The Balance of Interests in the Coexistence of Homonymous Geographical Indications: Suggestions for Practical International Implementation

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Abstract

This paper explores the coexistence of homonymous geographical indications (GIs) in the absence of explicit internationally harmonized provisions regulating this issue in general. It aims to identify the challenges or problems arising from such coexistence and to delineate the conditions under which it might be allowed, while maintaining a balance among the interests of producers, consumers, and States (public interest). To achieve this, the paper conducts an inductive analysis of the coexistence of the homonymous GI for grape distillates: "Pisco", claimed by both the Republic of Chile and the Republic of Peru. This analysis has revealed these three challenges arising from the coexistence: a) consumers' confusion, b) ambiguous international protection, and c) erosion of the GI's economic value as a marketing tool, which may give rise to other problematic consequences. Then, these three issues are analyzed in-depth from a theoretical standpoint, applying some of the principles of the trademark system by analogy. The paper ultimately concludes that coexistence should be allowed as an exception, provided that the GIs' distinctiveness is not diluted, and consumers are neither confused nor misled.

Bulding on this analysis, the paper proposes a systematic interpretation of the TRIPS Agreement provisions to address the issue of the coexistence of homonymous GIs. This suggested interpretation could lead to a redrafting of Articles 22 and 23 of the TRIPS Agreement, according to the terms outlined within this paper. Furthermore, it could be considered in negotiations of bilateral or plurilateral trade agreements in which States mutually recognize each other's GIs. To facilitate the latter, the paper advances a possible model clause that States can consider adopting.

Keywords

Geographical Indications, Appellation of Origin, TRIPS Agreement, Pisco, Homonymous GIs, Lisbon Agreement, Trademarks, Confusion, Territoir.

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Introduction

The literature on whether and to what extent Geographical Indications ('GIs') positively impact trade is controversial, with no consensus reached to date. However, one of the most recent studies using a meta-analysis approach confirms that GIs do have a positive impact on trade (De Filippis et al., 2022). This positive effect stems from the GI's ability to inform consumers about the geographical origin of products, and to use such information as a difficult-to-reproduce attribute to differentiate them in the market (Menapace and Moschini, 2012). Likewise, beyond functioning as a marketing tool, GIs also provide States with a means to develop the GI's territory, and can serve as a national symbol to project the culture of the place of origin.

After the Uruguay Round of the World Trade Organization (WTO) members, with the adoption of The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the role of GIs began to gain prominence at the multilateral level, and as part of free trade agreement negotiations and national policies. As a result, a growing number of scholars have paid more attention to GIs, and their legal treatment has become a fundamental part of policy discussions on economic and social development both nationally and internationally (Calboli, 2021, p. 289). Moreover, in the latest round of negotiations among the WTO Members (namely, the Doha Round), a discussion emerged regarding the creation of a multilateral system for the notification and registration of GIs at the WTO level for wines and spirits. This initiative was proposed as a possible solution to the low level of protection of GIs outside its jurisdiction and the associated costs and difficulties in enforcement (WTO, n.d.).

The discussion of the referenced proposeal could spotlight the analysis of conflicting claims over GIs and, consequently, further investigation regarding the coexistence of homonymous GIs in general. In other words, an in-depth analysis of the coexistence of identical GIs for identical types of products with different specifications and origins. This coexistence has neither been peaceful nor sufficiently discussed by scholars, partly due to the few cases in which this situation is presented. This coexistence has neither been peaceful nor sufficiently examined by scholars, partly due to the limited cases in which it arises. Nonetheless, its analysis represents an opportunity to re-legitimize the international debate on GIs. This aligns also with Calboli's (2014) proposal to examine the definition of GIs, as well as understanding the fundamental attributes that make GIs a difficult-to-reproduce attribute.

The coexistence of homonymous GIs, in general, is not regulated by any international treaty. In fact, the sole provision regulating homonymous GIs for wines is found in Article 23.3 of the TRIPS Agreement. Consequently, this paper examines the coexistence of GIs in the absence of explicit international harmonized provisions, to determine whether Article 23.3 of the TRIPS Agreement is sufficient to address this issue in general, so that its application can be extended to non-wine GIs.

In the first part of this paper, I explore whether the coexistence of homonymous GIs in general raises any challenges. The aim is to identify any issues posed by such coexistence. To this end, I will focus on the case of the coexistence of the homonymous GI for grape distillates: "Pisco", claimed by both Chile and Peru. This case was chosen over others such as: Rioja (Spain) vs. Rioja (Argentina) for wines, Lemberg (South Africa) vs. St. Magdalena am Lemberg (Austria) for wines, and Ribera del Duero (EU) vs. Rivera (Uruguay) for wines, for the following reasons. Firstly, it involves two developing countries[1] from the "New World"[2] of Latin America; secondly, Pisco is considered by some scholars as the first legally recognized GI in the Americas (Hinojosa, 2019); and, thirdly, despite sharing cultural and historical similarities, the two countries have different positions on the matter.

From the analysis of the Pisco case, three problems arising from the coexistence of homonymous GIs have been identified and extrapolated. Firstly, the consumers confusion, by diluting or eroding the GI's distinctiveness. Such confusion not only

1 While today's consumers exhibit a keen interest in geographic origins, GIs—beyond the occasional hype—can often serve as a valuable tool in boosting rural incomes in developing countries. Given that GI-based marketing can help developing farmers, properly calibrated legal protection of GIs should be part of a "development agenda" for jurisdictions with significant rural economies (Hughes, 2017).

2 On the one hand, some European countries (emigrant countries), representing the so-called "old world", have a long tradition of protecting GIs. On the other hand, the United States, Canada, Australia, and New Zealand, among others (immigrant countries), representing the so-called "new world", have not historically had separate laws to protect GIs beyond their respective systems of trademarks (Cortes, J.M., 2004).

hampers the GI's ability to represent the culture of a country as a national symbol but also hinders its potential to foster development in the associated territory. Secondly, an ambiguous international protection, mainly under bilateral and plurilateral agreements, which recognized and allowed the coexistence of homonymous GIs as a rule but do not determine the practical conditions for their differentiations. Thirdly, the erosion of the economic value of GIs as a marketing tool, which may discourage producers from investing in the GI and deter States from pursuing successful GI development.

In the second part of the paper, I address how the coexistence of homonymous GIs should be approached, given the absence of explicit international harmonized provisions regulating it and the fact that such coexistence is currently allowed only for wines. The aim of this second part is to establish whether, and under what conditions, the coexistence of homonymous GIs should be allowed to ensure a balance between the interests of the producers, consumers and the public interest represented by the State. To this end, the three issues extrapolated from the Pisco case are delved from a theoretical perspective.

In developing the theoretical analysis, this paper proposes a systematic interpretation of the TRIPS Agreement to address the coexistence of homonymous GIs and its problems. Such coexistence can be treated as an exception, provided the distinctiveness of the GIs remains undiluted and consumers are neither confused nor misled. This may ensure the balance between the interests of producers, consumers, and the States (public interest). The provisions of the TRIPS Agreement were chosen for analysis, as it is the most important multilateral treaty setting standards for the protection of GIs, with a significant membership of 153 parties.

The proposed interpretation could lead to a redrafting of Articles 22 and 23 of the TRIPS Agreement, as suggested in the third section of this paper. Additionally, this interpretation might be considered in bilateral or plurilateral agreements where States mutually recognize each other's GIs. To support this, the third section also introduces a model clause that States can implement. Collectively, the interpretation, the potential redrafting of Articles 22 and 23 of the TRIPS Agreement, and the model clause for recognizing homonymous GIs in bilateral and plurilateral agreements are proposals that the international community can implement.

Finally, the paper suggests that the recognition of the coexistence of homonymous GIs, as a rule, poses some problems, and it should not be allowed in cases where it distinguishes the same or similar products. It also shows that the provision of Article 23.3 of the TRIPS Agreement is not sufficient to address the issues from the coexistence of homonymous GIs for wines, let alone its application to the general coexistence of homonymous GIs. Therefore, as stated before, this paper seeks to contribute to the academia by offering a systematic interpretation of the TRIPS Agreement on this matter applying, by analogy, some of the principles of the trademark system. The study presents an opportunity to strengthen the geographical basis of GIs, which can be upheld by the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications; or by States at the local level when regulating this matter in their national laws. The paper also puts forth two other practical proposals as outlined in the preceding paragraph.

1. Pisco: the war of the Pacific for the homonymous GI

In this first section, the case of Pisco will be inductively analyzed to identify and extrapolate the issues, if any, raised by the coexistence of homonymous GIs. To this end, the analysis will consider: a) a brief historical account of the origin of Pisco, b) the legal protection given to Pisco in both countries, c) the cultural and nationalistic approach of Chile and Peru to the coexistence of the GI Pisco, d) the consumer's perspective on this coexistence, e) the international protection claimed by these countries over the GI Pisco, and f) the economic significance of the coexistence of the GI Pisco.

1.1. Brief historical account of the origin of Pisco

Pisco is the name of a province in the Ica region on the coast of Peru. It has appeared on maps since 1574 (Hinojosa, 2019) but it has existed since the time of the pre-Hispanic cultures of Paracas and Nazca. The Incas were the ones who used the Quechua word *"Pisko"* (which means "bird") to name the valley, located approximately 200 km south of Lima, where the Paracas culture developed (Nudman, 2007). With the establishment of the Viceroyalty of Peru, the port of Pisco was used to export the famous distillate made in the area with the grapes brought by the Spanish. Over time, this distillate came to be known as *"Pisco"*.

Pisco is also the name of a Chilean village in the community of Paihuano, within the province of

Elquique, Coquimbo region. "The original name of this village was La Greda. It was later changed to La Unión" (Wikiwand, n.d., par. 2) in 1873, and renamed Pisco Elqui in 1936. In the interim, Chile issued the Decree with force of Law No. 18117 in 1931, which reserved the name *Pisco* for spirits derived from the distillation of "grape broths" within the departments of Copiapó, Huasco, La Serena, Elqui, and others. As a result of this Decree, some scholars consider Pisco as the first legally recognized GI in the Americas (Hinojosa, 2019).

The name change to Pisco Elqui was made after the revoke of the prohibition to sell alcohol in the United States of America in 1933. Before this prohibition, Pisco exports from Peru were an important business, dating back to the time of the California gold rush in 1849 (Gutiérrez, 2019). Therefore, this name change has been criticized as being driven purely by commercial purposes, seeking to capitalize on the prestige of Peruvian Pisco in the United States of America, ensuring the exports of Chilean distillate under the name of Pisco (Gutiérrez, 2019).

Historically, both the Peruvian and Chilean distillates are products derived from the distillation of wines made exclusively from the fermentation of ripe grapes, originally brought to the Americas by the Spanish Crown[3]. Their production dates back to the 16th century, coinciding with the Spanish colonization of the territory known then as the Viceroyalty of Peru, an area that includes present-day Peru and Chile (Mitchell and Terry, 2011).

As can be seen, the distillate from Peru was named Pisco after the geographical area in Peru where it is produced. However, the distillate from Chile was also called Pisco mainly for commercial reasons. Subsequently, Chile renamed an area to Pisco Elqui where their distillate is produced. This move has been described as "a mala fide commercial maneuver mounted in a few weeks to attempt to circumvent the United States of America regulations on the proper use of geographical names to designate spirits" (Gutiérrez, 2019). The intent was to legitimize the naming of their product as Pisco and facilitate its export to the United States of America.

