

Exploration of Obligations and Rights of the Positive and Negative Requirements for obtaining the Protection of a Colombian Designation of Origin for the coastal cheese of the Colombian Caribbean

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Abstract

The objective of this article is to explore the possible obstacles, posed as challenges, that could arise for those who pursue the rights of protection of a designation of origin for coastal cheese made in the Colombian Caribbean Region. A review of the applicable legal framework is carried out, delving into the positive and negative criteria derived from what is enshrined in Andean Decision 486 of 2000, applied to a hypothetical request for protection that takes into account the real situation of coastal cheese producers in this area of the country. From this, certain suggestions are proposed aimed at satisfying the positive requirements and avoiding the negative requirements, so that the intended protection can be achieved.

Keywords: Denomination of Origin, Industrial Property, Costeño Cheese, Caribbean Region, Positive Requirements, Negative Requirements

INTRODUCTION

Around the 5th century BC, the Greek island of Chios (Χίος) began to be distinguished by the production, then completely artisanal, of three types of wines: one dry (ἀσθηρός), another with a sweet flavor (γλοκάζων) and another intermediate between those called (ἀτόργατος) (Boulay, 2015). The reputation of these products quickly spread throughout the Greek territory and to others of its influence, due to the appreciations of influential figures such as Erasistratus and Eparchides who exalted the organoleptic qualities and the dietary or therapeutic properties of the wine, based on the principles of Hippocratic medicine; the theory of the four elemental qualities, these being: hot, cold, dry and humid; and the theory of humors: sanguine, choleric, melancholic and phlegmatic (Boulay, 2015), which was intended to provide more or less objective reasons about the convenience of a product above the, sometimes unjustifiable, claims of taste.

This antecedent of the figure of denomination of origin, or also equated to the geographical indication or indication of origin in other legal systems, is one of the most remote of which we have knowledge, but it reflects with great clarity the foundations on which The protection of this category of Intellectual Property and specifically of Distinctive Signs has been built and consolidated according to the classification of the World Intellectual Property Organization (WIPO).

The history of the protection of appellations of origin is mixed with the history of the gastronomic culture of certain countries, such as France, whose outstanding reputation motivated its legislators to adopt legal formulas to protect both consumers and small businessmen against fraud and deception that could occur due to the export of local products (Melkonian, 2005).

One of these strategies promoted by France was incorporated, and never repealed, in the Statute of 1824, which established criminal sanctions for those who falsely indicated the origin of a product or lied about the manufacturer of some good (Melkonian, 2005).

These provisions were very useful in achieving the protection of French wine against the efforts of its imitators, who directly harmed local producers to the point of threatening the possibility of continued production of French wine in France.

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However, the French regulation that had to improve over time, as the middle of the 20th century arrived, could not guarantee general protection for traditional foods, such as Camembert cheese, which was considered by many to be the typical of France and superior in national and foreign sales to Brie cheese, because, despite the efforts of the Camembert producers of Normandy, who sought to exclude their competitors, the French Government considered that Camembert was a generic product that had exceeded the reach of the protection of the geographical indication provided for by the Law of 1919. For this reason, producers were forced to seek protection of the expression Camembert de Normandie, having been prevented from requesting protection of the simple name Camembert (Melkonian, 2005).

In the United States, efforts were also made to implement rules against food adulteration, specifically through the general prohibition against false brands that included the location of cheese or milk, very similar to the French Law of 1824. In this regard, it was included in New York a provision in Law 202 of 1884 contained in article 7, which established that no person could offer or sell butter or cheese marked or labeled with a mark or label that falsely indicates the region or state in which it is manufactured the product (Melkonian, 2005).

Another effort to discourage the trade in fraudulent foods involved the use of a special mark on locally produced cheeses in New York, which allowed consumers to know that the cheese was made in the traditional way with whole milk and in a county in particular (Melkonian, 2005).

