GEOGRAPHICAL INDICATIONS, BARRIERS TO MARKET ACCESS AND PREFERENTIAL TRADE AGREEMENTS

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Abstract

Canada is currently negotiating a Comprehensive Economic and Trade Agreement (CETA) with the European Union; the issue of Geographic Indications (GIs) is on the negotiating agenda and is expected to be one of the most contentious issues in the negotiations. While the exact nature of protection for GIs to be included in the agreement is not yet clear, there is a potential conflict over market access with the U.S. (and presumably the approximately 50 other countries that use trademarks instead of GIs to protect this type of intellectual property). This paper explores the wider issues surrounding differences in the protection of intellectual property and the effect on market access as well as the potential specific issues pertaining to the CETA for NAFTA members. General issues include, among others, how market access could be restricted either by *de facto* import bans or the imposition of additional costs on exporting firms; would this qualify as *nullification of impairment of a benefit* under GATT? Does the TRIPS provides any guidance for this issue and would GIs be treated in the same way as a country entering a customs union and having to pay compensation if it raises tariffs to the common level? Any potential conflict between Canada's NAFTA commitments and potential CETA provisions are also investigated

Keywords: Geographic Indications (GIs), trademarks, market access, FTAs, NAFTA.

U.S. Trade Officials last week met with their South Korean counterparts in Seoul to discuss U.S. demands that South Korea not implement the European Union-South Korea free trade agreement in such a way as to undermine expected benefits for dairy exports under the U.S.-Korea FTA, sources said. …

At issue is the fact that the EU-Korea FTA outlines specific protections that South Korea must uphold for geographic indications (GIs) including various cheeses. …

The EU has long pushed to establish GI protections through trade agreements, which pose some risk to U.S. exporters.

1.0 Introduction

The apparent inability to reach a successful conclusion to the Doha Round of multilateral trade negotiations at the World Trade Organization (WTO) has not dampened countries' enthusiasm for trade liberalization. Preferential trade agreements are being negotiated at an unprecedented pace with approximately 100 being negotiated at the close of 2010 (Kerr, 2010). While preferential trade agreements are allowed in the General Agreement on Tariffs and Trade (GATT) and must be broadly compliant with WTO rules, different preferential trade agreements can have different provisions. This may lead to countries that belong to more than one preferential trade agreement making commitments which are inconsistent. A specific rule negotiated in one preferential trade agreement may lead to loss of market access for countries outside of the trade agreement. For example, in the GATT (Article XXIV:6), if the country entering the customs union has to raise its tariffs to equal those that are applied in the custom union's common external tariff, then trading partners not joining the customs union can face a loss of market access and expected trade benefits will be forgone. In such a case, the countries suffering loss of market access have a right to compensation.

An example of such a conflict arises in South Korea's current preferential trade agreements negotiations with both the United States and the European Union (EU). The United States uses trademarks to protect a range of intellectual property, including geographic indications. The European Union uses a *sui generis* system to protect geographical indications (GI). The European Union has made protection of geographical indicators an integral part of its agricultural and rural development strategies (Josling, 2006) and has been aggressively extending protection of the geographical indications recognized domestically to additional countries through the preferential trade agreements (Kerr, 2006). The United States only protects geographical indications to the degree required in its commitments under the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) of the WTO. In short, the US does not recognize a wide range of GIs for which the EU has given legal recognition. In its preferential agreement with the EU, South Korea agreed to protect European Union GIs. The nature of GIs means that production must only take place in the region of origin stipulated in the GI. As a result, South Korea would have to exclude some products of US origin from its market if it were

to protect the intellectual property of the producers of EU products that have obtained a GI. This would arguably represent a *nullification or impairment of a benefit* for the US due to market access being denied for some of its products.

The issue this paper raises is whether in this circumstance, the US could potentially be entitled to compensation for its loss of expected benefits from trade. The answer could be of considerable importance to Canada because Canada is a trade partner in a preferential trade agreement – the North American Free Trade Agreement (NAFTA) – with the United States (and Mexico) and is currently negotiating a preferential trade agreement with the European Union – the Comprehensive Economic and Trade Agreement (CETA) (Viju et al., 2010).

In their discussion of the CETA negotiations, Alexander Gauthier and Michael Holden (2010) of the International Affairs, Trade and Finance Division of the Canadian Parliamentary Information and Research Service note:

> The EU places a high priority on gaining international support and recognition for its GI system as well as its lists of GI products. … All trade agreements signed by the EU to date have recognized its GIs[1].

They go on to say:

> The EU's recently signed trade agreement with South Korea includes formal recognition of the EU's system of GIs and a list of recognized GI products. That list provides an indication of the kinds of products that the EU will likely be looking to protect in a CETA with Canada.

While the CETA negotiations are ongoing so that the exact nature of protection for GIs that might be included in the agreement is not yet clear (Viju et al., 2010), it seems that there is a potential conflict over market access with the U.S. (and presumable the approximately 50 other countries that use trademarks instead of GIs to protect this type of intellectual property).

Vested interests in the US are certainly aware of the threat to their market access posed by the recognition of EU GIs in preferential trading agreements, including their access to the Canadian market. The lobbying effort at the political level in the US has been effective in making members of the US Congress aware of the issue and in prodding members of the US House of Representatives into action. For example, on September 27, 2010, fifty-six members of the Congressional Dairy Farmers Caucus sent a letter to Ambassador Ron Kirk, the United States Trade Representative, to share their concerns:

> ... with the European Union's (EU) aggressive escalation of its efforts to secure unfair market advantage through the misuse of Geographical Indicators (GI). We are particularly concerned with the EU's current efforts with regard to the Free Trade Agreement (FTA) it has negotiated with South Korea...

[1] It should be noted that recognition of GI's does not necessitate acceptance of the EU GI sui generis system. GI's are also protected via trademarks in many countries.

> We urge you ... to ensure that as the Koreans develop the domestic implementing regulations of GIs, those regulations do not undercut the dairy market gains secured in the US-Korea FTA. Specifically, we are very concerned that the implementing regulations of the EU-South Korea FTA will contain GI provisions that will greatly diminish, if not foreclose, the market opportunities available to many U.S. cheeses and other agricultural products. Moreover, it must be noted that *any such advantage gained by the EU will be magnified because it would set a precedent that could and likely would be, readily replicated in EU-negotiated FTAs in a number of other foreign markets of importance to the U.S. dairy industry. These markets include Canada*, Central America, China, Columbia and Peru, as well as many others (emphasis added).

Note, that even with Canada's heavily restricted – through the use of tariff rate quotas (TRQs) – import volumes for dairy products, Canada topped the list of markets of concern for the Caucus. The expression of concern in the letter was acted upon by the USTR[2] in early October, 2010 as indicated in the quote that began this paper. EU GIs extend to a wide range of agricultural products from cured meat to olive oil to wines and spirits as well as dairy products. Hence, it seems likely that recognition of EU GIs by Canada in the CETA could lead to a trade altercation with the US.

1.1 *Geographical Indications and Denial of Market Access*

Geographical indications have long been recognized as a particular form of intellectual property. Early international conventions include the Paris Convention for the Protection of Industrial Property of 1883, the Madrid Agreement of 1891 and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958. The World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, currently administers 24 international intellectual property treaties including most of those that pertain to GIs. The GATT-1947 was not concerned with intellectual property. Article IX deals with Marks of Origin and Article IX.6 is aimed solely at curbing fraudulent miss-representations of traded products. It states:

> The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation.

A role for trade agreements in the international protection of intellectual property had to await the formation of the WTO at the end of the Uruguay Round. The proportion of the value of goods comprised of intellectual property had been rising steadily in the years leading up to the launch of the Uruguay Round (Kerr and Perdikis, 2003) and there was considerable frustration

[2] The office of the USTR is responsible for the conduct of United States trade negotiations.

with the structure of the WIPO in that it could not compel countries to join nor punish them for not living up to their commitments to protect intellectual property. To overcome this deficiency in the WIPO, the sanctioning power of the GATT was to be brought to bear on the international protection of intellectual property through the Uruguay Round negotiations (Kerr, 2007). At the end of the negotiations there was a new Agreement on Trade Related Aspects of Intellectual Property (TRIPS), which was specifically designed to overcome the deficiencies of the WIPO, as part of a new multilateral trade organization, the WTO. The new WTO administered both the GATT, with its power to authorise the imposition of trade sanctions, and the TRIPS[3]. The WTO was endowed with a binding disputes settlement mechanism with specific provisions that would allow cross-agreement retaliation – e.g. the imposition of trade restrictions under the GATT for failures to live up to TRIPS commitments. Thus, economic costs could be imposed on countries that failed to protect foreign intellectual property, something that the WIPO is unable to do. In addition, members of the WTO had to accept all three of the agreements that the WTO administers. Hence, to gain the trade benefits arising from GATT membership, countries also had to accept the TRIPS. Countries were provided with an incentive to accept the TRIPS commitments to protect foreign intellectual property, again something that the WIPO could not do (Kerr, 2007). As a result, developing countries agreed to protect the intellectual property of foreigners. As developed countries have larger existing vested interests in intellectual property, their protection has been a greater priority for them in trade negotiations.

The TRIPS included commitments related to the protection of GIs. Geographic indicators are dealt with in three TRIPS articles – Articles 22, 23 and 24. Article 22 – Protection of Geographic Indicators – defines geographic indicators as follows:

> 1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

The remaining three clauses set out the obligations of members to legally discipline misrepresentations of the geographic origins of products in their domestic law. Article 24 – International Negotiations; Exceptions – provides under exceptions, a number of grandfathering clauses that have effectively allowed countries to pick and choose the geographical indications they wish to protect. As a result, effective international protection for geographic indicators will be determined by future negotiations. Other clauses of Article 24 pertain to matters such as rules for geographic indicators that are no longer in use and statutes of limitation on bringing forward complaints. The exceptions are used to prevent terms such as "cognac" and "cheddar", which have had a long history of generic use, from obtaining protection as geographical indications.

Article 23 – Additional Protection for Geographical Indications for Wines and Spirits – has provisions that are more specific, for example, limiting practices such as referring to fortified wines being in the "style of" Port, using homonyms that might mislead, such as "Bourgandie"

[3] The new WTO also administers the General Agreement on Trade in Services (GATS) that also arose from the Uruguay Round negotiations.

for "Burgundy", and the term "Sauternes" (a region of France) to describe wine even if the fact that it is being produced in Chile is fully revealed on the label. It also commits the member states to future negotiations. The Doha Ministerial Declaration placed on the agenda for negotiation that the system of internationally recognized geographic indicators would be extended to products other than wine. Little progress has been made at the Doha negotiations and, of course, the Doha Round itself, was far from complete at the beginning of 2012. The major proponent of extending the system of GIs has been the European Union. This is because it has made GIs for agricultural products a major pillar of its agricultural policy (Josling, 2006). Given the lack of progress at the multilateral negotiations, the European Union has been proactively promoting recognition of GIs in the preferential trade agreements it has been negotiating.

The European Union is the global leader in GIs with about 6021 EU-registered indicators, of which 5200 are for wines and spirits and 821[4] for foods (Giovannucci et al, 2009). However, it is often difficult to assess the actual number of registered GI's as different systems overlap or coexist. For example, several EU countries maintain individual national registers for GI's, particularly wines, in conjunction with the EU-wide system (Giovannucci et al, 2009). New registrations are occurring at a rapid rate (Yeung and Kerr, 2008), mostly under the EU's sui generis system[5]. Given the importance now placed on GIs in the agricultural policy of the EU, it is probably not surprising that the EU Commission has been attempting to extend that protection to foreign markets. It has long been recognized that returns to farmers can potentially be enhanced through product differentiation (Carver and Wilson, 1916; Wolf , 1944; Gordon et al., 1999). Geographical indications are one manifestation of product differentiation (Giovannucci et al., 2009). Legal recognition of a GI gives the rights-holder to the GI, normally a group of farmers, exclusive use of the indicator – in effect a monopoly in the market. The greater the number of countries that legally recognize and enforce the GI, the greater the opportunity to garner monopoly rents. This is at the heart of the EU strategy.

Geographical indications do not fit easily into the generally held interpretation of intellectual property due to their collective nature and their basis in natural phenomenon or traditional know how. To fulfil their role as a differentiator of products, however, GIs do require legal protection in the same way that company brands need protection to fend off those who would *pass off* counterfeits as the legitimate branded article. The attributes that make GIs distinct are what economists call credence attributes (Giovannucci et al., 2009). Credence attributes are those that consumers cannot discern even after consumption; i.e. a consumer cannot know whether the sparkling wine they are consuming actually comes from the Champagne region of France unless the wine is labelled as being Champagne[6]. To prevent the *passing off* of sparkling

[4] Includes all registrations under EC Regulations and may not include some products registered at the individual national level only.

[5] Where GI's are registered as Protected Designation of Origin (PDO) or Protected Geographic Indication (PGI) or Traditional Specialty Guaranteed (TSG). While TSG do not afford GI status, they do serve to support local traditions. Most new registrations are in the form of PDOs or PGIs (Giovannucci et al, 2009).

[6] Search attributes are those which can be identified by consumers prior to purchase (bruising on apples), experience attributes are those that can only be discerned upon consumption (the tenderness of a steak) and credence attributes are those that cannot be identified by consumers even after consumption (whether a fortified wine came from Madeira, whether Feta Cheese came from Greece). See Hobbs (1996) for a discussion of search, experience and

wine from other regions as originating in Champagne, there needs to be a legally recognized designation that can be labelled. In the absence of legal protection, the monopoly rents associated with the designation will be eroded in the absence of barriers to entry. Of course, the *passing off* of counterfeit goods may have other negative externalities for the owner of the GI. While the GI specific attribute may be credence in nature, other quality aspects of the product may be experience or even search attributes. If goods *passed off* as the GI are also inferior on these experience (or search) attributes, the GI product may suffer a loss of reputation that has negative economic consequences. Of course, this negative externality aspect of *passing off* applies to any branded good including those that have been trademarked and thus are not unique to goods with a GI designation; i.e. trademarked, branded blue jeans suffer loss of reputation when counterfeit jeans made with inferior denim are *passed off* as the genuine article.

There are two major legal mechanisms that are used to protect products from specific geographic areas – trademarks and *sui generis* systems – the latter are specific legislation that deals with the granting of monopoly rights to geographical indications whereas the former is a broader form of legal recognition that may or may not have sections that deal specifically with communally held rights or products from specific geographic areas. According to Giovannucci et al, 2009, p. 14):

> Of the 166 countries that protect GIs as a form of intellectual property, 110 (83 plus the EU 27) have specific or *sui generis* systems of GI laws in place.[7] Then, there are 56 countries using a trademark system, rather than or in addition to specific GI protection laws. These countries utilize certification marks, collective marks or trademarks to protect GIs.

Canada and the US use trademarks while the EU uses a system of *sui generis* legislation. Thus, Washington State apples are protected under trademark legislation in the US while Roquefort cheese is protected as a GI through *sui generis* legislation in the EU. Both are effective legal mechanisms to protect this type of property. While legal experts find subtle differences in the mechanisms, for the most part the two systems have similar economic effects. The current international competition between the EU, which wishes to expand the remit of *sui generis* based systems for GIs and the US, which is resisting this expansion, is often portrayed as an argument regarding the relative efficacy of GIs and trademarks, but in reality given that both are effective, the US resistance is likely based on a number of factors including existing vested interests in the trademark system, enforcement mechanisms and the large switching costs associated with moving from a system of trademarks to that of *sui generis*-based GIs (Yeung and Kerr, 2008).[8]

From an international trade policy perspective, however, there are differences in trademarks and *sui generis*-based GI systems that can impact market access. Geographical

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credence attributes. Of course, for some with "educated" palates, a GI can become an experience good – expert wine tasters could be an example. For the average consumer, however, the GI attributes remain credence in nature.

[7] *Sui generis* is the Latin expression, literally meaning "of its own kind" or "unique in its characteristics".

