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Brazilian GIs Landscape: From the TRIPS Commitments to the Real World, What Was Achieved, What Is Yet to be Faced?

After 25 years of the TRIPS Agreement, it is time to look at the Brazilian GI system and how it has developed since its establishment. GIs under TRIPS might not be the universal consensus, but they formed the starting point for the Brazilian GI system, and since 1996 GIs are expressly mentioned as such in domestic legislation. The article analyses the Brazilian GI journey from TRIPS to today's framework, and points out the challenges that are yet to be faced at domestic, regional and international level.

I. Introduction

In the pre-World Trade Organization (WTO) era, the intellectual property system in Brazil did not regard the geographical indication (GI) as an intellectual property right (IPR). Previous laws, starting in 1923, had provisions for *indications of provenance*¹ or *indications of source*, but these did not match the definition of a GI.²

At the end of the Uruguay Round it became clear that those nations wishing to be part of the WTO must comply with the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Thus, having ratified the WTO establishment agreement and, consequently, the TRIPS Agreement in 1994, Brazil, alongside other ratifying countries, needed to implement a set of trade obligations together with the minimum standard protection for IPRs, including GIs.

In 1996, the Brazilian government enacted a new law, the Brazilian Industrial Property (IP) Act (Law No. 9,279). Since then, GIs have been part of the national industrial property system and are seen as a promising tool for the country, not only as an IPR itself but also as a factor in development, a differentiation tool in marketing strategies and a way to help preserve traditional knowledge and traditional cultural expressions.³

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1 The indication of provenance conveys information about the place of production. It does not communicate that the good has certain qualities or characteristics or is subject to particular rules of production. See Alberto Francisco Ribeiro de Almeida, *Denominação de Origem e Marca* (Coimbra Editora 1999).

2 Decree No 16.254/1923 establishes the concept of the *geographical indication of the provenance of the products* and its indirect protection. The legislators chose the same expression *indication of provenance* in Law-Decrees No 7.903/1945, No 254/1967 and No 1005/1969. Decree No 24.507/1934 and Law No 5.772/1971 both contained provisions for the indirect protection of the *indication of source*. The Criminal Code (Law-Decree No 2848/1940) and the Criminal Procedure Code (Law-Decree No 3689/1941) also played a role by providing penal protection through the prevention of unfair competition. None of these provisions, however, matched the understanding of a GI.

3 See Sarah Bowen, 'Embedding Local Places in Global Spaces: Geographical Indications as a Territorial Development Strategy' (2010) 75 *Rural Sociology* 209.

TRIPS was the first multilateral instrument that offered a broad definition of GIs in terms of protection, as it is not tied to the concept of appellation of origin, which was already well known by the time the Agreement was drafted.⁴ It is also one of the main reasons why GIs are nowadays a topic of growing interest not only for producers but also for academics, policymakers, legislators, trade negotiators, lawyers and economists among other professionals. In addition, GIs are no longer restricted to traditional GI European countries such as Portugal, France, Italy or Spain.

Nonetheless, it is evident that the countries that embraced the concept of the GI after TRIPS still need to learn about it, as is the case with Brazil, where several improvements are yet to be made once the challenges have been overcome. Internally, they range from legislative review and policy establishment to producer and consumer awareness campaigns. Externally, there is the need to prove that the system can adapt to regional cooperation and international commitments.

On the basis of the TRIPS requirements,⁵ Brazil has established a new GI system, which has yet to prove if it is good enough for the Brazilians, if it provides the producers with the means to make the most of their GIs and if it is ready for external commitments. This article is guided by questions about the background, current working and expectations around the Brazilian GIs system, and it aims to provide an understanding of how GIs stand in Brazil and before the world.

Thus the text presents three content sections. Section II provides information about the system framework in general and in the light of international standards and references. Following that, Section III presents an overview of

4 For an interesting overview of the making of the TRIPS Agreement, see Jayashree Watal and Antony Taubman (eds), *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations* (WTO 2015) <https://www.wto.org/english/res_e/publications_e/trips_agree_e.htm> accessed 15 March 2020.

5 See Daniel Gervais, 'Geographical Indications under TRIPS' in Dev S Gangjee (ed), *Research handbook on intellectual property and geographical indications* (Edward Elgar 2016).

the issues that arise from the relationship between the legal and practical scenarios, i.e. the working of the GI in action in the domestic scene for Brazilian producers and consumers. Section IV comments⁶ on the major challenges in the country. It argues that there are two distinct and essential aspects concerning challenges for GIs in Brazil: one from the producer side and the other from the government, but regardless of the origin of the issue, both parties always need to be involved.

II. The Brazilian GI system framework

1. Legal framework

The way GIs are understood nowadays goes back more than a century, and was influenced by the status quo at the time, i.e., the first rules – and of course the most powerful contracting members influenced each of the relevant international agreements.

For that reason, and to maintain historical coherence, it is worth mentioning that the history of GIs⁷ started – at international level⁸ – with the Paris Convention for the Protection of Industrial Property⁹ in 1883, but without including a definition of GIs. Next came the 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods,¹⁰ which provides a means of protection for GIs through the unfair competition system. These were followed in 1958 by the Lisbon Agreement with its definition of appellations of origin, supplemented by the inclusion of geographical indications in 2015 through the Geneva Act¹¹ of the Lisbon Agreement.¹²

In the regional scenario, the Protocol on Harmonization of Intellectual Property Norms in Mercosur in the Field of Trademarks, Indications of Source & Appellations of Origin was adopted in 1995 but to date has not yet been ratified by any Mercosur country. However, as Brazil has adopted part of it, namely the GI concepts, it will be the object of discussion in part three.¹³

In Brazil, GIs are a result of – and perhaps only exist because of – the TRIPS Agreement. The TRIPS provisions state that GIs are indications that identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristics of the good is primarily attributable to its geographical origin (Art. 22.1).¹⁴ This is the standard protection, which ensures the right to exclude others

from using the geographic name in a manner which misleads the public, and means that the definitions of the GI in domestic legislation should be based on quality, reputation or other characteristics of a good that can relate the given good to its geographical origin. Any of those features alone is a sufficient basis for eligibility as a GI.¹⁵

In terms of domestic legislation in force, Brazil is very concise.¹⁶ The provisions in the Industrial Property Act consist of a few articles on the subject and do not define the GI; instead the Act identifies the GI as (i) an indication of source (IP) or as (ii) a denomination of origin (DO).¹⁷ The text reads as follows:

‘176. A geographical indication shall be an indication of source or a denomination of origin.

177. Indication of source shall mean the geographic name of a country, city, region or locality in its territory, which has become known as a center of extraction, production or manufacture of a given product¹⁸ or of provision of a given service.

178. Denomination of origin shall be the geographical name of a country, city, region or locality in its territory, that designates a product or service whose qualities or characteristics are due exclusively or essentially to the geographical environment, including natural and human factors.’

The system is based on registration, which has a declaratory effect and provides the same level of protection for both IPs and DOs, regardless of the difference concerning the link requirement. The DO involves a link with the natural and human factors of the given geographical area, which is not required of the IP, which is directly related to the renown of the geographical area.

The scope of protection is broad¹⁹ and covers not only agri-foodstuffs, but also handicrafts, industrialised items, as well as services. The possibility of having GI protection

¹⁴ For a more detailed narrative of the debates that led to art 22.1 of TRIPS, see Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge University Press 2012).

¹⁵ This statement is to be interpreted in line with the TRIPS Agreement, art 22. Some scholars go even further on the topic, defending that only art 23 TRIPS Agreement offers ‘real’ protection, while what art. 22 provides is negative protection – protection of interests, close to the unfair competition rules. In this regard, see Alberto Ribeiro de Almeida, ‘The Legal Nature of Geographical Indications and Designations of Origin’ (2014) 36 EIPR 640; Alberto Francisco Ribeiro de Almeida, *A Autonomia Jurídica Da Denominação de Origem: Uma Perspectiva Transnacional. Uma Garantia de Qualidade* (Coimbra Editora 2010). See also Felix Addor and Alexandra Grazioli, ‘Geographical Indications beyond Wines and Spirits’ (2005) 5 The Journal of World Intellectual Property 865; criticism of the TRIPS provisions on the possibility of having a GI based only on reputation is another important issue. See, for instance: Irene Calboli, ‘In Territorio Veritas? Bringing Geographical Coherence into the Ambiguous Definition of Geographical Indications of Origin’ (2014) 6 WIPO Journal 57.

¹⁶ Dominique Barjolle, Bertil Sylvander and Erik Thévenod-Mottet, ‘Public Policies and Geographical Indications’ in Elizabeth Barham and Bertil Sylvander, *Labels of origin for food: local development, global recognition* (CABI 2011) <<http://www.cabi.org/cabebooks/ebook/20113165529>> accessed 15 March 2020; Erik Thévenod-Mottet and Delphine Marie-Vivien, ‘Legal Debates Surrounding Geographical Indications’ in Barham and Sylvander (ibid) <<http://www.cabi.org/cabebooks/ebook/20113165524>> accessed 15 March 2020.