At the international level, the first serious attempt to harmonize the different standards of protection of geographical indications or appellations of origin was included in the Paris Convention on Trademarks of 1883, article 1 of which included the protection of the indication and appeal of origin. as an integral part of Industrial Property (Folkesson, 2005).

However, it was the Stresa Convention of 1951, also known as the International Convention on the Use of Appellations of Origin and Designations of Cheese, that specified the will of seven countries to protect cheeses made in their areas of interest. These efforts paved the way for the adoption of the Lisbon Agreement Concerning the Protection of Appellations of Origin and Their International Registration, in which the French definition of appeal of origin was adopted, granting protection only to indications that demonstrated that the qualities and characteristics of a product were exclusively or essentially due to a specific geographical area (Folkesson, 2005).

In the case of Colombia, at the end of 2023, 29 national Designations of Origin were protected, among which are not only agricultural products such as the Colombian Rose, or food products such as Paipa Cheese, but also crafts, such as the Suaza Hat. (Mor, 2024). This last category, so important in a country with a vast artisanal culture like Colombia, entails a challenge in the application of the internationally accepted requirements to access the protection of a designation of origin, since the impact of the natural factor or the conditions geographical characteristics of a given area in this type of products may not be direct or present, unlike the human factor, whose role is determining (Palacio, 2023).

When it comes to agricultural products, the natural factor is the most important when examining protection requirements, since these products, by their very nature, are subject to climatic conditions and other factors strictly related to the geographical characteristics of an area. particular area (Palacio, 2023). At the same time, it is possible to consider that, when the protection of food products is sought through the recognition of a designation of origin, the examiner must consider both natural factors and human factors, since the preparation of food usually requires human intervention, either physically or intellectually, for the transformation of agricultural or other similar inputs.

Thus, this document carries out an analysis of the main legal and economic challenges for obtaining the protection of a designation of origin for coastal cheese within the framework of the Project “Fortalecimiento de la Capacidad Productiva y Comercial de la Cadena de Suministro del Queso Costeño en las Subregiones del Caribe Colombiano, Departamentos del Magdalena, Córdoba y La Guajira”, with Code BPIN 2020000100116, financed by the General System of Royalties – SPGR”, led by: the University of Magdalena, the University of La Guajira and the University of Córdoba.

Starting from the applicable legal framework that regulates the actions of examiners who must decide on the protection of a designation of origin in Colombia, the so-called positive requirements must be met by applicants who wish to achieve said protection. Likewise, a review is carried out of the negative requirements or grounds for denial applied to a hypothetical application for protection of a designation of origin for Costeño cheese.

Applicable Legal Framework

The Lisbon Agreement of 1958 is one of the most important instruments adopted by the international community for the protection of appellations of origin and their international registration. However, Colombia has not adhered to it despite the approaches promoted by the Superintendency of Industry and Commerce as the competent authority to protect Industrial Property in the country (SIC, s.f.).

Given the above, the first international instrument on the subject that has binding force for the Colombian State is the Paris Convention of 1883 for the Protection of Industrial Property, to which Colombia adhered in 1996 (WIPO, s.f) and which contemplates in its article 10 the application of measures aimed at discouraging the direct or indirect use of a false indication concerning the origin of the product.

For its part, the Agreement on Trade-Related Intellectual Property Aspects (TRIPS, TRIPS in English), which was approved in Colombia through Law 170 of 1994, defined in its article 22 geographical indications as those that “identify a product originating in the territory of a Member or in a region or locality of that territory, when a certain quality, reputation or other characteristic of the product is fundamentally attributable to its geographical origin” (WTO, 1994).

The context of commercial globalization in which such adoption occurred gave rise to the creation of the Andean Community of Nations (CAN) through the Trujillo Protocol in 1996, currently made up of Bolivia, Ecuador, Peru and Colombia, which replaced the Andean Pact created through the Cartagena Agreement, with the purpose of promoting a common market through the harmonization of economic policies, instruments and regulations aimed at preventing unfair competition, developing a common intellectual property regime (Richardson, 2008).

