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TWENTY YEARS OF TRIPS, TWENTY YEARS OF DEBATE: THE EXTENSION OF HIGH LEVEL PROTECTION OF GEOGRAPHICAL INDICATIONS – ARGUMENTS, STATE OF NEGOTIATIONS AND PROSPECTS

FRIEDERIKE FRANTZ*

I. INTRODUCTION

Geographical Indications (GIs) designate the origin of a certain product and indicate what qualities the product may have due to its origin. “GIs stand at the intersection of three increasingly central and hotly debated issues in international law: trade, IPRs [intellectual property rights] and agricultural policy.”¹ The main purpose of the protection of GIs is to raise consumer welfare by providing reliable information and at the same time preserving the origin-related reputation supporting local producers.²

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1. Katsouri Das, *Unresolved Issues on Geographical Indications in the WTO*, in 1 RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES, 448, 450 (Carlos M. Correa ed., 2010).

2. KEITH E. MASKUS, PRIVATE RIGHTS AND PUBLIC PROBLEMS, THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY 202 (2012); *see also* KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 47 (2000).

Yet, Geographical Indications are not only a matter of economic importance, but also of local traditions and cultural heritage.³ That is part of the explanation why, twenty years after the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁴ went into effect, the level of protection for GIs is still under vigorous debate. Currently, TRIPS provides a higher level of GI protection to wines and spirits than to other products. The reason lies much more in the historical interests and the need for compromise than in compelling matter of fact. Therefore, ever since TRIPS came into effect, the alignment of the protection level has been discussed. The positions are not, as typically in the World Trade Organization (WTO), dividing developing and developed countries. The conflict appears much more along the lines of the “Old” versus the “New World.” In the Uruguay Round, GIs were the only issue with a North-North divide all through the negotiations.⁵

The extension of the high level protection for GIs for all products is not the only GI issue causing debate. Another highly debated issue is the creation of a multilateral system of notification and registration of wines and spirits GIs or even for all GIs, for that matter. Part of the agriculture negotiations is the “claw-back” proposal⁶ of the European Communities (EC).⁷ “However, among these three issues, extension, reportedly, remains the most difficult to crack, even after so many years of efforts on the part of its proponents.”⁸

This paper illustrates the current protection of GIs in TRIPS, the arguments of the parties for and against the high level protection extension and the state of negotiations, with a focus on the European Union (EU) and the U.S. as major advocates for each side of the discussion. The paper examines the prospects of a potential agreement in the extension

3. Das, *supra* note 1.

4. TRIPS: 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].

5. Das, *supra* note 1, at 448.

6. With the so-called “claw-back” proposal, the European Union (EU) wants to make GIs part of the WTO agriculture negotiations. Materially, among other propositions, the proposal includes the claim for exclusive use rights for certain GIs for the producers in the indicated regions, many of which now fall under Article 24 exceptions. See David Visas-Eugui & Christoph Spennemann, *The Evolving Regime for Geographical Indications in WTO and Free Trade Agreements*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE THE TRIPS AGREEMENT 163, 168-169 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008).

7. Since 2009, the European Communities are dissolved into the European Union.

8. Das, *supra* note 1, at 508.

debate within the WTO and looks at the influence of free trade agreements on the GI extension issue.

II. CURRENT PROTECTION OF GEOGRAPHICAL INDICATIONS IN TRIPS

Currently, the TRIPS Agreement provides a higher level of GI protection to wines and spirits (Art. 23)⁹ and only a basic level of protection to all other products (Art. 22). Article 1(1) of the TRIPS Agreement allows Members to provide higher protection, provided it does not contravene the provisions of the Agreement.

A. DEFINITION OF GEOGRAPHICAL INDICATIONS IN TRIPS

Article 22(1) of the TRIPS Agreement defines GIs as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” This definition of GIs affords protection to anything evoking the geographical origin of the good, whether it is the geographical name, symbol or anything else implying the origin.¹⁰ GIs under TRIPS can be any indications, including words and pictorial symbols, identifying a region, locality or country, linking to quality, characteristics or reputation of a product.¹¹ Examples include names of geographic regions, depictions of landmarks, familiar landscapes, heraldic signs, or well-known persons.¹² GIs can receive protection when their origin “had long represented a certain product and a standard of quality attributable to the methods of production,”¹³ e.g., because they are manufactured in a traditional fashion. Therefore, GIs can serve two main purposes. First, they can protect the consumer from misleading information and, secondly,

9. All articles in this paper refer to the TRIPS Agreement unless otherwise noted.

10. Das, *supra* note 1, at 461.

11. KEITH E. MASKUS, PRIVATE RIGHTS AND PUBLIC PROBLEMS, THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY 190 (2012); *see also* Roland Knaak, *The Protection of Geographical Indications According to the TRIPS Agreement*, in FROM GATT TO TRIPS – THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 117, 128 (Friedrich-Karl Beier & Gerhard Schrickler eds. 1996); *see also* David Visas-Eugui & Christoph Spennemann, *The Evolving Regime for Geographical Indications in WTO and Free Trade Agreements*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE THE TRIPS AGREEMENT 163, 171 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008).

12. Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 86 TRADEMARK REP. 11, 11-12 (1996).

13. *Id.* at 11.

protect businesses from unauthorized exploitation of their goodwill.¹⁴ GIs might also promote the region where the products come from.¹⁵

The Article 22(1) definition moves beyond the concepts of indications of source and appellations of origins used in previous World Intellectual Property Organization (WIPO) agreements, such as the Paris Convention, the Madrid Protocol or the Lisbon Agreement. “An *indication of source* is constituted by any denomination, expression or sign indicating that a product or service originates in a country, a region or specific place.”¹⁶ *Appellations of origin* designate a product originating from a specific country, region or specific place from which geographical environment, i.e., natural and/or human factors, the product exclusively or essentially derives its qualities from.¹⁷ The term *Geographical Indications*, as used in TRIPS, incorporates appellations of origin, but not all indications of source.¹⁸

B. GENERAL LEVEL OF PROTECTION IN TRIPS ARTICLE 22

Article 22 of TRIPS provides a general level of protection for all GIs. WTO Members, therefore, must provide legal means to prevent the designation of a good that misleads the public as to the geographical origin (Art. 22(2)(a)). This provision, therefore, requires the “misleading test” for GIs to be protected. WTO Members must also prevent the use of a GI that constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention for the Protection of Industrial Property (Art. 22(2)(b)). The Members’ obligations of Article 22(3) further include to refuse or invalidate a registration of a trademark containing a GI violating Article 22(2). This provision was included to dissolve some of the conflicts between trademarks and GIs.¹⁹ According to Article 22(4), the protection of Article 22(1)-(3) also applies to GIs in that, although literally true as to the territory, region or locality in which the good originates, it falsely represents to the public that the good originates in another territory. This provision aims at homonymous GIs, which espe-

14. FREDERICK ABBOTT, THOMAS COTTIER & FRANCIS GURRY, *THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM: COMMENTARY AND MATERIALS* 185-186 (Kluwer 1999).