1.2. Legal protection of Pisco in Peru and Chile

Despite the historical conflict, both Peru and Chile protect Pisco as a GI, specifically as an Appellation of Origin (AO). In Peru, GIs are regulated under a sui generis protection regime (World Intellectual Property Organization [WIPO], n.d.), established by the Andean Community Decision 486 of 2000 (hereinafter referred to as the "Decision"). The Decision stipulates two distinct legal figures: the AO and the indication of origin.

According to Article 201 of the Decision, an AO shall be understood to be a:

> GI consisting of the name of a particular country, region, or locality, or of a name which, without being that of a particular country, region, or locality, refers to a specific geographical area, which name is used to identify a product originating therein, the qualities, reputation, or characteristics of which are exclusively or essentially attributable to the geographical environment in which it is produced, including both natural and human factors.

On the other hand, according to Article 221 of the Decision, an indication of origin shall be understood to be "a name, expression, image or sign that indicates or evokes a particular country, region, locality or place".

In Chile, GIs are also regulated under a *sui generis* protection regime outlined in their Intellectual Property Law 19.039 of 2006. Article 92 of this Law distinguishes between two different legal figures: the GIs (similar to what is referred to as "indications of origin" in Peru), and the AO. According to this article, a GI is understood to be a "designation that identifies a product as originating in a country, region or locality within the national territory when its quality, reputation or other characteristic is fundamentally attributable to its geographical origin". Conversely, an AO is understood to be a "reference that identifies a product as originating in the country, region or locality within the national territory when its quality, reputation or other characteristic is fundamentally attributable to its geographical origin, taking into account,

3 Originally, the Spanish Crown brought the grapes from Europe mainly for consumption and wine production. However, when they banned wine exports to avoid competition with Spain's domestic industry, these grapes found an alternative purpose in pisco production (Nudman, 2007).

4 Likewise, in Chile, concepts such as certification marks, collective marks, GIs and appellations of origin are collectively referred to as seals of origin (Chilean National Institute of Industrial Property [INAPI], n.d.).

in addition, other natural and human factors that influence the characterization of the product"[4].

Under the legal frameworks of both countries, the protection of Pisco as an AO in Peru and Chile means that its characteristics, quality and reputation are either exclusively or essentially attributable to the geographical environment in which it is produced, including both natural and human factors. This standard of GI protection is the same as the one outlined in the Lisbon Agreement, which is more related to the concept of *terroir* than the one given under the TRIPS Agreement (World Trade Organization [WTO], 1994), due to the definition provided by them. This discussion is further explained in section 2.1 of this paper. However, it is worth noting that, unlike the Lisbon Agreement but in line with the TRIPS Agreement, the definition of AO in both Chile and Peru include names that, without specifying a particular country, region or locality, refer to a specific geographical area.

In Peru, Pisco was officially recognized as an AO by the Industrial Technology Institute (which is now known as the National Institute for the Defense of Competition and Intellectual Property [INDECOPI]), under Directorial Resolution 072087 of 1990. It was later ratified by Supreme Decree 001-91-ICTI/IND in 1991. This decree pertains to products derived from the distillation of wines made exclusively from the fermentation of ripe grapes produced along the coast of the departments of Lima, Ica, Arequipa, Moquegua, and the valleys of Locumba, Sama and Caplina in the department of Tacna.

In Chile, the AO for Pisco was historically defined by President Carlos Ibáñez del Campo, under Decree with Force of Law 18117 in 1931. It was specific for a grape distillate elaborated within the departments of Copiapó, Huasco, La Serena, Elqui and Ovalle. Afterwards, the Chilean Ministry of Agriculture issued the Supreme Decree 521 in 2000, which further laid out the regulations for the AO of Pisco.

Although the legal protection of Pisco in Peru can be historically implied from previous normative bodies, the legal protection for it as an indication of origin was granted earlier in Chile, and in both countries before the TRIPS Agreement. However, it is important to highlight that Chile's recognition of Pisco in 1931 was prior to the approval of the Intellectual Property Law 19.039, in which Chile officially defined the concept of a GI and an AO. In fact, this Law was enacted after the Paris Convention (1883), where Article 1 incorporates indications of source or AO within the protection scope of intellectual property. Based on the above, some scholars argue that the legal recognition of Pisco in Chile was granted only as an indication of source and not as a GI, for two reasons. Firstly, there was not a geographical area named Pisco in Chile at that time. Secondly, the Decree with Force of Law 18117 does not mention that the quality, reputation, or other characteristics of Pisco are exclusively or essentially attributable to its geographical origin.

1.3. Cultural and nationalistic approach to the protection of Pisco

The Peruvian government claims exclusive protection for the GI Pisco and is unwilling to either allowing or settling on the coexistence of its GI with that of Chile. The Chilean government, on the other hand, has sought to obtain the coexistence of both GIs[5], at least up until 2019. Then, it is reasonable to infer that Chile does not see the coexistence as problematic, but rather as a scenario to cooperate with Peru and benefit from protection in markets that exclusively recognize the Peruvian GI. For Chile, endorsing the coexistence will "simplify" the international protection of the GI Pisco.

Due to the Peru's strong position, in March of 2019, Rogers Valencia, who was the Minister of Culture in Peru at the time, declined the "truce" offered by Antonio Walker, then the Minister of Agriculture in Chile. The proposal was for the two countries to complement and recognize each other's AO in international markets. Peru categorically rejected the proposal, stating that under Peruvian regulations it was not possible to consider Chilean *aguardiente* as Pisco (Paúl, 2021). These facts prove the opposing positions of Peru and Chile. In fact, the Peruvian chancellery, in its refusal of the "truce" proposition, emphasized that:

5 Peru contends that the term Pisco was usurped by Chile based on the argument that its origin lies in the Peruvian port of Pisco. Hence, only the brandy of Peruvian origin deserves that designation. Consequently, it would be a product of its own, exclusive and incomparable with any other. Chile counters this by noting that the product also came from Coquimbo and Huasco in colonial times. They emphasize that Pisco was a hub for packaging and trade, not the actual point of origin. According to Chile, the real birthplace of Peruvian pisco is Ica, a town near Pisco (Nudman, 2007, p. 2).

> Pisco has no adjectives. It is not correct to indicate [that there is a] "Peruvian Pisco", but simply Pisco, which is the distillate that is produced in a certain area of Peruvian territory, in accordance with the technical specifications contained in the Pisco Denomination of Origin Regulations (Sistema Económico Latinoamericano y del Caribe [SELA], 2021, par. 31, free translation).

In this context, a Peruvian ambassador of Pisco producers stated that:

> It is time for Chile to embrace its genuine culture and call its distillate *elqui*, *curicó* or *limarí*, which are beautiful native Chilean words […]. Each culture has its words and has to embrace and love them. We, with all our problems, do not think of using a word that does not correspond to us (Paúl, 2021, par. 29, free translation).

When analyzing Pisco case, there is a relevant nationalistic and cultural factor to consider, rather than simply economic ones. Otherwise, the "truce" proposal would have not been rejected, and it would have allowed Chile and Peru to work together to develop internationally the GI Pisco. This has happened, for example, with Basmati rice, a joint registration for which India and Pakistan have actively worked together (Kannan, 2008; Ragnekar and Kumar, 2010; Latif and Adil, 2021). It is important to note that, unlike the GI Pisco claimed by Chile and Peru for a distillate with different specifications or characteristics produced in each country, the Basmati GI for rice, shared by India and Pakistan, has essentially the same specifications.

In other words, although Peru and Chile see the exportation of Pisco as a means of agricultural development, cultural and historical animosity drives their dispute. Indeed, the right to internationally commercialize and produce Pisco under this name, claimed by both countries, reflects national and cultural interests that are larger than simply the worldwide promotion of a niche product and its producers (Mitchell and Terry, 2011).

Likewise, political entities claim the origin of products as a means of strengthening national sovereignty, rather than merely acknowledging the rights of agricultural producers (Salazar et al., 2007, p. 1525). Hence, Joelson (2004) mentioned that "perhaps no other issue mobilizes nationalist spirit as much as the question of who owns the rights to this centuries-old aguardiente (firewater)" (p. 5).

These nationalistic and cultural factors are evident in both countries. For instance, under Chief Resolution 179 of 1988, issued by the Peruvian National Institute of Culture, Pisco was declared a cultural Peruvian national heritage. Similarly, on May 6, 1999, the Peruvian Ministry of Production proclaimed July 4 as the National Day of Pisco in Peru, under Ministerial Resolution 055-99-ITINCI/DM of 1999. Later, on May 14, 2009, Chile followed suit when its Ministry of Agriculture declared May 15 as their National Day of Pisco.

The "truce" proposal, however; shows that Chile's position may be driven by economic motives, as they believe these should prevail, akin to the Basmati rice case. In contrast, Peru's strong line is driven by the cultural significance of the distillate as a national symbol. Thus, for the Peruvian government, the nationalistic and cultural factors are strong enough to resist and challenge the international coexistence of both GIs, leading them to interpret the legal provisions for the protection of GIs in this sense.

From the above, it can be inferred that Peruvians, unlike the Chilean government, believe that the coexistence of the homonymous GI Pisco would undermine their capacity to project the Peruvian culture on an international stage using Pisco as a national symbol.

Additionally, it is worth noting that both products have different regulatory specifications[6], attributable to the human and natural factors of their origin. This makes them completely different products, even if they fall under the same category or type. Moreover, Pisco is recognized as a 'public property' good in both countries. The appellations of origin in Peru and Chile are goods owned by the Peruvian[7] and Chilean states, respectively. This means that Pisco is both imprescriptible and inalienable[8], and the State must promote and protect it through national policy measures.

6 In Chile, Pisco specifications are set in the Supreme Decree No. 521, Regulation of the Denomination of Origin Pisco of 2000. While, in Peru, the Pisco specifications are set in the Peruvian Technical Standard 211.001:2006 of 2006.

7 Article 88 of the Legislative Decree 1075 of 2008.

8 In Peru, according to Article 73 of the Political Constitution of Peru (1993); and, in Chile according to Article 93 of Law 19039 of 2007.

Consequently, Chile often chooses to promote its AO by incorporating the name of the country (i.e., Pisco Chile). The same strategy has been adopted in other disputes, such as in the Rioja case between Argentina and Spain. This raises a pertinent question: in such scenarios, does the distinctiveness reside primarily in the GI term, or does it shift to the name of the country? In other words, does the coexistence of homonymous GIs dilutes their distinctive force as distinctive signs to inform consumers of the product's geographical origin?

For Peru, Pisco is Peruvian and does not require any additional adjective for promotion. The GI is not 'Pisco Peru'; it is just 'Pisco' (SELA, 2021). Despite this, in 2019, after rejecting the Chilean "truce" proposal, the Commission for the Promotion of Peru for Exports and Tourism (PROMPERU) launched a promotional campaign as a sectoral brand called Pisco Spirt of Peru to promote the Peruvian AO.

