Union Economic Partnership Agreement
JVFTA	Japan-Vietnam Free Trade Agreement
KIPO	Korean Intellectual Property Office
KOREU	European Union-South Korea Free Trade Agreement
KORUS	United States-South Korea Free Trade Agreement
LIPA	Local Intellectual Property Administration
MAFF	Ministry of Agriculture, Forestry, and Fishery
MAFRA	Ministry of Agriculture, Food and Rural Affairs
MAGIAP	Measures for the Administration of Geographical Indications of Agricultural Products
MCFTA	Malaysia, Malaysia-Chile Free Trade Agreement
MEUFTA	Malaysia-European Union Free Trade Agreement
MFAFF	Ministry for Food, Agriculture, Forestry and Fisheries
MOA	Ministry of Agriculture
MOF	Ministry of Oceans and Fisheries
NAPCL	Nadukkara Agro-Processing Company Limited
NOIP	National Office of Intellectual Property of Vietnam
OAPI	African Intellectual Property Organization
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
PPGI	Provisions for the Protection of Geographical Indications
PPGIP	Provisions on the Protection of Geographical Indication Products
RCEP	Regional Comprehensive Economic Partnership
RCTM	Regional Collective Trademarks
REC	Regional Economic Communities
SAFFPF	Specific agricultural, forestry and fishery products and foodstuffs
SAIC	State Administration of Industry and Commerce

SWA	Scotch Whisky Association
TK	Traditional Knowledge
TM	Trade Mark
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSG	Traditional Specialities Guaranteed
TTAB	Trademark Trial and Appeal Board
TTB	Alcohol and Tobacco Tax and Trade Bureau
TTIP	Transatlantic Trade and Investment Partnership
US	United States
USPTO	United States Patent and Trademark Office
USSFTA	United States-Singapore Free Trade Agreement
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

LIST OF STATUTES, CONVENTIONS AND AGREEMENTS

1. Act on Protection of the Names of Specific Agricultural, Forestry and Fishery Products, and Foodstuffs, 2014 (Japan)
2. African Intellectual Property Organization (OAPI) Agreement, 1977
3. Agreement between the European Union and China on cooperation on, and protection of, geographical indication, 2019
4. Agreement between the European Union and Japan for an Economic Partnership, 2019
5. Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership, 2009
6. Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), 2009
7. Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994
8. Agricultural and Fishery Products Quality Control Act (AFPQCA), 1999 (South Korea)
9. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 2018
10. Comprehensive Economic Partnership Agreement between Japan and the Republic of India (CEPA), 2011
11. Convention on Biological Diversity (CBD), 1992
12. Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China, 2020
13. European Union-Canada Comprehensive Economic and Trade Agreement (CETA), 2016
14. Federal Alcohol Administration Act (FAA Act), 1935 (United States)
15. Foreign Geographical Indication Products Protection Measures (FGIPPM), 2019 (China)
16. Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 2011
17. Free Trade Agreement between the European Union and the Republic of Singapore, 2018

18. Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, 2019
19. Free Trade Agreement between the United States of America and the Republic of Korea, 2012
20. General Agreement on Tariffs and Trade, 1947
21. General Inter-American Convention for Trade Mark and Commercial Protection, 1929
22. Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, 2015
23. Geographical Indications Act, 2000 (Malaysia)
24. Geographical Indications Act, 2014 (Singapore)
25. Geographical Indication of Goods (Registration and Protection) Act, 1999
26. International Convention on the use of Appellations of Origin and Denominations of Cheeses (Stresa Convention), 1951
27. Lanham (Trademark) Act, 1946 (United States)
28. Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property, 2005 (Vietnam)
29. Law of the People's Republic of China on Agricultural Product Quality Safety, 2006 (China)
30. Lisbon Agreement for the Protection of Appellation of Origin and their International Registration, 1958.
31. Lusaka Agreement on the creation of the African Regional Intellectual Property Organization (ARIPO), 1976
32. Madrid Agreement for the Repression of False or Deceptive Indications of Sources on Goods, 1891
33. Malaysia, Malaysia-Chile Free Trade Agreement (MCFTA), 2010
34. Measures for the Administration of Geographical Indications of Agricultural Products (MAGIAP), 2007 (China)
35. Paris Convention for the Protection of Industrial Property, 1883
36. Provisions for the Protection of Geographical Indications (PPGI), 2020 (China)
37. Provisions on the Protection of Geographical Indication Products (PPGIP), 2005 (China)
38. Regional Comprehensive Economic Partnership (RCEP), 2020
39. Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89, 2008 (European Union)

40. Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialties guaranteed, 2006 (European Union)
41. Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 2006 (European Union)
42. Regulation (EC) No. 1601/91 laying down general rules on the definition, description and presentation of aromatized wines, aromatized wine- based drinks and aromatized wine-product cocktails, 1991 (European Union).
43. Regulation (EC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 1992 (European Union)
44. Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91, 2014 (European Union)
45. Regulation (EU) No 1151/2012 of the European Parliament and the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, 2012 (European Union)
46. Regulation (EU) No. 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No. 922/72, (EEC) No. 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007, 2013 (European Union)

PREFACE

In an era marked by globalization and the relentless interplay of international trade, the protection and promotion of Geographical Indications (GIs) have emerged as a critical facet of the world's economic landscape. For those uninitiated, GIs are more than just labels; they encapsulate the rich tapestry of culture, tradition, and terroir of a particular region. They bear testament to the unique qualities and attributes of products originating from a specific geographical area. Think of Champagne from the Champagne region of France, Darjeeling tea from the Himalayan foothills of India, or Parmigiano-Reggiano from the Emilia-Romagna region of Italy, and you're thinking of GIs. Underpinning the protection of GIs is a complex and evolving international legal framework, with its epicentre at the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Yet, within this framework, ambiguity and contention have reigned, leaving many questions unanswered and challenges unmet. The international community was tasked with forging a path forward, yet consensus remained elusive.

In the face of these roadblocks, a significant shift occurred. Countries, and notably those in Asia, began to look to Free Trade Agreements (FTAs) as a means of securing the protection and recognition of their GIs. In this regard, Asia emerged as a new crucible of the post-TRIPS GI discourse, with numerous countries in the region actively negotiating FTAs. This book embarks on a journey into the intricate landscape of Geographical Indications within the context of Free Trade Agreements, with a particular focus on seven Asian nations: China, India, Japan, Malaysia, Singapore, South Korea, and Vietnam. These nations, each unique in its own right, have recently signed FTAs and are in various stages of adapting their national laws to harmonize with international commitments. This book's objective is to dissect the peculiarities of their domestic GI protection frameworks and scrutinize the nature of GI provisions within their FTAs.

This examination reveals the intricate interplay between national interests, international agreements, and regional dynamics. We delve into the diverse tapestry of traditions, customs, and aspirations that define GI protection in this vibrant continent. As you embark on this journey through the pages of this book, we invite you to explore the intricate world of GIs in the Asian

context. The challenges and opportunities, the harmonies and dissonances, and the shared vision for a future where Geographical Indications are both preserved and harnessed will unfold before you. The road to understanding Geographical Indications and Free Trade Agreements in Asia is complex, but it is a journey that holds profound implications for trade, culture, and the future of intellectual property rights. We hope this book not only informs but also inspires a deeper appreciation for the role of GIs in preserving the identities of products and places, fostering economic development, and contributing to a more equitable global trade system. This is your invitation to embark on a journey through the captivating realm of Geographical Indications in the Free Trade Agreements signed by Asian countries. Enjoy the voyage.

Dr. Ananthu S Hari
Prof. K D Raju
November, 2023

ACKNOWLEDGMENTS

This book, a culmination of passion and dedication, is a tribute to the many kind-hearted individuals who have graced my journey throughout the years. It is a celebration of the teachers, friends, and family members who have inspired and supported me, and it is with immense gratitude that I acknowledge their invaluable contributions. My academic voyage has been enriched by the wisdom and guidance of numerous teachers, each a beacon of knowledge and inspiration. They have imparted wisdom, nurtured my curiosity, and expanded my horizons. To each one of them, I extend my heartfelt thanks for the privilege of learning from their wealth of experience.

A significant part of this journey was charted within the nurturing embrace of the Rajiv Gandhi School of Intellectual Property Law at the Indian Institute of Technology Kharagpur. The academic environment provided there has been instrumental in shaping my research pursuits and refining my methodology. I am deeply grateful for the support and encouragement that I received from the faculty members, my peers, and colleagues at the institution. Their insights, discussions, and unwavering encouragement have played a pivotal role in my academic growth. In this regard, I extend my profound appreciation to my supervisor, Professor K. D. Raju, whose mentorship has been nothing short of transformational. His guidance, patience, and unflagging support during my tenure at IIT Kharagpur have been instrumental in shaping my academic journey. Professor Raju's all-encompassing guidance has been a beacon, and I am fortunate to have had the opportunity to learn under his mentorship.

