

LEGAL PROTECTION FOR THE DEVELOPMENT POTENTIAL
OF GEOGRAPHICAL INDICATIONS

&

COMPARATIVE ANALYSIS OF THE LEGAL TOOLS FOR THE
PROTECTION OF GEOGRAPHICAL INDICATIONS IN ASIAN
COUNTRIES

Thesis for LLM (Corporate Law)



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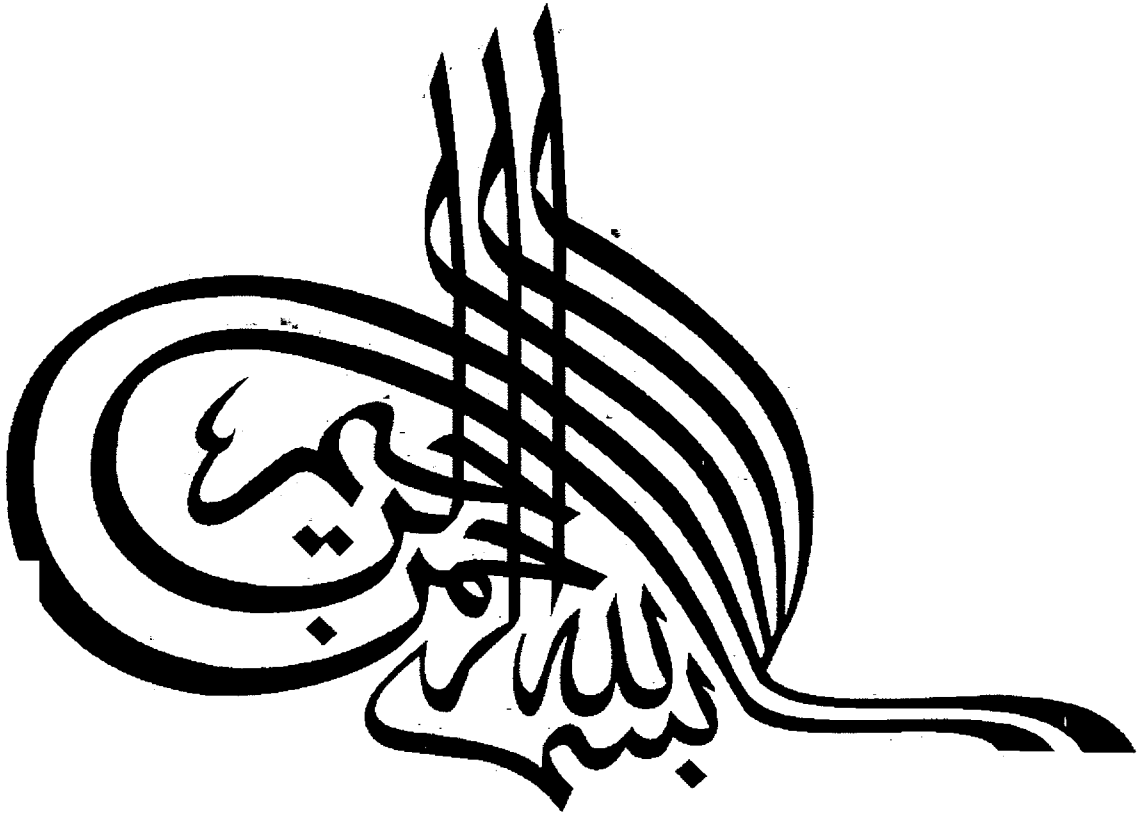
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*In the name of Allah,
the Most Beneficent,
the Most Merciful*


FINAL APPROVAL

It is certified that we have read the dissertation submitted by Ms. Seema Shams entitled "LEGAL PROTECTION FOR THE DEVELOPMENT POTENTIAL OF GEOGRAPHICAL INDICATIONS & COMPARATIVE ANALYSIS OF THE LEGAL TOOLS FOR THE PROTECTION OF GEOGRAPHICAL INDICATIONS IN ASIAN COUNTRIES" as a partial fulfillment for the award of degree of LLM Corporate Law. We have evaluated the dissertation and found it up to the requirement in its scope and quality for the award of degree.

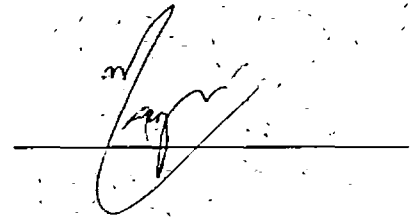
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List of Abbreviations

- AO—Appellation of Origin
PIPRO—Pakistan Intellectual Property Rights Organization
CAP—Common Agricultural Policy
WIPO—World Intellectual Property Organization
CTM—Certification Trademark
EC—European Commission
DDA—Doha Development Agenda
TM—Trade Mark
EU—European Union
GATT—General Agreement on Tariffs and Trade
GI—Geographical Indication
GIs—Geographical Indications
IP—Intellectual Property
IPO—Intellectual Property Organization
IPRs—Intellectual Property Rights
PDO—Protected Designation of Origin
PGI—Protected Geographical Indication
RD—Rural Development
TRIPS—Trade Related Aspects of Intellectual Property Rights
US—United States
WTO—World Trade Organization

Table of Cases

- A case study of 'Boseong' green tea
- The Case of Ceylon Tea
- Basmati Rice Case

DEDICATION

The thesis is dedicated to my parents and teachers

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Thesis Statement

Geographical Indications may be used to enhance commercial value of natural, traditional and crop products in relation to its origin and better exploitations and promotions of Geographical Indications would make it possible to afford better protection for economic interest of the community.

Preface

This Dissertation has been written as a requirement for LLM Corporate Law Program. In this Dissertation an attempt is made to highlight the beneficial impact of Geographical Indications for which effective legal protection is necessary to use the Geographical Indications as a beneficial tool. Geographical indications have not been paying much attention in the Pakistan, not generally nor in legal literature. In contrast, Southern European countries and in Asia only India and China have promoted and appreciated Geographical Indications which is also reflected by the weight Geographical Indications have received attention in their legal literature.

While recent empirical studies suggest that the protection of geographical indications (GIs) for specialty agricultural products can potentially benefit the rural economy. The potential of GIs for rural development has fully been recognized by the EU, which directly links GIs to certification of quality and, indirectly, to rural development and increasing farmer incomes. GIs are especially important to communities engaged in traditional agricultural practices, as they provide value when they protect the common reputation of farmers who strive to improve the quality of their products.

That's why many countries emphasizing that to extend the protection to agriculture products, handicrafts and traditional knowledge. We must follow a growing trend of utilizing GIs to protect their culture, arts, and traditional knowledge.

My focus is that there is a great need to develop a national legal system for the protection of Geographical Indications and formulate a proposal for the protection of GIs. If the GIs are protected in domestic laws then there is a possibility to seek protection in the foreign countries.

Seema Shams
(2010)

Abstract

Geographical Indications (GIs) are collective property rights, which identify a good as originating from a specific geographical region. If the producers of GI products can signal to the consumers the specific qualities their products possess, qualities that are attributable to the land, then – due to the products ties to their region of production – GI products are considered to have potentials to benefit rural development. I have worked on this issue that effective legal protection for GIs has the beneficial impact on the society especially with reference to Pakistan. The findings reveal that production of Geographical Indication products in the Asian countries and in the EU have in many cases contributed to rural development, even though the experience differs a lot between different regions and products. It also concludes that legal protection is necessary in order for the benefits stemming from GI production to benefit the rightful producers and regions. My focus is on the beneficial impact of GIs and Comparative analysis of legal tools used in the Asian countries including Pakistan for the protection of GIs and to propose recommendations for the suitable legal system.

INTRODUCTION OF THE THESIS

Legal Protection for the Development Potential of Geographical Indications and Comparative analysis of the Legal Tools for the Protection of Geographical Indications in Asian Countries

In recent years Geographical Indications (GIs) has emerged as one of the most important instruments of protecting the “quality, reputation or other character of goods essentially attributable to their Geographical origin”. Like trademark, Geographical Indications are valuable to providence. It is a 'source identifier' and indicator of quality. It helps to promote goods of particular region or country and “eligible for relief from acts of infringement and/or unfair competition”.

The Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement prescribes the minimum standard of protection for Geographical Indications (GIs) and additional protection for wines and spirits. Article 23 of the TRIPS Agreement, which grants higher status only to wines and spirits and excludes other goods and products out of its purview, has generated considerable resentment. This discrimination or imbalance in protection has led to demands for additional protection to other goods and products from a number of countries including Pakistan.

The most contentious issue concerning Geographical indications is the extension of enhanced protection to products other than wines and spirits because the products from the developing

countries having Geographical Indications are not on wines and spirits but rather, they relate to products from agriculture, textiles, and handicrafts. Using the flexibilities available in the TRIPS Agreement, the majority of the countries adopted *sui generis* systems of protection to facilitate the socio-economic development of the producers of GIs.

Chapter 1 will provide an introduction of term “Geographical Indications” and the evolution of the term in order to understand the basic concept of Geographical Indications. International systems of protection for Geographical Indications and discusses the development of Geographical Indications protection globally. This chapter will also examine the Importance and significance of Geographical Indications and the Difference between Geographical Indication and Trademarks (legal aspects). This background discussion is important as it provides the context for the remainder of the study. In this chapter we will also try to explore the answer to the question that in the presence of trademarks why Geographical Indications should be treated as a separate category of Intellectual Property law?

Chapter 2 will examine the Development potential of Geographical Indications, its Economic and Social Benefits and role of Geographical Indications protection for Agricultural Products and Handicrafts. It will also explore why many countries emphasizing that to extend the protection of Geographical Indications on an International level to handicrafts and traditional knowledge and what are the Rationale behind the Extension in the protection available for Geographical Indications and the arguments in favor and against the increased protection of Geographical Indications. This chapter will also provide the importance of Geographical Indications through various case studies.

Chapter 3 will provide the Comparative Legal analysis of legal tools available for the protection of Geographical Indications of Asian countries. This chapter will also observe that what is the attraction of Geographical Indications for developing countries, how the emergence of GI protection systems took place in the Asian countries in order to get the clear picture of the legal protection of Geographical Indications in Asia.

Chapter 4 will discuss the Geographical Indications in Pakistan, Problems regarding Geographical Indications' recognition in Pakistan, Pakistan's situation regarding Geographical Indications, Scope of the Geographical Indications in Pakistan being an agricultural country and its implication for economic benefits and the Developments in Pakistan regarding the Geographical Indications are sufficient or not.

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CHAPTER: I

GEOGRAPHICAL INDICATIONS

1.1 Introduction of Geographical Indications

Geographical indications are signs used for goods which indicate the origin or place of goods¹. It is necessary that the goods must have a specific region or place and characteristics of goods must be due to that region or place². As for their functions, Geographical Indications have traditionally played a fundamental role as source identifiers by informing consumers about the origin of the goods to which they are affixed³. "The fundamental concept behind Geographical Indications is that specific geographic locations yield product qualities that cannot be replicated elsewhere"⁴. In other words we can say that Geographical Indications give the information to the consumer about the quality reputation and characteristics of the product which are attributable to its Geographical origin⁵.

1 Teshager Worku Dagne, "Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products", *Oxford Journal of Intellectual Property Law & Practice*, (2010), Vol. 5, No. 6, 442

2 Kal Raustiala and Stephen R. Munzer, "The Global Struggle over Geographic Indications", *The European Journal of International Law* Vol. 18 no. 2, (October 19, 2010): 338

3 Irene Calboli, "Expanding the protection of geographical indications of origin under TRIPS: "old" debate or "new" opportunity?"

4 Kal Raustiala and Stephen R. Munzer, "The Global Struggle over Geographic Indications", *The European Journal of International Law* Vol. 18 no. 2, (October 19, 2010): 338

5 Ibid

A sign will not be considered as a Geographical Indication unless it does not fulfil the following conditions:

1. It must relate to a good (although in some countries services are also included, for example in Azerbaijan, Bahrain, Croatia, Jamaica, and Saint)
2. These goods must originate from a defined area;
3. The goods must have qualities, reputations or other characteristics which are clearly linked to the geographical origin of goods⁶.

Actually the Geographical name for the goods has always been used for the purpose of marketing in order to show that from where the goods came. With the passage of time people used to associate some Geographical names with the products popular for their highly desirable unique characteristics⁷. A working paper titled as "Geographical Indications: creation and distribution of economic value in developing countries" of NCCR (National Centre of Competence Research) defines the importance of GI as:

Geographical Indications are often analyzed as a tool to protect artisan products with a strong link to a territory against industrial copies and usurpations. Besides this legal aspect, recent research conducted in European countries has highlighted the ability of GI products to create economic value

6 O'Connor and Company, "Geographical indications and TRIPs: 10 Years Later... A roadmap for EU GI holders to get protection in other WTO Members", Part I Protection of Geographical Indications in 160 countries around the world.

7 Oskari Rovamo, "Monopolising Names? The Protection of Geographical Indications in the European Community" Helsinki University, Faculty of Law Department of Public Law Project: 'Globalisation, International Law and IPR' Professor Jan:1

and to distribute a certain share of the price premium to the producers of the raw material in the concerned rural area.⁸

On the world scene Geographical Indications (GIs) are increasingly recognized as a tool for securing the link between product quality and the region of Geographical origin⁹. Most of the countries consider the Geographical Indications as the form of intellectual property law. In these countries Geographical Indications are either protected through trade mark system or through separate dedicated laws. If any party wants to get protection through intellectual property law then it is the requirement that such party must register their Geographical Indications with authorized body¹⁰. The fundamental role of Geographical Indications in this setting, therefore, is that of providing a credible certification mechanism that solves a real-world information problem¹¹.

1.2 Concepts and Legal definition of Geographical Indication:

In order to understand the term “Geographical Indications” first we have to analyze the concepts of Geographical Indications.

8 Sophie Reviron, Erik Thevenod – Mottet and Nadja El Benni, “Geographical Indications: creation and distribution of economic value in developing countries”, March 2009:5

9 Dwijen Rangnekar, “Geographical Indications: A Review of Proposals at the TRIPS Council” <http://www.iprsonline.org/unctadictsd/docs/GI%20paper.pdf> last visited on September 29, 2010

10 Carsten Fink and Keith Maskus, “The Debate on Geographical Indications in the WTO” p:201 <http://www.ppl.nl/bibliographies/wto/files/6531.pdf> last visited on October 14, 2010

11 Giancarlo Moschini, Luisa Menapace, and Daniel Pick, “Geographical Indications and the Competitive Provision of quality in agricultural markets” August 2008

Initially "Indications of source" and "appellations of origin" are the terms used in the treaties administered by the World Intellectual Property Organization (WIPO) with respect to Geographical Indications. Articles 1(2) and 10 of the Paris Convention for the Protection of Industrial Property (Paris Convention) and Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 (the Madrid Agreement) contains the term "indication of source" and in these two treaties no definition of indications of sources but article 1(1) of the Madrid Agreement described the term in the following words:

All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries¹².

Consequently, an indication of source can be defined as an indication referring to a country, or to a place in that country, as being the country or place of origin of a product. It is important that the indication of source relates to the geographical origin of a product and not to another kind of origin, for example, an enterprise that manufactures the product. This definition does not imply any special quality or characteristics of the product on which an indication of source is used. Examples of indications of source are the mention, on a product, of the name of a country, or indications such as "made in ..."¹³

12 Surbhi Jain, " Effects of the extension of geographical indications: a south Asian perspective", Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009.P:67

13 Ibid

The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958 (Lisbon Agreement) contained the term "appellation of origin". Article 2(1) of the Lisbon Agreement describes the term "appellation of origin" in the following words:

*"The Geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the Geographical environment, includes natural and human factors"*¹⁴.

Under this definition, an appellation of origin can be regarded as a special kind of indication of source, because the product for which an appellation of origin is used must have a quality and characteristics that are due exclusively or essentially to its origin. Examples of protected appellations of origin are Bordeaux (wine), Noix de Grenoble (nuts), tequila (spirit) and Jaffa (oranges)¹⁵.

In the comparison of the definitions of indication of source, appellation of origin and Geographical Indication following points can be observed:

Indication of source is the broadest term. It comprises Geographical Indication and appellation of origin. Indications of source only require that the product on which the Indication of source is used originate in a certain Geographical area. Thus, there are Indications of source, which seem not to be covered by the definition of Geographical Indication under the TRIPS Agreement, namely indications of source whose use

¹⁴ Ibid

¹⁵ Ibid

on products does not imply a particular quality, reputation or characteristic of those products. Geographical Indications are more broadly defined than the appellations of origin. In other words, all appellations of origin are geographical indications, but some geographical indications are not appellations of origin¹⁶.

This is a problematic issue to define and determine the exact scope of the term Geographical Indications coincided with the national system. However it is difficult to determine the exact definition and scope of Geographical Indication for instance “what is a Geographical Indication, and what is not?”¹⁷

Generally the term Geographical Indications used to identify the specific Geographical region of the agricultural or other products that are a manufacture or grown and such products derive their unique characteristics and reputation. In this respect the term Geographical Indications includes “appellations” or “indications” of origin¹⁸.

“Indication of Source” refers to a word, symbol, or device that indicates that a product originates in a specific geographic region,

“Appellation of Origin” refers to a word, symbol, or device that indicates that a product originates in a specific geographic region only when the characteristic qualities are due to the geographical environment, including natural and human

16 Worldwide symposium on geographical indications, “organized by the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO)” San Francisco, California, July 9 to 11, 2003p:3

17 “Standing committee on the law of trademarks, industrial designs and geographical indications”, World intellectual property organization, 2002 Geneva.

http://www.wipo.int/edocs/mdocs/sct/en/sct_9/sct_9_4.pdf last visited on September 29, 2010)

18 Irene Calboli, “Expanding the protection of geographical indications of origin under trips: “old” debate or “new” opportunity?” Marquette intellectual property law review, vol. 10:2, P:184

factors; "Geographical Indication" includes both of the above concepts¹⁹.

According to TRIPS Agreement Article 22.1

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.^{20/21}

The definition of "appellation of origin" available in the Article 2 of the Lisbon Agreement apparently provides a base for this definition (in the TRIPS Agreement) but to some extent it is different from Article 2 of the Lisbon Agreement. Article 21.1 of the TRIPS Agreement defines Geographical Indications as "indications which identify a good [...]" whereas Article 2 of the Lisbon Agreement defines appellations

19 Charlie Fu, "Geographical Indications in Multinational Agreements", The journal of contemporary legal issues, VOL.19:451, (2010): 452

20 Dwijen Rangnekar, " Geographical Indications: A Review of Proposals at the TRIPS Council" June 2002

21 This definition is mainly derived from the definition of "appellation of origin" established by Article 2 of the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration ("the Lisbon Agreement").

However, where as:

a. Article 22.1 of the TRIPS Agreement defines geographical indications as "indications which identify a good ...",

Article 2 of the Lisbon defines appellations of origin as "the geographical name ... which serves to designate a product ...".

b. Geographical indications are thus not restricted to geographical names, but may also include other signs of geographical significance whether composed of words, phrases, symbols or emblematic images. In addition, it can readily be seen that Article 22.1 of the TRIPS Agreement applies to "goods",

Where as Article 2 of the Lisbon applies to "products".

c. Moreover, Article 22.1 of the TRIPS Agreement applies to goods "where a given quality, reputation or other characteristic is essentially attributable to its geographical origin",

Where as Article 2 of the Lisbon applies to products "the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors".

of origin as "the Geographical name of a country, region, or locality, which serves to designate a product [...]"²².

Furthermore, the Lisbon Agreement requires that the quality and the characteristics of the product in question be due exclusively, or essentially, to the geographical environment, including natural and human factors. The TRIPS Agreement covers goods which have a given quality, reputation or other characteristic that is essentially attributable to their geographical origin. It is generally understood that goods which have "merely" a certain reputation, but not a specific quality being due to their place of origin, are not covered by the definition of appellation of origin as provided by the Lisbon Agreement²³.

In Pakistan the term Geographical Indications are defined in Trade Mark Ordinance 2001, as According to Section 2 (xx)

"Geographical Indication", in relation to goods originating in a particular country or in a region or locality of that country, means a mark recognized in that country as a mark indicating that the goods-

- (a) Originated in that country, region or locality; and
- (b) Have a quality, reputation or other characteristic attributable to their geographical region²⁴.

22 Worldwide symposium on geographical indications, "organized by the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO)" San Francisco, California, July 9 to 11, 2003p:3

23 Worldwide symposium on geographical indications, "organized by the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO)" San Francisco, California, July 9 to 11, 2003p:3

24 Trade Mark Ordinance 2001, Sec.2(xx)

Section 2(1) (e) of the Indian Act defines a Geographical Indication as follows:

"Geographical Indication", in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.²⁵

Geographical Indications have been defined by a number of authors and entities:

According to June Francis and David Robertson, the US Patent and Trademark Office define it as:

*"Indications which identify a good as originating in the territory of a member, or region or locality in that territory, where a given quality reputation or other characteristics of the good is essentially attributable to its Geographical origin"*²⁶

However, another very straightforward description is given by Kevin Murphy.