The most important characteristic of the community standards issued by the CAN is supranationality, that is, the power to be incorporated into the legislation of the member countries without a prior legislative process, so their application is direct (Richardson, 2008).

By virtue of the above, the provisions contained in Decision 486 issued by the CAN in 2000 are directly applied in the domestic legal system when cases related to Industrial Property are decided, including appellations of origin. Likewise, its compliance can also be directly demanded before the competent authority by the interested parties, even if there is some regulatory or administrative consecration in the member country that is contrary to the Andean Decision.

In this way, the definition of appellation of origin that is applied directly and preferably in the Colombian legal system is the one enshrined in article 201 of Andean Decision 486, which establishes that:

Appellation of origin shall be understood as a geographical indication constituted by the name of a country, a region or a specific place, or constituted by a denomination that, without being that of a country, a region or a specific place, refers to a determined geographical area, used to designate a product originating from them and whose quality, reputation or other characteristics are due exclusively or essentially to the geographical environment in which it is produced, including natural and human factors. (CAN, 2000)

From this definition and the documents issued by the authority in charge of carrying out the examination of the application, that is, the Superintendency of Industry and Commerce, the following positive requirements can be extracted that must be met for a designation of origin to be protected in Colombia:

- a) Indication of a geographical area, which may consist of a country, area, region, territory or a specific place, also admitting the use of a demonym (Palacio, 2023).

- b) Demonstration of the legitimate interest of the associations that are dedicated to the extraction, production or preparation of the product that is intended to be protected and/or the state, departmental or municipal entities of the area involved; or natural or legal persons, who according to article 203 of Andean Decision 486, are the only ones dedicated to the activity in that place (CAN, 2000), which means that the protection granted is preferably collective. .
- c) Indication of the quality and reputation of the product exclusively or essentially to the geographical environment in which it is produced, including natural and human factors (Resolution 70802 SIC, 2011).

Although the standard does not define what should be understood by quality and reputation of the product that is intended to be protected, the Superintendence of Industry and Commerce has stated that quality “can be understood as the property or set of properties inherent to a product that allows judging its value and aptitude” (SIC, 2021). Reputation, for its part, is related to “the recognition, prestige, fame, renown and good credit of the product among the relevant public or consumer” (SIC, 2021).

According to article 202 of Andean Decision 486 of 2000, the examiner must also check that the protection request is not subject to the following negative requirements:

- a) Does not comply with the definition of appellation of origin contained in Article 201 of the Decision
- b) Constitutes a common or generic indication to distinguish the product in question, thus being considered by experts on the subject or the general public.
- c) Is contrary to good customs or public order
- d) May mislead the public about the geographical origin, nature, method of manufacturing or the quality, reputation or other characteristics of the respective products.
- e) Are likely to generate confusion with a previously applied for or registered trademark (SIC, 2021)

The Superintendency of Industry and Commerce carried out the analysis of these requirements when it resolved the applications for designation of origin “Queso Paipa” and “Queso Caquetá”, the only two granted to Colombian cheeses to date through Resolution 70802 of 2011 and 68463 of 2011 respectively. .

Below, a review of the positive and negative requirements that could be faced by the request for protection of a designation of origin for Costeño cheese in Colombia is suggested.

Positive Requirements

a) Indication of a geographical area

Ana Varona, lawyer from the Directorate of Distinctive Signs of the Superintendency of Industry and Commerce, stated in an interview with Lesmes (2017) that one of the difficulties in achieving protection of the designation of origin “Queso Costeño” is related to the impossibility of This name indicates a specific geographical area, since according to what it states, “Costeño refers to the fact that it is from the coast and the coast is not a region as such, they would have to change the name whether it is cheese from the region caribbean [sic] or another suitable name” (p. 84).

Thus, the ideal expression to satisfy this requirement of protection of the Designation of Origin would be “Caribbean Coastal Cheese”, which indicates a specific geographical area that includes the terrestrial portion of the so-called Caribbean Basin, thus known since ancient times. of colonization, when the Government of Santa Marta exerted its influence throughout the New Kingdom of Granada (Mendoza, 1989).