Similarly, in the case of Rioja Argentina vs. Rioja (Spain), the Spanish government stated that using the country name Argentina was not enough to prevent market confusion or to dilute the protection of the Spanish GI. Interestingly, even though it is legally feasible, neither Chile[9] nor Peru[10] have requested the nullity of the GI registered in the other's country, in contrast to Spain's action against the recognition of Rioja Argentina as a GI. In fact, the Spanish Board of the Qualified Denomination of Origin Rioja unsuccessfully challenged, before the administrative and judiciary instances, the Resolution C-32/2002 from 2002, under which the National Winemaking Institute in Argentina recognized the term "La Rioja Argentina" as a GI. In response to the unfavorable outcome in the Rioja case, Pedro Saenz, who was the president of the autonomous community of La Rioja, Spain, in 2012, remarked that the decision "attacks, as a whole, competitiveness with Europe, from the point of view of the quality models of European appellations of origin, which the European Union protects and shelters" (La Nación, 2012, par. 6, free translation).

In the case of Rioja, the position of Spain is similar to that of Peru. Spain contended that Argentinean winemakers are usurping the reputation of their GI Rioja and causing confusion among consumers. They further argued that consumers might mistakenly associate the quality and reputation of Argentinean wines with that of Spain wines. On the other hand, the position of Argentina aligns closely with Chile's perspective. They emphasized that their wine labels clearly mention the country name, as in 'Rioja Argentina', and incorporate other distinguishing elements to set them apart, thereby eliminating any intention to mislead consumers.

1.4. The consumer's perspective on the coexistence of GI Pisco

The coexistence of GI Pisco has not been peaceful and has caused confusion in the market. To substantiate this, I looked into social comments from writers, historians, citizens, and producers from both Peru and Chile. Evidence of this confusion and cultural sensitivity around the coexistence of Pisco is abundant in various media outlets, from printed pages to the internet (Mitchell and Terry, 2011).

In the case of Peru, ample evidence show that the prevailing social perception is that this coexistence is muddling the market. This is not surprising given that the government and Peruvian society, in general, are opposed to the coexistence of the GI Pisco, claiming their exclusive rights over it, as explained in section 1.2.

In the case of Chile, the situation is more ambiguous. While, as explained in section 1.2, the Chilean government is open to the coexistence of both GIs, despite that there is some evidence suggesting that producers, writers, historians and the general society do not consider this coexistence to be legitimate, and that it is leading to consumer confusion in the market. In fact, the Chilean Pisco producers (SELA, 2021) have recognized this confusion. As Claudio Escobar, manager of Chilean Pisco Producers Association, stated:

> This [the confusion about Pisco] happens a lot in the international promotion activities of the category, such as master classes, showrooms, business roundtables [...]. This has necessarily implied evolving the communication message so as not to confuse the consumer, so today we are always talking about "Chilean Pisco" […]

9 According to Articles 101, 102 and 120 of Law 19039 of 2007.

10 According to Articles 206 and 207 of Decision 486 of 2000.

> when promoting our products and highlighting results with the differentiating attributes of our product (SELA, 2021, par. 4, free translation).

Likewise, the Chilean writer Isabel Allende mentioned in *El cuaderno de Maya* (2011) that the name *Pisco* had been unceremoniously usurped from Peru. Furthermore, Gabriel González Videla, former president of Chile, and deputy when the name change from La Unión to Pisco Elqui was proposed and approved, confessed in his memories that the name Pisco was owned exclusively by Peru (Westhoff, 2019).

Moreover, several authors have documented that this confusion led to anecdotes like the one starring in a well-known Peruvian music festival, where the leader of a popular Mexican band exclaimed during his performance: "Greetings from the land of Tequila, Mexico, to the land of Pisco Sour, Chile" (Díaz et al., 2004, p. 180, free translation).

In this context, it is important to mention that my exploration of social comments regarding the coexistence of GI Pisco revealed a strong cultural and nationalist sentimentalism among Peruvians. A response from a semi-anonymous reader to an article on a Peruvian website about national gastronomy vividly captures this sentiment:

> This is not a case of crying "bad, bad Chile", it is a case of defending a national symbol, a part of our cultural identity. Pisco is a drink related to our history, to our geography, to our national historical events. It is as if French would not defend the origin of Champagne, or the Scots of whisky. That is more important than how many bottles we or they sell. (Bernardo, 2008, as cited in Mitchell and Terry, 2011, p. 518)

While I did not observe the same intense sentiment in Chile, it's important to note that various news outlets, social media platforms, and topical websites in Chile feature open forums dedicated to discussing current affairs (Mitchell and Terry, 2011), in which Pisco remains particularly divisive and the discussion of its ownership is surrounded by an intense nationalistic sentiment. From this, one might infer that while the GI Pisco has indeed garnered a cultural and nationalistic significance in Chilean society, their collective perspective on the coexistence of the GI Pisco seems to be more influenced by commercial interests.

Consequently, as noted by Mitchell and Terry (2011), "even if the conflict over claims to appellation ownership may find some sort of resolution in a legal sense, in cultural terms such an outcome represents a festering sore spot of a sociopolitical nature" (p. 531). Yet, despite the evidence and potential confusion arising from the coexistence of the GI Pisco, the Chilean government appears willing to embrace this coexistence for commercial reasons, potentially diluting the GI's distinctive force. This will be further discussed in the second section.

1.5. International recognition of the GI Pisco

While the protection of the GI Pisco in both Chile and Peru has resulted in goods from one country being unable to be exported to the other under the label 'Pisco', the implications extend beyond their borders. This "Pisco War of the Pacific" has also ignited on an international stage, with both nations seeking protection in foreign countries.

There are two ways to obtain international protection for a GI: a) by entering into international bilateral or plurilateral agreements, and b) by signing or adhering to multilateral treaties. Peru and Chile are both parties of the Paris Convention and the TRIPS Agreement. However, only Peru is a contracting party of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon Agreement); and, more recently, of the Geneva Act of the Lisbon Agreement on Appellations of Origin and GIs (as adopted on May 20, 2015)[11].

In this context, on May 19, 2005, Peru submitted an application to the International Bureau of WIPO for the registration of the Peruvian AO Pisco. This was in accordance with the provisions of the Lisbon Agreement[12], administrated by the

11 The countries bound by the Lisbon Agreement form a Special Union and commit to protecting the appellations of origin of products from other member countries on their territories. These appellations must be recognized and protected in their country of origin and registered with the International Bureau of Intellectual Property, which established the WIPO (Article 1). This mechanism functions as a bundle of applications for the recognition of a GI centralized at WIPO, which notifies each country member of the Union. They can reject the protection for the proposed GI within a one-year timeframe, as stipulated in Article 5(3) of the Lisbon Agreement.

12 Per the Lisbon Agreement, every member state within the Lisbon Union commits to protecting the appellations of origin of products from other Union countries on its territory. These appellations must be both recognized and protected in their country of origin and be registered with the international office.

WIPO and whose signatories States form the Lisbon Union.

At the time of Peru's application, the Lisbon Union comprised 22 signatories: Algeria, Bulgaria, Burkina Faso, Congo, Costa Rica, Cuba, Slovakia, France, Gabon, Georgia, Haiti, Hungary, Israel, Italy, Mexico, Portugal, Czech Republic, Republic of Moldova, Democratic People's Republic of Korea, Serbia, Togo, and Tunisia.

As a result of the application, Pisco is registered as a Peruvian AO before WIPO, under Certificate No. 865 (WIPO, Lisbon Express, n.d.). However, eight countries have refused its protection: Czech Republic (Industrial Property Office of the Czech Republic, 2006), France (National Institute of Appellations of Origin of France, 2006), Italy (Directorate General for Productive Development and Competitiveness of the Ministry of Productive Activities of Italy, 2006), Hungary (International Trademarks Section of Hungary, 2006), Slovakia (International Trademarks Department of the of the Industrial Property Office of the Slovak Republic, 2006), Portugal (Trademarks, Designs and Models Department of the National Institute of Industrial Property of Portugal, 2006), Iran (Islamic Republic of Iran Industrial Property Office, 2007), and Bulgaria (Patent Office of the Republic of Bulgaria, 2006).

In the Czech Republic, France, Italy, Hungary, Slovakia, Portugal and Bulgaria[13] (EU Member States), the protection of the AO Pisco was refused in 2006 on behalf of Peru. This refusal stemmed from the earlier recognition of the Chilean GI Pisco under the Trade Agreement establishing an association between the European Community and its Member States, on the one part, and the Republic of Chile, on the other part, signed on November 18, 2022.

However, in 2013, Pisco was recognized as a Peruvian GI in all the EU Member States, under the Trade Agreement between the EU and Peru (2012). This was despite the fact that Pisco from Chile had already been recognized before, under the Association Agreement signed between Chile and the EU (2003). Likewise, under Commission Regulation 1065/2013 of 2013, the EU clarifies that the protection of the GI Pisco for products originating in Peru does not hinder the use of such denomination for products originating in Chile, and vice versa (Commission Regulation 1065/2013 of 2013).

As of 2013, the Peruvian and Chilean Pisco has been allowed to coexist in all the EU Members States. Thus, the European members of the Lisbon Agreement, who refused the protection for the Peruvian GI Pisco, should withdraw the refusal to ensure consistency between the bilateral agreements and the Lisbon System.

On October 23, 2006, Mexico also declined the protection of the AO Pisco requested under the Lisbon System on behalf of Peru. The refusal was based on the contention that it constituted an obstacle to the use of products from Chile labelled with the GI Pisco, which had been previously recognized under the 1998 Free Trade Agreement (FTA) between Mexico and Chile. In this regard, Mexico argued that, based on an integral interpretation of the Lisbon Agreement, the coexistence of homonymous appellations of origin is not allowed (General Directorate of the Mexican Institute of Industrial Property, 2006).

Mexico's position appears to be inconsistent with the provisions in the aforementioned FTA with Chile. This agreement specified that in Mexico, the importation, manufacture or sale of products under the Chilean AOs (including Pisco) would not be allowed unless they have been produced and certified in Chile, under the Chilean legislation applicable to such products but without prejudice to the rights that Mexico may recognize, in addition to Chile, exclusively for Peru, with regard to Pisco (FTA between Mexico and Chile, 1998). As may be appreciated, under the FTA, Mexico left the door open to protect the Peruvian AO, Pisco, but refused the protection applied internationally by Peru under the Lisbon Agreement. Currently, the Peruvian AO, Pisco, is protected in Mexico under the Peru-Mexico Trade Integration Agreement (2012).

Costa Rica also recognized both the protection for the Peruvian AO, Pisco, under the Lisbon Agreement, and the Chilean AO, Pisco, under the provisions of the FTA between Central America (including Costa Rica) and Chile, in force since 2002. In fact, Costa Rica withdrew in 2007 the partial recognition granted in 2006 (Direction of Industrial Property Registry of Costa Rica, 2006). At the time of granting the partial recognition, Costa

13 In Bulgaria, the protection for Pisco on behalf of Peru was firstly refused due to the prior national registered trademark P.I.C. Co. and design (Certificate No. 41228). Then, the grounds for refusal changed, as mentioned in the paragraph (Patent Office of the Republic of Bulgaria, 2006).

Rica stated that it was granted because the name of the AO could not be protected exclusively for the holder from Peru. Nevertheless, in 2007, this recognition was withdrawn due to the application for the recognition of the GI Pisco filed by Chile in Costa Rica, under the FTA between Costa Rica and Chile. Costa Rica stated that the coexistence of homonymous GIs is allowed, under the TRIPS Agreement, its national intellectual property law, and the aforementioned FTA, (Direction of Industrial Property Registry of Costa Rica, 2007).

