TRADITIONAL PRODUCTS IN DEVELOPING COUNTRIES: MAXIMIZING COMPETITIVE ADVANTAGE THROUGH GEOGRAPHICAL INDICATIONS

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INTRODUCTION

Like fashion, food trends tend to come and go. If a few decades ago American consumers were basing their diets on low-fat, highly processed foods and sodas[1], nowadays the millennial generation is concerned not only with the health benefits of the food they consume, but also with the stories the product in question tells.[2] This generation sees food as a way to express itself.[3] Millennials have the perfect multicultural makeup that makes them more likely to be concerned about the origin of the food they consume, the way it was cultivated, and the particulars of the practices used to do so.[4] These consumers are more worried about the risk of having chemical residues in the food they eat, the environmental effects of technology-based farming practices, and the health consequences of the consumption of antibiotic-filled animals.[5]

Therefore, agricultural producers who have forgone modern industrial procedures to farm their lands and have instead preserved their traditional and region-specific methods of agricultural production have a bigger competitive advantage.[6] Along with their European counterparts, who have zealously protected for decades their frozen-in-time agricultural practices both in the national

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[1] Anna Brones, *Food Trends Two Decades Ago: What if We Ate like It Was 1994?*, THE FOODIE UNDERGROUND (Aug. 05, 2014), http://foodieunderground.com/food-trends-1994/.

[2] Ginger S. Myers, *Food Preferences and Purchasing Trends─Getting Out Ahead of the Curve*, UNIVERSITY OF MARYLAND EXTENSION (June 13, 2017), https://extension.umd.edu/learn/food-preferences-and-purchasing-trends%E2%94%80getting-out-ahead-curve; *See also* Pat Conroy , Kim Porter , Rich Nanda , Barb Renner , Anupam Narula*, Consumer Products Trends,* DELOITTE INSIGHTS, https://www2.deloitte.com/insights/us/en/industry/consumer-products/trends-2020.html.

[3] *See supra* note 2.

[4] *Id*. *See also*, Thomas DeCarlo, Veronica Franck & Richar S. Pirog, *Consumer Perceptions of Place-Based Foods, Food Chain Profit Distribution, and Family Farms*, IOWA STATE UNIVERSITY DIGITAL REPOSITORY, 158 Leopold Ctr. Publications and Papers (2005)*;* Jill J. McCluskey & Maria L. Loureiro, *Consumer Preferences and Willingness to Pay for Food Labelling*, 34 J. of Food Distribution Res. 95, 95 (2003); Nicola Watts, *In the Artisan Economy All You Need Is Love*, OGILVY (Oct. 19, 2015, 09:10AM), https://www.ogilvy.com/topics/topics-storytelling/in-the-artisan-economy-all-you-need-is-love/.

[5] Cletos Mapiye, *Potential for Value-Addition of Nguni Cattle Products in the Communal Areas of South Africa: A Review,* 2 AFRICAN J. OF AGRIC. RES. 488, 490 (2007). *See also* Caitlin Dewey*, Most Meat Producers Use Antibiotics. Now Consumers Can See How Much*, THE WASHINGTON POST (Oct. 5, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/10/05/most-meat-producers-use-antibiotics-now-consumers-can-see-how-much/?utm_term=.4ba49a54b14d; Corinna Hempel & Ulrich Hamm*, Local and Organic: A Study on Consumer Preference from Organic Food and Food from Different Origins*, 40 International J. of Consumer Studies 732 (2016) (discussing how consumers are demanding "more transparency along the supply chain" and are turning towards "food that is directly by the producer").

[6] Chidi Oguamanam*, Patents and Traditional Medicine: Digital Capture, Creative Legal Inventions, and the Dialects of Knowledge Transformation*, 15 Indiana J. of Global Legal Studies 489, 525 (2008).

and international landscape, this market niche for traditional products puts developing countries at the forefront of the global market.[7]

Or at least, it should.

This "voracious appetite for exoticism and romanticism around cultural products" seems to bother those in the market who have invested in efficiency and in the technology to mass-produce rather than in the quality and cultural distinctiveness of their products.[8] Hence some companies have decided to advertise their products as exotic and evocatively region-specific, in the hopes of competing with those developing countries whose geographically specific foods are calling the attention of consumers.[9]

The dangers that those practices pose for traditional producers and for consumers are best shown through an example. India has been combatting such practices for years in relation to one of its teas: Darjeeling. The catchy marketing slogan stating "Darjeeling Tea. Born only in Darjeeling. Desired worldwide," is not an overstatement.[10] Producing Darjeeling tea is a very complicated endeavor.[11] The tea is produced in a highly delimited region in India where the plant

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[7] *See e.g.,* European Commission, *Why Geographical Indications Matter to Us?,* (July 30, 2003), http://europa.eu/rapid/press-release_MEMO-03-160_en.htm. *See also*, *Adding Value to Traditional Products of Regional Origin: A Guide to Creating a Quality Consortium*, United Nations Industrial Development Organization, https://www.unido.org/sites/default/files/2010-07/Adding_value_to_traditional_products_of_regional_origin_0.pdf (last visited May 18. 2018); Gavin Fridell, *Fair Trade Coffee: The Prospects and Pitfalls of Market-Driven Social Justice* (University of Toronto Press, 2007).

[8] *See* Oguamanam *supr*a note 6, at 525.

[9] *See e.g.,* Francoise Fridez, *Basmati Rice Fraud Under the Magnifying Glass of DNA Analysis*, 70 CHIMIA 354, 354 (2016) (stating that more than 150 different non-Basmati varieties had been detected in 176 samples that were supposed to be Basmati); Jim Yardley, *Good Name Is Restored in Terrain Known for Tea*, THE NEW YORK TIMES (16, Dec. 2016) http://www.nytimes.com/2012/12/17/world/asia/darjeeling-tea-growers-get-protection-from-european-union.html (stating that every year 88 million pounds of Darjeeling tea were being sold around the world when the Darjeeling district only produced around 20 million pounds a year); Lydia Mulvany*, The Parmesan Cheese You Sprinkle on Your Penne Could be Wood*, BLOOMBERG.COM (Feb. 16, 2016), http://www.bloomberg.com/news/articles/2016-02-16/the-parmesan-cheese-you-sprinkle-on-your-penne-could-be-wood; Anita Balakrishnan, *Walmart Sued for Adding Wood Pulp to its Parmesan*, NBC NEWS (Feb. 29, 2016), http://www.nbcnews.com/business/business-news/walmart-sued-allegedly-adding-wood-pulp-its-parmesan-n527986.

[10] Jeff Koehler, Darjeeling: The Colorful History and Precarious Fate of the World's Greatest Tea, 174 (Bloomsbury USA, 2015).

[11] *Id.*

is unable to expand further than the hills allow it, and farmers are not allowed to clear the forest to keep planting this tea.[12] The topography of the area makes it hard to set up a proper irrigating system, and thus the creation of new tea gardens is, in effect, impossible.[13]

Because of such geographical and topographical limitations, the production of this tea is inevitably low: around 20 million pounds per year.[14] However, as of 2012 as many as 88 million pounds of "Darjeeling" tea was being sold yearly on the global market.[15] How was this possible? The answer is that most of the tea sold as Darjeeling was not actually Darjeeling tea, or was heavily mixed by the wholesalers with more-available type of teas which were of lower quality.[16] This ended up hurting the local farmers' businesses, the tea's reputation, and consumers who kept paying a premium for what they thought was pure Darjeeling but essentially was a tea blend.[17]

As this example shows, when mass-producers free-ride on the geographical distinctiveness of certain regions or countries, the costs are real: consumers are being defrauded, and smaller, humble producers from developing countries are not reaping the economic benefits of maintaining their traditional agricultural practices and products.[18] In light of this, how can we protect traditional producers and ensure that consumers are getting accurate information about their products? The

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[12] *Id.*
[13] *Id.*
[14] Jim Yardley, *Good Name Is Restored in Terrain Known for Tea*, THE NEW YORK TIMES (Dec. 16, 2012), https://www.nytimes.com/2012/12/17/world/asia/darjeeling-tea-growers-get-protection-from-european-union.html.
[15] *Id.*
[16] *Id.*
[17] *Id. See also* Koehler *supra* note 10 at 173.

[18] *See supra* note 9*; see also* Infringement of Protected Geographical Indications for Wine, Spirits, Agricultural Products and Foodstuffs in the European Union, European Union Intellectual Property Office, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Geographical_indications_report/geographical_indications_report_en.pdf (last visited May 05, 2018). *See also*, Patrick Browne, How the Grate Parmesan Scam Costs Italy Millions (July 16, 2015, 14:09PM) https://www.thelocal.it/20150616/how-the-grate-online-parmesan-scam-cost-italy-m.

legal tools available to developing countries are limited, not only due to resources, but also due to the legal framework already in place in the rest of the world.

This Article discusses the various legal tools that might protect traditional producers from the unfair competition posed by their developed counterparts and to shield consumers from being defrauded, and it proposes one such tool as the best-suited: exclusive intellectual property rights in geographical indications. Geographical indications are trade names related to a place, region, or country that are used as the identifier of the products that come from such place, region or country.[19] Because of such connection with that place, the products bearing the place's name have very specific characteristics which ultimately end up accurately guiding the consumer's decision-making process in purchasing the products.[20] This Article advocates for exclusive geographical indications as the legal modality that best addresses the needs of both traditional producers and consumers. More specifically, this Article proposes a new *sui generis* system of exclusive geographical indications, designed to serve both developed and developing countries and consumers while avoiding the overprotective pitfalls that characterize existing geographical indication regimes.

This Article proceeds in three parts. Part I explains in depth the concept of geographical indications within the intellectual property landscape. It details the origin of the geographical indications concept and it outlines its international legal history. Furthermore, Part I illustrates the two modalities through which geographical indications are most widely implemented around the world—modalities that have been the subject of decades-long and contentious trade negotiations between the United States and the European Union.

[19] World Trade Organization, *Geographical Indications: Background and the Current Situation*, https://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm (last visited May 05, 2018).
[20] The best known example of a geographical indication – and the most controversial one, for that matter- is "champagne", which refers to a sparkly white wine coming from the Champagne region of France.