According to the current political-administrative division of Colombia, the geographical area in which the Costeño Caribbean Cheese originates would be made up of the eight departments that are part of the Colombian Caribbean Region: Magdalena, Bolívar, Atlántico, Cesar, Córdoba, La Guajira, San Andrés and Sucre, with their respective municipalities (DNP, 2016).

a) Demonstration of legitimate interest

Varona has indicated that, not only for the Costeño Cheese of the Caribbean, but in general for the Colombian producers who are part of the supply chain of products that could be protected by the Denomination of Origin, achieving associativity between them represents a great challenge that in some cases it is insurmountable, given that it is common to find that efforts fail due to jealousy, lack of camaraderie or interest (Lesmes, 2017).

According to the Superintendence of Industry and Commerce (2021), the legitimate interest must be proven according to the quality of the applicant. Thus, if an association of producers of Costeño del Caribe Cheese intends to achieve the protection of that designation of origin, it must accompany the application with the following documents:

- Statutes of the Constitution of the Association

- The percentage of producers that is represented in the Association in relation to the total of those that exist in the geographical area
- The description of the way in which the purposes of the Association are linked to the administration of the designation of origin
- The description of the guarantees of impartiality and objectivity offered to those who request authorization for use. (p. 30)

If the applicant is the governor of any department that makes up the Colombian Caribbean Region or if he or she is the mayor of one of its municipalities, the official record of appointment and possession must be provided; information on the existing producers and producer associations in the geographical area and accredit the potential beneficiaries of the designation of origin (SIC, 2021).

If the applicant is an individual natural or legal person, he or she must demonstrate that he or she is the only person dedicated to the production or preparation of Costeño del Caribe Cheese in the determined geographical area through a certification issued by the competent authority (SIC, 2021) but as is known, in the Caribbean Region there are a large number of artisanal and industrial coastal cheese producers (Causado, Peñaloza and Galindo, 2023), so this request would not be expected to prosper.

a) Indication of the quality and reputation of the product

To satisfy this requirement, the physical, chemical, microbiological and organoleptic characteristics of the Caribbean Costeño Cheese that distinguish it from any other must be described.

Demonstrating its reputation would not represent a very demanding task for applicants for protection of the designation of origin, since it is widely accepted throughout the country that the departments of the Colombian Caribbean are recognized for the production of their native cheese (Sandoval, Álvarez and Díaz, 2015), whose production dates back to the times of Spanish colonization, which has survived thanks to the stable geographical conditions and the traditional knowledge involved in its production (Gutiérrez and Burbano, 2015).

Its consumption has become popular throughout the country in recent years, so that it is considered a versatile input for the preparation of typical preparations from other regions of Colombia, being usually preferred by the baking industry to make buñuelos, bond bread, cheese kisses or add it to soups (Ensumesa, s.f.).

The quality of the Caribbean Coastal Cheese is equally recognized and associated with its high salt content, since the times when cheese making on the Colombian Caribbean Coast was done without refrigeration and salt was added to ensure its preservation despite of high temperatures (Rivera, Senior and Vergara, 2015), which shows that there is a nexus or link between the characteristics of this cheese and the geographical and historical conditions of the Colombian Caribbean Region.

Another of the essential elements in the production of Costeño Caribbean Cheese is the so-called rennet, an enzyme that causes coagulation (Causado, Galindo & Peñaloza, 2023), whose effectiveness is achieved

depending on the temperature, the concentration of the substrate, concentration of the calcium and acidity. The usual coagulation temperatures can vary between 28° C and 41° C, although the most common is 35° C (Torres, 2004), so the climatic conditions of all the municipalities of the Colombian Caribbean Region favor the production of this cheese naturally.

