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Remedies for non-EU Geographical Indication applicants and the ensuing responsibilities of EU institutions and Member States

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Abstract

According to a 2021 European Commission study, EU-registered Geographical Indications (hereinafter — GIs) are single-handedly responsible for doubling the sale value of the underlying goods bearing such quality labels, which are recognised as intellectual property (hereinafter — IP) rights. In theory, this quality scheme is also open to non-EU producers. However, non-EU producers often face unreasonable delays in the processing and registration of their GI applications, notably when their products are perceived as competitors by EU-producers (particularly, in the case of spirits). In such instances, the line between IP promotion and protectionism becomes blurred. Thus, non-EU applicants that are missing out on GI-generated higher earnings and lost market opportunities may consider resorting to legal remedies to seek substantial compensation. The article has a twofold objective: on the one hand, to illustrate the regional and international remedies available to applicants from third States seeking to register a GI in the EU; on the other, to warn EU institutions and Member States about possible liabilities stemming from protectionist conduct. First, the article provides a comprehensive analysis of the EU legal framework governing GIs, including relevant case law of the Court of Justice of the European Union and the WTO Dispute Settlement Body. Practical situations in which non-EU GI applications have not been treated in conformity with the EU framework are identified, as evidenced by GI databases (including the GI applications for Russian vodka, Cuban and Venezuelan rums). An overview of EU regional remedies is provided to address these situations, together with an assessment of their pros and cons. The article then focuses on international remedies available under relevant bilateral investment treaties (hereinafter —

BITs) to remedy the unfair treatment endured by non-EU GI applicants experiencing unjustified delays compared to EU-based GI applicants. The author suggests recourse to these international remedies to seek compensation for the lost profit directly caused by the EU administrative delays in processing non-EU GI applications. Based on the 2021 European Commission study on GIs itself, such lost profit can be quantified as the difference in sale price over the period during which the applicant has endured these administrative delays. This difference in sale price is precisely equal to the total value of the goods exported to the EU during the contested delay, since a GI leads to a twofold increase of the sale value.

Key words: investment arbitration, geographical indications, intellectual property, WTO, EU law, EU competition law, bilateral investment treaties

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Правовые средства защиты, доступные заявителям на регистрацию географических указаний из государств, не являющихся членами ЕС, и связанные с этим обязательства институтов Европейского союза и государств-членов

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Аннотация

Согласно исследованию Европейской комиссии 2021 года, зарегистрированные в Европейском союзе географические указания (далее — ГУ) обеспечивают двукратное увеличение стоимости реализации соответствующих товаров, маркированных такими знаками качества, которые признаются объектами прав интеллектуальной собственности. Теоретически данная система качества открыта и для производителей из государств, не являющихся членами ЕС. Однако на практике такие производители нередко сталкиваются с необоснованными задержками при рассмотрении и регистрации их заявок на ГУ, особенно если их продукция воспринимается как конкурентная по отношению к продукции производителей из ЕС (в частности, на рынке спиртных напитков). В подобных случаях грань между содействием охране интеллектуальной собственности и протекционизмом становится размытой. Поэтому для заявителей из третьих государств, которые вследствие отсутствия регистрации ГУ лишаются возможности получать более высокую прибыль и использовать дополнительные преимущества, связанные с географическими указаниями, открывается перспектива обращения к правовым средствам защиты с целью взыскания компенсации. Статья преследует двойную цель. С одной стороны, она выявляет, какие региональные и международные средства правовой защиты доступны заявителям из третьих государств, стремящимся зарегистрировать ГУ в ЕС. С другой стороны, она предупреждает институты Европейского союза и государства-члены о возможной ответственности, возникающей вследствие протекционистского поведения. Статью открывает всесторонний анализ правовой базы ЕС, регулирующей ГУ, в том числе практики Суда Европейского союза и Органа по разрешению споров Всемирной торговой организации. Выявляются случаи, когда заявки на регистрацию ГУ, поданные производителями за пределами ЕС, рассматривались с нарушением требований законодательства ЕС, что подтверждается данными реестров ГУ (включая заявки на регистрацию российской водки, кубинского и венесуэльского рома). Далее приводится обзор региональных средств правовой защиты в рамках ЕС, предназначенных для устранения подобных нарушений, а также оцениваются их преимущества и недостатки. Затем рассматриваются международно-правовые средства защиты, предусмотренные в двусторонних инвестиционных соглашениях, которые могут использоваться для устранения последствий несправедливого обращения с заявителями из государств вне ЕС, сталкивающимися с неоправданными задержками по сравнению с заявителями, базирующимися в ЕС. Автор предлагает использовать данные международные механизмы для взыскания компенсации за упущенную выгоду, возникновение которой обусловлено задержками в процедуре рассмотрения заявок на регистрацию ГУ, поданных производителями из третьих государств. Опираясь на упомянутое исследование Европейской комиссии 2021 года, упущенную выгоду можно определить как разницу в цене реализации продукции за период, в течение которого заявитель сталкивался с административными задержками. Эта разница в цене реализации фактически равна совокупной стоимости товаров, экспортированных в ЕС в течение оспариваемого периода задержки, поскольку регистрация географического указания приводит к двукратному увеличению стоимости реализации продукции.

Ключевые слова: инвестиционный арбитраж, географические указания, интеллектуальная собственность, ВТО, право ЕС, конкурентное право ЕС, двусторонние инвестиционные соглашения

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Introduction

Geographical Indications (hereinafter — GIs) are credited for single-handedly doubling the sale value of the products that obtain such quality certifications in the European Union (hereinafter — EU). Attributing such a significant positive impact to GIs carries the drawback of requiring corresponding compensation for those whose GI applications have not been treated fairly. Such unfairly treated GI applicants often originate from third States. This article has a twofold objective: on the one hand, to examine regional and international remedies available to applicants from third States seeking to register a GI in the EU in the face of prolonged EU administrative delays; on the other, to alert EU institutions and Member States to potential liabilities stemming from protectionist conduct. Firstly, the article defines what a GI is and explains how to apply for one in the EU by providing an overview of the relevant procedural framework and its timeframe. Secondly, by examining the EU and World Intellectual Property Organization (hereinafter — WIPO) registries of GIs, the article points to situations where non-EU GI applicants have not been treated in conformity with the EU framework, suggesting that at times the EU instrumentalises GIs as a tool of protectionism. In the third and fourth sections, the available regional and international remedies are discussed, respectively.