Part II analyzes which modality is the most beneficial for developing countries to implement, taking into consideration the trade and legal landscape and practices already in place in the rest of the world. It argues that a *sui generis* modality is the most attractive. This Part also questions the need for the implementation of geographical indications to protect developing producers and consumers in the first place, but ultimately explains why geographical indications, regardless of the adopted modality, are essential for developing countries to be able to compete fairly with their developed counterparts.

Part III acknowledges the disadvantaged position of developing countries in the implementation of a geographical indication system. This is not only due to their scarce resources, but also due to the advanced position that certain countries have—specifically those in the European Union—thanks to centuries of developing their geographical indications system to meet their own needs. In order to make the geographical indications market more inclusive, this Part advocates for the homogenous implementation of a geographical indications system around the world, to allow for an even playing field in trade favorable to traditional producers and to consumers worldwide, without restricting competition.

I. GEOGRAPHICAL INDICATIONS: THE PARAMETERS OF THE LEGAL BATTLEFIELD

Denominating agricultural products with the name of the region in which they were produced is a very old practice. It is in fact as old as the markets in which such transactions are conducted. The main objective of bringing the buyer's attention to the place of origin of the product was to convey its special value. This special value could be due to the inherent climatological characteristics of the area in which the farmers cultivated such a product and to the traditional methods historically used to achieve that very specific product, either in the farming, aging, or processing stage.

The first two products affected by this method of denominating the product's origin were wines and olive oil.[21] Wine and olive oil are especially sensitive to climatological changes and environmental factors which are completely outside of human control.[22] Hence, their special taste and qualities are mostly due to these characteristics, and people recognized—and still do recognize—these differences, thanks to where the wine or the olive oil come from. In fact, there are biblical references to the specific qualities of certain wines coming from Samos, Crete, and Thasos in Greece.[23] Therefore, intertwining location with food quality as an identifiable characteristic for consumers is not a novel idea.

Because of this, the main historical justification for the regulation of geographical indications has been to protect the informational function for consumers, allowing them to accurately identify the product, its properties, and its reputation.[24] Today, the implementation of geographical indications may also serve another purpose. Geographical indications, as already mentioned, may help protect local and rural farmers from having to unjustly compete against developed and wealthy mass-producing countries, which take advantage of the distinctiveness of products from developing countries to sell similar products of lower quality for a premium.[25]

Therefore, the law should have two very specific groups in mind when implementing a geographical indication system to guard the quality and authenticity of the products: consumers and traditional producers. Different countries have different ways of addressing these concerns, as

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[21] Pedro Donate Fanjul, Keys to Understand the Geographical Indications Provisions in the CETA Agreement, 6 (June 12, 2017) (unpublished master-thesis, Tilburg University).

[22] *See eg*., Somini Sengupta, *How Climate Change Is Playing Havoc With Olive Oil (and Farmers),* THE NEW YORK TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/climate/olive-oil.html; Kimberly A. Nicholas, Mark A. Matthews, et al., *Effect of Vineyard-scale Climate Variability on Pinot Noir Phenolic Composition*, Agric. Forest Meteorology (2011).

[23] *See* Fanjul *supra* note 21 at 6.

[24] Irene Calboli & Daniel Gervais, *Socio-Economic Aspects of Geographical Indications*, WORLD INTELL. PROP. ORG., www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_bud_15/wipo_geo_bud_15_9-annex1.pdf (last visited May 18, 2018).

[25] *Id.* at 1-4.

we shall soon see. However, to better learn how different countries treat geographical indications, it is important to first have a clear understanding of how the concept has internationally evolved.

A. *Geographical Indications: One of the Most Controversial Concepts in International Trade Agreements*

Historically, international trade agreements had the objective of opening markets and eliminating high import tariffs.[26] Even though this appears not to hold true for some countries today, it is still the norm in most of those countries who are members of the World Trade Organization (WTO).[27]

In the past several decades, intellectual property has come to the forefront of these international trade agreements.[28] Traditionally, intellectual property was territorial, but the rise of knowledge-based economies and the development of digital technology has made the copying of legally protected products more accessible worldwide.[29] After the rampant increase of piracy cases, the software, music, and pharmaceutical industries—among others—pushed Western countries like the United States to fight for the preservation of their intellectual property internationally as part of their trade transactions.[30]

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[26]Carolyn Heneghan, How International Trade Agreements Factor into the Food Industry, FOODIVE (Aug. 31, 2015) https://www.fooddive.com/news/how-international-trade-agreements-factor-into-the-food-industry/404420/.
[27] *Id.*, *see also*, David J. Lynch, Philip Rucker & Erica Werner, *Trump Imposes Tariffs on Steel and Aluminum, but Offers Relief to Allies* (March 08, 2018), https://www.washingtonpost.com/business/economy/after-trump-promises-tariff-announcement-staff-scrambles-to-figure-out-what-hell-say/2018/03/08/5e1483e4-22e6-11e8-86f6-54bfff693d2b_story.html?utm_term=.5c3819da8310.
[28] *See e.g.*, Paris Convention for the Protection of Intellectual Property, March 20, 1883; Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, April 14, 1891, 828 U.N.T.S. 163; The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1958, as revised July 14, 1967, 923 U.N.T.S. 205.

[29] Daniel J. Gervais, *The Changing Landscape of International Intellectual Property*, 1 J. Int'l Pty L & Practice, 246 (2006).
[30] Kal Raustiala & Stephen R. Munzer, *The Global Struggle over Geographic Indications*, 18 European J. of Int'l L 337, 340 (2007).

In these international negotiations, geographical indications have always received the black-sheep treatment in comparison to other intellectual property issues discussed.[31] As already seen, geographical indications are heavily dependent on the agriculture procedures used, and not only on the specific geographical location in which the food is produced.[32] This causes agricultural lobbyists and farmers from advanced industrial regions to be highly politically involved in the treatment of this type of products, lest strong protection for more traditionally produced goods curtail their ability to compete in the market.[33] As a result, those countries who treat geographical indications as their local darlings (e.g., European states) clash with heavily industrialized countries like the United States in their quest to "protect their agricultural sector from low-cost competition."[34]

The first time geographical indications were put on the international landscape's radar was back in the 1981 Madrid Agreement for the Repression of False and Deceptive Indication of Source, which prohibited the use of all indications of origin, in connection with the sale, display or offering for sale of any goods, capable of deceiving the public as to the source of the goods.[35] Afterwards, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration was the next international agreement addressing the protection of a very similar, but more specific type of geographical indications: "appellation of origins."[36] However,

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[31] *Id.* at 342
[32] *Id.*
[33] *See* Fanjul *supra* note 21 at 18; *see also* William New*, US Generic-Named Food Industries Cry For US Government Help Against 'Relentlessly Aggressive' EU*, INTELLECTUAL PROPERTY WATCH (March 03, 2018), http://www.ip-watch.org/2018/03/09/us-generic-named-food-industries-cry-us-government-help-relentlessly-aggressive-eu/.
[34] *See* Raustiala *supra* note 30 at 342.
[35] Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods, April 14, 1891, 828 U.N.T.S. 163.
[36] "Appellation of origins" protects products coming from a particular land, or as the French calls it "terroir". "Terroir" has a more specific meaning than what we would normally give to the word "land. "Terroir" really speaks to the idea that the product's quality come from the territory, and hence, producers from such territory can be the only ones allowed to use the territory's name: it would be impossible for anybody else in any other territory to produce the same product with the same quality. *See* The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1958, as revised July 14, 1967, 923 U.N.T.S. 205.

neither of these agreements attracted the attention or the interest of the international community, attaining initially just 8 and 11 signatures respectively, which, in turn, reduced their impact.[37]

After these initial, hesitant attempts to bring geographical indications to the international trade table, it was only when piracy became an issue for Western countries like the United States that a more global trade agreement and a more aggressive stand on intellectual property issues were undertaken.[38] It was then that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was born within the WTO context.[39] Apart from addressing copyright, patent, and trademark issues, TRIPS also addressed what would soon become a highly contentious issue between the United States and the European Union: geographical indications. Specifically, TRIPS established two different methods through which countries could build their own geographical indications protection system.

Under the minimum level of geographical indication protection, geographical indications would protect against the "use of any means … that indicates or suggests that the good in question originates in a geographical area other than the true place of origin."[40] Hence, the protection of the geographical indication would only be justified in the event of a misleading use of the indication of origin, or a use that would "constitute an act of unfair competition."[41]

The maximum level of protection was reserved to wines and spirits.[42] Under this level of protection, producers cannot use indications that are similar or identical to a geographical

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[37] *See* Contracting Parties>Madrid Agreement, WIPO http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=3 (last visited May 18, 2018); *see also*, Contracting Parties>Lisbon Agreement, WIPO, http://www.wipo.int/treaties/en/ActResults.jsp?act_id=12 (last visited May 18, 2018).
[38] *See* Raustiala *supra* note 30 at 340.
[39] Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994 (hereinafter TRIPS).
[40] TRIPS *supra* note 39, art 22.2
[41] *Id.*
[42] TRIPS *supra* note 39, Art 23.

indication in *any* case—regardless of whether the use misleads consumers.[43] However, given that the TRIPS Agreement does not specifically establish the way in which countries are obligated to protect geographical indications, states have had relative freedom in determining where in the spectrum of protection they want to fall.[44]

B. <u>The Two Main Levels of Geographical Indications Protection in Practice</u>

Because TRIPS established two different methodologies for protecting geographical indications, WTO members have been implementing different levels of protection into their own domestic legal systems. More specifically, a study conducted by the WTO revealed that its members specifically implemented either a trademark system, using certification and collective marks, or a system of *sui generis* geographical indications.[45]

Start with the system that uses certification and collective marks. Collective marks are "signs which distinguish the geographical origin, material, and mode of manufacture or other common characteristic of goods or services of different enterprises using the collective mark."[46] Therefore,

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[43] *Id.* This inclusion was the result of the European Union's push to heightened GI protection during the Uruguay Convention, in which the United States ended up compromising to give a very specific set of agricultural products the protection the European Council was after. *See* Daniel Gervais, The TRIPS Agreement, Drafting History and Analysis 293 (London: Sweet and Maxwell. 2003). *See also* Communication from the European Communities – Geographical Indications, TN/IP/W/ 11, (June 14, 2005) (trying to amend Section 3 of the TRIPS agreement to extend the system of protection for geographical indications on wines and spirits to geographical indications on all products).

[44] "Members shall provide the legal means…" TRIPS *supra* note 39, Art 22 (2).