15. *Id.* at 185.

16. *Id.*; see also World Intellectual Property Organization [WIPO], *Geographical Indications, An Introduction*, 26, available at http://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo_pub_952.pdf.

17. ABBOTT, COTTIER & GURRY, *supra* note 14, at 185; see also MASKUS, *supra* note 11, at 189.

18. MASKUS, *supra* note 11, at 189; Malobika Banerji, *Geographical Indications: Which Way Should ASEAN Go?*, 2012 B.C. INTELL. PROP. & TECH. F. 1, 2 (2012).

19. Das, *supra* note 1, at 462.

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cially occur often in former colonies, the so-called “New World,” where immigrants often gave new settlements the same name as the place they originated from. “‘Homonymous’ GIs are geographical names which are spelled and pronounced alike, but which designate the geographical origin of products stemming from entirely different geographical locations.”²⁰

This protection has certain downsides in practice, at least to the party seeking GI protection. In order to win a law suit against the unauthorized use of a GI, either as passing-off or unfair competition action, the party alleging the unauthorized use has the burden of proof concerning the misleadingness and resulting damages or likelihood of damages.²¹ This means, the acquired distinctiveness, i.e., that the relevant public associates the good with a geographical origin, needs to be shown in every law suit concerning a GI and found by national courts which may differ on the finding of misleadingness.²²

C. HIGHER LEVEL OF PROTECTION FOR WINES AND SPIRITS IN TRIPS ARTICLE 23

Article 23 provides a higher level of protection than Article 22, especially for wines and spirits. WTO Members must provide legal means to prevent the use of a false GI for wines and spirits, even where the consumer is not misled as to the true origin of the good (Art. 23(1)). Therefore, neither the indication of the true origin nor the GI used in translation or accompanied by words, such as “kind,” “type,” “style,” “imitation” or the like (Art. 23(1)), is in compliance with TRIPS. The only examination Article 23 requires is the “correctness test.” Article 23(2) allows the refusal or invalidation of registration as a trademark, even if the public is not misled. Article 23(3) protects homonymous GIs for wines which are not misleading or deceptive under Article 22(4). Article 23(4) holds a built-in mandate for the TRIPS council to negotiate a multilateral system of notification and registration of geographical indications for wines, whereas the mandating power of this provision is disputed (*see* III.D. of this paper). This provision has been extended to include spirits by the Singapore Ministerial Declaration of 1996.²³

20. *Id.* at 462.

21. *Id.* at 496.

22. *Id.*

23. Council for Trade-Related Aspects of Intellectual Property Rights, *Report (1996) of the Council for TRIPS*, ¶ 34, IP/C/8 (November 6, 1996).

D. EXCEPTIONS IN TRIPS ARTICLE 24

Article 24 holds several general exceptions to the Agreement's provisions. They provide that GI protection does not apply in cases of previous use, trademarks previously applied for or registered in good faith, genericness, personal names, and lack of national protection. Article 24 was included with the goal to address concerns that the GI protection would challenge what are acquired rights in some Member countries.²⁴ Article 24(1) clarifies that these exceptions shall not be used to refuse to enter into negotiations or agreements about the protection of GI.

E. THE IMPLEMENTATION OF ARTICLES 22-24 AND DIFFERENT APPROACHES TO GI PROTECTION

The TRIPS Agreement is not, in itself, binding international law, but requires Members to implement its provisions into national law.²⁵ Like all intellectual property rights, GIs are territorial rights. They "are registered and protected within national or regional jurisdictions, not across borders."²⁶ This gives Members leeway to choose the protection means of their liking and even the power to decide which indications fall under the definition of GI under TRIPS.²⁷ Room for this gives the "misleading test" in Article 22 for products other than wines and spirits, for which GIs are only protected in a certain country when the public of that country could be misled as to the real origin of the product. Article 23, on the other hand, holds an absolute prohibition on the use of GIs for wines and spirits not originating from the indicated place.²⁸ Therefore, the higher protection level is much more invasive to WTO Members' legal systems as it leaves little room for interpretation. A U.S. approach to find leeway is the construction of the GI definition as demanding a GI to function as

24. Das, *supra* note 1, at 463.

25. Stephen E. Bondura & Lloyd G. Farr, *Intellectual Property Rights Abroad and at Home After GATT*, S.C. Law., Sept.-Oct. 1995, at 20; Roland Knaak, *The Protection of Geographical Indications According to the TRIPS Agreement*, in *FROM GATT TO TRIPS – THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS* 117, 128 (Friedrich-Karl Beier & Gerhard Schricker eds. 1996).

26. MASKUS, *supra* note 11.

27. Roland Knaak, *The Protection of Geographical Indications According to the TRIPS Agreement*, in *FROM GATT TO TRIPS – THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS* 117, 128 (Friedrich-Karl Beier & Gerhard Schricker eds. 1996); *see also* ABBOTT, COTTIER & GURRY, *supra* note 14, at 186.

28. Roland Knaak, *The Protection of Geographical Indications According to the TRIPS Agreement*, in *FROM GATT TO TRIPS – THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS* 117, 128 (Friedrich-Karl Beier & Gerhard Schricker eds. 1996).

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a “distinctive source-identifier” in the country they are used in.²⁹ “[A] WTO member can interpret the definition of a geographical indicator in whatever way dictated by that member’s policy goals . . . as long as the approach is consistent with the TRIPS obligations.”³⁰ According to this opinion, absolute protection under Article 23 could only be achieved by a list.³¹

The EU, on the one end of the spectrum, has chosen to protect GIs as *sui generis* rights and allows registration as such.³² The U.S., on the other end, protects GIs as certification or collective marks within the trademark system. Certification marks can be obtained by any company demonstrating certain quality conditions in a certification process.³³ “Collective trademarks . . . are owned by an association of producers and may or may not refer to products from a particular origin.”³⁴

F. COMPROMISE OF THE URUGUAY ROUND

The different levels of protection for the two categories of products cannot be explained by material differences, logical or legal reasons that would call for differential treatment. Articles 22-24 rather reflect “a very sensitive compromise in an area that was one of the most difficult to negotiate during the Uruguay Round.”³⁵ As one of the trade-offs in the Uruguay Round, the compromise “exceeded the traditional realm of trade, involving such issues as the opening of markets for agricultural and industrial products against a deeper and wider set of intellectual property categories under the GATT and more specifically the TRIPS agreement.”³⁶

The leading parties in this conflict were the EC, “aggressively pushing for foolproof protection of GIs”³⁷ and the United States, arguing for a limited GI protection within trademark law, not recognizing the treat-

29. Amy P. 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, 1315 (2007).

30. *Id.* at 1299.

