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**THE PROTECTION OF GEOGRAPHICAL
INDICATIONS AND THE DOHA ROUND:
STRATEGIC AND POLICY CONSIDERATIONS
FOR AFRICA**

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In this series of papers, the authors examine a subject of importance to the development of the international intellectual property regime. The topics are selected following consultations with negotiators from developing countries.

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Executive Summary

In the on-going negotiations on the protection of geographical indications (GIs) in the Doha Round of Multilateral Trade Negotiations at the World Trade Organization (WTO), Members remain sharply divided on the two main issues under consideration. These issues relate to the question of establishing a register for GIs on wines and extending the enhanced protection currently offered to wines and spirits under Article 23 of Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) to cover all products.

The differences on approach and optimal negotiating outcomes also apply among the members of the African Group at the WTO. For the African Group, a key challenge has been finding a solid basis on which to base its position. The main problem is the lack of objective information and evidence. This study was commissioned to contribute to efforts to address this problem. The study has been conducted by undertaking a detailed review of literature, gathering new information and evidence, through interviews and questionnaires, and taking the analysis beyond listing of potential pros and cons and potential beneficiary products. Though further empirical work will undoubtedly be required, this Study presents new findings and offers recommendations that should provide the African Group with a more robust basis to make decisions on the way forward.

A number of findings have emerged in the various sections of the study. In the main these include that:

- Formally, African countries are active participants in the multilateral GI protection systems with wide membership in both the TRIPS Agreement and the Paris Convention.
- There are available legal means for the protection of GIs in all but six African countries.
- There are very few African GIs that are registered either in the African country of origin or third countries. This situation is puzzling considering the participation of African countries in international protection treaties and the availability of legal means for protection locally and abroad.
- In order to take the discussion beyond the pros and cons of GI protection and potential products, African countries need to consider a number of strategic and policy questions. These relate to the dynamics of capturing economic value out of GIs; access to GI protected products by local populations; the role of government in the GI framework; the costs of establishing and administering a GI regime in a country; the costs of developing, registering and enforcing individual GIs; and availability of technical assistance and capacity building.

In light of these findings and the analysis, the study makes three main recommendations regarding the Doha Round negotiations on GIs and on future research and technical assistance:

1. Regarding the register for wines, it recommends that provided the elements of notification are not burdensome, African countries can consider the proposal in WTO document TN/C/W/52 as a good basis for negotiations. In the final outcome, they need to ensure that the presumptions on evidence and genericness are rebuttable and that the standards of proof are determinable by national legislation.
2. With respect to whether to extend the protection offered to wines and spirits under Article 23 of TRIPS, including establishing a register, it is recommended that African

countries approach the issue with caution. Until there is better information and evidence, including a better understanding of the very limited use of the currently existing systems the focus should be on fact-based discussions and on establishing a better empirical evidence base.

3. On future research, analysis and technical assistance, it is recommended that the focus be on generating better empirical evidence at country and product level. This task can only be achieved through interdisciplinary field research. This is where technical assistance and capacity building efforts should also focus going forward.

1. Introduction

Since the launch of the Doha Round of Multilateral Trade Negotiations (hereinafter “the Doha Round”) the World Trade Organization (WTO) Members have, among other subjects, been negotiating possible rules for enhanced protection of geographical indications (GIs).¹ There are two main issues being addressed. The first relates to the establishment of a multilateral register for wines as mandated in Article 23 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. The second issue relates to whether the level of protection provided for wines and spirits under Article 23 of TRIPS, including the requirement to establish a multilateral register for wines, should be extended to cover all products.

In these negotiations, WTO Members remain sharply divided on a range of procedural and technical points. The differences range from political issues such as mandates through to substantive questions regarding the costs and benefits of the various proposed solutions. These differences are also reflected in the membership of the African Group at the WTO. The nature and scope of the solutions that comes out of the WTO negotiation are of particular interest to Africa as they will have important implications especially for food and agriculture trade in the future.²

A key challenge for Africa countries participating in these negotiations is finding a solid basis for the positions they take. The main problem is the lack of objective evidence on which to base their positions. This study seeks to contribute to efforts to address this key problem. Its purpose is to gather and analyse information and evidence on:

- The international legal regime for the protection of GIs, Africa’s participation in the system and the state of research and policy analysis on GI protection in Africa;
- Availability of legal means for the protection of GIs in different African countries;
- African products which are currently protected or registered as GIs both in the countries of origin and abroad;
- Other African Products that could be protected or registered as GIs; and
- Strategic and policy considerations in approaching GI protection issues.

Based on this information, evidence and analysis, the study then provides recommendations on how African countries should engage in the GI register and

¹ The definition of GIs used in this study is based on the definition in the TRIPS Agreement. GIs are defined, under Article 22.1 of the TRIPS Agreement as “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 origin.” GIs are therefore distinct from “indications of source”, terminology used in the Paris Convention for the Protection of Industrial Property (Paris Convention) and other WIPO treaties, which refer to goods bearing false or deceptive indication as to the country or place of origin. This also means that the term “geographical indications”, as used in this paper, is broader than the term “appellations of origin” which are defined in the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (The Lisbon Agreement) as “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, including natural and human factors.” As such, though all appellations of origin are GIs, some GIs are not appellations of origin.

² Josling (2006), p. 338.

extension negotiations as well as on future research and technical assistance. Finally, the study also provides a list of selected bibliographic materials including useful websites and WTO and WIPO documents.

The information and evidence contained in this study were collected through various means. These included a detailed literature review and desktop research as well as interviews and questionnaire surveys with key stakeholders and actors. Two sets of questionnaires used in the collection of information for the study are attached as annexes 1 and 2.

2. Background: The International Protection of Origin-labelled Products and Future Trends

Simply stated, a GI is any geographical name or sign (symbols, icons etc.,) affixed to a good which conveys geographical information that is useful in identifying the origin, reputation and/or qualities of the product.³ The international recognition for the use of GIs to differentiate goods dates as far back as 19th Century. Since then, their importance has progressively grown. In the last decade and a half, in particular, there has been heightened interest following the inclusion of GIs as protectable subject matter under the TRIPS Agreement. The increasing interest and use of GIs, however, also signals their increasing commercial importance, at least for some players, which parallels the increased interest and use of other types of intellectual property (IP) rights. In the main, while manufactured or industrial products can also benefit from GI protection, the vast majority of GI protection relates to agricultural products in the foods and beverages category.

This section provides a brief background to the international systems of protection for GIs and discusses future trends in the further development of GI protection globally. It also examines the participation of African countries in the international GI protection systems and the state of research and analysis on GI protection in Africa. This background discussion is important as it provides the context for the remainder of the study.

2.1 The international protection of GIs

International protection of origin-labelled products has a long history and a basic rationale that is difficult to dismiss.⁴ Today, international IP and related laws offer two main options for GI protection. These include (a) defense against unfair competition; and (b) positive protection through registration mainly under *sui generis* systems or through trademarks.⁵ Three distinct periods have marked the development of international rules on GIs. These include the period: (a) before the TRIPS Agreement; (b) after the adoption of TRIPS; (c) the post-TRIPS period marked by the Doha negotiations and developments in bilateral and regional trade arrangements as well as developments at World Intellectual Property Organization (WIPO).

³ Adapted from Larson (2007), p.2.

⁴ Josling (2006), p. 338.

⁵ Larson (2007), p. 1.

2.1.1 *The protection of GIs in the pre-TRIPS period*

The international protection of GIs, in one form or another, dates back to the time of the adoption of the Paris Convention for the Protection of Industrial Property (hereinafter “the Paris Convention”) in 1883.⁶ Under the Paris Convention, the scope of protected subject matter, in terms of Article 1.2 included ‘indications of source and appellations of origin’.⁷ The protection required to be offered by the members of the Paris Convention is to assure nationals of other Convention members’ effective protection against unfair competition. Article 10*bis* of the Convention defines an act of unfair competition as “any act of competition contrary to honest practices in industrial and commercial matters”. Acts specifically prohibited by the Paris Convention include, among others, “indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.”

Subsequently, the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 (hereinafter “the Madrid Agreement on Indications of Source”) and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (hereinafter “the Lisbon Agreement”) provided additional protection. Both Agreements, however, have very limited membership. The Madrid Agreement on Indications of Source has only 35 members while the Lisbon Agreement has 26 members out of the 184 Members of WIPO, the organisation that administers the Agreement.

In the pre-TRIPS period, there was also a multiplicity of regional and bilateral agreements on GIs involving both developed and developing countries as well as product specific treaties.⁸ One of the earliest bilateral agreements is the 1932 Convention between El Salvador and France concerning the Protection of Appellations of Origin. Product specific agreements included the International Convention for the Use of *Appellations D’Origine* and Denominations of Cheeses commonly known as the Stresa Convention of 1951 and the International Agreement on Olive Oil and Table Olives of 1986.