In summary, under the Lisbon Agreement, the GI Pisco was completely rejected by Iran, as well as by Bulgaria, the Czech Republic, France, Italy, Hungary, Slovakia and Portugal (all the latter EU members). In these EU members countries, the protection was refused only if it constituted an obstacle to the use of the products from Chile. In my opinion, this creates ambiguity, since it is not clear whether these refusals are conditioned to not interfere with the protection for the Chilean GI Pisco, previously recognized by bilateral or plurilateral trade agreements, or whether these refusals are absolute. Furthermore, there is no definition of what is meant by interfering with the Chilean GI. This ambiguity was later clarified, by Commission Regulation 1065/2013 of 2013, which allowed the coexistence of both GIs throughout the EU, and therefore also in the latter counties mentioned above.

In the same line of reasoning, it is fair to conclude that the bilateral or plurilateral recognition of the GI Pisco for Chile blocked the recognition of the GI Pisco on behalf of Peru for international application under the Lisbon Agreement. This scenario persisted unless Peru entered into a bilateral or plurilateral agreement with members of the Lisbon Union who had previously refused it based on an existing bilateral or plurilateral trade agreement signed with Chile. It is unclear on what grounds these bilateral agreements impeded the recognition under the Lisbon Agreement. There is ambiguity regarding whether this blockage corresponds to the interpretation that the Lisbon Agreement does not allow the coexistence of homonymous GIs. Moreover, while the EU has recognized the coexistence, its members have yet to withdraw -in some way possible- their refusals to the Peruvian application under the Lisbon Agreement before WIPO.

In addition, an ambiguous interpretation of the provisions on the coexistence of homonymous GIs is also inferred since Mexico withdrew its refusal and changed its interpretation of the Lisbon Agreement. This ambiguity opens new interpretations for countries to suit their commercial interests, as Mexico did after signing the Trade Integration Agreement with Peru. This is also allowed since the Lisbon Agreement does not contain any explicit provisions on the coexistence of homonymous GIs, and the bilateral agreements are in line with the TRIPS Agreement, which also does not prohibit or regulate the coexistence of homonymous GIs in general, with the exception on wines (Article 23.3).

The previous bilateral agreements blocking the recognition of a GI through the Lisbon Agreement show that there is a claim for priority in the recognition of a GI, similar to the case for trademarks. Regarding the latter, Article 6septies of the Paris Convention stipulates that when conflicting claims about rights to a specific trademark arise, the earlier right in time typically takes precedence. This priority might be based on first use, first registration, or the fact that the trademark was well-known prior to the registration or use of a similar or identical mark for similar or identical goods; as long as these conditions are fulfilled in good faith (WIPO, 2000). Article 16 of the TRIPS Agreement is also based on this provision.

Nevertheless, the TRIPS Agreement lacks any provision that refers to conflicting claims over the right to a specific GI. In this regard, Article 24 of the TRIPS Agreement, often referred to as the 'grandfather clause', contains a number of exceptions to the obligations under Articles 22 and 23, which pertain to the protection of GIs. Theses exceptions can be categorized into three classes: a) continuous and similar use of GIs for wine and spirits for at least 10 years before April 15, 1994, or in good faith before that date; b) pre-existing or prior trademarks rights established in good faith; and c) generic designations.

In practical terms, two main observations can be made. Firstly, bilateral or plurilateral trade agreements have become the main source for recognizing a GI. Secondly, under the Lisbon Agreement, which provides a unique system for the international registration of GIs, protection for a homonymous GI could be refused if its protection had been previously recognized for another country by a trade agreement, as evidenced by Peru's application. Yet, there is no international harmonization in the provisions set by the TRIPS Agreement to address this issue. In fact, there is no provision stipulating that the priority right should be given to the state that has previously claimed the recognition of the GI under a bilateral or plurilateral trade agreement as a means of "registration".

Then, which country is legitimate to claim prior rights over a GI? Could priority be based on first use, first registration, or the fact that the GI was well-known prior to the recognition or use of a similar or identical GI for similar or identical goods as long as these conditions are fulfilled in good faith? These questions are raised by the fact that the bilateral or plurilateral agreements have blocked the international registration of a GI under the Lisbon Agreement on the understanding that the prior right is based on the first registration under a bilateral or plurilateral trade agreement. Yet again, there is ambiguity. The same States have resolved the blocking situation by allowing coexistence through the execution of bilateral or plurilateral trade agreements with the other country that is also subject to coexistence. In other words, there is no explicit provision regulating the prior right claim over a GI or the coexistence of identical GIs in general.

Besides the international registration mentioned earlier, Peru has entered into various bilateral and plurilateral trade agreements currently in force[14]. Specifically, Peru has signed bilateral free trade agreements with Mexico (2011), China (2009), Korea (2011), Japan (2011), Panama (2011), the EU (2012), Costa Rica (2011), and Honduras (2015). These agreements offer mutual recognition of the protection for each party's GIs, including Pisco, on behalf of Peru, which in some cases is written as Pisco Peru (China, Korea, and Japan). In this regard, Peru has already signed a bilateral free trade agreement with Guatemala (2011), in which the protection of the AO Pisco is recognized. However, as of the writing of this paper, the agreement with Guatemala is not yet in force.

On the other hand, Chile, in addition to other trade agreements currently in force[15], has signed bilateral and plurilateral trade agreements with Central America (2002), South Korea (2003), the United States (2003), Japan (2007), Mexico (1998), Singapore, New Zealand and Brunei Darussalam (Economic Partnership Agreement, 2005), Uruguay (2016), the EU (2002) and Türkiye (2009). These agreements offer mutual recognition of the protection for each country's GIs, including Pisco, on behalf of Chile, which in some cases is written as Pisco Chile (Singapore, New Zealand, Brunei, Darussalam) or Pisco Chileno (Japan and the United States).

However, in the plurilateral free trade agreement between the United Kingdom on one side and Peru, Ecuador, and Colombia (2019) on the other, many Peruvian AOs are recognized, except for Pisco. A similar omission can be seen in the bilateral agreement between Chile and the United Kingdom (Association Agreement Chile - United Kingdom, 2019).

In light of the above, the coexistence of the homonymous AO Pisco is a global reality in at least 40 countries. In contrast, 30 countries exclusively grant the protection to Peru (El Peruano, 2022), while 5 countries offer exclusive protection to Chile.

As mentioned above, Article 23.3 of the TRIPS Agreement allows the coexistence of homonymous GIs for wines. In such cases, the States shall determine the practical conditions under which the homonymous indications will be differentiated from each other, considering a) the need to ensure equitable treatment of the respective producers; and b) that consumers are not misled. Notably, there is no provision in the TRIPS Agreement that regulates or prohibits the coexistence of homonymous GIs for products other than wines.

Nevertheless, Article 22.2.b of the TRIPS Agreement prevents the use of a GI that constitutes an act of unfair competition, as defined by Article 10bis of the Paris Convention. In other words, this refers to acts that might create confusion by any means, false allegations in the course of trade, and indications or allegations the use of which in the course of trade is liable to mislead the public by any means (deceptive GIs).

From the above, the following three scenarios can be identified:

a. Countries where the coexistence of the GI Pisco from Peru and Chile is allowed, and no measures to differentiate each other, different than the recognition of the GI Pisco along with the name of the country, have been implemented by the States in the framework of

14 For the purpose of this paper, all the bilateral agreements and multilateral agreements signed by Peru until 2023 have been reviewed (Peruvian Ministry of International Commerce and Tourism, n.d.).

15 For the purpose of this paper, all the bilateral agreements and multilateral agreements signed by Chile until 2023 have been reviewed (Chilean Sub secretary of International Economic Relations (n.d.).

bilateral or plurilateral agreements. Such obligation is only required in the case of wines by Article 23.3 of the TRIPS Agreement.

b. Countries where the recognition of the GI Pisco is exclusive to Chile or Peru. Thus, neither country can export its products to countries where the other has exclusive rights[16].

c. Countries where the GI Pisco is not recognized for either Peru or Chile. Since there is no recognition, products from both countries can be exported and compete in these markets, provided they comply with the national regulations concerning the commercialization of such products.

1.6. Economic significance of the international recognition of the GI Pisco

After describing the scenario of the international recognition of the GI Pisco in different countries, it is important to clarify the economic significance of the three scenarios presented in section 1.5. Recognizing the GI Pisco internationally lets Peru and Chile export goods to countries where its protection is granted. If coexistence is allowed or if neither country has recognition, goods from both Peru and Chile can be commercialized. The difference lies in the conditions of the coexistence recognition of the GI Pisco: under this, no other country can claim rights over this GI, nor can it be used as a generic in the market, opposite to what happens when the GI is not recognized at all. Finally, if one country has exclusive rights, the other cannot export its products.

To assess the significance of this situation for Peru and Chile, it is important to briefly mention the characteristics of the Pisco industry in both countries. In Peru, 525 companies are registered in the Directory of Pisco Producers (2021), as reported by INDECOPI and the Peruvian Ministry of Production (n.d.). In contrast, Chile has only twenty-five, based on data from the Chilean Ministry of Agriculture (2023).

According to the PROMPERU report, in 2022, the demand for Pisco from Peru reached USD 11.4 million in deliveries, which meant a 48.9% increase from the previous year. In the same year, Peru exported Pisco to forty-three countries, being the United States the main market with purchases worth USD 4.5 million, marking a 21% growth from the year before. This increase in demand is probably attributed to the United States allowing the coexistence of the GI Pisco. Other consumers who have Pisco among their favorite drinks include Spain (USD 1.1 million), the Netherlands (USD 0.9 million), Chile (USD 0.9 million), France (USD 0.6 million), Belgium (USD 0.7 million), the United Kingdom (USD 0.3 million), Colombia (USD 0.4 million) and Germany (USD 0.3 million) (Government of Peru, 2023). Spain, France, the Netherlands, Belgium, and Germany, as members of the EU, also allow the coexistence of the GI Pisco. In contrast, Chile does not recognize the GI Pisco from Peru and imports it as a distillate not labelled as Pisco. Finally, the United Kingdom also does not recognize the GI Pisco, while Colombia has recognized the exclusive rights of the GI Pisco to Peru.

On the other hand, Chile exported a total of 425 000 liters in 2022, amounting to USD 2.53 million, which represented a 0.5% increase in volume but an 8% decrease in value compared to 2021 figures. During 2022, the leading destinations in terms of export value were the United States (24.6%, USD 0.62 million), Germany (22.5%, USD 0.57 million), Argentina (15.1%, USD 0.38 million), France (8.2%, USD 0.21 million), and China (5.0%, USD 0.13 million). Among these countries, the United States, France, and China have allowed the coexistence of the GI Pisco, while Argentina has not recognized it. It is worth noting that Chile produces around 40 million liters of Pisco annually, 95% of which is consumed by the domestic market (Ministry of Agriculture, 2023).

In 2022, Chile's Pisco exports amounted to only 22% of what Peru exported worldwide. Two conclusions may be drawn from this: First, the international market for Pisco exported from Peru is larger than the one from Chile. Second, not all countries that allow coexistence are the primary destinations for Pisco exports from both nations. For instance, while Germany is a significant market for Peruvian Pisco, Chilean Pisco exports to Germany surpass those of Peru — with figures standing at USD 0.57 million for Chile versus USD 0.3 million for Peru. In this sense, both countries might seek to maintain their leading position in exportations by

16 It is important to mention that Peru and Chile mutually neutralize the import of each other's product into their respective countries (for more details see, Gutiérrez, 2019, p. 280).

investing more in marketing to differentiate their goods more effectively. Consequently, the coexistence of the GI Pisco implies additional costs for producers and promoters, including the States themselves, in efforts to differentiate their products in markets where coexistence is allowed.