1. An overview of the EU application procedure for a GI

The EU's GI system protects and promotes, through a quality certification, the names of typical food products, wines, spirit drinks, as well as craft and industrial products that originate from specific regions or countries and possess specific qualities or a reputation linked to the production territory. Geographical indications are recognised as intellectual property (Montero García-Noblejas, 2024a, p. 133) and are registered in the Union register maintained by the European Union Intellectual Property Office. Producers of products that are granted a GI recognition may label them with the distinct EU GI symbols to inform consumers of the inherent guarantees, thereby making the products easier to identify on the market. Food products and wines can obtain either a Protected Designation of Origin (hereinafter — PDO) or Protected Geographical Indication (hereinafter — PGI) as GI certification, depending on the degree of connection with the geographical origin (PDO signals that all stages of production occur in a specific territory, while PGI requires at least one stage to be linked to the territory of origin). Whereas spirit drinks, craft and industrial products are eligible only for GI protection (Moerland, 2025, p. 17). In its broad sense, the overarching term of EU GI includes the concept of Appellations of Origin (hereinafter — AO), as found in many international treaties and defined in

Article 2(1)(i) of the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications.

Since its inception in 1992, the EU's GI quality scheme has also been open to products originating from third States (art. 12, Regulation (EEC) No 2081/92).[1] Under the current framework, the EU GI system remains open to products that originate from outside the EU — art. 13(2) and 14(2) Regulation (EU) 2024/1143[2] — as long as they meet the requirements for a GI; i.e. the name shall identify a product:

a) originating in a specific place, region or country,

b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin, and

c) if at least one of its production steps takes place in the defined geographical area.

Additionally, non-EU GI applicants need to prove that their product is protected in a similar manner in their country of origin.

Although a GI application may vary slightly depending on whether it concerns wine, a spirit drink, an agricultural product, or a craft or industrial product, it must include the product specification. This specification contains the name to be protected, a description of the underlying product and its production steps, the demarcation of the geographical area concerned, details evidencing the link between a given quality (or reputation or other characteristic) of the product and its geographical origin, the names and addresses of the competent authority or body entrusted with the quality control to verify producers' compliance with the product specification, and the Single Document summarising that product specification.[3] The GI application is to be submitted by the association or entity that brings together the producers of a given product — the so-called "producer group" — which becomes the right-holder of the GI once it is registered pursuant to Articles 9 and 32 of the Regulation (EU) No 2024/1143. Accordingly, the GI applicant is entrusted with the legal

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1 Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. https://eur-lex.europa.eu/eli/reg/1992/2081/oj/eng.

2 Regulation (EU) 2024/1143 of the European Parliament and of the Council of 11 April 2024 on geographical indications for wine, spirit drinks and agricultural products, as well as traditional specialities guaranteed and optional quality terms for agricultural products, amending Regulations (EU) No 1308/2013, (EU) 2019/787 and (EU) 2019/1753 and repealing Regulation (EU) No 1151/2012. https://eur-lex.europa.eu/eli/reg/2024/1143/oj/eng.

3 The specific content of the Product Specification are detailed in Article 94 of Regulation (EU) No 1308/2013 for wine, Article 22 of Regulation (EU) 2019/787 for spirit drinks, and Article 49 of Regulation (EU) 2024/1143 for agricultural products.

protection of the common interests of its members (Montero García-Noblejas 2024b, p. 307).

Non-EU GI applicants can submit their applications directly to the European Commission, which is responsible for the examination, publication in the Official Journal of the European Union (hereinafter — OJEU), the decision on the admissibility of any oppositions, and the registration of the GI applications at the EU level (since the EU framework on GIs is uniform and exhaustive for all EU Member States according to the CJEU judgments in the 2009 case C-478/07, Budějovický Budvar,[4] and the 2017 case C-56/16 P, Port Charlotte).[5] Under Article 17 of Regulation (EU) 2024/1143, an opposition may be lodged by a Member State, a third State, or a natural or legal person having a legitimate interest, and the Commission decides on the admissibility of such opposition.

Absent admissible oppositions, upon the expiration of the three-month period following the publication of the application, the Commission shall register the GI pursuant to Article 15(4) Regulation (EU) 2024/1143 in combination with Article 21(2) of the same regulation. In order to be published, an application must fulfil the requirements for a GI; therefore, once it is published and in the absence of any opposition, it appears that the Commission cannot exercise any discretion to refuse registration of the GI.

In the event of an admissible opposition where the applicant and the opponent fail to reach an agreement, the decision on the registration of a GI falls to the EU Member States rather than the Commission. This is because the Commission must follow the examination procedure laid down in Article 5 of Regulation (EU) No 182/2011, which sets out the rules and general principles concerning mechanisms for *control by Member States* of the Commission's exercise of implementing powers (emphasis added).[6] In such a case, a Committee composed of representatives of the EU Member States is convened by the Commission to vote on the draft implementing act to be adopted by the Commission. The Committee is chaired by a representative of the Commission, but the Commission does not take part in the Committee vote. The Committee delivers its opinion by way of a qualified majority (at least 55 % of the members

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4 Case C-478/07, Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH [2009], ECLI identifier: ECLI:EU:C:2009:521. https://curia.europa.eu/juris/document/document.jsf;jsessionid=1E1C05672CEBF3B7042F1064687C355F?text=&docid=77071&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7825985.

5 Case C-56/16 P, European Union Intellectual Property Office (EUIPO) v Instituto dos Vinhos do Douro e do Porto, IP [2017], ECLI identifier: ECLI:EU:C:2017:693. https://eur-lex.europa.eu/legal-content/SL-EN/ALL/?uri=CELEX:62016CJ0056

6 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. https://eur-lex.europa.eu/eli/reg/2011/182/oj/eng.

of the Council comprising at least 65 % of the population of the Union). If the Committee delivers a positive opinion, the Commission adopts the draft implementing act registering the new GI; if the Committee delivers a negative opinion, the Commission rejects the application for registration accordingly.

Articles 15, 17, and 21 of the Regulation (EU) No 2024/1143 lay down a clearly defined administrative timeframe for processing GI applications, ranging from nine months to two and a half years depending on whether any opposition is filed:

The examination may take between six and twelve months. If the examination is favourable, the application is published, triggering a three-month period for filing any opposition.

In the event of an admissible opposition, a consultation period between the applicant and the opponent opens, ranging from three to nine months.

If an agreement is reached as a result of the consultation, the Commission shall register the GI after verifying that the agreement complies with EU law, and, if necessary, amend the information published in the OJEU provided that such amendments are not substantial.

If the opposition remains unsettled, the Commission has fourteen days to convene the Committee composed of representatives of the EU Member States, who shall vote on the draft implementing act within a proportionate time limit. Although this time limit is not expressly defined, it is conceivable that it shall not exceed six months, since a six-month period is the time initially given to the Commission to examine the application prior to its publication (accordingly, six months could be regarded as a proportionate time limit for this purpose).

Despite the clearly defined administrative timeframe, a 2022 report by the European Court of Auditors found the EU's GI registration process to be lengthy, with delays on selected samples of applications taking up to 48 months due to slow replies from Member States to the questions raised by the Commission.[7] Although the 2022 report referred to the previous regulation, delays in the processing of certain GI applications from third States persist under the current regulation.