In general, however, it is fair to say that until the entry into force of the TRIPS Agreement, global protection of GIs was mainly based on the limited protection offered under the Paris Convention.⁹

2.1.2 *The protection of GIs under the TRIPS Agreement*

The TRIPS Agreement, which provides a comprehensive definition of a GI, is the first truly multilateral agreement for the international protection of GIs.¹⁰ The protection

⁶ The text of the Paris Convention, including various revisions, is available on the WIPO website at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (last accessed 24 August 2008).

⁷ Specific protection is offered under Articles 10 and 11*bis* of the Convention.

⁸ For details on these agreements see WTO documents IP/C/W/85 and IP/C/W/85/Add.1.

⁹ While there were a number of bilateral and regional agreements, these, as is obvious, did not offer multilateral protection nor did they have significant impact on international protection in the same way that today’s bilateral agreements have in light of the national treatment requirements under the TRIPS Agreement.

¹⁰ WTO (2004), p. 73. For a detailed historical analysis of the provisions on GIs in the TRIPS Agreement see e.g., UNCTAD and ICTSD (2005).

under the Agreement can be divided into two categories.¹¹ First, Article 22 provides for a minimum protection to be offered in all WTO Members for all products. In the main, Members are required to provide legal means for the prevention of “the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good” and “any use which constitutes an act of unfair competition” under Article *10bis* of the Paris Convention. The provisions also provide for the refusal or invalidation of trademarks which contain or consist of a GI.¹² The essence of the Article 22 protection is therefore to provide an avenue to prevent misleading indications and acts of unfair competition. GI owners are therefore entitled to a negative right but not a positive right of exclusivity and to prevent use.

At the second level is the additional protection for wines and spirits. Here, Article 23 of the TRIPS Agreement requires WTO Members to provide legal means for “interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like.” Article 23 also makes provisions with respect to refusal or invalidation of trademarks containing or consisting of GIs for wines and spirits as well as protection in case of homonymous GIs for wines¹³. Finally, Article 23 provides a mandate for the Council for TRIPS to undertake negotiations on the establishment of a multilateral system of notification and registration of GIs for wines eligible for protection in the Members participating in the system.

The main difference between the protection offered under Article 23 of TRIPS and the general protection under Article 22 turns on the notion of ‘misleading the public’ and the question of establishing a register. The removal of the requirement of misleading the public means that GI owners for wines and spirits are entitled to protection:

- Even when use of the geographical name would not mislead the public or constitute an act of unfair competition; and
- Even in cases where the true origin of the product is indicated.

The GI owners for wines and spirits therefore enjoy a positive right and in case of a dispute, all they need to show is that the other party used the GI. Under the Article 22 protection the GI owner has the burden to prove that the public was misled or that there was act of unfair competition. Both these notions do not have an internationally agreed

¹¹ The protection of GIs under the TRIPS Agreement is dealt with in Section 3 of Part of the Agreement covering Articles 22 through to 24.

¹² Under paragraph 3 of Article 22 of the TRIPS Agreement, all WTO Members are required, ex-officio or at the request of an interested party, to refuse or invalidate the registration of a trademark which contains or consists of a GI with respect to goods not originating in the territory indicated if the use of the trademark is of such a nature as to mislead the public as to the true origin of the goods.

¹³ One of the most well-known case of homonymous wines relates to the producers of wine named after the municipality of “Champagne” in the Vaud region of Switzerland. In this case, the Swiss government entered into a bilateral agreement with the EU where Switzerland agreed to abandon the use of the name “Champagne”. Another case is that of Rioja wines which refers to both an area in Spain and an area in Argentina.

meaning in practice and are therefore subject to different interpretations in different jurisdictions.

The TRIPS Agreement also provides, in Article 24, for exceptions and a review mandate with respect to the operation of the system of GI protection established under the Agreement.¹⁴

2.1.3 *The future of GIs in the international IP system*

The reform of IP systems in WTO Members, particularly the developing and least-developed among them, to implement their obligations under the TRIPS Agreement are far from complete. Nevertheless, new rules and obligations on GIs continue to come into play through various processes. In the coming years, changes related to the international protection of GIs are likely to result from three main processes.

The first of these relates to bilateral and/or regional trade agreements which incorporate GIs in IP chapters. This is already the case with respect to the economic partnership agreements (EPAs) between the European Communities (EC) and African, Caribbean and Pacific (ACP) countries and other free trade agreements (FTAs) between the EC and other developing countries as well as FTAs between the U.S. and various developed and developing countries. In the ACP negotiations, already, the EC-CARIFORUM EPA contains detailed provisions on the protection of GIs for all products.¹⁵

The second process that is likely to have significant impact on the level and nature of GI protection is the Doha Round. The negotiations in the WTO, as already noted, address both the mandated negotiations under Article 23 of TRIPS with respect to the establishment of a multilateral system of notification and registration for wines as well as new demands by a significant number of WTO Members for the extension of the protection provided for wines and spirits under Article 23 to all products.¹⁶

In their latest proposal, the proponents, led by the EC, have proposed¹⁷:

- (a) The establishment of a register, to be administered by the WTO Secretariat, for GIs for wines protected by any WTO Member. Once established, national authorities

¹⁴ See Article 24 of the TRIPS Agreement.

¹⁵ For discussion of the EC-CARIFORUM EPA provisions on GIs and their implications for ACP countries, including African countries, see e.g., Musungu (2008).

¹⁶ Under Paragraph 18 of the Doha Ministerial Declaration (WTO document WT/MIN(01)/DEC/1), which is the basis of the Doha Round, Trade Ministers agreed that “With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits...” Negotiations with respect to extension of the protection provided for wines and spirits to other products are being undertaken on the basis of the mandate provided in paragraph 12 of the Ministerial Declaration. It provides *inter alia* that “We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing...” Extension of GIs to cover other products is an outstanding implementation issue.

¹⁷ This proposal, contained in WTO document TN/C/W/52 was submitted to the Trade Negotiations Committee (TNC) on 19 July 2008 by more than 100 Members of the WTO. This group included both the ACP group countries and the African Group countries excluding South Africa. The wide support for the submission should, however, not be confused with support for the GIs extension and register demands since the same submission also includes proposals on the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD). The latter proposals are not addressed in this paper.

- would be required to consult, and take into account, the information in the register when registering GIs or trademarks; and
- (b) An amendment of the TRIPS Agreement to extend the protection offered to wines and spirits under Article 23 to GIs for all products. The extension would also include the application of the register to all products.

If these proposals were accepted, what would it mean for African countries? This is the ultimate question that this study seeks to address.

Finally, there are also moves in WIPO to reform the system under the Lisbon Agreement. In particular, there are discussions on the need for amendments or revisions to the Agreement including its regulations.¹⁸ The exact direction and content of such revisions is, however, not yet clear.

2.2 The participation of African countries in international treaties relevant to the protection of GIs

There are, as already noted, four main international treaties that are relevant to the protection of GIs. These are the Paris Convention, the Madrid Agreement on Indications of Source, the Lisbon Agreement and the TRIPS Agreement. Table 1 below shows the membership of African countries in the four treaties.

<i>Name of Treaty</i>	<i>Total Membership</i>	<i>Number of African Countries Party to the Treaty</i>
The Paris Convention	173	47
The Madrid Agreement on Indications of Source	35	4
The Lisbon Agreement	26	6
The TRIPS Agreement	153	41

Source: WIPO and WTO

The wide participation of African countries in the TRIPS Agreement and the Paris Convention suggests that at the formal level, African countries are largely integrated in the multilateral system for the protection of GIs.

2.3 The state of research on the protection of GIs in Africa

There is extensive literature on the international protection of GIs. This reflects significant research and analysis on a range of points. In particular, since the launch of the Doha Round in 2001, the literature has grown exponentially. The selected bibliography to this paper, including the useful websites as well as WTO and WIPO documents provides a snapshot of the existing literature. Similarly, the period since 2002 has seen many national, regional and international conferences and seminars as well as an

¹⁸ For example, this question was the subject of a whole day discussion at the recent WIPO Forum on Geographical Indications and Appellations of Origin held in Lisbon. The forum details are available on the WIPO website at http://www.wipo.int/meetings/en/details.jsp?meeting_id=16802 (last accessed on 27 October 2008).

increase in capacity building and technical assistance activities on GIs.¹⁹ There has even been the birth of new organisations such as the Organisation for International Geographical Indications Network (oriGIn) which are engaged in policy, research and awareness activities. oriGIn has regional chapters including in Africa.²⁰

As a general proposition, it can therefore be concluded that there exists significant research and analysis on the international protection of GIs. The research addresses many aspects of GI protection including, among others the: international framework for GI protection; socio-economics of GI protection; the scope of obligations under the TRIPS Agreement including the negotiating history of the provisions; the development implications of GI protection; the available legal means of GI protection in various jurisdictions around the world; the relationship between GIs and trademarks; protection of GIs under bilateral agreements and regional regimes such as in the EC system; the Doha Round negotiations on GIs including the potential benefits and costs of extension of protection offered to wines and spirits to all products; and relationship between GIs and the protection of biodiversity and traditional knowledge.