IIT Kharagpur, however, offered more than just academics. The campus life was enriched by the camaraderie and support of an array of remarkable individuals. To all the wonderful people who made my time at the institution so enjoyable, I extend my gratitude. Their camaraderie and shared experiences have left an indelible mark on my memories.

Finally, I reserve the most profound expression of gratitude for my family. To Acha, Amma, Lachu, and Ammu, your unwavering support, encouragement, and love has been the wellspring of inspiration that sustained me throughout this journey. Your belief in my endeavours has been a constant reminder of the importance of pursuing one's passions and dreams. In the pages of this

book, I have endeavoured to distil the knowledge, insights, and experiences that I have gained through this remarkable journey. It is a testament to the collective efforts of those who have believed in me and have supported me along the way. Thank you for being part of this odyssey.

With deepest gratitude,

Dr. Ananthu S Hari
November, 2023

CHAPTER 1

INTRODUCTION

1.1 Background

Since ancient times, there has been a product-place link that assured the consumer a remarkable quality for products from specific geographical areas. There are reliable shreds of evidence on the export of printed fabrics from India to China, from as early as the 4th century BC.¹ If we go back in history, we can see that numerous products gained a reputation in the society when they bore the name of the region from where they came or originated. It could be anything, such as minerals, artefacts, clothes, or agricultural products. With the expansion of international trade, consumers became highly conscious about the reputation of products. Hence, the demand for products from specific regions with exclusive quality attributes also increased incessantly.² Gradually, the governments have begun to preserve the skills, exquisite works, and revenue generation possibilities of the artisans, craftsmen, farmers, and producers associated with such unique products.³ The food regulations brought in by many European countries in the 14th and 15th centuries have laid the foundation for laws protecting local producers from inferior interlopers and cross-border imitations.⁴ The earlier laws protecting origin-specific unique products can be traced to European

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- ¹ K. D. Raju and Shivangi Tiwari, “The Management of Geographical Indications: Post Registration Challenges and Opportunities,” *Decision*, June 4, 2015, <https://doi.org/10.1007/s40622-015-0084-2>.
- ² Tomer Broude, “Taking ‘Trade and Culture’ Seriously: Geographical Indications and Cultural Protection in WTO Law,” *University of Pennsylvania Journal of International Law* 26, no. 4 (January 1, 2005): 623, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1220&context=jil>.
- ³ Vandana Singh, *The Law of Geographical Indications - Rising above the Horizon* (Kolkata: Eastern Law House, 2017) 189.
- ⁴ Oana Deselnicu et al., “A Meta-Analysis of Geographical Indication Food Valuation Studies: What Drives the Premium for Origin-Based Labels?,” *DOAJ (DOAJ: Directory of Open Access Journals)*, August 1, 2013, <https://doi.org/10.22004/ag.econ.158285>.

jurisdictions like France, Portugal, and Tuscany.⁵ For example, the French King John's decree of 1351 demonstrates the first rudimentary official defence of quality.⁶

The concept of Geographical Indication (GI) indicates the rootedness of products in the local environment, which confers a quality, characteristic, or reputation, in such a striking manner that the product's name includes a reference to the place of origin.⁷ According to the World Intellectual Property Organization (WIPO),

“A Geographical Indication is a sign used on goods that have a specific geographical origin and possesses certain unique qualities and reputation that are due to that origin.”⁸

The very use of the term has gained popularity only after signing the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO) in 1994. Before TRIPS, origin-specific goods were protected in certain European countries through some other laws. The earliest history available concerning the protection of origin-specific goods is from France. Some foodstuffs were legally protected in France during the Middle Ages for safeguarding the interests of local producers.⁹ France was also the first country that enacted a penal statute criminalising fraud on Indication of Source.¹⁰ In France, the Law of 22 Germinal was enacted in 1803, imposing liability for fraud on Indication of

⁵ Shyamkrishna Balganes, “Systems of Protection for Geographical Indications of Origin,” *Journal of World Intellectual Property* 6, no. 1 (November 1, 2005): 191–205, <https://doi.org/10.1111/j.1747-1796.2003.tb00198.x>.

⁶ Rovamo Oskari, *Monopolising Names? The Protection of Geographical Indications in the European Community* (Helsinki: Helsinki University Faculty of Law 2006) 1-3.