[8] It is seldom suggested that the EU should switch to a trademark system.

indications are always tied directly to a specific geographic area. Trademarks with embedded geographic names may or may not be tied to a specific geographic area. Thus, apples sold under the trademark for Washington State apples must originate from production in that state. On the other hand, Parma ham sold under a trademark granted by the Canadian government does not originate in the Parma region of Italy. In Canada there has been a legal dispute between the firm that holds the Canadian trademark for *Parma Ham* and the Italian consortium that holds the GI for *Prosciutto di Parma* that wanted to market its GI product in Canada (Viju et al., 2010).[9]

Restricted Market Access and Trademarks

A loss of market access may arise if an importing country recognizes a *sui generis*-based system of a trading partner when it enters into a preferential trade agreement. If another trading partner has had market access for a trademarked product, and that trademark conflicts with that of a now-recognized GI, the courts in the importing country could rule that the sales of the imported trademarked product violate the rights of the GI holder and require that the trademarked product be withdrawn from the importers market. That would represent a loss of market access for the holder of the trademark.

It does not, however, mean that the trademark holder cannot sell its product in the importing country; it only means it cannot sell the product under its trademark. For example, a US producer of trademarked *Prosciutto* could still sell its product in Canada as long as it did not use its *Prosciutto* trademark – it could market its product as *Air Cured Italian Style Ham*. Of course, owners of trademarks may have spent considerable resources over the years building up the brand image – what Innes et al. (2011) call *brand equity*. Marketing without the trademark may well mean that the value of the brand equity is completely eroded so that there is a *nullification of benefit* even if the actual product still enjoys market access. Any trade challenge may, thus, depend on how a disputes panel interprets the meaning of *like product*.[10]

Restricted Market Access and Generic Products

The absence of any international agreement on mutual recognition of GIs, or even domestic recognition of GIs historically for many products, has meant that geographic-based terms that are now legally recognized as GIs in some countries are simply considered *generic* terms in other countries. For example, *Feta* cheese simply refers to a style of cheese in Canada and the US. This style of cheese has wide recognition among consumers and the firms that produce this style of cheese have made significant marketing expenditures to promote their

[9] The Canadian court ruled that selling Italian ham under the GI label violated the Canadian firm's trademark. The differences between the two types of hams are in the production process. The Canadian hams are cured for 8-9 months while the traditional Italian method has a curing stage lasting a minimum of 10 months. The Canadian hams are also smaller and more salty than the Italian ones (Dulic, 2003).

[10] It could be that the importing country could argue that the GI product and the non-trademarked imported product are a *like product* and, hence, there is no barrier to market access. Given that GIs are supposed to have special attributes, however, to argue that the non-trademarked product from a different country is a *like product* to the GI could lead to the recognition of the GI being directly challenged by the holder of the trademark. It could also be argued that the brand is the product and therefore nullification of benefit occurred as the brand cannot enjoy market access.

version of the cheese. In the European Union, however, *Feta* cheese is a Greek GI. In the letter from the Congressional Dairy Farmers Caucus to the United States Trade Representative (2010) cited above regarding the European Union-South Korea Free Trade Agreement, it is argued that for products that are considered generic in the US:

> … America's dairy industry will not be able to maintain, let alone enhance, its current level of exports if we do not combat European efforts to carve out the sole right for their producers to use many of the commonly used cheese names most familiar to consumers around the world (e.g. feta, gorgonzola, munster, parmesan, provolone)…

If Canada were to recognize European Union GIs in a trade agreement, US producers of products that are considered generic in the US would be excluded from the Canadian market if they are identified with a generic term which is considered a GI in the EU. The product could, however, still be sold in Canada if labelled as something else. Of course, there would be a loss of consumer recognition and the marketing expenses associated with creating consumer awareness and acceptance of the alternative name. It could be argued this represents a *nullification or impairment of a benefit* before a formal disputes panel. It would be up to the Panel to decide.

Restricted Market Access and Non-recognized GIs

The European Union is continually recognizing new GIs. Originally, GIs were based on *terroir* – something unique associated with the physical attributes of the soil and/or water (possibly in interaction with climate or other natural phenomenon). Latterly, however, the EU has been granting GIs to products, such as some artisan cheeses, whose unique and distinctive characteristics are human capital-based rather than on *terroir*.[11] Currently, if a country does not think that the characteristics claimed by a foreign GI are unique and distinctive they can deny the GI. According to Yeung and Kerr (2008, p. 17):

> Recognition will have different requirements. The granting of recognition may require that the granting authority be convinced of the link between superior quality and the GI. In these instances, a case will have to be made that, indeed, such a link exists. The more tangible and measurable the difference in quality is, the easier it will be to gain recognition.

Countries may not wish to recognize a foreign GI because they don't think a distinctive link exists. This is particularly the case where the GI is human capital-based. Human capital is mobile. Immigrants are often seen as providing an economic benefit due to the skills that they bring with them. Particularly in countries such as the US, which have been overwhelmingly immigrant-based societies since their inception, this form of human capital may be intrinsically valued. Human capital-based GIs are premised on the idea that the human capital is rooted in the particular geography. This implies that emigrants from those geographic areas cannot take the human capital with them – and that their skills cannot be taught to others. Countries may well

[11] For example, in the EU, products having the Protected Geographical Indication designation do not have to source raw materials such as the milk used to make cheese from the area of the geographical indication.

wish their immigrants to be able to capitalize on their ability to replicate products derived from where they came and to name them accordingly.

If in a preferential trade agreement an importing country agrees to recognize all of its trading partner's GIs – including those that may come into existence in the future – then if it were to defend the intellectual property of those from a trading partner belonging to the preferential trade agreement, its courts would have to prevent the marketing of labelled products from another trading partner who has not recognized the GI. For example, if immigrants to the US from a European region which has a GI for a particular cheese, let us say Cheshire, decide to market their brand of Cheshire cheese in the US and Canada, prior to the recognition of the European GI due to the preferential trade agreement, there would be no restraints in the Canadian market. Once the preferential trade agreement came into force, the US-made cheese labelled as Cheshire would be excluded from the Canadian market. Of course, US producers could still sell their product in Canada as long as it was no longer identified as being Cheshire cheese. Again, the US might argue that this change represents a *nullification or impairment of a benefit*. Neither Canada nor the United States are signatories to the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration. As Canada and the EU are in the process of negotiating a Closer Economic Trade Agreement, an examination of Canada's existing international Intellectual Property obligations, which may conflict with the EU's *sui generis* GI system, is a useful exercise.

2.0 Canada's International IP Obligations

While Canada is member to several preferential trade agreements, NAFTA is of primary importance, with just over 75 percent of Canada's overall exports destined for NAFTA partners in 2010. NAFTA is a plurilateral agreement between Canada, the United States and Mexico, generally using the trademark system to protect intellectual property, including geographic indications (GIs). An examination of Canada's intellectual property (IP) obligations under NAFTA *vis a vis* the US, its largest trading partner, serves as a case study of the potential conflicts which can be encountered when one member of an existing preferential trade agreement using the trademark system in common, enters into another, separate preferential trade agreement with the EU and its *sui generis* GI protection regime.

Intellectual property is included in the NAFTA as Chapter 17, and the NAFTA text for intellectual property is nearly identical to the TRIPS[12]. Like TRIPS, NAFTA incorporates the

[12] Although the TRIPS was formally adopted subsequent to NAFTA, Ortiz (1997) indicates that the TRIPS document itself, at least the portions relevant to GIs, was ready prior to the formal inclusion of the TRIPS into the WTO Agreement Appendices and NAFTA was 'influenced by a document known as the basic proposal drafted in the Uruguay Round'. It is often said that the provisions for Chapter 17, 'Intellectual Property' in the NAFTA were inspired by drafts of the TRIPS; though not exactly alike, the similarities greatly outnumber the differences. The most notable difference is the lack of provisions governing wines and spirits as GI's in NAFTA as compared to Article 23 of TRIPS; while some TRIPS provisions are absent in NAFTA, all NAFTA provisions for GI's (in Article 1712) have a TRIPS equivalent (Ortiz, 1997). Hertz (2010a) indicates that NAFTA Chapter 17 and TRIPS are sufficiently textually similar that interpretations applied to the meaning of one would directly translate to the clarification of the other.

substantive provisions of prior international IP legislation[13] including the concept of 'first in time, first in right' as embodied by the Paris Convention. It is based on the long standing mechanism, known as the principle of priority where the exclusive right to a trademark is attributed to the first who registered or used it. In other words, under NAFTA and TRIPS both, in the case of conflicting trademark claims, usually the prior right in time prevails, based on first use, first registration or common knowledge of the mark compared to those of competing marks (WIPO, 2000). Trademark law has historically also utilized the principle of specialty where similar or identical trademarks can co-exist so long as they are used on different goods or services. The concept of 'first in time, first in right' is an essential component of current intellectual property law, including geographic indications.

Under NAFTA, GIs are governed by Article 1712, whether represented by a geographic indication or a trademark. Its provisions for GIs preclude the misleading of, or making false representations to, the public about the origins or locality of a GI, provision of adequate domestic laws to enforce the terms, and preventing the registration of a term that is not protected or has fallen into disuse in the originating Party.

NAFTA makes specific reference and provides exceptions to the right of priority when a conflict between a trademark and GI occurs. The Agreement provides that when a conflicting GI has been in continuous use for at least 10 years or in good faith in a Party's territory before the NAFTA came into effect[14], the GI can continue to be used in its home territory (Article 1712.4). NAFTA also establishes that when a trademark or the rights to a trademark which have been applied for, already registered or acquired, in good faith, before the NAFTA came into effect or before the GI was protected in its Member State of origin, the trademark cannot be invalidated by a similar or identical GI (Article 1712.5). NAFTA Members are not obligated to protect a GI if it is a generic term in their territory (Article 1712.6). According to Ortiz (1997), Article 1712.7 provides a NAFTA Member with an optional five year term to refuse, cancel or invalidate a trademark registration or prevent the unauthorized use of a trademark that contains or consists of a protected GI for goods not originating in the indicated Member; this optional five year term is only available if the GI was used or registered as a trademark and begins either from the date of discovery of adverse use in the Member where protection is sought or the date of trademark registration, so long as the registration was published, but is not applicable in cases of bad faith.

NAFTA is in some ways TRIPS-plus, providing broader scope of national treatment requirements for *all* domestic intellectual property rights (IPR) adopted or maintained by a NAFTA Party[15], subject to only a few specific exceptions as compared to TRIPS, which only applies national treatment to specifically indicated rights (Hertz, 2010a).

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[13] Specifically, the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms , 1971 (Geneva Convention); the Berne Convention for the Protection of Literary and Artistic Works , 1971 (Berne Convention); the Paris Convention for the Protection of Industrial Property , 1967 (Paris Convention); and the International Convention for the Protection of New Varieties of Plants , 1978 (UPOV Convention), or the International Convention for the Protection of New Varieties of Plants , 1991 (UPOV Convention).

[14] January 1, 1994.

[15] For a specific list of examples, see Hertz, 2010a.

NAFTA's Investment Provisions

Beyond NAFTA Chapter 17, intellectual property rights and therefore GI's, have also been specifically included under NAFTA's investment provisions in Chapter 11. An investment is defined by Article 1139 as:

> real estate or other *property*, tangible or *intangible*, acquired in the expectation or used for the purpose of economic benefit or other business purposes; (NAFTA, 1994). *(emphasis added)*

By this definition, IPRs, including GI's are protected under NAFTA's investment provisions. The NAFTA also has a specific investment dispute settlement mechanism that allows private investors to submit a claim to binding arbitration for breach of obligation. Articles 1115-1118 enable private investors of one NAFTA Party to make claims against a host Party under the appropriate circumstances. In other words, should the government of a Party to NAFTA undertake a legitimate regulatory action in their domestic territory, which as an externality, results in a foreign company or investor based in another NAFTA Party suffering an economic loss or have benefit denied, that investor could possibly make a claim under NAFTA Chapter 11 against the host Party that undertook the regulatory action. Hertz (2010c) uses an example from 1994 when US tobacco companies informed the Canadian House of Commons Standing Committee on Health that should plain packaging regulations be implemented on cigarette packages, thereby depriving the tobacco companies their ability to use their existing Canadian trademarks on Canadian cigarette packs, their response would be an investor/State complaint under NAFTA's Investment Chapter as they believed the measure was a compensable expropriation of their Canadian trademark rights.

NAFTA's Non-violation Provisions

Non-violation breaches[16] of NAFTA obligations pertaining to intellectual property rights are also specifically addressed by Annex 2004 of NAFTA Chapter 20 which states:

> If any Party considers that any benefit it could reasonably have expected to accrue to it under any provision of:
>
> (a) Part Two (Trade in Goods), except for those provisions of Annex 300-A (Automotive Sector) or Chapter Six (Energy) relating to investment,
> (b) Part Three (Technical Barriers to Trade),
> (c) Chapter Twelve (Cross-Border Trade in Services), or
> *(d) Part Six (Intellectual Property),*

[16] Where damage to a country's benefits and expectations from its preferential trade agreement membership through a preferential agreement partner's change in its trade regime or failure to carry out its obligations that is *not inconsistent* with the agreement. In other words, the damage occurred as an externality to a policy change and the offending Party's actions were consistent with its obligations to the agreement itself (i.e. no agreement was violated). The damage caused is known as 'nullification' or 'impairment' of a benefit.

is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement under this Chapter. (*emphasis added*)

In other words, the other Parties to NAFTA may have recourse to the Agreement's State to State dispute settlement procedure (DSP) should they believe that as a result of a Party's new measure, a benefit that they could reasonably have expected to achieve under any provision of the Intellectual Property Chapter is being nullified or impaired, despite that measure not contravening NAFTA.[17]

For any dispute where recourse to NAFTA's dispute settlement procedure is chosen, regardless of whether under the provisions of Chapter 17 (Intellectual Property), Chapter 11(Investment) or Annex 2004 of Chapter 20 (Non-violation), the process remains the same. After a period of consultation and mediation, should a resolution not be found, an arbitral panel is struck, whose decision is binding and enforceable.

2.1 *NAFTA Dispute Settlement*

The NAFTA stipulates that all disputes between members, with the exception of anti-dumping and countervail measures, are subject to the Agreement's DSP as provided for in Chapter 20. Annex 2004 is included. Disputes over any matter covered by both the NAFTA and the GATT may be settled in either forum at the discretion of the complaining party (Article 2005). Parties to the GATT may refer to a dispute settlement proceeding in the GATT, on grounds that are substantially equivalent to those available under NAFTA, by notifying the 3rd NAFTA Partner of its intention and all Parties to the Agreement agree to do so. However, if consensus on a forum cannot be achieved, the dispute is to be settled via the NAFTA DSP. Parties to NAFTA may officially request that disputes pertaining to Sanitary and Phyto-Sanitary Measures (Chapter 7), Standards Related Measures (Chapter 9), or environmental and conservation agreements (Article 104) be solely adjudicated by the NAFTA DSP. Once a forum for DSP has been chosen, whether NAFTA or GATT (under the WTO), that forum will have exclusive jurisdiction over the matter.

Prior to invoking official dispute settlement procedures, Parties to NAFTA may request consultations with the other Parties, or undertake conciliation and/or mediation via the NAFTA Commission including referral to technical advisors or working groups. Should these avenues not be successful at resolving the matter, any of the disputants can request an arbitration panel, with the 3rd Party permitted to join either as a complainant[18] or an active participant[19] . The findings of the arbitration panel are binding, and should the disputants not be able to agree on a

[17] NAFTA, Art. 2004: Recourse to Dispute Settlement Procedures, and Annex 2004: Nullification and Impairment

[18] With written notice to the disputants and the Secretariat, the 3rd Party can join as a complainant should it believe it has a substantial interest in the matter. If it does not join as a complainant, the 3rd party will normally refrain from subsequently pursuing DSP from either NAFTA or the GATT on the same matter *ceteris paribus.*

[19] Although not a disputing Party, by providing notice to the other Parties and the NAFTA Secretariat, the 3rd Party can attend all hearings, make submissions to the panel and receive the submissions of the disputants according to Article 2013.

resolution, the complainant can suspend benefits, to equivalent effect, in the same sector(s) affected by the measure or matter found to be inconsistent with NAFTA obligations or that have caused nullification or impairment from the offending party until a resolution is agreed. Such retaliation is provided for by NAFTA Article 2019(2)a.