31. *Id.*

32. MASKUS, *supra* note 11.

33. *Id.*

34. *Id.*

35. Das, *supra* note 1, at 471.

36. David Visas-Eugui & María Julia Oliva, *The WTO Dispute on Trademarks and Geographical Indications: Some Implications for Trade Policy-Making and Negotiations*, in 2 RESEARCH HANDBOOK ON THE INTERPRETATION AND ENFORCEMENT OF INTELLECTUAL PROPERTY UNDER WTO RULES, 125, 125 (Carlos M. Correa ed., 2010).

37. Das, *supra* note 1, at 448.

ment of GIs as a separate category of intellectual property rights.³⁸ A relict of the controversy about GIs in the TRIPS Agreement is the provision for further negotiations in Article 24(2). Reasons for different viewpoints are tradition and consumer perception, as well as, economic interests and different production systems.³⁹

III. THE EXTENSION OF HIGH LEVEL PROTECTION

A. THE PROPOSED CHANGES

Over the twenty years of ongoing debate, there have been several slightly different proposals for the extension. The common, central proposition is the application of Article 23 protection to GIs for all products, as well as, the *mutatis mutandis* application of the Article 24 exceptions to these products.⁴⁰ That would mean that GI protection for products beyond wines and spirits would no longer depend on the misleading test, i.e., whether the public is misled by a GI as to the true origin of the good. Instead, GI protection would only require that the GI on a product refers to the place the product actually originates from, the “correctness test.”

B. ARGUMENTS FOR THE EXTENSION OF HIGH LEVEL PROTECTION

Arguing for the extension of high level protection are not only developed countries, mainly the EU and its Members, but also some developing countries.⁴¹ EU countries are strong proponents of the extension of the high level protection as many European products are known worldwide by the product name indicating their origin, such as Dijon mustard or Parma ham. The concept of GIs is widely appreciated and well-established and has existed in internal trade practice and the marketing of products partly for centuries, especially for agricultural products.⁴² Under the name “terroir,” the concept of geographical origin as reference to land and environmental conditions, traditional practices and know-how is widely recognized and used.⁴³

38. *Id.*

39. Visas-Eugui & Oliva, *supra* note 36, at 125-126.

40. General Council/Trade Regulations Committee, *Report by the Director-General: Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products Other than Wines and Spirits and Those Related to the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity*, ¶ 3 WT/GC/W/591 and TN/C/W/50 (June 9, 2008).

41. Irene Calboli, *Expanding the Protection of Geographical Indications of Origin Under TRIPS: “Old” Debate or “New” Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181, 195 (2006).

42. Visas-Eugui & Oliva, *supra* note 36, at 125-6.

43. *Id.* at 126.

But, developing countries also have an interest in protecting GIs as safeguards for their traditional knowledge and, simultaneously, as a promotion tool for rural development.⁴⁴ Some developing countries already have strong products, such as India with its Darjeeling tea,⁴⁵ which would be promoted by additional protection. Others see high level GI protection as an opportunity to enter world markets with a distinct product linked to their regions, as some African countries do.⁴⁶ When they enter global trade under the current system, their products are not well-known by the public yet and, therefore, the public does not associate the name or other kind of GI with the characteristics of the product yet. Thus, the GI will not meet the criterion of the misleading test in Article 22(2) and competitors could market similar products under the GI before it has gained reputation. The GI might even become generic in the meantime and no longer function as an identifier of a product of a certain regional origin before the GI even had a chance to acquire such meaning to the public that it would be protected under Article 22(2).

The main argument for the extension of protection lies in the inconsistency of protection levels for no economic, systemic or legal reason.⁴⁷ The GI protection extension is meant to create a level playing field and equal opportunities for all WTO Members, beyond those producing wines and spirits.⁴⁸ The current protection requires a product not only to carry a GI wrongly pointing at a pretended origin, but also the consumer to be misled by the GI. Extension advocates argue that this allows competitors to usurp the GI and “free-ride” on the reputation and quality of the products as long as the product’s true origin is mentioned too.⁴⁹ The allowed use of GIs for products in a non-misleading way carries the potential of these GIs to become the generic name, i.e., the common name for a category of products. Once a GI has become the generic name for a product, it loses its economic potential and value. Additionally, propo-

44. Das, *supra* note 1, at 512.

45. See S.C. Srivastava, *Protecting the Geographical Indication for Darjeeling Tea*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES 231* (Peter Gallagher et al. eds., 2005).

46. Calboli, *supra* note 41.

47. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey*, ¶ 4 IP/C/W/353 (June 24, 2002).

48. Trade Negotiations Committee, *Statement by Switzerland*, TN/C/4, (July 13, 2004).

49. *Id.*; see also Das, *supra* note 1, at 499.

nents argue non-misleading GI use may still deceive consumers.⁵⁰ Opposing WTO Members are concerned about the extension effect on GIs that were prior used in good faith use or in the common language of a country. Extension proponents respond with the proposal to apply all exceptions for wines and spirits to GIs for all products,⁵¹ including the exceptions for prior use in the common language or as trademarks. The application of the exceptions of Article 24 would ensure the balance of interests, proponents argue.⁵²

Proponents of the extension see a higher GI protection as incentive for local rural development, encouragement for quality agricultural and industrial policy,⁵³ fostering employment in decentralized regions, support the establishment of other economic activities such as tourism and preserve traditional knowledge and biodiversity.⁵⁴ All of these benefits are expected to arise when a GI and its connected products generate demand on the global market, starting a spiral of economic welfare leading to social and educational benefits promoting political stabilization. Whether or not this is a realistic picture solely derived from high level GI protection, such development definitely is unlikely when competitors have the chance to come in early after market access under the current legal situation and divert profits. A GI identifying regional characteristics can even function as asset and marketing tool for the regions they refer to.⁵⁵ Extension advocates call a high protection of GIs a “corollary of the efforts to liberalize trade in all sectors in order to foster the exchange of goods

50. Trade Negotiations Committee, *Statement by Switzerland*, TN/C/4, (July 13, 2004); see also Becki Graham, *TRIPS: Ten Years Later: Compromise or Conflict over Geographical Indications*, SYRACUSE SCI. & TECH. L. REP. 4 (2005).