It is worth recalling that, in addition to foreign direct applications, non-EU GIs may enter the EU Register by virtue of bilateral trade agreements whose annexes contain a list of GIs mutually protected by the contracting parties.

[7] European Court of Auditors, Special report, EU intellectual property rights, Protection not fully waterproof (2022). P. 29. https://www.eca.europa.eu/Lists/ECADocuments/SR22_06/SR_EU-IPR_EN.pdf.

2. Geographical indications in the EU: IP promotion or IP protectionism?

According to a 2021 study conducted for the European Commission — titled "Study on economic value of EU quality schemes, geographical indications (GIs) and traditional specialities guaranteed (TSGs)" — once a GI is registered, the certification leads to a twofold increase in the sales value of the product bearing the EU GI symbol (European Commission, 2021, pp. 110–113). This study helps to illustrate the strategic importance of IP rights in promoting the value of traditional goods that have a special link with a given terroir and the tangible effects of such intangible assets as powerful marketing tools (Adinolfi et al., 2024, p. 696).

This EU study is not alone in its findings. Much private (Raimondi et al., 2020, pp. 330–356; Crescenzi et al., 2023, pp. 985–1007) and institutional[8] research observing this phenomenon points in the same direction: a GI is an effective IP right capable of obtaining a significant price premium. Nonetheless, the considerable monetary value generated by GIs can become a double-edged sword whenever this opportunity is denied to a non-EU GI applicant or is unfairly delayed. Such an applicant may quantify the damage suffered by equating the loss to the total value of exported goods to the EU over the period the applicant has endured administrative delays at the EU level (since a GI certification spikes the sale value by doubling it). Thus, the increase normally attributed to and generated by a GI could effectively be used as a yardstick to assess the loss of profit directly caused by the European Commission delaying the registration of a given GI. Indeed, had the GI applicant obtained the GI in due time, it would have been in a position to double the sales value of the underlying goods bearing that certification, thereby grossing double the earnings actually achieved. This is based, on the one hand, on the striking statistics of the EU study — pointing to the premium price of GI products, whose sales value is on average 2.07 times higher than that of comparable standard products without a GI label (European Commission, 2021, p. 102), as well as at the ability of a protected GI to single-handedly double the sales value of the underlying products (European Commission, 2021, p. 35) — and, on the other hand, on the principle of full reparation under international law, which calls for applying counterfactual reasoning to estimate the loss suffered as a result of a State's internationally wrongful act. As this article will illustrate, EU delays can indeed amount to international violations attributable to the EU Member States.

8 Strengthening sustainable food systems through geographical indications, An analysis of economic impacts, Food and Agriculture Organization (FAO) of the United Nations, Rome, 2018. P. 15. https://openknowledge.fao.org/server/api/core/bitstreams/afc44660-75ac-43b4-918e-ef4915c0ff52/content.

To further substantiate the damage endured, such an applicant may look to comparable products whose GI applications were processed more quickly and whose sales value notably doubled following the attainment of the GI. Examples are provided by an EU Parliament press release[9] concerning the spirits category, a sector which, incidentally, appears to have the highest rate of non-EU applicants for GIs experiencing administrative delays that gradually assume the character of a temporal limbo after five or even ten years of waiting.

Notably, non-EU GI applicants have faced ‘extra hurdles’ to be listed in the EU Register (Crupi, 2022, pp. 95–110). For instance, the application for “Russian Vodka” submitted in 2010[10] and published by the European Commission[11] on 22 March 2013, as it complied with the EU GI framework (including the requirement of being protected as an appellation of origin at the national level under certificate No 0065 with Federal Service for Intellectual Property, Patents and Trademarks (ROSPATENT), since 5 June 2003), has still not been registered as a GI. The application for the name “Russian Vodka” should have been registered once that the six-month period for oppositions had elapsed following its publication under the then applicable Article 17(7) of Regulation (EC) No 110/2008,[12] i.e. no later than 23 August 2013.[13] It is worth noting that such delays have nothing to do with any sanction targeting Russia. Additionally, the sanctions concerning IP rights imposed on Russia by Article 5s of the Council Regulation (EU) 2024/1745 of 24 June 2024[14] — providing that EU intellectual property offices and institutions shall not accept *new* applications for registration of, inter alia, protected designations of origin and geographical indications filed by Russian nationals or natural persons residing in Russia, or by legal persons, entities or bodies established in Russia — are not applicable

9 European Parliament. (February 28, 2024). Press Release, MEPs improve EU protection for quality agricultural products. https://www.europarl.europa.eu/news/en/press-room/20240223IPR18089/meps-improve-eu-protection-for-quality-agricultural-products.

10 eAmbrosia, Union register of geographical indications, Russian Vodka application’s data. https://ec.europa.eu/agriculture/eambrosia/geographical-indications-register/details/EUGI00000016167.

11 European Commission’s announcement of the Main specifications of the technical file for ‘Russian Vodka’ (2013/C 83/08), Official Journal of the European Union (March 22, 2013). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2013:083:FULL.

12 Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89. https://eur-lex.europa.eu/eli/reg/2008/110(1)/oj/eng.

13 Regulation (EC) No 110/2008 was repealed by Regulation (EU) 2019/787, which in turn was amended by . The six-month period for opposition and registration remained consistent throughout Regulation (EC) No 110/2008 and Regulation (EU) 2019/787, while Regulation (EU) 2024/1143 provides that the examination by the EU Commission can be by further five months.

14 Council Regulation (EU) 2024/1745 of 24 June 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine. https://eur-lex.europa.eu/eli/reg/2024/1745/oj.

to applications filed before the implementation of this regulation (such is the case of the GI application for “Russian Vodka” that was filed back in 2010). Indeed, the EU sanctions emphasise “new applications”, implying that these restrictions are enforceable only against applications made after the date of entry into force of the Council Regulation.[15] Accordingly, this Council Regulation should be interpreted to mean that existing applications or registrations filed before its adoption shall not be affected by these sanctions on IP rights.

Such EU administrative delays also raise the question whether, at times, EU Member States deploy IP not so much as an instrument to promote their own products but rather as a protectionist measure to make their internal productions more appealing to consumers to the detriment of non-EU producers, thereby setting up the conditions for unfair competition. Coincidentally, this appears to be especially the case whenever the non-EU applicant offers a product that is the same or very similar to that of EU producers, thus risking becoming a direct competitor. Again, the case of vodka provides a striking example, as within the EU there exist Polish, Swedish, Finnish, Estonian, and Lithuanian Vodkas, all registered as protected GIs. By labelling EU-produced vodka as a GI, EU producers can make their goods appear as a more premium version of the Russian counterpart and double up their profits accordingly.