Certain inherent traits of intellectual property rights make them difficult to retaliate upon in practice. Hertz (2010d) provides several examples where retaliation in IPR is complicated and difficult to manage: the temporary retaliatory suspension of a patent application may permanently preclude the granting of the patent as a competitive invention may reach the market first; suspension or revocation of an IPR could qualify as expropriation, leaving the question of whether foreign IPR owners should be compensated for lost royalties, or should the IPR be assigned elsewhere, who owns the IPR after the period of suspension; temporary suspension of enforcement rights could allow unauthorized third parties to exploit the unprotected property for the duration of the suspension. How would these third parties be treated upon reinstatement of the enforcement rights? Would they be permitted to continue exploiting the newly re-protected property or be compensated for the economic loss incurred due to reinstatement[20]?

Under NAFTA Article 2019(2)b, should suspension of benefits in the same sector(s) not be practicable or effective, the complainant may suspend benefits in other sectors, known as cross-retaliation. Cross retaliation enables a complainant to suspend trade concessions in any sector, to the equivalent value of the affected sector. Thus, failure to perform or meet obligations in one sector can be compensated for in another and this concept is that which gives agreements such as NAFTA, utilizing cross retaliation, the ability to impose credible economic costs on trading partners. Given that the nature of IPRs makes it difficult to directly retaliate against intellectual property, cross-retaliation is a valuable tool in IPR dispute settlements under NAFTA and is similar to cross agreement retaliation in the WTO.[21]

3.0 Canada and the Trips

Canada is a WTO Member, and therefore subject to the TRIPS including Article 22, its provisions for GIs. Essentially, Canada's TRIPS obligations for GIs are similar in level of protection to those in the NAFTA, with the additional inclusion of Article 23 conferring

[20] Hertz (2010d) gives the specific examples of:

- The German-owned Bayer trademark for aspirin which was assigned to an unrelated US company during WWI in 1917. The international trademark conflict remained until Bayer AG, the original German trademark holder, purchased the US company owning the US Bayer trademark in 1994.
- The expropriation of the German-owned Hag coffee trademark by Belgium in WWII who assigned it to an unrelated Belgian company. The Belgian company's right to prevent coffee imports from Germany's Hag was confirmed by the European Court of Justice in 1990.
- IPRs may lapse because payment of royalties and fees pertaining to foreign-owned IPRs may be deemed as illegal transactions with the enemy during wartime.

[21] Hertz's examples raise interesting questions as to what might happen were the temporary retaliatory suspension, suspension of enforcement rights or cross retaliation be applied to a trademark or trademark application (if these actions are even legally possible). How would the principles of 'first in time', or priority as compared to seniority be applied? What would the consequences for the suspended trademark registration be and in contrast, for any competing trademark granted during the suspension? These questions can only be answered in the courts.

protections for GIs of wine and spirits. Canada is also subject to the WTO Dispute Settlement Provisions for any TRIPS related dispute as will be discussed below.

The TRIPS includes many of the provisions of the Paris Convention (1967)[22], including the concept of 'first in time, first in right' as discussed above, and as with NAFTA, makes provisions for exceptions to, and makes specific reference to, the right of priority when a conflict between a trademark and GI occurs in Article 24.

Article 24.5 (NAFTA Article 1712.5 is similar) states where a trademark was used or registered prior to the TRIPS agreement coming into effect in that member country or prior to the conflicting GI being protected in its home country, the existing trademark cannot be negated by the subsequent GI. Also, a term that has become generic in one WTO member cannot be protected as a GI in that member, even though it is a GI in its home country (the same as NAFTA Article 1712.6). Article 24.7 is similar to the NAFTA Article 1712.7 where a request for prohibition or revocation of a trademark registration that conflicts with a GI must be made within five years of discovery of the conflict or from the date of the trademark's registration. In creating a system of co-existence between GIs and trademarks, using the principle of priority as a basis, the TRIPS utilizes the date by which it came into effect for WTO Members, the beginning date of protection for GIs in their country of origin, and the time legitimate trademark rights were obtained when compared to conflicting GIs as well as the provisions in Article 24 (WIPO, 2000).

TRIPS Dispute Settlement

TRIPS Article 64 states that consultation and settlement of TRIPS disputes are governed by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. Article 1.1 and Appendix 1 of the Understanding specifically indicate its jurisdiction over TRIPS disputes. To date, since 1996, 29 disputes citing TRIPS have generated requests for consultations under the WTO DSP.

Retaliation and cross-retaliation are enforcement tools in the settlement of disputes in TRIPS, as in the NAFTA. Like NAFTA, TRIPS also faces issues in the practical application of retaliation in IPR disputes. Temporary domestic sanction can cause the loss of proprietary timeliness to file for IPR protection, suspension or revocation of existing IPRs could be considered compensable expropriation, unauthorized or assigned use of an IPR during a suspension becomes problematic upon reinstatement of protection, loss of fees and royalties conferring ownership are all examples of retaliation-related problems in the enforcement of IPR dispute settlements.

As a result, cross retaliation is available under TRIPS. An affected party must first seek to suspend benefits in the same sector as that affected by the offending measure, but if this is not possible in practice, it may do so in other sectors. The affected Party must have authorization from the WTO Dispute Settlement Body to implement cross-retaliation.

[22] In Article 1.

Therefore, as Hertz (2010d) suggests, Parties to both NAFTA and TRIPS have very strong incentives to meet their IPR obligations, as failure to do so can potentially result in the suspension of valuable trade concessions should a panel find against them.

'Non-Violation' Complaints (Article 64.2) in TRIPS[23]

A marked difference exists between NAFTA and TRIPS over *non-violation* intellectual property disputes. While NAFTA addresses IP non-violation in Annex 2004, TRIPS Article 64.2 instituted a five-year moratorium on IP non-violation complaints, to last from 1994 to 1999. The moratorium has since been extended and the TRIPS Council is currently discussing whether non-violation disputes in intellectual property should be permitted in TRIPS. Also under discussion is the extent of, and the means to incorporate, IP non-violation into the WTO's dispute resolution procedures if non-violation is allowed. In response to the TRIPS Council, most WTO Member States advocate completely banning non-violation under TRIPS or continuing the moratorium indefinitely. The United States and Switzerland advocate inclusion of IP non-violation disputes. The issue has been forwarded from the Doha (2001) to the Cancun (2003), to the Hong Kong (2005) and to the Geneva (2009) Ministerial Conferences; and onto the next upcoming Ministerial Conference (WTO, 2009) in December, 2011. At this current time, non-violation complaints are not permitted under TRIPS dispute settlement.

4.0 EU-GI Protection in Preferential Trade Agreements

The EU believes that protection and enforcement of European intellectual property rights, including geographic indications, is a cornerstone of its global competitiveness. As such, one of the EU's stated objectives is to see the high level of IPR protection available in the EU respected by third countries (EC, 2011). It pursues this objective at the multilateral level, working at the WTO and TRIPS lobbying that the greater protection accorded to wines and spirits be extended to agricultural products and foods. The EU also wants to create a multilateral register for geographic indications. A third goal of the EU is the multilateral acceptance and enforcement of a select list of European GIs, which would entail the revocation of prior conflicting trademarks and the clawing back of EU GIs that have become generic in third countries, thereby negating the exceptions provided for in TRIPS Article 24[24]. As the latter has not been well received at the

[23] Generally, WTO disputes involve allegations that one country has violated or broken agreed-upon obligations or commitments. However, disputes can arise when an agreement has not been violated. This is called a non-violation complaint and is allowed if one government can illustrate the loss of an expected benefit due to another government's action or existing situation (WTO, 2009). An example could be a government enacts strict anti-smoking regulations in order to improve the health of its citizenry. A WTO dispute could arise should a tobacco producing and exporting country lose its market share in the anti-smoking country. Despite the fact that the anti-smoking country did not violate any agreement with the tobacco exporter and acted on behalf of its citizenry, a non-violation complaint could be brought to the WTO against it. Non-violation is possible for goods and services (under the GATT and GATS) but a moratorium has been implemented for its application in TRIPS.

[24] Article 24 permits the continued use of certain pre-existing GIs that would otherwise violate the TRIPs. These include protecting terms that have become everyday terminology in their home market. For example, because of TRIPS Article 24, Canadian exporters could use terms that are GIs in Germany. Snyder (2008) cites *Swiss* and *cheddar* cheeses, *Swedish* meatballs, *Peking* duck, and *hamburger* meat patties as examples of terms that US exporters could use in France because of Article 24.

multilateral level, the EU is pursuing its Article 24 objectives through bilateral and regional trade agreements (Yeung and Kerr, 2008; Vivas-Eugui and Spenneman, 2006).

The EU strategy of protecting European GI's through preferential trade agreements has established a pattern of EU demands in their trade agreement negotiations. It has sought and achieved significant and substantial protection of wine and spirits names as well as oenological practices in many of its preferential trade agreements[25]. Through standard practice in its preferential trade agreements, the EU has also successfully exported its particular laws pertaining to a specific protected GI to the bilateral trade partner who must then defend those European GI measures in their country. All of the EU's preferential trade agreements subject the use of protected GIs to the legal regime from which the respective GIs originate. For example, the EU domestic legislation stipulating that trademarks conflicting with a limited list of wine GIs may not be used or may only be used until Dec 31, 2002, has been technically adopted or *imported* by the EU's preferential trade agreement partner (Vivas-Eugui and Spennemann, 2006).

The EU has also integrated a reciprocal obligation upon the Parties to several of its preferential trade agreements[26] which bestows automatic protection upon particular GIs listed in Annexes to the Agreements. This obliges the Parties to extend automatic protection to each other's GIs without the discretion to examine them under the TRIPS parameters for protection of GIs. Under TRIPS, the Parties have the discretion to examine the GI for eligibility under TRIPS Article 22.1 (Vivas-Eugui and Spennemann, 2006; Giovanucci et al, 2009). This discretion has been eliminated by the EU in its preferential trade agreements for the GI names listed in Annexes to their Agreements. Vivas-Eugui and Spennemann's (2006) analysis of the EU-Mexico Agreement's wording concludes that despite the absence of the words *reciprocal* or *mutual* which were contained in prior preferential trade agreements, automatic protection is still granted in the EU-Mexico Agreement. The text for the EU-Korea Agreement is very similar to the EU-Mexico agreement, thus it could be deductively inferred that automatic protection has also been afforded in the EU-Korea Agreement.

While the texts for the EU-Korea and EU-Mexico Agreements are similar, their motivations and GI coverage differ substantially. The EU-Mexico Agreement, signed in 2000, was sought by the EU as a means to counter trade diversion occurring subsequent to the conclusion of NAFTA when the EU's trade with Mexico plummeted (Woolcock, 2007). The EU-Mexico Agreement was negotiated in order to gain NAFTA-equivalent access to Mexico's market; legally it is an Economic Partnership Agreement which incorporated an existing bilateral agreement extending the EU's protected GI coverage only to spirits (as was typical of many of the EU's bilateral agreements at that time which protected either or both wines and spirits only). The sectoral agreement, signed in 1997, extends recognition and protection of designation for EU and Mexican spirits. Of the substantial list of protected spirits, Mexico protected only two – Tequila and Mezcal (OJEC,1997). The EU-Mexico FTA does not contain protection for any GI other than spirits (MADB, 2011), likely because at the time, the EU was not as stringently

[25] Chile, Australia, South Africa, Mexico, all of which focused particularly on GIs for wines and/or spirits and the wine/spirits section of the EU-Korea FTA. The EU also has wine and/or spirit Agreements with Canada and the US.
[26] Chile, Australia, South Africa, Mexico.

seeking protection of European GIs and because this agreement was mainly to halt trade diversion due to NAFTA.

The Economic Partnership Agreement contains provisions to revisit geographic indications but it does not appear to have occurred. Discussions addressing GIs occur at the annual IPR Special Committee meeting where the Mexican Institute for Intellectual Property (IMPI) has agreed on several occasions to address specific GI problems (MADB, 2011). These bilateral discussions appear effective in solving GI related irritants for as of the end of 2011, there had not been any issues arising in the EU-Mexico Agreement pertaining to GIs that have been taken to WTO DSP[27].

In contrast, the EU-Korea FTA is the EU's first to extend the EU's protected GI coverage beyond wines and spirits to agricultural products and foodstuffs including meat and dairy products, fish, fruit, vegetables, beer, beverages from plant extracts, pasta, bread, pastry, cakes, confectionary and other bakers wares. Korea has included 63 food products (mostly teas, rice and spices) and 1 wine as protected GI's while the EU has listed 60 food products and 105 wines/spirits as protected GIs in the EU-Korea FTA as of October 2010 (EC, 2010). The EU Korea FTA is one focusing on a greater commercial assertiveness, with less emphasis on developmental, political or cooperation goals (Dreyer, 2010). This particular FTA was signed prior to any US FTA initiatives with Korea, therefore was not sought as a reactionary remedy to trade diversion.

The EU has also been successful at *clawing back* as GIs, terms that have become generic in the markets of preferential trade agreement partners, negating the exceptions to protection provided for in TRIPS Article 24 (Yeung and Kerr, 2008).[28] As well, the EU typically includes provisions for creation of a registration system for GIs in its preferential trade agreements.

[27] There are GI related trade irritants however. EU complaints about GI protection in Mexico include the general difficulty for foreign rights holders to register and protect their GI in Mexico. EU officials continue to lobby Mexico to reform their IPR laws to enable registration of GIs. This has been flagged as a key barrier to be prioritized in the EU's trade relations with Mexico. Specific current examples of GI issues include:

- Jerez wine which is excluded from the EU-Mexico Spirits Agreement. The EU Jerez Consortium can only refer to TRIPS for protection against the names usurpation.
- Mexican wine is being sold by the company Carafe using various EU PDOs including Porto, Barolo, Chianti and Rioja. The company, the EU Delegation and Mexican Institute of Industrial Property are undergoing negotiations to remove these names from Carafes products.
- Manchego cheese which has become generic in Mexico but the EU believes a challenge to the use of the name is not possible.
- Parma is treated as generic in Mexico despite efforts by the Consorzio del Proscuitto de Parma's to protect what it believes is its exclusive rights. Mexcio has also refused to protect the GI Proscuitto de Parma notified under the Lisbon Agreement on appellations of origin due to a prior trademark.
- Barolo wine was registered as a trademark in Mexico prior to the inclusion of Barolo GI in the Lisbon Agreement (MADB, 2011).

[28] In EU-Korea, non-wine/spirit GIs that were *claw-backs* from generic terms include, for example, feta, roquefort, proscuitto, mozzerella, asiago, gorgonzola, and parmigiano reggiano. In its wine agreements, the EU has clawed back terms such as port, sherry, and ouzo.

The EU has systematically sought and regularly achieved the pre-eminence of its GIs over similar or identical trademarks in a number of its recent trade agreements. Any trademark registration that is similar or identical to an existing EU GI cannot be registered, but conversely, a conflicting GI could be registered despite the prior existence of a similar or identical trademark. An existing trademark for a product included on the lists annexing the EU's preferential trade agreements that conflict with an EU GI must be cancelled within a specified time frame, regardless of compliance with TRIPS Article 24.5. Once registered, a GI cannot become generic and over-ride prior and subsequent trademarks; the trademark owner is also subordinate to anyone who uses a conflicting registered GI in good faith. The EU GI system permits a trademark to coexist with a protected GI when the trademark is applied for, registered or established by use only under two conditions. The first is if it existed prior to the GI becoming protected in the country of origin. The second is if it was in place prior to the cut-off date of Jan 1, 1996 (even if this date is subsequent to the date the GI was granted protection in the country of origin) (Wattanapruttipaisan, 2009). In other words, the EU's GIs have TRIPS-plus priority rights over both previous and subsequent trademarks and a GI that follows an already-registered trademark can be refused under the TRIPS/trademark system but accepted by the EU's GI system.

The EU also places additional restrictions on 'traditional expressions' or names with an associated production method in its trade agreements, despite their not necessarily having a geographic link to an area, which disqualifies them as GIs under TRIPS definitions (Giovanucci et al, 2009). The EU designates these 'traditional expressions' as 'Traditional Specialty Guaranteed' (TSG). Such a designation means that a product must be traditional or established by custom (for at least one generation or 25 years), with uniquely distinguishing characteristics from other agri-food products. TSGs may have geographic affiliations but can be produced anywhere, subject to appropriate controls, thus are not a true form of GI. Haggis, mozzarella, ice wine or eiswein are common examples. Due to a lack of legal designations for such foods or traditions elsewhere, adequate systems to protect TSGs outside of the EU are rare and consumers in most countries are left to their own devices in determining the authenticity of such products (Giovanucci et al., 2009).