[45] Council for Trade-Related Aspects of Intellectual Property Rights, Note by the Secretariat: Review under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications: Summary of the Responses to the Checklist of Questions (IP/C/13 AND ADD.1), WTO Doc. IP/C/W/253/Rev.1. (Nov. 24, 2003). *See also*, Geographical Indications, WIPO, http://www.wipo.int/geo_indications/en/ (last visited May 18, 2018). Apart from the two methodologies specifically explained here, some countries decide to protect their products and consumers through business practices and consumer protection laws, sometimes even on top of a geographical indication's system. Even though these laws are not specifically enacted with the intention to protect traditional farming practices or products coming from a specific "terroir", they nonetheless achieve the historical objective of geographical indications, which is to protect consumers. Some examples of these laws are the establishment of certain food and labeling standards, or consumer protection laws. While these laws are fairly well-known to any type of compliance or business attorney, a downside of relying solely on this specific type of protection is that it may prove to be insufficient in more complicated Geographical Indication cases. *See* Naazima Kamardeen, *Geographical Indications at the Crossroads of Trade Development and Culture: Protecting Geographical Indications in Sri Lanka* 413 (Irene Calboli et al. 2017) (hereinafter Kamerdeen).

[46] Collective Marks, WIPO, http://www.wipo.int/sme/en/ip_business/collective_marks/collective_marks.htm (last visited May 18, 2018).

they indicate that the mark belongs to a discrete group of enterprises.[47] In contrast, certification marks are "given for compliance with defined standards, but are not confined to any membership."[48] In the geographical indications realm, this means that certification marks would be given to products having a particular geographical origin.[49] As better explained below, the United States uses this kind of geographical indication protection.

On the other hand there is the go-big-or-go-home approach that the European Union follows: the *sui generis* geographical indication system.[50] A *sui generis* system calls for the adoption of a specialized regime, usually governed by national authorities who are in charge of regulating the administrative procedures, such as those involved in registering geographical indications in a national registry created solely for that purpose.[51] The national registry in turn will consider several factors in deciding whether to give the desired protection, which are usually related to the quality of the product, the product's characteristics and reputation in the market, and the link between the region in which the product is created and all of the aforementioned special characteristics.[52] As explained in further detail below, the European Union follows this regime.

1. *The United States Approach: A Cherry-Picking System in Disguise*

In the United States, geographical indications are members of the trademark family.[53] Therefore, the United States does not give geographical indications a different status for protection, and the registration system set up to handle this type of products is the exact same that other

[47] *Id.*
[48] Certification Marks, WIPO, http://www.wipo.int/sme/en/ip_business/collective_marks/certification_marks.htm (last visited May 18, 2018).
[49] *See* Kamardeen *supra* note 45 at 413.
[50] Geographical Indications, WIPO, http://www.wipo.int/geo_indications/en/ (last visited May 18, 2018).
[51] Dagne Teshager, Intellectual Property and Traditional Knowledge in the Global Economy: Translating Geographical Indications for Development 111 (Routledge, 2015).
[52] *Id.*
[53] USPTO, Geographical Indication Protection in the United States, https://www.uspto.gov/sites/default/files/web/offices/dcom/olia/globalip/pdf/gi_system.pdf (last visited May 18, 2018).

products have for trademark purposes.[54] In fact, the United States Patent and Trademark Office (USPTO) denies registration to any mark that is "primarily geographically descriptive", or "primarily geographically deceptively misdescriptive" of the product in question in relation to the mark trying to be registered.[55] Even though this legislative scheme seems to leave geographical indications orphaned of protection, the American legislature opened the door to "indications of regional origin" for registration through certification and collective marks.[56]

Even though certification marks are a subset of trademarks, certification marks are special in several respects. First, the owner of the identified good is not allowed to use the certification mark by him- or herself.[57] This is what is called the "anti-use-by-owner rule."[58] Instead, the certification mark is owned by a third party who establishes the standards for being certified.[59] Those producers who meet the set quality standards (which may include regional origin) will be able to use the certification mark in commerce.[60] Second, certification mark owners do not have a lot of leeway in excluding others from using the mark; as long as other manufacturers meet the quality standards the third party has established, they too will be able to use the mark and benefit from the added value associated with it.[61]

In the United States, there are three main categories of certification marks. One kind is the "seal of approval" type of certification mark, which may be valuable to accredit that a producer is following certain traditional practices. This type of certification mark embodies the idea that most

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[54] D. Peter Harvey, *Geographical Indications: The United States' Perspective*, 107 Trademark Rep. 960, 966 (2017).
[55] Lanham Act, § 2(e), 15 U.S.C. § 1052(e)(2)-(3).
[56] 15 U.S.C.A. § 1054 (West).

[57] *See* Eleanor Meltzer, Worldwide Symposium on Geographical Indications, Geographical Indications and Trademarks: Intellectual Property Any Way You Slice It, WIPO Doc. GEO/SFO/03/3, at 11–13 (June 30, 2003) available at http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_sfo_03/wipo_geo_sfo_03_3-main1.pdf.
[58] McCarthy, § 19:92.
[59] *See* Meltzer *supra* note 57 at 11-13.
[60] *Id.*
[61] Fink & Maskus, *The Debate on Geographical Indications in the WTO, in Trade, Doha, and Development: A Window into the Issues*, 201, 201 (Richard Newfarmer ed., 2006).

have of what a certification mark is: someone determines quality standards, a producer meets those standards, and the producer gets the seal showing that the product is of a certain quality.[62] Second, there is the "union label" certification marks, which show that a union labor has provided the product.[63] Finally, and most importantly for the geographical indications debate, the last type of certification marks are those that attest to the regional or geographic origin of the product.[64] Furthermore, the same certification mark can certify several characteristics. For example, the certification mark ROQUEFORT not only indicates that the cheese is made of sheep's milk and cured in the region of the Community of Roquefort, but it also shows that it has been produced following their traditional methods and practices.[65]

But the fun part of the protection the United States gives to geographical indications—at least for attorneys—comes with the certification mark status acquired through common law; this is a completely foreign concept to other countries, especially to civil law jurisdictions.[66] Through this acquired status, what someone may deem as a generic name may actually be distinctive as long as the consumers recognize such name as referring to a specific product.[67] This newly acquired distinctive status will give the mark the protection it needs in the market.[68] For instance, going back to our Darjeeling example, the Tea Board of India was able to oppose a trademark application

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[62] *See* Harvey *supra* note 54 at 966.
[63] *Id.*
[64] *Id.*
[65] USPTO, Geographical Indication Protection in the United States, https://www.uspto.gov/sites/default/files/web/offices/dcom/olia/globalip/pdf/gi_system.pdf (last visited May 18, 2018).
[66] Deborah J. Kemp & Lynn M. Forsythe, Note, *Trademarks and Geographical Indications: A Case of California Champagne*, 10 CHAP. L. REV. 272, 264-265 (2006).
[67] *See* Institut National Des Appellations d'Origine v. Brown-Forman Corp., 47 U.S.P.Q.2d 1875, 1998 WL 650076 (T.T.A.B. 1998). *See also*, Boston Duck Tours, LP v. Super Duck Tours, LLC, 531 F.3d 1 (1st Cir. 2008)(explaining that a mark is entitled protection as long as it is a source-identifier of goods).
[68] *See eg.,* Tea Board of India v. The Republic of Tea Inc., 80 U.S.P.Q.2d 1881, 2006 WL 2460188 (T.T.A.B. 2006); Luxco, Inc. v. Consejo Regulador del Tequila 121 U.S.P.Q.2d 1477 (T.T.A.B. 2017), 2017 WL 542344. (where TTAB established that the word TEQUILA was not generic for a type of alcoholic beverage because it still "retain(ed) the ability to designate geographic source", after evaluating robust evidence, including federal regulations, dictionary definitions, bottle labels, consumers surveys, advertisements etc., showing that TEQUILA had significance as designation of source).

to register the mark “Darjeeling Nouveau.”[69] This was because the Tea Board of India claimed to have rights over the word “Darjeeling” as a common-law certification mark.[70] The USPTO's Trademark Trial and Appeal Board (“TTAB”) found that the applicant had failed to prove that “Darjeeling” was a generic term and that, despite its constant use in the media, the word “Darjeeling” was still distinctive.[71] Therefore, in fear that the applicant’s mark was going to be confused with the Tea Board of India’s rights, TTAB denied the applicant’s registration.[72]

In contrast to certification marks, a collective mark is defined as the mark “used by the members of a cooperative, an association or other collective group or organization, or which such cooperative, association or other collective group or organization has a bona fide intention to use in commerce […] and includes marks indicating membership in a union, an association, or other organization.”[73] Hence, these marks are not owned by standard-setting or certification entities, but rather, they are owned by collective associations that, instead of selling goods, are focused on promoting the goods sold by their members.[74]

Given the foregoing, it may seem that the United States is pretty set on wanting to protect and further its policy of legislating geographical indications through its trademark system. And in fact, the United States has been very outspoken on its opinion about the measures followed by countries in the European Union through their *sui generis* system.[75] Back in 2014, the Executive Director of

[69] 80 U.S.P.Q.2d 1881, 2006 WL 2460188 (T.T.A.B. 2006).
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] 15 U.S.C. § 1127
[74] *See* Meltzer *supra* note 57 at 11.
[75] *See* U.S. Congress Demands That U.S. Defend Common Food Names and Reject EU’s Aggressive Abuse of Geographical Indications, CONSORTIUM FOR COMMON FOOD NAMES (May 15, 2014), http://www.commonfoodnames.com/u-s-congress-demands-that-u-s-defend-common-food-names-and-reject-eus-aggressive-abuse-of-geographical-indications/. *See also*, USPTO Geographical Indications Frequent Asked Questions,https://www.uspto.gov/learning-and-resources/ip-policy/geographical-indications/geographical-indications-faqs (last visited May 18, 2018) (responding to the question whether European-style Geographical Indications are better than certification marks in a rather feisty manner, stating that “if by ‘better’ you mean there is wider protection against any evocation of the mark (potentially even against comparative advertising, potentially a conflict with U.S. First Amendment case law) and government enforcement (paid for by the European taxpayer), then

Consortium for Common Food Names illustrated the American animosity towards *sui generis* systems, describing them as an "abusive policy of pocketing common food names under the guise of fake geographical indications, plain and simple," and as a "flawed … strategy to continue to erect even bigger, more significant agricultural trade barriers." [76]

Therefore, it comes as a big surprise that the United States embraces the *sui generis* system in relation to its wines.[77] The Treasury Department's Alcohol and Tobacco Tax and Trade Bureau (TTB) forbids producers to indicate that their wines come from a specific geographical area in the United States if that is not actually the case.[78] To date, there are 240 established "American Viticultural Areas" enjoying the "appellation of origin" type of protection.[79] In a very similar fashion to the European Union protection, TTB requires at least 75% of the grapes used in the wine to be from the specific region for it to be labelled as coming from such region.[80] Furthermore, this *sui generis* system does not only arise at the federal level, but it also has significant following in state legislatures.[81] Some states, like California, require a higher percentage in the use of local

yes, Europe offers that. However, after nearly 15 years of a GI system in Europe, there are perhaps 3 foreign GIs protected there. Why is that? There is little incentive for a European taxpayer to accept financial responsibility for the protection of foreign private property rights that are being used by European industry.")