Rum provides another example of IP protectionism, specifically orchestrated by France, which counterintuitively is the biggest rum producer in the EU (thanks to its overseas territories). Whenever a non-EU producer group applies for a GI for rum, France automatically files an opposition, thus delaying the application.[16] Guatemalan and Cuban applicants for a GI for rum are among the non-EU producers affected by this French practice. The Cuban case is particularly curious, as Italy has also joined the French opposition, justifying it not on technical grounds but on the reasoning that granting a GI to Cuban rum producers would be tantamount to legitimising the expropriations that occurred during the Cuban Revolution. Another stated reason behind Italy’s objection to the Cuban application is the manifest intention to protect the interests of the Bacardi-Martini group, which has chosen Italy as its strategic hub, as reported in the transcriptions of the Italian parliamentary debate of 13 February

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[15] See on this point the press release of July 1, 2024, by the European Communities Trademark Association (ECTA). https://ecta.org/en/latest-news-detail/news-973/eu-imposes-ip-registration-restrictions-on-russian-nationals-and-entities/.

[16] See for example, French *Commission Nationale Boissons Spiritueuses, Demande d’enregistrement de l’IG « Cuba »*, meeting of June 7, 2023. https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://extranet.inao.gouv.fr/fichier/COMNAT-EDV-20231121-Note-opposition-IG-Rhum-Cuba.pdf.

2024[17] and of the Italian Government's reply of 11 April 2024 to that debate.[18] It is worth recalling that none of these reasons constitute an admissible ground for opposition under Article 19 of EU Regulation (EU) No 2024/1143. Furthermore, it is noteworthy that the Cuban appellation of origin for rum has already been registered as such under the Lisbon Agreement since 28 April 2015,[19] and that none of the EU Member States that are party to the Lisbon Agreement (Bulgaria, Czech Republic, France, Hungary, Italy, Portugal, and Slovakia) refused to grant protection to such appellation of origin.[20] Nonetheless, this Cuban appellation of origin remains de facto unenforceable in the territory of the EU because of the exhaustive nature of EU law on GIs.

Venezuelan application for "Ron de Venezuela" has met a similar fate — if not worse — as its application has not been published, despite having been filed on 30 July 2020, i.e., more than five years ago as of the time of this writing.[21] This is notwithstanding the fact that the examination of the application by the Commission prior to its publication should have taken six months at most under Article 26 of the EU regulation in force at the time the application was filed, namely Regulation (EU) No 2019/787.[22] Under Article 15 of the Regulation (EU) No 2024/1143 currently in force (which amends Regulation (EU) No 2019/787), the scrutiny of the application by the European Commission could have been extended by only five additional months. As long as the application remains unpublished in the OJEU, its processing stays internal and is therefore subject to arbitrariness, which further slows its handling

[17] Italian parliamentary, transcriptions of debate of February 13, 2024. P. 123, https://www.senato.it/leg/19/BGT/Schede/FascicoloSchedeDDL/ebook/57949.pdf.

[18] Italian parliamentary transcriptions of the Italian Government's reply of April 11, 2024 to that debate. P. 18–20. https://www.senato.it/service/PDF/PDFServer/BGT/01412210.pdf.

[19] Registration of the Cuban Appellation of Origin of the term "Cuba" for rum under the Lisbon Agreement, dated April 28, 2015. https://lisbon-express.wipo.int/pdf/NOTIF_7123_AO-1010.pdf.

[20] The transaction history of the registration of this appellation of origin under the Lisbon Agreement is available on the WIPO Lisbon Express Database at the following URL: https://lisbon-express.wipo.int/result-detail?offset=1&limit=1&keywords=%7B%22offset%22:0,%22limit%22:25,%22searchText%22:%22*%22,%22sortBy%22:%22KEY%22,%22searchFields%22:%5B%7B%22key%22:%22ST%22,%22val%22:false,%22operator%22:%22AND%22%7D,%7B%22key%22:%22%22,%22val%22:%22*%22,%22operator%22:%22AND%22%7D,%7B%22key%22:%22AP,TRI,TRA%22,%22val%22:%22CUBA%22,%22operator%22:%22AND%22%7D,%7B%22key%22:%22LIS_GEN_ACT%22,%22val%22:%7B%22lisbonAct%22:%22Y%22,%22genevaAct%22:%22Y%22%7D,%22operator%22:%22AND%22%7D%5D%7D&queryType=STRUCT&sortBy=KEY.

[21] Data of the GI application for Ron de Venezuela can be retrieved on the EU e-Ambrosia database. https://ec.europa.eu/agriculture/eambrosia/geographical-indications-register/details/EUGI00000017515.

[22] Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation (EC) No 110/2008. https://eur-lex.europa.eu/eli/reg/2019/787/oj/eng.

compared with other GI applications. Venezuela has a long and rich history of rum;[23] there should be no reason why its product specifications do not meet EU standards. Moreover, Ron de Venezuela also meets the additional requirement under Article 13(2)(b) of Regulation (EU) No 2024/1143 of being protected as a designation of origin at the national level in its country of origin since 4 November 2003.[24]

Surprisingly enough, delays are not an exclusive feature of foreign direct applications. Some non-EU GIs that should have entered the EU Register by virtue of a bilateral trade agreement also experience delays in actually being registered within the EU (Crupi, 2022, p. 102), highlighting an unfortunate disregard for international commitments undertaken by the EU.

3. Regional remedies and their inefficiencies

Theoretically, non-EU GI applicants may bring actions before the General Court (hereinafter — GC) of the Court of Justice of the European Union (hereinafter — CJEU) to challenge unjustified delays by the European Commission, by means of an action for failure to act, an action for annulment, and/or an action for damages under Articles 265(3), 263(4), and 340 of the Treaty on the Functioning of the European Union (hereinafter — TFEU), respectively. Pursuant to Article 256(1) TFEU, the GC has jurisdiction to hear such actions at first instance, and its ruling may be appealed to the CJEU at second and final instance.

The non-EU GI applicant may bring its claim as a “non-privileged applicant”, being a legal person rather than an EU institution or a Member State. Such an applicant has legal standing under Article 265(3) where it can allege that is has been directly affected by the European Commission’s inaction concerning the proper processing or registration of its own GI application, and given that the Commission has a non-discretionary duty to act under secondary EU law. Prior to the filing an action for failure to act, the non-EU GI applicant must formally request the Commission to register its GI application. After being formally called upon to act, the European Commission has two months to define its position on the registration of the GI application. If the Commission does not issue any statement defining its position within that period, the non-EU GI applicant may lodge an action for failure to act against the Commission with the General Court within the following two months. If the Commission issues

[23] Gibbs, A. (2024). Una pasión con nombre propio: Ron de Venezuela. 20 años D.O.C. Ediciones Punto Paladar. P. 18.