¹⁷ See Brazilian Industrial Property Act (Law No 9279) 1996.

¹⁸ Since the Brazilian legislation uses the word *product* and not *good* in its official translation – as well as in the original version, where *produto* is used instead of *bem* – the word *product* will be retained by the author when referring to domestic GIs.

¹⁹ Although the additional protection provided in the TRIPS Agreement for wines and spirits is not expressly available in the national legal framework.

⁶ It is not the author’s intention to deal exhaustively with the topics, each of which could be the object of a separate text.

⁷ Hélène Ilbert and Michel Petit, ‘Are Geographical Indications a Valid Property Right? Global Trends and Challenges’ (2009) 27 Development Policy Review 503. <<http://doi.wiley.com/10.1111/j.1467-7679.2009.00457.x>> accessed 15 March 2020.

⁸ Although not in bilateral agreements and the domestic regulations in many countries, in the Middle Ages there were nevertheless regulations that protected geographical names that had a qualitative function.

⁹ Paris Convention for the Protection of Industrial Property (as amended on 28 September 1979) 1883.

¹⁰ Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1891.

¹¹ Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications 2015.

¹² Of the mentioned treaties, Brazil is only a contracting party to the Paris Convention.

¹³ Protocol on Harmonization of Intellectual Property Norms in Mercosur in the Field of Trademarks, Indications of Source & Appellations of Origin 1995.

in connection with services²⁰ is a very interesting feature of the Brazilian system,²¹ and is also available in other countries such as Peru, Morocco and Korea. On the European side, this protection is available in Liechtenstein and Switzerland, and within the EU, in Latvia. This is, however, easy to understand to a certain extent, as in most EU countries as well as at EU level protection is restricted to agri-foodstuffs²² and is not even available for handicrafts.²³

The Brazilian Industrial Property Office (INPI) is the body responsible for the establishment of the registration conditions. Normative Instruction No. 95/2018 sets out these requirements alongside rules regarding geographical names not susceptible to registration, and the requirements imposed on applicants, *inter alia*.²⁴

The organisation representing the groups of producers is the legal representative entitled to apply for GI registration. It therefore acts on behalf of the producers established in the territory in question entitled to the exclusive right to use the geographical name. If there is only one producer or service provider entitled to use the geographical name, the natural person or an entity can apply for the protection. For a foreign GI already protected in the country of origin, the body responsible for the initial registration is responsible for the application in Brazil.²⁵

The documentation that needs to be submitted when applying for the registration includes in general and for both types of GIs:²⁶

- a. The application form, proof of payment of application fees and evidence of legal representation; a sample label' if the GI is represented in graphic or figurative form; evidence that there are producers or service providers in the geographical area, and other formal requirements;
- b. The specification, which shall contain:
 - i. the geographical name the application refers to;
 - ii. the description of the product or service;
 - iii. the official document that recognises the geographic area in question;²⁷

²⁰ At present, there is one service-related GI in Brazil, the *Porto Digital IP* for technological and digital services, registered in 2012.

²¹ This is a much-enlarged approach under TRIPS, which allows not only products but also services, in the sense that the word goods, in essence, covers more than only products.

²² See Insight Consulting, OriGIn and REDD, 'Study on Geographical Indications Protection for Non-Agricultural Products in the Internal Market' (2013) <https://www.upv.cz/dms/pdf_dokumenty/information_sources/geographical_indications_Study.pdf> accessed 15 March 2020.

²³ Although the EU Commission has been working on an extension of protection for non-agricultural GIs at least in recent years, with the most recent related study published in February 2020 dealing with the economic aspects of the protection for non-agricultural products. Details on the EU Commission on this matter as well as access to the studies already published are available at <https://ec.europa.eu/growth/industry/policy/intellectual-property/geographical-indications/non-agricultural-products_en> accessed 15 March 2020; see also Andrea Zappalaglio, Flavia Guerrieri and Suelen Carls, 'Sui Generis Geographical Indications for the Protection of Non-Agricultural Products in the EU: Can the Quality Schemes Fulfil the Task?' (2020) 51 IIC 31.

²⁴ Instrução Normativa PR No 95 2018.

²⁵ *ibid* art 5.

²⁶ *ibid* art 7.

²⁷ The official document with the geographical area definition is usually prepared by the Ministry of Agriculture (MAPA) or by the Agricultural Research and Rural Extension companies in the various Brazilian states. The Brazilian Institute of Geography and Statistics (IBGE) is also at the producer's disposal to that end, which is especially interesting in the case of a non-agri GI. Still related to this topic, there is an exception for foreign GIs, which do not need to comply with the Brazilian cartography system.

- iv. the description of the monitoring structure;²⁸
- v. production rules;
- vi. any infringements and penalties.

Another interesting feature of the Brazilian GI system is the possibility of having a figurative representation of the GI protected together with the nominate form. The Brazilian IP Act provides that 'the protection shall be extended to the graphical or figurative representation of a geographical indication, as well as the geographical representation of a country, city, region or locality in its territory whose name is a geographical indication.'²⁹ In practical terms, the producers can request a double protection that includes the word and the figurative part, i.e. a logo. Moreover, IN 95/2018 offers the possibility of having the name of the product (e.g., rice or cheese) featured in the logo, which was not allowed before.³⁰ In other countries, the producers usually need to apply for registration of a collective trademark to obtain the right to use a graphic representation, i.e. a logo that visually identifies the word part.³¹

In the case of an IP application, proof must also be submitted that the geographical name has become known as the centre of extraction, production or manufacture of the product or the provision of a given service. This proof is provided through literature references, including books, magazines and newspapers. Storytelling also plays a role in this regard, especially when it comes from elderly people respected by the community.

If the application concerns a DO, the applicant must submit documents that demonstrate the influence of the geographical environment on product quality or characteristics, and must provide descriptive elements about (i) the geographical environment, including natural and human factors; (ii) the product quality or features; and (iii) the relation between the first two elements.

Once the dossier is complete, the application for protection is submitted to the INPI, where it will be assessed in a two-step procedure. In the preliminary examination, only a formal assessment is made. The substantive review goes deeper, although the INPI will not embark on a merit analysis that would point out specific technical issues in the product specification, such as a possible problem related to one production step, as the INPI personnel does not have this kind of knowledge.³²

The assessment procedure carried out by the INPI is as shown in Figure 1 below, starting with the application

²⁸ Control is also an issue in Brazil, as there is no official control nor – in most cases – financial resources to establish a third-party control system, such as a certification system. In the majority of the cases the body known as a 'regulatory board', the control structure referred to by the regulation (IN 95/2018), only carries out internal production control. This is a body usually composed by a diverse range of people, like engineers (such as agronomists, chemical or environmental engineers), biologists, hotel and restaurant representatives or consumer representatives.

²⁹ Brazilian Industrial Property Act (Law No 9279) (n 17) art 179.

³⁰ *Banana da Região de Corupá* was an exception and the word *Banana* together with the logo was permitted during the term of the previous regulation.

³¹ Unlike in the EU and some other countries, however, there is nothing like a *Brazilian single label* – ie, a logo – to be used as a representation of the GI. While it seems to be of benefit for the producers – or service providers – to have their own logo protected as part of the GI registration, it also sounds a good idea to merge this approach with a single logo. Having both logos could increase the chances to deliver the message about the GI to the end consumer.

³² In the EU and in many other countries this is different, and the producers expect to receive qualified feedback on their written production specifications.