For Africa, however, there are two main shortcomings in the existing literature. The first is that specific research and analysis regarding GI protection in Africa remains very thin.²¹ The most significant study, which contains detailed information about the legal protection of GIs in various African countries, remains the O'Connor & Company/Insight Consulting study commissioned by the EC.²² The other important studies which cover Africa include the recent study by Larson²³ and oft cited 2005 paper by Grant.²⁴ The second problem, which is relevant beyond Africa, is that notwithstanding all the writing, very little theoretical and empirical evidence has been generated to substantiate the claims regarding the value and the costs of GI protection for the relevant economic agents.²⁵

The consequence of the limited literature on GI protection Africa and the lack of concrete economic evidence has been that there are many gaps regarding the need for, the use and the benefits and costs of protection including with respect to GI protection sought by African producers/business in third countries. The remainder of this study summarises the available evidence and information on various aspects of GI protection in Africa and provides new information and evidence collected for the study through desktop research and analysis and stakeholder interviews.

It should be noted, however, that a conclusive picture on the exact state of GI protection in Africa and an analysis of the economic benefits and costs is only possible through detailed empirical field research. A key reason for this is that neither the country IP offices nor key international organisations dealing with GIs seem to have reliable information. In cases where questionnaires have been administered, the response rate has

¹⁹ An example is the Worldwide Symposium on Geographical Indications which was organized by WIPO and the Italian government in June 2005. Information on this conference is available at http://www.wipo.int/meetings/en/2005/geo_pmf/wipo_geo_pmf_05_inf_1_prov.html (last accessed on 27 October 2008).

²⁰ Information about oriGIn can be found on their website at <http://origin.technomind.be/> (last accessed on 27 October 2008).

²¹ Ethiopian coffee has attracted the most attention in the literature that focuses on Africa.

²² O'Connor & Company and Insight Consulting (2007).

²³ Larson (2007).

²⁴ Grant (2005).

²⁵ WTO (2004), p.79.

been dismal. For example, except for Morocco, no other African country has responded to the Checklist of Questions for the TRIPS Article 24.2 review.²⁶ Similarly, only one country, Mali, responded to the specific questionnaire developed for this study.

Interestingly, even specialised international organisations such as WIPO either do not have reliable information or unwilling to provide such factual information. In response to the questionnaire for this study, for example, the WIPO Secretariat did not provide much information arguing that WIPO does not have a mandate to provide information of “legal or factual nature pertaining to individual intellectual property rights in its Member States”. The WTO Secretariat did not respond to the questionnaire.

3. Availability of Legal Means for the Protection of GIs in African Countries

GIs, taken as any geographical name or sign (symbols, icons etc.) affixed to a good which conveys geographical information that is useful in identifying the origin, reputation and/or qualities of the product can be legal protected in two main forms. Defensive protection, which focuses on the prevention of misleading indications and unfair competition and positive protection involving the registration of a GI either through a *sui generis* system or as trademarks. The legal means for obtaining defensive protection would mainly be through unfair competition laws, common law rules on passing off or case law. This study mostly focuses on positive protection which is directly relevant to the Doha Round negotiations.

There exists the possibility of obtaining positive GI protection, in one form or another, in all but six African countries.²⁷ For these six countries, there is either no positive protection available or there is no reliable information on whether positive GI protection can be obtained. Among the 47 countries where there is some level of positive protection, such protection can be obtained under one of two legal regimes. Protection could either be through specific GI laws or through trademark regimes where protection of certification or collective marks is possible.²⁸

23 of the 47 countries have specific laws providing GI protection while in one country - South Africa, there is *sui generis* GI protection for only wines and spirits pursuant to a bilateral agreement with the EC.²⁹ Of the 23 countries with *sui generis* GI laws, 16 are Members of the African Intellectual Property Organization (OAPI) and therefore have the same GI law, namely the provisions of Annex VI to the Bangui Agreement.³⁰

²⁶ The Checklist is contained in WTO documents IP/C/13 and IP/C/13/Add.1.

²⁷ These countries are Cape Verde, Comoros, Djibouti, Eritrea, Sao Tome & Principe and Somalia.

²⁸ In many countries it is possible to obtain trademarks with geographical references in certain circumstances. However, these are mostly special types of trademarks which could either be collective or certification marks. There are a number of reasons for this. These include the fact that trademark law generally prohibits the registration of purely descriptive words and forbids misleading the consumer through the trademark itself. For further discussion see e.g., Larson (2007).

²⁹ The agreement can be accessed at <http://europa.eu/scadplus/leg/en/lvb/r12207.htm> (last accessed on 27 October 2008).

³⁰ The Agreement was signed in 1977. It was then revised in 1999 to make it compliant with the TRIPS Agreement. The latter revisions came into force in 2002. The text of the Agreement and further information about OAPI is available at <http://www.oapi.wipo.net/fr/OAPI/index.htm> (last accessed on 24 August 2008).

In the remaining 24 countries, positive GI protection can only be obtained through certification or collective trademarks under national trademark laws. In addition, for a number of countries, it is also possible to obtain certification or collective trademarks through the African Regional Intellectual Property Organization (ARIPO) by virtue of the Banjul Protocol on Trademarks.³¹

Table 2 below shows the countries that have *sui generis* GI laws and those where GI protection can only be obtained through the use of trademarks. The table also indicates which of these are WTO Members. The countries marked with an asterisk in the table are the members of OAPI while those marked with two asterix are ARIPO members.

The increased attention and importance given to GIs coupled with the increase technical assistance suggests that many of the countries which currently only provides trademark protection for GIs are likely to move towards specific *sui generis* laws. Anecdotal evidence supports this assertion. For example, countries such as Botswana, Kenya and Rwanda are in the process of developing new *sui generis* GI laws. In the case of Rwanda, the new GI law received final approval by Parliament in November 2008 and should come into force once the implementing regulations are finalised.

4. Registered GIs in Africa and African products Registered as GIs in Third Countries

The existence of a number of multilateral treaties, particularly the Lisbon Agreement and the TRIPS Agreement, which mandate state parties to provide legal means for positive protection of GIs implies that African countries and/or producers/business can obtain such protection in large number of countries across the world. The question is whether African countries and producers/business have taken advantage of the existing laws and regulations for the protection of GIs, including their own laws. As corollary, there is also a question as to whether foreign producers and business have registered their GIs in African countries. The following sub-sections seek to provide answers to these questions.

4.1 Registered African GIs in the country of origin

There are very few African products that are currently registered or are in the process of registration as GIs including through the use of collective or certification marks. This is also true for the African countries that are party to the Lisbon Agreement. Our research so far has revealed that:

- Both Kenyan coffee and Kenyan tea are registered in Kenya through certification marks;
- There is a pending application for a GI on Argan Oil from the Souss Massa Dra region in Morocco;

³¹ The Banjul Protocol provides for a centralized trademark registration procedure. Applications for trademark registrations may be submitted either to the ARIPO Office in Harare or to the trademark office of a member state. The application must designate the member state(s) where registration is sought. Information about the Protocol and ARIPO generally is available at <http://www.aripo.org/> (last accessed on 24 August 2008).