[24] Resolución Nro. 798 de fecha 15 de agosto de 2003 del Servicio Autónomo de la Propiedad Intelectual de Venezuela, publicada en el Boletín de la Propiedad Industrial N°459 de fecha 04 de noviembre de 2003. https://sapi.gob.ve/wp-content/uploads/2024/06/BPI-459-TOMO-IX-DECLARATORIA-1.pdf.

a statement denying or further delaying the registration of the GI application, the action for failure to act becomes inadmissible, and the non-EU applicant may file a subsidiary action for annulment seeking to review the legality of the Commission's decision, within two months of its notification.

If the General Court upholds the applicant's complaint, it will declare in its judgment that the European Commission failed to act in breach of EU secondary law and thereby violated an obligation to act in the manner requested by the applicant (Thiele, 2021, para. 50). Depending on the circumstances of each case, the GC may find the Commission in violation of Articles 15(4) and 21 of Regulation (EU) No 2024/1143, meaning it failed to register the GI by means of an implementing act following the publication of the application and the expiry of the opposition period during which no admissible oppositions were filed (as is the case with the "Russian Vodka" GI application). Where an admissible opposition has been filed, the decision on the registration of the GI application falls to the Member States (as in the case with the Cuban application for rum and the French Government's opposition). In such circumstances, an action should not be directed against the European Commission, unless the delays stem from the fact that the Committee composed of representatives of the Member States has not yet been convened by the Commission to vote on the draft implementing act registering the application, or where the Committee has already delivered a positive opinion but the Commission has not yet followed through with the adoption of the draft implementing act registering the new GI, as required by Article 88 of Regulation (EU) No 2024/1143 and Article 5 of Regulation (EU) No 182/2011. Where a GI application has been filed but has not yet been published despite the expiry of the examination period by the Commission, the General Court may find that the Commission has infringed Articles 15(2) and 15(4) of Regulation (EU) No 2024/1143, meaning it failed to examine and publish the GI application in due time (as may be the case with the Venezuelan GI application for rum).

Should the non-EU GI applicant need to lodge an action for annulment because the European Commission has adopted a position by issuing an unfavorable decision on its GI application, the applicant may rely on the ground of infringement of any rule of law relating to its application, pursuant to Article 263(2) TFEU. On this basis, the applicant may complain of violations of general principles of EU law[25] — such as the principle of protection of legitimate

[25] Case 4/73, Judgment of the Court of 14 May 1974, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, para. 13. *European Court Reports 1974 -00491*, ECLI identifier: ECLI:EU:C:1974:51. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61973CJ0004.

expectations;[26] the principle of equal treatment[27] (where its application has been processed significantly more slowly than other EU applicants), and the principle of reasonable time in administrative proceedings[28] — as well as violations of the relevant rules of secondary EU law (Mańko, 2019, p. 7), including the deadlines set out in Regulation (EU) No 2024/1143 for processing a GI application.

The actions for failure to act and for annulment both seek a declaratory judgment, meaning that if successful, the CJEU merely declares the infringement under EU law with *ex tunc* and *erga omnes* effects. Nevertheless, the European Commission is obliged to take the necessary measures to comply with the General Court's judgment pursuant to Article 266 TFEU. However, due to the declaratory nature of the judgment, there is no formal mechanism to enforce it. Thus, if the Commission fails to comply with the GC ruling, the applicant is left only with the option of bringing another action for failure to act.

Alongside an action for failure to act and/or for annulment, the non-EU GI applicant may bring an action against the European Commission under Article 340 TFEU to seek compensation for the damages sustained as a result of the Commission's infringement of EU law, consisting in indefinitely postponing the processing and registration of its GI application. During such an infringement, the non-EU applicant has been missing out on the higher earnings generated by the GI, which would have doubled its sales profits and allowed it to compete on an equal footing with EU producers holding a GI. Based on the 2021 EU "Study on economic value of EU quality schemes, geographical indications (GIs) and traditional specialities guaranteed (TSGs)", the non-EU applicant can readily demonstrate the damage it sustained — specifically in the form of *lucrum cessans* (lost profit) — as well as the causal link between the damage suffered and the Commission's infringement of EU law: had the Commission processed and registered its GI application in due time in accordance with EU law, the non-EU producers would have earned double the profit from its sales during the years that the unjustified delays have lasted.

As there are no EU rules regulating the amount of compensation that may be awarded and the method of its calculation, if the General Court finds that the EU is liable for damages, it will leave the quantification of the amount to

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[26] Case C-519/07 P, Judgment of the Court (Third Chamber) of 17 September 2009, Commission of the European Communities v Koninklijke FrieslandCampina NV, ECLI:EU:C:2009:556. https://curia.europa.eu/juris/liste.jsf?language=en&num=C-519/07.

[27] Cases C-182/03 and C-217/03, Judgment of the Court (Second Chamber) of 22 June 2006, Kingdom of Belgium (C-182/03) and Forum 187 ASBL (C-217/03) v Commission of the European Communities, ECLI:EU:C:2006:416. https://curia.europa.eu/juris/liste.jsf?num=C-182/03&language=en.

[28] C-282/95, Judgment of the Court of 18 March 1997, Guérin automobiles v Commission of the European Communities, ECLI:EU:C:1997:159. https://curia.europa.eu/juris/liste.jsf;jsessionid=9ea7d2dc30d5cc9ae7d5edb740ca85f5efb5c7ebaf7c.e34KaxiLc3qMb40Rch0SaxuTahn0?num=C-282/95&language=en.

the parties so that they may reach an amicable settlement (Mańko, 2018, p. 7). Only if the parties fail to agree on the compensation to be awarded will the case return to the GC for its determination. Since such amicable settlements are often confidential, publicly available data on the compensation typically awarded are scarce. The available data come from cases where the GC had to determine the amount because the parties could not reach an agreement, and indirectly from the sums allocated in the EU budget that are earmarked for damages caused by EU institutions, bodies, and agencies.

Importantly, the action for damages is regarded as an independent remedy, meaning it is not conditional on the prior successful pursuit of a different cause of action. Furthermore, the action for damages could potentially be directed also against a Member State whose opposition had the sole objective of further delaying the registration of the non-EU GI applicant whose goods compete with that Member State's national producers. Indeed, this action allows for the establishment of concurrent liability where the damage is caused jointly by an infringement of an EU institution and one or several EU Member States (Mańko, 2018, p. 4).

Under Article 46 of the CJEU Statute, an action for damages must be brought within five years of the event giving rise to EU liability. However, where the damage caused by an EU institution is of a continuous nature (as is the case with non-EU GI applicants that suffer lost profit each year as long as the EU administrative delays persist), the claims for compensation become successively time-barred, meaning that damages cannot be claimed for any period falling more than five years before the action is filed.[29] Thus, in the case of the "Russian Vodka" GI application, which has been delayed for over a decade, the Russian applicant may claim the lost profit that the GI would have generated only for the last five years prior to the filing of its action for damages.