25WIPO Asia and the pacific regional symposium on the protection of geographical indications. Organized by the World Intellectual Property Organization (WIPO) in cooperation with the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India and with the assistance of the Japan Patent Office, New Delhi, November 18 to 20, 2003.P:2

26 Sarah M. Faria, "Producers' Perspectives towards the Geographical Indication Recognition Process in Brazil - An Analysis of Difficulties Found in the Process and Possible Improvements", August 2010,p:13

<http://etd.ohiolink.edu/send-pdf.cgi/Faria%20Sarah%20M.pdf?ohiou1280298282> last visited on October 14, 2010

"He states that Geographical Indications have a more important role than just pointing out the country of origin of a good".²⁷

Murphy affirms that Geographical Indications "Denote a guarantee of quality and distinctiveness derived from a combination of unique regional, environmental, and human influences, such as climate, soil, plants and special methods of production particularly traditional, collectively observed farming and processing techniques".²⁸

1.3 Need for Protection

If the Geographical Indications are not adequately protected although they have valuable reputation in many countries may be misrepresented by the dishonest commercial representatives. False use of Geographical Indications by unauthorized user is a great threat to the consumer's interest and the legitimate producers. If there is no protection is available then consumers will be easily deceived by the dishonest commercial representatives and consumers will lead into believing to by a genuine product while they in fact get a worthy less product. In such a case the legitimate producer will suffer a lot of damages by two ways in one way the valuable business is taken away from them and on the other hand the established reputation for their product and good will of their business will be in danger²⁹. In respect of protection,

²⁷ Ibid

²⁸ Ibid

²⁹ Lisa P Lukosi, "Rational and Prospects of the Protection of Geographical Indications : An Inquiry", Journal of Intellectual Property Rights 'Vol 12, March 2007 pp 212-223, Indian Law Institute, Bhagwandas road, New Delhi

Geographical Indications may be protected in the national level and/or international level³⁰.

1.4 Protection of Geographical Indications at National Level

At the national level there are many forms for the protection of Geographical Indications. Protection of Geographical Indications on the national and regional levels is characterized by the existence of a variety of different legal concepts. Those concepts were developed in accordance with different national legal traditions and within a framework of specific historical and economic conditions³¹. Geographical names are normally protected in accordance with national laws in the context of a wide range of legal disciplines, such as³²:

Laws against unfair competition and Passing off

Consumer protection laws

Laws for the protection of certification marks; or

Special laws for the protection of Geographical Indications or appellations of origin

30 Budi Suratno, "Protection of Geographical Indications", Report, IP Management Review 2, 87-93, 2004

31 San Francisco, California, "Introduction to Geographical Indications and Recent Developments in the World Intellectual Property Organization(WIPO)" Worldwide Symposium on Geographical Indications: Organized by the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO), July 9 to 11, 2003

32http://books.google.com/books?id=8vO0EJledlWc&pg=PT1&lpg=PT1&dq=The+Law+of+Geographical+Indications+By+Bernard+O'Connor&source=bl&ots=p5V7RzrtAB&sig=IVgOMRs_mZP8q_qMTfw74d38JQ3Y&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PPA5,M1 last visited on October 15, 2010

1.4.1 Common Law measures for the protection of Geographical Indications:

a) Unfair Competition:

Many countries have adopted different kinds of protection measures against unfair business practices. On international level it got reflection from 'Article 10*bis* into the Paris Convention at the 1900 Brussels Revision Conference, establishing a basic international rule concerning protection against unfair competition'. It makes an obligation of the member states party to the Paris convention to take effective measures against unfair competition, which defined as: "any act of competition contrary to honest practices in industrial or commercial matters"³³.

Protection against unfair competition evolved differently. But the one objective is similar in all the different approaches that are 'to provide those in trade with an effective remedy against unlawful and dishonest business practices of their competitors'. In order to perform the function of consumer protection and for the repression of unfair competition some countries have specific statutes³⁴.

In order to prevent the unauthorized use of a Geographical Indication on the basis of an action against unfair competition, a plaintiff must regularly show that the use of the geographical indication in question by an

33 San Francisco, California, "Introduction to Geographical Indications and Recent Developments in the World Intellectual Property Organization(WIPO)" Worldwide Symposium on Geographical Indications: Organized by the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO), July 9 to 11, 2003.p:5

34 Ibid

unauthorized party is misleading and, as the case may be, that damages or a likelihood of damages result from such use. Such an action can only be successful if the Geographical Indication in question has acquired distinctiveness; in other words, if the relevant public associates goods sold under that geographical indication with a distinct Geographical origin and/or certain qualities or reputation³⁵.

(b) Passing off:

“Countries having a civil-law tradition that provide for some kind of protection for businesses against unlawful commercial acts from competitors usually base that protection on general tort law”.

The action of passing off is regarded as the basis of protection against dishonest business competitors in the countries that follow the common law tradition. The remedy of passing off is available in the cases where the goods or services of one person are represented as being the goods or services of another person. In these cases the plaintiff suffers damage by losing the customers because the defendant led them to believe that they were buying the plaintiff's goods, when they actually obtained the goods of the defendant³⁶.

35 San Francisco, California, “Introduction to Geographical Indications and Recent Developments in the World Intellectual Property Organization(WIPO)” Worldwide Symposium on Geographical Indications: Organized by the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO), July 9 to 11, 2003.p:5

36 Ibid, 6

Very broadly speaking, in order to prevent the unauthorized use of a Geographical Indication through a successful action for passing off, a plaintiff must establish that goodwill or reputation is attached to the goods on which the geographical indication is regularly used and which are supplied by him, that the defendant misrepresents to the public that the goods offered by him originate from the plaintiff and that he is likely to suffer damage from such a misrepresentation.³⁷

1.4.2 Protection of Geographical Indications through trademarks law:

(a) Certification marks³⁸:

The protection of a Geographical Indication in the form of a certification mark is enforced under general trademark law. In principle, an action for infringement of a certification mark is initiated by the owner of the certification mark³⁹.

³⁷ Ibid

³⁸ Certification marks are marks which indicate that the goods or services on which they are used have specific qualities, which may also include geographical origin. The owner of the certification mark undertakes to certify that the goods or services on which the certification mark is used have those qualities. As a basic rule, the owner of the certification mark does not have the right to use the mark. This principle is also referred to as the "anti-use by owner rule." Every producer who complies with standards of production as defined by the owner of the certification mark has the right to use that mark. The owner of the certification mark, who may be a private or public entity, must ensure that the goods or services on which the certification mark is used possess the certified quality. In order to carry out this certification function in a neutral and impartial manner, the owner of the certification mark has to file, together with the application for the registration of the certification mark, detailed regulations which prescribe, inter alia, the characteristics certified by the mark, the authorized users and details concerning the certification and control. As already pointed out, in order to safeguard the objectivity of the owner of the certification mark, he is not allowed to use the certification mark himself. Disregard of that rule regularly leads to the invalidity of the certification mark.

³⁹ San Francisco, California, "Introduction to Geographical Indications and Recent Developments in the World Intellectual Property Organization(WIPO)" Worldwide Symposium on Geographical Indications: Organized by the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO), July 9 to 11, 2003.p:8

(b) Collective Marks⁴⁰

Like in the case of certification marks, the protection of collective marks is enforced under general trademark law. An action for infringement may be brought by the owner of the Collective mark⁴¹.

1.5 International Legal framework for the protection of Geographical Indications

Article 22 provides the basic framework for the protection of all GIs, “where the obligation is for members to provide the legal means for interested parties⁴² to secure protection of their Geographical Indications”. The required legal means are unspecified and consequently raise the problem of multiplicity of systems of protection, but also present an opportunity to members to explore alternative mechanisms⁴³.

40 It has been pointed out that it is difficult to distinguish collective marks from certification marks, and that the difference is one of form rather than one of substance.

Collective marks are owned by a collective body such as, for example, a trade association or an association of producers or manufacturers, and serve to indicate that the person who uses the collective mark is a member of that collectivity. Membership in the association that is the owner of the collective mark is, generally speaking, subject to compliance with certain rules, such as the geographical area of production of the goods on which the collective mark is used, or standards of production of such goods. A further difference between the two categories of marks is that the owners of collective marks are regularly not barred from using the mark themselves.

41 San Francisco, California, “Introduction to Geographical Indications and Recent Developments in the World Intellectual Property Organization(WIPO)” Worldwide Symposium on Geographical Indications: Organized by the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO), July 9 to 11, 2003.p:8

42 Article 10(2), The Paris Convention for the Protection of Industrial Property 1883

43 Dwijen Rangnekar, “ Geographical Indications: A Review of Proposals at the TRIPS Council” June 2002.p:19 <http://www.iprsonline.org/unctadictsd/docs/GI%20paper.pdf> last visited on September 29, 2010

Under Article 22, the scope of protection is composed of three components:

- Protection against the use of indications that mislead the public or are deceptive
- Protection against the use of indications in a manner that are acts of unfair competition
- Refusal or invalidation of trademarks that contain or consist of indications, where there it may mislead the public⁴⁴

International rules for the protection of GIs were first established in several intellectual property conventions, notably the Paris Convention (originally signed in 1883) and the Madrid Agreement (originally signed in 1891)⁴⁵.

European countries have traditionally advocated that GI should not be used by unrelated parties because GI identify the unique qualities, characteristics, and reputation of the products to which they are affixed; thus, should others use GI improperly, consumers would be confused as to the origin of the products⁴⁶.

To this claim, the United States and other “new world” countries have generally responded by pointing out that many GI are generic terms of their soil, such as

44 Ibid

45 Carsten Fink and Keith Maskus, “The Debate on Geographical Indications in the WTO”p:205 <http://www.ppl.nl/bibliographies/wto/files/6531.pdf> last visited on September 14, 2010

46 Irene Calboli, “Expanding the protection of geographical indications of origin under trips: “old” debate or “new” opportunity?” P:182 <http://law.marquette.edu/ip/calboli2.pdf> last visited on September 15, 2010

“champagne” or “Chablis,” and, thus, consumers could not be confused as to the origin of the products identified by these terms⁴⁷.

In the midst of this international debate, the adoption of the Agreement on Trade-Related Aspects on Intellectual Property Rights⁵ (TRIPs) in 1994 marked an important victory for the European approach because it established general minimum standards for GI protection for all of its signatories⁴⁸.

Prior to TRIPs, the most relevant sources for international protection of GI could be found in three different agreements:⁴⁹

1.5.1 Paris Convention for the protection of industrial property 1883:

The Paris Convention on Intellectual Property 1883 was the first step which was taken on an international level for the protection of Geographical Indications. This convention provides protection for “indications of source or appellations of origin”⁵⁰. According to Article 1(2) of the Paris convention *“the protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellation of origin, and the repression of*

47 Ibid

48 Ibid

49 Ibid, 187

50 O'Connor and Company, Geographical indications and TRIPs: 10 Years Later... A roadmap for EU GI holders to get protection in other WTO Members, “Part I Protection of Geographical Indications in 160 countries around the world” p:2, <http://www.anilact.pt/documentos/geoindications.pdf> last visited on October 18, 2010

unfair competition".⁵¹ By analyzing the Article 9 and 10 of the Paris Convention there is a direction for the member countries to restrict or 'seize on importations' goods bearing 'direct or indirect false indications of source of the goods'.^{52/53} Remedies are also provided by the Paris Convention under article 10 for the unlawful use of indications of source of goods⁵⁴.

The Paris Convention receives criticism on the following grounds:

1. "Silent about consumer deception or confusion concerning the Geographical origin. The Convention was silent regarding the minimum standards of protection, the level of protection varied according to the domestic laws of the countries protecting their Geographical Indications"⁵⁵.

51 The Paris Convention for the protection of industrial property was agreed in 1883 and complemented by the Madrid Protocol of 1891. It was revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Lisbon (1958), and Stockholm (1967), and amended in 1979. As of 1 October 2006 the Paris Convention had 169 signatory states. Available at: <http://www.wipo.org>, "Treaties", "Intellectual Property Protection Treaties", "Paris Convention".

52 Oskari Rovamo, "Monopolising Names? The Protection of Geographical Indications in the European Community" Helsinki University, Faculty of Law Department of Public Law Project: 'Globalisation, International Law and IPR' Professor Jan.p:19 <http://ethesis.helsinki.fi/julkaisut/oik/julki/pg/rovamo/monopoli.pdf> last visited on October 18, 2010

53 The words 'direct or indirect' were added at the diplomatic conference in Lisbon (1958)

54 O'Connor and COMPANY, Geographical indications and TRIPs: 10 Years Later... A roadmap for EU GI holders to get protection in other WTO Members, "Part I Protection of Geographical Indications in 160 countries around the world" p:2, <http://www.anilact.pt/documentos/geindications.pdf> last visited on October 18, 2010)

55 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "Exploring the Relationship between GIs and TK: An Analysis of the Legal Tools for the Protection of GIs in Asia", Intellectual Property Rights and Sustainable Development, Published by: International Centre for Trade and Sustainable Development (ICTSD) August 2007, p:11

1.5.2 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1891:

The Madrid agreement deals with the protection of Geographical Indications in the best form as compared to the Paris Convention. In other words, the Madrid agreement gives slightly higher level of protection. The object of Madrid agreement is to specify rules for the repression of false and deceptive indications of source⁵⁶.

Article 1(1) of the Madrid Agreement provides that:

"All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries."⁵⁷

In order to fulfil the deficiency in the protection of Geographical Indications provided by the Paris Convention a number of countries agreed to establish an agreement for the better protection of Geographical Indications so Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, 1891 was introduced⁵⁸.

56 Irene calboli, "Expanding the protection of geographical indications of origin under trips: "old" debate or "new" opportunity?" p:188

<http://law.marquette.edu/ip/calboli2.pdf> last visited on 15.10.2010

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

58 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "Exploring the Relationship between GIs and TK: An Analysis of the Legal Tools for the Protection of GIs in Asia", Intellectual Property Rights and Sustainable Development, Published by: International Centre for Trade and Sustainable Development (ICTSD) August 2007.p:12

1.5.3 Madrid Agreement Concerning the International Registration of Marks 1891:

Geographical Indications could be protected under the Madrid System for the International Registration of Marks as collective marks, certification marks or guarantee marks. This means that an international registration system for trademarks, established by the Madrid Agreement 1891 and the Protocol relating to the Madrid Agreement Concerning the International Registration of Marks 1891, could also serve as a means of protection of Geographical Indications Internationally. However, this system could only be used by those countries that protect Geographical Indications via a certification trademarks regime and have no specific rules on the protection of Geographical Indications⁵⁹.

1.5.4 The Stresa Convention 1951:

It was not until the 1950s that the positive regulation of Geographical Indications, defined according to their dual identity of appellations of origin and indications of source, was introduced into International law. On June 1, 1951, an International Convention on the use of Appellations of Origin and Denominations of Cheeses (known as the Stresa Convention) was signed in the northern Italian town of Stresa⁶⁰.

The Stresa Convention applies specifically to cheeses. It concerns the use of designations of origin and the names of cheeses. The signatory countries committed themselves to prohibiting the use of the false designations of origin on their

⁵⁹http://books.google.com/books?id=8vO0EJledlWC&pg=PT1&lpg=PT1&dq=The+Law+of+Geographical+Indications+By+Bernard+O'Connor&source=bl&ots=p5V7RzrtAB&sig=1VgOMRs mZP8q_qMTFw74d38JQ3Y&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PPA5,M1 last visited on October 15, 2010

⁶⁰ Ibid

territory and to take all necessary measures to ensure the application of the Convention⁶¹.

1.5.5 Lisbon Agreement for the protection of appellations of origin and their international registration 1958:

"The Lisbon Agreement of 1958, the most serious attempt to achieve effective and enforceable international protection for GI, finally provided for a much stricter level of protection that was extended to all indications of origin, thereby expanding the protections beyond false or deceptive uses of these indications".⁶²

For the first time the concept of 'appellations of origin' defined in the Lisbon Agreement of 1958. Article 2(1) of the agreement provides that:

*"Appellations of origin means the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographic environment, including natural and human factors"*⁶³.

From the above definition it becomes obvious that indirect Geographical Indications or in other words non-geographical names are excluded from protection and make it essential that there must be a link between the product and the place of origin.⁶⁴

⁶¹ Ibid

⁶² Irene calboli, "Expanding the protection of geographical indications of origin under trips: "old" debate or "new" opportunity?"p:188,189 <http://law.marquette.edu/ip/calboli2.pdf> last visited on October 15,2010

⁶³ Article 2(1) of Lisbon Agreement 1958

⁶⁴ N.S. Gopalakrishnan,Prabha S. Nair & Aravind K. Babu, "Exploring the Relationship between GIs and TK: An Analysis of the Legal Tools for the Protection of GIs in Asia",Intellectual Property Rights

Unlike Paris Convention and Madrid Agreement there is an extension in the scope of protection which is explained in Article 3 as:

*"Protection shall be ensured in any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as "kind", "type", "make", "imitation" or the like"*⁶⁵

1.5.6 Trade Related Aspect of Intellectual Property Rights (TRIPS) 1994:

'TRIPS introduce the concept of 'Geographical Indications in a groundbreaking manner'⁶⁶. TRIPS Agreement is the first multilateral agreement which not only provides protection for Geographical Indications but also gives a comprehensive definition of Geographical Indications⁶⁷. In the protection of Geographical Indications TRIPS Agreement considered as a milestone⁶⁸. The Section 3 of Part II of the TRIPS Agreement deals with the Geographical Indications. The related articles are from Article 22 to 24 of the Agreement on TRIPS⁶⁹.

and Sustainable Development, Published by: International Centre for Trade and Sustainable Development (ICTSD) August 2007.p:13

65 Article 3 of the Lisbon Agreement 1958

66 Teshager Worku Dagne, "Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products", Oxford Journal of Intellectual Property Law & Practice,(2010),Vol. 5, No. 6,442

67 O'Connor and COMPANY, Geographical indications and TRIPS: 10 Years Later... A roadmap for EU GI holders to get protection in other WTO Members, " Part I Protection of Geographical Indications in 160 countries around the world" p:4

68 Irene Calboli, "Expanding the protection of geographical indications of origin under TRIPS: "old" debate or "new" opportunity?"p:190

69 Cancun Agenda: Geographical Indications and Developing Countries.p:1

<http://www.ris.org.in/Pbno7.pdf> last visited on October 18, 2010

Article 22 of the TRIPs Agreement provides a definition of geographical indications. They are:

“... 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”⁷⁰.

The definition provided in the TRIPs Agreement is broader in scope as compare to the Lisbon model. TRIPs definition extends to indications that confer only “reputation,” but not necessarily “quality and characteristics” to the goods to which they are affixed’⁷¹. In other words:

This definition expands the Lisbon Agreement concept of appellation of origin to protect goods which merely derive a reputation from their place of origin without possessing a given quality or other characteristics which is due to that place. Also, under the TRIPS Agreement a geographical indication to be protected has to be an indication, but not necessarily the name of a geographical place on earth. Thus, for example, “Basmati” is taken to be an indication for rice coming from the Indian sub-continent, although it is not a place name as such. The indication has to identify goods as originating in the territory of a Member, a region or a locality of that territory. This definition also indicates that goods to be protected should originate in the territory, region or locality to which it is associated. This suggests that licenses for the use

70 O’Connor and COMPANY, Geographical indications and TRIPs: 10 Years Later... A roadmap for EU GI holders to get protection in other WTO Members, “Part I Protection of Geographical Indications in 160 countries around the world” p:6, <http://www.anilact.pt/documentos/geoindications.pdf> last visited on October 18, 2010

71 Irene Calboli, “Expanding the protection of geographical indications of origin under TRIPS: “old” debate or “new” opportunity?” p:190 <http://law.marquette.edu/ip/calboli2.pdf> last visited on October 15, 2010)

of geographical indications cannot be protected under the TRIPS Agreement⁷².

The TRIPS definition permits Members protect geographical indications of goods where the quality, reputation or other characteristic of goods are attributable to their geographical origin⁷³.

The minimum standard for the protection of Geographical Indications is prescribed in Article 22 of TRIPs Agreement irrespective of the nature of the goods⁷⁴.

In line with the Paris Convention and the Madrid Agreement, Article 22 prohibits the use of false GI in the territory of member countries. According to Article 22(2), member countries must "provide the legal means . . . To prevent the use of [GI] in a manner which misleads the public as to the geographical origin of the good [or] which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention." In contrast with previous agreements, Article 22 not only provides for broader measures for GI protection but also sets minimum standards to be implemented into the laws of TRIPs member countries⁷⁵.

1.6 Importance and significance of Geographical Indications:

In the comparison of Geographical Indications with trademarks we can conclude that in function both are similar for instance:

72 The IPR-Helpdesk is a project of the European Commission DG Enterprise, co-financed within the fifth framework programme of the European Community.

<http://seed.agron.ntu.edu.tw/ipr/GI/ipr-helpdesk-gi.pdf> (last visited on September 29, 2010)

73 Ibid

74 O'Connor and COMPANY, Geographical indications and TRIPs: 10 Years Later... A roadmap for EU GI holders to get protection in other WTO Members, "Part I Protection of Geographical Indications in 160 countries around the world" p: 6, <http://www.anilact.pt/documentos/geoindications.pdf> (last visited on October 18, 2010)

75 Irene Calboli, "Expanding the protection of geographical indications of origin under trips: "old" debate or "new" opportunity?" p:190,191 <http://law.marquette.edu/ip/calboli2.pdf> last visited on October 15, 2010

- (1) Both indicate the origin of the goods. While the trademark indicates commercial origin, a GI indicates geographical origin.
- (2) Both serve as guarantees of quality. While a trademark guarantees consistent quality, a GI provides more specific guarantees such as a defined area of production, according to a certain traditional process etc.
- (3) Finally, both trademarks and GIs can act as valuable commercial brands⁷⁶.

“This raises the obvious question: If GIs and trademarks are functionally similar, why should GIs be treated as a separate category of IP? The answer to this lies in the historical development of trademark law and the underlying policies supporting GI protection”⁷⁷. Along with similarities in functions at the same time we have the following points of differences between them.