[76] *See* U.S. Congress Demands That U.S. Defend Common Food Names and Reject EU's Aggressive Abuse of Geographical Indications, CONSORTIUM FOR COMMON FOOD NAMES (May 15, 2014), http://www.commonfoodnames.com/u-s-congress-demands-that-u-s-defend-common-food-names-and-reject-eus-aggressive-abuse-of-geographical-indications/. However, nowadays such concern for the erection of trade barriers seems to have subsided. *See*, Mark Landler & Jim Tankersley, *Trump Will Hit China with Trade Measures as White House Exempts Allies from Tariffs*, THE NEW YORK TIMES, https://www.nytimes.com/2018/03/22/us/politics/trump-will-hit-china-with-trade-measures-as-white-house-exempts-allies-from-tariffs.html?mtrref=www.google.com&gwh=986C5950F4D313A48C29941354564105&gwt=pay. *See also,* Jeremy Diamond, *Trump Hits China with Tariffs, Heightening Concerns of Global Trade War*, CNN, https://www.cnn.com/2018/03/22/politics/donald-trump-china-tariffs-trade-war/index.html (quoting Trump, who ironically said that "[The United States] ha[s] a tremendous intellectual property theft problem…[Tariffs are] going to make us a much stronger, much richer nation".)

[77] 27 U.S.C. § 205; 27 C.F.R. § 4.25 (2015).

[78] *Id.*

[79]Established American Viticultiral Areas, Alcohol and Tobacco Tax and Trade Bureauhttps://www.ttb.gov/wine/us_by_ava.shtml (last visited May 18, 2018).

[80] 27 C.F.R § 4.25(b)(1).

[81] Michael Maher, *Comment, On Vino Veritas? Clarifying the Use of Geographic References on American Wine Labels*, 89 CALIF. L. REV. 1881, 1913-14 (2001).

grapes to later lawfully label the wine as coming from that locality.[82] These percentage requirements seem to address a similar concern: safeguarding the quality of American wines against the possible dilution by less "pure" copycat wines. As explained below, that is exactly the rhetoric followed by the European Union in justifying the protection of their own products through a *sui generis* system.

2. *The European Union Approach: A Monopoly-Driven Modality?*

The system followed in the European Union to protect geographical indications is fairly intricate and complicated. On one side, European Union countries have a *sui generis* systems at the state level.[83] In fact, the European Union *sui generis* system is based on the systems that were already in place in some of its countries before the European Union was formed in 1993.[84] On the other side, as already mentioned, there are European Regulations. The main European Regulations establishing the makeup of geographical indications protection are the following: Council Regulation (EU) No. 1151/2012, in relation to the quality schemes of agricultural products and foodstuffs; Council Regulation (EU) No. 401/2010, in relation to the labelling and the presentation of wine; and Council Regulation (EC) No.110/2008, in relation to the regulation of spirit drinks.[85] These regulations address different types of geographical indications: designation of origins (PDOs), traditional specialties guaranteed (TSGs), and the old-fashioned geographical indications (PGIs).[86]

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[82] CAL. CODE REGS. Tit. 17, § 17015 (2018) (requiring 100% of the wine's volume to come from Californian grapes); OR. ADMIN. R. 845-010-0920 (2018) (requiring 95% of grapes used in the wine to come from Oregon).
[83] Notable references to Greece, Italy, Spain and France.
[84] Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 306-07 (2006).
[85] However, this last regulation is likely to change in the near future, since a proposal for replacement was presented to the European Commission back in 2016, and in early 2018 the Committee on the Environment, Public Health and Food Safety (ENVI) adopted its report.
[86] Christine Haight Farley, *Conflicts between US Law and International Treaties Concerning Geographical Indications*, 22 Whittier L. REV. 73, 77 (2000). *See also* EU Regulation No. 1151/2012 of the European Parliament and of the Council of Nov. 21, 2012 on Quality Schemes for Agricultural Products and Foodstuff, 2012 O.J. (L 343)1.

PDOs are considered to be the strictest category of geographical indication protection in the European Union.[87] PDOs are granted to those products that originate within a specific region and whose characteristics are intrinsically linked to that geographic area.[88] However, the product not only must come from that area, but its production, processing and preparation must have also taken place there.[89] This does not necessarily refer merely to the production and manufacture of the product, but it can also speak to how and where the product is being sliced or packaged.[90] For PDOs then the basis for the protection is both the land and the skill used by its people.[91]

On the other hand, PGIs identify products that originate in a specific location, but whose quality or other characteristics are merely "essentially related" to such location.[92] Furthermore, for PGI protection, only one of the production steps to create the product has to take place in the area in question.[93] Hence, PGIs are the attenuated brothers of PDOs.

TSGs are a much more specialized category of geographical indication protection that does not actually relate at all to the geographic origin of the product. TSGs are mainly a quality scheme under which the methodology of production or the ingredients used to produce the food are

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[87] Yves Van Couter & Florence d'Ath, *Protecting the Origin of Foodstuffs in the European Union*, 4 EFFL 290, 296 (2016).
[88] *Id.*
[89] EU Regulation No 1151/2012 of the European Parliament and of the Council of Nov. 21, 2012 on Quality Schemes for Agricultural Products and Foodstuff, 2012 O.J. (L 343) 1, art 5(3). For example, Iberian Acorn Fed Ham enjoys PDO protection, which covers all those hams that come from Iberian pigs, are fed with acorn, and roam freely in the Guijuelo region, and had a curing process of 30 months in natural dryers. *See*, Iberian Acorn Fed Ham P.D.O. Guijuelo Whole Piece, ALMA DE IBERICO http://www.almadeiberico.com/en/acorn-fed-iberian-ham-do-guijuelo/11-jamon-iberico-bellota-do-guijuelo-pieza-entera.html, (last visited May 18, 2018). However, the European Union does permit in limited cases that PDOs protection extends to products that have not entirely been manufactured and made in the same region. For example, Prosciutto di Parma is a protected PDOs, but it is allowed that some parts of the pigs used for the ham come from outside the region of Parma. *See*, The Pigs, PARMA, https://www.prosciuttodiparma.com/en_UK/prosciutto/pigs (last visited May 18, 2018).
[90] *See* Van Couter *supra* note 87 at 296 (explaining that, for example, Prosciutto di Parma ham "must be sliced and packed in the region of production").
[91] *Id.*
[92] EU Regulation No. 1151/2012 of the European Parliament and of the Council of Nov. 21, 2012 on Quality Schemes for Agricultural Products and Foodstuff , 2012 O.J.(L 343)1.
[93] *Id.*

protected.[94] Hence, consumers of TSGs pay a premium for these products not because of where they come from, but because of the use of traditional recipes in their production.[95]

The methodology to achieve these types of protection is a bit convoluted. First, the producer in question needs to contact the relevant authority in his or her country to gain protection under the national law.[96] Once achieved, the producer then applies to the Directorate-General of the European Union Commission to register the geographical indication modality in question.[97] Along with the application, the producer will need to prove that it in fact complies with all the requirements established in the applicable regulation.[98] If the producer is successful, the application will be published so others in the market have the ability to oppose for a period of three months.[99] If after those three months there is no contention as to the name's registration, the producer of the PDO, PGI, or TSG in question will be protected against others using that same denomination, or using evocative terms or even comparisons of that geographic indication against another.[100] The protection of geographical indications in the European Union is so fierce that even stating in the label of the product that a product is "like" a PDO, a PGI, or a TSG would be a violation.[101] Therefore, the European Union implements the highest level of protection allowed by TRIPS to all of their geographical indications, regardless of whether the products are within the wine and spirits category.

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[94] *Id.*
[95] An example of a TSG is Mozzarella cheese. *See* Van Couter *supra* note 87 at 291.
[96] Irene Calboli, *Time to Say Local Cheese and Smile at Geographical Indications of Origin? International Trade and Local Development in the United* States, 53 HOUSTON L. REV. 373, 392 (2015).
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id. See also* EU Regulation No. 1151/2012 of the European Parliament and of the Council of Nov. 21, 2012 on Quality Schemes for Agricultural Products and Foodstuff , 2012 O.J.(L 343)1.
[101] *See e.g.*, EU Regulation No. 1151/2012 of the European Parliament and of the Council of Nov. 21, 2012 on Quality Schemes for Agricultural Products and Foodstuff , 2012 O.J.(L 343)1, art. 13; Regulation 110/2008, of the European Parliament and of the Council of Jan. 15, 2008 on the Definition, Description, Presentation, Labeling and the Protection of Geographical Indications of Spirits Drinks and Repealing Council Regulation (EEC) 1576/89, 2008 O.J. (L 39), art. 16.

As seen already, this type of *sui generis* system has evoked a great deal of animosity from the United States, mainly because it is seen as stifling competition and freedom of speech, and as a monopolistic methodology that aims to enrich only a few. This is the result of very different policy considerations in the protection of products coming from a specific region. The difference in policy considerations mainly relates to the group that the geographical indications aim to protect. Such policy considerations are better explained below.

C. *Why Is There Such a Big Disconnect Between the Two Systems? – Benefits and Costs of the Two Models.*

The big divergence earlier outlined between the United States and the European Union is best explained as a difference in view of the functional role that geographical indications have in society.