**Table 2:
Available Legal Regime for GI Protection in 47 African Countries**

Country	Legal Regime	WTO Member
Algeria	Specific GI protection regime	No
Angola	Trademark regime	Yes
Benin*	Specific GI protection regime	Yes
Botswana**	Trademark regime	Yes
Burkina Faso*	Specific GI protection regime	Yes
Burundi	Trademark regime	Yes
Cameroon*	Specific GI protection regime	Yes
Central African Republic*	Specific GI protection regime	Yes
Chad*	Specific GI protection regime	Yes
Congo Republic*	Specific GI protection regime	Yes
D. R. Congo*	Specific GI protection regime	Yes
Egypt	Trademark regime	Yes
Equatorial Guinea*	Specific GI protection regime	Yes
Ethiopia	Trademark regime	No
Gabon*	Specific GI protection regime	Yes
Gambia**	Trademark regime	Yes
Ghana**	Trademark regime	Yes
Guinea*	Specific GI protection regime	Yes
Guinea Bissau*	Specific GI protection regime	Yes
Ivory Coast*	Specific GI protection regime	Yes
Kenya**	Trademark regime	Yes
Lesotho**	Trademark regime	Yes
Liberia	Trademark regime	Yes
Libya	Trademark regime	No
Madagascar	Trademark regime	Yes
Malawi**	Trademark regime	Yes
Mali*	Specific GI protection regime	Yes
Mauritania*	Specific GI protection regime	Yes
Mauritius	Specific GI protection regime	Yes
Morocco	Specific GI protection regime	Yes
Mozambique**	Specific GI protection regime	Yes
Namibia**	Trademark regime	Yes
Niger*	Specific GI protection regime	Yes
Nigeria	Trademark regime	Yes
Rwanda	Trademark regime	Yes
Senegal*	Specific GI protection regime	Yes
Seychelles	Trademark regime	No
Sierra Leone**	Trademark regime	Yes
South Africa	Trademark regime (except for wines and spirits)	Yes
Sudan**	Trademark regime	No
Swaziland**	Trademark regime	Yes
Tanzania**	Trademark regime	Yes
Togo*	Specific GI protection regime	Yes
Tunisia	Specific GI protection regime	Yes
Uganda**	Trademark regime	Yes
Zambia**	Trademark regime	Yes
Zimbabwe**	Specific GI protection regime	Yes

Source: O'Connor/Insight Consulting 2007

- Through a cooperation agreement between the French National IP Institute and OAPI the following products are being developed as GIs: Oku white honey and njombe pepper from Cameroon; Atcheke of Grand Lahou and the Khorogho garment from Coted'Ivoire; Diama coffee and the Mafeya pineapple from Guinea; and Massina Kwite butter and the Souflou green beans from Burkina Faso.

While Ethiopian coffees are registered as trademarks in many countries, it is not clear whether in fact similar trademarks have been registered in Ethiopia. It also remains unclear whether the trademark registrations are collective or certification trademarks or whether they are ordinary trademarks.

This low level of registration of GIs in African countries is puzzling considering that at the minimum, legal means for positive GI protection is available in most countries. Various reasons could be advanced explain this situation. These include that:

- There is a low level of awareness regarding the availability of GI protection as is the case with other forms of IP such as patents;
- Many African economies remain largely dominated by the informal sector where the use of registered GIs may be less important than say in Europe;
- Considering that many groups that may be interested in GIs, such as farmers or traditional handicraft dealers, are small, they face a range of challenges which have prevented them using GIs in their marketing strategies³²; and
- There may have been no investment in market research by African countries and/or producers to determine the demand, or market, for differentiated products.

Ultimately, it is important to understand that the legal, economic and cultural importance that countries give to geographical labelling in their internal markets will determine how they benefit from enhanced international GI protection.³³

4.2 African GIs registered in third countries

Protection of GIs originating from Africa in third countries is very limited. Except Ethiopian coffee and Rwanda coffee, the latter which is registered by an individual as US trademark number 3378503 for 'The land of a Thousand Hills Coffee Handpicked in the Republic of Rwanda', the author has so far found no evidence that African products have been registered as GIs in third countries including other African countries. This appears to be the case even for the six African countries that are parties to the Lisbon Agreement.

In the case of Ethiopia, according to the Ethiopian Coffee Network, which includes the Ethiopian Intellectual Property Office, Ethiopian coffees Sidamo, Harar and Yirgacheffe have been registered or are in the process of being registered in 28 countries around the world. These include the US and EU as well as a number of developing countries such as China, India, Brazil and South Africa.³⁴ In some of the countries the applications for registration are facing opposition.

³² Many of these potential challenges are highlighted in section 5 below.

³³ Larson (2007), p. 60.

³⁴ Detailed information can be found on the organisations website at <http://www.ethiopiancoffeenetwork.com/about5.shtml> (last accessed 27 October 2008).

4.3 Third countries' GIs registered in Africa

Except for the long list of wines and spirits under the EC-South Africa agreements on trade in wine and spirits respectively, evidence of other foreign GIs that are specifically registered in Africa is also scarce. So far the research for this study has revealed that only:

- “Champagne” appears to have been registered in the 16 African countries that are members of OAPI.

4.4. Other African products that could be registered as GIs

Except for the few GIs discussed above, the literature on GIs in Africa mainly contains information regarding the potential African products that may benefit from extended GI protection under the TRIPS Agreement. The products that are mentioned range from agricultural products to fish products through to handicrafts.³⁵ During the course of the research for this study the author heard of many more examples. It is not particularly relevant, however, to list all the possible products here. Suffice it to say that in a continent with rich traditional and cultural heritage as well as abundant biodiversity, including genetic resources for food and agriculture, there are potentially an infinite number of products that *could* benefit from GI protection.

Developing and eventually capturing the economic and socio-cultural development benefits from GIs, however, depends on many factors. Whether a particular product will bring benefits if protected by GIs depends on a range of strategic and policy considerations. These considerations, which we discuss in section 6 below, should guide the thinking of African countries and producers regarding the actual potential of GIs on particular products.

4.5 The experience with GIs in other developing countries

In general, both Latin American and Asian countries have more developed systems and more experience with GIs than African countries. This becomes clear when one considers the number of GIs protected locally in these countries.³⁶ Most of the countries in Latin America have statutory protection of GIs which producers have taken advantage of. GIs such as Café de Colombia, Pisco, protected in Chile and Peru, as well as Tequila and Mezcal from Mexico are well known. Brazil is reported to have 12 or more GIs covering coffee, coloured cotton, mineral waters and electronic equipment. In Asia, countries such as China, India, Thailand, Vietnam and Sri Lanka all have significantly developed GI regimes with various GIs registered locally.

Overall, however, while there are clear success stories such as Café de Colombia and some anecdotal evidence of economic, cultural and environmental benefits in these countries, there is no empirical evidence of widespread benefits.³⁷

³⁵ For example, at the Worldwide Symposium on Geographical Indications, *supra* note 19, Otieno Odek of the Kenya Industrial Property Institute (KIPI) gave a list of over 50 Kenyan and other African countries that could benefit from GI protection.

³⁶ See Larson (2007).

³⁷ See e.g., the discussion in Zografos (2007).

5. GI Protection in Africa: Strategic and Policy Considerations

There is wide agreement that the protection of GIs has the potential to benefit African countries. Some of the possible benefits include maintaining the reputation of products, helping producers obtain premium prices and the use of GIs as a possible tool to protect traditional knowledge and biological resources.³⁸ Box 1 below contains a list of some of the advantages, particularly for developing countries, including African countries, which one finds in GI literature or will hear from GI supporters.

Box 1: Potential Benefits of GI Protection for African Countries
<ul style="list-style-type: none">• GIs, unlike patents, require very low levels of innovation, if any, which allows a larger number of players to benefit from protection.• GIs attached to goods can be an important signal to consumers about the reputation of the product regarding its quality and hence justify a higher price.• Since GIs predominantly apply to agricultural and cultural products, African and other developing countries have a natural competitive advantage.• Convergence of GI strategies with other market incentives such as organic certification is useful for small organisations.• GIs are important to prevent delocalisation of production since a GI can only be produced in a given area or locality.• GIs can be utilised to transform producers of generic goods into exporters of high-quality agribusiness and handicraft products.• When reputation already exists, small farmers may benefit directly from GI protection coupled with niche market development.• GI governing bodies being collective spaces in which organisation processes are focused on regional identity may bring about the type of governance needed to transform supply chains into value chains that create added value.• The collective approach to GIs can benefit small producers that could normally not be able to finance marketing and brand development activities.• Strong links between product and culture can benefit rural development.• Once small producers have achieved the quality standards needed to access new markets, precise use of geographical information in labelling can easily be implemented with or without GI registration.• GIs can help prevent bio piracy of traditional knowledge as well as help protect or provide recognition to traditional production methods such as seed selection criteria and food conservation practices. This will permit the transformation of TK into marketable products.• GI production systems and processes based on well managed extractive activities promote conservation of natural vegetation and forested areas which benefits ecosystem and landscape conservation.
Summary by author based on existing literature

³⁸ See e.g., Grant, Catherine, “Geographical Indications: Potential Benefits and Costs for ECOWAS Region”, presentation at the ICTSD, ENDA and QUNO Regional Dialogue on the Economic Partnership Agreements, Intellectual Property and Sustainable Development for ECOWAS Countries”, Saly, Dakar, Senegal 30 – 31 May 2007 (Available at http://www.iprsonline.org/ictsd/Dialogues/2007-05-30/2007-05-30_docu.htm) (last accessed on 24 August 2008).