1. Unlike a trademark which usually has a single registered owner, there exists a collective interest in the protection of such geographical brands. No single producer from the region can claim exclusive rights. At the same time others from outside this region should not be allowed to use this name. This would deceive consumers as well as unfairly compete with the genuine producers. So what is required is a collective right for all genuine producers to use the name and a right to prevent others from misusing it. Trademark law historically used to vest rights in a single entity. This has now changed with the introduction of Certification and Collective Marks.
2. The second reason why GIs developed as a separate category was that trademark rights were not granted for geographical terms. In order for a trademark to be registered, a universal

⁷⁶ Dev Gangjee, “Protecting Geographical Indications as Collective Trademarks: The Prospects and Pitfalls” IIP Bulletin 2006, available at: http://www.iip.or.jp/e/e_summary/pdf/detail2005/e17_14.pdf last visited on October 27, 2010)

⁷⁷ Ibid

requirement is that it must be distinctive. However, using a geographical name on the label will usually be descriptive of the place of production of the goods. So a packet of tea with the label 'India' on it will lead consumers to believe that the product originates in India rather than from a specific producer or company⁷⁸.

1.7 Difference between Geographical Indication and Trademarks

The interface between GIs and trademarks is complex. As a general rule, trademarks must be distinctive so as to fulfil the role of distinguishing goods/services of one manufacturer from those of another. This leads to the general proposition that GIs are excluded from the domain of trademark⁷⁹.

The relationship between trademarks and GI's is complex. Trademarks generally identify products from a specific manufacturer. GI's do not identify a manufacturer (or producer), but rather the product's place of origin.

Trademarks imply human creativity. GI's, on the other hand, are linked to climate, soil and other factors that are largely independent of human ingenuity. They are expressions or symbols (such as a flag) which recognize a product as originating in a certain country where a given quality, reputation or other characteristic is attributable to its geographical origin. Trademarks are words, signs, numerals, and figures that distinguish products of one manufacturer from another. GI's apply to all producers in a country, region or locality. Trademarks can be used by only one entity. They are

78 Dev Gangjee, "Protecting Geographical Indications as Collective Trademarks: The Prospects and Pitfalls" IIP Bulletin 2006, available at: http://www.iip.or.jp/e/e_summary/pdf/detail2005/e17_14.pdf last visited on October 27, 2010

79 Dwijen Rangnekar, "Geographical Indications: A Review of Proposals at the TRIPS Council" June 2002, p:21

<http://www.iprsonline.org/unctadictsd/docs/GI%20paper.pdf> last visited on September 29, 2010

easier to protect than GI's, but protection requires the active role of the trademark's owner⁸⁰.

Article 22 concerns the relationship between GIs and trademarks.⁸¹ Under Article 22.3 of TRIPS⁸² this article does not come into play in the case of the registration of a trademark which contains or consists of a GI identifying another category of products as the one identified by the GI. In such circumstances, the general standard protection of article 22.3 applies.⁸³

This Article should be compared with Article 23.2⁸⁴ where the requirement for the public being misled is absent. Doubtless, this strengthens the scope of protection for GIs for wines and spirits.⁸⁵

As the WTO survey cited earlier indicates, there is no single mechanism used to protect GI's.

80 Geographical indication, A Discussion Paper from the International Food & Agricultural Trade Policy Council, 2003.p:5

<http://www.agritrade.org/Publications/DiscussionPapers/GI.pdf> last visited on October 15, 2010

81 Dwijen Rangnekar, " Geographical Indications: A Review of Proposals at the TRIPS Council" June 2002.p:19

<http://www.iprsonline.org/unctadictsd/docs/GI%20paper.pdf> last visited on September 29, 2010

82 A Member shall, ex officio if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

83 Surbhi Jain, "Effects of the extension of geographical indications: a south Asian perspective", Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009.P:78

http://www.unescap.org/pdd/publications/apdj_16_2/4_Jain.pdf last visited on October 23, 2010

84 The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, ex officio if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

85 Dwijen Rangnekar, " Geographical Indications: A Review of Proposals at the TRIPS Council" June 2002.p:21 <http://www.iprsonline.org/unctadictsd/docs/GI%20paper.pdf> last visited on September 29, 2010

As a rule, trademarks that contain a GI cannot be protected if the use of the trademark would mislead the public about the true origin of the product. The TRIPS Agreement allows

Members to refuse or invalidate trademarks that contain geographical indications on goods that do not originate in the territory indicated if the use misleads the public. The same rule applies to wine and spirits, but in that case, members can refuse or invalidate the trademark whether or not the public is misled⁸⁶.

⁸⁶Geographical indication, A Discussion Paper from the International Food & Agricultural Trade Policy Council, 2003, p.5 <http://www.agritrade.org/Publications/DiscussionPapers/GI.pdf> last visited on October 15, 2010

CHAPTER: II

DEVELOPMENT POTENTIAL OF GEOGRAPHICAL INDICATIONS

2.1 Introduction

As the intellectual property rights are gaining importance in the trade at national and international level, the “harnessing trade benefits” depend on the level of protection available to the owners of the IPRs. So the importance and present value of Geographical Indications in the world of trade demands comprehensive and effective protection to goods registered as GI goods⁸⁷.

As it becomes more popular, a GI takes on value just like any familiar brand. For producers⁸⁸, a GI helps to confer uniqueness or differentiation, and can be used to grant a measure of protection to what has essentially evolved to represent a brand name for their product. Besides the value of legal protection, GI status can ostensibly

87“ Geographical Indications of India Socio- Economic and Development Issues” available at: <http://www.aiacaonline.org/pdf/policy-briefs-geographical-indications-india-socio-economic-development-issues.pdf> last visited on January 24, 2011

88 Producer in relation to goods, means any person who If such goods are agricultural goods, produces the goods and includes the person who processes or packages such goods; If such goods are natural goods, exploits the goods; If such goods are handicraft or industrial goods, makes or manufactures the goods, and includes any person who trades or deals in such production, exploitation, making or manufacturing, as the case may be, of the goods.

reduce the information problems faced by consumers when product characteristics are not readily evident⁸⁹.

Geographical Indications of Goods⁹⁰ ensure quality and genuineness of products to the consumers and better market returns to the producers⁹¹.

In order to minimize the risk of counterfeiting⁹² the legal protection is important for Geographical Indications. "The legal recognition of a Geographical Indication also means the setting up of a legal framework to protect the use of the geographical name, thus, Geographical Indications become exclusivity rights under the legal system of Intellectual Property"⁹³.

One noted scholar, Stanford University's Tim Josling, states:
So public authorities may need to do more than provide legal remedies for deception: they may need to establish a registry, define quality standards and take steps to protect the reputation inherent in the GI from devaluation. In either case "protection" of the GI is essentially a public policy, but the

89 Daniele Giovannucci - Tim Josling - William Kerr - Bernard O'Connor - May T. Yeung, "guide to geographical indications linking products and their origins" International Trade Centre (ITC) Geneva 2009 P:15

90 Under Articles 1 (2) and 10 of the Paris Convention for the Protection of Industrial Property, geographical indications are covered as an element of IPRs. They are also covered under Articles 22 to 24 of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which was part of the Agreements concluding the Uruguay Round of GATT negotiations.

91 R.Kalpna Sastry, "A Case Study Under NAARM-CAS-IP NPI Collaboration Project" Intellectual Property Management Regime in the Indian National Agricultural Research Systems. National Academy of Agricultural Research Management Indian Council of Agricultural Research Rajendranagar, Hyderabad 500407, Andhra Pradesh, India.

92 Counterfeiting goes along with notorious Industrial Property rights and implies a high risk of dilution and misleading the consumer. In any case, counterfeiting is a clear case of unfair competition since counterfeiter take profit of the reputation of the geographical indication.

93 Regional Protection of GIs in Europe, "E.U Asean workshop on geographical indications: a way into the market. Presentation by dora de teresa, legal adviser of the regulatory council of Designation of origin "teruel ham" Hanoi, 7-8 October 2003

responsibility for quality maintenance can be assumed by the public authorities or left to the private sector⁹⁴.

“Nevertheless, that monopoly of use is limited by the territory of recognition, so in the countries where those types of rights are not acknowledged, there is no protection”⁹⁵.

2.2 Development Implications of Geographical Indications

The four important components, which are essential for human developments i.e. Empowerment, productivity, equity and sustainability, can be obtained through Geographical Indications. In low-income agricultural and artisanal societies, Geographical Indications gives to the owner a legitimate right and empowers them to the productive use of these rights. Another feature of Geographical Indications, which enhances its importance, is that it ‘can be expected to contribute to an equitable distribution of benefits. The legal-economic incentives could then create a virtuous cycle of other incentives to nurture and sustain traditional methods and know-how, which could contribute to intergenerational equity’⁹⁶.

94 Daniele Giovannucci - Tim Josling - William Kerr - Bernard O'Connor - May T. Yeung, “guide to geographical indications linking products and their origins” International Trade Centre (ITC) Geneva 2009 P:15

95 Regional Protection of GIs in Europe, “E.U Asean workshop on geographical indications: a way into the market. Presentation by dora de teresa, legal adviser of the regulatory council of Designation of origin “teruel ham” Hanoi, 7-8 october 2003

96 Surbhi Jain, “ Effects of the extension of geographical indications: a south Asian perspective”, Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009.P:80.81

Geographical Indications has a close link with the livelihood of the people of a particular area so it should be taken as a development issue by the South Asian Countries. Well known products related to Geographical Indications are agriculture, fisheries, crafts and artisanal works, these sectors providing opportunities for the poor people of the designated area to generate money. So it is a matter of great concern for the governments of that region to critically examine the whole supply chain of the products in order to obtain socio-economic benefits of Geographical Indications. Because these benefits are not evenly distributed among all the stakeholders like a high price demanded on the account of Geographical Indications protection such price becomes remains in the hands of the powerful participants of the upper stream of the supply chain and providing no benefits to the weaker section of the chain and this point destroys the development implications of Geographical Indications protection⁹⁷. Initially the South Asian Countries are required to protect IPR in their countries, as domestic protection because it is the prerequisite for TRIPS Agreement protection. It is required for the countries 'to strengthen their databases on Geographical Indications, their socio-economic and cultural values, associated features such as the microenterprises they can spin off, and their attraction for tourism or investment'⁹⁸.

Anticipating more sophisticated cases of disputes over GIs,
there is a need to determine and codify scientific attributes of

97 Surbhi Jain, " Effects of the extension of geographical indications: a south Asian perspective", Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009.P:80.81

98 Ibid

their products on which legal verdicts can be based, instead of relying on subjective, connoisseur-determined statements on reputation, as is largely the case now (Das 2007)⁹⁹.

2.3 Geographical Indications protection for Agricultural Products and Handicrafts:

The term Geographical Indications is applied for both Agriculture and Handicrafts and it may include traditional knowledge as well, which has the potential and ability to capture a consumer market¹⁰⁰. GIs are especially important to communities engaged in traditional agricultural practices, as they provide value when they protect the common reputation of farmers who strive to improve the quality of their products¹⁰¹. The potential of GIs for rural development has fully been recognized by the EU, which directly links GIs to certification of quality and, indirectly, to rural development and increasing farmer incomes¹⁰². Geographical Indications also plays an important role in the protection of “traditional knowledge-based agricultural products (TKBAPs) in the international IP framework”¹⁰³.

‘Traditional Knowledge-based agricultural products’
(TKBAPs) refers to the resources among indigenous people

⁹⁹ Ibid

¹⁰⁰ G. E. Evans and Michael Blakeney, “the protection of geographical indications after doha: quo vadis?” *Journal of International Economic Law* Advance Access published July 12, 2006

¹⁰¹ D Gangjee, ‘Quibbling siblings: conflicts between trade marks and GIs’ (2007) 82 *Chicago-Kent Law Review* 1253 at 1257

¹⁰² Teshager Worku Dagne, “Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products”, *Oxford Journal of Intellectual Property Law & Practice*, (2010), Vol. 5, No. 6, P:450

¹⁰³ Ibid, 441

and local communities engaged in agricultural production who utilize traditional means of production. In their standard definition in regional and international legal instruments, agricultural products are understood as 'products of the soil, of stock-farming and of fisheries and products of first-stage processing directly related to these products'¹⁰⁴.

The European Commission's deployment of GIs gives a regulatory model for developing countries for "small farming and rural communities".

European law provides two means of protecting geographical names for agricultural products and foodstuffs,^{*} the Community Regulation on the Protection of Geographical Indications and Designations of Origin (GI Regulation), in addition to the Community Trade Mark Regulation (CTM). Although the GI Regulation was enacted with the express aim of promoting small agricultural enterprise¹⁰⁵.

In Europe, a system for their registration is considered as an important part of their agricultural policy. This system fulfil two main objectives first it "generates income for small and medium size producers" and second it plays an important role in "guarantee the sustainability of the rural economy"¹⁰⁶. In a successful attempt to export this model, the EC negotiated its inclusion in the TRIPS Agreement albeit limited to wines and spirits¹⁰⁷.

¹⁰⁴ Ibid, 442

¹⁰⁵ G. E. Evans, "The Comparative Advantages of Geographical Indications and Community Trademarks for the Marketing of Agricultural Products in the European Union"

¹⁰⁶ G. E. Evans* and Michael Blakeney, "the protection of geographical indications after doha: quo vadis?" *Journal of International Economic Law* Advance Access published July 12, 2006

¹⁰⁷ Blakeney M., 'Stimulating Agricultural Innovation', in K. E. Maskus and J. H. Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge, UK: Cambridge University Press, 2005), 367-90.

The European Community and its supporters work for increased protection for Geographical Indications in other words they support the extension of Geographical Indications protection for “agricultural products¹⁰⁸, foodstuffs, and handicrafts”. Finally in June 2005 European Communities (EC) suggest amendment in the TRIPS Agreement to provide a multilateral system of registration and enforcement for GIs¹⁰⁹ and submit a proposal¹¹⁰.

2.4 Geographical indications as a development tool

The Geographical Indications have the potential to develop the rural areas. The Geographical Indications provides an opportunity to the owner to get economic benefits and excludes the non entitled user. These attributes will, in turn, translate into

108 The purpose of protection is to promote agriculture's role in protecting the rural environment, in producing safe and high quality food and in contributing to maintaining the attractiveness of rural areas for the young and new residents.

109 In June 2005, the EC submitted a proposal for amending Section 3 of the TRIPS Agreement with a view to extending the regime of protection today available for geographical indications on wines and spirits to geographical indications on all products ('extension') and in addition a proposal for the inclusion of an annex to the TRIPS Agreement establishing a multilateral system of notification and registration of geographical indications (GIs). World Trade Organization, General Council, Trade Negotiations Committee, Council for Trade-Related Aspects of Intellectual Property Rights, Special Session on Geographical Indications, Communication from the European Communities 14 June 2005, WT/GC/W/547, TN/C/W/26, TN/IP/W/11. See earlier submissions of the EC, 22 June 2000, IP/C/W/107/Rev.1 with respect to the register and submission of 2002 in respect of the extension, IP/C/W/353, 24 June 2002.

110 G. E. Evans* and Michael Blakeney, "the protection of geographical indications after doha: quo vadis?" *Journal of International Economic Law Advance Access* published July 12, 2006

an equitable distribution of value and benefits to the owners of Geographical Indications and their communities¹¹¹.

Geographical Indications may play an important role in the removal of poverty in the rural areas. That's why many countries emphasising that to extend the protection to handicrafts and traditional knowledge¹¹².

The EU Commissioner responsible for Agriculture, Rural Development, and Fisheries cited rural development as one of the contributions of GIs.

Several studies have shown that they GIs have an important role to play in the regeneration of the countryside since they ensure that agro-foodstuffs are produced in such a way that conserves local plant varieties, rewards local people, supports rural diversity and social cohesion, and promotes new job opportunities in production, processing and other related services. The needs of today's population are met, while natural resources and traditional skills are safeguarded for generations to come¹¹³.

In other words Geographical Indications can also provide an export opportunity for small and medium scale businesses¹¹⁴. One of the most important features of

111 Geographical Indications & Socio-Economic Development, Working Paper 3 December 2008 Daphne Zografos

112 Hélène Ilbert and Michel Petit, "Are Geographical Indications a Valid Property Right? Global Trends and Challenges" *Development Policy Review*, 2009, 27 (5): P:504

113 Teshager Worku Dagne, "Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products", *Oxford Journal of Intellectual Property Law & Practice*, (2010), Vol. 5, No. 6, 442, P:450

114 Victor mosoti, "International mechanisms for the protection of local Agricultural brands in central and eastern Europe" *Legal Papers Online* August 2006 P:9

<http://www.fao.org/legal/prs-ol/lpo60.pdf> last visited on November 3, 2010

Geographical Indication is that it gives a success of the rural development projects and program by giving the protection to the local products¹¹⁵.

(Nelson 1970; Josling 2005; Klein and Leffler 1981; Moschini 2004)

Geographical Indications are increasingly viewed as helpful tools for achieving product differentiation, and can increase economic efficiency because such measures provide producers with incentives to deliver appropriate supply to the market¹¹⁶.

2.5 Economic and Social Benefits of Geographical Indications

The World Intellectual Property Organization (WIPO) has also listed those benefits. In one of its symposiums on Geographical Indications, Surip Mawardi has talked about those benefits during his presentation on "Establishment of Geographical Indication Protection System in Indonesia, Case in Coffee." This reference is suitable here, because, like Brazil, Indonesia is a developing country and faces problems with Geographical Indication and protection of property rights as a whole. In his work Mawardi has written that the Protection Law on Products with Geographical Indication is important and therefore its application is justified because of the following benefits it bears:

115 Hélène Ilbert and Michel Petit, "Are Geographical Indications a Valid Property Right? Global Trends and Challenges" *Development Policy Review*, 2009, 27 (5): P:505

116 Jeongwook Suh and Alan MacPherson, "The impact of geographical indication on the revitalization of a regional economy: a case study of 'Boseong' green tea"

- Geographical Indications can be used in the domestic and in the international market in a product's marketing strategy
- Geographical Indications promote an improvement in the producers' livelihood, as it adds more value to the certified product
- Geographical Indications is a tool that rural areas have to develop themselves using the good reputation of their product's quality
- Geographical Indications can improve the reputation of the product in global trade
- Geographical Indications is seen as an action to evade unfair competition (Mawardi 3)¹¹⁷.

2.5.1 The socio-economic utility of GIs

As a study by the United Nations Conference on Trade and Development clearly recognizes:

Geographical indications reward producers that invest in building the reputation of a product. They are designed to reward goodwill and reputation created or built up by a producer or a group of producers over many years or even centuries. They reward producers that maintain a traditional high standard of quality, while at the same time allowing flexibility for innovation and improvement in the context of that tradition¹¹⁸.

117 Sarah M. Faria, "Producers' Perspectives towards the Geographical Indication Recognition Process in Brazil - An Analysis of Difficulties Found in the Process and Possible Improvements", August 2010, p:13

<http://etd.ohiolink.edu/send-pdf.cgi/Faria%20Sarah%20M.pdf?ohiou1280298282> last visited on October 14, 2010

118 Teshager Worku Dagne, "Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products", Oxford Journal of Intellectual Property Law & Practice, (2010), Vol. 5, No. 6, 442, P:449..

The reward that GIs may offer arises from the “substance of the concept” of GIs, which is to demonstrate a link between the origin of the product to which it is applied and a given quality, reputation or other characteristic that the product derives from that origin¹¹⁹. GIs carry additional information about the product such as a traditional production method¹²⁰. They signify added value and specific qualities of a product from a region by enabling producers to differentiate their products based on criteria attractive to consumers. Consumers now seek quality products, authentic products with a solid tradition behind them, and they are influenced by their social conscience when choosing products¹²¹.

Most of GIs have the potential to create positive social and environmental effects for the benefit of rural development. Even if it is not their major goal, most of them take it into account for two reasons: to guarantee the promise to consumers of an artisan, extensive, traditional, ethical production; to respond to donors’ and public authorities’ concerns. Public support is a strong pillar of the GI systems institutional framework in European and developing countries. Most of initiatives have received financial and non-financial support, mainly justified by these expected positive side-effects.

In this context, to prove positive side-effects of GIs on rural territories is an important issue. If successful, it reinforces sympathy towards the protection of GIs and helps to explain

119 WIPO, The Definition of Geographical Indications (Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Ninth Session, Geneva, 11–15 November 2002) Sct/9/4 [Definition] at para 4...

120 D Gangjee, ‘Quibbling siblings: conflicts between trade marks and GIs’ (2007) 82 Chicago-Kent Law Review 1253 at 1257...

121 Ibid

and justify public support. It would change the political vision about the relative efficiency of competing food systems, if reliable methods could compare the global performance (economic, social, and environmental) of conventional supply chains and various alternative systems¹²².

The basic economic function of geographical indications is to protect the goodwill of products to which they relate. There is no agreed definition of goodwill, at least in international trademark law. It can be conveniently defined as the "tendency or likelihood of a consumer to repurchase goods or services based upon the name or source of goods and services" (WIPO 2003)¹²³.

Following are the equitable distribution of value and benefits to the owner of

Geographical Indications and their communities:

1. The owners of Geographical Indication will provide with the opportunity to get economic benefits from their Geographical Indication.
2. The owners of Geographical Indication have the right to exclude non entitled users by creating a barrier to entry into a niche market segment¹²⁴.

It is widely believed that an effective protection of a GI-product, by way of preventing loss of value through copying, free riding or usurpation, could facilitate in increasing

122 Sophie Reviron, "Geographical Indications: creation and distribution of economic value in developing countries" March 2009.P:21

http://phase1.nccr-trade.org/images/stories/publications/IP5/report_IP5_GI_Value_2009.pdf last visited on October 18, 2010

123 Surbhi Jain, " Effects of the extension of geographical indications: a south Asian perspective", Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009.P:68

124 Working Paper 3 Daphne Zografos, "Geographical Indications & Socio-Economic Development", December: 2008. P.12

the inflow of cash income in the community involved in its production. Hence, GI is often cited as a tool that has the potential to contribute to rural development, though indirectly, through a reduction in income poverty of the rural poor¹²⁵.