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Negative Requirements

a) Does not comply with the definition of appellation of origin contained in Article 201 of the Decision

To avoid incurring this cause of denial, applicants should prefer to seek the protection of the designation of origin “Queso Costeño del Caribe” or “Queso Costeño del Caribe Colombiano” and not only “Queso Costeño”, since the latter would not be enough to identify a country, a region or a specific place as required by article 201 of Andean Decision 486 of 2000.

In the same sense, the simple expression “Queso Costeño” would not be enough to indicate the direct relationship between the geography of the Caribbean, its history, its culture, its people and its cheese, as the name “Queso Costeño del Caribe” would. ” by indicating specifically and without ambiguity the geographical origin of this food product that dates back to colonial times, whose production and marketing began in the 19th century from the Caribbean Coast of present-day Colombia to the neighboring islands, which are dedicated to a single activity coffee, tobacco or sugar cane plantations as a way to feed the slave and indigenous population, given that local livestock farming did not exist on the islands due to the limited island territories (Caro, Vilorio, Sinning and Silva, 2023).

a) Constitute a common or generic name

The Costeño Caribbean Cheese is a well-differentiated product that is associated with the natural and human factors of the Colombian Caribbean Region, so it is possible to consider that such an expression has not become common or generic to identify cheese.

b) Is contrary to good customs or public order

This negative requirement is in line with the causes of absolute unregistrability that apply to trademarks as contained in article 135 of Andean Decision 486 of 2000.

In this regard, the Court of Justice of the Andean Community has stated that "public order must be conceived as the set of legal, political, moral and economic principles that are absolutely obligatory for the conservation of social order in a town and a given time" (TJCA 30-IP-96).

As for good customs, these must be assimilated to what is morally required for the good coexistence of people considered honest (TJCA 30-IP, 96).

Thus, the applicants for the designation of origin Queso Costeño del Caribe could defend without further requirements that such designation is not contrary to good customs or public order.

c) May mislead the public

The TJCA has recalled that there are signs that may deceive the commercial media or the consuming public, especially in what has to do with the geographical origin of the product that is intended to be claimed (TJCA 136-IP, 2015). Such signs are unregistrable for absolute reasons, since they do not meet the condition of distinguishing a product from others, but rather have the purpose of causing distortion of reality in the mind of the consumer regarding the geographical origin of a product or its origin. business of a product or service (TJCA 136-IP, 2015).

Based on this cause, the Delegation for Industrial Property of the SIC decided to deny the registration of the mixed trademark “Alpina Parmesano Snack” through Resolution 12177/2023, considering that the requested sign was potentially misleading by containing the protected designation of origin. through Resolution 55188/2013, Parmigiano Reggiano, whose Spanish translation is Parmesan. This decision sought to prevent the consumer from being induced to wrongly attribute the characteristics associated with the geographical origin of the cheese made in Parma, Italy and confuse it with the one offered under "Alpina Parmesano Snack."

In the same Resolution, the competent authority highlighted that when the requested sign reproduces, imitates or contains a protected designation of origin, its registration must be denied, even if the reproduction is not literal, it is sufficient that it simply resembles or evokes the designation of origin of somehow (SIC- Resolution 12177, 2023).

This negative requirement is not destined to become an obstacle for those who have the legitimate interest in seeking the protection of the designation of origin Queso Costeño del Caribe, given that this sign is associated with a delimited and well-differentiated territory or area, which provides certain characteristics capable of distinguishing cheese made in the Colombian Caribbean Region from cheese made elsewhere in the country or the world, even using similar techniques.

The protection of the designation of origin Queso Costeño del Caribe would allow consumers to overcome the error to which they are induced by the presence in the market of products labeled with the expression “Queso Costeño”, which, despite appealing to a geographical origin through the use of the demonym “costeño”, they lack any nexus or link with the geographical area of the Colombian Caribbean Coast. Such is the case of the cheese produced and marketed by Lácteos Levelma, which is labeled as Queso Costeño; In its description it is recognized that it is typical of the Atlantic Coast [sic] but it is made in Cajicá, Cundinamarca (Lácteos Levelma, 2024). Likewise, Tiendas Jumbo offers a coastal cheese manufactured by the Cooperativa Lechera Colanta in Funza, Cundinamarca (Tiendas Jumbo, 2024).