The United States views geographical indications as part of its trademark system, and not as a freestanding system unto itself. This is mainly influenced by the liberal economic theory on which the United States bases its view on trade.[102] The focus is on the individual, and not on the collective. Accordingly, geographical indications are seen as business interests held by private individuals and corporations, whose purpose is to protect such geographical indications so they can keep reaping their benefits.[103] To this extent, the trademark system's focus on the individual does not disappear in certification and collective marks; that is, in certification and collective marks the right holders of such marks need to come together to form a juridical person—e.g., a corporation or association—in order to enforce their rights.[104]

[102] Elisabeth Barham, Localization within Globalisation: Better Protecting Geographical Indications to Favour Sustainable Development (Comments offered for the 2004 Annual WTO Public Symposium ORIGIN Round Table on Geographical Indications, Geneva, 27 May 2004).
[103] *Id.*
[104] *Id.*

This means that, in the event that there is an infringement of the certification or collective mark, the system relies on private enforcement to challenge the infringement before a court, even when that takes the individual or the corporation to a foreign country.[105] For example, in the United States, defending a mark can translate into hundreds of thousands of dollars invested in private legal fees to undertake opposition proceedings with the TTAB.[106] Not defending a mark, on the other hand, could lead to the cancellation or the dilution of the mark. When one takes into consideration these risks, spending that amount of money on enforcement proceedings is not an option, but an obligation for the mark owner.[107]

Given this reliance on private enforcement, and its expense, producers who want to be part of such a collective would need to pay fees or become members in order to benefit from the certification or collective mark's competitive advantage in the market.[108] Hence, this reliance on private right holders and on corporate structures may become an insurmountable hurdle for producers who cannot afford to gain access to the corporate group in question.

In contrast to the largely privatized US regime, the European Union's *sui generis* system has the very public objective of "achieving sustainable rural development."[109] It views geographical indications as effective tools for putting traditional producers at the forefront of the market, encouraging the use and development of traditional practices to compete internationally.[110] This is because the European Union values the quality of its products over the quantity it can produce, and it therefore wants its traditional producers to compete based on quality, rather than on

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[105] *Id.*
[106] Daniele Giovannucci, Elizabeth Barham & Richard Pirog, *Defining and Marketing 'Local' Foods: Geographical Indications for U.S. Products*, 13 J. of World Intell. Prop., __, 12 (2009).
[107] *Id.*
[108] Sudhir Kohchar, *Institutions and Capacity Building for the Evolution of the Intellectual Property Rights Regime in India: Identification and Disclosure of IP products for their IPR Protection in Plants and Animals*, 13 J. of Intell. Prop. Rts. 336, 343 (2008).
[109] *See* Teshager *supra* note 51 at 40.
[110] *Id.*

quantity.[111] The European Union has long believed that topographical and human factors are the main reasons why its products are of high quality, and why they attain such a strong distinctiveness in the market.[112] Therefore, it aims to protect and capitalize on the quality that is distinct and unique to specific European regions. Unlike the United States system, where certification and collective marks are viewed as liberal economic tools for individuals and corporations to use, in the European Union geographical indications are public goods designed to achieve the public good of protecting the proprietary interests of their producers, "who, combining traditional techniques with unique geographical characteristics, produce distinctly authentic goods."[113] Hence, once geographical indication protection is attached to a product, the product and the traditional technique used to produce it stay protected.[114]

Given this notion that geographical indications are created for a common and public good, it is up to the states and to public agencies to enforce them. On a smaller scale, regional producers regulate themselves through cooperatives in which they establish and maintain the traditional methods of production that grant their products the special geographical indication protection.[115]

However, it should be kept in mind that the *sui generis* system protects the traditional techniques used by producers in a specific region, and does not allow for any type of divergence in the implementation of such techniques. Therefore, it has been argued that this paternalistic protection of traditional techniques in production may have stifling consequences for the

[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *See* Giovannucci *supra* note 106 at 13.
[115] *See* Institut National Des Appellations d'Origine v. Vintners Intl. Co., 858 F2d 1574, 1580 (1992).

producers' development, constricting them into a frozen-in-time methodology of production, and consequently making them less profitable in the long run.[116]

Hence, the strongest arguments against a *sui generis* system speak precisely to the strongest characteristic of the system itself: the strict protection of products which come from a geographical area and which follow a very precise and specific method of production. This seems like a good idea from the perspective of both the producer (who does not have to worry about free riders and unfair competitors) and the consumer (who does not need to wonder whether he or she is paying for a rip-off of a reputable good). However, this apparent control given to both the producer and the consumer by the *sui generis* system goes out of the window when an uncontrollable variable comes into play: the environment.[117] The rigid structure of a *sui generis* system does not allow for any type of change, not even the climate's.[118] Most crops are highly sensitive to climate, especially those that are protected through geographical indications, like wines and olive oil.[119] Therefore, once climate changes affect the crops in question, farmers would likely want to have the flexibility to adapt to such changes in order to maintain the quality of the product.[120] Yet a *sui generis* system, as it exists today, would not allow for such changes.[121] Ultimately the product's quality would be

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[116] *See* Matin Qaim, *Benefits of Genetically Modified Crops for the Poor: Household Income, Nutrition and Health*, 27 New Biotechnology 552, 552-557 (2010); Ben Shepherd, *Costs and Benefits of Protecting Geographical Indications: Some Lessons for the French Wine Sector*, Groupe d'Economie Mondiale Working Paper, at 16 (2006) available at http://ecipe.org//app/uploads/2014/12/Shepherd_Cost_and_Benefits_of_Protecting_GIs-French_Wine.pdf (hereinafter Shepherd), *but see* Nathaniel Johnson, *Why Get Big Isn't the Answer for Poor Farmers around the Globe*, GRIST, (22, Sep 2014) https://grist.org/food/why-get-big-isnt-the-answer-for-poor-farmers-around-the-globe/.

[117] *See gen.,* Raz Barnea, Appellations and Adaptations: Geographical Indication, Viticulture, and Climate Change, 26 Wash. Int'l L.J. 605 (2017).

[118] *Id.*

[119] *See* Hans R. Schultz & Gregory V. Jones, *Climate Induced Historic and Future Changes in Viticulture*, 21 J. WINE RES. 137, 137 (2010); M. Moriondo et al., *Projected Shifts of Wine Regions in Response to Climate Change*, 119 CLIM. CHANGE 825 (2013); G. V. Jones & R. E. Davis, *Climate Influences on Grapevine Phenology, Grape Composition, and Wine Production and Quality for Bordeaux, France*, 51 AM. J. ENOL. VITIC. 249 (2000); Tony B. Shaw, *A Climatic Analysis of Wine Regions Growing Pinot Noir*, 23 J. WINE RES. 203 (2012). *See also*, Somini Sengupta, *How Climate Change Is Playing Havoc With Olive Oil (and Farmers),* THE NEW YORK TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/climate/olive-oil.html.

[120] *See* Barnea *supra* note 117 at 619.

[121] *See e.g.,* Geneviève Teil, *Nature, the CoAuthor of Its Products? An Analysis of the Recent Controversy Over Rejected AOC Wines in France*, 17 J. WORLD INTELL. PROP. 96, 99 (2014) (explaining that wine needs to pass

affected, consumers would be confused for the lack of consistency in the product they buy, and the protection would in the end be revoked.[122]

II. WITH WHOM SHOULD DEVELOPING COUNTRIES SIDE?

Developing countries, as already seen, need some type of protection for their geographically distinctive products given the competitive advantage they have from a consumer point of view. People are more willing to buy traditional and exotic products, which developing countries have in abundance. However, developing countries lack the financial resources to create the infrastructure and to implement a new regulatory scheme to protect the unauthorized use of their geographical indications and enforce such protection in other jurisdictions.

Because of these very specific financial concerns of developing countries, the *sui generis* system is the most attractive approach for them to protect their very unique and traditional products. The *sui generis* system, even though as costly to implement as the certification and collective marks system, allows for the protection of geographical indications through *ex officio* and *ex parte* procedures, which would help with the financial costs of enforcing their geographical indications in other jurisdictions. Furthermore, and unlike in certification and collective marks systems, developing countries would not have to worry about whether a certification mark has been created through common law, which would likely reduce litigation costs. Finally, *sui generis* systems are especially beneficial for those who not only want to protect the geographical link between the product's quality and the product itself, but also for those who want to protect the very specific and traditional technique used in the production of the product. The following section

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very stringent quality tests and must follow certain viticulture techniques in order to enjoy appellation of origin protection in France).

[122] *See* Barnea *supra* note 117 at 619. It is also worth noting that such changes do not necessarily need to be bad: climate change can arguably affect crops for the better, which would allow for such new producers to establish a *sui generis* system to protect the newly acquired quality of the product thanks to the environmental shift, and which would in turn enhance competition against those producers who cannot maintain the quality of their products because of the aforementioned climate shift.

will delve into these reasons to explain in further detail how a *sui generis* system is more beneficial for developing countries, and will consider and rebut some related counterarguments.

A. The Lesser of Two Evils: Why the Sui Generis System is Better for Developing Countries

One of the main arguments against the implementation of geographical indications the European Union way relates to the legal and institutional mechanisms and infrastructure in which developing countries would need to invest.[123] The country in question would need to set up administrative mechanisms to identify and register the products eligible for protection, and would need to invest in a workforce specialized in examining whether the product actually meets the quality and reputation characteristics to be protected.[124] Nor is registration the only concern. Once registration is obtained, compliance programs would need to exist in order to avoid having the geographical indication in question become generic.[125]

It is true that implementing a *sui generis* institutional framework would be costly. But so would the implementation of administrative and enforcement procedures and infrastructure related to *any* intellectual property modality. Still, that is exactly what TRIPS asks developing countries to do.[126] It seems the industrialized countries that pushed for the creation and implementation of TRIPS wanted a broad international protection on all intellectual property rights with the following caveat: *as long as it is beneficial to us*.