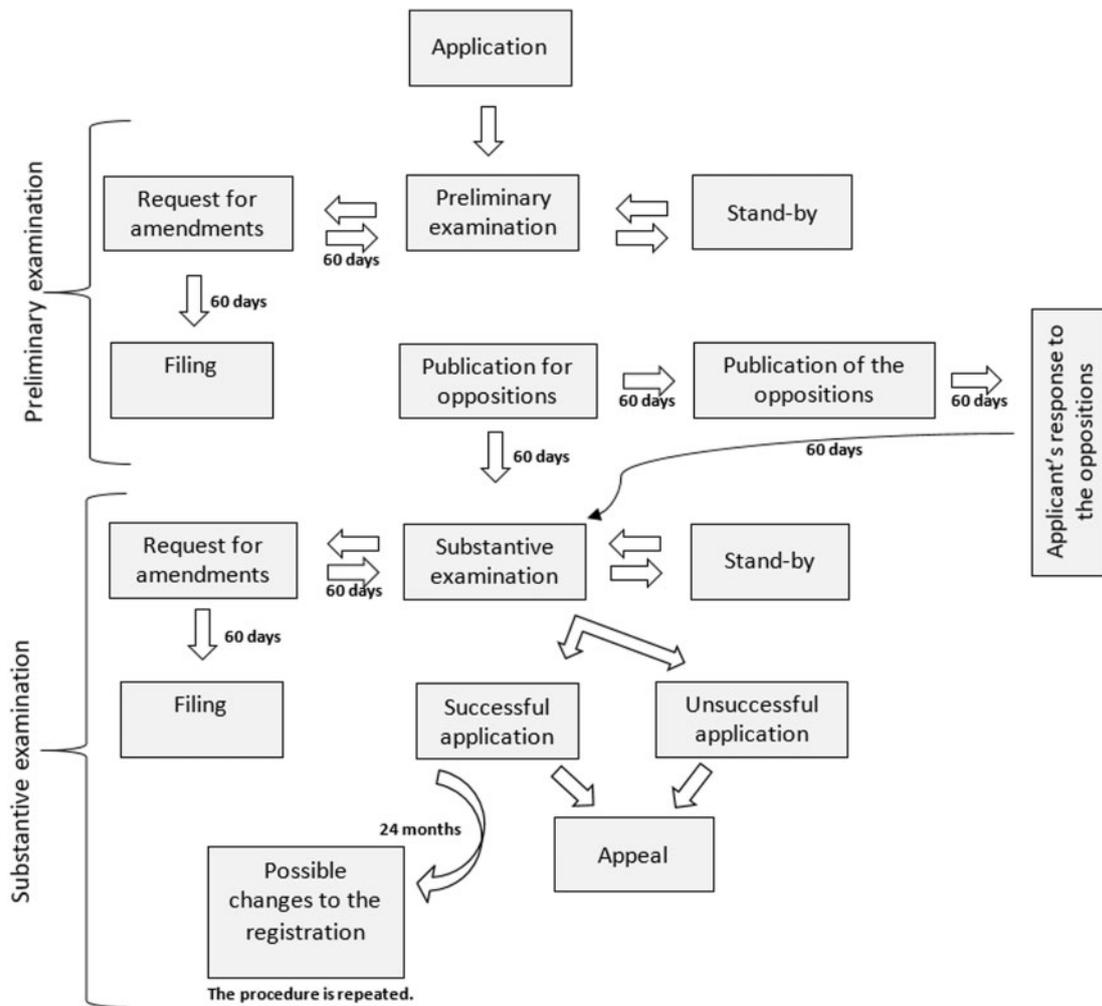


Figure 1: GIs application assessment process in Brazil³³

and going through the two-phase analysis, the preliminary and the substantive examination. It also includes the possibility of intervention by third parties, and anyone with an objection to the particular application is allowed to intervene. Regardless of the outcome of the analyses, the applicants or third parties can appeal.

The analysis process takes on average two years³⁴ to be completed, but there are several cases in which the application process lasted less than one and a half years. Other cases, however, took more than four or five years, as the Appendix shows. Once the registration process is over, the formal protection³⁵ of the GI is in place.

IN 95/2018 met old demands from the producers, such as the possibility of amending the specifications.³⁶ After a period of two years after recognition, amendments can be made. The opportunity to amend the specifications is an

improvement in the Brazilian system, as there are many examples of producers being overwhelmed when dealing with the product specifications, and the document ends up being either too restrictive or too open, thus preventing the GI from fully developing.

In addition, the producers are entitled to request amendments in relation to the geographical name and its logo – word and figurative part, the geographical area and the type of GI. No matter which amendment is on the table, the INPI assessment will follow the whole process shown in Figure 1 above.

Following the formal GI registration process, and as also demanded by TRIPS in Art. 22.2, each country should provide legal means to prevent the unauthorised use of GIs, uses that can mislead consumers as to the geographical origin of the good or uses that constitute acts of unfair competition.³⁷ Therefore, to ensure protection of the exclusive right in a GI, the Brazilian law provides for three criminal offences and their penalties, which are:³⁸

‘192. Manufacturing, importing, exporting, selling, displaying or offering for sale, or having in stock a product that bears a false geographical indication. Penalty — imprisonment, from 1 (one) to 3 (three) months, or a fine.

³³ Adapted from INPI. For the original version in Portuguese see <<https://www.gov.br/inpi/pt-br/servicos/indicacoes-geograficas/analise-do-pedido-de-indicacao-geografica>> accessed 15 March 2020.

³⁴ Information based on the author’s analysis of all the applications processes. The full information on which these numbers are based is available at <<http://www.inpi.gov.br/menu-servicos/indicacao-geografica/analise-do-pedido-de-indicacao-geografica>> accessed 15 March 2020.

³⁵ The use of the expression *official protection* is because, unlike other countries, in Brazil the registration of a GI by the INPI has a declaratory effect rather than being constitutive of the right, meaning that the GI is formally recognised as such.

³⁶ See mainly the conclusion of Dev S Gangjee, ‘Proving Provenance? Geographical Indications Certification and Its Ambiguities’ (2017) 98 World Development 12.

³⁷ The last requirement is under art 10^{bis} of the Paris Convention.

³⁸ Brazilian Industrial Property Act (Law No 9279) (n 17).

193. Using, on a product, container, wrapping, ribbon, label, invoice, circular, poster, or any other means of divulgence or advertising, modifiers such as “type”, “species”, “genus”, “system”, “similar”, “substitute”, “identical”, or equivalent terms, that do not safeguard the true source of the product.

Penalty — imprisonment, from 1 (one) to 3 (three) months, or a fine.

194. Using a mark, trade name, title of establishment, insignia, advertising phrase or sign, or any other form that indicates other than the real source, or selling or displaying for sale a product bearing such marks.

Penalty — imprisonment, from 1 (one) to 3 (three) months, or a fine.’

GIs are also protected against unfair competition, and the Brazilian IP Act provides that:

‘195. A crime of unfair competition is perpetrated by anyone who:

(...)

III. employs fraudulent means to divert the customers of another person to his or another party’s advantage;

(...)

VII. attributes to himself, for advertising purposes, a reward or distinction that he has not received;’

Additionally, civil-law protection is available against free-riding, when there is either unjust enrichment³⁹ or an abuse of a right.⁴⁰ This is a protection provided against non-competing third parties whose acts are harmful to the GI. The product or service must be identified with its own name. In this case, the misuse of the reputation of the GI by a non-authorised party leads to the weakening and dilution of the GI. For this reason, the fraudulent description of the origin of a product is a violation of a collective right – although not a right open to everyone.

Additionally, the producers can decide which particular infringements of a private nature they wish to include in the product specifications and that can lead to administrative or legal proceedings against the infringer. However, despite the existence of these widely applicable statutory provisions, plus the specific clauses that concern every GI in particular, lawsuits are still not common in this field. There are only seven decisions in which one of the expressions GI, DO or IP (in full or in a shortened version) in conjunction with the name of the law (9279) in the database of the Superior Court of Justice (STJ), decreasing to four after overlapping is eliminated. None of the four cases deals with a specific GI matter; instead, they assess the GI question indirectly, since they do not relate to any registered GI.⁴¹ The cases deal mostly with trademarks issues, and because the trademarks in question have a word element that refers to a geographical name, the legal provision on the use of a geographic component of a trademark needs to be assessed.

This scenario might change in the future when the number of GIs increases. Currently,⁴² there are 79 GIs



Figure 2: Map of regional distribution of Brazilian GIs⁴⁵

registered under the Brazilian system.⁴³ Nine of them are foreign⁴⁴ – all of them with DO status – and 70 are Brazilian, with 13 DOs and 57 IPs. Figure 2 above presents the national distribution of GIs in Brazil by federal state. The diversity of the Brazilian GIs concerning their kind and type of associated product can be seen in the Appendix.

2. GI practice and legal policy

With the aim of ensuring that the functioning of the system is well understood, in late February 2020 a draft version of the INPI GI Manual was published together with an invitation for society to comment. The reasoning behind the document, according to the INPI, is to provide transparency concerning the Institute’s analysis and examination process. In addition, making manuals available to the users of the INPI services is a long-term undertaking, as is the case with trademarks, industrial designs or patents.⁴⁶

It is an extensive document of 95 pages, which is more than double the size of the French *Guide du demandeur*⁴⁷ and much more extensive than the EU Guide to Applicants⁴⁸ on how to complete the single document. It includes nine sections, which deal with: general provisions; GI and registration characteristics; geographical name; logo; expressions not registrable; applicant and user; documents to be presented with the application;

⁴² Last updated in June 2020. For the full lists, see <<https://www.gov.br/inpi/pt-br/servicos/indicacoes-geograficas/arquivos/status-pedidos/AcompanhamentodelGs.RPI2581.23Jun20.pdf>> accessed 24 May 2020.

⁴³ In 1999, only three years after the Brazilian IP Law came into force, the first application was filed by Região do Cerrado Mineiro for coffee. In the following year, 2000, the second application by Vale dos Vinhedos for wines was submitted. The GI for coffee was granted six years after the application, and the wine GI two years after the filing date. Up to 2010, the number of applications grew slowly, but has increased in recent years, nevertheless.

⁴⁴ Região dos Vinhos Verdes, Cognac, Franciacorta San Daniele, Porto, Napa Valley, Champagne, Roquefort, Tequila.