“Social benefits such as the creation of employment, the retention of the population in rural areas and the possibility to generate tourism will also benefit the owners of a Geographical Indication and the community as a whole”¹²⁶.

2.6 The utility of Geographical Indications with regard to Traditional Knowledge

There is no specific definition of the term ‘traditional knowledge’ and also it is difficult to distinguish it from other knowledge. We have some relevant terms with “traditional knowledge”, as “indigenous knowledge”, “local knowledge”, “folk knowledge”, and “community knowledge” etc. But it is better to use the term “traditional knowledge” here, in order to avoid possible ambiguities.

The definition of TK provided by the African Group in its submission to the World Intellectual Property Organization (WIPO):

“TK is thus the totality of all knowledge and practices, whether explicit or implicit, used in the management of socio-economic and ecological facets of life”¹²⁷.

125 Kasturi Das, “Socioeconomic Implications of Protecting Geographical Indications in India” Center of WTO studies, August 2009

126 Working Paper 3 Daphne Zografos, “Geographical Indications & Socio-Economic Development”, December: 2008. P.12

Geographical Indications is also considered as an important instrument for the protection of traditional knowledge. This is because, *“Geographical Indication as an instrument of intellectual property (IP) protection has certain peculiar features, which in contrast to other IPRs, are considered to be relatively more amenable to the customary practices of the indigenous communities”*.¹²⁸

2.6.1 The suitability of Geographical Indications for protecting TK

Geographical Indications are the most appropriate and a suitable way for protecting TKBAPs. For the following reasons:

First, in IP regimes GIs are unique in the sense that GIs are based upon “collective traditions and a collective decision-making process”¹²⁹ Geographical Indications apply to all producers who live in that particular area or location which gives rise to a quality or reputation indicated by Geographical Indications¹³⁰.

Second, GIs relate to the old knowledge of the product and their cultural importance¹³¹. As Geographical Indications is a part of intellectual property law so most of the other IPRs provide exclusive rights to the person who creates new

127 Teshager Worku Dagne, “Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products”, Oxford Journal of Intellectual Property Law & Practice, (2010), Vol. 5, No. 6, 442

128 Kasturi Das, “Socioeconomic Implications of Protecting Geographical Indications in India” Center of WTO studies, August 2009

129 S. Singhal, “Geographical Indications and Traditional Knowledge”, Oxford Journal of Intellectual Property Law & Practice (JIPLP) (2008) 11, 732 at 733

130 Teshager Worku Dagne, “Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products”, Oxford Journal of Intellectual Property Law & Practice, (2010), Vol. 5, No. 6, 446

131 Ibid, 447

knowledge that's why other IPRs are not suitable to protect TK-based products¹³².

"GIs do not reward "new inventions", they reward the goodwill and reputation that producers who use traditional methods created or built up in a geographical territory"¹³³.

Third, The beneficial impact of Geographical Indications depends upon the maintenance of collective tradition. In other words, Geographical Indications provides benefits to its rights holders as long as they maintain collective tradition¹³⁴. Geographical Indications provides protection for production methods which can be changed and modified according to the circumstances GIs do not restrict to one method of the given product. In this way GIs allow evolution of the product this characteristic of GIs makes it suitable for the protection of TK-based products¹³⁵.

"GIs recognize the quality and reputation of cultivations by particular communities indefinitely, and prohibit others from free-riding off that reputation, as long as natural and cultural characteristics in the relevant place of cultivation are maintained"¹³⁶.

132 Ibid

133 T Cottier and M Panizzon, 'Legal perspectives on TK: the case for intellectual property protection' (2004) 7 JIEL 371 at 380.

134 Teshager Worku Dagne, "Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products", Oxford Journal of Intellectual Property Law & Practice, (2010), Vol. 5, No. 6, 447

135 Teshager Worku Dagne, "Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products", Oxford Journal of Intellectual Property Law & Practice, (2010), Vol. 5, No. 6, 447

136 Ibid

2.7 Geographical Indications have a means of maintaining Culture

Culture can be an economic asset¹³⁷. Cultural heritage is the most important part of a particular area and Geographical Indications can be a useful tool to protect the cultural heritage of the area. Developing countries considers the traditions and cultural knowledge as the most valuable assets. Geographical Indications gives opportunity to the consumers to get knowledge about the culture, traditions, art and traditional craft. It becomes obvious from the history that developing countries need to take strong measures to protect their cultures otherwise they will lose their valuable cultural heritage¹³⁸.

Culture plays an important role in configuring and contextualizing GI-products – not only in terms of stabilizing particular repertoires of ‘good farming’ but also in terms of notions of authenticity and origin of products. As protection transforms cultural values into economic value and re-organizes supply chains, it also impinges on existing patterns of use of the protected products (and their intermediate inputs)¹³⁹.

137 See generally chris hayter & stephanie casey pierce, nat'l governors ass'n, ctr. For best practices, arts & the economy: using arts and culture to stimulate state economic development (2009), available at <http://www.nga.org/Files/pdf/0901artsand economy.pdf>.

138 Alexandra Basak Russell, "Using Geographical Indications to Protect Artisanal Works in Developing Countries: Lessons from a Banana Republic's Misnomered Hat", *Transnational law & Contemporary problems*, vol. 19:705, Spring 2010:p:727

139 Dr. Dwijen RANGNEKAR; " The International Protection of Geographical Indications: The Asian Experience" CSGR and the Law School, University of Warwick UNCTAD / ICTSD Regional Dialogue "Intellectual Property Rights (IPRs), Innovation and Sustainable Development" 8 - 10 November; Hong Kong, SAR, People's Republic of China.

2.8 Costs and Limitations of Geographical Indications as a Development Tool

It is universally established that successful Geographical Indications become the sources of many social and economic benefits in developing countries. But for the attainment of these benefits well organized policy for Geographical Indications are required.

The economic and social benefits attributed to geographical indications through the creation of value in the market place require investment, such as in production methods, the development of reliable supplies of raw materials and quality controls. These costs, which may be significant, are to be borne by the owners of geographical indications, be it the producers or their governments.¹⁴⁰

2.9 The Rationale behind the Extension in protection available for Geographical Indications:

Following are the few rationales which are given for the extension of Geographical Indications protection for the products (agricultural products, foodstuffs, and handicrafts) other than wine and spirit.

a. All products of Geographical Indication other than wine and spirit are facing the problem of legitimate method of marketing such good, so, they are in need of

140 Working Paper 3 Daphne Zografos, "Geographical Indications & Socio-Economic Development", December: 2008. P.13

satisfactory extension in Geographical Indications (under TRIPs) for all products.

WTO (2001 b) is in favour of such extension.¹⁴¹

b. There are some reasons on the basis of which certain products are given undue protection as presents, there are no authorized rules. The reasons are:¹⁴²

1. The products having particular quality due to a specific region
2. The products may be counterfeited. Or the products not having the desired quality¹⁴³.

c. The products and the consumers will be given identity and variety of choice respectively under extended protection¹⁴⁴.

d. Extension would not only provide opportunities for trade but also encourage healthy agricultural competition and contribute to the betterment of rural communities. Furthermore it would provide local protection like GIs 145.

e. Wide-ranging establishment of GI protection would sufficient enough to carry out business activities and developments among different member states of WTO without any priority to one member state. In addition to that TRIPS Agreement endows with sufficient proofs that flexibility on the basis of exception and transitional periods cannot affect trade flow, production and exportation of products. 146

141 Surbhi Jain, " Effects of the extension of geographical indications: a south Asian perspective", Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009.P:77

142 Ibid

143 Ibid

144 Ibid, 77.78

145 Ibid, 77

146 Ibid, 77

f. Although implementation of new law requires administrative costs, in given perspective WTO is the assigning authority for the implementation of costs, in the testimony of TRIPS. Increased level of protection does not involve new cost but it would be applied to those countries who are claiming for the first for other products. Conversely, extending would lower the legal cost, mentioned in TRIPS in relation to wine and spirit protection type¹⁴⁷.

2.10 Brief outline of the different positions:

2.10.1 The Demanders:

The countries that support the extension of Article 23 to other products as well as a multilateral register for wines and spirits are the European Union and some Eastern European countries (non-EU members), China, Iceland, India, Kenya, Mauritius, Nigeria, Pakistan, Sri Lanka, Switzerland, Thailand, Tunisia, Turkey, Jamaica and several other Caribbean and Andean countries, as well as several African countries.

2.10.2 The Joint Proposal Group:

The group opposing an extension of Article 23 are the United States, Argentina, Australia, Brazil, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Djibouti, Dominican Republic, El Salvador, Guatemala, Hong Kong, Japan, Malaysia, Mexico,

147 Surbhi Jain, " Effects of the extension of geographical indications: a south Asian perspective", Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009.P:77

New Zealand, Paraguay, the Philippines, South Africa and Uruguay. Instead they support the idea of a voluntary notification and enforcement system within the WTO.

2.11 Arguments in favour of increased protection of Geographical Indication

- a) Export market can get a boom by additional protection of Geographical Indication for all types of goods.
- b) Additional protection can avoid free-riding in value particularity of all such goods.
- c) Article 22 contains ambiguity regarding the enforcement of protection for Geographical Indications for goods other than wine and spirit.
- d) Article 22 is also responsible for hoodwinking and unjust treatment towards the public for the protection of Geographical Indications¹⁴⁸.

2.12 Arguments against increased protection of Geographical Indication

- a) The legal and administrative costs associated with extending the scope Article 23.1 would be significant;
- b) There is no evidence of failure of Article 22 to protect Geographical Indications for products other than wines and spirits;
- c) There is no evidence to indicate whether extending the scope of Article 23.1 to products other than wine and spirits would result in more effective protection than is already afforded to those products under Article 22;

148 Carina Folkesson, "Geographical Indications and Rural Development in the EU" p:21.22 <http://biblioteket.ehl.lu.se/olle/papers/0000429.pdf> last visited on November 2, 2010

d) Additional protection could close-off future market access opportunities in emerging industries and result in uncertainty concerning the continued use in existing markets;

e) Consumer confusion would be caused through the disappearance of terms customarily used to identify products which will, in turn, increase search and transaction costs for consumers and potentially prices as well¹⁴⁹.

2.13 Importance of Geographical Indications through Case Studies

A case study of 'Boseong' green tea

Boseong is a country which is located in the southern coastal area of the Korean peninsula. Its specialty is green tea because it has the warm and rainy climate which is a suitable condition for the cultivation of green tea. In Boseong there are eighteen producers engaged in the production of green tea properly operating under the cover of Geographical Indications. One of the authors in order to analyze or evaluate the contribution or beneficial impacts of Geographical Indications conducted the interviews of the eighteen producers. Furthermore, the officials of local government were also interviewed because the contribution of government of Boseong in the implementation of Geographical Indications was remarkable. Interviews were

149 Carina Folkesson, "Geographical Indications and Rural Development in the EU" p:21.22 <http://biblioteket.ehl.lu.se/olle/papers/0000429.pdf> last visited on November 2, 2010)

conducted in February 2006. The objective of the interviews was to address the following issues:¹⁵⁰

1. To observe the impact of Geographical Indications on the sale and production.
2. The role of Geographical Indications in the rising import competition through trade liberalization.
3. The role of Geographical Indications in the preservation of culture and heritage and in the tourism sector.
4. The process of implementation of Geographical Indications.
5. The interaction between producers for quality control.¹⁵¹

2.13.1 Quality improvement:

The most important and prominent effect of Geographical Indication pertains to the quality control and improvement in the quality of the product. All the eighteen producers regarded it the most salient aspect of Geographical Indications. One of the producers noted that:

Since the introduction of the geographical indication system, the image of Boseong green tea has been greatly enhanced. While the image of Boseong tea was vague in the past, the geographical indication made the image more evident because

150 Jeongwook Suh and Alan MacPherson, "The impact of geographical indication on the revitalization of a regional economy: a case study of 'Boseong' green tea", *Area* Vol. 39 No. 4, pp. 518-527, 2007, ISSN 0004-0894 © The Authors. Journal compilation © Royal Geographical Society (with The Institute of British Geographers) 2007.p:520

151 Ibid

the geographical indication means that the quality of the product has been officially acknowledged. We are very proud of the fact that Boseong green tea is the first product to have been officially registered as a geographical indication in Korea. In this era of trade liberalization, quantity or price is no longer effective to cope with cheap imported agricultural products from countries such as China, for example. Now is the time to compete with quality¹⁵².

One of the officials of the local government commented in the following words:

The thing that we put the most emphasis on with regard to the geographical indication is quality control so that Boseong green tea can be continuously acknowledged as a reliable brand. To make Boseong green tea an internationally famous brand like French Cognac for example, we think the most important thing is to continuously strengthen quality management. Geographical indication should fail unless appropriate quality control is guaranteed. Therefore we are making efforts to enhance the quality and to keep the quality standardized¹⁵³.

For quality control, persons concerned with the Geographical Indication including green tea producers, local officials and experts in research institutes regularly have 'quality evaluation meetings'. One producer explained that

We randomly pick up Boseong green teas with geographical indication in the markets and bring them to the evaluation meeting place. The persons concerned evaluate them through

152 Ibid

153 Jeongwook Suh and Alan MacPherson, "The impact of geographical indication on the revitalization of a regional economy: a case study of 'Boseong' green tea", *Area* Vol. 39 No. 4, pp. 518-527, 2007, ISSN 0004-0894 © The Authors. Journal compilation © Royal Geographical Society (with The Institute of British Geographers) 2007.p:522

senses such as taste, color, and smell. In addition, we compare our products with like-products from other regions. In this process we give advice for inferior products to enhance the quality and keep the quality standardized. Because the local producers share the same experience and meet often, it is easy to communicate with each other to reach a common understanding. Because even one or two products which fall behind the quality requirement can damage the whole image of Boseong green tea, this quality evaluation meeting functions as a kind of peer pressure and plays an important role for quality control¹⁵⁴.

For the registration of Geographical Indication it is one of the conditions 'that the producers should be organised as the same legal person, the producers tend to be tied to a common fate'. This condition plays a vital role in the 'information sharing, education and training in a cooperative manner to strengthen learning effects regarding quality improvement'. Information sharing among the producers organized under the same legal person is the key factor in making the Boseong green tea industry highly unified¹⁵⁵.

2.13.2 Product marketing:

From the results of the interviews it became clear that Geographical Indications had a best and positive impact 'on prices and production levels, largely as a result of improved marketing.' The emergence of Geographical Indications, the market value and price of Boseong green tea has increased by 90 per cent as a result of its enhanced

154 Ibid

155 Ibid

image and brand value'. This fact can be proved that the prices of the non- Boseong tea produced in Korea have not changed to any significant degree. One producer noted that:¹⁵⁶

Since the geographical indication, the consumers' recognition and price of Boseong green tea has increased, which in turn has contributed to the increase of production. On average the production grows by 20–30% every year. Taking into account the fact that a lot of additional tea trees were planted recently more accelerated production can be expected in 3–4 years when the trees can produce teas¹⁵⁷.

2.13.3 Trade policy

From the interviews result it becomes clear that Geographical Indication has the potential and expected that it can function as an effective tool to cope with trade liberalization. 'Korea's current import tariff on green tea amounts to 514 per cent, and these high tariffs have been in place for several decades. Currently, the price of green tea in Korea is fully four times higher than the competitive International price'.

If the import tariff is reduced in accordance with WTO directives, then domestic green tea producers may have difficulty competing with cheaper imports. In fact, according to the interview results, most producers feel seriously threatened by the trend toward trade liberalization. However, they admitted that in this globalization era the trend of trade liberalization is inevitable. In particular, they answered that

156 Jeongwook Suh and Alan MacPherson, "The impact of geographical indication on the revitalization of a regional economy: a case study of 'Boseong' green tea", *Area* Vol. 39 No. 4, pp. 518–527, 2007, ISSN 0004-0894 © The Authors. Journal compilation © Royal Geographical Society (with The Institute of British Geographers) 2007, p:523

157 Ibid

the geographical indication can be a good policy to cope with trade liberalization¹⁵⁸.

According to one producer,

We cannot block open market policy that comes with the WTO or FTAs. However, if the geographical indication brings about quality improvement and enhances consumers' recognition of our products, I think trade liberalization may come as an opportunity rather than a threat¹⁵⁹.

These results suggest that quality improvement via geographical indication can be a critical element in coping with trade liberalization. If consumers' recognition of domestic agricultural products increases to the extent that they perceive such products as luxury brands, then domestic products may be able to compete with cheaper imports via product differentiation (Lillywhite *et al.* 2005)¹⁶⁰.

2.13.4 Place marketing and tourism:

The impact of Geographical Indication on the market place and tourism remains positive. 'The producers and local officials responded that since Geographical Indication, tourist numbers visiting Boseong have increased substantially because of the enhanced image of the place'. In the survey conducted by the Korea Tourism Organization in 2004, it was concluded that Boseong was selected by the visitors as the

158 Jeongwook Suh and Alan MacPherson, "The impact of geographical indication on the revitalization of a regional economy: a case study of 'Boseong' green tea", *Area* Vol. 39 No. 4, pp. 518–527, 2007, ISSN 0004-0894 © The Authors. Journal compilation © Royal Geographical Society (with The Institute of British Geographers) 2007, p:523

159 Ibid

160 Ibid

most favourable visiting place among Koreans. It can be easily said that Geographical Indications not only enhanced the commercial value of the product but also marketing the place. Geographical Indication positively contributes in presenting the image of the place. Local government is properly taking advantages from the enhanced place image by conducting tea festivals. 'As a result, the number of tourists visiting Boseong has sharply increased to 5.5 million in 2004'¹⁶¹.

According to the official in the local government:

Since the geographical indication, the general public's recognition of Boseong has become higher and better. The equation that 'Boseong is green tea and green tea is Boseong' has been rooted in the minds of the general public. With the current well-being trend, the tourists to Boseong have been greatly growing. We are trying for the general public to relate Boseong to the word of rest or relaxation¹⁶².

2.14 The Case of Ceylon Tea:

Sri Lanka gets importance due to its teas with unique flavours and aroma. One of the best teas of Sri Lanka is traditionally known as "Ceylon Tea". It has a global market and the main buyers of this tea are Australia, Europe, Japan, and North America. This sector is creating a job opportunity for more than 3000,000 people. Today, tea

161 Jeongwook Suh and Alan MacPherson, "The impact of geographical indication on the revitalization of a regional economy: a case study of 'Boseong' green tea", *Area* Vol. 39 No. 4, pp. 518-527, 2007, ISSN 0004-0894 © The Authors. Journal compilation © Royal Geographical Society (with The Institute of British Geographers) 2007.p:524

162 Ibid

accounts for approximately 15 % of the agriculture exports of Sri Lanka. The process of preparing tea is the main reason for its high quality¹⁶³. Tea is plucked by hand usually two leaves and a bud¹⁶⁴ which is considered as another major reason for the unique quality of Ceylon Tea. During the manufacture of pure Ceylon Tea no artificial flavouring or preservatives are added, which makes the tea unique. In order to export best quality product in the foreign market several precautionary measures takes place such as anything does not cope with the standards is rejected. Sri Lanka is the largest exporter, bringing in over US\$700 million in earnings to support over 1 million people¹⁶⁵.

Today Sri Lanka is the world's third biggest tea producer and the industry is the main source of foreign exchange earnings. Out of the total 21% of the GDP from agricultural export the tea industry accounts for 15%. Its production is around 9% of the share globally and also accounts for 19% of the market share. The major export countries are the U.S. (\$1.8 billion), U.K., Germany, Japan, and Belgium. Moreover, Russia, countries of the

163 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 | Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).

164 It is only the bud and two youngest leaves that are plucked that give the flavour and aroma. The first quality inspection is made in the muster sheds where the leaf is weighed. In the factory the leaves are withered using large blowers and they are cut to bring out the juices for fermentation. During fermentation the humidity, temperature and fermentation time are well controlled to ensure that the flavour and aroma are not lost. Once the fermentation is completed the leaf is fired, to lock in the flavour, to dry it to improve the keeping qualities.

165 Swarnim Waglé, "Geographical Indications as Trade-Related Intellectual Property: relevance and implications for human development in Asia-Pacific" Asia-Pacific Trade and Investment Initiative, UNDP Regional Centre in Colombo, January 2007

Commonwealth of Independent States (CIS), UAE, Syria and Turkey are Sri Lanka's other minor tea export countries¹⁶⁶.

It is proved that the GI "Ceylon Tea" is playing a major role in the socioeconomic development and providing a large number of benefits to the people of Sri Lanka. If there is one it can be protected through the GI because of its wide reputation. It is also important to note that a higher level of protection is internationally needed to ensure better socioeconomic benefits¹⁶⁷.

166 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 | Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).

167 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 | Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).

CHAPTER: III

COMPARATIVE LEGAL ANALYSIS OF SELECTED ASIAN COUNTRIES

3.1 Introduction

Many countries from Asia are active members of the demander group for GI-extension at Geneva¹⁶⁸. Differences in the form and substance of GI protection have long been a transatlantic trade irritant¹⁶⁹. The EU countries have protected GIs for a long time through a sophisticated system of sui generis GIs that incorporate stringent criteria¹⁷⁰. The Asian countries had GIs protections for products long before the TRIPS Agreement. But legal protection as envisaged under the TRIPS Agreement seems never to have existed in these countries. So an attempt is made to examine the nature and content of the legal tools adopted to protect GIs¹⁷¹. According to the Article 22 of the TRIPS *"unless a GI is protected in a country of its origin there is no obligation under the*

168 Dr. Dwijen Rangnekar; "The International Protection of Geographical Indications: The Asian Experience" CSGR and the Law School, University of Warwick UNCTAD / ICTSD Regional Dialogue "Intellectual Property Rights (IPRs), Innovation and Sustainable Development" 8 – 10 November; Hong Kong, SAR, People's Republic of China.