⁷ N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, *Exploring the Relationship between GIs and TK: An Analysis of the Legal Tools for the Protection of GIs in Asia* (Geneva: International Centre For Trade And Sustainable Development, 2007) 10-13

⁸ “Geographical Indications,” n.d., http://www.wipo.int/geo_indications/en/.

⁹ Delphine Marie-Vivien et al., “Are French Geographical Indications Losing Their Soul? Analyzing Recent Developments in the Governance of the Link to the Origin in France,” *World Development* 98 (October 1, 2017): 25–34, <https://doi.org/10.1016/j.worlddev.2015.01.001>.

¹⁰ Rovamo, “Monopolising Names? The Protection of Geographical Indications in the European Community,” 6.

Source.¹¹ The first successful step in criminalising Indication of Source misrepresentation was also initiated in France by enacting the Statute of 1824.¹² It was from this particular juncture onwards that the modern GI systems have started to develop gradually.¹³

1.2 History of International GI Protection Framework

The Paris Convention for the Protection of Industrial Property, 1883 (Paris Convention) is widely considered as a landmark in the history of the modern intellectual property system.¹⁴ It was the first-ever international instrument that offered a protection mechanism for origin-specific goods. Article 1(2) of the Convention includes Indication of Source and Appellation of Origin (AO) among the different industrial properties explicitly, with the intent to benefit from the principle of national treatment enshrined in Article 2.¹⁵ However, the Convention did not define either of the two terms.¹⁶

There are only slight differences between concepts such as Indication of Source and AO. According to the WIPO,

“An indication of source can be defined as an indication referring to a country, or to a place in that country, as being the country or place of origin of a product.”

¹¹ Dev Gangjee, “Quibbling Siblings: Conflicts between Trademarks and Geographical Indications,” *Chicago-Kent Law Review* 82, no. 3 (December 31, 2007): 1253, https://nationalaglawcenter.org/wp-content/uploads/assets/bib/articles/gangjee_quibbling.pdf.

¹² Dev Gangjee, *Relocating the Law of Geographical Indications*, 2012, <https://doi.org/10.1017/cbo9781139030939>.

¹³ *ibid*

¹⁴ “Paris Convention for the Protection of Industrial Property,” n.d., <https://www.wipo.int/treaties/en/ip/paris/>.

¹⁵ Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, Mar. 20, 1883 21 U.S.T. 1583; 828 U.N.T.S. 305, Article 1(2).

¹⁶ Jane Bullbrook, “Geographical Indications within GATT,” *Journal of World Intellectual Property* 9 (November, 2005): 501-514, <https://doi.org/10.1111/j.1747-1796.2004.tb00217.x>

Therefore, the Indication of Source is primarily connected with geographical origin rather than any other factor.¹⁷ On the other hand, according to the WIPO explanation,

“An appellation of origin can be regarded as a special kind of indication of source because the product for which an appellation of origin is used must have quality and characteristics which are due exclusively or essentially to its origin.”

The fundamental difference between the Indication of Source and AO is that the connection with the place of origin must be more assertive in the case of an AO.¹⁸ In the case of AO, the quality or characteristics of the product must have an exclusive and essential connection with its geographical origin.¹⁹ That is, the collection of raw materials as well as its processing, should take place in the place of origin. On the other hand, the Indication of Source is only a primary source indicator, and quality requirements are not very stringent.

Article 10 of the Paris Convention provides for the obligation of the member states to protect the Indication of Source. However, there is no similar provision for the protection of AO because each AO, in the broader sense, constitutes an Indication of Source as per the language of the Convention.²⁰ The Paris Convention’s general approach to the protection of Indication of Source was based on the concept of unfair competition.²¹ The basic principle of protection against unfair competition is set out in Article 10bis of the Convention, which is generally incorporated in the subsequent TRIPS Agreement under Article 2 and incorporated explicitly as a foundation for the protection of GI under Article 22 (2) (b).

¹⁷ Kasturi Das, “International Protection of India’s Geographical Indications with Special Reference to ‘Darjeeling’ Tea,” *Journal of World Intellectual Property* 9, no. 5 (September 1, 2006): 459–95, <https://doi.org/10.1111/j.1422-2213.2006.00300.x>.

¹⁸ All of these examples cited are appellations of origin registered under the Lisbon Agreement.

¹⁹ “Frequently Asked Questions: Geographical Indications,” n.d., https://www.wipo.int/geo_indications/en/faq_geographicalindications.html.

²⁰ Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, Oxford University Press EBooks, 2007, <https://doi.org/10.1093/law/9780199271283.001.0001>.