Thus, the evaluation of this negative requirement applied to the hypothetical request for the protection of the appellation of origin Queso Costeño del Caribe reveals that this sign does not and cannot mislead or deceive the consuming public.

CONCLUSIONS

Appellations of origin have emerged in response to the need to protect the market against fraudulent practices that involve taking advantage of the reputation of a specific geographical area, in which natural and human factors exclusively or essentially influence the characteristics of a product. .

Following Folkeson (2005), it is possible to recognize that the protection of designations of origin contributes more to rural development than what conventional agricultural production achieves, since the competitive advantage that this protection grants by granting the exclusivity of use of the expression, allows products covered by that sign to be marketed at a special price, which would eventually improve the income of producers, generate more employment and provide an indirect impact on the regions involved by stimulating tourism.

However, the path towards effective legal protection of the designation of origin has not been clear, but there has been resistance in some scenarios considering that the promotion of said figure could cause a disincentive to innovation and progress in favor of traditional production (Melkonian, 2005).

In the case of Colombia, the designation of origin belongs to the group of distinctive signs and these, in turn, to Industrial Property governed mainly by the provisions of Andean Decision 486 of 2000, which enjoys supranational and preferential character by be a community standard of direct application in the Colombian jurisdiction (Richardson, 2008).

In this legal framework, the SIC has granted the protection of 29 national designations of origin, among which are Queso Paipa and Queso Caquetá (Mor, 2024), for having satisfied, in the opinion of the examiner, the positive requirements and having avoided the requirements negatives derived from what is contained in articles 201 and 202 of Andean Decision 486 of 2000 that have been addressed in this document.

The designation of origin granted for these Colombian cheeses has motivated both producers and academics to seek the protection of a designation of origin for the native cheese of the Colombian Caribbean Region. However, the main challenge to achieve it is the choice of an appropriate expression capable of indicating a specific geographical area, since according to the competent authority, the expression Costeño Cheese does not refer to a specific country, area, territory or place, therefore that it is suggested to move towards the protection of the expression Queso Costeño del Caribe (Lesmes, 2017).

Another challenge of similar importance is brought about by the low levels of tendency towards associativity of agricultural producers in the Colombian Caribbean Region, as shown by the results of the study carried out by Mendoza and Ortiz (2020), which establishes that in the majority of the Departments of the Region, such producers prefer to form informal groups and avoid participating in formal collective activity except in cases in which the association represents easier access to credit, technical assistance and the market. The above is in line with what was expressed by Wilches, Djordjevic and Cohen (2021) when expressing that the initiatives of some countries, including Colombia, to encourage the formalization of small businesses, do not always report the expected benefits.

For industrial and artisanal producers of Costeño del Caribe Cheese who intend to achieve the protection of this designation of origin, it is advisable that they make efforts aimed at achieving formal associativity in order to adequately satisfy the positive requirement of demonstration of legitimate interest, given that, when If there is a multiplicity of producers in the Region, the application cannot be submitted by a natural person, but only by legally constituted associations or entities and/or by state, departmental or municipal authorities (SIC, 2021).

Otherwise, applicants should not encounter major difficulties in accessing the protection of the designation of origin of the native cheese of the Colombian Caribbean Region (Sandoval, Álvarez and Díaz, 2015), which is widely known and distinguished for its related qualities. with the geographical area from which it comes and with the human factor that, through the exercise and teaching of traditional practices, has maintained the authentic production of this emblematic product over time.

Thus, the protection of the designation of origin Queso Costeño del Caribe would allow the activity of the producers of the Caribbean Region of Colombia to be vindicated, who from one generation to the next have taken advantage of the production of this product for their own support and that of many inhabitants of this area of the country frequently affected by invisibility, conflict and poverty (Sarmiento and Lagos, 2016).

Conflict of Interest

The authors declare that they have no conflict of interest.

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