The main advantage of these regional remedies is that they are relatively inexpensive, since the proceedings before the GC and the CJEU are generally free of court fees under Article 139 of their respective Rules of Procedures. However, EU remedies for "non-privileged litigants" (i.e. individuals and legal persons) have a notably low success rate when addressing the liability of EU Institutions before EU courts (Mańko, 2018, pp. 8–9). Lack of predictability, consistency, and transparency, as well as the overall ineffectiveness of such EU remedies, have drawn many criticisms (Van Dam, 2013, p. 50) over the years, including from Professor A. Biondi (Biondi & Farley, 2009, p. 162), currently serving as Advocate General at the CJEU. Therefore, it is worth discussing the

[29] Case 256/80, Judgment of the Court (Fifth Chamber) of November 13, 1984, Birra Wührer / Council and Commission at para. 16, ECLI identifier: ECLI:EU:C:1984:341. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61980CJ0256%2801%29.

international remedies available, as they may offer access to more neutral, impartial, independent, and effective dispute resolution mechanisms, as opposed to EU courts ruling on violations by EU Institutions.

4. International remedies and investment protection

To seek full reparation for the substantial damage that a non-EU applicant may incur from EU delays in obtaining a GI, the applicant may invoke the BITs in force between its country of origin and the relevant EU Member States. This is possible as far as such BITs qualify GIs as protected investments, and the Draft Articles on Responsibility of International Organizations (hereinafter — DARIO)[30] provide for situations where a State remains responsible for an internationally wrongful act even when the international organisation (hereinafter — IO) to which that State belongs has competence over the subject-matter of the breach (as is the case with the Commission *vis-à-vis* the EU Member States with regarding GI applications). Additionally, EU trade and investment instruments (where applicable) and international intellectual property treaties may offer further legal support to assert the commitments undertaken by EU institutions and Member States in the field of geographical indications protection, by operation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (hereinafter — VCLT).[31] Indeed, Article 31(3)(c) VCLT enables investment arbitration tribunals to take into account "any relevant rules of international law applicable in the relations between the parties" when interpreting an investment treaty, thereby fostering a systemic cross-fertilisation of international law (Bianchi & Zarbiyev, 2024, pp. 157–184).

Many BITs concluded by EU Member States treat GIs as protected investments. Some BITs do so expressly by using the term "appellations of origin" (e.g. Article 1(2) of the Spain-Russia BIT),[32] while others do so implicitly by referring to IP rights generally, and since a GI is a form of intellectual property, it falls within the definition of a qualifying investment (e.g.

[30] International Law Commission, Draft articles on the responsibility of international organizations, Yearbook of the International Law Commission, 2011, vol. II, Part Two. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf. Although the DARIO are not contained in any binding international instrument, to a great extent they reflect the state of customary international law regarding the allocation of responsibility between an international organization and its member states, based on landmark cases addressed in the DARIO Commentary. Therefore, the DARIO are an authoritative codification of international custom applicable to the EU Member States for this purpose.

[31] Vienna Convention on the Law of Treaties 1969, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155. P. 331. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[32] Russia-Spain Bilateral Investment Treaty, signed on October 26, 1990, entered into force on November 28, 1991. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2225/download

Article 1(1)(d) of the Italy-Cuba BIT).[33] Accordingly, EU Member States are bound by the obligations contained in their respective BITs with regard to GI applications, meaning they must accord fair and equitable treatment (hereinafter — FET) to such applications, as well as national treatment and the most-favored-nation treatment. Where an applicant faces unjustified delays or an undue rejection, particularly when its application is processed less favourably than a comparable product from another national, EU, or third-country producer, that applicant may argue that the EU Member State has breached these investment protection standards through multiple investment arbitrations. Arbitral tribunals have found that substantial delays may amount to a breach of the FET standard.[34] In each arbitration, the applicant may claim as compensation an amount equal to its sales volume in each EU Member State over the relevant period (since its loss consists of not having been able to double the unit sales value of its products). For instance, the "Russian Vodka" Producers Association could be in a position to seek compensation of over EUR 1 billion from the various EU Member States collectively for having endured a decade-long delay in the registration of its GI, considering that the EU imported approximately EUR 100 million worth of vodka from Russia per year during the contested period.[35]

Moreover, the GI applicant may also recover the amounts spent on advertising its product in the EU by its affiliates, since those sums amount to investments in the goodwill and reputation of the GI application — in other words, sunk costs for the purposes of investment protection.

Part Five of the DARIO addresses the responsibility of a State in connection with the conduct of an IO. Articles 59, 61, and 62 may assist a non-EU applicant in attributing to each EU Member State responsibility for the EU's protracted administrative delays or rejection of its GI application. Article 59 provides for the responsibility of a State that controls an IO in the commission of an internationally wrongful act. EU Member States exercise such control in cases of opposition by directly voting for the adoption of the implementing act that decides on the registration of a GI, and that contributes to administrative delays through their slow replies to the Commission. Article 62 provides for the responsibility of a State member of an IO that circumvents its international obligations by taking advantage of the fact that the IO has competence over the

[33] Italy-Cuba Bilateral Investment Treaty, signed on May 7, 1993, entered into force on August 23, 1995. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/907/download.

[34] *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2. Para. 664. https://www.italaw.com/sites/default/files/case-documents/italaw9215.pdf.

[35] Statista Research Department, Export value of vodka from Russia from 2016 to 2021 (in million U.S. dollars). https://www.statista.com/statistics/1013917/exports-of-vodka-by-region-russia/

subject-matter of the breach of that State's international obligations. EU Member States have certain obligations concerning the treatment of GI applications by virtue of the BITs they have entered into. Although Member States may have delegated competence over GIs to the Commission, they cannot delegate their responsibility to promote and protect such IP-qualified investments in accordance with their respective BITs. Under international law, the internal arrangements made by EU Member States do not override their international obligations, pursuant to the maxim *pacta sunt servanda*. Lastly, Article 62 provides for the responsibility of a State member of an IO for an internationally wrongful act of that organisation if that State has accepted responsibility towards the affected party. Importantly, such acceptance may also be implied. Thus, a Member State that does not actively remedy an international violation of the organisation may be held jointly and severally liable.

Interestingly, the emerging EU strategy of placing the protection of GIs at the heart of the intellectual property chapters of its bilateral trade and investment agreements has been cited as a factor suggesting a high likelihood of future investment disputes involving GIs, given the substantial role of public authority in shaping GI specifications, which may lead to protectionist and anticompetitive measures adversely affecting a GI proprietor's rights (Sanders, 2017, pp. 168–185). Examples of this EU practice include Article 46 of the Cotonou Agreement[36] — to which Cuba and the EU are parties — and Article 74 of the EU-Kenya Economic Partnership Agreement (EPA), both of which acknowledge the importance of protecting GIs. However, such EU trade and investment instruments generally do not offer the same degree of protection as individual EU Member States' BITs; accordingly, their role in enforcing a GI is marginal. On the other hand, EU bilateral agreements that exchange an appendix listing specific mutually recognised GIs may offer a robust level of protection. Such is the case with the EU-Chile Association Agreement,[37] which, curiously enough, recognises and protects "Vodka chileno" as a GI.