⁴⁵ Created by the author based on data available on the INPI website. For an illustrated version, see the Brazilian GIs thematic map at <<https://www.ibge.gov.br/geociencias/cartas-e-mapas/sociedade-e-economia/22920-indicacoes-geograficas.html?=&t=acesso-ao-produto>> accessed 15 March 2020.

⁴⁶ For the draft version of the GI Manual, see <<https://www.gov.br/inpi/pt-br/servicos/indicacoes-geograficas/arquivos/consulta-publica/MinutaManualdeIndicaesGeograficasParaConsultaPblica.pdf>> accessed 15 March 2020.

⁴⁷ See <https://www.inao.gouv.fr/content/download/854/7671/version/5/file/201711_guideAOPIGP.pdf> accessed 15 March 2020.

⁴⁸ It is under revision process and will soon be replaced by a broader document.

³⁹ Brazilian Civil Code (Law No 10406) 2002, art 884.

⁴⁰ *ibid* art 187.

⁴¹ What can be noted is that, as GIs are still relatively new in Brazil, there is apparently little interest in misusing the protection of GIs to profit from them irregularly. There are, of course, exceptions, like for cheeses, but this practice is not reflected in cases being brought before the judiciary.

foreign applicants; GI application examination; and changes after registration.

The document brings together information that was dispersed, plus new information, like the explanation about the change in the possibilities after registration, introduced in December 2018, as well as many examples to illustrate the written report, although some of these examples are well known as being problematic GIs. Due to its length, one can naturally expect several quotations. The publishing of the draft version of the GI user manual for public consultations shows a willingness to learn from the community about what is sufficiently clear and what could be improved. The final version should be an improvement if the comments by the experts and all the interested parties are taken into consideration. This is important because once the final version is published, it will be the official guide not only for the applicants or third parties but also for those in charge of the application analyses.

Moving to the policymaking and enforcement situation in Brazil, the Joint Parliamentary Front in Defence of Intellectual Property and the Prevention of Piracy (in Portuguese: *Frente Parlamentar*⁴⁹ *Mista em Defesa da Propriedade Intelectual e de Combate à Pirataria*) was relaunched in March this year. The mixed group is composed of 216 congresspeople, 16 senators and representatives of private-sector entities. Their priority at the moment is the project to create the provisional patent application, with simplified requirements and deadlines.⁵⁰ Another priority will be to support the INPI plan to increase the number of patents, trademarks and industrial designs by about 20%. For the time being, GIs are not on the group's radar, but they will also monitor the work and public consultation on the National Intellectual Property Strategy, which was launched by the Ministry of the Economy within the scope of the Inter-ministerial Group on Intellectual Property (GIPI), and which regards GIs as part of a broader IP project.

Tasked with proposing government action to reconcile internal and external policies aimed at foreign trade in goods and services related to intellectual property, the GIPI was created by a Presidential Decree in 2001. It did not do much work in the following years, but resumed its activities in September 2019. It is composed of 11 members,⁵¹ who are authorised government representatives, and it is in charge, among other activities, of coordinating actions and inter-ministerial debates related to intellectual property, whether domestic or international, providing subsidies for the creation of intellectual property policies, alongside offering technical positioning for international negotiations. In this context, members submit relevant topics to the Group for information, discussion and,

ultimately, for deliberation. Technical issues are dealt with in thematic subgroup meetings, while organisational and higher-level political decisions are taken during plenary sessions with the principal representatives of each member. The whole spectrum of IP law is covered, including copyright and related rights, plant variety, unfair competition, intellectual property rights related to genetic resources and traditional knowledge.⁵²

Unlike the *Frente Parlamentar* work, the GIPI activities include GIs in the National Intellectual Property Strategy that is being drafted and will present⁵³ an intuitive approach along seven axes:

- a. Income generation instruments for small producers;
- b. Identification logo for consumer dissemination;
- c. Articulation between actors and institutions working with IGs;
- d. Legislation review;
- e. Training of inspection agents;
- f. Prospecting IGs; and,
- g. Promotion of Brazilian products abroad.

A public consultation is planned to take place in 2020 when the strategic plan is fully defined. Although it has not yet been sufficiently publicised, this initiative seems to be the beginning of a real public policy for Brazilian GIs, because as reported below, the supporting structure is far from being satisfactory.

The Brazilian legal framework for GIs is rather shallow, especially when compared to European countries and EU legislation. For this reason, the development and maturation of the GI system in Brazil require much work to be done. Consequently, it is predictable that there will be many challenges for the Brazilian GI system to overcome.

Internally, Brazil's main GI challenges relate – as already mentioned – to the achievement of benefits by the producers and communities, and this depends very much on the public policies in force and their effectiveness. In this regard, it is expected that the package that will be presented by the GIPI can be of help to that end.

III. Institutional GI support structure

Brazil is a country of vast dimensions, with fertile and very productive soil, and is home to many different cultures, traditions and values. All of that can be of advantage when selling Brazilian products on the market, where demanding consumers expect to buy more than a product but also experience, history, culture, tradition. That is the scenario in which GIs have a prominent role to play, a crucial point in public policies for development discussions.⁵⁴

Products and services that have natural, cultural, traditional or historical features⁵⁵ attached to them can gain ground on the markets as well as promote employment,

⁴⁹ A parliamentary front is an association of members of the legislature, regardless of political party, created to improve legislation on a specific topic.

⁵⁰ For detailed information on the project, see Bill No 10920 2018.

⁵¹ The GIPI members are: the Ministry of Agriculture and Supply; the Ministry of Science and Technology; the Ministry of Culture; the Ministry of Development, Industry and Foreign Trade; the Ministry of Justice; the Ministry of Foreign Affairs; the Ministry of Health; the Civil House of the Presidency of the Republic; the Ministry of the Environment; and the Ministry of Finance. In addition to these members, INPI is heard whenever a matter falls within its competence and other actors can be convened, such as the Competition or the Health Regulation authorities.

⁵² See <<http://www.mdic.gov.br/index.php/inovacao/inovacao-global-e-propriedade-intelectual/propriedade-intelectual/gipi-grupo-interministerial-de-propriedade-intelectual>> accessed 15 March 2020.

⁵³ This information has not yet been formally published by the Government.

⁵⁴ See Barjolle, Sylvander and Thévenod-Mottet (n 16).

⁵⁵ See Dev S Gangjee, 'Geographical Indications and Cultural Rights: The Intangible Cultural Heritage Connection?' in Christophe Geiger (ed), *Research handbook on human rights and intellectual property* (Edward Elgar 2015).

income and keep producers local, avoiding migration and contributing to the collective production organisation.

It is here that the collective aspect of the GI is remarkable, since it makes a GI distinct from other forms of IPR. In this sense, several studies have highlighted this attribute, identifying GIs as a collective good⁵⁶ or a club good.⁵⁷ In a club good, the GI is meant to be used only by the producers who meet the specifications – the ones who comply with the requirements for admittance to the club. However, as the use of a GI by one producer does not prevent others from using it as well, GIs are a collective good. These features are indeed interesting when one thinks about GIs and the generation of benefits for the producers, but then comes uncertainty: is the Brazilian GI system ready for that?

1. Producer support

The specialised literature is mostly driven by the GI's ability to generate development.⁵⁸ This is particularly the case when the GI is able to pass the correct message to the consumers.⁵⁹ Registration ensures an exclusive collective property right⁶⁰ that cannot be delocalised,⁶¹ and a registered GI is also a valuable argument in defending a good on the market against free-riding or misuses, serving as reliable proof of origin and characteristics for consumers.

The lack – or insufficiency – of governmental policy and support for the producers can lead to a different scenario. Even though Brazil is a country with enormous GI

potential, and even though GIs can bring a variety of benefits, there are currently only 70 registered Brazilian GIs, which is very few when compared to the country's cultural diversity and substantial geographical area.

A comparison with the European Common Agriculture Policy (CAP),⁶² which integrates GIs under the European Quality Schemes,⁶³ or national examples like the French and the manner in which the country supports GI processes and producers, reveals a huge disparity between the European and the Brazilian approach. The producer support structure is very different in Brazil,⁶⁴ and in developing countries in general,⁶⁵ where demands for producer protection can be disregarded in favour of health and food supply priorities, for instance.

Objectively, the alternatives available to producers are the Ministry of Agriculture, Livestock and Food Supply (MAPA),⁶⁶ the Brazilian Public Agricultural Research Corporation (Embrapa),⁶⁷ the Brazilian Micro and Small Business Support Service (Sebrae),⁶⁸ and the INPI. These bodies offer some degree of assistance at national level on the basis of different methodologies and measures.