5.0 Piggy in the Middle – The US, Canada, and the EU

> ….the USA in its bilateral free trade agreements has recently promoted the protection of GIs under trademark law, giving trademarks priority over GIs in case of pre-existence of the trademark. A country party to bilateral agreements with both the USA and the EU might find itself caught between opposing obligations in the case of a conflicting European GI and a US trademark that is similar to or incorporates that European GI. (Vivas-Eugui and Spennemann, 2006, p.12).

The EU's standard position in its bilateral trade agreements negotiations pertaining to GIs could put Canada in significant conflict with its existing NAFTA obligations. Given its history in preferential trade agreement negotiations, the EU may be unwilling to grant concessions pertaining to its GIs (Gauthier and Holden, 2010).

Therefore, if the EU is able to get Canada to agree to the protection of GIs using the legal regimes of their originating EU country, the EU will have exported its GI protection system to Canada. Canada will be obligated to uphold EU measures and regulations, as were Korea and Mexico, as applicable to whatever sectors and coverage was negotiated in their individual agreements. Likewise, should the EU negotiate some form of automatic protection into the CETA, Canada will lose its discretionary powers to assess whether EU GIs would qualify for protection under TRIPS criteria; it would have to unquestioningly protect them.

The EU practice of ensuring European GI's dominate over conflicting trademarks via the negating of exceptions provided for under TRIPS Article 24 could predictably affect US holders of agricultural and food trademarks in Canada. Of concern for US trademark holders will be that a registered GI cannot become generic and will over-ride prior and subsequent trademarks. Firms in both Canada and the US (by virtue of NAFTA) that utilize what are considered generic terms in the US and/or Canada, such as feta and gorgonzola, whose claw back is usually an EU priority, will be affected. This is the situation Korea is facing in light of its respective FTAs with the EU and the US. The scope of protection negotiated for particular GIs will determine the impact upon Canadian and US firms. EU GIs that are region specific, such as 'camembert de Normandie' cheese will be less difficult to deal with than a GI simply for 'camembert' cheese (Gauthier and Holden, 2010).

The revocation of prior conflicting trademarks and the clawing back of generic terms could be the most pertinent for Canada's NAFTA obligations. It would be entirely possible that the US make a claim under the NAFTA DSP either under Annex 2004(d) for non-violation, impairment or nullification of benefit specifically for intellectual property, or Chapter 17 specifically for potential violations of Articles 1712.4 – 6. Action under Annex 2004 could be sought by the US government as a Party to NAFTA. Canada could also conceivably have a claim filed against it at the NAFTA under Chapter 11, either by the US government or a private US investor such as an industry group or private firm whose ability to use their existing trademark or generic term will be negatively affected by recognition of an EU GI.

The probability of the US taking such action under NAFTA is not insignificant for several reasons. Firstly, there exist marked differences in interpretation of the NAFTA IP provisions by the Canadian and US governments. NAFTA Article 1708(2) states:

> Each Party shall provide to the owner of a registered trademark the right to prevent all persons not having the owner's consent from using in commerce identical or similar signs for goods or services that are identical or similar to those goods or services in respect of which the owner's trademark is registered, where such use would result in a likelihood of confusion. In the case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any prior rights, nor shall they affect the possibility of a Party making rights available on the basis of use (NAFTA, 1994).

Canadian negotiators have consistently argued that an IPR's *benefit* is nothing more than the enjoyment of the specific right conferred on the IPR owner (Hertz, 2010a). The Canadian

interpretation of NAFTA Article 1708(2), which defines the protection given to trademarks, is that signatories are not afforded a guaranteed right to *use* their trademarks, but only the right to *prevent unauthorized* third parties from using their trademark (Hertz, 2010b)[29]. In other words, Canada's view is that just because you have a trademark, doesn't mean you have a guaranteed right to use it. You do however, have the benefit of a guaranteed right to prevent anyone else from using it.

This contrasts sharply with the broader US interpretation of an IPR's *benefit* which conceptually includes commercial exploitation. Section 301 of the US Trade Act authorizes the US Trade Representative to take discretionary action due to the:

> …the denial of fair and equitable non-discriminatory market access opportunities [including] restrictions on market access related to the use, *exploitation, or enjoyment of commercial benefits* derived from exercising intellectual property rights in protected works or fixations or products embodying protected works (USC, 2010) (*emphasis added)*.[30]

Hertz (2010b) states that during NAFTA negotiations, the US delegation's perspective was that Chapter 17 (Intellectual Property) of NAFTA would be used to govern the *management* of IPRs, while Annex 2004 (Nullification and Impairment) would ascertain the *use* of IPRs. The US stance includes market access as conceptually intrinsic to intellectual property rights as defined by Section 301 of the US Trade Act. In other words, owning a trademark also gives you the right to use it to economically gain. It was also the US position that non violation, i.e. under Annex 2004, is a remedy for market access failure such as that cited in Section 301(Hertz, 2010b). Therefore market access is a component of commercial exploitation which is considered a *benefit* of IPR in the US position. The US view of Annex 2004 as a remedy for denial of such *benefits*, contrasts with Canada's narrower definition of *benefit*; as a result there is a predisposition to disputes under NAFTA. As the CETA may well deny prior US food and agri-food product trademark holders use of their Canadian trademarks in Canada, thereby denying them *market access and enjoyment of commercial benefits derived from exercising IPRs*, a claim being made under Annex 2004 is easily foreseen. Similarly, NAFTA Chapter 11 could also enable a US investor holding an affected food or agri-food trademark to submit a claim to NAFTA DSP. At this point, there has not been an intellectual property case brought forth to the NAFTA DSP to test the legal validity of any of these hypotheses.

Secondly, the potential for loss of market access and enjoyment of commercial benefits has been raised by US industry and developments under the CETA are being closely observed by

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[29] Hertz (2010a) indicates that consistently during NAFTA and the Uruguay Round negotiations, Canadian negotiators argued that an IPR's 'benefit' is nothing more than the enjoyment of the specific right conferred on the IPR owner and that the idea of 'benefit' cannot encompass all possible economic outcomes that might result from the use of a particular IPR as many factors, including many beyond their control, could influence the right holder's ability to utilize the protected item. Canadian negotiators explained that IPRs are normally articulated not as an affirmative "right to use" but rather as a negative "right to prevent unauthorized use."

[30] USC, 19(12) (3) (2411), (d) (3) (f) (ii) – Enforcement of US Rights under Trade Agreements and Response to Certain Foreign Trade Practices.

the USTR[31]. With heightened US awareness and monitoring, any potential non-violation, impairment or nullification issues will be raised sooner rather than later.

Of note, the issues and conflicts between existing trademarks and European GIs are more likely to arise in the area of food and agri-food rather than wine and spirits as both Canada and the US have existing formal wine/spirits agreements with the EU. In these agreements with the EU, both Canada and the US have allowed the EU to claw back certain terms considered generic in North America. In both countries, government worked closely with their respective wine industries to reach a negotiated settlement that would adequately compensate their wineries in return for voluntarily giving up the use of generic wine terms the EU claims as its own. Compensation included aspects such as adequate protection for U.S. and Canadian geographical indications, as well as mutual acceptance of Canadian and US winemaking practices, reductions to EU wine tariffs and subsidies, and the removal of market restrictive EU certification and labeling requirements, all within general transition periods that allowed companies time to adjust to any eventual phase out of generic wine terms (Dudas, 2003; AAFC, 2008). For example, Canadian producers of sauterne, rhine, grappa and ouzo were given a five year transition period before those names could no longer be used (in 2008) while producers of champagne, burgundy, port and sherry have a ten year transitional period which expires at the end of 2013. Canadian companies have changed products names to comply with EU GI's – Fired Earth or Pipe for fortified red wines such as Port.

The focus of this discussion has been Canada's NAFTA obligations vis-à-vis the United States. Yet NAFTA is a plurilateral trade agreement with Mexico as the third Party. Mexico and the EU entered into a formal preferential trade agreement in 1997, yet the issue of conflicting regimes for GIs and trademarks has not raised much concern. Mexico, as Party to NAFTA, is equally subject to Chapter 17, Chapter 11 and Annex 2004 as Canada and the US. Mexico, therefore, could have faced the same IPR repercussions in its relations with the US because of its preferential trade agreement with the EU as Canada may well face. However, the Mexico-EU preferential trade agreement is strictly an agreement on the mutual recognition and protection of GIs for spirits and wines only. Mexico agreed to protect the GIs of more than 250 European alcoholic beverages and, in exchange, gained the ability to enjoy the use of place names like "Tequila" and "Mezcal", on products sold in Europe (Kim, 2007). While the US could potentially have invoked the NAFTA DSP, likely no nullification or impairment of benefit occurred as the US is not an exporter of the liquors protected by EU GIs or Mexico. The US has a formal wine agreement (2006) with the EU while Canada has a wine and spirits agreement (2003) with the EU. To date, no NAFTA dispute between the US and Mexico over GIs and IPRs has taken place.

One additional area of GI coverage, beyond Chapter 17 and its appendices, exists within the NAFTA. Annex 313 of Chapter 3(National Treatment and Access of Goods to the Market) provides for the protection of *Distinctive Products* in the Parties. The Annex recognizes Bourbon Whiskey and Tennessee Whiskey as distinctive products of the US. Canadian Whisky is a distinctive product of Canada, while Tequila and Mezcal are distinctive products of Mexico. The

[31] See Congressional Dairy Farmers Caucus (2010).

Parties agree not to permit the sale of these distinctive products unless it has been manufactured pursuant to the laws and regulations of the originating Party. Ortiz (1997) notes that Annex 313 may have been included at Mexico's insistence as a means to protect the appellation of origin for Tequila as neither Canada nor the US are party to the Lisbon Agreement and Mexico desired express protection for Tequila so that it would not be treated as a generic or common term by its NAFTA partners.

Finally, beyond the NAFTA and the TRIPS, there are no other intellectual property rights treaties with provisions for effective dispute settlement. In 1997, WIPO drafted a dispute resolution agreement that was never ratified. NAFTA and the WTO provide for disputes in the case of non-violation or nullification or impairment of benefit, with NAFTA specifically including provisions governing nullification or impairment of benefits in intellectual property. The TRIPS refers to the WTO Understanding on Dispute Settlement. Table 1 provides IP Treaties managed by WIPO and their respective provisions for dispute settlement.

Table 1: WIPO Managed Intellectual Property Treaties and Their Provisions for Dispute Settlement

No Provision for Dispute Resolution
Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1891, 1958)
Madrid Agreement Concerning the International Registration of Marks (1891, 1958)
The Hague Agreement Concerning the International Deposit of Industrial Designs (1925, 1967, 1979)
Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957, 1977, 1979)
Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958, 1967, 1979)
Locarno Agreement Establishing an International Classification for Industrial Designs (1968, 1979)
Strasbourg Agreement Concerning the International Patent Classification (1971, 1979)
Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication (1971)
Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite(1974)
Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the purposes of patent procedure (1977, 1980)
Nairobi Treaty on the protection of the Olympic Symbol (1981)
Treaty for the International Registration of Audiovisual Works (FRT) (1989)
Protocol Relating to the Madrid Agreement concerning the International Registration of Marks (1989)
Trademark Law Treaty (1994)
Geneva Treaty on the International Recording of Scientific Discoveries (1978)
WIPO Copyright Treaty (1996)
WIPO Performances and Phonograms Treaty (1996)

Convention on Patents of Invention (1889)
Convention on Literary and Artistic Property (1889)
Convention on Trademarks (1889)
Treaty on Patents of Inventions, Industrial Drawings, Models, Trademarks (1902)
Convention on Patents of Invention, Drawings and Industrial Models (1906)
Convention on Literary and Artistic Copyright (1910)
Convention on Patents of Inventions, Designs and Industrial Models, (1910)
Agreement on Patents and Privileges of Invention (1911)
Convention for the Protection of Commercial, Industrial and Agricultural Trademarks and Commercials Names (1923)
Protocol on the Inter-American Registration of Trademarks (1929)
Treaty on Intellectual Property (1939)
InterAmerican Convention on the Rights of the Author in Literary, Scientific and Artistic works, (1946)
European Convention Relating to the Formalities Required for Patent Applications (1953)
European Agreement on the Protection of Television Broadcasts (1965)
UPOV Convention for the Protection of New Varieties of Plants (1961, 1978, 1991)
Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property (1962)
Convention on the Unification of Certain Points of Substantive Laws on Patens for Invention (1963)
European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories (1965)
Convention Relating to the Protection of Appellations of Origin (1969)
CMEA, Agreement on the Legal Protection of Inventions, Industrial Designs, Utility Models and Trademarks in the Framework of Economic, Scientific and Technical Cooperation (1973)
CMEA, Agreement on the Unification of Requirements for the Execution and Filing of Applications for Inventions (1975)
CMEA, Agreement on the Mutual Recognition of Inventors' Certificates and other Titles of Protection for Inventions (1976)
Agreement Relating to the Creation of an African Intellectual Property Organization(1977)
Protocol on Patents and Industrial Designs Within the Framework of ESARIPO (1982)

Non-binding (Opt-out or With Reservation to Opt-out) Dispute Settlement Mechanism	***Dispute Settlement via Referral to Courts of Justice or Arbitration***
Paris Convention for the Protection of Industrial Property (1883, 1967, 1979)	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), (International Court of Justice)
Berne Convention for the Protection of Literary and Artistic Works (1886, 1971, 1979)	General Inter-American Convention for Trademark and Commercial Protection (1929), (national civil or criminal courts)
Patent Cooperation Treaty (PCT) (1970, 1979, 1984)	Benelux Convention Concerning Trademarks (1962), (Benelux Court of Justice)

Trademark Registration Treaty, (1973, 1980)	Benelux Designs Convention (1966), (Benelux Court of Justice)
Vienna Agreement for the Protection of Type Faces and their International Deposit (1973, 1985)	Central American Agreement for the Protection of Industrial Property Marks (1968), (Arbitration Tribunal)
Madrid Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties (1979)	Universal Copyright Convention (1952), (International Court of Justice)
Washington Treaty on Intellectual Property in Respect of Integrated Circuits (1989)	Convention on the Grant of European Patents (1973), (International Court of Justice)
	Convention for the European Patent for the Common Market (1975), (Court of Justice of the European Communities, binding)
	Agreement on the Creation of an Industrial Property Organization for English-Speaking Africa (1976), (Council decision, binding)
	Agreement Relating to Community Patents (1989), (Court of Justice of the European Communities, binding)
	Eurasian Patent Convention (1994), mediation
	Protocol of Amendment to the Central American Agreement for the Protection of Industrial Property (1994), (governing body mediation)
Source: adapted from WIPO, 1997.	

6.0 Potential Conflicts in Specific Goods: CETA and NAFTA

Geographical Indicators (GIs) for agricultural products and foodstuffs are a sensitive issue in the CETA negotiations. The protection of GIs is a priority in EU foreign policy; this is reflected to varying degrees in its existing preferential trade agreements and is a priority in the agreements it is currently negotiating. The EU has not, as yet, disclosed its position on GIs in the CETA negotiations. However, based on the WTO Cancun Summit in 2003 and the FTA between EU and South Korea, it is possible to glean some insights regarding which GIs EU would like Canada to protect. The only list of products that the EU has formally sought protection for on the multinational level was put forward at the WTO Cancun Summit in 2003. The list contains 40 products (foodstuffs, wines and spirits) and it was suggested that the EU will demand the list be accepted by WTO members as non-generic, protected terms as part of Doha Round Negotiations (Viju et al., 2010). The list of non-wine and spirits designated for protection is listed in Table 2. Most of the products are either cheeses or cured meats.

Table 2: Non-Wine and Spirit Designation Protection Sought by the EU at WTO Cancun Summit in 2003

Names to be protected	Product
Asiago, Comté, Feta, Fontina, Gorgonzola, Grana Padano, Manchego, Mozzarella di Bufala Campana, Parmigiano Reggiano, Pecorino Romano, Queijo São Jorge, Reblochon, Roquefort	Cheese
Azafrán de la Mancha	Saffron
Jijona y Turrón de Alicante	Confection
Mortadella Bologna, Prosciutto di Parma, Prosciutto di San Daniele, Prosciutto Toscano	Meat product

Source: Viju et al. (2010).