169 T Josling, "The war on terroir: geographical indications as a transatlantic trade conflict" (2006) 57 Journal of Agricultural Economics 337–363 at 338.

170 Teshager Worku Dagne, "Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products", Oxford Journal of Intellectual Property Law & Practice, (2010), Vol. 5, No. 6, 444

171 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 | Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).

*TRIPS Agreement for other country to extend reciprocal protection*¹⁷². It is argued that a carefully structured legal protection of GIs could facilitate the socio-economic development of producers of GIs products including those local and village communities in developing countries¹⁷³.

3.2 The attraction of GIs for developing countries

The developing countries have long suggested amendment in the Paris Convention regarding the cancellation of a registration of a mark, and the prohibition of the use of a mark, "if the mark contains a GI of a country from which the associated goods do not originate and similar goods are now or later produced in the named geographical region"¹⁷⁴ because the developed countries have already secured protection for their GIs to aid in their export trade, and, at the same time, have permitted the geographical names of developing countries to become registered as marks, thus effectively frustrating the use by developing countries of their geographical names¹⁷⁵.

In this context, the interest of developing countries in GIs has traditionally been for the primacy of GIs over trade marks to be used to prevent the establishment, in developed countries, of trade mark rights in geographic names where distinctive biodiversity resources in the south are cultivated, which, in

172 Kaushik Laik, "Roll of Intellectual Property in Economic Growth", Journal of Intellectual Property Rights Vol 10, November 2005, pp 465-473

173 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 | Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).

174 WR Brookhart et al., "Current International Legal Aspects of Licensing and Intellectual Property" (American Bar Association, Chicago, 1980) at 19.

175 Ibid

effect, hinders the exports of goods from developing countries to larger markets¹⁷⁶.

In Doha negotiations the major supporters of GIs the EU and Switzerland highlighted the two hot issues in the WTO: an amendment to the TRIPS that would require disclosure of origin of genetic materials used in patent applications and the extension of high-level protection enjoyed by GIs for wines and spirits to GIs in other goods¹⁷⁷. The EU puts India as an example who is in favour of GIs protection because its economy is based upon its distinct culture, which it also exports in the form of saris (traditional dress worn primarily by Hindu women), specialty teas (Darjeeling, Assam), and rice varieties (such as Basmati)¹⁷⁸.

It appears that developing countries are taking interest in the subject of Geographical Indications. And some countries considering the Geographical Indications as an instrument that may contribute to a remunerative marketing of an agricultural production based upon traditional cultivation methods¹⁷⁹. The interest of the developing countries can be derived from the fact that many developing countries like

176 Teshager Worku Dagne, "Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products", *Oxford Journal of Intellectual Property Law & Practice*, (2010), Vol. 5, No. 6, p:445.446

177 WTO, Communication from Albania, Brazil, China, Colombia, Ecuador, the European Communities, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the ACP Group, and the African Group, Draft Modalities for TRIPS Related Issues, TN/C/W/52 (19 July 2008).

178 European Commission, External Trade, Intellectual Property, TRIPs and Geographical Indications: EU submits Three Communications on Geographical Indications, Brussels, 24 June 2002, http://europa.eu.int/comm/trade/issues/sectoral/intell_property/wto_nego/intel4.htm

179 Teshager Worku Dagne, "Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products", *Oxford Journal of Intellectual Property Law & Practice*, (2010), Vol. 5, No. 6, p:445.446

Chile, Brazil, Argentina, India, Malaysia, Singapore, Thailand, Jordan, and Egypt have developed their sui generis system for the protection of Geographical Indications, between 1996 and 2004. According to the WIPO's review of the IP of TK reports that Venezuela and Vietnam protects TK through GIs. India and Pakistan, have registered GI protections over diverse goods of immense export value, after widely publicized disputes involving Darjeeling tea, Basmati rice, and Jasmine rice¹⁸⁰.

3.3 Emergence of GI protection systems in Asia

Geographical Indication has been considered as an important development tool in Asia. But the information regarding their development aspects even in the major countries of that area is not on a high level. In this region China is taking new steps and strong measures with respect to introduce a new system for the Geographical Indications¹⁸¹. In China the products for which the Geographical Indications are available such as: *"agricultural products, food, traditional Chinese medicine, handicrafts, etc and registered geographical indication products are fruits, tea, rice, vegetable, poultry, flowers, yellow wine, beans, etc"*¹⁸².

180 Ibid

181 Daniele Giovannucci - Tim Josling - William Kerr - Bernard O'Connor - May T. Yeung, "guide to geographical indications Linking products And their origins" Geneva 2009p:68.69.

182 ASEM Working Group on Intellectual Property: Meeting on Geographical Indications, "GIs playing an important role in rural development"

3.4 Application and importance in South Asia

In South Asia the case of Basmati rice¹⁸³ heated up the importance of Geographical Indications. The important examples of Geographical Indications are in South Asia include: Himalayan waters, Alphonso and Sindhri mangoes, Bhutanese red rice, Pakistani shu (windproof woollen fabric) and ajrak (designs from Sindh), jasmine (Hom Mali) rice, Ceylon and Darjeeling teas, and Phulkari of Pakistan, among others¹⁸⁴.

3.5 Intellectual Property Rights regimes of the South Asian countries

Pakistan, Sri Lanka and India are taking progressive measures for IPR regimes while Afghanistan, Nepal and Bhutan are struggling in order to get a place in the world trade.

Pakistan does not have a sui generis system of GI protection yet. In Pakistan the protection is available for Geographical Indications under the country's Trade Marks Ordinance, 2001 and the Trade Marks Rules, 2004. This includes:

183 Basmati, a variety of *Oryza sativa*, is the fragrant, long, slender rice with a nutty flavour that has been grown in the northern parts of the Indian subcontinent for hundreds of years. Among the hundred or more types of aromatic rice in the world, basmati is probably the most expensive—India earns over \$400 million annually in basmati exports. In September 1997, Texas-based RiceTec Inc. was awarded Patent No. 5663484 on basmati rice lines and grains by the United States Patent and Trademark Office (USPTO). This caused a furore in the subcontinent, and provoked India to lodge an immediate protest. RiceTec had made 20 patent claims, essentially covering: (a) rice plants with characteristics identical to basmati; (b) grain produced by such plants; and (c) a method of selecting rice plants, based on the starch index test. Following the challenge by India, in September 2000 RiceTec withdrew 4 of its 20 claims. In March 2001, USPTO told RiceTec that, of its remaining claims, only three were approved, issuing it a varietal patent to market the types of basmati developed by it, and not cultivated and bred traditionally by farmers in India and Pakistan.

184Surbhi Jain, "Effects of the extension of geographical indications: a south Asian perspective", Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009.P:80.81

(a) Special laws for the protection of Geographical Indications or appellations of origin;

(b) Trademark laws in the form of collective marks or certification marks;

(c) Laws against unfair competition;

(d) Consumer protection laws;

(e) Specific laws or decrees that recognize individual Geographical Indications¹⁸⁵.

Sri Lanka protects Geographical Indications through their own country provisions which are available in "*part IX, chapter XXXIII under the new Intellectual Property Act, passed on 12 November 2003*". The protection available for Geographical Indications is broader in scope and provides strong protection for agricultural products and also has the provision for homonymous GIs. The Act contains the identical definition of Geographical Indications to article 22.1 of the TRIPS Agreement¹⁸⁶.

As it is clear to us that for the protection of Geographical Indications Sri Lanka has a *sui generis* system but has no registration system, on this point Sri Lankan Geographical Indications protection system receives criticism that this system of protection is similar to copyright protection and vulnerable. And for Geographical Indications protection is also available through trademark laws which make the country courts overloaded in order to provide remedies¹⁸⁷.

185 Surbhi Jain, " Effects of the extension of geographical indications: a south Asian perspective", Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009.P:80.81

186 Ibid

187 Ibid

A major deficiency in the new law for the protection of Geographical Indications is that it does not provide protection for handicrafts and fishery products. “Section 103 (marks), sections 160 and 161 (unfair competition)” of the Intellectual Property Act are the sections which provides protection for Geographical Indications¹⁸⁸.

India has a sui generis system for the protection of Geographical Indications. In India Geographical Indications are protected and governed by *Geographical Indication of Goods (Registration and Protection) Act 1999*. The examples of Geographical Indications in India are: Basmati Rice, Darjeeling Tea, Kanchipuram Silk Saree, Alphonso Mango, Nagpur Orange, Kolhapuri Chappal, Bikaneri Bhujia, Agra Petha, malabar pepper.

3.6 An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia

Under this heading we will examine the nature contents and usefulness of the legal tools for the protection of Geographical Indications used by *India, Thailand, Malaysia, Singapore, Indonesia, Jordan, China and Pakistan*. And also we will try to examine that whether these adopted legal tools by the Asian countries are contributing in the development of the producers of these countries socially and economically¹⁸⁹.

188 Ibid

189 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, “An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia”, Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 | Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).

In Asian countries, Pakistan and China gives protection to the products through trademark laws while other above mentioned countries had adopted sui generis laws of different nature from each other according to their circumstances. The main objective of these countries while making laws in their countries for protecting different kinds of Geographical Indications available there, to promote their socio-economic conditions of their producers. From a thorough study the laws protecting Geographical Indications of these Asian countries it becomes obvious to us that they provide higher protection to the products of agriculture, textile, and handicrafts from their countries similar two that are available in the TRIPs for wine and spirit. They also have the different standards and strategies for the quality control¹⁹⁰.

3.6.1 The Asian legal framework: a comparative analysis

In the pre TRIPs era in Asian countries the designations were protected through business practices such as unfair competition, consumer protection, and food standards. With the emergence of the modern trademark law after the industrial revolution, a new form of protection through collective and certification marks came into existence¹⁹¹. The protection available under TRIPs is not contrary to the prevailing protection in other words TRIPs Agreement does not remove the

190 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p: 18

191 Ibid, 19

prevailing system of protection. But the main objective of the TRIPs Agreement is to provide strong, effective and systematic protection for Geographical Indications. And provides international standards for the protection, the protection under TRIPs can be either through business practices, trademark law or *sui generis* options.

We will here see the response of the Asian countries towards the TRIPs standards for the protection of Geographical Indications, the laws of India, China, Thailand, Malaysia, Singapore, Indonesia, Jordan and Pakistan, all of which are analyzed.

The comparative analysis is limited to four major headings:¹⁹²

- (a) Conceptualization of Geographical Indications;
- (b) The nature of protection;
- (c) Institutional arrangement for administration.
- (d) The Legal Mechanisms for Quality Control

(a) Conceptualization of Geographical Indications

Under this heading we will try to get a clear picture of the term GIs and its definition in different countries. The definitions adopted by all the *sui generis* laws are according to the TRIPs Agreement. Under the laws of Thailand,¹⁹³ Malaysia,¹⁹⁴ Singapore¹⁹⁵ and

¹⁹² Ibid

¹⁹³ Geographical Indications Protection Act, B.E. 2546, section 3 defines GI "means a name, sign or anything which is used to call or represent a geographical origin which can identify that the product originating from that geographical origin is the product of quality, reputation or any unique characteristic of that geographical origin".

¹⁹⁴ The Geographical Indications Act, 2000 section 2 defines GIs as "an indication, which identifies any goods as originating in a country or territory or a region or a locality in that country or territory,

Jordan¹⁹⁶ are confined to that of TRIPS definition.¹⁹⁷ The definition of GIs in Indonesia is according to the TRIPs Agreement but with the addition that "Geographical environmental factors, including the factors of nature, the people, or combination of the two factors must be responsible for the specific characteristics and quality of the goods bearing the GIs"¹⁹⁸. In Indian legislation the definition of Geographical Indication provides wider scope of protection.

"Geographical Indications in relation to goods means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods

where a given quality, reputation or other characteristic of the good is essentially attributable to their geographical origin".

195 The Geographical Indications Act, 1999 section 2 defines GIs as "any indication used in trade to identify goods as originating from a place provided that (a) the place is a qualifying country or region or locality in the qualifying country; and (b) a given quality, reputation or other characteristic of the good is essentially attributable to that place".

196 Geographical Indications Law for the Year 2000 Article 2 defines GIs as "any indication, which identifies a good as originating in the territory of a specific country, or a region or locality of that territory where a given quality, reputation or other characteristic of the good is essentially attributable to its origin".

197 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:19

198 Law of The Republic of Indonesia Number 15 Year 2001 Regarding MARKS, Article 56 (1) defines GIs as "a sign indicating the place of origin of the goods, which due to its geographical environment factors, including the factor of the nature, the people or the combination of the two factors, gives a specific characteristic and quality on the goods produced therein".

concerned takes place in such territory, region or locality as the case may be"¹⁹⁹.

This definition properly prescribes the identification of designation eligibility for the protection and also elaborates the geographical factors that clearly establish the link with the product²⁰⁰. Majority of Asian nations are in the support that the term Geographical Indications must cover the wide range of products as possible to be designated by the GIs²⁰¹. The legislations of India,²⁰² Thailand,²⁰³ Malaysia²⁰⁴ and Singapore²⁰⁵ permits to include natural, agricultural, handicraft and industrial products in the definition of goods designated by the GIs while on this point Indonesia and Jordan remain silent. Thus the majority of laws increase the scope and coverage of domestic protection of Geographical Indications²⁰⁶. All the laws adopt silence on the

199 The Indian Geographical Indications Act, 1999 section 2 (e).

200 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:20

201 Ibid, 20

202 The Geographical Indications Act, 1999 section 2. 1. (f) defines goods as "...any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes food stuff."

203 Section 3 Goods" means things which can be purchased, exchanged or transferred whether they originate by nature or they are agricultural products including handicraft and industrial products.

204 Geographical Indication Act 2000 section. 2 "goods" means any natural or agricultural product or any product of handicraft or industry.

205 Geographical Indication Act 1999 section. 2 "goods" means any natural or agricultural product or any product of handicraft or industry;

206 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:20

extension of Geographical Indications protection in the field of services.²⁰⁷ In Asian countries only Pakistan and China provide protection of Geographical Indications through trademark law²⁰⁸. The definition of Geographical Indications provided by the legislations of Pakistan²⁰⁹ and China²¹⁰ is according to the mandate of TRIPs agreement²¹¹. The Trademark Ordinance of Pakistan defines goods broadly to include anything subject to trade, manufacture or commerce²¹². It is interesting to note that unlike other Asian countries, in China and Pakistan the GIs could designate goods and services²¹³.

207 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD). p:20

208 Ibid, 20

209 The Trademark Ordinance 2001, Pakistan, section 2: "Geographical indications, in relation to goods originating in a particular country or in a region or locality of that country, means a mark recognized in that country as a mark indicating that the goods- (a) originated in that country, region or locality; and (b) have a quality, reputation or other characteristic attributable to their geographical region".

210 The Trademark Law of the People's Republic of China, Section 16 (explanation). Geographical indications mentioned in the preceding paragraph are indications, which identify a good as originating in a region, where a given quality, reputation or other characteristic of the goods is essentially attributable to its natural or human factors.

211 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD). p:20

212 The Trademark Ordinance 2001 of Pakistan, Section 2(i) read: "goods" means anything which is subject of trade, commerce or manufacture".

213 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD). p:21

It is evident from this analysis that the intention of these countries is to cover all categories of GIs within the definition, keeping in mind the nature of the products in which GIs are used domestically. It is also clear that these countries have attempted to satisfy the obligations stipulated in the TRIPS Agreement.²¹⁴

(b) Nature of protection:

India²¹⁵, Thailand²¹⁶, Malaysia²¹⁷ and Indonesia²¹⁸ establish a registration system and from the provisions it becomes obvious that protection is also available for the unregistered Geographical Indications in these countries through different ways. On the other hand no system of registration prescribed by the Singapore and Jordan. "At the same time, Singapore provides that rights under the trademark laws or passing off are not affected by its laws"²¹⁹. Protection against unfair competition acts which are considered as misleading the public regarding the place of origin of the goods is available in all the above mentioned countries except Indonesia. The term unlawful use is defined in Thailand,²²⁰ as it includes 'unfair competition and consumer deception

214 Ibid

215 India, Chapter 2, 3 and 4 deals with the particulars of registration. Section 20(2) provides that "Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.

216 Chapter 2 of the Law of Thailand provides for registration of the GIs, but does not expressly provide that unregistered GIs are prevented from enjoying the passing off remedy. So it is assumed that Thai being a common law country protects unregistered GIs under the passing off remedy.

217 Malaysia, The Geographical Indications Act, 2000, section. 3 Protection under this Act shall be given to a geographical indication (a) regardless whether or not the geographical indication is registered under this Act.

218 In Indonesia, unregistered GIs are protected as source of origin (Article 59) and they enjoy the same rights enjoyed by the registered GIs (Article 60).

219 Singapore, The Geographical Indications Act, 1999, section. 12.

220 See section 27.

as to the place of origin of the goods and in Indonesia²²¹, it is not defined'. Singapore²²² and Jordan²²³, considered "the unfair competition and consumer deception are, *inter alia* as prohibited acts or uses". In Malaysia against these acts remedies in the form of injunction and damages²²⁴ are available. In India such acts are considered as acts constituting infringement^{225/226}.

Having different approach, all the laws seem to meet the standard of the TRIPs Agreement and provide legal protection for Geographical Indications against "consumer deception and unfair competition"²²⁷.

In China and Pakistan the nature of protection is different like China expressly indicates that "marks consisting of signs or indications designating the geographical origin of goods and services are eligible for registration as certification trademarks in Part B of the Register"^{228/229}.

221 Indonesia, Article 57(1) The Right Holder to a Geographical Indication may file a lawsuit against an unlawful user of the Geographical Indication, in the form of claim for damages and an order for stopping the usage as well as disposal of labels of the Geographical Indication concerned which have been unlawfully used." But the Act never defines the unlawful uses of the GI.

222 Singapore, sections. 3 (1) and (2).

223 Jordan Article 3.

224 Malaysia, section. 5.

225 The Indian Geographical Indications Act, 1999, section. 22 (1).

226 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:22

227 Ibid

228 Trademark Ordinance, China, section 64 (3).

229 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:22

The definition of certification in China is a type of trademark which is controlled by an organization capable of supervising a type of goods or service and which is used in respect of goods or services by other organizations or individuals who do not belong to the said organization, with a view to certifying the origin, raw material, mode of manufacture of goods or performance of services, quality or other characteristics²³⁰.

In Pakistan there are three different ways are available for the protection of Geographical Indications.

1. GIs designating goods or services could be registered as trademarks if they have acquired distinctiveness prior to the application for registration²³¹.
2. It also permits GIs to be registered as collective,
3. Or certification marks.^{232/233}

For the protection of Geographical Indications in Pakistan the owner can enjoy three options. But the question why these three options are available, the answer this question is still not available. Both China²³⁴ and Pakistan²³⁵ protect the prior uses of the

230 Trademark Law of China, section 3.

231 The Trademark Ordinance 2001, Pakistan, section. 14.

232 The Trademark Ordinance 2001, Pakistan, Schedule I & II.

233 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:23

234 Trademark Ordinance, China, section.64 (4) Nothing in this Ordinance shall entitle the proprietor of a certification trade mark that consists of signs or indications described in subsection (3) to interfere with or restrain the use by any person of any signs or indications the use of which is in accordance with honest practices in industrial or commercial matters (in particular, by a person who is entitled to use a

GIs, which are registered as a trademark, collective mark²³⁶ and certification mark²³⁷ as the case may be. So it becomes obvious that in both the countries the remedies are available in the form of passing off for unregistered Geographical Indications. China and Pakistan provides high level of protection for all the Geographical Indications which is available to the wine and spirits²³⁸.

geographical name). See also section 33 (1) Nothing in this Ordinance shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods or services in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date anterior-(a) to the use of the first mentioned trade mark in relation to those goods or services by the proprietor or a predecessor in title or his, or (b) to the registration of the first-mentioned trade mark in respect of those goods or services in the name of the proprietor or a predecessor in title of his, whichever is the earlier, or to object (on such use being proved) to that person being put on the register for that identical or nearly resembling trade mark in respect of those goods or services under section 22. (2) The references in subsection (1) to the use of a trade mark by a person's predecessor in title shall, as respects use in relation to services before the commencement of the Trade Marks (Amendment) Ordinance 1991 (44 of 1991), be construed as references to use by any predecessor of his in business. Also see section 34. No registration of a trademark shall interfere with- (a) any bona fide use by a person of his own name or of the name of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business (b) the use by any person of any bona fide description of the character or quality of his goods, not being a description that would be likely to be taken as importing any such reference as is mentioned in section 27(1)(b) or in section 67(1)(b); or (c) the use by any person of any bona fide description of the character or quality of his services, not being a description that would be likely to be taken as importing any such reference as is mentioned in section 27A(1)(b) or in section 67A(1)(b).

235 The Trademark Ordinance 2001, Pakistan, Entry 3 (2) of Schedule I & II The proprietor of such a mark shall not be entitled to prohibit the use of the marks or indications in accordance with honest practices in industrial or commercial matters, in particular, by a person who is entitled to use a geographical name.

236 Collective marks are owned by a collective body like a trade association and serve to indicate that goods or services displaying the mark are produced by an enterprise that is a member of the collective body. As membership to the association entails some qualifying standards, the collective mark is a distinctive sign conveying the said standards (i.e. quality, origin, etc.) of the trade association.

237 Certification marks are marks which indicate the goods or services on which they are used have specific qualities, produced in a particular way, have met a service standard and maybe, though not necessarily, of certain geographical origin. As a general rule the owner of a certification mark does not 'use' the mark but licenses it to other enterprises and certifies that the goods or services carrying the mark are of a certain quality. These are frequently used by bodies certifying industrial standards and are used by anybody that meets the standards set by the owner of the certification mark.

238 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical

Thus it is evident that the provisions of the majority of the countries satisfy the minimum standards prescribed in the TRIPS in this regard²³⁹.