Given the nature of their work, the MAPA and Embrapa⁶⁹ provide assistance or support only for agri-food GIs. Sebrae, which is 'a non-profit private entity with the mission of promoting the sustainable and competitive development of small businesses',⁷⁰ has no restrictions concerning the type of product. It offers technical assistance, the costs of which are shared between the organisation⁷¹ and producers.⁷² The INPI⁷³ provides

56 In this regard, see Filippo Arfini, 'The Value of Typical Products: The Case of Prosciutto Di Parma and Parmigiano Reggiano Cheese' in Bertil Sylvander, Dominique Barjolle and Filippo Arfini, *The Socio-Economics of Origin Labelled Products: Spatial, Institutional and Co-ordination Aspects* (1999) <http://ageconsearch.umn.edu/record/241032/files/Arfini_1999_The_value_of_typical_products.pdf> accessed 15 March 2020; Giovanni Belletti, 'Origin Labelled Products, Reputation and Heterogeneity of Firms' 21 <<http://ageconsearch.umn.edu/record/241035>> accessed 15 March 2020; Warren Moran, 'Rural Space as Intellectual Property' (1993) 12 *Political Geography* 263 <<https://linkinghub.elsevier.com/retrieve/pii/096262989390057E>> accessed 15 March 2020.

57 Frank Thiedig and Bertil Sylvander, 'Welcome to the Club? – An Economical Approach to Geographical Indications in the European Union' (2000) 49 *German Journal of Agricultural Economics/ Agrarwirtschaft* 428.

58 For an analysis of the most successful Brazilian GI, see Adilene Alvares Mattia, Janaina Macke and João Alberto Rubim Sarate, 'Enoturismo e Território: O Caso Do Vale Dos Vinhedos' (2016) 19 *Turismo – Visão e Ação* 52 <<http://siaiap32.univali.br/seer/index.php/rtva/article/view/9759>> accessed 15 March 2020; Vander Valduga, 'O Desenvolvimento Do Enoturismo No Vale Dos Vinhedos (RS/Brasil)' (2012) 6 *CULTUR – Revista de Cultura e Turismo* 127-143.

59 See Xiomara F Quiñones-Ruiz and others, 'Insights into the Black Box of Collective Efforts for the Registration of Geographical Indications' (2016) 57 *Land Use Policy* 103-116; see, for instance Paulo Hartmann, Vincenzina Caputo and Maurizio Canavari, 'Consumer Preferences for Mangoes with Geographical Indication Labels in Brazil' (Conference Ecological Economics and Rio+20, Rio de Janeiro, June 2012) <https://www.researchgate.net/publication/264971894_Consumer_Preferences_for_Mangoes_with_Geographical_Labels_in_Brazil> accessed 15 March 2020.

60 On the discussion on the nature of the right, see Almeida, 'The Legal Nature of Geographical Indications and Designations of Origin' (n 17); see also Elizabeth Barham, 'Translating Terroir: The Global Challenge of French AOC Labeling' (2003) 19 *Journal of Rural Studies* 127 <<https://linkinghub.elsevier.com/retrieve/pii/S0743016702000529>> accessed 15 March 2020.

61 See Bruce A Babcock and Roxanne LB Clemens, 'Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products' [2004] MATRIC Briefing Papers <https://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=1006&context=matric_briefingpapers> accessed 15 March 2020; Paul F Skilton and Zhaohui Wu, 'Governance Regimes for Protected Geographic Indicators' 33 *Journal of Macromarketing* 144 (2013) <<http://journals.sagepub.com/doi/10.1177/0276146712473116>> accessed 15 March 2020.

62 For a comparative overview of the Brazilian and EU systems, see Flávio Sacco dos Anjos, Encarnación Aguilar Criado and Nádia Velleda Caldas, 'Indicações Geográficas e Desenvolvimento Territorial: Um Diálogo Entre a Realidade Europeia e Brasileira' (2013) 56 *Dados* 207.

63 However, the fact that the European GI system is under the CAP is one of the reasons why protection has not yet been extended to non-agricultural products.

64 In this regard, see, for example, Sarah Bowen, 'Development from Within? The Potential for Geographical Indications in the Global South' (2010) 13 *The Journal of World Intellectual Property* 231 <<http://doi.wiley.com/10.1111/j.1747-1796.2009.00361.x>> accessed 15 March 2020.

65 In this regard, see for example *ibid.*

66 The MAPA has an IP and agricultural technology department that deals with all relevant kinds of IPRs, including patents and plant varieties alongside GIs. The ministry promoted various introductory and GI-specific courses in the area of IP and innovation in agribusiness from 2009 to 2015. These courses were introduced to develop skills for understanding and implementing IPRs in the agricultural sector, using a distance education platform with participants from all over the country.

67 Embrapa has offices in each federal state and their focus is defined by the specialisation within the regions. For example, in the state of Rio Grande do Sul, it focuses on grapes and wines, which is decisive for this state's wine GIs. In general, it supports producers particularly in relation to the climate and soil conditions as well as providing the evidence of animal feeding that is necessary for certain GI applications.

68 Sebrae is specialised in small businesses and does not have restrictions in regard to the kind of service. It works through a network of accredited consultants, who mainly help producers to prepare the necessary documentation for GI registration. The organisation depends on public funding and payments by producers for the services.

69 See Embrapa, 'Unidades – Embrapa No Brasil – Portal Embrapa' <<https://www.embrapa.br/embrapa-no-brasil>> accessed 15 March 2020.

70 Sebrae, 'Sebrae. Small Business Experts' <https://m.sebrae.com.br/sites/PortalSebrae/canais_adicionais/sebrae_english> accessed 15 March 2020.

71 Sebrae's budget is also funded with resources provided by public bodies.

72 As matching fund, the producers can offer not only their resources but also funding obtained elsewhere.

73 INPI, the national body responsible for evaluating requests for GI protection, has developed a strategy of sending its collaborators to GI events across Brazil to publicise the GI application process, explaining the legal requirements more easily to a wider audience.

contributing to development. Table 1 above summarises how the support system is organised in terms of methodology and what is or can be the contribution to the process.

The above is the extent of Brazil's domestic support activities. Unlike in the EU, there is no quality policy to drive GI matters. Nevertheless, the country's size and the diversity of its regional products provide sufficient grounds for GI strategy development.

2. Consumer awareness

The lack of support for producers may lead to a lack of consumer awareness, as the communication and promotion of the GI and its features to the public might be insufficient. The producers could then find themselves in the situation of being unable to promote development, as the consumers are a vital part of the process.

As a comparison, at EU level, there is a single label for each of the quality schemes,⁷⁷ which can encourage the consumer to recall the brand, helping them to relate the label to the features of the GI. However, both at EU and national level, there is usually no possibility of having a specific and personalised logo together with the GI. This is why, even despite the fact that consumers awareness in Brazil – of Brazilian GIs – must grow, the country does have an advantage here that can work in its favour.

In Brazil, on the one hand, a single label system is not available.⁷⁸ On the other hand, the possibility of having double protection that covers nominate and figurative aspects – as explained earlier – reflects producer creativity and design diversity. Nevertheless, the absence of a single label can impact on consumers, who may or may not instantly recognise a (Brazilian) GI when they see it. Whenever the consumer is not able to recognise a label or understand what the label means, the producer loses an opportunity to profit financially from the GI and to promote the region.

At this point, it becomes necessary to teach consumers about the definitions that the system covers. They will only be able to fully understand what an attractive logo means if they know the meaning of a GI – both DO and IP. From the national point of view, and mainly related to the conceptual side, there is a need for education, because it is the only way to the development.

To succeed, the GI needs to generate financial profit. It is a circle in which one element depends on the other: the producers depend on the policies and institutional support for there to be a strong and efficient organisation behind the GI. They can then reach the consumers, who depend not only on the promotion strategy that the producers develop but also on institutional awareness campaigns. When the circle works, profit will result and other aspects can be developed, such as the social and cultural sides of the community around the GI.⁷⁹

If development depends on financial profit, it is primarily analysed from the economic point of view. This analysis is usually performed using one of the following two

approaches, which may or may not take consumer awareness into account. The first has its basis in microeconomic models and relates to the welfare consequences of the use of GIs.⁸⁰ The other method focuses on an institutional analysis of quality and the local endogenous theories of development.⁸¹ The second seems to be the most adequate for the Brazilian scenario, precisely because of the lack of consumer awareness, which is a crucial reason why the majority of GIs do not achieve widespread recognition.⁸² This approach considers that the market viability of GI goods is mainly connected to the consumers' perception and willingness to buy such origin-based goods.⁸³ It also takes into consideration the fact that GI endorsement applies to a basket of goods and services, promoting the entire area and its community around the main (GI) good.⁸⁴

Currently, however, it is still not possible for the majority⁸⁵ of Brazilian GIs to achieve this level of development, and one of the reasons for this is the lack of or insufficiency of supporting structure available at the moment. Both producers and consumers need support, if the GIs are to fully achieve the benefits they are meant to generate. That is also important because there is a set of challenges to be overcome, as follows.

IV. The challenges facing the Brazilian GI system at international, regional and national levels

There are several challenges facing the Brazilian GIs system, but the natural conclusion following what has been said in this article is that the legal provisions – regarding

⁸⁰ Regarding this approach, see, for instance, Marion Desquilbet and Sylvette Monier-Dilhan, 'Are Geographical Indications a Worthy Quality Label? A Framework with Endogenous Quality Choice' (2015) 42 *European Review of Agricultural Economics* 129; GianCarlo Moschini, Luisa Menapace and Daniel Pick, 'Geographical Indications and the Competitive Provision of Quality in Agricultural Markets' (2008) 90 *American Journal of Agricultural Economics* 794 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-8276.2008.01142.x>> accessed 15 March 2020.