Regarding international intellectual property law treaties and their bearing on investment arbitrations involving GIs by way of Article 31(3)(c) VCLT, a distinction should be drawn between their procedural and substantive aspects. It is the substantive part of these treaties (such as the definition of GIs and

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36 Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (the Cotonou Agreement), entered into force on April 1, 2003. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2499/download.

37 2002 Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2002.352.01.0003.01.ENG&toc=OJ:L:2002:352:TOC.

the standards of protection to be accorded to them) that can have an impact in investment arbitrations. Critically, in the context of an investment arbitration, whether an IP right qualifies as a protected investment under the relevant investment treaty and whether the respondent State has breached one of its obligations with respect to that protected investment are questions governed by international law, rather than the municipal law of the host State. As international intellectual property law is part of international law, where an investment dispute concerns IP rights, the specialised rules of international intellectual property law enshrined in the relevant body of IP treaties may come into play as the applicable law for such a dispute (Oke, 2025, p. 180). Accordingly, applicable international IP treaties can serve to assess whether a breach of an investment protection standard under the relevant BIT concerning an IP-qualified investment has occurred. International IP treaties that provide for the protection of geographical indications include the 1883 Paris Convention for the Protection of Industrial Property, the 1891 Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods, the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration and its 2015 Geneva Act, the 1995 WTO Agreement on Trade Related Aspects of Intellectual Property Rights (hereinafter — TRIPS) (Verma & Dhiman, 2024, pp. 78–81). Thus, infringements of obligations concerning GIs under any of these IP treaties may, where applicable, constitute the cause of action of a GI applicant in an investment arbitration.

Such infringements would translate into a breach of the FET standard under the applicable BIT, because the host State's compliance with the obligations contained in the relevant international IP treaties informs the content of foreign investors' legitimate expectations. In other words, foreign investors may reasonably rely on the host State respecting the international obligations of the treaties to which it is a party. Consequently, foreign investors are entitled to have those expectations protected against any host State infringement of such international obligations affecting their investment. Potentially, such infringements may also be regarded as a violation of the umbrella clause of the relevant BIT, whereby the host State undertakes to observe any obligations it may have entered into with respect to foreign investments (including those arising from IP treaties). Indeed, the possibility of enforcing WTO obligations through investment arbitrations is not a novel concept (Alford, 2013, pp. 55–60).

Notably, Section 3 of Part II of the TRIPS Agreement imposes on the WTO Member States the obligation to provide interested parties with the legal means to protect their geographical indications. By obstructing the registration of a GI application that meets the definition of a GI under Article 22(1) of the TRIPS Agreement, the EU and its Member States are effectively preventing the GI applicant from protecting its GI within the EU and are therefore contravening their obligation under the TRIPS Agreement to provide that interested party with the legal means to protect its GI in the EU. For instance, on multiple occasions during the Russia — EU Intellectual Property Dialogue Meetings, the Russian delegation raised concerns regarding the legal protection of the “Russian Vodka” designation in the EU, because without the registration of this GI, Russian stakeholders cannot properly protect their IP rights against the use of the term “Russian Vodka” in trademark applications in the EU or against counterfeit Russian vodka flooding the EU market.[38] A GI is also a helpful tool to protect a product against fraud, international standardisation, and unfair competition (De Filippis et al., 2022, p. 8).

By the same token, WTO jurisprudence also becomes relevant for interpreting the TRIPS Agreement where that international treaty becomes applicable law in the context of investment arbitrations dealing with IP investments, due to the very nature of the rights at stake (Allen & Soave, 2014, p. 31; Dolzer et al., 2022, pp. 262–263). Curiously enough, the EU application procedure for GIs has already been at the centre of a WTO dispute,[39] and the Panel’s report — as adopted by the Dispute Settlement Body (hereinafter — DSB) — indeed found violations by the EU of the national treatment (hereinafter — NT) with respect to geographical indications under Article 3(1) of the TRIPS Agreement. In 2005, the WTO Panel held that the EU regulation in question did not provide NT to other WTO Members’ right holders and products, because: (a) registration of a GI from a State outside the EU is contingent upon the government of that State adopting a system of GI protection equivalent to the EU system and offering reciprocal protection to EU GIs; (b) the regulation’s procedure requires the non-EU GI holder to file its GI application in the EU through its own government, which must vet the application for consistency with EU regulations and operate a system of product inspection (so-called “government intervention”) (Handler 2006, pp. 70–80). By providing “formally identical” but in fact different procedures based on the origin of a GI, non-EU nationals did not enjoy the same access to the EU system for GIs as EU nationals; thus, the EU regulation was discriminating against foreign nationals and foreign products with respect to GI protection. Following the WTO dispute,

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[38] See Rospatent’s Press release on 8th Russia – EU Intellectual Property Dialogue Meeting, December 7, 2009: https://rospatent.gov.ru/en/news/2009-12-07-2dc711f8-4e4b-11e1-cadd-9c8e9921fb2c and Rospatent’s Press release on 9th Russia – EU Intellectual Property Dialogue Meeting of June 15, 2010: https://rospatent.gov.ru/en/news/2010-06-15-press_9.

[39] WT/DS174 - European Communities - Protection of trademarks and geographical indications for agricultural products and foodstuffs, WTO dispute settlement case - Complaint against the EU by the USA, Panel report of 15 March 2005, adopted on 20 April 2005 by DSB. P. 165–168. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/174R.pdf&Open=True.

the EU amended its regulation on GIs to comply with the DSB's findings. Nonetheless, Australia and the United States still disagree that the EU has fully implemented the DSB's recommendations.[40] Admittedly, under the current EU regulation on GIs, foreign "government intervention" is no longer required to file an application for a non-EU GI. However, the requirement for the non-EU applicant to show that its country of origin has a system of GI protection equivalent to the EU system persists. Indeed, the non-EU GI applicant must prove that its product is protected in a similar manner in its own country as per Article 13(2)(d) of the Regulation (EU) No 2024/1143. That requirement appears to be interpreted in a non-stringent manner. However, where the EU does appear to continue discriminating against non-EU GI holders is in the length of time required to process and register non-EU GIs, which experience delays far beyond the administrative timeframe set for such purpose.