It should be noted; however, that as with many other forms of intellectual property, effectively using GIs to achieve these objectives raises a number of challenges. These challenges apply not just for African countries but many other developing countries and even developed countries. Some of these challenges are not easy to surmount which might explain the very low level of use of GIs in Africa or by African producers/businesses abroad. In a recent study, Larson summarises (Box 2) some of the challenges and pitfalls related to GI protection in developing countries.

The long list of potential benefits and the equally long list of possible disadvantages and challenges, though useful, are not intrinsically helpful in answering the central question with which this study is concerned -whether African countries can benefit from an enhanced international GI protection regime. The analysis needs to go beyond potential products and generic advantages and disadvantages. The character and strength of a particular GI will vary significantly depending on the history of the GI as well as the market dynamics both locally and abroad. There is also a broader innovation and economic question, that is, whether GI protection encourages or discourages technical change and favourable marketing or if it restricts legitimate competition.³⁹ Ultimately, the issue as to whether a GI is merited or not is essentially empirical.⁴⁰ The costs and benefits have to be weighed based on empirical facts about markets, products, consumer tastes and perceptions as well as financial requirements.

In order to move beyond the potentials to a reasoned basis for taking positions in the Doha Round, African countries need to address themselves to a number of strategic and policy considerations. The considerations include: the dynamics of capturing economic value from GIs; access to GI protected products by local populations; the role of government; the costs of establishing and administering a GI regime in a country; the costs of developing, registering and enforcing individual GIs; and availability of technical assistance and capacity building. The study discusses each of the considerations in turn in the sub-sections 6.1 through to 6.6 below.

5.1 Capturing Economic Value from GI Protection

From a trade perspective, GIs are important for two basic reasons - consumer protection and value addition. The latter is the most important for African countries in the context of the WTO negotiations. Consequently, while it true that the consumer protection function of GIs has an economic value, we concentrate here on the question of value addition and value capture. Two specific issues are important to determine whether developing countries, their producers, especially the small producers, and other entities will capture significant new value through GI protection. First, one needs to consider the workings of the production and distribution value chains for the particular product. Secondly, the market structure for the GI protected goods needs to be understood. A related issue that also needs to be considered when thinking about capturing economic value relates to the potential for misappropriation of GIs on African products.

5.1.1 Production and distribution value chains

“The existence of governance structures that organise the value chain to reach the market, invest in the intrinsic quality of the product and defend its values in trade is,

³⁹ For discussion see e.g., Josling (2006), pp. 338 – 339.

⁴⁰ Josling (2006), p. 339.

Box 2:
Challenges and Pitfalls with respect to GI Protection in Developing Countries

- Linking a GI to a specific variety, breed or sub-species as a response to productivity and market demands may marginalise other genetic resources that are biologically and culturally relevant.
- Formal and well distributed knowledge and information about biological resources and cultural practices with GI potential is lacking in developing countries.
- It is common that small farmers cannot produce surpluses to participate in market-oriented activities such as GI development.
- Small producers are vulnerable in national and export markets for economic and scale reasons which cannot be addressed solely with GI differentiation.
- Although evidence of economic benefits from GI protection can be found in developing countries, the distribution of benefits within value chains is unclear and several cases point to concentration of power in transformers and distributors.
- Employment generated by GI may contribute to the rural economy but not necessarily generate benefits for biodiversity conservation and small farmers.
- In the absence of democratic governance structures the value added of GI monopoly may not be capitalised by regional interests or small farmers.
- Differentiation of production processes, qualities and markets will be difficult to achieve without operating governance structures that are respectful of local culture.
- Market segmentation that attends only to high end niches may generate economic exclusions or inhibit access to nutritious and culturally valuable resources by local or low income populations.
- Statutory declaration of GIs without the relevant operating bodies may fail to connect GIs to rural development policy.
- Formal definitions of quality imposed by external stakeholders tend to provoke exclusions of legitimate but culturally different producers.
- Ownership of culturally sensitive GIs by the state may lead to conflicts with indigenous peoples.
- Complying with labelling, safety and traceability regulations requires significant organisation and technical effort which is challenging to small organisations.
- GIs, especially where they are related to rural agriculture, may not succeed if their development is isolated from complementary agricultural and rural development policies including economic support.
- Legal frameworks and support measures from different government arms are not well coordinated producing a complex scenario for GI development.

Source: Larson (2007)

perhaps, the most important condition for GI implementation.”⁴¹ As a result, while GIs have the potential to provide tangible economic benefits, especially to small groups and communities in Africa, this can only become a reality if the value chains permits these groups or communities to participate in value creation. There is a clear difference between the value that agricultural commodity exporters can extract from GIs and what exporters of transformed or speciality products can extract. Value chain analysis is therefore a critical strategic issue to consider in GIs. Understanding the value chain of the products in detail will be important to determine the necessity and form of GI to be sought and the actual value that African producers might extract.

In general, there are two types of value chains to consider. On the one hand, are producer driven chains – where dominant market players are those that control the production of

⁴¹ Larson (2007), p. 66.

the product. In such sectors, powerful firms compete to control the production/supply side. On the other hand, are consumer driven chains – where consumer taste and preference drives the market and market players that directly supply the final consumer, such as retailers, supermarkets etc., are the dominant actors. Most of the exports of African countries operate in the latter type of value chain.

The key characteristics of the consumer driven value chains are existence of many small scale producers with less differentiated products and limited market power on the production side. This means that the lion's share of income in these value chains go to players on the distribution side. If GIs were used in this context, it is likely that the ultimate benefits may not go to the small producers but rather to the supermarket chains. To change this might require interventions in the value chain or change in the nature of activities performed by producers. Though different models might apply in the value chains for different products and hence generalisation may be misleading, thinking about the possibility of exclusion is an important consideration.

5.1.2 Product market structure and dynamics

There are a number of factors relating to the product market structure and regulatory framework that need to be considered to determine whether investing in GIs as marketing and value addition tool is advisable. These relate both to the export and local markets.

The first issue to consider is the nature of GI related regulations. Specifically, consideration should be given to the form of protection that is most relevant in the market. In the case of African countries, for example, a clear distinction must be made between the European market and the US market. Europe has a *sui generis* GIs system while the US predominantly uses certification and collective trademarks. Because of common business use and consumer practices, it might be that even if the WTO rules changed, US consumers might be more responsive to trademark labelling than *sui generis* GI labelling. The choice of approach may therefore be significantly impacted by the regime in the most important export market.

Secondly, it should not be taken for granted that consumers in local or foreign markets will know the significance of the GIs attached to particular goods. This is particularly the case when dealing with products that are produced in multiple places such as coffee. For example, a 1998 Eurobarometer study carried out on European consumers regarding their knowledge and perceptions of protected designations of origin found that many did not even notice the labels or did not know what the GI labels meant.⁴²

Assumptions should also not be made about consumer preferences and the impact of GIs on prices. African Diasporas and attachment to the continent by foreign nationals as a result of tourism etc. may make physically distant markets such as the EU or the US culturally and emotionally closer which increases the possibilities of GIs succeeding. On the other hand, however, demographic changes as well as changes in lifestyle in African countries may mean that markets which are physically closer may be culturally and emotionally distant. Regarding premium prices, while in theory consumers are willing to pay higher prices of origin labelled goods which indicate certain characteristics and qualities; this is not always the case. Though

⁴² Barjolle *et al.*, (2000) cited in Larson (2007), p. 62 – 63.

some studies have shown significant premium attached to the GIs, other studies, such as the one on Darjeeling tea, show that GI protection hardly improved the prices.⁴³ Markets for GIs should therefore be thought about not just in terms of distance, scale or regulation but also in terms of cultural and lifestyle dynamics.

Overall, a clear understanding of the main market's consumer knowledge and preferences is a crucial consideration in determining whether to invest in GIs for a particular product or not, and whether, overall, GIs would bring economic benefits to the country. Geographic names including country names have emotional power which, in part, influences people to have a favourable view of GIs. While such emotional attachments might be a basis for creating a market, it could, at the same time, also be a basis of overvalued estimates of gains.

There is also the issue of the relationship, including potential conflicts, between GIs and fair trade schemes. GIs seek to leverage quality and reputation as the basis for attracting consumers to the product. Fair trade schemes, on the other hand, seek to leverage equity in the value chain as the basis for attracting consumers. While GIs may work in some markets, fair trade schemes may work better for other products and in other markets. There might therefore be cases where a choice needs to be made between investing in GIs and fair trade. A larger issue relating to GIs and fair trade concerns coordination and exclusions. In most cases, the GI governance structure will be different and distinct from that for fair trade structure. Since fair trade may cover a smaller section of the overall producers of a particular GI product it is important that the country seeks to coordinate the two schemes where both exist.