From the sections 2.1-2.6, it is clear that without harmonized provisions in the TRIPS Agreement governing the coexistence of identical or homonymous GIs in general, several problems arise. The following three have been identified and extrapolated from the inductive analysis of the Pisco case:

a. Consumer confusion by diluting the GIs' distinctiveness or the link of the product to its geographical origin, from which its characteristics, reputation and quality are attributable. This also undermines the GIs' ability to project the culture of a country as a national symbol or a flagship product.

b. Ambiguous international protection, in the sense that even when the homonymous GIs are recognized in other foreign States, mainly under bilateral or plurilateral agreements that allow their coexistence, this has been done without defining the practical conditions under which the homonymous indications will be differentiated from each other.

c. Erosion of the economic value of GIs as a marketing tool, which may discourage producers from investing in the GI and States from developing a successful GI.

2. Coexistence of homonymous GIs: A theoretical analysis under TRIPS Agreement

In this section, I conceptually analyze the issues of the coexistence of homonymous GIs for identical products, identified and extrapolated from the Pisco case. I aim to propose a systematic interpretation of the provisions of the TRIPS Agreement to address these problems in the absence of explicit international standards regulating the coexistence of homonymous GIs. The above is to establish under what conditions the coexistence should be allowed in order to maintain a balance between the interests of producers, consumers and States (public interest).

Preliminarily, it is important to establish the definition of the coexistence of homonymous GI, especially in the absence of a legal definition of homonymy in the TRIPS Agreement. According to the Oxford English Dictionary (n.d.) and the Real Academia Española (RAE, n.d.), a homonymous term is a word that is spelled and pronounced like another word, but which conveys or identifies a different person or object. Interestingly, from a strictly linguistic standpoint, the Oxford English Dictionary (n.d.) also defines *homonymous* as equivocal or ambiguous. Despite these definitions, the WIPO (2000) defined homonymy as "two or more identical [GIs] used to designate the geographical origin of products stemming from different countries" (p. 20); a definition that will be upheld in this paper.

Therefore, the condition for the coexistence of homonymous GIs is that the GI-term must be identical, regardless of the products they distinguish. From this premise, three scenarios arise under which this situation might appear, and each one is considered in the analysis. The first scenario is when the homonymous GIs distinguish identical products (i.e., the same type of products), as in the Pisco case. The second one is when they distinguish similar products (i.e., commercially related products). The third one is when they distinguish different products.

Finally, in this section, I introduce, by analogy, some of the principles of trademarks since they are similar to GIs to the extent that both fulfil a distinctive function. GIs identify the origin or source of goods and help differentiate individual products among similar goods by communicating the "specific quality" attributed to the geographical origin (Kireeva and O'Connor, 2009). The similarity between GIs and trademarks suggests that GIs share some of the key economic functions of trademarks, such as reducing consumers' search costs for the desired product by avoiding confusion between goods that might appear identical before purchase (Landes and Posner 2003).

2.1. The weakening of the GI's distinctive function and the confusion in the market caused by the coexistence of homonymous GIs

2.1.1. The dilution or erosion of the distinctiveness of the GIs

Historically, GIs are signs used to identify the geographical origin of a product, indicating where it is grown or produced, and from which its characteristics, quality or reputation are attributable. In international treaties, GIs have included the so-called AO and GI. Meanwhile, in national or regional legislations, the term has included concepts such as "AO", "Protected AO", and "Protected GI", making differences depending on each jurisdiction. Despite these different concepts, the core or rationale of GIs has historically been the link between the product's geographical origin and its characteristics, quality, or reputation. This link or connection has been the fundamental, or sine qua non, basis upon which various jurisdictions have construed GI protection (Calboli, 2006).

Based on the established link between a product and its geographical origin, GIs, in economic terms, have the distinctive function or role of informing consumers about the origin of the goods they represent and their commercial quality, which is intrinsically tied to their place of origin. Additionally, GIs play a role in potentially promoting the goods of a given area, consequently fostering development in that region and generating income and tangible benefits for rural or marginalized groups (Gangjee, 2012). The above is without prejudice to the ability of GIs to project the culture of a country or region as a national symbol, as already illustrated in the case of Pisco.

Likewise, from the link between the GI-product and the GI-origin, it is fair to deduce that the distinctiveness character or function of a GI shall be assessed in light of the trademark's specificity principle. This principle gives protection to a trademark against an identical or similar sign that seeks to distinguish identical or similar products. Therefore, the distinctiveness of GIs or the connection between the geographical origin of the product and its characteristics, quality, or reputation must be protected and assessed in relation to a specific product.

Besides, I must mention that the so-called distinctive character of the GI is somewhat of a 'legal fiction', created to protect the fundamental link previously described, as it conveys relevant information to consumers about the product's characteristics, reputation, and quality. Consequently, the GI's role in informing consumers gives it its distinctive character, as the GI might be able to differentiate and distinguish a product in the market from similar offerings. This is different from the case of trademarks since, under its legal system, the designation of the product's origin could be considered descriptive.

From a legal perspective, according to the Paris Convention (WIPO, 1883)[17], the "indications of source" and AOs fall under the scope of industrial property protection (Article 1.2). However, there is no definition of "indication of source" or AO. The Lisbon Agreement (WIPO, 1958)[18], on the other hand, aiming to uphold the fundamental basis of the GIs, established the protection of AOs and defined them as the geographical denomination of a country, region, or locality used to designate a product originating therein, and the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors (Article 2.1).

In this context, the TRIPS Agreement[19] defined GIs as indications that identify goods 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 goods is essentially attributable to their geographical origin, without considering or mentioning the human factor (Article 22.1).

The TRIPS Agreement establishes a broader scope of protection compared to the Lisbon Agreement[20] by removing the word *essentially*, omitting the reference to the *human factor,* and adding the concept of reputation to the definition of GIs. In fact, as pointed out by Calboli (2014, p. 59), the GI's definition essentially misuses, or at least misinterprets, the notion of the terms *geographical* and *origin*, and expands the scope of GI protection beyond the meaning of these terms.

This discrepancy from a literal interpretation contributes to granting exclusive rights to GIs beyond the original rationale for protection and demonstrates that the geographical link has been progressively broadened. This has been done to accommodate corporate and national interests, primarily coming from businesses from the EU and other countries with GI-intensive industries (mainly from the Old World), since the delocalization of

17 Peru and Chile are members.

18 Peru is a member country, Chile is not.

19 Internationally, the Paris Convention, the Madrid Agreement and the Lisbon Agreement are the main sources for international protection of GIs before the TRIPS Agreement. All of these sources set the standards for the protection of GIs.

20 However, the scope of the latest agreement is currently expanded by the Geneva Act of the Lisbon Agreement (WIPO, 2015) concerning AOs and GIs to protect these last, as conceptualized in the TRIPS Agreement.

the GI allows to reduce production costs, as well as to meet greater demands, as was mentioned by Calboli (2014). She also called this delocalization of the product's origin an "ambiguous geographical origin", and advocated against the misuse, or misinterpretation of the term *geographical origin* in Article 22.1 of the TRIPS Agreement. Therefore, the author proposes a redrafting of the mentioned article and encourages national legislators to consider a stricter interpretation of GIs at the local level.

From a theoretical standpoint, the protection of GIs remains fundamentally linked to the notion of geographical origin. Even more so considering that historically GIs were "originated in France as a form of intellectual property to prevent the usurpation of French wines' reputation in consumer markets and to promote quality standards in wine production" (Bassem and Cadogan, 2017, p. 3). Both actions were accomplished by protecting the concept of the *terroir*, i.e., the link between the GI product and its geographical origin.

In fact, the term GI is derived from the law related to AOs, which initially appeared in the French Law of August 1, 1905. Although this Law did not provide a definition for AOs until 1966, subsequent amendments eventually defined AO as a geographical name of a country, region, or locality, that serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors (Awad and Cadogan, 2017). This definition is similar to the one in the Lisbon Agreement.

However, a closer look at the controversies surrounding the GI debate reveals a partially different application of the concept of "geographical origin" in relation to GI protection. Indeed, the protection of GIs appears to be increasingly shifting towards a trend aimed at exploiting their commercial value (i.e., reputation), at the expense of geographical accuracy; that is, regardless of whether GIs still provide accurate information about the geographical origin of the products (Calboli, 2014), as illustrated by the allowance of coexistence of homonymous GIs for identical or similar products.

This growing trend is evident in the case of Pisco, which is protected in Chile and Peru as an AO, which, by definition, has a closer basis on the concept of *terroir* than GIs. However, internationally it is mostly recognized and protected as a GI (on its broader concept), particularly in those jurisdictions that do not distinguish between GI and AO. However, even if recognized as an AO, the recognition, if granted for both countries, would be weaker than an exclusive recognition for just one country. This is because it would be granted at the expense of maintaining the link between the GI-territory and the GI-product; that is, at the expense of Pisco geographical origin accuracy.

In the same way, from my perspective, the coexistence of homonymous GIs for identical or similar products can also be considered as a way of delocalizing the origin of the GI-product under the consumer's perception. This is because when homonymous GIs coexist for identical or similar products, the GI-term ceases to offer consumers unique and precise information about the origin of each product. This could mislead or confuse consumers, as seen in the case of Pisco.

In this regard, I consider that the delocalization of the origin may not occur when dealing with identical GIs for different products. Within the trademark system, identical signs for different products can coexist because they can still accurately inform consumers of the origin or source of the products, allowing trademark owners to differentiate their ventures in the market. As a result, trademarks retain their distinctive character in this scenario[21]. By analogy, the same rationale can be applied to identical GIs for different products, especially given that GIs and trademarks, both being distinctive signs, serve similar economic functions, as previously noted.

Consequently, allowing the coexistence of homonymous GIs for identical or similar products would undermine the fundamental rationale behind GIs that justifies their legal protection. In other words, such coexistence would breach the link between the GI product and its geographical origin.

For Calboli (2014), when producers turn to outside resources to take advantage of a partially or completely delocalized production model, allowed by the GI's broader concept under the TRIPS Agreement, they unequivocally breach what the author calls the "GI-protection bargain", that is:

21 For this paper, the analysis is made considering that the GI has not gained a well-known caracther in its country or its not internationally renowned, in which case principles to protect this type of trademarks can apply.

> The fact that GIs are protected because they inform consumers about the link between the natural and human factors of the GI-denominated areas and the products coming from those areas, and therefore provide economic incentives to invest and maintain economic capital in those same areas. (p. 62)

From my perspective, when States allow the coexistence of homonymous GIs for identical or similar products, it results in their delocalization. This, in turn, breaches the "GI-protection bargain", based on the concept of terroir. Moreover, in my opinion, this delocalization may also hamper the ability of the GI to project the culture of a country as a national symbol. Otherwise, countries like Chile and Argentina, for example, would not have recognized or promoted their GIs in tandem with the country's name to indicate the accurate geographical origin of the GI-products, since the GI-term can no longer fulfill said distinctive function as a source of information regarding the product's geographical origin.