Furthermore, a *sui generis* system does not need to be based on organizational structures as complex as the one in place in the European Union. *Sui generis* systems base geographical

[123] *See* Kohchar *supra* note 108 at 343.
[124] UK Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, at 101, http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf. (last visited May18, 2018).
[125] Daniele Giovannucci, et. al.„ Guide to Geographical Indications: Linking Products and Their Origins, 15-16 (International Trade Center 2009). Available at: http://www.origin-gi.com/images/stories/PDFs/English/E-Library/geographical_indications.pdf.
[126] D. Vaver, Intellectual Property Rights: Critical Concepts in Law, 330 (Routledge, 2006).

indication rights on a territorial basis. To benefit from the geographical indications protection, producers thus do not have the obligation to be members of a particular collective; they only need to fit within the production conditions in the region.[127] Unlike with certification and collective marks, where individual producers need to become members or pay fees to the organization that owns the certification mark in order to benefit from it, here producers could collectively engage with each other to manage their geographical indications rights without involving a third party.[128] This asks traditional producers and farmers to take collective action protect one another—which is already the existing culture in such close developing communities.[129] Therefore, the mere family and "neighbor" relationships in the specific geographical area could be an effective channel for developing and enforcing the standards to follow for geographical indication protection.[130] This way, the economic burden of implementing an organizational and structural governance—which a system of certification or collective marks would otherwise have to bear—would be lessened for the developing country.

Even if these close-knit relationships did not make a *sui generis* system preferable, it would still be superior to a system of certification and collective marks for the kinds of smaller agricultural producers one finds in developing countries. This is because a *sui generis* system, with its focus on the public good, would be less subject to capture by larger, corporate-controlled producers who might seek to move in and take over production in a given region.[131] In other words,

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[127] Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is US Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 Fordham Intell. Prop. Media and Ent. Law J. 1, at 98 (2005).
[128] *See* Kohchar *supra* note 108 at 343.
[129] *See* Kremers *supra* note 127 at 98.
[130] *Id.*
[131] *See* Magnus Boström & Mikael Klintman, Eco-Standards, Product Labelling and Green Consumerism, 24 (New York: Palgrave Macmillan, 2008).

a system in which development and enforcement are in the hands of private parties—as is the case with certification and collective marks—is a system that favors the parties with the most resources.

Of course, money will matter under any approach. For example, detractors of the *sui generis* system argue that, even if there were such a system in place, producers from developing countries would not have the capital to litigate any violation of their newly recognized geographical indications abroad.[132] Indeed, as already seen in the Darjeeling case, developing countries are especially vulnerable to major corporations' counterfeiting their traditional products.[133] Yet the fact that companies already target developing countries' traditional knowledge and products is no reason to despair; rather, it is a red flag that shows that more and better protection is sorely needed. The question, then, is which approach will be most helpful to developing countries, given their limited resources.

Once the question is so stated, another advantage of the *sui generis* system emerges: it would allow for the protection of geographical indications through *ex officio* and *ex parte* procedures.[134] These procedures accordingly allow public agencies to participate in the implementation of geographical indications.[135] This means that developing countries' traditional products could be protected after the producers themselves have asked for such protection—or that the public authorities themselves can take the lead in the protection of products without having been

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[132] U. Grote, *Environmental Labeling, Protected Geographical Indications, and the Interests of Developing Countries*, 10 ESTEY CTR. J. OF INT'L LAW & TRADE POL'Y 94, 107 (2009).

[133] Another example of developing countries being targeted by corporations from wealthier and more industrialized countries is the Antigua coffee case from Nicaragua in which 50 million pounds of coffee was being sold over the world under the "Antigua" name, when only 6 million pounds were actually being produced. *See* European Commission, *Intellectual Property: Why Do Geographical Indication Matter to Us?* http://europa.eu/rapid/press-release_MEMO-03-160_en.htm (last visited May 18, 2018).

[134] *See* Council Regulation (EC) No 882/2004 of the European Parliament and of the Council of April 29, 2004 on Official Control Reformed to Ensure the Verification of Compliance with Feed and Food Law, Animal Health, and Animal Welfare Rules, 2004 O.J. L/191, Art.54-55; *See also*, Minutes of the Round Table on Geographical Indications on « The ex officio protection » (June 09, 2009), http://www.origin-gi.com/images/stories/PDFs/English/Your_GI_KIt/news_en_minutes_of_the_round_table_on_the_ex_offico_protection.pdf.

[135] *Id.*

prompted.[136] This level of state involvement enables more humble producers to allocate the registration and maintenance of their geographical indication rights to public authorities, which is key in developing countries where small producers do not have resources to squander.

As for the litigation costs that inevitably come with any approach, a *sui generis* system would actually impose lower litigation expenses than a trademark system. As already seen in Part I, if the trademark system allows for common-law certification marks like the United States does, this would inevitably create a lot of grey areas which could only be clarified through litigation. A *sui generis* system, on the other hand, would lack common-law rights of this kind and would thus avoid the expenses it imposes.

As already mentioned, one possible cost of *sui generis* protection is that it can force traditional producers to keep being that: traditional.[137] After all, the whole idea is minimize the impact on traditional practices, even though some changes in production would be inevitable to assure that the product meets the set quality standards and maintains its reputation among consumers.[138] The issue is whether this emphasis on traditional practices would get developing countries out of the industrialization game, thus impeding their development.[139]

While it is true that *sui generis* system is not only focused on the geographical location of the product, but also on the skill the people from that location use to birth it into existence, it is misguided to assume that staying traditional is always a bad thing. As already alluded to, consumers are increasingly more attracted to products that are environmentally conscious and free

[136] *See eg*., *Legal Systems to Protect GIs*, ORIGIN, http://www.origin-gi.com/your-gi-kit/legal-info/item/4744-legal-systems-to-protect-geographical-indications-en-gb-4.html. (last visited may 18, 2018).
[137] *See* Shepherd *supra* note 116 at 16.
[138] X. Le Roux et al., Agriculture and Biodiversity Benefiting from Synergies, INRA Multidisciplinary Scientific Assessment,https://www6.paris.inra.fr/depe/content/download/3393/33185/version/1/file/ESCoABd-4pages-anglais.pdf. (last visited May 18, 2018).
[139] *See* sources cited *supra* note 116.

of GMOs.[140] Consumers no longer trust the health and safety impacts of industrialized production and are looking for more traditional alternatives, to the point that they are willing to pay more for such products.[141] This willingness to pay a premium for sustainable traditional products is, therefore, very positive for those in developing countries.[142] Even though consumers would be able to reap such benefits regardless of whether the country uses the *sui generis* system or the certification mark system, producers on the other hand would be more constricted if they had to rely solely on the labeling protection that certification systems provide.[143] This is because, as already mentioned, such a labeling system is mostly initiated by the private sector, which increases the price for producers trying to become part of a labeling certification mark system.[144] Furthermore, such labels are often subject to renewal, while geographical indications in the *sui generis* system are permanent as long as the geographical location and the methods of production do not change.[145]

Moreover, it is misguided to believe that only industrialized methods of production would enrich the developing country's economy and production.[146] In fact, these assumptions have led to

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[140] *See gen*., Jill J. McCluskey a& Maria L. Loureiro , *Consumer Preferences and Willingness to Pay for Food Labeling: A Discussion of Empirical Studies*, 34 J. OF FOOD DISTRIBUTION RES. 95 (2003); Alexandra Gibbs, *Millennials willing to pay more for sustainable, better quality goods: Nestlé Chairman,* CNBC, (Nov. 04, 2016, 10:44AM) https://www.cnbc.com/2016/11/04/millennials-willing-to-pay-more-for-sustainable-better-quality-goods-nestle-chairman.html; Corinna Hempel & Ulrich Hamm*, Local and Organic: A Study on Consumer Preference from Organic Food and Food from Different Origins*, 40 INT'L J. OF CONSUMER STUD. 732 (2016).

[141] *Id*. *See also* Luis Guerrero et al., *Consumer-driven definition of traditional food products and innovation in traditional foods. A qualitative cross-cultural study*, 52 Appetite 345, 349 (2009) (stating that "generally, highly complex technological processes make consumers more critical of the products.")

[142]It is true that it has not been established whether such price premium ultimately reaches the producers, or stays with the middle-men. *See* Grote *supra* note 132 at 103. However, as already mentioned, the proprietary nature of the *sui generis* system here advocated would allow producers to treat their "bundle of rights" however they see fit, enabling them to limit the use of the geographical indication by third parties or to establish conditions for the use of the geographical indication. Such conditions can be related to price control, demanding the establishment of the product's price through negotiated terms, instead of having to rely on the international price determination system. *See* Sophie Reviron, *Geographical Indications: Creation and Distribution of Economic Value in Developing Countries*, Working Paper No. 2009/14, at 15-17 (2009).

[143] *See* Grote *supra* note 132 at 100.

[144] *Id.*

[145] *Id.*

[146] Nathanael Johnson, *Why "get big" isn't the answer for poor farmers around the globe*, GRIST (Sept. 22, 2014), https://grist.org/food/why-get-big-isnt-the-answer-for-poor-farmers-around-the-globe/.

the imposition of certain methods of production that ultimately stripped traditional farmers of their power to control agricultural production, and therefore, their wealth.[147] For example, in Southeast Asia, the use of genetically modified corn, an industrial methodology of production, has already destroyed several local corn varieties.[148] The imposition of this type of industrial production has resulted in only three private companies having the control of almost 70% of the Asian seed market, replacing and excluding those smaller traditional producers from competition.[149] For these and other reasons, the past few years have seen increased argument for the de-intensification of agricultural production and for a more sustainable method of production that does not use chemical fertilizers and pesticides.[150] This is precisely what developing countries offer, and what a *sui generis* system would indirectly protect.

B. But, Is Geographical Indication Protection Needed in the First Place? Ethiopia as an Outlier

The foregoing comparison of both systems demonstrated that protection through *sui generis* geographical indications would best serve developing countries. However, one cannot be blind to the reality that geographical indications, whether *sui generis* or based on certification/collective marks, may not be the end-all-be-all for developing countries. In this sense, Ethiopia has forced advocates of geographical indications to open their eyes to new alternatives.[151]

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[147] Id. (explaining how Kenya tea-makers are all organized in small farms, but still Kenya is the biggest world's tea exporter). *See also,* Teshager *supra* note 51 at 111.
[148] *Turning the Paddy Gold: Corn in Southeast Asia*, GRAIN (Sept. 20, 1999) https://www.grain.org/fr/article/entries/275-turning-the-paddy-gold-corn-in-southeast-asia.
[149] *Id.*
[150] *Id*. *See also* Qaim *supra* note 116 at 552-557.
[151] Mary O'Kicki, *Lessons Learned from Ethiopia's Trademarking and Licensing Initiative: Is the European Union's Position on Geographical Indications Really Beneficial for Developing Nations?,* 6 LOY. U. CHICAGO INT'L L. REV. 311, at 318 (2008).