51. Trade Negotiations Committee, *Statement by Switzerland*, TN/C/4, (July 13, 2004); General Council/Trade Negotiations Committee, *Note by the Secretariat: Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products other than Wines and Spirits*, WT/GC/W/546 (May 18, 2005).

52. Trade Negotiations Committee, *Statement by Switzerland*, TN/C/4, (July 13, 2004); General Council/Trade Negotiations Committee, *Note by the Secretariat: Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products other than Wines and Spirits*, ¶ 9 WT/GC/W/546 (May 18, 2005).

53. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey*, ¶ 4 IP/C/W/353 (June 24, 2002).

54. Trade Negotiations Committee, *Statement by Switzerland*, TN/C/4, (July 13, 2004); see also Das, *supra* note 1, at 512.

55. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bulgaria, the Czech Republic, Egypt, Iceland, India, Kenya, Liechtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey*, ¶ 2 IP/C/W/204/Rev.1 (Oct. 2, 2000).

with higher added value.”⁵⁶ GIs, in their view, enhance access to third country markets and, therefore, are of benefit to producers worldwide.⁵⁷

The current protection of products other than wines and spirits under Article 22 depends on the interpretation of the misleading test, i.e., whether a GI is found to mislead the public as to the real origin of the product. Proponents argue that this test “is tailored to suit unfair competition or consumer protection regulations, but not intellectual property protection.”⁵⁸ Some opponents disagree with the view that WTO Members have agreed to protect GIs as intellectual property rights *sui generis*, despite the systematic structure of TRIPS,⁵⁹ for the reason that intellectual property rights are meant to protect either innovation or creativity.⁶⁰ Extension proponents respond referencing, e.g., the protection of undisclosed information for marketing approval of pharmaceutical products,⁶¹ and insist that, for this purpose, GI reputation is partly based on creativity, including in the development of traditional knowledge.⁶²

The concern about the dependence of GI protection on the misleading test is that this requires determination of whether the public is misled by a certain GI. This, proponents of the extension say, results in legal uncertainty, not at last to the chagrin of producers that want to use GIs of a region they do not produce in, but cannot be sure whether the public is interpreted to be misled by their product packaging.⁶³ Also, legitimate users have to undergo costly procedures to demonstrate that consumers

56. *Id.*

57. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey*, ¶ 4 IP/C/W/353 (June 24, 2002).

58. Das, *supra* note 1, at 498-99.

59. Part II. of the TRIPS Agreement is divided into sections, each dealing with a separate area of law. Since other sections deal with copyrights, trademarks or patents, the systematic interpretation suggests that GIs, which are regulated in a separate section (Section 3), are considered intellectual property rights *sui generis*. This view is supported by the heading of Part II., in which GIs are included, that reads “Standards Concerning the Availability, Scope and Use of Intellectual Property Rights.”

60. Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard on 25-27 and 29 November, and 20 December 2002* ¶ 130 IP/C/M/38 (Feb. 5, 2003).

61. *Id.*

62. *Id.* ¶ 125.

63. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey*, ¶ 4 IP/C/W/353 (June 24, 2002).

are confused as to the origin of a good when it displays a wrong GI.⁶⁴ The correctness test of Article 23 would be objective and judicial decisions would be uniform and harmonious.⁶⁵

Another argument for the GI high level protection extension is that GIs facilitate product identification by the consumer and thus, consumer choice⁶⁶ and would even more so when they were protected, regardless of whether the consumer is misled.

The implementation of the extension would be seamless, as argued by proponents, as already existing structures for wines and spirits simply could be expanded to include other products. The administrative cost will be negligible, proponents predict, as the rules for wines and spirits merely will be applied to other products as well.⁶⁷ Additionally, under Article 1(1) of the TRIPS Agreement, WTO Members can choose their form of implementation and can leave enforcement to the right holders.⁶⁸ The problem of business activities developed in one WTO member country on the basis of denominations protected in some other WTO Members on an exclusive basis can be addressed by the same provisions coping with this problem for wines and spirits.⁶⁹ TRIPS has enough flexibility with exceptions and transitional periods to ensure no disruption of trade flows.⁷⁰

C. ARGUMENTS AGAINST THE EXTENSION OF HIGH LEVEL PROTECTION

Opponents of the extension of high level protection were, in most cases, not interested in a high protection level for any GIs in TRIPS in the first place,⁷¹ but also find reasons to justify differential protection afforded under the current system.

64. *Id.* ¶ 13.

65. *Id.*

66. *Id.* ¶ 4.

67. COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 88 (2002), available at http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf.

68. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey*, ¶ 4 IP/C/W/353 (June 24, 2002).

69. *Id.*

70. *Id.*

71. Knaak, *supra* note 28, at 127.

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For one, they argue that “protection provided for in Article 23 was more than was necessary to achieve the legitimate objectives of GI protection.”⁷² The extension would, therefore, be a step in the wrong direction and a further departure from the balance found in Article 22 between the interests of consumers, producers and the general public.⁷³ Opponents also doubt the insufficiency of protection that proponents allege Article 22 of and demand concrete examples.⁷⁴ They argue that the problem, much rather, is the failure to implement Article 22 fully and appropriately and to protect GIs domestically in all countries.⁷⁵

Secondly, since the production methods for agricultural products may be more significant than the geographic origin, there actually is justification for the different levels of GI protection, opponents say.⁷⁶

They also see an imbalance of obligations and the distribution of benefits between WTO Members as some might have very few GIs, but might be obliged to protect numerous GIs from other WTO Members.⁷⁷

Another concern is that many GIs have become generic and no longer reflect the geographical origin, but a general set of characteristics of the product.⁷⁸ If the extension was applied to these products and they were relabeled according to the new provisions, consumers would no longer

72. Trade Negotiations Committee, *Statement by Switzerland*, TN/C/4, (July 13, 2004); General Council/Trade Negotiations Committee, *Note by the Secretariat: Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products other than Wines and Spirits*, ¶ 9 WT/GC/W/546 (May 18, 2005).

73. *Id.*

74. General Council/Trade Regulations Committee, *Report by the Director-General: Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products Other than Wines and Spirits and Those Related to the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity*, ¶ 4 WT/GC/W/591 and TN/C/W/50 (June 9, 2008).; see Das, *supra* note 1, at 499.

75. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Argentina, Australia, Canada, Chile, the Dominican Republic, El Salvador, Guatemala, New Zealand, Paraguay, the Philippines, Chinese Taipei and the United States: Implications Of Article 23 Extension*, ¶ 6 IP/C/W/386 (Nov. 8, 2002); Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard on 25-27 and 29 November, and 20 December 2002* ¶ 76 IP/C/M/38 (Feb. 5, 2003).

76. Das, *supra* note 1, at 453.

77. Trade Negotiations Committee, *Statement by Switzerland*, TN/C/4, (July 13, 2004); General Council/Trade Negotiations Committee, *Note by the Secretariat: Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products other than Wines and Spirits*, ¶ 10 WT/GC/W/546 (May 18, 2005).see also Uruguay, IP/C/M/37/Add.1, para. 172; Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Argentina, Australia, Canada, Chile, the Dominican Republic, El Salvador, Guatemala, New Zealand, Paraguay, the Philippines, Chinese Taipei and the United States: Implications Of Article 23 Extension*, ¶ 3-4 IP/C/W/386 (Nov. 8, 2002).

78. Das, 448, *supra* note 1, at 470.

recognize products they were used to. Opponents foreshadow falling supply due to lacking demand and as a result, a price increase.⁷⁹ All-in-all, it is a scenario contrary to the TRIPS objectives. Article 7 holds as an objective of the TRIPS agreement, among others, the promotion of economic welfare. Producers in the “New World” might face considerable adjustment and other costs associated with developing substitute terms, changing current packaging, and generating consumer awareness.⁸⁰

Besides that, opponents claim the proposal is culturally insensitive to the WTO Members that obtained part of their cultural heritage from immigrants from the so-called “Old World.”⁸¹ For people whose traditions and names came from the “New World”; the “Old World” could not claim back these now generic descriptions for food products or food preparation methods.⁸² The extension proposal promoted by the EU is even seen as part of the EU strategy to cope with the expected disadvantage in the world-wide competition of agricultural products once the subsidies for the agricultural sector are cut down within the European Union.⁸³

Another line of argument is that extending the protection for GIs would mean extending monopoly rights in certain geographical terms to certain producers, an outright anti-competitive measure.⁸⁴ Since the protection may still be justified to some extent, unfair competition and consumer protection law can provide such.⁸⁵ Accordingly, the U.S., as a major opponent of the extension, promotes GI protection through certification or collective marks within trademark law.⁸⁶ Opponents resist any system that would force countries to honor another’s GIs over the country’s own registered trademarks.⁸⁷ The counterargument is that, for example, U.S. producers of Idaho potatoes and Florida oranges would enjoy the benefits of high level protection for these products too and would “no doubt prefer that only those products actually originating in those locales be labeled as such.”⁸⁸

79. *Id.* at 500.

80. *Id.* at 499.

81. Becki Graham, *TRIPS: Ten Years Later: Compromise or Conflict over Geographical Indications*, SYRACUSE SCI. & TECH. L. REP. 4 (2005).

82. *Id.*

83. See Das, *supra* note 1, at 459; see MASKUS, *supra* note 11, at 198.

84. Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard on 25-27 June 2002*, ¶ 152 IP/C/M/36/Add.1 (Sept. 10, 2002).

85. Das, *supra* note 1, at 456.

86. *Id.* at 467.

87. Emily C. Credit, *Terroir vs. Trademarks: The Debate over Geographical Indications and Expansions to the TRIPS Agreement*, 11 VAND. J. ENT. & TECH. L. 425, 438-39 (2009).

88. *Id.* at 439.

Lastly, there are doubts concerning expected trade benefits through the extension. This view anticipates presumed trade benefits by the extension to be outweighed by extra financial and administrative burdens on all WTO Members, but especially on developing countries, upon implementation.⁸⁹ These costs would include the establishment of a registration system, defining and enforcing standards for particular GIs, marketing expenses to build a GIs reputation and providing governmental aid to support producers.⁹⁰ This would amount to expenses not in proportion to the benefits.

D. THE DOHA MANDATE AND THE EXTENSION OF HIGH LEVEL PROTECTION

WTO Members do not agree whether the extension of high level protection is covered by the Doha Mandate and whether Article 24(1) of the TRIPS Agreement holds the mandate for the necessary negotiations.⁹¹ “[P]roponents of extension have advanced that there is a clear mandate to launch negotiations while opponents claimed that there is no mandate in the DMD to negotiate any extension.”⁹² Paragraph 18 of the Doha Ministerial Declaration (DMD) provides 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.”⁹³ Paragraph 12 attaches “the utmost importance to the implementation-related issues” and makes “negotiations on outstanding implementation issues . . . an integral part of the Work Programme.”⁹⁴ Where a “specific negotiating mandate [is provided] in this declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies.”⁹⁵

WTO Members opposing the view that Article 24(1) contains an express mandate argue that the phrase “individual geographical indications under

89. COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 67.

90. MASKUS, *supra* note 11, at 192.

91. David Visas-Eugui & Christoph Spennemann, *The Evolving Regime for Geographical Indications in WTO and Free Trade Agreements*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE THE TRIPS AGREEMENT 163, 178 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008).

92. Das, *supra* note 1, at 495.

93. Doha Ministerial Conference, *Ministerial Declaration* ¶ 18 WT/MIN(01)/DEC/1 (Nov. 20, 2001).

94. *Id.* ¶ 12.

95. *Id.*

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Article 23” relates exclusively to goods covered by Article 23, i.e., wines and spirits.⁹⁶ According to this view, the reference to increased protection of those indications only relates to the possible abolition of the current exemption under Article 24(4) of TRIPS.⁹⁷ Therefore, the authorization of Article 24(1) would then be limited to individual indications for wines and spirits.

These Members argue that the issue of GI extension should not be addressed in the context of the modalities decision, but that the suggested draft modalities text presented by the extension advocates would already prejudice an outcome.⁹⁸

The opposite view contends that Article 24(1) applies to all products and the reference to Article 23 does not relate to products contained therein, but to a means of additional protection to be provided.⁹⁹ As support for this argument, they refer to Article 24(2) of TRIPS, which authorizes the TRIPS Council to keep the application of the GI provisions under review.¹⁰⁰

IV. STATE OF NEGOTIATIONS AND PROSPECTS

A. ALL QUIET ON THE WTO FRONT

The issue of the extension of high level protection for GI for all products has been continuously debated since TRIPS went into effect. However, in those twenty years of discussion, the momentum for a resolution of this and the related GI controversies has, at times, been greater than it is right now in the WTO.