The expansion of the GI concept under Article 22.2 of the TRIPS Agreement should be considered as an over-protective regime. When IP rights are overprotected, they take on the economic characteristics of subsidies. This is because, in an environment where it is "raining carrots", producers hardly need or pursue investments in the GI-territory if substantive reward can be obtained from the existing regime, which allows the delocalization of the GI (Frankel, 2017, p. 163).

Hence, to avoid said overprotection, States should adopt a stricter territorial or geographical approach, as proposed by Calboli (2014, p. 59). According to the author, this could be the much-need solution to restore legitimacy to the international debate on GIs, since, as GI critics have pointed out, GIs can become an unjustified market entry barrier and a disguised subsidy, especially when they do not fully reflect the geographical origin of the products they identify.

Accordingly, I believe that a stricter territorial or geographical approach would be the solution for States to ascertain under which situations or conditions the coexistence of homonymous GIs should be allowed. In my view, coexistence should only be allowed as an exception when the GI-protection bargain or the distinctive role of the GI, as an indication or source of information about the product's geographical origin, is not breached; and, thus, consumers are not confused or misled. Consequently, this approach will prevent a broad interpretation and application of Article 23.3 of the TRIPS Agreement, which allows the coexistence of homonymous GIs for wines.

To sum up briefly, the protection of the geographical origin of a product has historically been based on the concept of terroir, i.e., the link between the GI-product and the GI-origin, to which its characteristics, reputation and quality should be exclusively (or at the most "essentially") attributable. However, the TRIPS Agreement expands the definition of GIs, thereby weakening their protection and allowing their delocalization. This favors the dilution of the information content of GI promotion or geographical origin (Menapace and Moschini, 2014, p. 1031).

Therefore, the coexistence of homonymous GIs for identical or similar products should be interpreted with a strict territorial approach, so that the GIs' fundamental basis or core, i.e., the concept of terroir, prevails. Otherwise, the distinctive function of the GI, as a distinctive sign that conveys information about the geographical origin of the GI-products, may be eroded or diluted, specifically in relation to the product it aims to identify in the market. Should this occur, there is a potential risk that the GI may become a non-distinctive sign, which would then fall outside of the scope of intellectual property protection.

2.1.2. Likelihood of confusion in the market and misleading consumers

From a theoretical standpoint, as explained above, the coexistence of homonymous GIs for identical or similar products results in a delocalization of their origin in the perception of the consumers, who do not receive accurate information about the origin of the product from the GI itself. Therefore, it constitutes a breach of the "GI-protection bargain" (or the dilution of the GI's distinctiveness), which causes confusion in the market or mislead consumers.

The coexistence of identical trademarks (distinctive signs) on behalf of two different titleholders is the exception rather than the rule (WIPO Magazine, 2006). In such cases, the public interest and the interests of consumers take precedence, meaning that the distinctiveness of the trademark and the consumer's protection prevail over the likelihood of confusion and misleading situations. By analogy, the recognition of homonymous GIs by third countries could only be considered fair or lawful as an exception, provided there is no likelihood of confusion, the consumers are not misled, and the GI's distinctiveness is not diluted. These factors should be assessed *ex ante*, before recognizing both homonymous GIs abroad, to prevent confusing or misleading the consumer due to their coexistence.

On the one hand, concerning the misleading of consumers, Article 22.4 of the TRIPS Agreement stipulates that the GI's protection shall be applicable against those that, although literally true as to the territory, region or locality in which the goods originate, falsely represent to the public that the goods originate in another territory. Likewise, Article 23.3 states that the practical conditions that the States shall implement to differentiate their homonymous GIs, when allowing the coexistence of identical GIs for wines, should take into account the need to ensure that consumers are not misled.

On the other hand, confusion is an act prevented by the protection of the GIs in Article 22.2.b of the TRIPS Agreement. Under this article, the WTO Members shall provide interested parties with legal means to counter any use that constitutes an act of unfair competition, as defined in Article 10bis of the Paris Convention. This definition includes any act of such a nature as to create confusion by any means with the establishment, goods, or industrial or commercial activities of a competitor. Nevertheless, the TRIPS Agreement lacks provisions addressing the likelihood of confusion regarding the coexistence of identical GIs in general. Furthermore, this issue is not mentioned in the provision of Article 23.3 that regulates the coexistence of homonymous GIs for wines.

From a theoretical standpoint, when dealing with trademarks, to determine that there is likelihood of confusion, both the signs and the goods they identified shall be either identical or similar. In this regard, in Article 16.1 of the TRIPS Agreement, the likelihood of confusion shall be presumed in the case of identical signs for identical products. Notably, this article does not mention if such presumption is absolute (*iuris et de iure*) or relative (*iuris tamtum*). However, as a general principle of law, presumptions must be considered relative, meaning that they are subject to proof to the contrary, unless it is explicitly prohibited by the legal provision.[22]

In the case of homonymous GIs, the signs or GI-terms are, by definition, identical. Thus, if we apply the criteria of the trademark system explained in the previous paragraph by analogy, determining whether or not these signs are likely to cause confusion hinges on analyzing whether the GIs-products are identical or similar. If they are, their coexistence should not be allowed, as it would cause confusion in the market; even more so, in the case of identical GI-terms for identical products, the likelihood of confusion shall be presumed, subject to proof to the contrary.

It is important to note that for products to be considered identical, they must be of the same type, even if they have different specifications, as in the Pisco case. Similarly, in order for some products to be considered similar, they should have the same nature, distribution channels, and target consumers, among other factors. This is akin to the criteria used in the case of confusion between trademarks.

Furthermore, it is possible for one of the identical GIs to become well-known in the country where coexistence is claimed. In this case, States should consider the principles of the well-known-trademarks provisions of the TRIPS Agreement (Article 16.3) to assess if said coexistence should be allowed. In doing so, the States should analyze if the other GI, which is intended to coexist with the well-known GI, is likely to cause confusion, regardless of the specificity principle. This scenario would arise when the recognition of the non-well-known GIs, in relation to the goods distinguished, suggests a connection or link to the well-known GI's origin. Also, when the GI-area, nation, or region, as well as its producers' interests concerning the well-known GI, are at risk of being compromised by a dilution or tarnishing of its distinctiveness.

Unlike trademarks, for practical purposes, the well-known GI should first be recognized in the State where coexisting is under consideration. Otherwise, it will be technically and politically complicated to implement a procedure in which the country owner of the well-known GI could oppose the recognition of the other GI under a bilateral or plurilateral trade agreement.

In light of what has been discussed in sections 2.1.1. and 2.1.2., and considering the three sce-

22 For more details about the legal presumptions see Rudzkis and Panamariovas, 2017.

narios in which homonymous GIs may be claimed as distinctive signs, the question of "when should the coexistence of homonymous GIs be allowed?", or in other words, "when should the exception apply?" might be answered as follows:

For the first scenario, where the homonymous GI distinguishes the same type of product, the "GI-protection bargain" is breached by the delocalization of the origin of the GI-product in the consumer's perception. This means that the distinctiveness of the GI or the concept of the *terroir*, as the fundamental basis of GI protection, is diluted or eroded. Likewise, in this scenario, theoretically, there is likelihood of confusion, which is even presumed. In this regard, the Pisco case has proven that, when two identical GIs for identical (i.e., same type of) products coexist, there is likelihood of confusion, as the Chilean producers have recognized.

Similarly, in the second scenario, where the homonymous GI distinguishes similar or commercially related products, the "GI-protection bargain" is also breached by the delocalization of the origin of the GI-product in the consumer's perception. Thus, the distinctiveness of the GI is also diluted or eroded, as in the previous one. Likewise, theoretically, there is likelihood of confusion in this scenario.

Regarding the third scenario, where homonymous GI distinguishes different products, the "GI-protection bargain" may not be breached since the GI-term is associated with different target products, and there is no delocalization of the origin of the GI-product in the consumer's perception. As a result, the GI may keep its distinctiveness and there may not be likelihood of confusion. The above, provided that there is no well-known GI affected. Nontheless, the use of identical GI-terms and allowing their coexistence in this scenario is not commercially ideal, since the more unique the GI-term is, the stronger it is as a commercial tool. Therefore, in this case, we encourage the States to establish some measures of differentiation between the identical GIs to strengthen the GI as a valuable commercial tool.

In conclusion, coexistence should be allowed as an exception only when a) the fundamental basis of GIs is not breached, meaning that its distinctive character is not diluted or eroded; b) there is not likelihood of confusion; and c) consumers are not misled. This approach can ensure a balanced representation of the interests of producers, consumers, and the States.

First, producers, because they want to and will be able to benefit from the economic functions of the GIs in which they invest. Second, consumers, because they want to and will be protected from being confused or misled, and also because of the benefits from the GI's distinctive function, which reduces the consumers' search costs. Third, the States (i.e., the public interest), since they will protect consumers, seek to encourage investment in GIs and will be able to use the GI as a precise national symbol to project their culture.

2.1.3. Is Article 23.3 of the TRIPS Agreement enough?

Article 23.3 of the TRIPS Agreement, regulating the coexistence of GIs only for wines, establishes that:

> In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

From a literal standpoint, first, the Article establishes coexistence for wines as a rule. Secondly, it dictates that the protection shall be accorded to each indication, leaving the door open to any kind of interpretation as it does not provide any guidelines to the State on how to proceed. Thirdly, it refers to paragraph 4 of Article 22, under which the protection of GIs shall be applicable against deceptive GIs (i.e., GIs that are literally true, but misleading regarding the true origin of the goods on which they are used) to prevent consumers from being misled. Fourth, it establishes an ambiguous obligation, according to which each WTO member shall determine the practical conditions under which the homonymous GIs will be differentiated from each other. However, the provision does not mention whether this obligation should be fulfilled by the members that allow or claim coexistence. Fifth and finally, the need to ensure equitable treatment of the producers, and that consumers are not misled is a condition for fulfilling the previously mentioned obligation, not for assessing whether coexistence should be allowed.

I consider Article 23.3. is not enough to regulate the coexistence of GIs for wines and, in a broader context, for other products as well. Here, I present my reasoning:

First, it does not contemplate coexistence as an exception.

> Second, it does not oblige States to analyze whether the coexistence will dilute or erode the distinctiveness of the GI (the concept of *terroir)*, which is the fundamental basis for its protection and existence. It also does not address the likelihood of confusion that the coexistence might create, or whether consumers could be misled by allowing such coexistence.
>
> Third, it does not offer any harmonized provisions for States to determine whether coexistence could pose problems and, therefore, whether it should be disallowed.
>
> Fourth, the obligation to establish measures of differentiation is ambiguous, as it is unclear which competing GI claim these measures should target or upon whom they should be imposed. However, even if the differentiation measures were clear, they would represent additional costs for producers and States, and still might not be enough in scenarios where, as analyzed earlier, coexistence should not be allowed. Furthermore, regarding the conditions that States must comply when establishing said measures, there is no reference made to prevent the likelihood of confusion.
>
> Fifth, by stating that "*protection shall be accorded to each indication*", Article 22.3. provides no harmonization guidelines to States to determine when the coexistence of homonymous GIs should be allowed, and it leaves the door open for States to make prevail their economic interests. The latter is risky, as States could allow the coexistence of homonymous GIs in situations where such exception should not be applied. This could compromise the GIs' distinctiveness character, and lead to confusion or mislead for both consumers and producers.