⁸¹ In this sense, see Sarah Bowen and Tad Mutersbaugh, 'Local or Localized? Exploring the Contributions of Franco-Mediterranean Agrifood Theory to Alternative Food Research' 31 *Agriculture and Human Values* 201 (2014) <<http://link.springer.com/10.1007/s10460-013-9461-7>> accessed 15 March 2020; Maud Hirczak and others, 'From the Model of «basket of Goods» to a More General Model of Territorialized Complex Goods: Concepts, Analysis Grid and Questions' (2018) 31 *The Canadian journal of regional science = La revue canadienne des sciences régionales* 241.

⁸² Of course, more is involved, as '[n]evertheless, two other characteristics of the supply are relevant to understanding the economic nature of these products. The first characteristic is the existence of the unique tie between the quality of the GI product and the territory where it is produced, which is a key point in understanding how these products are tied to externalities and public goods.' Giovanni Belletti, Andrea Marescotti and Jean-Marc Touzard, 'Geographical Indications, Public Goods, and Sustainable Development: The Roles of Actors' Strategies and Public Policies' (2017) 98 *World Development* 45 <<https://linkinghub.elsevier.com/retrieve/pii/S0305750X15001138>> accessed 15 March 2020.

⁸³ Belletti, Marescotti and Touzard (n 82).

⁸⁴ Besides the authors mentioned (n 52), especially regarding the theory of the basket of goods, see Bernard Pecqueur, 'Qualité et Développement Territorial: L'hypothèse du Panier de Biens et de Services Territorialisés' (2001) 261 *Économie Rurale* 37 <http://www.persee.fr/doc/AsPDF/ecoru_0013-0559_2001_num_261_1_5217.pdf> accessed 10 October 2017.

⁸⁵ Vale dos Vinhedos is one of a special group of successful GIs, but its outcome is not the most common. See, for instance, the Serro cheese case, which had different results: Mirna de Lima Medeiros, Leonardo Augusto Amaral Terra and João Luiz Passador, 'Geographical Indications and Territorial Development: A Soft-System Methodology Analysis of the Serro Case' (2020) 37 *Systems Research and Behavioral Science* 82 <<http://doi.wiley.com/10.1002/sres.2601>> accessed 15 March 2020.

⁷⁷ Protected Designation of Origin (PDO), Protected Geographical Indication (PGI) and Traditional Specialities Guaranteed (TSG).

⁷⁸ Although there are some rumours about the creation of a single label.

⁷⁹ Suelen Carls, 'Proteção Jurídica Das Indicações Geográficas e Desenvolvimento: O Regulamento de Uso e as Estruturas de Gestão e Controle' (thesis, Universidade Federal de Santa Catarina 2016).

both the IP definition and the additional protection – are issues that have a huge impact at all levels. That is why the concerns emerging from the system's incompatibility with the international, regional and national scenarios are interconnected.

1. Mercosur–EU Trade Agreement

In that regard and for the time being,⁸⁶ at international level, one situation is yet to be accommodated within the Brazilian legal framework. The conclusion of the trade agreement between the EU and Mercosur is a significant achievement in the multilateral scenario, as the parties have tried to reach a deal on a trade agreement for the past 20 years. During this long journey, GIs in the TRIPS Agreement, the opening of markets to imports in South America, Internet accessibility and the growth of international travel have made GIs an essential topic in any trade agreement. It was no different in the agreement in question, the GIs being the most challenging part of the IP chapter to resolve.

Within the scope of the trade agreement, the EU presented a long list of GIs for which they requested protection.⁸⁷ The final list includes more than 350 European GIs⁸⁸ that will be protected not only in Brazil but also in the four Mercosur countries with a higher level of protection than the protection given to national GIs. In short, that means that those names cannot be used to identify products made within Mercosur anymore, not even together with the use of explanatory terms and details of the exact origin.⁸⁹

While the Brazilian DO concept is comparable to the European PDO, the IP concept is not comparable to the European PGI. Thus, all European GIs in the agreed list will automatically be protected in Brazil as DOs. Although this is already settled, and even considering that Brazilian IP law provides the same level of protection for both DOs and IPs, some questions remain unanswered, since, in the long term, practical issues can arise.⁹⁰ How can fair use and infringement be balanced? How is good faith use to be considered? From what side? To what extent?

Within the Brazilian situation, it is evident that the grant of protection to the European GIs will prevent the identification of a number of products in Brazil that are recognised by the consumers using the same expression as the protected European GI.⁹¹ However, to try to prevent the recognition of those European GIs would have

brought disrepute upon the Brazilian system itself. A public consultation was commenced in the country but the report has not yet been published. In any case, the EU was the winner of this dispute, having succeeded in pushing its current GI approach in negotiating Free Trade Agreements (FTA).⁹²

Much effort was put into the IP chapter negotiations to ensure a deal that met EU expectations regarding the GIs. However, from the beginning, two decades ago, Mercosur was always reluctant to enter into a commitment to that effect and proposed some alternative approaches, such as a bi-regional dialogue. In 2017 it became clear that if there was to be a trade deal, IP would need to be discussed. The South American countries rejected the EU proposal as a working basis and presented an alternative version. Subsequently, the IP chapter negotiations were completed in two years, a record for the kind of issue and different views that were under discussion. Not surprisingly, the result is a text that is equally unsatisfactory for both sides.

Nevertheless, the agreement has been concluded and is now about to into force. Both parties will then experience how easy or hard it is to address certain questions, e.g., Mercosur countries will provide higher protection – Art. 23 TRIPS – to the majority of the GIs listed by the EU. This means that Mercosur countries will have a double standard. Will domestic law then be modified to avoid discrimination against local producers?

2. Protocol on Harmonization of IP Norms and Agreement for mutual GI recognition

Another open question is that of GI – and other IPR – enforcement and control by Mercosur. How will that be possible when there are neither harmonised regulations on enforcement nor any border measures? This situation also shows how fragile Mercosur is in its essence, as there is no regional system – neither for GIs nor for other matters – and it is hard to speculate whether the block will manage to go further towards real union. One example that puts this to the test is the Protocol on Harmonization of Intellectual Property Norms in Mercosur in the Field of Trademarks, Indications of Source & Appellations of Origin (1995) and the agreement signed last year for mutual GI recognition among the members.

Even though none of the members has ratified this Protocol,⁹³ which, therefore, is not in force in any of the countries, Brazil has adopted its Arts. 19 and 20. It is no coincidence that the Brazilian definitions of IPs and DOs are word-for-word definitions from the Protocol, which is not the case with the other Mercosur countries. Their concepts of GIs are different from those adopted by Brazil and also differ amongst themselves.

⁸⁶ Although it is not at issue now, the agreement under negotiation between Brazil and Chile has several provisions on GIs. In the agreement between Brazil and Mexico for the mutual protection of Cachaça and Tequila, the IP concept played a role in relation to the formal aspects of protection.

⁸⁷ The EU-Mercosur agreement has given the EU the most exceptional protection for its GIs. The EU presented a list of 360 GIs, while Mercosur listed 220. The agreement with Mexico protects 340 EU GIs, while protection in Japan was given to 200 GIs, and Canada protects 158 EU GIs.

⁸⁸ On the Brazilian side, the number is much lower and, alongside Cachaça, includes GIs related to coffee, honey, and rice.

⁸⁹ With a few exceptions. For some products, grace periods of five, seven and ten years have been agreed. In other cases, such as for Manchego cheese, Parmigiano Reggiano, Fontina, Gruyere, Grana and Gorgonzola, the names can still be used in the South American countries providing certain conditions are met.

⁹⁰ As highlighted, there is nothing in the Brazilian GI framework that expressly provides for art 23 TRIPS protection for wines and spirits. The European GIs will all be able to rely on the additional protection, not only wines and spirits.

⁹¹ At first sight, it seems to be only harmful for the Brazilian producers, but it can actually make the situation better. It can be the perfect and definite justification for a change in the legislation towards stronger protection and an opportunity to open new markets for national production.

⁹² It is not the author's intention to analyse the content of the Agreement or the path that led to its conclusion. For a general reading of the GIs in the trade agreements concluded by the EU, see Tim Engelhardt, 'Geographical Indications Under Recent EU Trade Agreements' (2015) 46 IIC 781 <<http://link.springer.com/10.1007/s40319-015-0391-3>> accessed 15 March 2020.

⁹³ With exception of Venezuela, which is now suspended (since 2016) from Mercosur and was obliged to adopt the Protocol upon its admission in 2012.