The last remarkable event of the debate was the introduction of drafts from both sides of the argument in 2011. The proponents of high level protection extension introduced their proposed changes in form of a

96. Visas-Eugui & Spennemann, *supra* note 91.

97. *Id.*

98. General Council/Trade Regulations Committee, *Report by the Director-General: Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products Other than Wines and Spirits and Those Related to the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity*, ¶ 4 WT/GC/W/591 and TN/C/W/50 (June 9, 2008).

99. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bulgaria, the Czech Republic, Egypt, Iceland, India, Kenya, Liechtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey*, ¶ 12 IP/C/W/204/Rev.1 (Oct. 2, 2000).

100. Visas-Eugui & Spennemann, *supra* note 91, at 179.

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drafted adaptation of Section 3 of the TRIPS Agreement.¹⁰¹ The opponents had shortly before issued the “Joint Proposal” that suggests a strictly voluntary register and database for GIs for wines and spirits.¹⁰² Countries would commit to consult this database when assigning trademarks and GIs under their domestic laws. This proposal purposefully held nothing concerning the protection level of GI.

According to the WTO, talks have been “largely inactive”¹⁰³ since. The Chairman of the Council for TRIPS, Dacio Castillo, stated in April 2015 that “[t]he traditional differences on the substance and scope of the negotiations persist, and delegations remain hesitant to fully engage in the TRIPS Special Session for lack of clarity on the overall negotiations picture after Bali.”¹⁰⁴ Further developments to return to more substantive discussions are not expected before the “overall atmosphere for re-engagement has become more favorable”¹⁰⁵ and “a clearer picture emerges in other key subjects in the Doha Round as a whole.”¹⁰⁶ These statements are the straight-forward acknowledgment that negotiations are stuck with irreconcilable contrary positions. A Doha work program on the remaining issues of the Doha Development Agenda has not yet been delivered,¹⁰⁷ and therefore, the GI negotiations are on hold for an indefinite period of time. WTO Members will meet in December for a Ministerial Conference.¹⁰⁸

The only substantial new developments in the second decade of GI negotiations after TRIPS have brought no progress, but opened up new dis-

101. Trade Negotiations Committee, *Communication from Albania, China, Croatia, European Union, Georgia, Guinea, Jamaica, Kenya, Liechtenstein, Madagascar, Sri Lanka, Thailand, Turkey, and Switzerland: Draft Decision to Amend Section 3 of Part II of the TRIPS Agreement*, TN/C/W/60 (Apr. 19, 2011).

102. Council for Trade-Related Aspects of Intellectual Property Rights Special Session, *Submission by Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Israel, Japan, Korea, Mexico, New Zealand, Nicaragua, Paraguay, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, South Africa and the United States: Proposed Draft TRIPS Council Decision on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits*, TN/IP/W/10/Rev.4 (Mar. 31, 2011).

103. World Trade Organization [WTO], *Secretariat Gives Delegates Refresher on GI Register Talks as Differences Persist*, (Feb. 23, 2015), https://www.wto.org/english/news_e/news15_e/trip_23feb15_e.htm.

104. Trade Negotiations Committee, *Oral Reports by the Chairs of the Bodies Established by the TNC and Statement by the Chairman of the TNC*, ¶ 1.5 JOB/TNC/47 (April 27, 2015).

105. *Id.*

106. WTO, *Secretariat Gives Delegates Refresher*, *supra* note 103.

107. WTO, *DG Azevêdo: Expect “intense, relentless” Engagement on DDA Issues in September*, (July 31, 2015), https://www.wto.org/english/news_e/news15_e/tnc_31jul15_e.htm.

108. *Event Calendar*, WTO, https://www.wto.org/english/news_e/events_e/events_e.htm.

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cussions with similarly immovable positions on both sides of the extension issue itself. While the negotiations for a wines and spirits register are the furthest along among the GI issues, proponents of the GI extension have called for a link of the issues of the creation of a register, the extension and another controversial topic, the relationship between the TRIPS Agreement and the Convention on Biological Diversity (the “TRIPS/CBD issue”).¹⁰⁹ The opposing parties of the GI high level protection extension object to the linkage and want to stick to the negotiations mandate of a register for wines and spirits.¹¹⁰ Therefore, the proposed link has been seen as another “major roadblock to resolution of the negotiations.”¹¹¹

B. NEGOTIATIONS AT OTHER FORA

Meanwhile, the issue of GI protection is more successfully negotiated at other fora. For the proponents of the extension, bilateral or multilateral agreements outside of the WTO have become the more feasible and more realistic way to reach protection, even though not to the same extent with all WTO Members. The claw-back proposal has been seen as indication that countries that seek GI protection do not believe in TRIPS for that matter at the moment.¹¹²

But, opponents of the extension have also sensed the opportunity to create new realities by manifestation of the status quo in free trade agreements.

1. WIPO Geneva Act

The most recent successful international agreement covering GIs was signed in May 2015 after negotiations of WIPO Members that are parties of the Lisbon Agreement.¹¹³ The Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications.¹¹⁴ The Geneva Act allows in Articles 4 and 6, the international registration of GIs in addition to appellations of origin. This broadens the scope of indications to be protected since for a GI, a single criterion attributable to the geographical origin would be sufficient according to Article 2 of the Geneva

109. WTO, *Secretariat Gives Delegates Refresher*, *supra* note 103; Das, *supra* note 1, at 505.

110. WTO, *Secretariat Gives Delegates Refresher*, *supra* note 103; Das *supra* note 1, at 506.

111. KEITH E. MASKUS, *supra* note 11, at 201.

112. Amy P. Cotton, *supra* note 29, at 1316.

113. The Lisbon Agreement, originally concluded in 1958, protects appellations of origin.

114. Press Release, WIPO, Negotiators Adopt Geneva Act of Lisbon Agreement at Diplomatic Conference (May 20, 2015), available at http://www.wipo.int/pressroom/en/articles/2015/article_0009.html.

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Act. In Article 10, the Geneva Act explicitly allows contracting parties to choose their type of legislation to establish the protection. This might as well be the national trademark system, which, as a result, has triggered the hope that this might motivate new countries to join the agreement. However, since only parties of the Lisbon Agreement negotiated the Geneva Act, while non-parties could only participate as observers, others doubt that the new act will attract new signatories.¹¹⁵

To put the impact of the Act into perspective, there are currently twenty-eight contracting parties to the Lisbon Agreement, not all of which have implemented the agreement in national regulations. Of these twenty-eight, only fourteen have signed the Geneva Act and none have yet implemented its reforms. It, nevertheless, is the proof for the unchanged interest in achieving a higher level of GI protection.