Ethiopia lives on their coffee—so much so that 15 million people are affected by the industry and 60% of Ethiopia's export earnings come from coffee.[152] In spite of their coffee's global recognition, however, many coffee producers in Ethiopia were earning less than $1 a day before 2004.[153] This is a huge disparity, given that many Westerners pay $4 or more for a single cup of coffee.[154]

In order to address this issue, the Ethiopian government, with the aid of the United Kingdom's Department for International Development, decided to launch the Ethiopian Coffee Trademarking and Licensing Initiative.[155] In spite of the high stakes involved in protecting their heritage coffees, Ethiopia chose to use a creative version of trademark law to preserve and enforce their rights. In a new spin on trademark law, it was the government, and not a private individual or corporation, who owned the names of the products referring to their geographical locations, and who later decided to license it to coffee distributors.[156] This was a conscious, financially strategic decision: they forwent the costs of setting up the geographical indication system and instead invested that money in developing their crops' reputations and building relationships with coffee distributors around the world.[157]

But when the Ethiopian government decided to file for trademark registration for their Harar, Yirgacheffe, and Sidamo coffees in the United States, it encountered a roadblock: Starbucks had already applied for registration of "Shirkina Sun-Dried Sidamo."[158] It was not until a year later that Starbucks, pressured by NGOs and the press, decided to unblock the road for Ethiopia's

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152 *The Coffee War: Ethiopia and the Starbucks Story*, WIPO, http://www.wipo.int/ipadvantage/en/details.jsp?id=2621, (last visited May 18, 2018).
153 *Id.*
154 *Id.*
155 *Id. See also* O'Kicki *supra* note 151 at 329.
156 *Id.*
157 *Id.* at 328.
158 U.S Trademark Application Serial No. 78,589,307 (filed Mar.15,2005); U.S Trademark Application Serial No. 78,431,410 (abandoned July 8, 2006).

trademark registration.[159] However, that was not the only problem Ethiopia had to encounter. The National Consumer Agency opposed to Ethiopia's registration of the word "Sidamo" because it was simply a generic word for coffee in Ethiopia, and as such, was not entitled to trademark protection.[160]

In spite of all these hurdles, Ethiopia managed to obtain registration with the USPTO.[161] It then proceeded to create an online portal through which retailers could license the trade name.[162] Ethiopia seemed to abide by the "keep it simple, stupid" mantra; the trademark licensing agreement through which it allowed retailers to sell its coffees was in Adobe format on the internet.[163] Their website also encouraged all visitors to work as their representatives and deliver the agreement to their local coffee shops, so as to inform their owners of their obligation to sign the agreement if they were selling Ethiopian coffee.[164]

This type of collaboration between a developing country, consumers, and retailers worldwide seems to be the perfect symbiosis in the trade world. Through their licensing system Ethiopia is obtaining both recognition and economic benefits from its distinctive coffee blends.[165] The licenses ensure that the licensees are responsible for the protection and defense of the trademark in the event that it is infringed, and hence they allocate the financial burden to the least financially vulnerable party.[166] At the same time, the retailers have the incentive to allocate their own

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[159] U.S Trademark Application Serial No. 78,431,410 (abandoned July 8, 2006). See also, Aslihan Arslan & Christopher P. Reciher, *The Effects of the Coffee Trademarking Initiative and Starbucks Publicity on Export Prices of Ethiopian Coffee* 2 (Kiel Institute for the World Economy, Working Paper No. 1606, 2010), https://www.ifw-members.ifw-kiel.de/publications/the-effects-of-the-coffee-trademarking-initiative-and-starbucks-publicity-on-export-prices-of-ethiopian-coffee-1/kwp-1606.pdf.
[160] *See supra* note 152.
[161] *Id.*
[162] *See* O'Kicki *supra* note 151 at 332.
[163] *Id.* at 333.
[164] *Id.* at 333.
[165] *Ethiopian Fine Coffee, a System Changing Venture*, POSITION BUSINESS LTD, https://www.positionltd.com/ethiopian-coffee/ (last visited May 18, 2018).
[166] *See* O'Kicki *supra* note 151 at 334.

resources on such protection and enforcement, given that the value of the licensed trademark resides in the product's distinctiveness and reputation among consumers. [167] The strategy set up by Ethiopia seems to have borne fruit. The licensing system doubled Ethiopia's exports income from $100 million to $201 million in 2008, and also doubled the nation's farmer income.[168]

That said, although the licensing initiative calls for celebration, it also calls for skepticism. First, one of the key reasons why the initiative was successful was the pro bono legal aid provided by a D.C. firm.[169] This means that, unless the developing country can count on such free legal representation, it is highly unlikely for it to be successful, particularly if a big corporation like Starbucks decides to take up the fight.

Secondly, an initiative such as this one overlooks the developing country's obligation to establish a compliance system through which the quality of the product can be evaluated. The nature and cost of such quality compliance programs would ultimately make this alternative very expensive for developing countries, and would deter other developing countries from replicating the Ethiopian model. This is problematic because the quality of the product is, after all, the key to success in both market recognition and price premiums. Even though an initiative like this one may get developing countries in the fight, it does not provide them with all the required tools to survive it.

Finally, it is important to keep in mind that the Ethiopian case is a very rare one. Usually, trademark registration does not grant such a high amount of publicity in Western countries as Ethiopia received.[170] This level of publicity was likely achieved thanks to Oxfam's involvement

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[167] *Id.*
[168] *See supra* note 165.
[169] *See* O'Kicki *supra* note 151 at 329.
[170] *See e.g*, *Ethiopia Inks Starbucks Trademark Deal*, THE FINANCIAL TIMES, (June 21, 2007) https://www.ft.com/content/f29ac99a-1fcf-11dc-9eb1-000b5df10621; Ashley Seager, *Starbucks, the Coffee Beans and the Copyright Row that Cost Ethiopia £47*, THE GUARDIAN (Oct. 26, 2006),

in the case.[171] After Starbucks refused to sign the licensing agreement for the first time, Oxfam created a toolkit with instructions on how consumers should protest in support of Ethiopia.[172] However laudable Oxfam's action was, one cannot expect it to happen on a regular basis. Hence, developing countries cannot rely on the pressure that consumers' outcry can create for corporations that aim to free-ride on a product's geographical denomination.

III. WHAT WOULD THE IDEAL GEOGRAPHICAL INDICATION SYSTEM LOOK LIKE?

As already seen, there is no perfect methodology to follow in creating a geographical indication system. Even though a *sui generis* system seems to be the most beneficial to developing countries, we should not forget that the European Union already controls the geographical indication market after centuries of perfecting its legal framework to meet its own needs. Hence, developing countries are obviously at a disadvantage, and would have to spend a lot of their already scarce resources on marketing, brand recognition, and developing their products to enter the European Union's controlled geographical indication's marketplace.[173] On the other hand, if this *status quo* did not exist, developing countries would face fewer challenges in the establishment of their geographical indications protection. Similarly, the animosity between the United States and the European Union could probably be resolved.

That hypothetical world is where I situate this final part of the Article. If we were starting from scratch, what type of geographical indication protection system would we put in place? It is important for such system to protect what geographical indications originally were meant to protect: consumers. As already shown, today's consumers are interested in the origin of their

https://www.theguardian.com/world/2006/oct/26/usa.ethicalliving; *Starbucks in Ethiopia Coffee Vow*, BBC NEWS (June 21, 2007), http://news.bbc.co.uk/2/hi/business/6225514.stm.

[171] *See* O'Kicki *supra* note 151 at 333.

[172] *Id.*

[173] *See* Teshager *supra* note 51 at 108.

products and how they were produced, and they attach a specific type and level of quality to such origin and techniques. This makes them an easy target for those who are in the business of making rip-offs, with the objective of obtaining a premium without the cost of producing such products through traditional techniques in a very specific region. Therefore, the system here created is first aimed at protecting consumers who value the quality and authenticity of the products they consume. Furthermore, this system takes into consideration the already disadvantaged position of countries with very little means, and aims to redress the possible abuse that a geographical indication system, such as the one created by the European Union, may impose on future competitors.

The system advocated for is a *sui generis* system in which protection is given solely to those products which quality and reputation have a high connection to the geographical area from which they come, being somewhat similar to the European PDOs. However, unlike the European *sui generis* system, this system would allow for the use of qualitatives in labels, stating that a product is “like” or a “style” of an already protected geographical indication, and would also permit comparative advertising of products bearing the geographical indication in the same specialized market. Furthermore, this system would prevent producers and wholesalers in the market from free-riding on someone else’s geographical indication. Based on this idea, the system created here will only offer protection to those products which ingredients, methods of production and any other variable coming into place in their production is made and offered within the geographical region in question. Therefore, we would require a very high link between the geographical area and the product to grant geographical indication protection and to avoid abusing the role of geographical indications.

A. <u>Protecting Consumers</u>

For trademark systems, the most vulnerable group—and hence the most worthy of protection—are consumers.[174] Their main objective is, therefore, setting up a system in which there are high levels of accurate information given to the public, so they are able to make the best-informed decision. With access to accurate information, producers or sellers who are tempted to confuse consumers will not succeed; consumers will be able to recognize which is the real product and which is not. To put it in terms of information theory, trademark law tries to limit the existence of asymmetric information between consumers and sellers.[175] When asymmetric information exists, consumers do not have the ability to differentiate products, and the marketplace is filled with products of low quality, with consumers potentially paying higher prices for products that do not possess the quality they expect. [176]

A *sui generis* type of geographical indications system would help promote trademark's main goal of protecting consumers from such asymmetrical information. Indeed, geographical indications provide more information than a trademark; they not only convey where the product comes from, but also the methods used to produce it, its ingredients, etc.[177] Hence, a geographical indication system is a cost-effective way of conveying an accurate bundle of information to consumers. This is particularly important today, because such information is not only useful, but accurate; as already explained, consumers are more interested in the type of products they buy, and their impact on health and the environment.[178]

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[174] W.M. Landes and R. A. Posner, The Economic Structure of Intellectual Property Law, 30 (Cambridge: Harvard University Press, 2003).
[175] Angela Tregear & Georges Giraud, Geographical Indications, Consumers and Citizens, in LABELS OF ORIGIN FOR FOOD: LOCAL DEVELOPMENT, GLOBAL RECOGNITION 63, 66–67 (Elizabeth Barham & Bertil Sylvander eds., 2011).
[176] *Id.*
[177] WIPO, The Definition of Geographical Indications (Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Ninth Session, Geneva, November 11 to 15, 2002) SCT/9/4 at 1257. Available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2307.
[178] *See* sources cited *supra* note 5.