Likewise, the practice developed by those EU Member States that are party to the Lisbon Agreement on the Appellations of Origin (hereinafter — AO) may also give rise to investment arbitrations. Such EU Member States circumvent their obligations under the Lisbon Agreement on the pretext of the exhaustive nature of the EU framework on GIs, rendering AOs already registered in the International Register of the Lisbon system de facto unenforceable (unless and until they also undergo the protracted EU registration process). In such circumstances, under the applicable BIT, the GI proprietor could also invoke protection against expropriation of its qualifying investment (represented by its registered AO or GI in the Lisbon system). Indeed, by denying the legally binding effects of the Lisbon Register — where AOs and GIs should be directly enforceable in the States of the Lisbon Union — EU Member States are indirectly expropriating the GI from the GI proprietor. To a certain degree, the practice of EU Member States is also inconsistent with the CJEU's 2022 ruling in Case C-24/20,[41] *European Commission v Council of the European Union,* which allowed those EU Member States that were party to the 1958 Lisbon Agreement to ratify individually the 2015 Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications. If such EU Member States were ultimately authorised to ratify the Geneva Act — despite the European Commission's exclusive competence on GIs — then it follows that they are in a position to honour individually the international commitments entered into under the Lisbon system. Consequently, a GI or AO from the Lisbon

[40] See the WTO dispute overview: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm.

[41] Judgment of the Court (Grand Chamber) of 22 November 2022, European Commission v Council of the European Union. ECLI identifier: ECLI:EU:C:2022:911. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CJ0024.

Register should be directly enforceable in their respective territories without the prerequisite of also being registered in the EU register by the Commission.

Lastly, Article 10bis of the 1883 Paris Convention for the Protection of Industrial Property — the first multilateral treaty providing for the protection of, inter alia, appellations of origin and indications of source — could also be interpreted imposing a further substantive obligation that is not met by the EU's protectionist use of Gis, thereby lending itself to possible investment arbitration. Article 10bis requires Contracting Parties to assure effective protection against unfair competition. Although the article is primarily aimed at ensuring protection against unfair acts by competing market actors, Article10bis(2) defines unfair competition broadly (Gangjee, 2024, p. 97) and Article10bis(3) provides a non-exhaustive list of acts falling within that definition. Therefore, this provision could be also construed as requiring the Contracting Parties not to actively engage in creating tailored conditions for unfair competition by discrediting the quality of a foreigner's goods on ground that the latter has not obtained a registered GI in the EU, as opposed to national manufacturers of the same goods. In other words, using GIs as a regulatory market measure to convey the misleading impression that certain foreign competitors' goods are of inferior quality compared to national producers' goods could constitute an act of unfair competition by a State, where the State (or the IO to which the State belongs) is deliberately delaying the attainment of the GI quality certification by those foreign competitors. As highlighted above, it would appear that EU Member States sometimes resort to the GI quality scheme as a protectionist measure by indefinitely delaying the granting of a GI to non-EU producers who happen to offer a product that can compete with EU producers because of its characteristics (as is the case of Russian vodka or Cuban and Venezuelan rums). As a result, GI EU products appear artificially more valuable on the market to the detriment of non-EU producers. Accordingly, such use of the GI quality scheme by the EU Member States, which skews the level playing field at the expense of non-EU competitors, may contravene their international obligation to guarantee fair competition as enshrined in Article 10bis of the Paris Convention and, in turn, the obligation to accord FET to non-EU GI applicants under the applicable BITs.

In a not too dissimilar fashion, Cuba argued that Article 10bis of the Paris Convention was breached by Australia in the WTO tobacco plain packaging case, where cigarette brands were mandatorily stripped from the packaging. Cuba maintained that Australia's legislative measures constituted an act of unfair competition, on the grounds that they created conditions for unfair competition by traders against which Australia was obliged to offer effective protection.[42] In that case, the WTO Panel did not side with Cuba's argument, principally because Australia's measure applied indistinguishably to all competitors (nationals or foreigners) and public health concerns were a consideration warranting the use of regulatory powers.[43] By contrast, the EU's instrumentalisation of the GI quality scheme is selective (it primarily benefits EU producers), and no public health concerns can be invoked as a defense to justify the exercise of regulatory powers (if anything, the opposite is true, as some GIs promote the consumption of alcoholic beverages). Hence, in such instances, the argument that a State breach Article 10bis of the Paris Convention by distorting the conditions of fair competition may actually succeed. As noted above, studies and reports show that consumers are willing to pay a premium for goods bearing a registered GI in the EU. By unfairly delaying or denying the registration of a GI to non-EU producers, the EU and its Member States are actively distorting the marketplace, as their conduct affects the ability of non-EU producers to charge that premium, whereas EU producers of competing goods can do so. Such regulatory-generated asymmetrical conditions lead to unfair competition directly caused by the EU and its Member States. These measures could be sanctioned in investment arbitrations to the extent that they encroach upon intellectual property qualified as foreign protected investment. Indeed, non-EU producers are placed in a position where they cannot reap the same returns from their investments in their GI as EU producers can, due to the obstruction by the EU and its Member States.

Conclusion

According to EU Institutions, once a GI is registered, the unit sales value of a product bearing a GI certification becomes, on average, double that of a similar non-certified product. The EU GI system is designed to protect and promote IP rights and is also open to non-EU producers. However, non-EU producers often experience lengthy administrative delays in their GI application process at the EU level, especially, when their product is perceived — due to its inherent characteristics — as a competitor by EU producers (particularly in the spirits sector). In such instances, the line between IP promotion and IP protectionism becomes blurred.

[42] WTO, Reports of the panels, *Australia – certain measures concerning trademarks, geographical indications and other plain packaging requirements applicable to tobacco products and packaging*, 28 June 2018, B-60-71, paras 66–71. https://www.wto.org/english/tratop_e/dispu_e/435_441_458_467r_a_e.pdf.

[43] WT/DS435/R ; WT/DS441/R ; WT/DS458/R ; WT/DS467/R, Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Report of the Panels, para. 7.2721. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/435R.pdf&Open=True.

Had such a non-EU GI application been registered in due time, that non-EU producer could have marketed its products at double their sale price much earlier, since the certification causes a twofold increase in sales values. Consequently, such a non-EU applicant may be in a position to claim as lost profit the difference in sale price during the unjustified delay period in its GI application process, either by filing an action for damages before EU courts or by invoking the BITs in force between its home State and the EU Member States that protect IP rights, including GIs. EU legal action may be more affordable than international remedies, but the latter offer access to a neutral, impartial and more effective dispute resolution mechanism through international arbitration. Will Cuban, Venezuelan, and Russian GI applicants avail themselves of such remedies to seek substantial compensation? Resorting to these remedies may have the desirable effect of speeding up the registration of these non-EU GIs. Furthermore, even if these non-EU GIs are eventually registered, the respective GI holders will still be able to claim damages for the unfair delays their applications endured, which caused them lose half of their profits during the relevant period.

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