2. Numerous Free Trade Agreements

In the past twenty years, numerous free trade agreements have been entered into, most of which include intellectual property sections and even many GI subsections.¹¹⁶ These agreements develop significant multilateral impact through the Most-Favored-Nation (MFN) principle. Only free trade agreements in force before 1995 are exempt from the TRIPS MFN clause (Art. 4(d)). Under the MFN principle, a WTO Member cannot treat another Member less favorable than any other Member; in other words, a privilege afforded to one Member, and may it be a partner in a free trade agreement, must be afforded to all WTO Members.¹¹⁷

Article 24(1) of the TRIPS Agreement expressly makes dispositions concerning bilateral or multilateral agreements on GIs by stating that the exceptions of Article 24(4) through (8) shall not be used to refuse to negotiate such agreements. This is read to encourage, to some extent, bilateral agreements on the issue. This is an unusual provision within a WTO agreement as the organization seeks multilateral results through its agreements.¹¹⁸

115. William New & Eimear Murphy, *WIPO's New Act for GIs: Not Much Ado About Place Names?*, INTELLECTUAL PROPERTY WATCH (Apr. 6, 2015), <http://www.ip-watch.org/2015/06/04/wipo-new-act-for-gis-not-much-ado-about-place-names/>.

116. David Visas-Eugui & Christoph Spennemann, *The Evolving Regime for Geographical Indications in WTO and Free Trade Agreements*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE THE TRIPS AGREEMENT 163, 170 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008).

117. *See id.* at 170.

118. *Id.* at 169.

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The trend of free trade agreements seems to deepen the divide in the argument over GI protection. “[B]oth the EU and the USA intend to promote their own legal system and incur minimum legislative adjustment costs in the implementation of their obligations.”¹¹⁹ While the EU tends to strengthen and deepen GI protection as *sui generis* rights within intellectual property law, the U.S. follows their trademark approach and emphasizes the protection of existing rights in certain GIs or their inability to be protected due to genericness.¹²⁰

The numerous agreements alter the existing TRIPS obligations and flexibilities and are even seen as creating “a race for locking up the regulatory IP framework with close trading partners,”¹²¹ in the attempt to set accomplished facts that influence the continuing legal debate. The hope is that, once a certain level of GI protection is negotiated with the contracting parties of bilateral or multilateral agreements, this level will spread by means of the MFN clause as contracting parties must not treat non-contracting WTO Members less favorable than any other WTO Members.

3. TPP and TTIP – Showdown or Checkmate?

The current tactic of the strongest advocates on each side of the argument over high level protection extension for GIs is to accomplish the legal framework of their liking with as many trade partners as possible and implement a widely recognized and used legal system of GI protection. The legal systems promoted by each side, however, are considerably contrary. Since the EU and U.S. are negotiating their own free trade agreement called Transatlantic Trade and Investment Partnership (TTIP), the showdown on the GI extension issue seems to come closer. There is no question that GIs will be addressed in the agreement.¹²² To overcome the differences, that are similar to the differences between the EU and the Canadian position, a similar approach as in the EU-Canada Comprehensive Economic and Trade Agreement (CETA), for which negotiations were concluded in 2014, seems conceivable. CETA provides that Canada will protect specific, enumerated EU GIs, to some degree with many exceptions, and allows for the coexistence of GI protected names on the Canadian market with potential Canadian trademark protection of similar

119. *Id.* at 211.

120. *Id.*

121. *Id.* at 212.

122. See, e.g., EU, *Intellectual Property EU Position Paper* (Mar. 20, 2015), available at http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153331.7%20IPR%20EU%20position%20paper%2020%20March%202015.pdf.

names. However, the agreement does not protect all EU GIs in Canada.¹²³ While there is no indication that the EU is considering anything other than a CETA approach, political and commercial interests of the U.S. do not suggest that approach – to the contrary.¹²⁴ However, economic interests on both sides may make TTIP, as a whole, so important that these interests may force a consensus in the field of GI as well. The big difference compared to the TRIPS extension negotiations is the stronger bargaining interest of the U.S. in TTIP. The U.S. has no interest in achieving a compromise on the GI extension in TRIPS since they are content with the *status quo* and a reason to give it up has yet to be presented.

The Trans-Pacific Partnership (TPP) is the TTIP counterpart over the Pacific for the U.S. Twelve Pacific Rim countries have agreed on TPP in October 2015,¹²⁵ once again giving implications for a potential consensus between the EU and U.S. advocates pro and contra the GI extension. While TRIPS allows a denial of protection for common names (Art. 24(6)), the current draft of TPP is interpreted to require such denial of GI protection in case of a common name (TPP draft Art. 18.32). Consequentially, “[a]ny requirement under TTIP to protect ‘sherry’ or ‘parmesan’ will be inconsistent with U.S. obligations under the TPP.”¹²⁶ If this interpretation of TPP proves to be the common understanding, this presents an additional substantial obstacle to a compromise, if not the check mate played by the U.S. as it is completely incompatible with the EU efforts to claim back certain GIs.

C. IMPLICATIONS OF RECENT DEVELOPMENTS FOR THE WTO AND GIs: THE DANGER AND CHANCE OF ACCOMPLISHED FACTS

The debate about the extension of GI protection in TRIPS has come to a hold. As the negotiating parties admitted, their new tactic will be to wait for other controversial issues in the Doha Round to take shape so that

123. Bernard O’Connor, *The Legal Protection of GIs in TTIP: Is There an Alternative to the CETA Outcome?*, Paper Presented at the 145th EAAE Seminar: Intellectual Property Rights for Geographical Indications: What is at Stake in the TTIP? (April 14-15, 2015), at 13-14, available at <http://ageconsearch.umn.edu/bitstream/204144/2/B.%20O%20Connor%20%282015%29%20The%20Legal%20Protection%20of%20GIs%20in%20TTIP%20Is%20There%20an%20Alternative%20to%20the%20CETA%20Outcome.pdf>.

124. *Id.* at 14.

125. Tim Reif, USTR Chief Transparency Officer, *The Path Forward on the Trans-Pacific Partnership*, USTR (Nov. 5 2015), <https://medium.com/the-trans-pacific-partnership/the-path-forward-on-the-trans-pacific-partnership-f2df5dde4f78#.1xp8o5w4b>.