²¹ Philippe Zylborg, “Geographical Indication v. Trademarks: Lisbon Agreement: A Violation of TRIPS” *University of Baltimore Intellectual Property Law Journal* 11, no. 1 (Fall 2002): 69-70.

Unlike the Paris Convention, which was a general convention that offered protection of different categories of industrial property, the Madrid Agreement for the Repression of False or Deceptive Indications of Sources on Goods, 1891 (Madrid Agreement) was specific to the Indication of Source.²² However, the term Indication of Source is not defined anywhere in this Agreement as well. The Madrid Agreement was the first international Agreement that provided particular rules for curbing false and deceptive Indications of Sources. It was open to the Member States to decide what all comes under the category of false indications. The Madrid Agreement was the largest specific Union under the Paris Convention. However, it has not received the expected acceptance among different countries. One of the major arguments against the Madrid Agreement was its treatments, which have become generic. In general, the Agreement was seen as a less significant international instrument except for specific wine appellations.²³

Interestingly, the International Convention on the Use of Appellations of Origin and Denominations of Cheeses (Stresa Cheese Convention) was signed in 1951. It was also not very successful because of the lesser number of signatories. However, the idea of protecting the use of AO and denominations of products was confirmed with the signing of the Lisbon Agreement for the Protection of Appellation of Origin and their International Registration (Lisbon Agreement) in 1958. The Lisbon Agreement was an attempt to facilitate substantial protection for AO.²⁴ This Agreement was, for many reasons, different from the earlier agreements.²⁵ According to Lisbon Agreement, AO means:

“The geographical denomination of a country, region or locality, which serves to designate a product originating therein, the quality or characteristics

²² Bernard O'Connor, *The Law of Geographical Indications*, 2004, <http://ci.nii.ac.jp/ncid/BA75420125>.

²³ Robert W. Benson, *Toward a New Treaty for the Protection of Geographical Indication* (Zurich: Bureaux Internationauxreunis Pour La Protection De La Proprieteindustrielle, 1978) 127-129.

²⁴ J. Thomas McCarthy and Veronica Colby Devitt, “Protection of Geographic Denominations: Domestic and International” *Trademark Reporter* 69 (1979): 199-204, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/thetmr69&div=27&id=&page=>.

²⁵ Robert W. Benson, “Toward a New Treaty for the Protection of Geographical Indication,” 23

of which are due exclusively or essentially to the geographical environment, including natural and human factors.”²⁶

The Agreement provided an international AO registration system for the first time. This particular system was considered as something that supplements the previous agreements on AO and Indication of Source. The Lisbon Agreement was instrumental in bringing a more comprehensive protection regime for appellations since the protection was made available in the jurisdictions of all Member States through a single application. Even though the procedure was made more straightforward, the Agreement proved unsuccessful because of the fewer adherences.²⁷ This was mainly due to the disagreement between the European Union (EU) and the United States (US). The EU was vigorously campaigning for a stronger universal system based on AO. On the contrary, the US was in favour of a trademark-centric approach.

By 1974, the WIPO started preparing for a new international treaty for the protection of AO and the Indication of Source that modifies the Paris Convention.²⁸ In 1975, the Draft Treaty on the Protection of Geographical Indications was issued by the WIPO, which included many principles established by the prior international agreements. One of the fundamental purposes of the Draft Treaty was to define GI to broaden its ambit scientifically. Therefore, the Draft Treaty intentionally has gone beyond what was already provided by the earlier treaties. Here, the protection was extended to both Indications of Source as well as AO. In contrast to the Lisbon Agreement, which demands that the AO must be protected in its country of origin, the Draft Treaty requires only that the country of origin make an official statement. Other than this requirement, the Treaty retains most of the characteristics of the Lisbon Agreement.²⁹ However, the Draft Treaty was not finalised, and the proposed changes have not seen the light.

²⁶ The Lisbon Agreement for the Protection of Appellations Of Origin And Their International Registration 1958, Article 2(1).

²⁷ “Significance And Challenges Of Protection To Traditional Fashion Under Geographical Indications” | *LexOrbis*, July 26, 2017, <https://www.lexorbis.com/significance-and-challenges-of-protection-to-traditional-fashion-under-geographical-indications/>.

²⁸ The Convention establishing the World Intellectual Property Organisation was signed in Stockholm on 14 July 1967 and entered into force in 1970.

²⁹ J. Thomas McCarthy and Veronica Colby Devitt, “Protection of Geographic Denominations: Domestic and International,” 24.