Finally, the impact of foreign GIs on the local market needs to be considered. Since a large number of GIs relate to agricultural and animal products, stronger protection of foreign GIs might have the impact of displacing local producers in the market. For example, a flood of EU GIs which have more established reputations may outcompete local GIs on similar products in African countries.

5.1.3 Cases of misappropriation of African country or regional names

The question of capturing the economic value from GIs also necessitates thinking about misuse or fraud related to African country names or regions. The research undertaken for this study shows that the problem exists both locally and in foreign markets. It is, however, unclear what the extent of the problem is. A determination on the exact nature and extent would require detailed empirical research which is beyond the scope of this study.

The case of Ethiopia and Starbucks is a well known example but there are others. One interesting recent example is US Trademark number 3378503 which is for "The land of a Thousand Hills Coffee Handpicked in the Republic of Rwanda" which was registered in February 2008 by an individual named Jonathan D. Golden. Another well documented example is the case of Rooibos tea where a South African individual had registered a trademark in the US.⁴⁴ While South Africa succeeded in getting rooibos recognised as a generic name, the objection process took approximately 10 years.

⁴³ See the studies cited and discussion in WTO (2004), pp.84-88.

⁴⁴ For a discussion of the Rooibos case see Larson (2007), pp. 47 – 48.

5.2 Access to GI protected products by local population

GIs, like any other form of IP confer exclusive rights of use aimed at allowing the producer or owner to extract higher rents (price). From the producer perspective this is a plus. However, as the debate on IP and access to essential medicines has shown, the higher prices may lead to denial of access to poorer populations and invert the priorities in the production process. African governments therefore need to pay close attention to the accessibility component of GI protected products locally. This is particularly critical where the GIs are attached to foodstuff and cultural products. Ultimately, it is seeking a balance between obtaining premium prices and ensuring that the local population continues to have access to essential food and cultural products at an affordable cost.

5.3 The role of government in the GI framework

Developing and marketing a GI is a continuous long-term process especially when one is dealing with international markets. Cafe de Colombia, which in 2007 became the first non-EU GI registered in the EC register, achieved this status after decades of efforts by the National Federation of Colombian Coffee Producers. Efforts by the Colombians to differentiate their product in the world markets are said to date as far back as 1959.⁴⁵ As with other IP rights, it should also be noted that obtaining a GI does not confer a right to market the product. Other regulatory issues, such as novel food regulations in Europe and sanitary and phytosanitary standards (SPS), also have to be addressed.

In order to manage this long term process, and for GIs to benefit various groups in the country or region, it is critical that there is a democratic governance structures which would allow both small and large producers' interests to be accommodated. Where financial resources, management and technical expertise are not readily available, the role of the government in facilitating and, in some cases, developing and promoting GIs is of critical importance.

The exact nature of the governance structure and the role of government will vary from product to product depending on the market structure, levels of investment required and the regulatory framework especially in the export market. There are certain products such as coffee and tea where the government might have a larger role. Others, such as handicrafts, may require a lesser role. Ultimately, strategic decisions have to be made about the role of government in the governance and institutional set-up for GI development and promotion.

5.4 The costs of establishing and administering a GI protection regime

A key consideration for African countries in approaching GIs, as would be the case, with other forms of IP rights relates to the costs of setting up the institutional framework for registering, administering and enforcing GIs in the country. Considering their human, financial and technical resource constraints, it is critical that in the short to medium-term the costs for establishing and running the system be reasonable considering the economic value that might accrue to their economies. Technical and financial assistance may obviate some of these constraints in the short-term. However, in the longer-term, it is important to ensure that the

⁴⁵ Larson (2007), p. 63.

focus on GIs does not divert scarce resources from more pressing and economically important activities.

Various factors may impact the cost of setting up and running a GI regime in African countries. These include whether:

- Legal reforms related to GI protection are undertaken in isolation or as part of a broader IP and trade law reforms. In the latter case, the costs for a GI system are likely to be lower.
- The administration of the GI regime is integrated with overall IP administration or is distinct.
- The country is party to a regional or international registration system such as the OAPI and ARIPO systems or the Lisbon system.
- Cost recovery from registration and renewal fees is feasible or not.
- The enforcement of GIs, especially through litigation, is part of the general law enforcement or is dealt with separately. The costs will inevitably be higher in the latter case.

The establishment of the administrative and enforcement framework for IP, including for GIs, entails a range of one-time as well as recurrent costs.⁴⁶ There are also direct costs incurred by IP agencies as well as indirect costs incurred as a result of implementing enforcement requirements in the Judiciary, the police, customs etc. Very little empirical work has been done to determine the cost of implementing the TRIPS Agreement for developing countries, leave alone the implementation of specific obligations with respect to GIs. This is partly because it is difficult to aggregate the cost of implementing international IP obligations such as those imposed by TRIPS on developing countries.⁴⁷

Some estimates exist, however. The Leesti and Pengelly study in 2002 included figures for Jamaica, which could provide some sense of the implementation costs one is looking at with respect to overall TRIPS obligations including those related to GIs. In the study, it is reported that in the financial year 1999/2000 Jamaica's expenditure on IP administration was USD 283,752 while revenues for the same period was USD 161,693. That means that the tax payers in Jamaica had to spend USD 122,059 in direct costs for IP administration excluding indirect costs. With respect to the specific costs for a GI system, the Hong Kong Economic and Trade Office estimated, in 2003, that with two-full time university graduate staff supported with a small team of clerical staff and basic office accommodation computer system and secure server, the annual recurrent expenditure for running a GI system would be approximately USD 253,900.⁴⁸

5.5 The costs of developing, registering and enforcing individual GIs

Developing, registering and enforcing, through litigation or other administrative action, a GI can be time consuming and costly. The actual costs for each product will vary depending on many factors including the market structure, consumer knowledge and perceptions, level of misuse etc., The higher these costs are the less likely it is that it will be a viable avenue for use by African producers especially small groups. Even where government support is provided,

⁴⁶ Leesti and Pengelly (2002), p. 38.

⁴⁷ *Id.*

⁴⁸ Cited in Larson (2007), p. 61.

these costs may prove prohibitive in the context of international competition. There are two types of cost that need to be considered. First, the cost in the local (national) market. Second would be the cost in foreign markets.

The costs in both cases may be charged or incurred for a range of things. These include:

- Application fees;
- Search fees;
- Advertisement fees;
- Publication fees;
- Costs in opposition proceedings;
- Litigation costs;
- Renewal fees (mainly in cases of trademarks);
- Fees for change of address or name;
- Fees in case of assignment;
- Fees for correction of clerical or other errors;
- Charges for amendment to application or registration; and
- Attorney's fees for preparation and legalisation of documents.

The O'Connor & Company/Insight Consulting study⁴⁹ provides a comprehensive picture of the various fees in 160 countries including 47 African countries. For example, to register and enforce a GI (one litigation) would cost approximately USD 2,500 in OAPI countries. While the actual figures in the countries might have changed since the study was undertaken, the study is still useful as it gives a clear sense of the costs for obtaining GIs in Africa as compared to other regions and the type of costs which African producers would expect to incur to register *sui generis* GIs or trademarks.

The costs in the O'Connor & Company and Insight Consulting study, however, do not include the costs for developing and marketing the GIs as well as other costs that would be incurred by the GI owner, including management costs.

5.6 Technical assistance and capacity building

There are significant technical and capacity needs which have to be addressed at different levels of developing and using a GI as well as setting up a national protection system. Many African countries either do not have or cannot afford the costs of all these technical and capacity components. For this reason, the availability of technical assistance and capacity building resources both for producer groups as well as the relevant government agencies is an important strategic and policy consideration.

There are various categories of technical assistance and capacity building needs that should be addressed in the context of GIs. These include:

- Establishing and effectively running a governmental GI administration;
- Business support including management training to enable African producers/companies or entities to protect their GIs locally as well as abroad;

⁴⁹ O'Connor & Company and Insight Consulting (2007).

- Participating in bilateral, regional and multilateral negotiations or the activities of regional (e.g. OAPI, ARIPO) and international (e.g., WTO and WIPO) organisations;
- Research and impact analysis, including market surveillance and surveys; and
- Teaching and educational programmes.

The increased interest, economic importance and general interest in GIs has been matched by an attendant increase in technical assistance providers and resources. The providers range from international organisations including WIPO, WTO, FAO and UNCTAD to bilateral providers led by the EU and Switzerland to regional cooperation organisations and forums such as the Asia-Pacific Economic Cooperation (APEC), industry groups such as oriGI through to research and academic institutions and non-governmental organisations.