(c) Institutional arrangement for administration:

Indian law prescribed a strong institutional legal framework for the administration and protection of Geographical Indications.

The application for registration of GIs and their authorized users is to be made to the Registrar of Geographical Indications. For the purpose of registration, a register of geographical indications is maintained at the Head Office of the Geographical Indications Registry (Chennai) in which all the registered GIs are entered with the names, addresses and a description of the proprietors, the names, addresses and a description of the authorized users and such other matters relating to the registered GIs as prescribed²⁴⁰. The Register of GIs contains two parts: Part A containing detail of registration of the GIs and Part B containing the particulars of authorized users²⁴¹. Procedures for registration are the same for both classes²⁴². GIs may be registered in respect of any or all of the goods comprised in such class of goods as may be classified by the Registrar and in respect of a definite territory of a country, region or a locality as the case may be²⁴³. Goods are to be classified according to the

Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD), p:23

239 Ibid

240 The Indian Geographical Indications Act, 1999, section. 6.

241 The Indian Geographical Indications Act, 1999, section.7.

242 The Indian Geographical Indications Act, 1999, section. 17 (3).

243 The Indian Geographical Indications Act, 1999, section. 8 (1).

International Classification of Goods for the purpose of registration of the GIs²⁴⁴. Procedures for registration are also detailed along with particulars to be furnished with the application²⁴⁵. Registration is valid for a period of 10 years and is subject to renewal^{246/247}.

In Malaysia all the powers regarding the administration of Geographical Indications are vested with the Registrar of Geographical Indications and he is also bound to maintain a GIs register which contains all the important particulars and records. "A Central GIs Office with branch offices is established under the Act and documents filed at the Branch Offices are deemed to have been filed at the Central Office"²⁴⁸.

No registration mechanism is available in Singapore and Jordan, the institutional mechanism for administration of the GIs is left to the law courts where the affected parties can opt to undertake law suits²⁴⁹.

In China if any person is interested and claiming to be entitled to the registration of geographical indications must apply in writing and in the prescribed manner.

In China the application of GIs is treated like an ordinary trademark application in all respects. When the application is accepted whether absolutely or conditionally, the applicant has to advertise the application as accepted and it will also be subject to

244 The Indian Geographical Indications Act, 1999, section. 8 (2).

245 The Indian Geographical Indications Act, 1999, sections. 10 & 11. Also Rule 32 & 25.

246 The Indian Geographical Indications Act, 1999, section. 18.

247 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:23.24

248 Ibid

249 Ibid

opposition. After giving due hearing to the parties, and following all the necessary formalities like to consider the evidence, imposing conditions and limitations, amendments, and modifications, the registration would be allowed.²⁵⁰

In Pakistan it is also requires that for the registration of Geographical Indications application is to be made to the registrar of the trademark along with the regulations governing the use of the mark²⁵¹, specifying the persons authorized to use the mark, conditions for membership of the association, conditions for the use of the mark and any sanctions against misuse in the case of a Collective Mark²⁵².

The regulations are to be approved by the Registrar taking into account compliance with the requirements to be furnished along with the application and that they are not contrary to public policy or morality²⁵³. For a certification mark, the Registrar has to also look into whether the applicant is competent to certify the goods or services for which the mark is proposed to be registered.²⁵⁴ If all the requirements are met, the application would be accepted and then the regulation is published.²⁵⁵ All other procedures in respect of trademark registration would be followed²⁵⁶.

250 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:24

251 The Trademark Ordinance 2001, Pakistan, Entry 6 (1) of Schedule 2 & Entry 5 (1) of Schedule 1

252 The Trademark Ordinance 2001, Pakistan, Entry 6 (1) of Schedule 2 & Entry 5 (2) of Schedule 1.

253 The Trademark Ordinance 2001, Pakistan, Entry 6 (1) of Schedule 1 and Entry 7 (1) of Schedule 2.

254 The Trademark Ordinance 2001, Pakistan, Entry 7 (1) of Schedule 2.

255 The Trademark Ordinance 2001, Pakistan, Entry 7 & 8 of Schedule 1 and Entries 8 & 9 of Schedule, 2

256 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable

(d) The Legal Mechanisms for Quality Control

The main objective of protecting Geographical Indications is to protect the interest (in maintaining the reputation of the GIs) of the consumer than ensure and protect the quality of the product. Though TRIPs does not describe any specific method for quality control system but makes it implied obligation for national laws of the signatories to establish a legal mechanism for quality control under Article 22(2). While protecting Geographical Indications the quality of the product could be ensured through various ways. In one way by adopting a direct approach and makes a prerequisite in the legislation for the method of quality control system. In this context the EC Regulations for the protection of GIs on agricultural products and foodstuffs²⁵⁷ are the best example according to Article 4 of the Regulation to claim protection it is necessary that product specifically contains quality. The other approach could be to leave it to the parties to establish it before the court of law when there is infringement of GIs²⁵⁸.

A notable feature of all the *sui generis* laws examined is that they do not contain any specific provision for quality control. Still, some of the provisions relating to

Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:24

257 Council Regulation (EC) No. 510/2006 of 20, March 2006, Official Journal of the European Union, 31.3.2006, L 93/12.

258 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:25

registration of GIs in these laws could be read as providing some inbuilt mechanism for quality control²⁵⁹.

Only in Indonesia the protection of Geographical Indications is available only on the basis of quality or unique features. In other words quality or the peculiar feature is made the basis for protection²⁶⁰.

In Singapore the importance is given to the prior use and use of GIs is the precondition for the protection,²⁶¹ no reference regarding quality is available.

It appears that whenever there is an allegation of prohibited uses of GIs, the plaintiff has to establish the quality based on prior use of the GIs and the reputation acquired. The prior user concept seems to be introduced in Singapore to ensure that only actual manufacturers of the product are entitled to use the GIs and others could use only with permission. This will enable the producers to maintain the quality of the product and also compels them to join together and protect the reputation of the GIs²⁶².

259 Ibid

260 Article 56 (7) of law of Indonesia.

261 Singapore, section 2 read: "Use means use as part of, or in connection with — (a) any transaction, including a purchase, sale or exchange; (b) any importing or exporting; (c) any advertisement; or (d) any invoice, wine list, catalogue, business letter, business paper, price list or other commercial document". Also see section 4 "Subject to the provisions of this Act, if it is established to the satisfaction of the Court that the defendant to an action brought under section 3 (1) has carried out or is carrying out an act to which section 3 applies, the Court may grant to the plaintiff one or both of the following: (a) an injunction (subject to such terms, if any, as the Court thinks fit) to restrain the further carrying out of the act; (b) damages or an account of profits.

262 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD), p:25,26

In India²⁶³, Thailand²⁶⁴ and Malaysia²⁶⁵ the detail about the quality reputation and other characteristics of the GIs were the prerequisites at the time of registration. Only Jordan is the Asian country in which laws no direct or indirect reference is available for quality control²⁶⁶.

263 In India, under the GIs Rules the applicant has the obligation to explain how the GIs serves to designate the goods as originating from the territory, region or locality as the case may be in respect of quality, reputation or other characteristics which are due exclusively or essentially to the geographical environment with its inherent natural and human factors and the production, processing or preparation which takes place in such place. It also insists on description of the human creativity involved if any. The application must also specify the standards for the use of GIs as regards the production, exploitation, making or manufacture of the goods and particulars of the mechanism to ensure that the standards, quality, integrity and consistency or other special characteristics are maintained by the producers, makers or manufacturers of the goods. The application must also detail the particulars of special human skill involved, the uniqueness of the geographical environment, or other characteristics associated with the GIs. Similarly, the application in respect of the registered proprietor and the authorized users of the GIs must contain a statement of the period during which, and the person by whom, the GIs have been used in respect of the goods specified in the application. The applicant has to file an affidavit testifying to such use with exhibits showing the GIs as used, the volume of sale under that GI, definite territory and related particulars. These provisions could be treated as an attempt to ensure prescribed standards of manufacture and quality.

264 In Thailand, the application must indicate the product using the GIs, details about the quality, reputation and other characteristics of the goods, and the relationship between the product and the geographical origin. After registration, the producers in the geographical area and the traders get the right to use the GIs. It is important to note that even though there is an obligation to provide details on the quality, reputation and other characteristics, the law of Thailand only prohibits the use of GIs in a manner causing confusion as to the geographical origin, quality, reputation or other characteristics of the goods. It is doubtful whether this provision could ensure quality of the products by users, particularly traders. Permitting the use of GIs by traders without proper quality control could result in dilution of the value of the GI causing irreparable injury to actual producers.

265 In Malaysia also, there is an obligation to give the details of the quality, reputation or other characteristics of the goods in the application for registration of GIs. The certificate of registration will contain the GIs registered, the demarcated geographical area, the name and address of the person in whose name the GIs is registered, the concerned goods, the quality, reputation and other characteristics of the goods and any conditions for use etc. Thus the intention of the Act is to ensure quality control. The right to use is limited to producers carrying out activities in the geographical area specified in the register in accordance to the quality, reputation or other characteristics. This ensures quality control and puts the responsibility on the actual producers in the geographical area. Even though dealers and traders are included in the definition of producers, they must also carry out their activities in the specified geographical area.

266 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable

China provides adequate provisions for the quality mechanism through the certification and collective mark systems. According to certification mark:

“a mark which is controlled by an organization capable of supervising a type of goods or service and which is used in respect of goods or services by other organizations or individuals who do not belong to the said organization with a view to certifying the origin, raw material, mode of manufacture of goods or performance of services, quality or other characteristics”^{267/268}

In Pakistan, it is specifically provided that the collective or certification marks registered in respect of a GI should not be misleading as to character or significance²⁶⁹.

The application for registration is to be filed with the Registrar along with the regulations governing the use of the mark²⁷⁰, specifying the persons authorized to use the mark, conditions for membership of the association, conditions for the use of the

Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:27

267 Trademark Act of China, section 3.

268 The applicant for the registration of a GI as certification mark in China has to transmit to the Registrar draft regulations for governing the use of the mark concerned including instances where the proprietor is to certify goods or services and to authorize the use of the mark¹⁶². The approved regulations shall be deposited with the Registrar and shall be open to inspection¹⁶³. The processing of the application will be in relation to the competency of the applicant to certify, whether the draft regulations are satisfactory and whether registration will result in public advantage¹⁶⁴. Registration gives the proprietor and the persons authorized by them the exclusive right to use the mark in relation to the goods concerned¹⁶⁵. It is their responsibility to ensure the quality as specified in the regulation before permitting anyone to use the mark. The deposited regulations can be altered, expunged or varied with the consent of the Registrar

269 The Trademark Ordinance 2001, Pakistan, Entry 5 (1), Schedule 2 and Entry 4 (1), Schedule 1, See Appendix 1 and 2

270 The Trademark Ordinance 2001, Pakistan, Entry 6 (1) of Schedule 2 and Entry 5 (1) of Schedule 1. See Appendix 1 and 2

mark and any sanctions against misuse in the case of a collective mark²⁷¹. In addition to this the persons authorized to use the certification mark, the characteristics to be certified by the mark, the manner in which the certifying body shall test the characteristics and supervise the use of the mark, and other related matters, must also be mentioned²⁷². These provisions indicate that a quality control mechanism has been deliberately built into the system. The position becomes stronger in Pakistan since the collective or certification mark is subject to revocation owing to the failure of the proprietor to secure observance of the regulations governing the use of the mark²⁷³.

Thus it is clear that the majority of the countries examined address the issue of quality control and some of them, particularly Malaysia, mandate that the actual producers ensure that standards of quality are maintained. In some other countries like India it is the responsibility of the registered owner and user of the GIs to ensure the maintenance of the quality of the goods²⁷⁴.

From the above analysis of the legislations of Asian countries following concluding points can be derived. In order to satisfy the obligations under TRIPs Asian countries have adopted different approaches. For all the Asian countries GIs protection is a new

271 The Trademark Ordinance 2001, Pakistan, Entry 5 (2) of Schedule 1, See Appendix 1

272 The Trademark Ordinance 2001, Pakistan, Entry 6 (2) of Schedule 2, See Appendix 2

273 The Trademark Ordinance 2001, Pakistan, Entry 13 of Schedule I and Entry 15 of Schedule II, See Appendix 1 and 2

274 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:28

initiative. It is evident from the facts that for foreign GIs owner the remedies are available in the form of passing off in order to prevent the abuse of GIs even before TRIPs. Other remedies like passing off, certification mark and collective mark registration are available as an alternative way of protection GIs for the parties in all the Asian countries. The most important point derived in the context of TRIPs agreement is that if the GIs are protected in domestic laws then there is a possibility to seek protection in the foreign countries.

It becomes clear to us from the analysis of laws regarding Geographical Indications of various countries that all the countries going into the support of the fact that "human contribution" is one of the main factors to recognize the GIs protection. It clearly shows from the study that no law expressly links the GIs with TK.

Legal measures and the status of a legally protected category will of course become a cause of the many beneficial impacts like improved socioeconomic conditions such as improvement in the quality of life, educational standards economic stability, social responsibility and many other related conditions for the group (people engaged in the production of the products using Geographical Indications).

By promoting exports and capture a foreign market gives an opportunity for the expansion of trade which would surely add to the development of the communities at the same time this fact demands extension of the GIs protection equal to that of wine and spirits to other products. In the laws of China and Pakistan no separate conditions are maintained regarding special requirements for Geographical Indications. It is

required that if this could be added in the law then this system could actively protect Geographical Indications.

In short, it is clear that all the Asian Countries provide protection which is prescribed by the TRIPS for wine and spirit to all the categories of products. The products of all these countries not only have a domestic market but also have an export market as well.

CHAPTER: IV

GEOGRAPHICAL INDICATIONS IN PAKAKISTAN

4.1 Historical background of Geographical Indications in Indo - Pak

Pakistan and India realized the need or importance of protection of Geographical Indications when the case of *Basmati Rice* came on screen. In this case the US patent office issued in 1997 a patent for new three strains of rice. 'These strains could be sold under the name "*Basmati*", referring to a particular form of rice - long-grained, aromatic, and associated with the plains of Punjab. In 1998 the US Rice Federation submitted that the term "*Basmati*" was generic and referred to a specific type of aromatic rice'. In order to prevent the US grown rice from being advertised and sold by the name of *Basmati* US and Indian civil society organizations filed a petition and in May 2001 the US Department of Agriculture and the US Federal Trade Commission rejected the petition. Neither considered that the labeling of rice as "*American-grown Basmati*" was misleading, and deemed "*Basmati*" to be a generic term. After the protest of India and Pakistan against the use the name "*Basmati*", the US patent office disallowed the patent holder from using the generic name "*Basmati*"²⁷⁵.

In Pakistan, an application for a GI on Basmati protected as a collective trademark under Section 82 of the Trade Mark Ordinance 2001 has been filed on

275 "Summary of the presentation ,Link between Geographical Indications and Traditional Knowledge", O'Connor and Company European lawyers.p:2,

December 2005, in the form of regulation. The objective of the legal protection is to protect the economic prosperity of the Basmati farmers and to facilitate the action against infringement²⁷⁶.

4.2 Geographical Indications in Pakistan

Pakistan provides protection of Geographical Indications under the trademark law in the form of collective marks or certification marks. The definition of GIs of Pakistan²⁷⁷ is in conformity with TRIPS. The Trademark Ordinance of Pakistan defines goods broadly to include anything subject to trade, manufacture or commerce²⁷⁸. It is interesting to note that unlike other Asian countries, in Pakistan the GIs could designate goods and services. The general prohibitions applicable to the registration of trademarks like marks contrary to public order, morality, misleading the public etc, are also applicable in the case of registration of a GIs as collective or certification be marked²⁷⁹. As in Pakistan²⁸⁰ prior uses of Geographical Indications is

276 Depline Marie-Vivien, "From Plant Variety Definition of Geographical Indication Protection: A Search for the Link Between Basmati Rice and India/Pakistan", *The Journal of World Intellectual Property* (2008) Vol 11, No.4, 336

277 The Trademark Ordinance 2001, Pakistan, section 2: "Geographical indications, in relation to goods originating in a particular country or in a region or locality of that country, means a mark recognized in that country as a mark indicating that the goods- (a) originated in that country, region or locality; and (b) have a quality, reputation or other characteristic attributable to their geographical region".

278 Section 2(i) read: "goods" means anything which is subject of trade, commerce or manufacture".

279 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", *Exploring the Relationship between Geographical Indications and Traditional Knowledge*, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:24

280 The Trademark Ordinance 2001, Pakistan, Entry 3 (2) of Schedule I & II The proprietor of such a mark shall not be entitled to prohibit the use of the marks or indications in accordance with honest

protected, which are registered as a trademark, collective mark or certification mark as the case may be. From this it can be derived that the remedies of passing off are available for unregistered Geographical Indications²⁸¹.

4.3 Problems regarding Geographical Indications' recognition in Pakistan

In Pakistan, there are three different ways in which one could protect GIs. The first option is that GIs designating goods or services could be registered as trademarks if they have acquired distinctiveness prior to the application for registration²⁸². It also permits GIs to be registered as collective, or certification marks²⁸³. Thus the owner of the GI has three options. It is not clear why such options are created. It appears that this may result in confusion when the law is put into practice²⁸⁴.

4.4 Pakistan's situation regarding Geographical Indications

GIs receive some protection in the Pakistan Trademark Ordinance 2001, which has been promulgated and enforced. A draft Ordinance on GIs of Goods (Registration

practices in industrial or commercial matters, in particular, by a person who is entitled to use a geographical name.

281 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:24

282 The Trademark Ordinance 2001, Pakistan, section. 14.

283 The Trademark Ordinance 2001, Pakistan, Schedule I & II, See Appendix 1 and 2

284 N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, "An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia", Exploring the Relationship between Geographical Indications and Traditional Knowledge, August 2007 Intellectual Property Rights and Sustainable Development. A Study Commissioned by the International Centre for Trade and Sustainable Development (ICTSD).p:28

and Protection) has not yet been promulgated²⁸⁵. It becomes clear that well protected Geographical Indications have the potential of socioeconomic benefits. The role of GIs in the socioeconomic development needs effective protection of GI-product because through this effective protection we can protect the rights of the community involved in its production from copying, free riding or usurpation. GIs regarded as a tool for rural development because indirectly it plays a very significant role in the reduction of poverty and increases the inflow of cash income. The importance and commercial value of GIs the legal protection of GI assumes enormous significance. Without such protection the unfair business practices like competitors not having legitimate right on a GI might ride free on its reputation can't be controlled. "In order to rule out its misuse and to tap the potential economic and socio-economic benefits emanating from this IP, it is essential to ensure an appropriate legal protection for GIs at the national as well as the international level"²⁸⁶.

4.5 Steps of the Process of Geographical Indication Recognition

Importantly, more extensive protection is envisioned in the draft legislation for GIs, Geographical Indications of Goods (Registration and Protection), which awaits approval and enactment. Interestingly, there are media reports concerning Pakistan's

285 "Geographical Indications as Trade-related intellectual property: Relevance and implications for human development in Asia-Pacific" Discussion Paper, "Geographical Indications as Trade-related intellectual property" Asia-Pacific Trade and Investment Initiative UNDP Regional Centre in Colombo: January 2007P:24

286 Kasturi Das, "Socioeconomic Implications of Protecting Geographical Indications in India" August 2009

effort to get US support in protecting 100 GIs through a special treaty (Ahmed, 2003)²⁸⁷.

4.6 Scope of the Geographical Indications in Pakistan being an agricultural country and its implication for benefits

GIs have a high potential of increasing the reputation of a product, which has many benefits:

An economical value for producers

- Higher quality leads to higher benefits
- Better identification in the market tends to increase consumer attraction
- No high cost for producers

More benefits for producers

- Administration certifies production and guarantees good quality
- Producers association and goes in the same way altogether
- They get advice and support from the regulatory body experts Multi sectional benefits, such as:
 - Development of rural areas and a stronger implication with a specific territory
 - Environmental issues: protecting the land
 - Promoting stronger links between people and the region²⁸⁸

287 Dr. Dwijen RANGNEKAR; "The International Protection of Geographical Indications: The Asian Experience", CSGR and the Law School, University of Warwick UNCTAD / ICTSD Regional Dialogue "Intellectual Property Rights (IPRs), Innovation and Sustainable Development" 8 – 10 November; Hong Kong, SAR, People's Republic of China.