Still on the question of external commitments, in December 2019 Brazil and the other Mercosur members signed an agreement for the mutual protection of GIs originating in the territory of its members. Interestingly, the text of the agreement provides only one general definition for GIs, which reads as follows:

‘Article 2

Definitions

1) For the purposes of this Agreement, a Geographical Indication is a name that identifies a product or service as originating in the territory of a State Party, or region or locality of that territory, when a specific quality, reputation or other characteristics of the product or service may fundamentally be attributed to its geographical origin.

2) For the purposes of this Agreement, Effective Protection shall be understood as that provided for in the legal order of each State Party.’⁹⁴

The initial analysis is followed by the submission of a ‘technical file’. It is similar to the EU single document and does not make any distinction regarding the type of GI granted in the country of origin.

Article 2(2) makes it clear that the protection to be given is that available in each country. However, Mercosur will eventually need to take further steps towards the integration of its members if it wants to become a union both in theory and in action. Indeed, the theory provides evidence towards that end, as in the case of Art. 242 of the Brazilian LPI:

‘The Executive Power shall submit to the National Congress a bill of law intended to accomplish, whenever necessary, the harmonization of this Law with the industrial property policy adopted by the other countries that are members of Mercosur.’⁹⁵

For the time being, nothing is happening towards integration. It remains to be seen whether this will change soon, not only for GIs but for all topics that might be or need to be regulated at regional level, and perhaps the EU-Mercosur FTA will be of assistance to the South American block as it takes further steps towards effective integration.

The challenges discussed in this section can be understood as a reflection of two recent deals. Firstly, there is the EU-Mercosur trade agreement, which has finally been concluded after more than 20 years of discussion, with the IP chapter being the most critical section for the parties as they attempted to reach an agreement, although nobody is certain that it will come into force. Secondly, the regional agreement signed between the Mercosur countries that allows for mutual GI registration. These will surely not be the only warning signs that Brazil needs to change.

3. National homework

There are several challenges developing at national level that need to be overcome by the Brazilian GI system. For instance, the social empowerment function of GIs, meaning that the process of structuring a GI in a given community needs to follow a bottom-up approach in which all

the producers as well as the community are consulted and made to feel part of the process. As shown in Table 1, the MAPA methodology goes in this direction, and the GI projects supported by the Ministry involve much discussion, in which the opinion of all the people concerned is taken into consideration. Unfortunately, MAPA has limited resources and is not able to support many projects simultaneously. But it is an example to follow.

Other example is the questionable ‘the-more-the-better’ campaign. It is evident that Brazil could have more GIs, but it should not mean embarking on a race for numbers: GIs need to have a strong producers’ organisation, but this takes time and also depends on a good institutional support system.

In addition, there should be a unique GI discourse across the country, but even among the institutions that offer support to the producers, this is not the case. How consumers are expected to understand the meaning of a GI when the *mentors* have conflicting positions is a question that does not need to be asked.

The producers need to be aware that in some cases GIs can have side effects: the property market can experience inflation, the environment can suffer when sustainability measures are not settled, and the price of the good after the GI has been granted can make it too expensive for the local community.

These are just some examples of the challenges that are facing the producers and consumers on one side, and the success of GIs on the other. However, in view of what has been said in this article, one of the most contentious challenges is the need for legislative review of the IP definition and the formal incorporation of the additional protection of Art. 23 TRIPS for wines and spirits into the domestic system.

GIs are only a heading under which IPs and DOs are defined. While the DO definition is in line with an understanding that has a terroir-based link, the IP – as said – does not convey a similar message. It is likely that Brazil will not place GIs at the centre of a development policy like the European CAP. But it urgently needs to review the legal framework.

If a complete GI legislation review does not emerge as one of the results of the work of the GIPI, at least a solution needs to be found to the two most concerning issues. In essence, the Brazilian IP is not an IPR,⁹⁶ as it does not work like a GI as defined in the TRIPS Agreement. It is worthwhile returning to what TRIPS provides in Art. 22(1):

‘Geographical indications are, for the purposes of this Agreement, *indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.*’⁹⁷

The definition of the Brazilian IP takes a different direction:

⁹⁴ Protocol on Harmonization of Intellectual Property Norms in Mercosur in the Field of Trademarks, Indications of Source & Appellations of Origin (n 13).

⁹⁵ Brazilian Industrial Property Act (Law No 9279) (n 17).

⁹⁶ And, depending on the point of view, neither are DOs an IPR in essence (n 15); however, as this article takes the TRIPS Agreement as the starting point for the Brazilian GI system, and the definition of DO complies with art 22, this is not the place to discuss this issue.

⁹⁷ Trade-Related Aspects of Intellectual Property Rights 1994 (emphasis added).

‘Indication of source shall mean the geographic name of a country, city, region or locality in its territory, which has become known as a center of extraction, production or manufacture of a given product or of provision of a given service.’⁹⁸

Because the Brazilian IP concept is based on the renown of the geographical area instead of being based on the product’s reputation (quality or other characteristic) that is then linked to the geographical area, it does not meet the TRIPS definition of a GI – nor the majority understanding of what a GI could be defined as. For this reason, instead of being a GI in essence, the concept conveys a simple indication of origin, referring as it does to a characteristic of the geographical area instead of the product.

In addition, even if not because of the EU-Mercosur FTA – as the recognition via agreements works differently – a revised definition of IP would be of help not only at national level but also in terms of regional integration and harmonisation, which is not happening at present.

As a next step, Brazil should comply with TRIPS as regards the provision of additional protection for wines and spirits. Currently, there is no legal provision that ensures a higher level of protection for the GIs in question. The integration of the TRIPS Agreement into the national framework does not allow for its direct application, as has already been decided by the Brazilian Supreme Court (STF). Article 193 of the Brazilian IP Act, the only provision that touches upon the use of rectifying terms, definitely does not do the job. Moreover, the possibility of make using of civil law in cases of an infringement is neither enough nor even closer to what is expected in relation to the additional protection.

The challenges are diverse, and like the national challenges, those that come from outside the borders have to do with the producers, the consumers, the government and also with the country’s image. Addressing these incompatibilities demands first looking at the organisational, legal and practical problems from inside and through a bottom-up approach, in which the people at grassroots are consulted, and this begins with action at national level.

V. Conclusion

Brazil has all that it takes to achieve success in the GI business, but this success cannot be achieved without much effort. The country is semi-compliant with the

TRIPS Agreement. It is also hard to understand why the GI definitions come from a protocol that has never been ratified by the Mercosur members. Finally, in terms of national improvements, there is a need to educate producers and consumers about GIs and their nuances, disseminating a single and coherent understanding that could lead to the development of a workable agreement.

On the one hand, in terms of what has been achieved, Brazil does have a *sui generis* system that allows for GI registration, and despite the conceptual issues producers pursue registration – perhaps never realising that there is a problem – and some of them are achieving some degree of success. That is true, but not enough, as the system must be 100% coherent.

On the other hand, the federal government – as well as at state and municipality level – has no means to provide wide support to producers or to educate consumers about GIs.⁹⁹ This leads to the scenario where both sides do not speak the same language, and it is therefore difficult for producers to communicate the features of their products and for consumers to consciously enjoy those products.

The domestic Brazilian GI system is to a certain extent inconsistent and contradictory, and this is a red flag indicating that if the country is to make the most of the external commitments to its own benefit, it is necessary first look at what can be done at home.

These external commitments can be seen as the chance for Brazil to think seriously about its GI legislation and consider improving it. This should be done by reviewing the definitions of each kind of GI, offering a high level of protection for both of them – at least for wines and spirits, providing strong IPR protection for the national GIs – instead of only for the foreign GIs protected through trade agreements. This would ultimately also educate consumers and place the national GI products on the same level as the foreign ones.

Accordingly, the way forward for Brazil requires taking a path towards a fully workable system that will advance primarily through the legislative process. Brazil needs to turn the GI system into an unquestionable IPR system that provides a high level of protection for the subjective right in question. Secondly, it requires the establishment of a broader policy package. The journey will be fraught with challenges, but the destination will provide great benefits. Once the homework has been done, it will be easy to deal with the challenges.

⁹⁸ Brazilian Industrial Property Act (Law No 9279) (n 17) (emphasis added).

⁹⁹ Of course, GIs are important, and they can work very well for farmers and producers in general, but as developing countries are usually running out of resources and they must prioritise areas like health, GIs are left behind.