How useful technical assistance and capacity building will be for African countries will depend on a number of factors two of which are critical. First, African countries need to undertake detailed needs assessment related to the various strategic issues addressed in this section. Second, there needs for better coordination between various government agencies and producer groups including the country missions in Geneva. More sophisticated needs assessment and coordination, among other things, will help identify gaps in the current technical assistance and capacity building programmes.

6. Africa's Participation in the Doha Round Negotiations on GIs: Conclusion and Recommendations

There are very few African products that currently enjoy positive GI protection either in the countries of origin or in foreign markets. These few cases are not sufficient to provide a basis for any generalised conclusions. Overall, however, the research presented in this study points to one main conclusion. With a long list of potential advantages and an equally long list of potential disadvantages, the determination of the socio-economic benefits of GI protection in Africa requires detailed country by country and product by product analysis. This means that the actual benefits that will accrue to different African countries will vary, in many cases, significantly.

Going forward, the African Group needs to address three main issues regarding GIs in the context of the Doha negotiations, namely:

- The position to take regarding the GI register for wines;
- The position to take regarding GI extension; and
- Building the evidence base on GIs in Africa to support their continued engagement in the WTO processes as well as evolve strategies in other negotiations such as in the negotiations on economic partnership agreements (EPAs) with the EU.

In the sub-sections that follow, the study discusses and makes recommendations on how to proceed on all the three issues.

6.1 Recommendations on the GI register for wines

There is a clear mandate under Article 23 of TRIPS for the establishment of a system of notification and registration of GIs for wines. The latest proposal by the Friends of GIs (contained in WTO document TN/C/W/52) with respect to the register for wines is that:

- A register will be established which is open to any wine and spirit GI protected by any WTO Member; and
- Once established, national authorities would be required to consult, and take into account, the information in the register when registering GIs or trademarks in accordance with domestic procedures.

The register, as proposed, would have legal effects in each WTO Member. In particular, the register shall be considered *prima facie* evidence that the registered GI meets the definition of GI under Article 22.1 of TRIPS and that assertions of genericness against registered GIs will have to be substantiated.

This proposal has been opposed by other WTO Members (the so-called Joint Proposal proponents) who propose a different approach. In their proposal (contained in WTO document TN/IP/W/10/Rev. 2) they propose that the register:

- should be strictly voluntary and that no Member shall be required to participate; and
- Would be consulted by the participating Members when making decisions regarding registration of trademarks and GIs for wines in accordance with domestic procedures. Members not participating in the system would have no obligation to consult or take into account the notifications in the register.

Under this proposal, the register would only apply in the participating Members and would not constitute *prima facie* evidence.

The key question with which African countries should be concerned with is the legal effect issue and presumptions. There are two key dimensions to consider. The first dimension relates to administrative and financial burden and the market impact of the presumptions on evidence and genericness. The requirement to consider registration in the register *prima facie* evidence that the good in question originates from the territory of a member or a region or locality in that territory and that the quality, reputation or other characteristics of the good are essentially attributable to its geographical origin is fairly easy to rebut. Unlike the Lisbon Agreement, this approach avoids the need for international opposition proceedings tied to each GI that is notified. The presumption of genericness can also be rebutted based on national legal approaches, practices and case law since the burden of proof will be determined in accordance with national law. In this context, it is also important to remember that the decision taken on the register for wines will have implications for any decision on extension in the sense that any register for other products will be mapped against the wines register.

The second dimension relates to what these legal effects mean for African producers/businesses or countries in third markets. On this dimension the approach in the latest proponents' proposal (TN/C/W/52) is fairly balanced. What it would mean for African countries is that their producers will have an increased level of legal certainty (though not absolute) by having a lower barrier to entry and avoiding the genericness trap.

In this context, it is recommended, provided the elements of notification are not burdensome,

that African countries focus on ensuring that the presumptions on definition and genericness are rebuttable and the standards of proof are dependent on national legislation. In other words, the approach in document TN/C/W/52 on the GI Register provides a reasonable basis for moving forward.

6.2 Recommendations on GI extension

The main difference between the protection offered under Article 23 of TRIPS and the general protection under Article 22 turns on the notion of ‘misleading the public’ and the question of establishing a register. If the Article 23 protection, including the proposed register, was extended to cover all products it would mean that any GI holder would be entitled to protection even:

- When the use of the geographical name by third parties would not mislead the public or constitute an act of unfair competition; and
- In cases where the true origin of the product is indicated.

The extension would also mean that if the approach in TN/C/W/52 were accepted, such GIs, once notified to the WTO, would benefit from the presumptions relating to evidence and genericness.

The TN/C/W/52 proposal also contemplates special and differential treatment and other special measures in favour of developing countries, including the least-developed among them.

The TN/C/W/52 proposal has been opposed by the Joint Proposal proponents mainly on the basis that no case has been made to support the need for extension.

Is there a case that extension would benefit Africa?

While it may be assumed that broadening the range of products that can enjoy enhanced GI protection can benefit African countries, supporting extension with the current level of knowledge about specific products and markets is questionable. As demonstrated in this study, there is no concrete evidence that enhanced GI protection for all products would generate significant new economic benefits for African countries. This is particularly the case because a number of African countries in fact have Article 23 type protection for all products. Such protection is also available in foreign jurisdictions such as in the EU.

It is therefore fair to argue that while there is overall theoretical merit in considering extension, a conclusive case has not been made regarding the exact approach. Consequently, it is recommended that African countries approach the question of extension with caution. Until they have better information and evidence, including a better understanding of the very limited use of the currently existing systems, African countries may be well served to demand more empirical evidence and details regarding the proposed special and differential aspects of the amendment to TRIPS.

6.3 Recommendations on future research, analysis and technical assistance

This study makes an important contribution towards enhancing the level of understanding on GI protection in Africa and the direction which Africa could take in the Doha Round negotiations on the subject. However, as noted in the background section of the study, there is still a lot that we do not know about GI protection in Africa and the reality of economic benefits that could accrue from enhanced protection. This remaining gap can only be addressed by interdisciplinary empirical research at country and producer levels including specific case studies on particular products. This is where technical assistance and capacity building efforts should focus going forward. If extension is to be addressed in the Doha Round, then the urgency for the studies and technical assistance cannot be gainsaid.

More broadly, each African country interested in GIs needs to work towards establishing a better national baseline which accurately reflects the existing situation. While it is impossible to, *ex ante*, determine how a particular GI will perform in the market or the overall benefit to the country, it is possible to get a much better degree of information for policy-making and business decisions than countries in Africa have so far.

On the basis of the strategic and policy considerations discussed in section 5 of this study, African countries that do not yet have detailed *sui generis* GI laws should, before establishing such systems, undertake country specific assessments including through technical assistance programmes. In addition, these countries, most of which offer GI protection through certification and collective trademarks, should empirically examine why such protection has not been taken advantage of by producers or business. The countries which already have detailed *sui generis* GI protection systems should evaluate why the systems have not been used much either by local or foreign producers. Such an evaluation should go beyond simplistic conclusions such as ‘there is lack of awareness’.

Annex 1 General Questionnaire for Stakeholders

Background

The Quakers United Nations Office (QUNO), at the request of the African Group in the World Trade Organization (WTO) has commissioned Sisule Musungu of IQsensato to prepare a study on the protection of geographical indications (GIs) in Africa. The overall goal is to inform the position of the Group in the on-going GI negotiations in the context of the Doha Round of Multilateral Trade Negotiations. In this regard, the study is aimed at generating objective evidence regarding:

- the availability of legal means to protect GIs in African countries;
- the costs and benefits of GI protection including the costs of administration and acquisition of GI protection;
- African products that are currently protected by GIs including African products that are protected as GIs outside Africa such as in Europe;
- Other African products that are currently not protected that could benefit from GI protection including under a possible new WTO regime for enhanced protection; and
- The technical assistance needs in this area including the level to which current technical assistance and capacity building needs are being met.

Use of Information Provided in Response to Questionnaire

The information and opinions you share in this questionnaire will be recorded and used as a basis for the study. However, such opinions and information will only be directly attributed to you if you give your consent. Otherwise the information will be used in an anonymised form.

INSTRUCTIONS

Please respond to all the questions as accurately and candidly as possible and provide information or documents that support your responses. We request that you return your completed questionnaire to Sisule Musungu at sisule@iqsensato.org.

Name:

Affiliation:

Contact Details:

1. PROTECTED AFRICAN GEOGRAPHICAL INDICATIONS

1.1 Are you aware of any African products that enjoy GI protection anywhere?

1.2 If yes, which products and in which countries?

1.3 If you are affiliated to a government, are you aware of any African products that are protected by GIs in your country? If yes, which products?