Under the EU-South Korea Free Trade Agreement (FTA) that was officially signed on October 6, 2010, South Korea agreed to protect the GIs that the EU proposed in the negotiations and the Annex of the final agreement includes the full list of protected products (Table 3).

Table 3: Non-Wine and Spirit Designation Protection in EU-South Korea FTA

Name to be protected	Country	Product
Tiroler Speck	Austria	Ham
Steirischer Kren	Austria	Horseradish root
České pivo , Budějovické pivo , Budějovický měšťanský var, Českobudějovické pivo , Žatecký chmel	Czech Republic	Beer
Comté , Reblochon , Roquefort , Camembert de Normandie , Brie de Meaux, Emmental de Savoie	France	Cheese
Pruneaux d'Agen / Pruneaux d'Agen mi-cuits	France	Dried cooked plums
Huîtres de Marennes-Oléron	France	Oyster
Canards à foie gras du Sud-Ouest (Chalosse, Gascogne, Gers, Landes, Périgord, Quercy)	France	Duck fatty liver
Jambon de Bayonne	France	Ham
Huile d'olive de Haute-Provence	France	Olive oil
Huile essentielle de lavande de Haute-Provence	France	Lavender essential oil
Bayerisches Bier , Münchener Bier	Germany	Beer
Ελιά Καλαμάτας (transcription into Latin alphabet: Elia Kalamatas)	Greece	Olives
Μαστίχα Χίου (transcription into Latin alphabet: Masticha Chiou)	Greece	Gum
Φέτα (transcription into Latin alphabet: Feta)	Greece	Cheese

Szegedi téliszalámi / Szegedi szalámi	Hungary	Salami
Aceto balsamico Tradizionale di Modena	Italy	Sauce - seasoning
Cotechino Modena	Italy	Pork meat sausage
Zampone Modena	Italy	Pork meat
Mortadella Bologna	Italy	Large pork meat sausage
Prosciutto di Parma , Prosciutto di S. Daniele , Prosciutto Toscano	Italy	Ham
Provolone Valpadana	Italy	Cheese
Taleggio , Asiago , Fontina, Gorgonzola, Grana Padano, Mozzarella di Bufala Campana, Parmigiano Reggiano, Pecorino Romano	Italy	Cheese
Queijo de São Jorge	Portugal	Cheese
Baena, Sierra Mágina, Aceite del Baix-Ebre-Montsía / Oli del Baix Ebre-Montsià, Aceite del Bajo Aragón, Antequera, Priego de Córdoba, Sierra de Cádiz, Sierra de Segura	Spain	Olive oil
Guijuelo, Jamón de Huelva, Jamón de Teruel	Spain	Ham
Salchichón de Vic / Llonganissa de Vic	Spain	Sausage
Mahón-Menorca, Queso Manchego	Spain	Cheese
Cítricos Valencianos / Cítrics Valencians	Spain	Citrus
Jijona	Spain	Nougat
Turrón de Alicante	Spain	Confectionary
Azafrán de la Mancha	Spain	Saffron

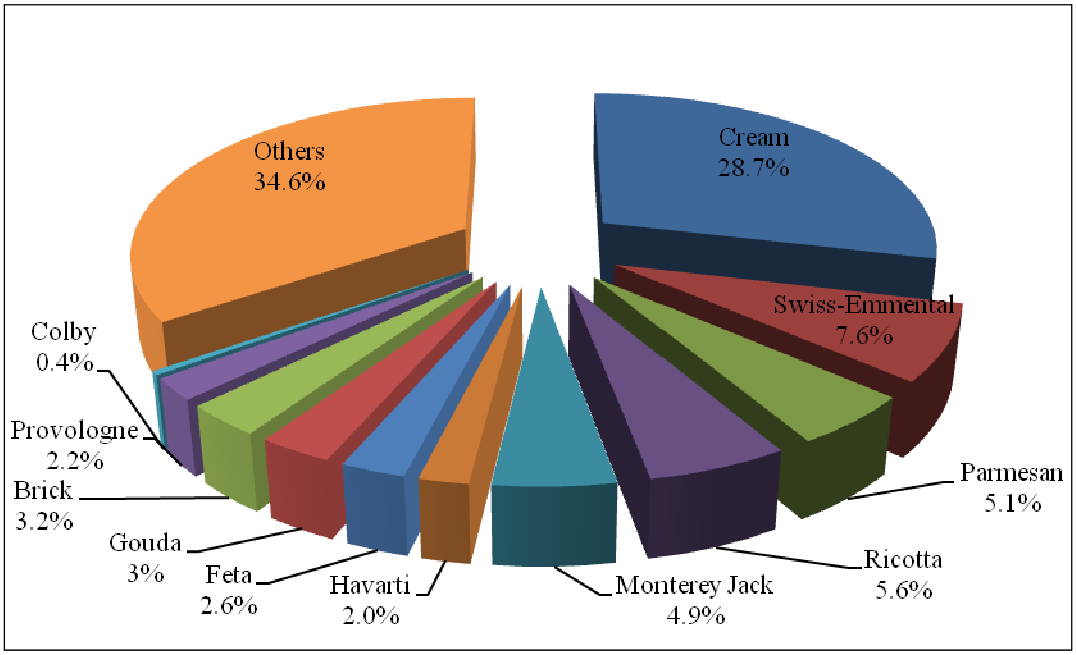
Source: EC (2010).

South Korea will now protect 59 non-wine and spirit products, consisting mostly of cheese and cured meats. Compared to the list proposed by the EU at the WTO in 2003, different types of olive oil and beer products have been added. Of the products on the two EU lists, cheese and cured meats (ham) will create the most issues for Canada, both for its domestic market as well as its largest trading partner, the United States, should it agree to protect EU GIs.

The dairy industry is the third most valuable sector of the Canadian food and beverage industry (approximately 15 percent), following grains and red meats. Roughly 80 percent of dairy farms are located in Ontario and Quebec. The dairy processing industry is relatively concentrated with 75 percent of Canadian milk production processed by three large companies (Saputo, Agropur and Parmalat). The market for processed dairy products such as butter, cheese, yogurt and ice cream represents 61.1 percent of total milk production (or 46.2 million hectolitres of milk) (AAFC, 2010a).

Canada produces approximately 1050 varieties of cheese which are classified according to their moisture content, with most of cheeses being categorized into firm, soft or semi-soft groups (Table A.1, Appendix A) (Canadian Dairy Information Centre, 2011a). The varieties of specialty cheese produced in Canada are depicted in Figure 1, with the largest percentage being Cream cheese, at 28.7 percent (Figure 1).

Figure 1: Specialty Cheeses (2010)



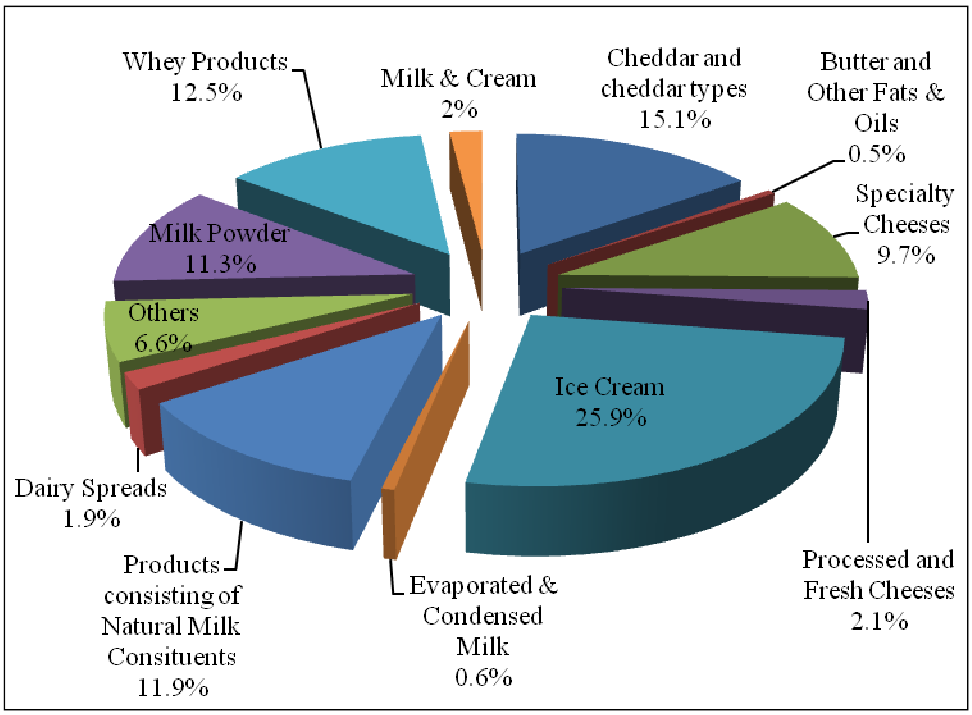
Source: Canadian Dairy Information Centre (2011b).

The US is the main destination for Canadian dairy products, accounting for 33 percent of the total value of dairy products exported from Canada in 2009; cheese products account for 27 percent of total dairy exports (Figure 2). Of total Canadian cheese exports, Cheddar and Cheddar-types comprise approximately 55 percent, while Specialty Cheese accounts for 35 percent (Table 4). The largest importer of Canadian cheddar cheese is the UK, accounting for 66 percent of the total volume of cheddar exports (AAFC, 2010b). The US is the primary destination for Canadian specialty and fresh cheese (Table A.2, Appendix A), while France is the largest importer of Canadian processed cheese.

If Canada accepts the obligation to protect EU GIs, Canadian cheese producers will not be able to label and advertise those cheeses included in the EU GI list using their current names. Most of the cheese that the EU might ask protection for are included in the Specialty Cheese category, thus 9.7 percent of total dairy exports would be affected, in addition to domestic marketing of Specialty Cheeses, as new labelling and advertising requirements would increase production costs for Canadian cheese producers. However, beyond affecting Canadian cheese exports and domestic costs, protecting EU GIs will likely alter the composition of Canadian cheese imports, increasing competition for the Canadian dairy sector.

Figure 2: Exports of Dairy Products in 2009 (Value)

(Total: CAD $230 millions)



Source: Agriculture and Agri-Food Canada (AAFC) (2010b).

Table 4: Canadian Cheese Exports

Cheese exports/year	**Value (CAD$)**			**Quantity (kg)**		
	2007	2008	2009	2007	2008	2009
Cheddar and cheddar types	36,746,167	40,431,242	34,735,965	4,821,826	5,125,469	4,184,053
Specialty	20,936,862	22,553,846	22,237,178	3,166,737	3,456,507	3,901,979
Processed	405,494	99,093	305,277	99,925	21,816	68,087
Fresh	5,052,810	4,678,745	5,458,155	1,343,778	1,263,149	1,334,661
Total - Cheese	**63,141,333**	**67,762,926**	**62,736,575**	**9,432,266**	**9,866,941**	**9,488,780**

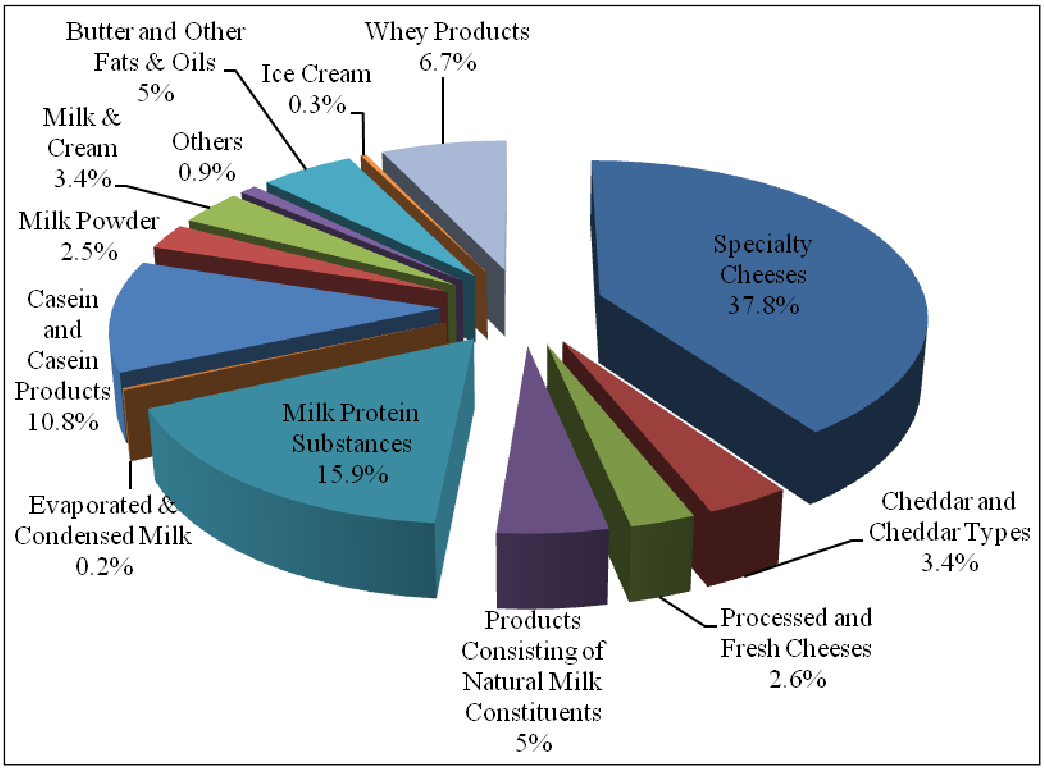
Source: Canadian Dairy Information Centre, Government of Canada (2010).

Canada's largest supplier of dairy products is the EU, with 37.8 percent of total Canadian dairy imports, followed by the US with 34 percent (AAFC, 2010b). As Figure 3 shows, the top dairy product category imported by Canada is "Specialty Cheese" accounting for 38 percent of total dairy imports. Canadian cheese imports are subject to a tariff rate quota (TRQ) of

20,411,866 kg. Total cheese imports in 2009 were 24,071 tonnes, valued at CAD $251 million (Table 5). Specialty cheese accounted for 86 percent of the total value of cheese imports, followed by Cheddar cheese at 7.7 percent, processed cheese at 4.5 percent and fresh cheese with 1.4 percent.

Figure 3: Imports of Dairy Products in 2009 (Value)

(Total: CAD $573 millions)



Source: Agriculture and Agri-Food Canada (AAFC) (2010b).

Table 5: Canadian Cheese Imports

Cheese imports/year	Value (CAD$)			Quantity (kg)		
	2007	2008	2009	2007	2008	2009
Cheddar and cheddar types	15,047,863	21,667,624	19,402,139	1,986,185	2,978,380	2,772,886
Specialty	192,143,549	222,706,849	216,573,540	19,812,664	20,337,756	19,551,793
Processed	21,273,905	14,717,039	11,331,238	3,054,112	1,789,211	1,150,494
Fresh	3,243,652	2,833,215	3,558,908	640,706	548,397	596,056
Total - Cheese	**231,708,969**	**261,924,727**	**250,865,825**	**25,493,667**	**25,653,744**	**24,071,229**

Source: Canadian Dairy Information Centre, Government of Canada (2010).

The largest supplier of specialty cheese to Canada is the EU, with Italy providing specialty cheese valued at CAD $51.8 million in 2009, followed by France with CAD $41.2 million. The US is the third most important supplier, exporting CAD 23.1 million worth of specialty cheese to Canada (Table 6). Table A.3 (Appendix A) provides information on Canadian cheese imports from the US according to HS Number.

Table 6: Major Suppliers of Cheese to Canada by Type in 2009

Country	Primary Cheese Imported	Volume (tonnes)	Value (millions of $)
Italy	Parmesan	3,084	38.4
	Romano	697	7.2
	Other specialty cheeses	570	6.2
France	Gouda and Edam cheeses	1,089	16.5
	Brie	784	9.4
	Other specialty cheeses	1,919	15.2
United States	Cheddar and cheddar type	2,231	14.3
	Processed cheese	249	1.8
	Specialty cheeses	2,391	23.1
Switzerland	Swiss/Emmental	953	10.7
	Gruyère and Gruyère type	785	10.4
	Other specialty cheeses	51	0.43

Source: Agriculture and Agri-Food (AAFC) (2010b).