For all the above mentioned benefits need strong legal protection and detailed institutional framework. While recent empirical studies suggest that the protection of Geographical Indications (GIs) for specialty agricultural products can potentially benefit the rural economy, the system remains relatively under-utilized by the majority of countries.²⁸⁹

The case of Basmati rice has prompted the Pakistani Government to undertake a serious evaluation of the need to provide enhanced protection for national products, especially agricultural produce and cultural heritage. Agriculture remains a major economic activity in Pakistan. The region produces many high quality agricultural product, fruits and vegetables. Because of their good quality and reputation however, some of these products are subject to extensive counterfeiting. Their well known names are also being used illegally to market products of lesser quality. This remains a big problem. . It is therefore necessary to explore ways in which it may be solved, so that producers can reap the benefits of their high quality produce.²⁹⁰

GIs also highlight qualities of a product which are due to human factors associated with the place of origin of the products, such as specific manufacturing skills and traditions for example Handicraft Of Hala (Sind), similarly Knives manufactured in Wazirabad (Punjab) and very recently a workshop was held on a kind of a embroidery named as

288Dora de Teresa, "Regional Protection of GIs in Europe", E.U ASEAN workshop on geographical indications: a way into the market, Hanoi, 7-8 October 2003

289 G. E. Evans, " The Comparative Advantages of Geographical Indications and Community Trademarks for the Marketing of Agricultural Products in the European Union"

290 Victor Mosoti, "international mechanisms for the Protection of local Agricultural brands in Central and eastern Europe" August 2006

Phulwari in Lahore Pakistan introduced by three sisters called now Batool Sisters, which is originated from the region of Multan etc. That place of origin may be a village or town, a region or a country.²⁹¹

In Pakistan variety of products are widely considered as potential candidates for protection: Peshawari Chappal, Kashmiri Shawls, Multani Sohan Halwa and Nehari (Khursheedkhan, 2001).²⁹²

4.7 Whether the Developments in Pakistan regarding the Geographical Indications are sufficient:

In Pakistan the legislation on Geographical Indications protection is in the infancy stage. Developments in Pakistan regarding the Geographical Indications are not sufficient. Legal protection will allow producers of Pakistan to enjoy more benefits accruing from the protection as such products will be relatively more competitive in the global market. And at the same time they may contribute to the Pakistan's economy in other words it will be able to generate income for the country when the relevant producers obtain a better rate of returns. In the meantime, consumers will be better off than previously since they would have more choices of products with high and distinctive quality. Resultantly they will not be easily misled as far as the true origins or indications of such products are concerned. Another supporting argument

291 Shazia Tasleem & Co, "Geographical Indications – IP in Pakistan" July 12, 2008

292 Dr. Dwijen Rangnekar; "The International Protection of Geographical Indications: The Asian Experience", CSGR and the Law School, University of Warwick UNCTAD / ICTSD Regional Dialogue "Intellectual Property Rights (IPRs), Innovation and Sustainable Development" 8 – 10 November; Hong Kong, SAR, People's Republic of China.

for providing a legal protection is that in international level Pakistan is the member of the group who support and demand the extension of the scope of TRIPs additional protection for products other than wines and spirits. So convinced of economic and social benefit as well as great trade potential inherent in Geographical Indications, it is the responsibility of Pakistan which has most of her interests on agricultural products, should consider her position, to legislate a law and take developmental steps on the priority basis. Otherwise the objective of Pakistan to improve economy and developments in a rural area will not be attained.

4.8 How can Pakistan use the IP Tools to advance their development strategy? Comparison with International Developments

In the flow of the ever-changing globalized environments, it is a country policy to support the developments and exports of Pakistani goods using indigenous knowledge and intellects and to foster the development of Pakistani intellectual properties while utilizing the abundant domestic raw material.²⁹³

Like other developing countries, Pakistan has to consider that two fundamental principles, natural resource and traditional knowledge, can be helpful to support the development of grass root economy. In this regard the Geographical Indications, therefore, are going to play an important role as, if properly used they can become an effective marketing tool of great economic value. It is generally accepted that

293 Suraphol Jaovisidha, "Protection of Geographical Indications – "Thailand's Perspective" Prepared for the EU-ASEAN Workshop on Geographical Indication: A way into the market Hanoi, 7 – 8 October 2003

Geographical Indications are not only beneficial for the producers but also for the consumers by protecting them from deceptions. From the consumer's point of view, GI gives them certain expectation as to the characteristics of the product. From the perspective of the producers, as GI high light quality and unique characteristic of products, the products bearing a Geographical Indication implies that certain standards have been met.²⁹⁴ At the same time Geographical indications supports the products and increase its price in the market than a product without any indication.

In particular, geographical indications may be used to enhance the commercial value of natural, traditional and craft products of all kinds if their particular characteristics may be attributed to their geographical origin. A number of products that come from various regions are the result of traditional knowledge and processes implemented by one or more communities in a given region.

The special characteristics of those products are appreciated by the public, and may be symbolized by the indication of the source used to identify the products. Better exploitation and promotion of geographical indications would make it possible to afford better protection for the economic interests of the local communities and to preserve our traditional knowledge.²⁹⁵

Some of Pakistani products are internationally well known but most are not. In this regard it is the responsibility of the Pakistani Government to launch different projects for the Pakistani products of the local commodities so that they register some market

294 Suraphol Jaovisidha, "Protection of Geographical Indications - "Thailand's Perspective" Prepared for the EU-ASEAN Workshop on Geographical Indication: A way into the market Hanoi, 7 - 8 October 2003

295 Ibid

shares domestically and, if possible, as exports. Pakistan has the potential to develop some of its national products to be qualified for Geographical Indication protection. After accepting the importance of Geographical Indications, like many other developing countries, Pakistan should consider their position to support the extension of the scope of TRIPs additional protection to products other than wines and spirits.²⁹⁶ Pakistani products which could be considered as Geographical Indications products, for example, "Kashmir Shawls, Multani Sohan Halwa, Nehari, Kinuo (oranges) albeit the need of relevant future research to establish a link between products and the place. In this respect, it is also important to note that the degree to which Geographical Indication protection would be beneficial for a country depends on how well prepared a country is to adapt itself to this new genre of intellectual property.²⁹⁷ In this regard this would require coordination and sustained efforts from both government and the private sector. The first task here is to develop products with higher standards to meet the market demand and to have an appropriate legal regime and the public sphere of the protection of Geographical Indication.²⁹⁸

296 Ibid

297 Suraphol Jaovisidha, "Protection of Geographical Indications – "Thailand's Perspective" Prepared for the EU-ASEAN Workshop on Geographical Indication: A way into the market Hanoi, 7 – 8 October 2003

298 Ibid

Conclusion and Recommendations

Conclusion

On the world scene Geographical Indications emerged as an important area in Intellectual Property Right regime. An empirical study shows that awareness and interest in developing countries has also increased. The main objective of the protection of Geographical Indications in International and national level is to facilitate the international trade and to protect the interest of the consumers for deception. Special protection given to wine and spirit on international level is the clear example in this respect.

The utility of Geographical Indications in the rural development is immensely tremendous. In Asian countries it has been established that survival of a large number of village communities depends on the income generating from marketing their products using Geographical Indications. After getting the analysis of the legal framework of the Asian countries, it becomes obviously clear that the products using geographical indications from Asian countries are not wine and spirit but they mostly relate to the textiles, agriculture, and handicrafts.

Although, there are no minimum strict standards laid down in the TRIPS, the countries have adopted different modes according to their domestic legislations. Other countries which have no adequate laws in their national legislations, they adopt the existing international GIs standards for the protection of their products.

After analyzing the international and national law, the main objective that comes forward is the protection given to the consumers. The main products of the Western countries are wines and spirits, and much protection has been given to these products in the laws. South Asian countries demand an equivalent protection to their products as their products is related to agriculture, handicrafts and textile.

The growing need and importance of Geographical Indications reflects that it would be beneficial to widen the scope of Geographical Indications and apart from agricultural products other industrial goods must be included in the cover of Geographical Indications. In this regard it is the responsibility of all the members of WTO to work for the effective protection of Geographical Indications because there is a great need to establish a comprehensive mechanism for reducing the unfair practices or false use of Geographical Indications.

Chapter 1 provided the background and the basic concept of Geographical Indications in the light of various legal international mechanisms. In International level Paris Convention (1883) --false indication, Madrid Agreement (1891) --false and deceptive indication, Lisbon Agreement (1958) --define appellation of origin, TRIPS Agreement (1994) are available for the protection of Geographical Indications. This chapter also highlights the need and importance of Geographical Indications and basic differences between Trademarks and Geographical Indications. From the existing studies two main objectives come forward for the protection of Geographical Indications: one is to

protect the good will of the producers and second is to protect the interest of the consumers from deception.

Chapter 2 added the beneficial impact of Geographical Indications and the role of Geographical Indications in the rural development. Several studies have shown that Geographical Indications have an important role to play for the betterment of the communities. Article 22 of the TRIPS contains the definition and general standards for GIs protection and gives the free hand to the member states to implement the legal means to protect their GIs. Article 23 of TRIPS provides additional protection for wine and spirits. We find that TRIPS provides same definition for all geographical indications without considering the categories of products, but provides two levels of protection of article 22 basic protections available for all GIs in general and in article 23 additional protections are provided for wine and spirits. There is no strong reason or logic which could justify this discriminatory treatment.

So many countries want to utilize the GIs as beneficial tool and demand for extension of the protection available for GIs for all the products equal to the protection mandated by TRIPS for wines and spirits.

Chapter 3 set out the comparative analysis of the legal tools available for the protection of Geographical Indications in Asian countries. Majority of the Asian countries that realize the importance of Geographical indications, by utilizing the available possibilities under the TRIPS Asian countries are providing effective and higher forms of protections for all the products which the TRIPS provides only for

wine and spirits. In order to maintain the reputation of their Geographical Indications and to facilitate the international trade adequate and effective provisions have been included in their laws to achieve the advantages of GIs for their communities.

Chapter 4 articulated the position of Pakistan regarding Geographical Indications. As quoted earlier that Pakistan does not have a sui generis system of GI protection yet. In Pakistan the protection is available for Geographical Indications under the country's Trade Marks Ordinance, 2001 and the Trade Marks Rules, 2004. The protection through Collective Marks and Certification Marks in Pakistan is not adequate because there is a deficiency which becomes the cause of misuse of Geographical Indications such as in this law in of Pakistan no separate conditions regarding requirements for Geographical Indications are mentioned. Non-serious attitude of Government of Pakistan towards the law making process regarding Geographical Indications protection causing massive damage to the socio-economic development of Pakistan. Insufficient Government action regarding Geographical Indications is the main hurdle in the rural development in Pakistan because in the rural areas most of the people generating their income from marketing their traditional handicrafts, agricultural products, textile products etc. There is an urgent and great need that Government should take serious legislative measure regarding Geographical Indications protection.

Recommendations

This final section of the thesis concludes with the recommendations.

It is established that Pakistan indeed has products which could potentially benefit from Geographical Indications protection. As discussed in chapter II that proper and successful valorisation of the products through the use of Geographical Indications could lead to improve the value of the product in the market and helps the producer to earn a premium. However due to absence of the separate law for the protection of Geographical Indications and the lack of institutional framework within which to valorise these products are the basic hurdles due to these hurdles the Geographical Indications which is regarded as an important rural development tool is not being utilized. Along with that the producers lose valuable intellectual property in their products.

Importantly traditional products represent the culture and traditions of the people. Old skills and traditional processes of making goods which have survived and developed are the backbone of our cottage industry. It is established that Pakistani Handicrafts have the foreign market and become a profitable trade. So Geographical Indications law should be made with the objective of promoting goods bearing Geographical Indications in the export market

To protect the Geographical Indications domestically it is recommended for the Pakistani Government to provide for the development of an institutional framework. This could be done only by way of sui generis system for the protection of Geographical Indications and should not be limited to the protection under the existing Trade Marks system.

As we have seen that India has the strong institutional arrangement for the protection of Geographical Indication in the chapter III under the heading of "The Asian legal framework: a comparative analysis". There is a great need for serious attempts to capture a foreign market for Pakistani products one of the priorities, necessary to improve the quality of life of people in rural areas of Pakistan.

As Pakistan is an agricultural state, our economy depends to a large extent on the contribution of agriculture; strong laws regarding Geographical Indications dealing with the protection of agricultural products are the dire need of the time; until and unless agricultural products are not protected our producer can't compete in the international market. Strong national legislation is required on urgent basis.

To be most effective, Geographical Indications require investment in local management structures and participatory methods in order to form a strong legal system for protection. In this respect recommendations are divided in to following three categories.

A. Legislative measures for the protection of Geographical Indications in Pakistan

B. Promote awareness of the GI for Pakistani products

C. Action Plan Strategy

A. Legislative measures for the protection of Geographical Indications in Pakistan

While drafting a law for the protection of Geographical Indications, it must be considered that it is in full compliance with the TRIPS. Equal protection must be given to all kinds of goods or products such as Agricultural, Industrial goods and Handicrafts. It is essential that participatory approach is to follow in order to discuss the policy goals and to provide for appropriate measures at local level. Institutional Arrangement for the administration of GIs is required. In order to obtain valuable advantages and the promotion of Geographical Indications in Pakistan following steps is necessary in this regard.

- I. Set up an appropriate, efficient and strong legal framework.
- II. Control and monitoring wing.
- III. Rules for quality control system.
- IV. Select products deserving GI protection.

I. Set up an appropriate, efficient and strong legal framework.

In order to achieve social and economic benefits, Pakistani government to have a strong Geographical Indications policy. For the administration of Geographical Indications protection a detailed institutional framework is required through which

the value of the Pakistani products can be increased. It is recommended that Pakistan government take into consideration the potential of the Geographical Indications and use it properly to improve the rural development and there is great need to protect the national assets from foreign appropriation:

Firstly it is required to draft a GIs Ordinance having following suggested rules and regulations.

(a) Geographical Indications Board.

For administration of GIs it is recommended that setting up a Geographical Indications wing for the establishment of the "Geographical Indications Board" for the enforcement and implementation of the GI system. It is proposed that as a strong regulatory authority the Board may consists of the Secretary Ministry of Industry could be the Board Chair Person and the Registrar Department of Patent, Design and Trademark, should be the Board Member. And the representatives of the Government and public organizations.

(b) System of Registration.

Registration affords better legal protection to facilitate an action for Infringement. The authorized users can exercise the exclusive right to use the Geographical Indication. In the light of this establish a system of registration and notification for all the products bearing Geographical Indications. It is recommended that registration register must contain two parts. Part A should be reserved for the registration of Geographical Indications products with their specifications and qualities. And part B

should be reserved for the particulars of authorized users. In this registration system the other related issues of registration such as Cost of registration, application, notice of opposition, extension of time, certificate, amendments of registration, revocation of registration; Cost of litigation, opposition, appeal. It will depend on the complexity of the case; Time frame for registration and protection should be set.

II. Control and monitoring wing.

Firstly in order to obtain socio-economic benefits in the rural area of Pakistan it is suggested that to establish a control and monitoring wing with the responsibilities to control and monitor the whole supply chain of the products. Because these benefits are not evenly distributed among all the stakeholders like a high price demanded on the account of Geographical Indications protection such price becomes remains in the hands of the powerful participants of the upper stream of the supply chain and providing no benefits to the weaker section of the chain and this point destroys the development implications of Geographical Indications protection.

Secondly to monitor the Organization of the producers in a collective structure (GI societies), there has to be organization of producers. Most are weak as institutions. This needs to be strengthened. For minimizing the conflicts between growers or producers with respect to the membership of a particular association for a product. Because for the registration of GIs it is one of the conditions that the producers should be organised as the same legal person. This condition plays a vital role in the

‘information sharing, education and training in a cooperative manner to strengthen learning effects regarding quality of the product.

III. Rules for quality control system.

The method of quality control system should be incorporated as a prerequisite in the legislation for the protection of Geographical Indications. In this context as we have seen in chapter III under the heading of “The Legal Mechanisms for Quality Control” that the EC Regulations on the protection of Geographical Indications (on agricultural products and foodstuffs) is the best example (Council Regulation (EC) No. 510/2006) according to Article 4 of the Regulation to claim protection it is necessary that product specifically contain quality.

It is recommended that to establish of Research wing for Quality control with proper rules for quality control system. Experts in research wing must conduct regularly quality evaluation meetings. Because the most important thing is to continuously strengthen quality management. GIs should fail unless appropriate quality control is guaranteed. Therefore it is required to making efforts to enhance the quality and to keep the quality standardized.

IV. Select products deserving GI protection.

It is suggested that to draw up a Pakistani database of local products based on local traditions. This would provide a policy makers a clear indication of what stands to be lost if protection is not provided.

B. Promote awareness of the GI for Pakistani products

Best possible efforts should be made to sensitize and establish a committee with the responsibility to arrange or conduct a nationwide campaign for the creation of awareness among the various stakeholders of Handicrafts and Textile sectors on the advantages or benefits of Geographical Indications. The committee should identify potential of the products and facilitates Geographical Indications registrations of the products. As Pakistan is a country rich in culture and Handicrafts is also the part of the cultural heritage of the country.

C. Action Plan Strategy

Pakistan needs to develop strong Strategic plan. a successful GI can't be obtained without a consistent focus and an explicit sequence of agreed steps. Developing a plan helps to determine the choice of structures and standards at the origin level.

Strategy I:

At the first stage it is suggested that Government should made a plan for properly Implementation and enforcement of the new law and regulations for the smooth running of Geographical Indication wing for the administration of Geographical Indications system which includes registration process and quality control mechanism.

Strategy II:

Another important factor that influence the success of Geographical Indication is strong organizational and institutional structure. Institutional Strengthening Capacity

building and inter-institutional coordination, feasibility studies for specific products by assessing the economic, social and technical Interest for protection under the GI.

Strategy III:

The creation and training of the public and private agencies, and association involved in GI issue, on-line access should be provided for all kinds of information relating to Geographical Indications.

A promotional policy will not succeed if the product is not differentiated, poorly defined or inadequately controlled.

APPENDIX: 1
COLLECTIVE MARKS
FIRST SCHEDULE
TRADE MARKS ORDINANCE 2001

General

The provisions of this Ordinance shall apply to collective marks subject to the provisions contained in this Schedule.

Signs of which a collective mark may consist

In relation to a collective mark the reference in clause (xlvii) of section 2²⁹⁹ to distinguish goods or services of one undertaking from those of other undertaking shall be construed as a reference to distinguishing goods or services of members of the association which is the proprietor of the mark from those of other undertakings.

Indication of geographical origin

(1) Notwithstanding the provisions of clause (c) of sub-section

(1) of section 14³⁰⁰, a collective mark may be registered which

²⁹⁹ Section 2 (xlvii) of Trade Marks Ordinance 2001

In this Ordinance, unless there is anything repugnant in the subject or context.

[.....]

(xlvii) "trade mark" means any mark capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings;

³⁰⁰ Section 14(1)(c) of Trade Marks Ordinance 2001

Absolute grounds for refusal of registration

(1) The following shall not be registered, namely;

[.....]

consist of marks or indications which may serve, to distinguish the geographical origin of the goods or services.

(2) The proprietor of such a mark shall not be entitled to prohibit the use of the marks or indications in accordance with honest practices in industrial or commercial matters, in particular, by a person who is entitled to use a geographical name.

4. Collective mark not to be misleading as to character or significance

(1) A collective mark shall not be registered if the public is liable to be misleading as regards the character or significance of the mark, in particular, if it is likely to be taken to be something other than a collective mark.

(2) The Registrar may accordingly require that a mark in respect of which application is made for registration include some indication that it is a collective mark.

(c) trade marks which consist exclusively of marks or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services

(3) Notwithstanding the provisions of sub-section (7) of section 27³⁰¹, an application may be amended so as to comply with any such requirement.

5. Regulations governing use of collective mark

(1) An application for registration of a collective mark may be filed with the Registrar along with regulations governing the use of the mark.

(2) The regulations referred to in sub-Para (1) shall specify the persons authorized to use the mark, the conditions of membership of the association and, where they exist, the conditions of the use of the mark, including any sanctions against misuse.

(3) Any further requirement with which the regulations referred to in sub-Para (1) shall have to comply may be imposed as may be prescribed.

301 Section 27 (7) of Trade Marks Ordinance 2001

If the tribunal is of opinion that it is fair and reasonable in all the circumstances of the case to do so, may at any time, whether before or after acceptance, correct any error in, or in connection with, the application or may permit the applicant to amend his application upon such terms as it may think fit;

Provided that no amendment or correction shall be permitted in the application which substantially affects the identity of the trade mark or extends the goods or services covered by the application;

Provided further that if the amendment or correction in the application is permitted after the application has been advertised, the amendment or correction shall also be published.

6. Approval of regulations by the Registrar

(1) A collective mark shall not be registered unless the regulations governing the use of the mark- (a) comply with the requirements of Para (2) of Para 5 and any further requirement as may be prescribed; and (b) are not contrary to public policy or to accepted principles of morality.

(2) Before the end of the prescribed period after the date of the publication for registration of a collective mark, the applicant shall file the regulations with the Registrar and pay the prescribed fee failing which the application shall be deemed to have been withdrawn.

7. Procedure of acceptance or refusal of applications

(1) The Registrar shall consider whether the requirements specified in sub-Para (1) of Para 6 are duly met.

(2) If it appears to the Registrar that such requirements are not met, he shall inform the applicant and give him an opportunity, within such period as the Registrar may specify, to make representation or to file amended regulations.

(3) If the applicant fails to satisfy the Registrar that such requirements are met, or to file regulations amended so as to

meet them, or fails to respond before the end of the specified period, the Registrar shall refuse the application.

(4) If it appears to the Registrar that such requirements, and the other requirements for registration, are met he shall accept the applications and shall proceed in accordance with section 28³⁰²;

302 Section 28 of Trade Marks Ordinance 2001

Publication, opposition proceedings and observations.

- (1) When an application for registration of a trade mark has been accepted, whether absolutely or subject to conditions or limitations, the Registrar shall, as soon as may be after acceptance, cause the application as accepted, together with the conditions and limitations, if any, subject to which it has been accepted, to be advertised in the Journal, and for all legal purposes, advertisement of the trade mark in the Journal shall constitute sufficient notice of acceptance of the trade mark;

Provided that the Registrar may cause an application to be advertised before acceptance where it appears to him that it is expedient by reason of any exceptional circumstances so to do, and where an application has been so advertised the Registrar may, if he thinks fit, advertise it again when it has been accepted, but shall not be bound so to do;

Provided further that where an application is advertised by reason of any special circumstances under the above proviso, the Registrar shall simultaneously notify the exceptional circumstances which led him so to do.