Appendix**Table 2: Registered national geographical indications up to June 2020¹⁰⁰**

GI	Product/Service	Status	State	Application date	Registration date	Years
Vale dos Vinhedos	Wines	IP ¹⁰¹	Rio Grande do Sul (RS)	06.07.2000	19.11.2002	2.37
Região do Cerrado Mineiro	Coffee	IP	Minas Gerais (MG)	28.01.1999	14.06.2005	6.38
Pampa Gaúcho da Campanha Meridional	Beef	IP	Rio Grande do Sul (RS)	08.08.2005	12.12.2006	1.35
Paraty	Spirits	IP	Rio de Janeiro (RJ)	27.11.2006	10.07.2007	0.62
Vale dos Sinos	Leather	IP	Rio Grande do Sul (RS)	14.09.2007	19.05.2009	1.68
Vale do Submédio São Francisco	Grapes and mangoes	IP	Pernambuco/Bahia (PE/BA)	31.08.2007	07.07.2009	1.85
Pinto Bandeira	Wines	IP	Rio Grande do Sul (RS)	07.10.2008	13.07.2010	1.76
Litoral Norte Gaúcho	Rice	DO	Rio Grande do Sul (RS)	28.01.2008	24.08.2010	2.57
Mantiqueira de Minas Gerais	Coffee	IP now DO ¹⁰²	Minas Gerais (MG)	03.10.2007	31.05.2011 changed on 23.06.2020	3.66
Costa Negra Pelotas	Shrimps	DO	Ceará (CE)	03.10.2009	16.08.2011	1.87
	Sweets	IP	Rio Grande do Sul (RS)	12.03.2009	30.08.2011	2.47
Região do Jalapão do Estado do Tocantins	Golden grass hand-crafted items	IP	Tocantins (TO)	18.05.2009	30.08.2011	2.28
Goiabeiras	Clay pot cooker	IP	Espírito Santo (ES)	19.05.2010	04.10.2011	1.38
Serro	Cheese	IP	Minas Gerais (MG)	16.04.2010	13.12.2011	1.66
São João del Rei	Tin handcrafted items	IP	Minas Gerais (MG)	15.09.2010	07.02.2012	1.40
Franca	Leather shoes	IP	São Paulo (SP)	25.11.2010	07.02.2012	1.20
Vales da Uva Goethe	Wines	IP	Santa Catarina (SC)	18.08.2010	14.02.2012	1.49
Canastra	Cheese	IP	Minas Gerais (MG)	16.04.2010	13.03.2012	1.91
Pedro II	Opals and hand-crafted opal jewellery	IP	Piauí (PI)	17.12.2010	03.04.2012	1.30
Região Pedra Carijó Rio de Janeiro	Rock	DO	Rio de Janeiro (RJ)	23.06.2010	22.05.2012	1.92
Região Pedra Cinza Rio de Janeiro	Rock	DO	Rio de Janeiro (RJ)	23.06.2010	22.05.2012	1.92

(Continued)

Table 2: (continued)

GI	Product/Service	Status	State	Application date	Registration date	Years
Região Pedra Madeira Rio de Janeiro	Rock	DO	Rio de Janeiro (RJ)	23.06.2010	22.05.2012	1.92
Cachoeiro de Itapemirim	Marble	IP	Espírito Santo (ES)	14.07.2010	29.05.2012	1.88
Manguezais de Alagoas	Red propolis and red propolis extract	DO	Alagoas (AL)	29.03.2011	17.07.2012	1.30
Linhares	Cocoa beans	IP	Espírito Santo (ES)	22.12.2009	31.07.2012	2.61
Norte Pioneiro do Paraná	Coffee	IP	Paraná (PR)	26.03.2009	25.09.2012	3.50
Vale dos Vinhedos	Wines	DO	Rio Grande do Sul (RS)	16.08.2010	25.09.2012	2.11
Paraíba	Natural dyed cot- ton textiles	IP	Paraíba (PB)	17.07.2009	16.10.2012	3.25
Região de Salinas	Spirits	IP	Minas Gerais (MG)	22.12.2009	16.10.2012	2.82
Porto Digital	Digital services	IP	Pernambuco (PE)	05.08.2011	11.12.2012	1.35
Altos Montes	Wines	IP	Rio Grande do Sul (RS)	13.03.2012	11.12.2012	0.75
Divina Pastora São Tiago	Handcrafted lace Biscuits	IP IP	Sergipe (SE) Minas Gerais (MG)	22.09.2011 23.08.2011	26.12.2012 05.02.2013	1.26 1.46
Alta Mogiana	Coffee	IP	São Paulo (SP)	26.09.2007	17.09.2013	5.98
Mossoró	Melons	IP	Rio Grande do Norte (RN)	28.11.2011	17.09.2013	1.81
Cariri Paraibano Monte Belo	Handcrafted lace Wines	IP IP	Paraíba (PB) Rio Grande do Sul (RS)	13.04.2012 22.08.2012	24.09.2013 01.10.2013	1.45 1.11
Região do Cerrado Mineiro	Coffee	DO	Minas Gerais (MG)	19.11.2010	31.12.2013	3.12
Piauí	Cajuína (non-alco- holic beverage)	IP	Piauí (PI)	13.04.2012	26.08.2014	2.37
Rio Negro	Ornamental fishes	IP	Amazonas (AM)	24.04.2012	09.09.2014	2.38
Microrregião Abaíra	Spirits	IP	Bahia (BA)	09.01.2012	14.10.2014	2.76
Pantanal	Honey	IP	Mato Grosso/ Mato Grosso do Sul (MT/ MS)	22.08.2013	10.03.2015	1.55
Farroupilha	Wines	IP	Rio Grande do Sul (RS)	25.07.2014	14.07.2015	0.97
Ortigueira	Honey	DO	Paraná (PR)	08.02.2013	01.09.2015	2.32

(Continued)

Table 2: (continued)

GI	Product/Service	Status	State	Application date	Registration date	Years
Maracaju	Sausages	IP	Mato Grosso do Sul (MS)	30.07.2014	24.11.2015	1.32
Região de Mara Rosa	Saffron	IP	Goiás (GO)	11.10.2013	02.02.2016	2.31
Região das Lagoas Mundaú-Manguaba	Embroidery	IP	Alagoas (AL)	09.12.2014	19.04.2016	1.36
Carlópolis	Guava	IP	Paraná (PR)	28.10.2015	17.05.2016	0.55
Região de Pinhal	Coffee	IP	São Paulo (SP)	05.02.2014	19.07.2016	2.45
Região da Própolis Verde de Minas Gerais	Green propolis	DO	Minas Gerais (MG)	30.09.2013	06.09.2016	2.94
Região São Bento de Urânia	Yams	IP	Espírito Santo (ES)	03.07.2014	20.09.2016	2.22
Marialva	Grapes	IP	Paraná (PR)	21.10.2015	27.06.2017	1.68
São Matheus	Mate herb	IP	Paraná (PR)	04.11.2015	27.06.2017	1.65
Oeste do Paraná	Honey	IP	Paraná (PR)	09.12.2015	04.07.2017	1.57
Cruzeiro do Sul	Cassava flour	IP	Acre (AC)	16.10.2015	22.08.2017	1.85
Maués	Guaraná	IP	Amazonas (AM)	06.02.2015	16.01.2018	2.95
Sul da Bahia	Cocoa beans	IP	Bahia (BA)	24.11.2014	24.04.2018	3.42
Colônia Witmarsum	Cheese	IP	Paraná (PR)	04.11.2015	24.04.2018	2.47
Venda Nova do Imigrante	Socol	IP	Minas Gerais (MG)	03.07.2014	12.06.2018	3.95
Banana da Região de Corupá	Bananas	DO	Santa Catarina (SC)	01.09.2016	28.08.2018	1.99
Sabará	Jabuticaba products (liqueurs, jelly, sauces, preserved peel, and jam)	IP	Minas Gerais (MG)	23.09.2014	23.10.2018	4.08
Tomé-Açu	Cocoa	IP	Pará (PA)	28.10.2014	29.01.2019	4.26
Oeste da Bahia	Green coffee beans	IP	Bahia (BA)	17.07.2014	14.05.2019	4.83
Pirenópolis	Handmade silver jewellery	IP	Goiás (GO)	12.12.2017	09.07.2019	1.57
Uarini	Cassava flour	IP	Amazonas (AM)	05.07.2017	27.08.2019	2.15
Capanema	Beaten honey syrup and drained honey syrup	IP	Paraná (PR)	29.10.2015	17.12.2019	4.14
Campos de Cima da Serra	Cheese	DO	Santa Catarina/Rio Grande do Sul (SC/RS)	11.09.2017	02.03.2020	2.48
Campanha Gaúcha	Wines	IP	Rio Grande do Sul (RS)	14.12.2017	05.05.2020	2.39

(Continued)

Table 2: (continued)

GI	Product/Service	Status	State	Application date	Registration date	Years
Novo Ramanso	Pineapples	IP	Amazonas (AM)	02.05.2017	09.06.2020	3.11
Caicó	Embroidery	IP	Rio Grande do Norte (RN)	25.06.2018	23.06.2020	2.00

100 Created by the author based on data available on the INPI website. See <<https://www.gov.br/inpi/pt-br/servicos/indicacoes-geograficas/arquivos/status-pedidos/AcompanhamentodeIGs.RPI2581.23Jun20.pdf>>.

101 Vale dos Vinhedos and Região do Cerrado Mineiro are the two cases where a geographical name was previously registered in connection with an IP and later registered also as a DO. Under the current regulation (IN 95/2018) this is not allowed.

102 Mantiqueira de Minas was the first GI to change its registration from IP to DO, which is possible according to the current regulation (IN 95/2018).