A *sui generis* system would protect consumers from the dangers of providing very low protection to geographical indications. Such low protection could dilute the distinctiveness that the geographical indication has in the market, and could potentially confuse consumers as to the origin of the product they are buying, and what that denomination actually means to them. Furthermore, a low level of protection would also promote the dilution of the distinctive geographical indication in the market by blurring its singular characteristic even when there is no danger of consumer confusion. This phenomenon is known as the genericide of a mark. Among the products that have suffered from such phenomenon are basmati rice and parmesan cheese which—even though protected in Europe—are considered generic terms in the United States and therefore not worthy of protection.[179]

Having said this, it is important to proceed with caution. The European Union has advocated for the highest level of protection for geographical indications on the grounds that doing otherwise would lead to the genericide of their brands.[180] But this seems to be an exaggeration; a competing product that uses the geographical indication along with a qualitative such as “like,” or “type” would presumably not lead to genericide. Indeed, the opposite is more likely: by highlighting that the competing product is *not* from the same region, the comparison emphasizes the distinctive nature of the geographical indication.

Furthermore, such use of qualitative words will likely not confuse consumers. Instead, it would inform them of the type of product they are buying, while at the same time managing their expectations of quality. The use of a qualitative would also insulate wholesalers from the temptation to bump up the price of the product, knowing that consumers will likely not be willing

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[179] Michelle Agdomar, *Removing the Greek from Feta and Adding Korbel to Champagne: The Paradox of Geographical Indications in International Law*, FORDHAM INTELL. PROP. MEDIA & ENT. LAW J. 541, 581 (2007).
[180] *See* Hughes *supra* note 84 at 381.

to pay a comparable high price for a product that is merely in the "style" of the authentic good. Therefore, allowing for the use of words like "style" or "type" on the label of a product will ultimately be beneficial to consumers, consistent with the information theory on which the trademark system is based.

Unlike in the European Union, where any competitive challenge is prohibited in relation to a protected geographical indication, the system advocated in this Article would allow for comparative advertising.[181] Prohibiting such advertising stifles both competition and the freedom of commercial expression.[182] Allowing it, on the other hand, would mean that producers within the same market, like the viniculture market, would be able to compete against each other using the geographical indication to do so. For example, wine makers from La Rioja would be able to freely compare Rioja wine with Sonoma wine. This would enable consumers to better learn the differences among those products, and make a more informed decision as to which one they want to be purchasing.[183]

B. Protecting Traditional Producers

As already seen, *sui generis* geographical indication systems are geared not only towards protecting consumers, but also towards the protection of sustainable rural development and towards the promotion of traditional producers' involvement in the market.[184] This entrance of local and traditional producers into the market has the potential to create specialized markets within the general market of a specific product. For example, a traditional producer of olive oil in the

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[181] Annette Kur, *Quibbling Siblings: Comments to Dev Gangjee's Presentation*, 82 CHI.-KENT LAW REV. 1317, 1321 (2007).

[182] *See gen.,* Oxana Valeryevna Gassy-Wright, *Commercial Speech in the United States and Europe*, 14-17 (May 01, 2005) (unpublished LLM thesis, University of Georgia Law).

[183] *See* Tregear *supra* note 175 at 66–67.

[184] See Giovannucci supra note 125 at 5. See also, *Intellectual Property: Why Do Geographical Indication Matter to Us?,* European Commission*,* http://europa.eu/rapid/press-release_MEMO-03-160_en.htm. (last visited May 18, 2018).

region of Jaen, Spain, not only would compete in the olive oil general market, but also in the Jaen local (and perhaps more competitive) specialized market. Therefore, far from pushing the market into a monopoly, geographical indications have the potential of making competition even fiercer.[185] This market specialization would in turn heighten the quality offered to consumers, motivating local and traditional producers to maintain such specific quality to keep playing in the big league.[186]

Furthermore, even though geographical indications usually are criticized for stifling competition against those products that are not protected,[187] they can actually have the opposite effect. When a product is geographically protected and enjoys a certain amount of reputation, producers who do not enjoy such protection will not be able to free-ride on the protected product's reputation, which encourages such producers to innovate and create different products to be able to compete in the market. This can lead to producers who would otherwise have merely aimed to free-ride on another's geographical indication, to instead create their own, which in turn encourages more competition.[188]

However, to promote the *sui generis* end-goal of helping traditional producers be competitive in the market, there needs to be a level of protection in place that forbids the use of identical terms.[189] Traditional producers are the ones responsible for the creation and the maintenance of a specific consumer's association of quality with their products. An unauthorized use of the

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[185] Margaret Ritzert, *Champagne is from Champagne: An Economic Justification for Extending Trademark-Level Protection to Wine-Related Geographical Indicators,* 37 AIPLA Q.J. 191, 212–20 (2009).
[186] Dev Gangjee, *Quibbling Siblings: Conflicts Between Trademarks and Geographical Indications*, 82 CHI.-KENT LAW REV., 1253, 1267 (2007).
[187] Kal Raustiala & Stephen R. Munzer, *The Global Struggle over Geographic Indications*, 18 EUR.J. INT'L L. 337, 351-62 (2007).
[188] Such was the case in Australia: when Australia ceased to use several terms in relation to wine that were protected under the European Union sui generis system, the Australian wine industry got to be internationally recognized for its quality. This was precisely because they stopped using other people's geographical indications, and began using their own. *See* Irene Calboli*, Expanding the Protection of Geographical Indications of Origin Under TRIPs: "Old" Debate or "New" Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181, 200–01 (2006).
[189] See Agdomar supra note 179 at 586-87.

geographical indication that indicates such quality would hurt the traditional producers by diluting the special characteristics that they are trying to exploit.[190] This, in turn, would also reduce the consumer's desire to buy their products, given that consumers would not be able to distinguish which products are authentic and hence bear the quality that traditional producers have fought to achieve. The geographical indication system proposed here would accordingly fight against those free-riders in the market who merely use evocative names of certain geographical areas in order to capitalize on the hard work that traditional producers put into creating a link between their geographical specific products and such products' quality.

Moreover, for the system to actually work, it needs to be based on the honest effort that traditional producers make in creating connections between the geographical location and the product's quality. The argument for disallowing free-riders to compete against traditional producers is hypocritical if producers are allowed to use such name to refer to products that have absolutely nothing to do with the geographical location in question or with traditional modes of production. Furthermore, allowing for such type of protection would inevitably saturate the market with geographical indications, devaluing the objective of geographical indications, and desensitizing consumers to products that are geographically protected.

Therefore, unlike in the European Union where PGIs and TSGs are protected, the geographical indication system proposed here would require a much higher connection between the geographical location in question and the product.[191] It would not be sufficient, for example, for the product to be created or produced using the traditional ingredients or practices of the locality, if the product in question does not actually come from such locality. Also, this geographical

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[190] Irene Calboli, Of Markets, Culture, and Terroir: The Unique Economic and Culture-Related Benefits of Geographical Indications of Origin, in INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 433, 448-449 (Daniel J. Gervais ed., 2015).
[191] *See gen.* Van Couter *supra* note 87 at 291-96.

indication system would not protect those products for which production has also been partially delocalized, or whose ingredients do not fully come from that specific geographical location. For example, the United States' determination that at least 75% of the grapes used in the wine needs to be from the specific locality for it to be labeled as coming from such locality would not be acceptable in this system.[192]

Therefore, in order to avoid stifling competition and inadvertently creating a monopoly, the requirements to grant geographical indication protection should be more demanding. To continue with the example of the percentage of grapes used in wine, this system would require for the percentage to reach a much higher number. This type of system would accordingly account for and shut down the possibility of abusing the role of geographical indications, while at the same time protecting those traditional producers that genuinely work on the connection between the geographical location and the product's quality.

CONCLUSION

Consumers today are demanding products of higher quality and with characteristics that go beyond their nutritional value. They have an increased interest in the health, environmental, and social impact of such products' production. Therefore, those countries that have invested in protecting their traditional production techniques should have a competitive advantage over those countries that have merely focused on more time-effective and efficient industrial techniques. This should give developing countries' products the push to compete on a global scale, given their products' added value.

However, this is only possible if the developing countries have a system in place to protect themselves from more technologically-savvy countries that can rapidly create rip-offs to capitalize

[192] 27 C.F.R § 4.25(b)(1).

on the added value of the developing countries' exotic products. Hence, to protect consumers who are looking for higher-quality products and products that have been traditionally produced, and to protect the traditional producers themselves, geographical indications are the best recourse.

In the trade world in which we currently live, the geographical indications' protection system that most effectively can protect developing countries is the *sui generis* system, such as that followed by the European Union. This system is less costly for developing countries, given that they would have access to *ex parte* and *ex officio* proceedings. Furthermore, unlike in the certification mark system currently in place in the United States, developing countries following a *sui generis* system would not have to use litigation to determine whether a certification mark has been created through common law. And even though it may seem that a *sui generis* system discourages the development and industrialization of developing countries, at this moment it is in fact the lack of industrial techniques that is attracting consumers' attention, and that would give developing countries the competitive advantage.

However, choosing the *sui generis* system over the certification mark system followed by the United States should not be construed as support for how the European Union's *sui generis* system currently works. Over the decades, the discussion around geographical indications between the United States and the European Union has highlighted the hypocrisy of the latter's rhetoric, and has shown that, instead of differences of ideology among both cultures, there is mostly a trade concern as to who is going to have the biggest competitive advantage over whom, and who has a better market access.

Therefore, in order to overcome this hypocrisy, there should be a clean-slate to enable developing countries to be part of the conversation. As the system is set up right now, the European Union has market control over geographical indications after decades of determining how to protect their own interests, which makes it increasingly hard for developing countries to participate in that market merely through the implementation of their own *sui generis* systems. On the same note, developing countries do not have the resources to implement the more business- and money-driven certification mark protection that the United States has. Therefore, the geographical indication system advocated in this Article alleviates the differences between the *sui generis* and the certification mark systems, while at the same time making it possible for developing countries to enter into and be competitive in the global marketplace.