The US is the world's largest cheese producer, but most of its production is consumed domestically, with roughly 4 percent of total cheese production destined for exports. However, Canada is the third largest export destination for US cheese, consuming an average of 11 percent of total US cheese exports per year (Table A.4, Appendix A).

Specialty cheese comprise five percent of total US cheese exports to Canada; were Canada to recognize EU GIs, a maximum of five percent of US cheese exports to Canada composed of specialty cheese, would no longer be accepted in the Canadian market unless US cheese exporters market their specialty cheese under different names in the Canadian market. As the US does not recognize EU GIs and has a trademark system in place, the probability of US cheese producers marketing their cheese products destined for Canada under different names is very low. The prospect of losing market share in Canada, their third largest export market, will not be welcomed by US cheese producers as their reaction to South Korea protecting EU GIs attests.

South Korean imports of US cheese had recently increased significantly (Table A.4, Appendix A); this is the main reason behind US cheese exporters' complaints about the protection South Korea will now afford EU GIs. Such protection is likely to result in the exclusion of some US cheese products from the valuable South Korean market.

Conflicts between Canadian and US trademark holders and EU GIs are also particularly likely in cured meats. The major area of contention from a Canadian perspective regarding the GIs proposed by the EU is represented by *Parma Ham*. The Canadian company Maple Leaf Foods trademarked the term *Parma* in 1971 and the EU feels that it infringes on the GI *Prosciutto di Parma* (Viju et al., 2010).

The Canadian red meat and meat products industry represents the largest sector of the Canadian food manufacturing industry. The US is the dominant purchaser of Canadian processed pork products consuming approximately 70 percent of total exports (AAFC, 2010e). Canada's share of world pork products exports is 17.38 percent (2008), compared to the US, the world's largest pork and pork products exporter, with a share of roughly 39 percent. Canada imported 9.05 percent of US pork and pork products exports in 2008 while more than four-fifths of US imports of pork and pork products originate from Canada (USDA, 2009).

Although it is not possible to identify the exact levels of Parma ham production and trade in Canada and the US, Tables A.5 and A.6 from Appendix A provide detailed information on the levels of Canadian imports and exports of cured hams from/to the US. Thus, were Canada to protect EU GIs, firstly, the Canadian company Maple Leafs Meats would be required to have its trademark cancelled and, secondly, any future US exports of Parma ham to Canada would be denied unless the US markets its product destined for Canada under a different name. It is not clear how a trademark could be cancelled and/or how much compensation would have to be paid.

7.0 Canada-EU Wine and Spirits Agreement

The EU wish list for GIs and protected indications of wines and spirits presented at the WTO Cancun Summit in 2003 was comprised of 22 wines and spirits. In 2003, however, Canada and the EU signed an agreement on wines and spirits under which the two parties agreed to recognize some generic classifications of Canadian and EU wines and spirits. Examples of Canadian wines and spirits indications that are protected by the EU include Okanagan Valley,

Niagara Peninsula, Niagara-on-the-Lake and Canadian Rye Whisky. The list of EU wines and spirits that Canada agreed to protect is presented in Table 7.

Though the agreement was signed in 2003, it was designed with a three-phase termination period for generic status, with some products affected immediately, others by the end of 2008 and some others by the end of 2013 (Viju et al., 2010). Most of the EU wines and spirits covered by the EU-Canada Wines and Spirits Agreement are part of the GI wish list presented by the EU at the WTO Cancun Summit. By recognizing EU GIs in wines and spirits, Canadian producers are not allowed to label and market the protected products under their original names and Canada is not allowed to accept imports of the specific protected products from countries other than the EU.

Based on the levels of trade in wines and spirits between Canada and the US (Tables A.7 and A.8, Appendix A), it can be concluded that the Canada-EU Wines and Spirits Agreement did not have a negative effect on the levels of trade. Even though Canadian wine and spirit exports to the US have shown a slight decrease in 2009 compared to 2007 levels, Canadian imports of wines and spirits from the US have generally increased during the three-year period.

Table 7: Wine and Spirit Designation Protection Sought by the EU

Provided to WTO Members, 2003	*Canada-EU Agreement*
Beaujolais	n/a
Bordeaux	Bordeaux
Bourgogne	Bourgogne (also: Burgundy)
Chablis	Chablis
Champagne	Champagne
Chianti	Chianti
n/a	Claret
Cognac	n/a
Grappa di Barolo, del Piemonte, di Lombardia, del Trentino, del Friuli, del Veneto, dell'Alto Adige	Grappa
Graves	n/a
Liebfrau(en)milch	n/a
Malaga	Malaga
Marsala	Marsala
Madeira	Madeira
Médoc	Médoc (also: Medoc)
Moselle	Moselle (also: Mosel)
Ouzo	Ouzo
Porto	Porto (also: Port)
Rhin	Rhin (also: Rhine)
Rioja	n/a

Saint-Emilion	n/a
Sauternes	Sauternes (also: Sauterne)
n/a	Sherry
Jerez, Xerez	n/a

Source: Viju et al., 2010

In the EU-South Korea free trade agreement, South Korea agreed to protect 105 EU wines and spirits including the ones proposed at WTO Cancun Summit and in the Canada-EU Wines and Spirits Agreement. However, given that the Canada-EU Wines and Spirits Agreement covers major products such as Chianti, Chablis, Bordeaux, Port and Sherry and most of the wines and spirits included in the EU-South Korea free trade agreement are not produced in Canada or the US, an extension of the wines and spirits GIs under CETA will not represent an important constraint for Canadian producers and it is not likely to affect US exports of wines and spirits to Canada. US exports to Canada in this sector will likely face less displacement should Canada agree to protect the EU's GIs in wines and spirits; the likelihood of CETA causing conflict with Canada's NAFTA obligations is reduced as the wines and spirits of interest to the EU are already protected, without undue disruption to US exports of these products to Canada.

These case studies have used the EU-South Korea FTA as a proxy to determine what GIs the EU will seek protection for in the CETA but it must be recalled that the cases of South Korea and Canada are markedly different as Canada is partnered with the US as part of NAFTA, while the US-South Korea FTA was only ratified by the US Congress late in 2011. Thus, Canada has longstanding legal obligations under both the WTO and NAFTA to consider in its negotiations under the CETA. As NAFTA has specific provisions concerning Members' market access and intellectual property rights, the CETA may well precipitate trade altercations between Canada and the US.

8.0 Conclusion

In the absence of an agreement in the Doha Round of WTO negotiations, individual countries have been seeking to pursue their particular trade agendas through preferential trade agreements. This has been particularly true for the major trading countries (Kerr and Hobbs, 2006; Viju et al., 2010). One area where there is no agreement in the Doha negotiations, and little prospect for an agreement, is the strengthening of the provisions to protect geographical indications championed by the EU. As a result, the EU has been aggressively pursuing its agenda on enhancing the protection of its GIs through the preferential trade agreements it has been negotiating[32] .

The EU's interest in extending protection for GIs stems from the importance now given to GIs in its agricultural policy. In the wake of the Uruguay Round's Agreement on Agriculture where limits were put on the traditional forms of support given to farmers, one policy alternative is to endow regional agricultural producers with monopoly rights – that mechanism has been

[32] The US is also pushing its agenda on GIs, one example is the proposed Trans-Pacific Partnership (see *Inside US Trade*, 2011).

GIs. The number of EU GIs has increased to approximately 5000 (Giovannucci et al., 2009) and registrations continue at a rapid pace (Yeung and Kerr, 2008). One way to increase the monopoly rents accruing to farmers endowed with a GI is to increase the size of the monopoly market by garnering foreign recognition and protection of the GI.

Given the conflicting agendas of the major trading countries and the large number of regional trade agreements – meaning countries may be a party to more than one preferential trade agreement – it is probably not surprising that potential conflicts in commitments arise. For example, recently South Korea has negotiated preferential trade agreements with both the EU and the US. There have been strong objections raised in the US over South Korea's commitments to the protection of EU GIs in its recent agreement with the EU. Canada is already in a preferential trade agreement with the US, the NAFTA. The NAFTA has relatively strong commitments pertaining to intellectual property, although they remain largely untested. In the case of geographical indicators the NAFTA commitments are structured around the trademark system used by the US and Canada. Canada is currently negotiating a preferential trade agreement – the CETA – with the EU. Although the exact nature of the intellectual property chapter of the CETA has not yet been revealed, if the EU remains true to form it will be pushing hard for a commitment from Canada to recognize and enforce its GIs. Any commitment similar to those made in other recent preferential trade agreements signed with the EU (e.g. the EU-South Korea Agreement) would almost certainly lead to a US challenge under the provisions of the NAFTA.

It may be difficult for Canada to successfully conclude an agreement with the EU without making a commitment to protect EU GIs. If it does, then it will likely face a trade challenge from the US. The question of GIs represents a major challenge for trade policy makers. It also provides an example for why having these types of differences solved through multilateral negotiations – hard though the negotiations may be – is preferable to a plethora of preferential trade agreements.

There is an old African proverb that is appropriate to the challenge Canadian trade policy makers face over the protection of GIs – *When two elephants fight, it is the grass that suffers* (Van Meter Crabb, 1965, p. 2).

APPENDIX A

Table A.1: Canadian Production of Cheese by Variety

Varieties	2006	2007	2008	2009	2010
	Kilograms - '000				
Cheddar	139,326	130,154	128,795	129,436	138,050
Mozzarella	117,512	123,479	119,525	119,535	115,127
Cream	34,390	34,363	36,155	36,355	37,257
Cottage	27,844	29,887	29,790	26,125	26,020
Suisse & Emmental	8,172	8,517	8,749	9,124	9,898
Parmesan	7,270	6,756	6,805	7,876	6,670
Ricotta	6,265	6,717	6,351	6,611	7,273
Monterey Jack	4,613	4,705	4,933	5,711	6,390
Havarti	4,057	4,342	6,144	4,048	4,137
Feta	2,921	3,210	3,773	3,920	3,965
Gouda	4,095	4,315	3,161	3,485	3,371
Brick	4,859	5,762	3,389	3,207	2,640
Provolone	2,790	3,062	3,302	3,018	2,913
Farmers Skim Milk	1,505	5,297	1,302	992	1,127
Colby	467	531	525	549	502
Others	20,783	29,987	36,790	39,498	43,871
TOTAL	**386,938**	**401,149**	**399,554**	**399,544**	**409,212**
Category	**2006**	**2007**	**2008**	**2009**	**2010**
	Kilograms - '000				
Soft Cheese	71,166	73,657	75,738	72,280	73,745
Semi-soft Cheese	133,345	140,758	133,538	133,640	130,339
Firm Cheese	165,412	169,312	165,294	171,148	173,179
Hard Cheese	7,960	7,584	8,506	8,290	7,016
Blue-veined Cheese	76	87	94	95	96
Others	8,909	9,751	16,384	19,086	24,838
TOTAL	**386,868**	**401,149**	**399,554**	**404,540**	**409,212**

Source: Canadian Dairy Information Centre (2011b).

Table A.2: Canadian Cheese Exports to the US by Product (Export HS Number)

HS5	HS7	Product	2007	2008	2009	2010-July
40610	4061000	Cheese, fresh (unripened or uncured) incl whey cheese unfermented, & curd (Kilogram)	$4,964,206	$4,580,613	$5,286,482	$2,983,312
		Total	**$4,964,206**	**$4,580,613**	**$5,286,482**	**$2,983,312**
40620	4062090	Cheese, nes, grated or powdered, of all kinds (Kilogram)	$0	$0	$351,734	$175,073
	4062010	Cheese, cheddar, grated or powdered, of all kinds (Kilogram)	$0	$0	$7,052	$0
		Total	**$0**	**$0**	**$358,786**	**$175,073**
40630	4063000	Cheese processed, not grated or powdered (Kilogram)	$48,587	$23,459	$0	$0
		Total	**$48,587**	**$23,459**	**$0**	**$0**
40690	4069010	Cheese, cheddar (Kilogram)	$7,524,045	$10,762,007	$11,316,057	$6,736,418
	4069090	Cheese, nes (Kilogram)	$15,995,465	$15,101,777	$13,206,375	$5,735,235
	4069020	Gjetost cheese, made from goat's milk whey or mix whey goat milk & <20% cow milk (Kilogram)	$6,589	$42,618	$0	$0
		Total	**$23,526,099**	**$25,906,402**	**$24,522,432**	**$12,471,653**

Source: AAFC (2010c).

Table A.3: Canadian Cheese Imports from the US (Export HS Number)

HS5	HS9	Product	2007	2008	2009	2010-july
40610	406101010	Cream cheese, excluding whey and buttermilk cheese, within access commitment (Kilogram)	$1,111,852	$1,031,539	$1,710,904	$1,907,562
	406101090	Cheese, fresh, nes, including whey cheese, unfermented and curd, w/a commitment (Kilogram)	$847,325	$679,356	$720,595	$491,195
	406102000	Cheese, fresh, nes, including whey cheese, unfermented and curd, o/a commitment (Kilogram)	$356	$188	$43,271	$69,840
		Total	**$1,959,533**	**$1,711,083**	**$2,474,770**	**$2,468,597**
40620	406209190	Cheese, nes, grated or powdered, within access commitment (Kilogram)	$6,032,904	$5,976,286	$5,681,962	$3,152,455
	406209110	Parmesan cheese, grated or powdered, within access commitment (Kilogram)	$1,837,709	$3,262,834	$4,363,791	$2,464,668
	406209120	Romano cheese, grated or powdered, within access commitment (Kilogram)	$192,736	$745,193	$411,544	$236,494
	406201110	Cheddar cheese, grated or powdered, within access commitment (Kilogram)	$711,909	$3,844,956	$3,156,661	$42,666
	406201120	Cheddar type cheese, grated or powdered, within access commitment (Kilogram)	$128,788	$1,093	$20,524	$1,130
	406201200	Cheddar & cheddar type cheese, grated or powdered, over access commitment (Kilogram)	$10,137	$151	$4,422	$426
	406209200	Cheese, nes, grated or powdered, over access commitment (Kilogram)	$3,630	$189,291	$7,619	$375
		Total	**$8,917,813**	**$14,019,804**	**$13,646,523**	**$5,898,214**

40630	406301090	Cheese, processed, nes, not grated or powdered, within access commitment (Kilogram)	$5,515,573	$3,736,657	$1,297,250	$532,078
	406301012	Cheddar type cheese, processed, not grated or powdered, within access commitment (Kilogram)	$71,215	$361,402	$92,419	$101,911
	406302000	Cheese, processed, not grated or powdered, over access commitment (Kilogram)	$5,619	$1,025	$4,501	$872
	406301011	Cheddar cheese, processed, not grated or powdered, within access commitment (Kilogram)	$1,126,867	$936,879	$439,340	$39,049
	406301030	Swiss cheese, processed, not grated or powdered, within access commitment (Kilogram)	$14,743	$8,872	$13,645	$0
		Total	**$6,719,274**	**$5,035,963**	**$1,833,510**	**$673,910**
40640	406401000	Blue-veined cheese, within access commitment (Kilogram)	$260,197	$318,158	$287,357	$239,665
	406402000	Blue-veined cheese, over access commitment (Kilogram)	$4	$29	$59	$0
		Total	**$260,201**	**$318,187**	**$287,416**	**$239,665**
40690	406904190	Gouda type cheese, nes, within access commitment	$591,578	$5,167,108	$7,233,836	$4,137,077
	406906100	Mozzarella & Mozzarella type cheese, made from whole milk, w/a commitment (Kilogram)	$1,974,192	$3,249,287	$3,488,538	$4,115,184
	406901110	Cheddar cheese, nes, within access commitment (Kilogram)	$2,134,293	$5,790,333	$4,322,158	$3,323,127
	406909890	Cheese, nes, within access commitment (Kilogram)	$5,624,234	$6,538,181	$6,990,428	$2,246,278
	406901129	Cheddar type cheese, nes, within access commiment (Kilogram)	$4,000,160	$4,752,793	$5,169,595	$1,723,959
	406909810	Feta cheese, within access commitment (Kilogram)	$1,137,281	$1,330,422	$1,038,765	$835,196
	406901121	Colby, Monterey Jack, Farmer or Brick cheese, within access commitment (Kilogram)	$1,964,566	$2,281,799	$1,490,807	$796,528
	406909820	Muenster cheese, within access commitment	$803,118	$721,486	$745,728	$341,988