By the 1970s, the WIPO recognised the need for a more robust international legal regime for GI protection. It was in the changed scenario that the proposal for a model law on GI was introduced. The Model Law for Developing Countries on Appellations of Origin and Indication of Source was eventually issued in 1975 which intended to address specifically the developing countries, as GI awareness in those countries was limited. The Model Law was very careful in defining AO and Indication of Source as both were given separate definitions. In addition, the Model Law established a system for AO registration. The significance of registration was that it protected producers of AO from international infringements. However, the Model Law was never revised or updated to accommodate the changes that have taken place since then.

In 1990, the WIPO Committee of Experts on the International Protection of Geographical Indications dealt with the need for establishing a new international system for GI protection. There were many reasons which led to such an initiative. The restricted scope of the Paris Convention and ratification of the Madrid and the Lisbon Agreements by fewer nations were some of the prominent reasons. Therefore, there was a need for a stronger legal regime for GI protection at the international level, putting different countries together in a single wrap. To make the Treaty acceptable to all the member states of the Paris Convention, the concepts of AO and Indication of Source were replaced with the notion of GI.³⁰ It was argued that such a notion of protection would provide a blanket wrap for all the existing protection systems. The Committee also deliberated upon establishing a universal registration system, meeting the interests of different countries. The most straightforward pathway suggested to achieve this particular goal was that the Member States should be given a free hand in choosing the manner of GI protection in their respective jurisdictions. However, eventually, the Treaty was not continued since the Committee did not meet for any further sessions.

1.3 The Uruguay Round: Battle Between Europe and New World

The Uruguay Round negotiations (1986-1994) that eventually led to the adoption of the TRIPS Agreement saw an interesting divide between Europe

³⁰ Vandana Singh, "The Law of Geographical Indications - Rising above the Horizon," 3

and New World countries as to the nature of GI protection.³¹ The term ‘New World’ was first coined by famous Italian explorer Amerigo Vespucci in 1503 in a letter he wrote to his friend Lorientzo Di Pier. It was in this letter that he claimed that the lands discovered by the European sailors did not belong to Asia, as Christopher Columbus had suggested. According to his argument, the newfoundland belongs to an entirely separate continent, and named it the New World. Italian navigator Peter Martyr also supported this contextual usage of the term.³²

Gradually, the Europeans migrated to these new lands and started settling there. This process eventually led to European expansion and colonization in the New World. In the New-World, the immigrants adopted their traditional practices of agriculture, including winemaking techniques. This resulted in the emergence of wine literature classifying the wine-producing countries into Old-World countries and New-World countries. According to this classification, the Old-World countries are traditional wine producing countries around the Mediterranean region and include most of the European countries. On the other hand, New World countries are modern wine-making countries that emerged as a result of European colonization and have countries such as the US, Canada, Australia, Argentina, South Africa, etc.

Europe and the New World disagreed regarding GIs on two fronts: the relation to history and culture and the choice of legal/political systems.³³ To this can be added, the different manner in which the agriculture industry is organized when the GI concept emerged. European migrants built the New World during the last five centuries. Leaving their land behind, they carried with them their traditional knowledge, skills, and seed stock. They continued their farming activities in the new land and used the same terms to designate their produce in the new land.³⁴

³¹ José Manuel Cortès Martin, “The WTO TRIPS Agreement: The Battle between the Old and the New World over the Protection of Geographical Indications,” *Journal of World Intellectual Property* 7, no. 3 (November, 2005): 290-291.

³² Tim Mcneese, *Exploring the New World: Discovering the Americas* (Milliken Publishing Company, 2002) 21.

³³ Delphine Marie-Vivien, *The Protection of Geographical Indications in India: A New Perspective on the French and European Experience* (Sage Publications India, 2015) 4.

³⁴ John Wilkinson, Claire Cerdán, and Clóvis Dorigon, “Geographical Indications and ‘Origin’ Products in Brazil – The Interplay of Institutions and Networks,” *World Development* 98 (October 1, 2017): 82–92,

This reality justified their use of a GI for the New World, even though the country of origin was elsewhere. They thus do not consider that there is any intention of fraud or misappropriation in using well-known indications. The reason behind this clash can be found in the history of wine, wherein lies the cultural and historical differences between countries where originally wines were cultivated (The Mediterranean basin) and who are for using the name of their territories to designate wines that are exclusively produced there, and the new countries of immigrants, where the newly arrived winegrowers use the original appellation for newly planted wines on their territories.³⁵ Moreover, the New World group argues that the producers of Europe who would like to take back these names are seeking to take advantage of the commercial success of the New World producers. The New World countries thus argue that GIs are historical and geographical accidents. However, for the European countries, GIs are not historical accidents but reflect history, continued and reinvigorated ceaselessly by producers who have remained in their country of origin. The reputation of a product may be based on decades or even centuries of adaptation and creativity through which traditional knowledge has been maintained and improved.³⁶