In the absence of general provisions regulating the coexistence of homonymous GIs, the Standing Committee on the Law of Trademarks, Industrial Designs and GIs of WIPO (2000) proposed extending the principle of Article 23.3 to all products, regardless of the type for which the GIs are used. However, in my opinion, this provision is not enough and, even more concerning, it preserves the possibility of allowing the coexistence of homonymous GIs as a rule, despite the potential issues I have detailed above.

Given the established provisions of the TRIPS Agreement, and the stipulation that homonymous GIs for wines can coexist (as long as consumers are protected from misleading GIs), I concede there is no practical alternative to address this issue other than applying the principle set out in Article 23.3 and letting the States determine the practical conditions under which their GIs will be differentiated in the market, considering the need to ensure equitable treatment of the concerned producers and that consumers are not misled. This latter is, in my opinion, referred to the States that are subject to the coexistence constrained by those that allow it.

In this paper I propose a systematic interpretation of the TRIPS Agreement, as elaborated earlier. The proposal considers, by analogy, certain principles of the trademark system that States can apply to assess whether they should allow the coexistence of homonymous GIs. In my opinion, it should be done as an exception in the cases described in section 2.1.2.

Such an interpretation may lead to a redrafting of Articles 22 and 23 of the TRIPS Agreement and might also encourage States to redraft the clauses of the bilateral or plurilateral trade agreements under which the coexistence of homonymous GIs is allowed. To further aid this process, the third part of this paper elaborates two additional proposals, complementary to the proposed systematic interpretation and not mutually exclusive.

2.2. International regime for the coexistence of homonymous GI: trade agreements as a tool for GIs recognition, and the unjustified additional differentiation cost

2.2.1. Conflicting claims over an identical GI by different titleholder

GIs are both commercial instruments and symbols of national or regional identity (Gervais, 2012, p. 122). They are protected and recognized by international treaties and multilateral agreements, such as the TRIPS Agreement, as well as by bilateral and plurilateral trade agreements. In this context, there is an increasing shift away from the WTO and other systems, such as the one established by the Lisbon Agreement, in favor of bilateral and plurilateral trade agreements (Calboli, 2014, p. 67) for the recognition and protection of GIs.

In this sense, as illustrated by the Pisco case, the international recognition of a homonymous GI under the Lisbon Agreement has been blocked due to its prior recognition for another country under bilateral or plurilateral trade agreements.

Based on the above, it is reasonable to conclude that, in the case of conflicting GI claims, the priority right in an international GI registration system is currently based on the first recognition under a bilateral agreement. This holds true until the homonymous GI is also recognized by another bilateral agreement with the same country, as happened in the Pisco case with Mexico. Initially, Mexico refused Peru's application under the Lisbon Agreement. This refusal was due to Mexico's prior recognition of the Chilean GI Pisco under a bilateral agreement. Mexico argued that the Lisbon Agreement does not allow the coexistence of homonymous GIs. However, after signing the bilateral trade agreement with Peru, Mexico changed its interpretation of the Lisbon Agreement, which does not contain any provision regarding the coexistence of homonymous GIs. As a result, Mexico withdrew its refusal after recognizing the Peruvian GI Pisco through a bilateral trade agreement. In this regard, given that there is no detailed argumentation in Mexico's decision, I infer that its initial refusal was based on the Lisbon Agreement provisions, particularly considering the narrowed scope of the concept of an AO and the fundamental basis of GIs.

This situation, where bilateral agreements block the international registration of a GI under the Lisbon Agreement, prompts the following question for future research, as highlighted in the analysis of the Pisco case: Which country is legitimized to claim prior rights over a GI? In other words, in cases where there are conflicting claims over the right to a given GI, can States apply the priority principle of trademarks to resolve the conflict?

These questions have been particularly raised in cases where the coexistence of homonymous GIs should not be allowed, such as when there are identical GIs for identical or similar products. In such situations, the issues arising make it preferable for only one country to have the legitimate claim to use it and gets its recognition. Conversely, this situation does not arise in the case of identical GIs for different products, since in this scenario the coexistence of homonymous GIs could be allowed, as previously explained, and only provided that there ir no well-known GI affected.

In the trademark system, under the so-called principle of priority, priority may be based on first use, first registration or the fact that a trademark was well known prior to the registration or use of a similar or identical trademark for similar or identical goods, provided that the prior right was acquired in good faith. This principle is used to resolve conflicting claims to an identical mark by different owners.

Given that protection for a specific GI in a foreign country starts with its recognition, and considering that this recognition can be granted under bilateral or plurilateral trade agreements, multilateral systems like the Lisbon Agreement, or any sui generis regime dictated by the national law of each jurisdiction, a critical question arises: What should be the principle to resolve conflicting claims over the rights of a given GI? This question is proposed for future discussions.

Indeed, elaborating a detailed answer to these questions is outside the scope of this paper. Nevertheless, for further research, I will attempt to do so by proposing a principle of priority in GIs based on geography. Not surprisingly, once again, borrowing the expression of Calboli (2014, p. 67), the solution to the GI debate and concerns lies in geography.

To reply to the previous questions, I consider that it is important to recall the fundamental basis of GIs protection development. In other words, to recall the concept of *terroir* or the link between the product's geographical origin and its characteristics, quality or reputation. In this regard, Frankel (2017, p. 148) states that what makes GIs valuable, at least initially, is the place with which the GI-branded product is associated, and such association (if they are genuine) is not identically replicable. Therefore, in my perspective, the priority right should be granted to the State that possesses geographical rights over the given indication or GI-term. If two countries share this right, it should be given to the one with historical precedence, which can be proven by referencing the GI-term on maps.

In situations where the GI-term represents an area falling within the territories of both states claiming its protection, and where historical maps from the same date bear this term on each country, or in instances where the GI is not the name of a territorial region (as might be allowed under the TRIPS Agreement), or where states lack historical evidence corroborating the GI-term's reference on maps, it is in these exceptional circumstances that I propose the priority right be granted to the state with evidence of first use of the GI.

I consider that in these exceptional situations, the priority principle right should be based on the first use and not on the first registration. This is because GI's "registration" implies the recognition of rights over the characteristics, quality and reputation of a product that already exists in the market. Essentially, it is the same as officially accepting that a product of a given quality, reputation and characteristics exists under the GI-name, as to prevent third parties from using it for different products that do not comply with the specifications.

As a consequence of applying the priority principle for GIs in the case of conflicting claims over identical GIs for identical or similar products, one of the States shall change its GI-term, since the illegitimate one's recognition granted by an international system as the Lisbon Agreement or by a bilateral or plurilateral agreement might be declared null or should not be recognized.

Is changing the GI-term as bad as it sounds for the country that loses its "right" over it? Experience has shown that it is not. Rather than a punishment, it should be seen as an opportunity. For example, after signing the bilateral agreement with the EU in 1994, Australia stopped using the French GIs Burgundy or Chablis to describe its wines. Then, the country started to rely on its own regional names, like Coonawarra and Barossa; and to stress grape varieties like Chardonnay and Shiraz. This is how Australia built the world's most dynamic wine industry (Calboli 2006, p. 201). This boom is an example of how the renouncement to use illegitimately a GI might be an opportunity, as well as an example to show that the benefit of GIs "would not be limited to 'Old World' countries, but, at least in the long-term, could eventually be shared by all TRIPs Members" (Calboli, 2006, p. 200). Indeed, even though the protection of IP rights mostly benefits wealthy states, also developing countries are keen to establish protection for their goods to foster development (Bowen, 2010).

2.2.2. The recognition of homonymous GIs in trade agreements

IP rights are considered non-tariff trade barriers (Gervais, 2012), as an exception to the principle of free movement of goods of the GATT Agreement. Indeed, Moran (1993) accurately predicted that IP rights, as a form of non-tariff trade restrictions, would become an important influence on trade flows and a growing distinction among rural products. Consequently, the scope of GI protection impacts trade in a way that a broader scope translates to a broader barrier to trade. Therefore, maintaining the proper scope of GI protection by strictly enforcing the link between a product's geographical origin and its characteristics, quality, or reputation is also essential for trade purposes.

The above discussion highlights the need for harmonized provisions regarding the coexistence of homonymous GIs under the TRIPS Agreement. One option is to redraft Articles 22 and 23 to address this issue. Alternatively, given the political and technical challenges of amending the TRIPS Agreement's articles, a systematic interpretation of its provisions could offer a viable solution, as previously suggested. A third option would involve recognizing homonymous GIs through unambiguous clauses in bilateral and plurilateral agreements, thereby avoiding to give them -what I will call in this paper- an "empty protection", as will be explained in this section.

Otherwise, accepting the coexistence of homonymous GIs as a rule, especially when it dilutes the fundamental basis of GIs and leads to consumer confusion and misleading, would essentially mean broadening the protection granted to GIs and not maintaining the proper scope of protection, which is crucial for trade.

In this context, there are three scenarios regarding the coexistence of homonymous GIs in international trade. The first scenario involves states that allow coexistence. The second one pertains to states that grant exclusive rights to one country, thereby rejecting coexistence with another homonymous GI. The third scenario relates to States that do not recognize any homonymous GI.

In the first scenario, the absence of international harmonized provisions under the TRIPS Agreement regulating the coexistence of homonymous GIs has unjustifiably broadened the GIs' scope of protection by allowing the coexistence of identical GIs, even at the expense of the likelihood of confusion in the market, the misleading of the consumers, and the dilution or erosion of the GI distinctiveness.

As mentioned above, the broad international protection of homonymous GIs has been realized through bilateral agreements, under which the States have, in some cases, just recognized the homonymous GIs, stating that one recognition does not affect or prejudice the recognition of the other. However, States have not implemented any practical condition or establish any compromise for the differentiation of identical GIs other than recognizing the GI along with the country name, as in the case of the GI Pisco.

For instance, in the bilateral trade agreements signed between Peru and States like China, Korea, Japan, and the United States, the GI Pisco is recognized as "Pisco Peru." On the other hand, in plurilateral trade agreements between Chile and countries such as the United States and Japan, as well as the so-called P4 block (comprising Singapore, New Zealand, Brunei, and Darussalam), the GI Pisco is recognized as either "Pisco Chileno" or "Pisco-Chile." However, as previously mentioned, this measure does not effectively prevent the dilution or erosion of the link between the GI product and its characteristics, quality, and reputation attributable to its origin.

In my opinion, the clauses recognizing the coexistence of homonymous GIs have bestowed upon them what I term "empty protection." This refers to a recognition that comes at the expense of potential market confusion, the risk of misleading consumers, and the dilution or erosion of the GI's distinctiveness, often driven by political or economic interests. This approach has created an additional unjustified cost or barrier for producers and promoters, such as the States, to enter the GI market, i.e., the cost of differentiation.

Differentiation entails offering customers something of value that competitors lack. However, manufacturing a unique product does not guarantee a competitive edge in the market unless consumers discern and appreciate what the seller is differentiating on (McMillan & McGrath, 1997). In the context of homonymous GIs for similar or identical products, the link between the product's characteristics, quality, reputation, and origin becomes diluted. Consequently, this link cannot be effectively used as a marketing tool for differentiation. As a result, producers and promoters must invest more in marketing strategies to clearly convey to consumers the unique attributes of their GI, elucidating how and why it stands apart from other homonymous GI so they can value them. Thus, in countries where coexistence is allowed, producers must promote their trademarks identifying their GI products and comply with their own GI regulations, among other legal tasks. They also tackle challenges stemming from the coexistence of identical GIs for identical or similar products. This situation inevitably leads to the added costs of differentiation, as previously discussed.