		(Kilogram)				
	406907110	Swiss/Emmental cheese, within access commitment (Kilogram)	$515,017	$728,539	$580,283	$320,622
	406904110	Gouda cheese, within access commitment (Kilogram)	$1,079,904	$776,005	$834,477	$291,189
	406907190	Swiss/Emmental type cheese, nes, within access commitment (Kilogram)	$359,457	$271,583	$295,529	$173,192
	406906200	Mozzarella & Mozzarella type cheese, made from whole milk, over access commitment (Kilogram)	$843,867	$508,572	$976,503	$111,639
	406905110	Provolone cheese, within access commitment (Kilogram)	$44,872	$191,874	$213,009	$81,642
	406909320	Parmesan type cheese, nes, within access commitment (Kilogram)	$438	$220,568	$160,293	$68,384
	406907130	Jarlberg cheese, within access commitment (Kilogram)	$0	$4,444	$152,366	$62,641
	406909110	Havarti cheese, within access commitment (Kilogram)	$87,546	$213,685	$71,361	$40,006
	406904120	Edam cheese, within access commitment (Kilogram)	$47,134	$63,362	$33,271	$18,818
	406905120	Provolone type cheese, within access commitment (Kilogram)	$12,961	$7,971	$27,517	$16,350
	406909510	Romano cheese, nes, within access commitment (Kilogram)	$365	$51,577	$21,799	$10,739
	406904200	Gouda & Gouda type cheese, over access commitment (Kilogram)	$5	$1,889	$136	$10,311
	406901200	Cheddar & Cheddar type cheese, nes, over access commitment (Kilogram)	$42,191	$108,662	$250,772	$9,083
	406909310	Parmesan (Grana, Parmigiano, Reggiano, Sardo) cheese, nes, w/a commitment (Kilogram)	$53,324	$40,092	$65,786	$4,790
	406909900	Cheese, nes, over access commitment (Kilogram)	$4,997	$9,137	$3,815	$4,223

	406909520	Romano type cheese, nes, within access commitment (Kilogram)	$0	$1,915	$54,908	$2,982
	406908110	Gruyère cheese, nes, within access commitment (Kilogram)	$0	$12,728	$0	$2,365
	406907200	Swiss/Emmental & Swiss/Emmental type cheese, over access commitment (Kilogram)	$112	$103,453	$83,137	$1,518
	406909400	Parmesan & Parmesan type cheese, nes, over access commitment (Kilogram)	$36,055	$23,027	$11	$210
	406909600	Romano & Romano type cheese, nes, over access commitment (Kilogram)	$54	$0	$27	$10
	406902110	Camembert cheese, within access commitment (Kilogram)	$0	$24,108	$0	$0
	406902120	Camembert type cheese, within access commitment (Kilogram)	$0	$25,439	$0	$0
	406902200	Camembert & Camembert type cheese, over access commitment (Kilogram)	$19	$0	$0	$0
	406903110	Brie cheese, within access commitment (Kilogram)	$51	$14,314	$0	$0
	406903120	Brie type cheese, within access commitment (kilogram)	$3,064	$8,504	$1,086	$0
	406903200	Brie & Brie type cheese, over access commitment (kilogram)	$0	$5	$0	$0
	406905200	Provolone & Provolone type cheese, over access commitment (kilogram)	$530	$8	$65	$0
	406907120	Samsoe cheese, within access commitment (kilogram)	$0	$31,751	$0	$0
	406908120	Gruyère type cheese, nes, within access commitment (kilogram)	$388	$0	$0	$0
	406909120	Havarti type cheese, within access commitment (kilogram)	$5	$0	$0	$0

	406909200	Havarti & Havarti type cheese, over access commitment (Kilogram)	$0	$8	$16	$0
	406909830	Cheese of partly skimmed milk, nes, within access commitment (Kilogram)	$128,393	$101,849	$0	$0
		Total	**$21,490,171**	**$33,376,478**	**$34,306,022**	**$18,750,051**

Source: AAFC (2010d).

Table A.4: US Cheese Exports (Metric Tons)

	2006	2007	2008	2009	2010	2011 1 Mth.
North America	*115,008*	*170,820*	*214,502*	*194,014*	*243,579*	*19,053*
Bermuda	2,105	2,839	2,848	2,320	2,548	232
Canada	31,700	37,795	51,579	47,808	53,674	3,251
Mexico	81,203	130,186	160,075	143,886	187,357	15,570
Caribbean	*13,920*	*19,346*	*27,038*	*24,736*	*42,155*	*3,863*
Bahamas	3,865	4,056	5,797	6,514	7,136	614
Dominican Rep.	5,055	6,637	8,208	8,231	11,910	825
Jamaica	1,905	4,790	7,807	4,587	5,265	482
Trinidad & Tobago	3,095	3,863	5,226	5,404	5,614	597
Central America	*9,625*	*14,966*	*29,050*	*22,769*	*32,235*	*3,910*
South America	*6,742*	*7,757*	*8,391*	*8,859*	*14,913*	*1,740*
Brazil	63	52	47	20	242	41
Chile	1,290	2,919	2,794	2,950	6,488	850
Colombia	1,295	1,155	1,057	958	1,501	200
Peru	1,984	2,241	2,061	2,724	6,604	254
Venezuela	928	210	894	179	20	0
Europe	*7,237*	*25,622*	*24,130*	*7,288*	*16,483*	*1,525*
EU 27	6,369	23,676	22,375	6,064	8,925	1,431
FSU	22	1,088	1,010	963	7,251	85
Middle East/North Africa	*15,152*	*28,749*	*79,409*	*32,058*	*98,154*	*10,597*
Saudi Arabia	5,281	8,200	26,751	7,825	25,960	2,557
U.A.E.	1,728	3,567	6,965	4,817	7,151	458
Algeria	0	0	1,012	0	534	0
Egypt	1,230	3,845	13,131	4,222	28,118	458
Far East	*72,512*	*102,640*	*157,304*	*122,934*	*217,809*	*27,262*
China/Hong Kong	5,572	9,473	15,896	11,805	17,440	2,520
Taiwan	5,699	7,408	10,081	9,684	13,176	831
South Korea	22,457	33,615	58,881	42,374	78,697	13,974
Japan	29,438	37,568	45,060	43,029	73,181	5,763
Southeast Asia	9,345	14,575	27,386	16,042	35,314	4,174
Singapore	1,181	2,159	2,888	2,230	3,665	415
Indonesia	3,474	4,562	9,772	4,718	11,865	782
Malaysia	1,167	2,286	2,830	2,311	6,216	448
Philippines	3,298	4,312	10,979	5,995	12,404	2,329
South Asia	*208*	*38*	*81*	*201*	*323*	*1,108*
Oceania	*366*	*10,425*	*18,032*	*3,578*	*25,269*	*1,411*
Sub-Saharan Africa	*276*	*1,015*	*1,600*	*2,338*	*3,284*	*80*
World	***244,736***	***388,029***	***569,268***	***430,412***	***694,214***	***70,549***

Source: US Dairy Export Council (2011).

Table A.5: Canadian Ham Exports to the US (Export HS Number)

HS5	HS7/HS8	Product	2007	2008	2009	2010-July
21011	2101110	Pork hams and cuts thereof, bone in, cured (Kilogram)	$97,688	$704,321	$99,212	$41,922
	2101120	Pork shoulders and cuts thereof, bone in, cured (Kilogram)	$1,265,715	$1,298,565	$1,040,383	$922,822
		Total	**$1,363,403**	**$2,002,886**	**$1,139,595**	**$964,744**
160241	16024110	Hams and cuts thereof, prepared or preserved in airtight container (Kilogram)	$50,909,211	$42,067,264	$39,602,187	$20,430,697
	16024190	Hams and cuts thereof, prepared or preserved exc in airtight containers (Kilogram)	$10,550,951	$13,503,793	$10,665,600	$4,736,999
		Total	**$61,460,162**	**$55,571,057**	**$50,267,787**	**$25,167,696**
	2031210	Hams, and cuts thereof, bone in, fresh or chilled (Kilogram)	$82,202,671	$61,380,159	$89,154,519	$55,759,131
	2032200	Hams, shoulders and cuts thereof, of swine, bone in, frozen (Kilogram)	$9,865,069	$7,240,710	$12,485,370	$4,984,624

Source: AAFC (2010d).

Table A.6: Canadian Ham Imports from the US (Export HS Number)

HS5/ HS6	HS9/HS10	Product	2007	2008	2009	2010-July
21011	210110000	Hams, shoulders and cuts thereof, of swine, with bone in, cured (Kilogram)	$11,849,665	$16,413,893	$26,044,890	$11,729,824
		Total	**$11,849,665**	**$16,413,893**	**$26,044,890**	**$11,729,824**
160241	1602419000	Hams and cuts thereof, of swine, prepared or preserved, o/t in cans/glass jars (Kilogram)	$11,252,708	$14,840,962	$14,964,744	$6,704,130
	1602411000	Hams and cuts thereof, of swine, in cans or glass jars (Kilogram)	$966,226	$2,622,000	$1,149,721	$1,112,191
		Total	**$12,218,934**	**$17,462,962**	**$16,114,465**	**$7,816,321**
	203120000	Hams, shoulders and cuts thereof, of swine, bone in, fresh or chilled (Kilogram)	$10,162,241	$8,365,006	$4,786,006	$3,851,232
	203220000	Hams, shoulders and cuts thereof, of swine, bone in, frozen (Kilogram)	$1,452,981	$920,405	$4,321,003	$122,451

Source: AAFC (2010d).

Table A.7: Canadian Wine and Spirit Exports to the US (Export HS Number)

HS6	HS8	Product	2007	2008	2009	2010-July
220410	22041000	Grape wines, sparkling (Liter)	$15,248	$0	$2,801	$4,411
		Total	**$15,248**	**$0**	**$2,801**	**$4,411**
220421	22042110	Icewine, in containers holding 2 litres or less (Liter)	$1,810,280	$2,725,655	$1,266,567	$738,433
	22042190	Other grape wine nes, incl fort & grape must,unferment by add alc in ctnr <=2 l (Liter)	$4,736,193	$3,519,367	$1,831,511	$727,776
		Total	**$6,546,473**	**$6,245,022**	**$3,098,078**	**$1,466,209**

220429	22042900	Grape wines nes, incl fort & grape must, unfermented by add alc, in ctnr > 2 l (Liter)	$1,320,320	$2,888,827	$3,496,838	$2,717,667
		Total	**$1,320,320**	**$2,888,827**	**$3,496,838**	**$2,717,667**
220600	22060000	Fermented beverages nes (for example, cider, perry, mead, etc) (Liter)	$4,346,113	$4,361,918	$4,330,766	$2,894,166
		Total	**$4,346,113**	**$4,361,918**	**$4,330,766**	**$2,894,166**
220820	22082000	Spirits obtained by distilling grape wine or grape marc (Liter of pure alcohol)	$147,663	$727,206	$131,221	$219,205
		Total	**$147,663**	**$727,206**	**$131,221**	**$219,205**
220830	22083099	Whiskies, nes, not in bulk (bottled) (Liter of pure alcohol)	$171,692,130	$159,243,932	$167,039,537	$86,802,671
	22083091	Whiskies, nes, in bulk (Liter of pure alcohol)	$66,201,689	$74,593,663	$68,692,581	$37,435,699
	22083019	Rye, not in bulk (bottled) (Liter of pure alcohol)	$4,958,032	$5,765,298	$3,356,017	$3,260,879
	22083011	Rye, in bulk (Liter of pure alcohol)	$3,159,776	$3,767,983	$2,935,512	$1,560,298
		Total	**$246,011,627**	**$243,370,876**	**$242,023,647**	**$129,059,547**
220840	22084000	Rum and other spirits obtained by distilling fermented sugar-cane products (Liter of pure alcohol)	$4,982,987	$7,265,135	$6,188,623	$1,943,312
		Total	**$4,982,987**	**$7,265,135**	**$6,188,623**	**$1,943,312**
220850	22085000	Gin and geneva (Liter of pure alcohol)	$325,198	$513,672	$296,821	$125,847
		Total	**$325,198**	**$513,672**	**$296,821**	**$125,847**
220860	22086000	Vodka (Liter of pure alcohol)	$8,153,997	$8,687,317	$17,838,619	$6,535,499
		Total	**$8,153,997**	**$8,687,317**	**$17,838,619**	**$6,535,499**
220870	22087000	Liqueurs and cordials (Liter of pure alcohol)	$76,571,211	$48,196,503	$47,636,965	$25,902,705

		Total	**$76,571,211**	**$48,196,503**	**$47,636,965**	**$25,902,705**
220890	22089000	Undenatured ethyl alc < 80% alc cont by vol & spirits, liqueurs & spirit bev nes (Liter of pure alcohol)	$1,200,927	$543,533	$1,120,602	$1,774,220
		Total	**$1,200,927**	**$543,533**	**$1,120,602**	**$1,774,220**

Source: AAFC (2010d).

Table A.8: Canadian Wine and Spirit Imports from the US (Export HS Number)

HS6	HS10	Product	2007	2008	2009	2010-July
220410	2204101000	Sparkling wine, of an alc strt by vol <= 22.9% vol, incl champagne (Liter)	$5,010,942	$6,012,555	$8,018,005	$3,041,121
	2204109000	Other sparkling wine, of an alc strt > 22.9% vol, except champagne (Liter)	$67	$0	$0	$0
		Total	**$5,011,009**	**$6,012,555**	**$8,018,005**	**$3,041,121**
220421	2204211092	Grape wine, red, alc strength by volume<=13.7% vol, in containers<=2 litres (Liter)	$84,964,339	$88,513,995	$93,164,949	$52,575,536
	2204211091	Grape wine, white, nes, alc strength by volume<=13.7% vol, in containers<=2 l (Liter)	$39,156,117	$43,367,827	$45,061,740	$27,927,720
	2204212100	Grape wines,nes,incl fort,alc strength by vol >13.7% vol<=14.9% vol, ctnr<=2 l (Liter)	$44,196,291	$52,662,349	$45,216,285	$27,016,707
	2204211099	Grape wines, nes, alc strength by volume <=13.7%	$14,135,553	$14,937,884	$16,911,009	$11,489,011
	2204212200	Grape wines, nes, incl fort,alc strength by vol >14.9% vol<=15.9% vol, cntr<=2 l (Liter)	$3,825,558	$6,270,834	$6,037,577	$3,055,140

	2204212390	Grape wines, nes, incl fort, alc strength by vol >15.9% vol<=16.9% vol,ctnr<=2 l (Liter)	$99,557	$170,776	$276,704	$172,205
	2204212590	Grape wines, nes, incl fort, alc strength by vol >17.9% vol<=18.9% vol,ctnr<=2 l (Liter)	$95,741	$91,504	$75,946	$35,439
	2204212490	Grape wines,nes,incl fort, alc strength by vol >16.9% vol<=17.9% vol, ctnr<=2 l (Liter)	$45,761	$20,731	$1,222	$8,015
	2204212690	Grape wines, nes, incl fort, alc strength by vol >18.9% vol<=19.9% vol,ctnr<=2 L (Liter)	$0	$51	$459	$543
	2204211010	Icewine (Liter)	$2,070	$806	$12	$50
	2204212790	Grape wines, nes, incl fort, alc strength by vol >19.9% vol<=20.9% vol,ctnr<=2 l (Liter)	$125	$166	$306	$14
	2204212800	Grape wines, nes, incl fort, alc strength by vol >20.9% vol<=21.9% vol,ctnr<=2 l (Liter)	$159	$16	$28	$6
	2204213190	Grape wines,nes,incl fort,alc strength by vol >21.9% vol<=22.9% vol,ctnr<=2 l (Liter)	$0	$4	$0	$0
	2204212310	Sherry, alc strength by volume >15.9% vol<=16.9% vol, containers<=2 litres (Liter)	$746	$0	$1,107	$0
	2204212410	Sherry, alc strength by volume >16.9% vol<=17.9% vol, cntr<=2 litres (Liter)	$64	$2	$2	$0
	2204212610	Sherry, alc strength by volume >18.9% vol<=19.9% vol, ctnr<=2 litres (Liter)	$341	$0	$0	$0
	2204212710	Sherry, alc strength by volume >19.9% vol<=20.9% vol, ctnr<=2 litres (Liter)	$49	$0	$0	$0