126. K. William Watson, *Geographical Indications in TTIP: An Impossible Task*, CATO INSTITUTE (Oct. 2015), <http://www.cato.org/publications/cato-online-forum/geographical-indications-ttip-impossible-task>.

GIs can be used as a “bargaining chip,”¹²⁷ one way or another. GIs have also been seen as “deal-facilitator”¹²⁸ for commercial liberalization of European agriculture. While the EU will slowly give up some power over its overregulated agricultural market, the EU will need some compensation, not least for policy and public relations reasons. Higher protection of European GIs in foreign markets might be just the right exchange.

When the proponents of GI high level protection extension introduce additional proposals, such as the linkage with other no less controversial subjects, it seems to contradict their interest in finding resolution fast, may it be for dealing with one controversy at a time. The combination of issues only complicates the debate and puts a solution further in the distance. However, from a bargaining standpoint, the introduction of more controversial issues into the list of demands of one party, also means extending the list of negotiation aspects that this party could give up – and therefore, the party could claim a prevailing position on another issue. One might suspect some tactic behind this course of action.

But, this tactic may be dangerous for the proponents of high level protection for GIs. While TRIPS negotiations on the issue are more or less frozen, the battle is fought on other grounds, mainly the grounds of free trade agreements. This may create new realities that WTO negotiations, once they are picked up again, have to adapt to.

However, facing reality, the gradual international negotiation of GI protection, one regional trade agreement at a time, might be the only way for the discussion to gain momentum again. But, these regional agreements can never replace an agreement on the WTO level.

While it is understandable for the opposing parties to switch to the smaller tables of regional trade agreements that promise faster success, the greater good is at stake. The fairest possible deal is achieved when all the diverging interests around the world are balanced. Thus, when more countries are part of the agreement, more interests are taken into account and the more likely is it that every party will achieve a positive result for themselves, balanced with the interests of the other parties. The WTO has experience in – and is pretty much founded on – the concept of compromise, balancing out legitimate, yet often contrary interests. These compromises, while they can never be perfect from the national standpoint due to their very nature, cater for the greater good. The TRIPS

127. Visas-Eugui & Spennemann, *supra* note 91, 168-210.

128. *Id.* at 169-170.

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Agreement, as the most important international intellectual property agreement,¹²⁹ is the right place for GI rules. By incorporating all WTO Members, and their individual interests, TRIPS can distribute the opportunities and costs of GI protection more evenly and fairly than numerous smaller free trade agreements. “Compromises that harmonize intellectual property law will reduce trade barriers and positively affect economic growth.”¹³⁰

V. CONCLUSION

Among all those technical and strategic quarrels, the debate lost focus of the subject matter itself. The objective of the TRIPS Agreement is, according to Article 7, to protect intellectual property rights for them to promote technological innovation and transfer and dissemination of technology, “to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

Following this guideline, the consumer protection aspect, as well as, the economic development potential of GIs needs to be brought back into focus of the discussion.¹³¹ In an increasingly globalized world, producers, formerly restricted to local and regional markets, start to compete with others on the world market.¹³² This holds the opportunity for them to gain reputation for the regional specialties and acquire customers worldwide, but also makes them more susceptible to misappropriation.¹³³ To foster the increased competition, but prevent misuse, GIs are the appropriate means. Although some criticize GI protection in the form of property rights altogether, for dogmatic reasons,¹³⁴ the WTO Members have chosen this approach over twenty years ago. Since this decision is not materially wrong, just not compelling, the WTO should stick with this approach because producers and other world market player have adjusted to it and deserve legal certainty and continuity.

The extent to which GIs should be protected is not dictated by compelling matters of fact. However, for the sake of legal certainty and fair

129. Xuan-Thao N. Nguyen, *Nationalizing Trademarks: A New International Trademark Jurisprudence?*, 39 WAKE FOREST L. REV. 729, 761 (2004).

130. Stephen M. Jurca, *What’s in A Name?: Geographical Indicators, Legal Protection, and the Vulnerability of Zinfandel*, 20 IND. J. GLOBAL LEGAL STUD. 1445, 1465 (2013).

131. See also MASKUS, *supra* note 11, at 203.

132. Das, *supra* note 1, at 457.

133. *Id.*

134. Kal Raustiala & Stephen R. Munzer, *The Global Struggle Over Geographic Indications*, 18 EUR. J. INT’L L. 337-65 (2007).

distribution of rights and opportunities, once a protection level is chosen, it should be applied to all products. If different protection levels are the outcome of a debate, the allocation of a product to a protection level should have logical, material reasoning and should not only reflect a compromise between the interests of the strongest negotiators. In the current situation, the compromise was designed for the opposing interests of some main players in the debate. While the U.S. achieved the basic protection level they were rooting for, for most products, Europe received its desired high level protection for wines and spirits, products especially important to some EU Member economies. Particular interests of developing countries are not met by the current protection as their potential to benefit from GIs often lies beyond wines and spirits, especially in Muslim countries, which may not even produce alcohol altogether.¹³⁵ At the same time, developing countries could benefit from GI protection in the way that their products newly enter the global market and acquire reputation for the production region. As long as such a reputation is not established, the misleading test of Article 22 protection will not suggest a GI misappropriation if a competitor copies the product and sells it under the same name. In these cases, the extension would actually distribute the advantage of GI protection more fairly as the special arrangement for wines and spirits is mainly to the EU's advantage. Most of the concerns about the extension, especially the impact on trademark holders for foreign GI, can easily be addressed by the existing or newly added exceptions.

Not only have the numerous free trade agreements of the past years given hope that WTO Members will want to react with TRIPS on the newly created realities, but there is also the chance that extension opposing countries find their interest in high level protection when they develop new traditions and local specialties.¹³⁶ Whatever will reactivate the momentum to resolve the issue, the extension should not just be the trade-off for other interests in the Doha Round.

Yet, a solid GI protection can only be the first step. International legal protection is necessary, but not sufficient to induce the commercial benefits of GIs.¹³⁷ Gaining back GIs for products that are already on the world market requires multi-pronged efforts, including the identification of valuable GIs for export purposes, brand-building and promotion, as well as, finding appropriate marketing channels and strategies.¹³⁸ There-

135. Visas-Eugui & Spennemann, *supra* note 91, at 209.

136. *See, e.g.*, Jurca, *supra* note 129.

137. Das, *supra* note 1, at 512.

138. *Id.*

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fore, there is still a long way to go for some regions to profit on their local products, but the consolidated legal protection of GI is the necessary premise for this journey and gives incentive to promote small regions in a globalized world.