- (2) Any person may, within two months from the date of the advertisement or readvertisement of an application for registration or within such further period not exceeding two months in the aggregate, as the Registrar, on application made to him in the prescribed manner and on payment of the prescribed fee, may allow, give notice to the Registrar of opposition to the registration.
- (3) The notice under sub-section (2) shall be given in writing in the prescribed manner, and shall include a statement of the grounds of opposition.
- (4) The Registrar shall serve in the prescribed manner a copy of the notice on the applicant, and within one month from the applicant of such copy of the notice of opposition, or within such further period not exceeding two months in the aggregate, as the Registrar, on application made to him in the prescribed manner and on payment of the prescribed fee, may allow, the applicant shall send to the Registrar in the prescribed manner a counter-statement of the grounds on which he relies for his application, and, if he does not do so he shall be deemed to have abandoned his application.
- (5) If the applicant sends the counter-statement referred to in sub-section (4), the Registrar shall serve in the prescribed manner a copy of the counter-statement on the opponent. If the opponent deems necessary, he may within one month from the receipt of such copy of the

8. Regulation to be published

(1) The regulations governing the use of a collective mark shall be published and notice of oppositions may be given, and observation may be made, relation to the matters specified in sub-para (1) of para 6.

(2) The provisions of sub-para (1) shall be in addition to any other grounds on which the application may be opposed or observations made.

9. Regulations to be open to inspection

The regulations governing the use of a registered collective mark shall be open to public inspection in the same way as the Register.

counter-statement, or within such further period not exceeding two months in the aggregate, as the Registrar, on application made to him in the prescribed manner and on payment of the prescribed fee, may allow, send to the Registrar in the prescribed manner a rejoinder.

- (6) If the opponent sends a rejoinder, the Registrar shall send in the prescribed manner a copy of the rejoinder to the applicant.
- (7) Any evidence upon which the opponent and the applicant may rely shall be submitted in the prescribed manner and within the prescribed time to the Registrar, and the Registrar shall give an opportunity to them to be heard, if they so desire.
- (8) The Registrar shall, unless the proceedings are discontinued or dismissed, after giving to the opponent and to the applicant an opportunity of being heard, decide whether, and subject to what conditions or limitations, if any, registration is to be permitted.
- (9) If the Registrar is of opinion that it is fair and reasonable in all circumstances of the case to do so, he may, on request made in the prescribed manner, permit correction of any error in, or any amendment of, a notice of opposition, a counter-statement, or a rejoinder on such terms as he thinks just.

10. Amendment of regulations

(1) An amendment of the regulations governing the use of a registered collective mark shall not be effective unless and until the amended regulations are filed with the Registrar and accepted by him.

(2) Before accepting any amended regulations the Registrar may, in any case where it appears to him expedient to do so, cause them to be published.

(3) If the Registrar does so, a notice of opposition may be given, and observations may be made, relating to the matters specified in sub-para (1) of para 6.

11. Infringement of rights of authorized user

The following provisions shall apply in relation to an authorized user of a registered collective mark as in relation to a licensee of a trade mark, namely:-

- (a) Sub-section (7) of section 40³⁰³;
- (b) Sub-section (2) of section 51³⁰⁴; and

303 Section 40 (7) of Trade Marks Ordinance 2001

A person who applies a registered trade mark to material intended to be used for labeling or packaging goods shall be treated as a party to any use of the material which infringes the registered trade mark if when he applied the mark he knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.

304 Section 51 (2) of Trade Marks Ordinance 2001

(c) Section 53³⁰⁵.

12 Infringement of a registered collective mark

(1) The provisions of this para shall have effect as regards the rights of an authorized user in relation to infringement of a registered collective mark.

(2) An authorized user shall be entitled, subject to any agreement to the contrary between him and the proprietor, to call on the proprietor to take infringement proceedings in respect of any matter which affect his interests.

(3) If the proprietor- (a) refuses to do so; or (b) fails to do so within two months after being called upon, the authorized user may bring the proceedings in his own name as if he were the proprietor.

In considering what order, if any should be made, the High Court or District Court shall consider whether other remedies available in a action for infringement of the registered trade mark would be adequate to compensate the proprietor and any licensee and protect their interests.

305 Section 53 of Trade Marks Ordinance 2001

Infringing goods, material or articles may be treated as prohibited.-

- (1) The proprietor of the registered trade mark may give notice in writing to the Collector of Customs that
 - (a) he is the proprietor of the registered trade mark;
 - (b) at a time and place specified in the notice, goods which, in relation to that registered trade mark are infringing goods, material or article, or bear false indications as to their source or the identity of their manufacture are expected to arrive in Pakistan from outside Pakistan and that they are subject to the control of the customs authorities under the Customs Act, 1969 (IV of 1969): and
- (c) He requests the Collector of Customs to treat such goods as prohibited goods.

(4) Where infringement proceedings are brought under this para, the authorized user may not, without the leave of the High Court, proceed with the action unless the proprietor is either joined as a plaintiff or added as a defendant.

(5) The provisions of para (4) shall not affect the granting of interlocutory relief on an application by an authorized user alone.

(6) A proprietor who is added as a defendant as provided in sub-para (4) shall not be made liable for any costs in the action unless he takes part in the proceedings.

(7) In infringement proceedings brought by the proprietor of a registered collective mark, any loss suffered or likely to be suffered by authorised user shall be taken into account, and the High Court or a District Court may give such directions as it thinks fit as to the extent to which the plaintiff shall hold the proceeds of any pecuniary remedy on behalf of such users.

13. Additional grounds for revocation of registration

Apart from the grounds of revocation provided for in section 73³⁰⁶, the registration of a collective mark may be revoked on

306 Section 73 of Trade Marks Ordinance 2001

Revocation of registration

(1) The registration of a trade mark may be revoked on any of the following grounds, namely:-

- (a) That within the period of five years following the date of completion of registration procedure it has not been put to bona fide use in Pakistan by the proprietor or by an authorised user thereof, in relation to the goods or services for which it is registered and there are no proper reasons for its non-use;
- (b) That the bona fide use has been suspended for an uninterrupted period of five years and there are no proper reasons for its non-use;
- (c) That in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered; and (d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purpose of sub-section (1), use of a trade mark shall include use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered.

(3) The registration of a trade mark shall not be revoked on the grounds specified in clause (a) or (b) of sub-section (1), if such use, as it referred to in those clauses, is commenced or resumed after the expiry of the five years period and before the application for revocation is made, shall only be regarded if the preparation for commencement or resumption began before the proprietor became aware that the application is made.

(4) An application for revocation may be made by an interested party to the Registrar, except that

(a) If proceedings concerning the trade mark in question are pending in the High Court or a District Court, the application shall be made to the High Court or, as the case may be, the District Court; and

(b) In case the application is made to the Registrar, he may at any stage of the proceedings refer the application to the High Court or a District Court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from-

(a) The date of the application for revocation; or

(b) If the Registrar, the High Court or a District Court is satisfied that the grounds for revocation existed at an earlier date, that date.

any of the following grounds, namely:- (a) that the manner in which the mark has been used by the proprietor has caused it to become liable to mislead the public in the manner referred to in sub-para (1) of para 4; (b) that the proprietor has failed to observe, or to secure the observance of, the regulations governing the use of the mark; or (c) that an amendment of the regulations governing the use of mark has been made so that such regulations- (i) no longer comply with requirement of sub-para (2) of para 5, and any further conditions as may prescribed; or (ii) are contrary to public policy or to accepted principles of morality.

14. Additional grounds for invalidity of registration

Apart from the grounds of invalidity provided for in section 80³⁰⁷, the registration of a collective mark may be declared

(7) Where the registration of a trade mark is revoked or declared invalid on the ground that the registration was secured in bad faith, the applicant shall be barred from applying for registration of the identical or similar trade mark for two years from the date of revocation or invalidation, whatever the case may be.

307 Section 80 of Trade Marks Ordinance 2001

Grounds for invalidity of registration.

(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 14 or any of the provisions thereof.

(2) Where the trade mark was registered in breach of clause (b), (c) or (d) of sub-section (1) of section 14, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registered acquired a distinctive character in relation to the goods or services for which it is registered.

(3) The registration of a trade mark may be declared invalid on the ground that there is- (a) an earlier trade mark in relation to which the conditions set out in sub-section (1), (2) or (3) of section 17 obtain;

invalid on the ground that the mark was registered in breach of the provisions of sub-para (1) of para 4, or sub-para (1) of para 6.

or (b) an earlier right in relation to which the condition set out in sub-section (4) of section 17 is satisfied, unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(4) An application for declaration of invalidity may be made by an interested party either to the Registrar or to the High Court or a District Court, except that-

- (a) If proceedings concerning the trade mark in question are pending in the High Court or a District Court, the application shall be made to the High Court or a District Court; and
- (b) In any other case, if the application has been made to the Registrar, he may at any stage of the proceedings refer the application to the High Court or a District Court.

(5) In the case of bad faith in the registration of a trade mark, the Registrar may apply to the High Court or a District Court for a declaration of the invalidity of the registration.

(6) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(7) Where the registration of a trade mark has been declared invalid to any extent, the registration shall to that extent be deemed never to have been made provided that this shall not affect the transactions past and closed.

APPENDIX: 2
CERTIFICATION MARKS
SECOND SCHEDULE
TRADE MARKS ORDINANCE 2001

General

The provisions of this Ordinance shall apply to certification marks subject to the provisions contained in this Schedule.

Signs of which certification mark may consist

In relation to a certification mark the reference in clause (xlvii) of section 2³⁰⁸ to distinguish goods or services of one undertaking from those of other undertaking shall be construed as a reference to distinguishing goods or services which are certified from those which are not.

Indication of geographical origin

1) Notwithstanding the provisions of clause (c) of subsection (1) of section 14³⁰⁹, a certification mark may be registered

308 Section 2 (xlvii) of Trade Marks Ordinance 2001

In this Ordinance, unless there is anything repugnant in the subject or context.

[.....]

(xlvii) "trade mark" means any mark capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings;

309 Section 14(1)(c) of Trade Marks Ordinance 2001

Absolute grounds for refusal of registration

which consist of signs or indications which may serve, in trade, to designate the geographical origin of the goods or services.

2) The proprietor of such a mark shall not be entitled to prohibit the use of the signs or indications in accordance with honest practices in industrial or commercial matters, in particular, by a person who is entitled to use a geographical name.

Nature of proprietor's business

A certification mark shall not be registered if the proprietor carries on a business involving the supply of goods or services of the kind certified.

Certification mark not to be misleading as to character or significance

1) A certifications mark shall not be registered if the public is liable to be misled as regards the character or significance of the mark, in particular, if it is likely to be taken to be something other than a certification mark.

(2) The following shall not be registered, namely;

[.....]

(c) trade marks which consist exclusively of marks or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services

(2) The Registrar may, accordingly, require that a mark in respect of which application has been made for registration include some indication that it is a certification mark.

(3) Notwithstanding the provisions of sub-section (7) of section 27³¹⁰, an application may be amended so as to comply with any such requirement.

6. Regulations governing use of certification mark

(1) An application for registration of a certification mark may be filed with the Registrar along with regulations governing the use of the mark.

(2) The regulations referred to in sub-para (1) shall indicate who shall be authorized to use the certification mark, the characteristics by the mark, how the certifying body shall test those characteristics and supervise the use of the mark, the fee, if any, to be paid in connection with the operation of the mark and the procedures for resolving disputes.

310 Section 27 (7) of Trade Marks Ordinance 2001

If the tribunal is of opinion that it is fair and reasonable in all the circumstances of the case to do so, may at any time, whether before or after acceptance, correct any error in, or in connection with, the application or may permit the applicant to amend his application upon such terms as it may think fit;

Provided that no amendment or correction shall be permitted in the application which substantially affects the identity of the trade mark or extends the goods or services covered by the application;

Provided further that if the amendment or correction in the application is permitted after the application has been advertised, the amendment or correction shall also be published.

(3) Any further requirements with which the regulation referred to in sub-para (1) shall have to comply may be imposed as may be prescribed.

7. Approval of regulations by the Registrar

(1) A certification mark shall not be registered unless- (a) the regulations governing the use of the mark- (i) comply with the requirements of sub-para (2) of para 6, and any further requirements, as may be prescribed; and (ii) are not contrary to public policy or to accepted principles of morality; and (b) the applicant is competent to certify the goods or services for which the mark is to be registered.

(2). Before the end of the prescribed period after the date of the application for registration of a certification mark, the applicant shall file the regulations with the Registrar and pay the prescribed fee, failing which the application shall be deemed to be withdraw.

8. Procedure for acceptance or refusal of application

(1) The Registrar shall consider whether the requirements specified in sub-para (1) of para 7 are met.

(2) If it appears to the Registrar that such requirements are not met, he shall inform the applicant and give him an opportunity, within such period as the Registrar may specify, to make representations or to file amended regulations.

(3) If the applicant fails to satisfy the Registrar that such requirements are met, or to file regulation amended so as to meet them, or fails to respond before the end of the specified period, the Registrar shall refuse the application.

(4) If it appears to the Registrar that such requirements, and the other requirements for registration, are met, he shall accept the application and shall proceed in accordance with section 28³¹¹.

311 Section 28 of Trade Marks Ordinance 2001

Publication, opposition proceedings and observations.

- (5) When an application for registration of a trade mark has been accepted, whether absolutely or subject to conditions or limitations, the Registrar shall, as soon as may be after acceptance, cause the application as accepted, together with the conditions and limitations, if any, subject to which it has been accepted, to be advertised in the Journal, and for all legal purposes, advertisement of the trade mark in the Journal shall constitute sufficient notice of acceptance of the trade mark;

Provided that the Registrar may cause an application to be advertised before acceptance where it appears to him that it is expedient by reason of any exceptional circumstances so to do, and where an application has been so advertised the Registrar may, if he thinks fit, advertise it again when it has been accepted, but shall not be bound so to do;

Provided further that where an application is advertised by reason of any special circumstances under the above proviso, the Registrar shall simultaneously notify the exceptional circumstances which led him so to do.

- (6) Any person may, within two months from the date of the advertisement or re-advertisement of an application for registration or within such further period not exceeding two months in the aggregate, as the Registrar, on application made to him in the prescribed manner and on

9. Regulations to be published

The regulations governing the use of a registered certification mark shall be published and notice of opposition may be given, and observations may be made, relating to the matters specified in sub-para (1) of para 7, in addition to any other grounds on which the application may be opposed or observations made.

payment of the prescribed fee, may allow, give notice to the Registrar of opposition to the registration.

- (7) The notice under sub-section (2) shall be given in writing in the prescribed manner, and shall include a statement of the grounds of opposition.
- (8) The Registrar shall serve in the prescribed manner a copy of the notice on the applicant, and within one month from the applicant of such copy of the notice of opposition, or within such further period not exceeding two months in the aggregate, as the Registrar, on application made to him in the prescribed manner and on payment of the prescribed fee. May allow, the applicant shall send to the Registrar in the prescribed manner a counter-statement of the grounds on which he relies for his application, and, if he does not do so he shall be deemed to have abandoned his application.
- (5) If the applicant sends the counter-statement referred to in sub-section (4).the Registrar shall serve in the prescribed manner a copy of the counter-statement on the opponent. If the opponent deems necessary, he may within one month from the receipt of such copy of the counter-statement, or within such further period not exceeding two months in the aggregate, as the Registrar, on application made to him in the prescribed manner and on payment of the prescribed fee, may allow, send to the Registrar in the prescribed manner a rejoinder.
- (6) If the opponent sends a rejoinder, the Registrar shall send in the prescribed manner a copy of the rejoinder to the applicant.
- (7) Any evidence upon which the opponent and the applicant may rely shall be submitted in the prescribed manner and within the prescribed time to the Registrar, and the Registrar shall give an opportunity to them to be heard, if they so desire.
- (8) The Registrar shall, unless the proceedings are discontinued or dismissed, after giving to the opponent and to the applicant an opportunity of being heard, decide whether, and subject to what conditions or limitations, if any, registration is to be permitted.
- (9) If the Registrar is of opinion that it is fair and reasonable in all circumstances of the case to do so, he may, on request made in the prescribed manner, permit correction of any error in, or any amendment of, a notice of opposition, a counter-statement, or a rejoinder on such terms as he thinks just.

10. Regulations to be open to inspection

The regulations governing the use of a registered certification mark shall be open to be public inspection in the same way as the Register.

11. Amendment of regulations

(1) An amendment of the regulations governing the use of a registered certification mark shall not be effective unless and until the amended regulations are filed with the Register and accepted by him.

(2) Before accepting any amended regulations the Registrar may, in any case where it appears to him expedient to do so, cause them to be published.

(3) If he does so, a notice of opposition may be given, and observations may be made, relating to the matters specified in sub-para (1) of para 7.

12. Consent to assignment of registered certification mark

The assignment or other transmission of a registered certification mark shall not be effective without the consent of the Registrar.

13. Infringement of rights of authorised user

The following provisions shall apply in relation to an authorised user of a registered certification mark as in relation to a licensee of a trade mark, namely:-

- (a) Sub-section (7) of section 40³¹²;
- (b) Sub-section (2) of section 51³¹³; and
- (c) Section 53³¹⁴.

14. The High Court or a District Court to take into account loss suffered by authorised users

In infringement proceedings brought by the proprietor of the registered certification mark any loss suffered or likely to e

312 Section 40 (7) of Trade Marks Ordinance 2001

A person who applies a registered trade mark to material intended to be used for labeling or packaging goods shall be treated as a party to any use of the material which infringes the registered trade mark if when he applied the mark he knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.

313 Section 51 (2) of Trade Marks Ordinance 2001

In considering what order, if any should be made, the High Court or District Court shall consider whether other remedies available in a action for infringement of the registered trade mark would be adequate to compensate the proprietor and any licensee and protect their interests.

314 Section 53 of Trade Marks Ordinance 2001

Infringing goods, material or articles may be treated as prohibited.-

(1) The proprietor of the registered trade mark may give notice in writing to the Collector of Customs that

- (a) He is the proprietor of the registered trade mark;
- (b) At a time and place specified in the notice, goods which, in relation to that registered trade mark are infringing goods, material or article, or bear false indications as to their source or the identity of their manufacture are expected to arrive in Pakistan from outside Pakistan and that they are subject to the control of the customs authorities under the Customs Act, 1969 (IV of 1969); and
- (c) He requests the Collector of Customs to treat such goods as prohibited goods.

suffered by authorised user shall be taken into account and the High Court or a District Court may give such directions as it thinks fit as to the extent to which the plaintiff shall hold the proceeds of any pecuniary remedy on behalf of such users.

15. Additional grounds for revocation of registration

Apart from the grounds of revocation provided for in section 73³¹⁵, the registration of a certification mark may be revoked on

315 Section 73 of Trade Marks Ordinance 2001

Revocation of registration

(1) The registration of a trade mark may be revoked on any of the following grounds, namely:-

- (a) That within the period of five years following the date of completion of registration procedure it has not been put to bona fide use in Pakistan by the proprietor or by an authorised user thereof, in relation to the goods or services for which it is registered and there are no proper reasons for its non-use;
- (b) That the bona fide use has been suspended for an uninterrupted period of five years and there are no proper reasons for its non-use;
- (c) That in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered; and (d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purpose of sub-section (1), use of a trade mark shall include use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered.

(3) The registration of a trade mark shall not be revoked on the grounds specified in clause (a) or (b) of sub-section (1), if such use, as it referred to in those clauses, is commenced or resumed after the expiry of the five years period and before the application for revocation is made, shall only be regarded if the preparation for commencement or resumption began before the proprietor became aware that the application is made.

(4) An application for revocation may be made by an interested party to the Registrar, except that

- (a) if proceedings concerning the trade mark in question are pending in the High Court or a District Court, the application shall be made to the High Court or, as the case may be, the District Court; and

any of the following grounds, namely:- (a) that the proprietor has begun to carry on such a business as is specified in para 4; (b) that the manner in which the mark has been used by the proprietor has caused it to become liable to mislead the public in the manner referred to in sub-para (1) of para 5; (c) that the proprietor has failed to observe, or to secure the observance of, the regulations governing the use of the mark; (d) that an amendment of the regulations has been made so that the regulations- (i) no longer comply with the requirements of sub-para (2) of para 6, and any further conditions as may be prescribed; or (ii) are contrary to public policy or to accepted principles of morality; or (e) that the proprietor is no longer competent to certify the goods or services for which the mark is registered.

16. Additional grounds for invalidity of registration

Apart from the grounds of invalidity provided for in section 80³¹⁶, the registration of a certification mark may be declared

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- (b) in case the application is made to the Registrar, he may at any stage of the proceedings refer the application to the High Court or a District Court.

(7) Where the registration of a trade mark is revoked or declared invalid on the ground that the registration was secured in bad faith, the applicant shall be barred from applying for registration of the identical or similar trade mark for two years from the date of revocation or invalidation, whatever the case may be.

invalid on the ground that the mark was registered in breach of the provisions of para 4, sub-para (1) of para 5 or sub-para (1) of para

Grounds for invalidity of registration.

(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 14 or any of the provisions thereof.

(2) Where the trade mark was registered in breach of clause (b), (c) or (d) of sub-section (1) of section 14, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registered acquired a distinctive character in relation to the goods or services for which it is registered.

(3) The registration of a trade mark may be declared invalid on the ground that there is- (a) an earlier trade mark in relation to which the conditions set out in sub-section (1), (2) or (3) of section 17 obtain; or (b) an earlier right in relation to which the condition set out in sub-section (4) of section 17 is satisfied. unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(4) An application for declaration of invalidity may be made by an interested party either to the Registrar or to the High Court or a District Court, except that-

- (a) if proceedings concerning the trade mark in question are pending in the High Court or a District Court, the application shall be made to the High Court or a District Court; and
- (b) in any other case, if the application has been made to the Registrar, he may at any stage of the proceedings refer the application to the High Court or a District Court.

(5) In the case of bad faith in the registration of a trade mark, the Registrar may apply to the High Court or a District Court for a declaration of the invalidity of the registration.

(6) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(7) Where the registration of a trade mark has been declared invalid to any extent, the registration shall to that extent be deemed never to have been made provided that this shall not affect the transactions past and closed.

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