	2204213110	Sherry,alc strength by volume >21.9% vol<=22.9% vol,containers<=2 litres (Liter)	$1	$0	$1	$0
	2204212510	Sherry, alc strength by volume >17.9% vol<=18.9% vol, ctnr<=2 litres (Liter)	$9,052	$10,172	$15,026	$6,500
	2204212630	Port, alc strength by vol >18.9% vol<=19.9% vol, ctnr<=2 litres (Liter)	$692	$1,842	$1,646	$1,333
		Total	**$186,532,216**	**$206,048,959**	**$206,764,019**	**$122,288,219**
220429	2204291020	Grape wine, red, alc strength by volume<=13.7% vol,ctnr >2 litres (Liter)	$7,531,271	$10,682,451	$8,833,457	$5,154,452
	2204291010	Grape wine, white, alc strength by volume<=13.7% vol, ctnr >2 litres (Liter)	$6,914,143	$7,471,112	$5,650,852	$3,489,269
	2204292100	Grape wines, nes, alc strength by vol >13.7% vol<=14.9% vol, ctnr >2 l (Liter)	$468,180	$2,117,432	$2,889,690	$1,070,925
	2204291090	Grape wines, nes, alc strength by volume<=13.7% vol,ctnr >2 litres (Liter)	$427,966	$845,419	$652,294	$393,680
	2204293100	Grape wines,nes,incl fort,alc strength by vol >21.9% vol<=22.9% vol,cntr >2 L (Liter)	$244,357	$36,841	$78,187	$76,040
	2204292800	Grape wines, nes incl fort, alc strength by vol >20.9% vol<=21.9% vol, ctnr >2 l (Liter)	$74,242	$287,054	$174,135	$38,213
	2204292500	Grape wines, nes,incl fort, alc strength by vol >17.9% vol<=18.9% vol, ctnr >2 L (Liter)	$97,870	$129,212	$78,932	$34,312
	2204292200	Grape wines, nes,incl fort, alc strength by vol >14.9% vol<=15.9% vol, ctnr >2 l (Liter)	$21,382	$57,489	$9,082	$3,801
	2204292300	Grape wines, nes,incl fort, alc strength by vol >15.9% vol<=16.9% vol, ctnr >2 l	$0	$0	$1	$0

		(Liter)				
	2204292600	Grape wines, incl fort, alc strength by vol >18.9% vol<=19.9% vol, ctnr >2L (Liter)	$0	$0	$2,423	$0
		Total	**$15,779,411**	**$21,627,010**	**$18,369,053**	**$10,260,692**
220510	2205101090	Grape wine, nes,flav w plants/arom subs,alc strength by vol<=18.3% vol,ctnr<=2 L (Liter)	$1,462	$2,431	$187,252	$665
	2205101030	Vermouth, rosé, alc strength by volume <=18.3% vol, ctnr <=2 litres (Liter)	$0	$0	$331,091	$283,584
	2205101020	Vermouth, red, alc strength by volume <= 18.3% vol, ctnr <=2 litres (Liter)	$0	$0	$388,089	$261,178
	2205101010	Vermouth, white, alc strength by vol <=18.3% vol, ctnr <=2 litres (Liter)	$0	$4,686	$0	$191
		Total	**$1,462**	**$7,117**	**$906,432**	**$545,618**
220590	2205901000	Vermouth and flavoured grape wine, nes,alc strength by vol <=18.3% vol,ctnr >2 L (Liter)	$0	$9,908	$0	$0
	2205903000	Vermouth & flav grape wines, nes, alc strength by vol >22.9% vol, ctnr > 2L (Liter)	$0	$2	$0	$0
		Total	**$0**	**$9,910**	**$0**	**$0**
220600	2206006100	Sake & wine, nes, not sparkling, alc strength by vol >13.7% vol<=14.9% vol (Liter)	$1,115,865	$1,104,665	$1,125,594	$611,801
	2206006200	Sake & wine, nes, not sparkling, alc strength by vol >14.9% vol<=15.9% vol (Liter)	$917,238	$819,126	$821,417	$454,086

	2206006300	Sake & wine, nes, not sparkling, alc strength by vol >15.9% vol<=16.9% vol (Liter)	$318,006	$342,435	$289,438	$145,548
	2206005011	Kosher, blackberry, wine, not sparkling, alc strength by vol<=13.7% vol (Liter)	$145,634	$151,236	$172,118	$87,496
	2206005019	Fruit wine, nes, not sparkling, alc strength by vol<=13.7% vol (Liter)	$62,479	$958,020	$56,748	$37,702
	2206006500	Sake & wine, nes, not sparkling, alc strength by vol >17.9% vol<=18.9% vol (Liter)	$38,049	$27,242	$37,885	$14,697
	2206005090	Wine,nes,not sparkling,alc strength by vol <=13.7% vol (Kilogram)	$28,287	$16,019	$18,397	$11,690
	2206006410	Fruit wine, nes, not sparkling,alc strength by vol >16.9% vol<=17.9% vol (Liter)	$13,949	$0	$9,158	$7,776
	2206006700	Sake & wine, nes, not sparkling, alc strength by vol >19.9% vol<=20.9% vol (Liter)	$697	$1,521	$2,380	$1,954
	2206007100	Sake & wine,nes,not sparkling,alc strength by vol >21.9% vol <=22.9% (Liter)	$0	$0	$0	$68
	2206003900	Perry, sparkling, of an alc strength by vol > 22.9% vol (Liter)	$0	$0	$0	$6
	2206001100	Cider, sparkling, of an alc strt by vol <= 22.9% vol (Liter)	$600	$2,478	$3,737	$0
	2206001200	Cider, sparkling, of an alc strt by vol > 22.9% vol (Liter)	$15	$0	$122	$0
	2206006600	Sake & wine, nes, not sparkling, alc strength by vol	$1,533	$1,420	$648	$0

	2206006800	Sake & wine, nes, not sparkling, alc strength by vol >20.9% vol<=21.9% vol (Liter)	$1	$0	$0	$0
	2206007200	Sake & wine, nes, not sparkling,alc strength by vol >22.9% vol (Liter of pure alcohol)	$6,208	$7,955	$39	$0
	2206001800	Other cider, except sparkling, of an alc strt by vol <= 22.9% vol (Liter)	$0	$1,764	$1,637	$24,587
	2206001200	Cider, sparkling, of an alc strt by vol > 22.9% vol (Liter)	$15	$0	$122	$0
	2206003900	Perry, sparkling, of an alc strength by vol > 22.9% vol (Liter)	$0	$0	$0	$6
	2206009230	Fermented beverages, nes, alc strength by vol >7.0% vol<=22.9% vol, except mead (Liter)	$186,553	$189,025	$456,008	$212,905
	2206009220	Fermented beverages, nes, alc strength by vol >1.2% vol<=7.0% vol, except mead (Liter)	$14,108,274	$12,921,086	$12,523,554	$6,848,571
		Total	**$16,943,403**	**$16,543,992**	**$15,519,002**	**$8,458,893**
230700	2307000000	Wine lees; argol (Kilogram)	$126	$155	$170	$105
		Total	**$126**	**$155**	**$170**	**$105**
220820	2208200090	Spirits, obtained by distilling grape wine or grape marc, excluding in bulk (Liter of pure alcohol)	$1,476,295	$1,314,432	$1,322,652	$660,579
	2208200010	Spirits, obtained by distilling grape wine or grape marc, in bulk (Liter of pure alcohol)	$72,028	$161,351	$333,473	$1,065
		Total	**$1,548,323**	**$1,475,783**	**$1,656,125**	**$661,644**
220830	2208300019	Whisky, bourbon, excluding in bulk (Liter of pure alcohol)	$17,066,154	$19,195,689	$19,491,314	$11,262,020

	2208300011	Whisky, bourbon, in bulk (Liter of pure alcohol)	$8,751,552	$4,224,418	$7,981,882	$3,587,324
	2208300091	Whiskies, nes, in bulk (Liter of pure alcohol)	$2,879,163	$3,873,233	$1,691,022	$699,328
	2208300099	Whiskies, nes, excluding in bulk (Liter of pure alcohol)	$428,981	$540,940	$401,626	$241,601
	2208300040	Whisky, rye (Liter of pure alcohol)	$932,648	$624,485	$562,683	$211,056
	2208300029	Whisky, scotch, excluding in bulk (Liter of pure alcohol)	$585,062	$620,615	$329,926	$43,454
	2208300030	Whisky, irish (Liter of pure alcohol)	$1,417	$25,130	$2,947	$0
		Total	**$30,644,977**	**$29,104,510**	**$30,461,400**	**$16,044,783**
220840	2208409000	Other spirits, obtained by distilling fermented sugar cane products (Liter of pure alcohol)	$25	$12	$39	$0
	2208401010	Rum, in bulk (Liter of pure alcohol)	$33,252,035	$29,063,916	$36,962,341	$14,568,068
	2208401090	Rum, excluding in bulk (Liter of pure alcohol)	$6,967,611	$6,359,912	$8,101,228	$5,860,613
		Total	**$40,219,671**	**$35,423,840**	**$45,063,608**	**$20,428,681**
220850	2208500090	Gin and Geneva, excluding in bulk (Liter of pure alcohol)	$301,261	$534,573	$378,391	$104,546
	2208500010	Gin and Geneva, in bulk (Liter of pure alcohol)	$95,095	$74,915	$120,970	$0
		Total	**$396,356**	**$609,488**	**$499,361**	**$104,546**
220860	2208600000	Vodka (Liter of pure alcohol)	$18,220,499	$24,163,017	$26,628,684	$15,353,497
		Total	**$18,220,499**	**$24,163,017**	**$26,628,684**	**$15,353,497**
220870	2208700000	Liqueurs and cordials (Liter of pure alcohol)	$17,222,901	$24,476,373	$21,275,041	$10,020,212
		Total	**$17,222,901**	**$24,476,373**	**$21,275,041**	**$10,020,212**

220890	2208909800	Spirits and spirituous beverages, packaged, nes, alc strength by vol<=7% vol (Liter of pure alcohol)	$7,536,997	$13,327,040	$10,949,368	$11,637,779
	2208909900	Spirits and spirituous beverages, not packaged, nes, alc strength by vol >7% (Liter of pure alcohol)	$15,708,111	$20,460,080	$15,618,268	$10,257,956
	2208901000	Tequila (Liter of pure alcohol)	$463,816	$659,222	$340,450	$304,297
	2208904100	Spirituous fruit juices, packaged, alc strength by vol not exceeding 7%vol (Liter of pure alcohol)	$0	$16,743	$37,670	$16,743
	2208902100	Ethyl alcohol,undenatured, <80% vol,for use as or for mfg of spirituous/alc bev (Liter of pure alcohol)	$209,358	$70,074	$37,812	$3,091
	2208909200	Fruit brandies (Liter of pure alcohol)	$4,717	$6,079	$2,263	$2,897
	2208902900	Ethyl alcohol, nes, undenatured, alc strength <80% vol (Liter of pure alcohol)	$0	$123	$135	$20
		Total	**$23,922,999**	**$34,539,361**	**$26,985,966**	**$22,222,783**

Source: AAFC (2010d).

Table A.9: Geographical Indications for Wines, Aromatised Wines and Spirits
EU-South Korea FTA

Name to be protected	Country	Product
Jägertee / Jagertee / Jagatee	Austria	Spirits
Inländerrum	Austria	Spirits
Korn / Kornbrand	Austria	Spirits
Korn / Kornbrand	Belgium	Spirits
Ouzo	Cyprus	Spirits
Vodka of Finland	Finland	Spirits
Finnish berry liqueur / Finnish fruit liqueur	Finland	Spirits
Beaujolais	France	Wine
Bordeaux	France	Wine
Bourgogne	France	Wine
Chablis	France	Wine
Champagne	France	Wine
Graves	France	Wine
Médoc	France	Wine
Moselle	France	Wine
Saint-Emilion	France	Wine
Sauternes	France	Wine
Haut-Médoc	France	Wine
Alsace	France	Wine
Côtes du Rhône	France	Wine
Languedoc	France	Wine
Côtes du Roussillon	France	Wine
Châteauneuf-du-Pape	France	Wine
Côtes de Provence	France	Wine
Margaux	France	Wine
Touraine	France	Wine
Anjou	France	Wine
Val de Loire	France	Wine
Cognac	France	Spirits
Armagnac	France	Spirits
Calvados	France	Spirits
Mittelrhein	Germany	Wine
Rheinhessen	Germany	Wine
Rheingau	Germany	Wine
Mosel	Germany	Wine

Korn / Kornbrand	Germany	Spirits
Ρετσίνα (transcription into Latin alphabet: Retsina)	Greece	Wine
Σάμος (transcription into Latin alphabet: Samos)	Greece	Wine
Ouzo	Greece	Spirits
Tokaj	Hungary	Wine
Törkölypálinka	Hungary	Spirits
Pálinka	Hungary	Spirits
Irish whiskey / Irish whisky	Ireland	Spirits
Chianti	Italy	Wine
Marsala	Italy	Wine
Asti	Italy	Wine
Barbaresco	Italy	Wine
Bardolino	Italy	Wine
Barolo	Italy	Wine
Brachetto d'Acqui	Italy	Wine
Brunello di Montalcino	Italy	Wine
Vino nobile di Montepulciano	Italy	Wine
Bolgheri Sassicaia	Italy	Wine
Dolcetto d'Alba	Italy	Wine
Franciacorta	Italy	Wine
Lambrusco di Sorbara	Italy	Wine
Lambrusco Grasparossa di Castelvetro	Italy	Wine
Montepulciano d'Abruzzo	Italy	Wine
Soave	Italy	Wine
Campania	Italy	Wine
Sicilia	Italy	Wine
Toscana	Italy	Wine
Veneto	Italy	Wine
Conegliano Valdobbiadene	Italy	Wine
Grappa	Italy	Spirits
Polska Wódka / Polish Vodka	Poland	Spirits
Wódka ziołowa z Niziny Północnopodlaskiej aromatyzowana ekstraktem z trawy żubrowej / Herbal vodka from the North Podlasie Lowland aromatised with an extract of bison grass	Poland	Spirits
Polska Wiśniówka / Polish Cherry	Poland	Spirits
Madeira	Portugal	Wine
Porto or Port	Portugal	Wine
Douro	Portugal	Wine

Dão	Portugal	Wine
Bairrada	Portugal	Wine
Vinho Verde	Portugal	Wine
Alentejo	Portugal	Wine
Dealu Mare	Romania	Wine
Murfatlar	Romania	Wine
Tokajská or Tokajský or Tokajské	Slovakia	Wine
Málaga	Spain	Wine
Rioja	Spain	Wine
Jerez – Xérès – Sherry or Jerez or Xérès or Sherry	Spain	Wine
Manzanilla - Sanlúcar de Barrameda	Spain	Wine
La Mancha	Spain	Wine
Cava	Spain	Wine
Navarra	Spain	Wine
Valencia	Spain	Wine
Somontano	Spain	Wine
Ribera del Duero	Spain	Wine
Penedés	Spain	Wine
Bierzo	Spain	Wine
Ampurdán - Costa Brava	Spain	Wine
Priorato or Priorat	Spain	Wine
Rueda	Spain	Wine
Rías Baixas	Spain	Wine
Jumilla	Spain	Wine
Toro	Spain	Wine
Valdepeñas	Spain	Wine
Cataluña	Spain	Wine
Alicante	Spain	Wine
Brandy de Jerez	Spain	Spirits
Pacharán	Spain	Spirits
Swedish Vodka	Sweden	Spirits
Svensk Aquavit / Svensk Akvavit / Swedish Aquavit	Sweden	Spirits
Svensk Punsch / Swedish Punch	Sweden	Spirits
Scotch Whisky	UK	Spirits

Source: EC (2010).

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