The second factor dividing the two blocks concerns the political regime and the economy most appropriate for protecting GIs, especially regarding the role given to the State. The political regime built by immigrants, who have tasted freedom, seeks to be less bureaucratic than the European countries.³⁷ Benjamin Franklin's pamphlet of 1784, meant for potential emigrants' states that America has few government posts to offer and significantly no superfluous posts, contrary to the situation in Europe.³⁸ The system of AO

<https://doi.org/10.1016/j.worlddev.2015.05.003>.

³⁵ Edi Defrancesco, Jimena Estrella Orrego, and Alejandro Gennari, "Would 'New World' Wines Benefit from Protected Geographical Indications in International Markets? The Case of Argentinean Malbec," *Wine Economics and Policy* 1, no. 1 (December 1, 2012): 63–72, <https://doi.org/10.1016/j.wep.2012.08.001>.

³⁶ Filippo Arfini et al., "Current Situation and Potential Development of Geographical Indications in Europe.," in *CAB International EBooks*, 2011, 29–44, <https://doi.org/10.1079/9781845933524.0029>.

³⁷ Delphine Marie-Vivien, "The Protection of Geographical Indications in India: A New Perspective on the French and European Experience," 33

³⁸ Justin Hughes, "Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications," *Hastings Law Journal* 58, no. 2 (January 1, 2006): 299,

monitored by the State in France and the EU is thus generally considered to be bureaucratic and disturbing by New World countries. It is perceived as undermining the fundamental rights of the winegrowers to choose the appellation they wish to identify their products.

Such a divide in the State's role led to two systems at loggerheads during the General Agreement on Tariffs and Trade (GATT) negotiations; on the one hand, the system of certification marks or collective marks, such as in the US, and on the other hand, the *sui generis*³⁹ system of AO (completed later by GIs), as in France and Europe.⁴⁰ In the first case, the market decides the quality standards, which is to say whether a product is successful with consumers or not. This system is based on the protection of the geographic origin through the tort of passing off and steps taken in case of unfair competition against practices intended to make consumers believe that the products are of another company. In the second case, a GI is applied by a group of producers and includes specifications describing the production method for achieving quality.⁴¹

1.4 The TRIPS Agreement and Post-TRIPS GI Debate

The negotiations for arriving at a single formula solution for GI protection has its genesis in the GATT of 1947. The GATT addressed the need for the protection of marks of origin under Article IX (6). During TRIPS negotiation, the approach to be taken for GI protection remained very sensitive because of the conflicting interests.⁴² Member states came to a settled position only during the last sessions of the Uruguay round.⁴³ The

https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3644&context=hastings_law_journal.

³⁹ *Sui generis* legislation simply means “one of its own kind” which can be formulated in a way that it caters to the needs of the nation. India needs a legislation which listens to the needs of the communities and combines all the moral, human, customary and economic rights within it.

⁴⁰ Jane Bullbrook, “Geographical Indications within GATT,” 16.

⁴¹ Lina Montén, “Geographical Indications of Origin: Should they be Protected and Why - an Analysis of the Issue from the US and EU Perspectives,” *Santa Clara High Technology Law Journal* 22, no. 2 (2005): 315-319. <https://core.ac.uk/download/pdf/149256786.pdf>

⁴² Suresh C Srivastava, “Geographical Indications and Legal Framework in India,” *Economic and Political Weekly* 38, no. 38 (September, 2003): 4022-4024, <https://www.jstor.org/stable/4414050>.