In the second scenario, where States grant exclusive rights solely to one country, there is no added cost of differentiation. In this situation, States need only ensure they do not unreasonably hinder the free movement of goods in trade, especially when coexistence does not pose an issue. This exception is permissible provided the conditions for its application, as previously detailed, are met. Additionally, States should remain cognizant of the principle of priority for GIs, as previously explained and proposed.

In the third scenario, where States do not recognize any homonymous GIs, challenges arise for the producers of GIs and States seeking protection. The lack of protection means the GI can be freely used to identify any product, including those identified by the GI. This could render the GI a generic term. However, this dilemma can be tackled through an international GI registration system akin to that established by the Lisbon Agreement or the one proposed by the EU during the Doha Round of WTO negotiations. Alternatively, bilateral agreements shaped by mutual commercial interests can also offer a solution.

From the three scenarios, it is reasonable to conclude that the States have recognized homonymous GIs through bilateral and plurilateral agreements, giving priority to the countries' economic and political interests even at the expense of the likelihood of confusion in the market, the misleading of consumers, and the dilution or erosion of the GI's distinctiveness. Moreover, States have failed to establish precise practical conditions for differentiation, as Article 23.3 of the TRIPS Agreement stipulates.

A clear example of how States may prioritize their economic and political interests when faced with the coexistence of homonymous GIs is Spain's contradictory position on this issue. Indeed, Spain (EU Member Country) recognized the protection of Pisco from Chile and Peru but claimed the exclusive protection of the GI Rioja, arguing that its coexistence with the Rioja GI from Argentina, on the one hand, will cause confusion in the market, since the consumers will associate the Argentinean wine with the Spanish wines' quality and reputation; and, on the other hand, the Argentinean wine would also usurp the notoriety and reputation of the Spain region Rioja winery and the Spanish GI.

Therefore, in light of the systematic interpretation of the TRIPS Agreement proposed above, I recommend considering all these criteria when drafting the clause in bilateral or plurilateral trade agreements related to recognizing homonymous GIs. This will be further detailed in the third section of this paper to ensure clarity and avoid any ambiguity or 'empty protection' of GIs.

2.3. Economic significance of the coexistence of homonymous GIs

Indeed, legal protection of GIs does not automatically ensure their market success. Other factors, such as investment and infrastructure around the concerned business, industry, place, and communities, are essential to achieve the previously detailed purposes of GIs. Nevertheless, adequate legal protection and harmonized provisions are foundational starting points. Without them, there would be little incentive to invest in developing other necessary components. The right scope of protection can significantly influence trade, thereby affecting the success of a GI.

Based on the above premise, the problems raised by allowing the coexistence of homonymous GIs as a rule, as it has been allowed until now in the absence of provisions on this matter in the TRIPS Agreement, undermine the value of the GI as a tool for promotion, development, and national and cultural identification, with two economic consequences.

Firstly, allowing the coexistence of homonymous GIs could discourage producers from investing in them. This is primarily due to the added costs of differentiation mentioned earlier. Producers may need to over-invest to strengthen and, where feasible, maintain the distinctiveness of the GIs, ensuring their market value remains intact. In fact, diluting a GI's distinctiveness effectively reduces the value derived from each dollar GI producers spend. This dilution might subsequently decrease their motivation to promote or invest further in GIs (Menapace & Moschini, 2014, p. 1031). The strength of GI protection affects how informative the GI message can be. Despite this, States have often provided homonymous GIs with what I described as "empty protection."

Secondly, the coexistence of homonymous GIs might impede States from effectively developing their GIs and leveraging them as conduits for national culture. As promoters of GIs, States would face the additional costs of differentiation and the repercussions of GI delocalization, consequences stemming from homonymous GIs as previously outlined. In essence, it may hinder the States from developing the value of their GIs as a tool for advertising, development, and national and cultural identification. As a result, to secure a solid footing for their GIs in the global market, States might be compelled to over-invest.

In conclusion, the coexistence of homonymous GIs, as currently applied by States, makes their market or industry less attractive to producers or investors and hampers the success of the GI internationally. This situation, therefore, reduces the economic importance of GIs and makes it more difficult for a region or country to benefit from them.

3. Proposals: How to balance the coexistence of a GI?

To address the coexistence of homonymous GIs in general, in the absence of provisions regulating them and given the insufficiency of the extent application of Article 23.3, this paper suggests the following three proposals:

The first proposal is a systematic interpretation of the provisions of the TRIPS Agreement, including those on trademarks that may correspond. As discussed, in-depth in the second section of this paper, this interpretation seeks to answer how the coexistence of homonymous GIs should be approached. It also addresses whether and under what conditions such coexistence should be allowed to maintain the balance among the interests of producers, consumers, and the State (public interest).The analysis presented in the second section of this paper leads me to conclude that the coexistence of homonymous GIs should be allowed only as an exception in cases where: a) the fundamental basis of the GIs is not breached, meaning that their distinctive character is neither diluted nor eroded; b) there is no likelihood of confusion; and c) consumers are not misled regarding the geographical origin of the product, from which the product's characteristics, reputation, and quality derive.

This first proposal can be implemented by States when considering whether to allow the coexistence of homonymous GIs in a bilateral or plurilateral trade agreement; and by the WIPO Standing Committee on the Law of Trademarks, Industrial Designs, and GIs by adopting the proposed interpretation as its own and suggesting it to States in the final document of its session prepared by the International Bureau. Finally, if the EU's ideal of creating a multilateral system for the notification and registration of GIs at the WTO level, as discussed in the Doha Round of WTO Members' negotiations, comes to fruition, the proposed interpretation could also be adopted by the WTO Bureau responsible for GI registration. This would be useful when analyzing and determining whether two identical GIs should be registered in the system and, if not, which GI should prevail under the proposed priority principle. In this way, the WTO could set a precedent for the coexistence of homonymous GIs based on the proposed interpretation.

The second proposal follows the first, as this interpretation might lead to a redrafting of Articles 22 and 23 of the TRIPS Agreement. I propose incorporating a general provision on the coexistence of homonymous GIs into Article 22 of the TRIPS Agreement while eliminating the provision in Article 23(3), as follows:

> Homonymous GIs shall only be allowed by States as an exception, and their protection shall be accorded to each indication, ***guaranteeing that the link between the products and their geographical origin will not be diluted, the consumers are not misled, and it does not generate likelihood of confusion in the market. A likelihood of confusion shall be presumed in the case of homonymous signs for identical goods.***
>
> ***In all cases of coexistence of homonymous GIs***, each Member claiming their individual recognition shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure ***the link between the products and their geographical origin***, to ensure equitable treatment of the producers concerned, and to prevent the consumers from being misled ***or confused***.

Considering the technical and political difficulties inherent in redrafting the TRIPS Agreement, I would encourage States to adopt the suggested systematic interpretation when deciding whether a homonymous GI should be recognized. If recognition is not granted, States should apply the proposed priority principle, granting prior rights over the GI to whoever may correspond. In instances where coexistence does not pose a problem, States can allow it through bilateral or multilateral agreements. As a third proposal, I suggest the following model clause that includes the rationale of the proposed systematic interpretation:

(State A) recognizes the geographical indication(s) (X) for exclusive use on products originating in (State B). Consequently, in (State A), the import, manufacture, or sale of products under the geographical indication(s) is not permitted unless they have been produced and certified in (State B) following the legislation of (State B) applicable to such products.

The recognition provided for in this clause shall be without prejudice to the rights that (State A) may recognize in other trade agreements for the homonymous geographical indication (X) for its exclusive use on products originating in (State C), given that the products of (State B) and (State C) are not identical or similar. Therefore, there is no likelihood of confusion in trade, and the interests of consumers, producers, and States are balanced.
(State B) undertakes under this agreement to implement the following practical conditions in (State C) in order to strengthen the distinctiveness of coexisting homonymous GIs: a) to use a distinctive distinguishing element together with the GI, such as a certification, collective, or country mark; b) to use the name of the country together with the GI; and c) to use other identifiers of the country in the promotion of the GI. Country C will also undertake to take the above measures within the framework of the corresponding trade agreement.
Conclusions

From the inductive analysis of the Pisco case, this paper illustrates that the coexistence of homonymous GIs for identical or similar products presents the following three problems. Firstly, the consumer confusion arising from the dilution or erosion of the GI's distinctiveness. This not only undermines the GI's ability to protect a country's culture as a national symbol but also hinders its contribution to the development of the GI-territory. Secondly, an ambiguous international protection, primarily through bilateral and plurilateral agreements. While these recognize and permit the coexistence of homonymous GIs, they do not specify the practical conditions required for their differentiation. And, thirdly, the erosion of the GIs' economic value as a marketing tool. This can discourage producers from investing in the GI and prevent States from developing a successful GI. All these issues were corroborated in the theoretical analysis.

Indeed, from a theoretical analysis of the above issues, by revisiting the fundamental basis of GIs (i.e., the concept of terroir) and by analogously applying the principle of specificity and priority, as well as mechanisms and presumptions from trademark system to assess the likelihood of confusion, I determined that coexistence should only be allowed as an exception in cases where: a) the fundamental basis of the GIs is not breached, meaning their distinctive character is neither diluted nor eroded; b) there's no risk of confusion; and c) consumers are not misled regarding the origin, quality, characteristics, or reputation of the product attributable to its origin. This suggestion seeks to balance the interests of producers, consumers, and the public interest represented by States.

Consequently, given that Article 23.3 of the TRIPS Agreement does not align perfectly with the proposed interpretation, I conclude that it is not enough to address the coexistence of homonymous GIs for wines or to expand its purview to coexistence more broadly regardless the product, as it facilitates the delocalization of the GI by allowing the coexistence of homonymous GIs as a rule, expanding its concepts, and not addressing the likelihood of confusion that arises from such coexistence, among other issues I've detailed in the paper.

In this context, the lack of provisions regulating the coexistence of homonymous GIs in general has prompted countries to favor their economic interests over the fundamental essence of GIs. This is manifest in the recognition and allowance of coexisting GIs, primarily through bilateral and plurilateral trade agreements, without due consideration of the issues this might cause. Further, no practical measure has been established by the States for their differentiation. Such an approach has granted GIs what this paper terms as 'empty protection,' undermining the distinctiveness of the GIs and leaving consumers vulnerable to confusion and deception. Moreover, it has imposed additional burdens on both producers and States, namely the cost of differentiation.

Consequently, I proposed a systematic interpretation of the TRIPS Agreement to address the coexistence of homonymous GIs. This segues into our second and third proposals: a revised text for Articles 22 and 23 of the TRIPS Agreement and a model clause for recognizing homonymous GIs in bilateral and international agreements. Moreover, while it lies beyond the scope of this paper, I have posited a principle of priority for conflicting claims over homonymous GIs. This principle would prioritize titleholders based on historically mapped geography. In cases where this is not feasible, the focus would shift to prior use.

In summary, analyzing the coexistence of homonymous GIs in general should be viewed as an opportunity to establish clear and harmonized rules strengthened by the adoption of a strict territorial-geographical approach. Such approach aims to balance the interests of producers, consumers, and States representing the public interest. Doing so might restore legitimacy of GIs in the international debate. This debate has faced considerable criticism over the years, even more so due to the broader definition of GIs introduced in the TRIPS Agreement.

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