⁴³ Brian Waldron Rose, “No More Whining about Geographical Indications: Assessing the 2005 Agreement between the United States and the European

main reasons for the difference of opinion among the States were primarily due to the interlinking of GI with agricultural negotiations.⁴⁴

These negotiations were primarily carried out between the US and the European Communities (EC) to the near exclusion of all the other countries.⁴⁵ The US Proposal has not mentioned anything about protecting GI as intellectual property under the TRIPS framework during the talks.⁴⁶ The US position reflected their inclination towards a private ownership-centric system than community ownership with a State support mechanism.⁴⁷ However, the EC was particular about having a more assertive international legal regime for GI protection.⁴⁸ The EC proposal included elaborative provisions on GIs.⁴⁹ This pressure from EC resulted in one whole section (Section 3 of the TRIPS Agreement) being dedicated to GIs. The compromise position was accepted, with a minimum standard of protection being afforded to GIs under the text of the Agreement. A higher level of protection was made available to wines and spirits to satisfy European

Community on the Trade in Wine,” *Houston Journal of International Law* 29, no. 3 (March 22, 2007): 731, <https://www.questia.com/library/journal/1G1-168283787/no-more-whining-about-geographical-indications-assessing>.

⁴⁴ Kasturi Das, “International Protection of India’s Geographical Indications with Special Reference to ‘Darjeeling’ Tea,” 17.

⁴⁵ S. K. Soam, “Analysis of Prospective Geographical Indications of India,” *Journal of World Intellectual Property* 8, no. 5 (September 1, 2005): 679–704, <https://doi.org/10.1111/j.1747-1796.2005.tb00274.x>.

⁴⁶ Daniele Giovannucci, Elizabeth Barham, and Richard S. Pirog, “Defining and Marketing ‘Local’ Foods: Geographical Indications for US Products,” *Journal of World Intellectual Property* 13, no. 2 (March 1, 2010): 94–120, <https://doi.org/10.1111/j.1747-1796.2009.00370.x>.

⁴⁷ Frances G Zacher, “Pass the Parmesan: Geographic Indications in the United States and the European Union - Can there be Compromise,” *Emory International Law Review* 19, no. 2 (2005): 429–433 (2005), https://heinonline.org/HOL/Page?handle=hein.journals/emint19&div=18&g_s ent=1&casa_token=&collection=secjournals.

⁴⁸ 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,” *University of Pennsylvania Journal of International Law* 22, no. 1 (December 31, 2001): 107, <https://paperity.org/p/84748857/who-will-raise-the-white-flag-the-battle-between-the-united-states-and-the-european-union>.

⁴⁹ Irene Calboli, “Expanding the Protection of Geographical Indications of Origin under TRIPs: ‘Old’ Debate or ‘New’ Opportunity?” *Marquette Intellectual Property Law Review* 10, no. 2 (January 1, 2006): 181–203, <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1078&context=iplr>.

interests. This higher level of protection was accepted subject to specific prior use exceptions to soothe and console the New World block. Therefore, the final Agreement came out with sufficient room for future negotiations.

The debate between the EU and the US is reflected in the implementation of the Agreement as well. The EU adopted a sophisticated *sui generis* regime, which has a public approach towards protection. The US and many New World countries adopted GI protection systems based on certification trademarks with a private approach.⁵⁰ This divergence in the policies is attributable to the different cultures and the economic interests of the two blocks.⁵¹ The EU favoured the concept of *terroir* protection by advocating the unavoidable nexus between product characteristics and their place of origin. They considered GI as a collective right with an inherent cultural component. At the same time, New World countries considered GI only as a subset of trademark, emphasising a utilitarian economy theory based on individual exclusive ownership.⁵² As the TRIPS agreement envisaged only minimum standards of intellectual property protection, it opened up a large canvas of flexibility. Different countries adopted domestic laws following their socio-economic interests and in conformity with the minimum standard requirements.⁵³ As a result, diverse systems related to GI protection are available across jurisdictions.

⁵⁰ Eva Gutiérrez, “Geographical Indicators: A Unique European Perspective on Intellectual Property,” *Hastings International and Comparative Law Review* 29, no. 1 (January 1, 2005): 29, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1651&context=hastings_international_comparative_law_review.

⁵¹ Peter Slade, Jeffrey D. Michler, and Anna Josephson, “Foreign Geographical Indications, Consumer Preferences, and the Domestic Market for Cheese,” *Applied Economic Perspectives and Policy* 41, no. 3 (August 7, 2019): 370–90, <https://doi.org/10.1093/aep/ppz010>.

⁵² Bernard O’Connor and Giulia De Bosio, “The Global Struggle between Europe and United States over Geographical Indications in South Korea and in the TPP Economies,” in *Ius Gentium*, 2017, 47–79, https://doi.org/10.1007/978-3-319-53073-4_3.

⁵³ Marsha A. Echols, “Geographical Indications for Foods, Trips and the Doha Development Agenda,” *Journal of African Law* 47, no. 2 (October 1, 2003): 199–220, <https://doi.org/10.1017/s0021855303002092>.