1.4 If you are affiliated to an intergovernmental entity, are you aware of African products that are protected by GIs in your member countries? If yes, which products and in which countries?

1.5 If you are affiliated to a government or an intergovernmental entity, which other African products would you consider could qualify for GI protection in your country/member countries?

1.6 Overall, what other African products do you think can benefit from GI protection? Why?

1.7 If you are affiliated to a government or an intergovernmental entity, do you think that if the protection under Article 23 of the TRIPS Agreement was extended to all products it would increase the number of African GIs sought or protected in your country on member countries?

1.8 If you are affiliated to a producers' organisation do you think that if the protection under Article 23 of the TRIPS Agreement was extended to all products it would increase the number of your African members seeking protection for GIs?

2. PROTECTION OF FOREIGN GEOGRAPHICAL INDICATIONS IN AFRICA

2.1 To your knowledge, do foreign GIs enjoy effective protection in African countries? If yes, why? If not, why not?

2.2. If you are affiliated to a government or an intergovernmental entity which statement would be correct with respect to the protection of your producers'/companies' GIs in Africa:

- There are many GIs protected in African countries that are owned by producers/companies/entities from my country/member countries;
- There are some GIs protected in African countries that are owned by producers/companies/entities from my country/member countries;
- There are very few or no GIs protected in African countries that are owned by producers/companies/entities from my country/member countries?

2.3 Do you think that if the protection under Article 23 of TRIPS was extended to cover all products it would increase the number of producers/companies or entities in your country that would seek GI protection in Africa?

3. COSTS OF PROTECTING GEOGRAPHICAL INDICATIONS

3.1. What information do you have with respect to the costs for applying for, and enforcing (litigation), GIs in various African jurisdictions?

3.2. If you are affiliated to a government or intergovernmental organisation what, on average, are the costs for applying for, and enforcing (litigating), GIs in your country/member countries?

3.3 What information do you have with respect to the costs of establishing and running a GI administration system in African countries?

3.4 In general, what parameters would you use to determine whether the costs of protecting GIs in a country would, on balance, outweigh the benefits or vice-versa?

4. TECHNICAL ASSISTANCE AND CAPACITY BUILDING

4.1 Are you aware of the types of technical assistance and capacity building needed by African countries in terms of:

- Establishing and effectively running a governmental GI administration;
- Enabling African producers/ companies or entities to protect their GIs;
- Participating in bilateral, regional and multilateral negotiations or the activities of regional (e.g. OAPI, ARIPO) and international (e.g., WTO TRIPS Council, WIPO etc.) organisations;
- Research and impact analysis; and
- Teaching and educational programmes?

4.2 Has and/or is your government or organisation providing any technical assistance to any African countries? If yes, which countries?

4.3 If your country or organisation is providing technical assistance to any African country which of the aspects under question 4.1 above does the assistance target?

4.4 If your country or organisation is providing technical assistance on GIs is it coordinating or collaborating with any other countries or entities? Which ones?

4.5 On average how much money (in Swiss francs) does your government or organisation spent per year on providing technical assistance and for capacity building on GIs in Africa?

4.6 Are you aware of other governments or organisations providing technical assistance on GIs for African countries? If yes, who?

4.7 If the Article 23 protection was extended to cover all products how would the technical assistance or capacity needs of African countries change? If you are a provider of technical assistance how do you plan to respond to these changes?

4.8 Overall, do you think the technical assistance and capacity building efforts currently provided for African countries with respect to GI protection is adequate? If not, what additional assistance is required and who could provide it?

Annex 2
Questionnaire for African Country Missions in Geneva and National IP Offices

Background

The Quakers United Nations Office (QUNO), at the request of the African Group in the World Trade Organization (WTO) has commissioned Sisule Musungu of IQsensato to prepare a study on the protection of geographical indications (GIs) in Africa. The overall goal is to inform the position of the Group in the on-going GI negotiations in the context of the Doha Round of Multilateral Trade Negotiations. In this regard, the study is aimed at generating objective evidence regarding:

- the availability of legal means to protect GIs in African countries;
- the costs and benefits of GI protection including the costs of administration and acquisition of GI protection;
- African products that are currently protected by GIs including African products that are protected as GIs outside Africa such as in Europe;
- Other African products that are currently not protected that could benefit from GI protection including under a possible new WTO regime for enhanced protection; and
- The technical assistance needs in this area including the level to which current technical assistance and capacity building needs are being met.

Use of Information Provided in Response to Questionnaire

The information and opinions you share in this questionnaire will be recorded and used as a basis for the study. However, such opinions and information will only be directly attributed to you if you give your consent. Otherwise the information will be used in an anonymised form.

INSTRUCTIONS

Please respond to all the questions as accurately and candidly as possible and provide information or documents that support your responses. We request that you return your completed questionnaire to Sisule Musungu at sisule@iqsensato.org.

Name of Country:

Name and Designation of Person/Institution:

Contact Details:

1. PROTECTED AFRICAN GEOGRAPHICAL INDICATIONS

1.1 Are GIs in your country protected through a *sui generis* system or through trademarks?

1.2 Are there any on-going or planned legal reforms to your GI protection regime? If yes, what type of reforms?

1.3 Are you aware of any products from your country that are currently registered as GI (whether under a *sui generis* system or as a trademark) in your country or any other country?

1.4 If yes, which products and in which countries?

1.5 If not, do you know the reasons why your country or its producers/businesses have not taken advantage of the local and foreign GI regimes?

1.6 Overall, what other products from your country do you think can benefit from GI protection locally and in foreign jurisdictions?

1.7 For these other products has any research been undertaken to understand the value chain and market structure for the product and to determine the scale of any additional value that might accrue to producers? If yes, by whom and when?

2. PROTECTION OF FOREIGN GEOGRAPHICAL INDICATIONS IN AFRICA

2.1 To your knowledge, are there any foreign GIs that are registered in your country?

2.2 If yes, from which country do the GIs originate and by who are they registered?

2.3 If not, are you aware of the reasons why?

2.4 Do you think that if the protection under Article 23 of TRIPS was extended to cover all products it would increase the number of foreign producers/companies or entities that would seek GI registration in your country?

3. TECHNICAL ASSISTANCE AND CAPACITY BUILDING

3.1 Are you aware of the types of technical assistance and capacity building needed in your country in terms of:

- Establishing and effectively running a governmental GI administration;
- Enabling producers/ companies or entities from your country to protect their GIs;
- Participating in bilateral, regional and multilateral negotiations or the activities of regional (e.g. OAPI, ARIPO) and international (e.g., WTO and WIPO) organisations;
- Research and impact analysis; and
- Teaching and educational programmes?

3.2 If you are aware of these needs how did you establish them? Was a needs assessment carried out? If yes, when and by who?

3.3 Is the technical assistance currently being provided sufficient to meet the identified needs?

3.4 Who are the main providers of technical assistance on GIs in your country?









3.5 Is there a coordination system or mechanism for undertaking needs assessment and receiving technical assistance with respect to GIs? Do the technical assistance providers coordinate among themselves?

3.6 On average how much money on average (in Swiss francs) does your government receive for technical assistance and for capacity building on GIs?

3.7 If the Article 23 protection was extended to cover all products how would the technical assistance or capacity needs of your country change? How does your country plan to respond to these changes?

* * *

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List of Useful WTO and WIPO Documents

WTO Documents IP/C/13 and IP/C/W/Add.1 – Checklist of Questions for the Review under Article 24.2 of TRIPS.

WTO Documents IP/C/W/85 and IP/C/W/Add.1 – Overview of International Notification and Registration Systems for GIs other than Wines and Spirits.

WTO Document IP/C/W/253/Rev.1 – Summary of Responses to the Checklist of Questions for the Review under Article 24.2 of the TRIPS Agreement.

WTO Document TN/IP/W/9 – Joint Proposal for GI Register.

WTO Document TN/IP/W/10/Rev. 2 – Joint Proposal on a TRIPS Council Decision on GI Register.

WTO Documents TN/IP/W/12 and TN/IP/W/12/Add.1 and TN/IP/W/12/Add.1/Corr.1 – Side-by-Side Presentation of GI Proposals.

WTO Document TN/C/W/25 – Compilation of Issues Raised and Views Expressed on the Extension of the Protection under Article 23 of TRIPS to Products other than Wines and Spirits.

WTO Document TN/C/W/50 – Report of the Director General on Issues Related to GI Extension, GI Register and Disclosure Requirement.

WTO Document TN/C/W/52 – Draft Modalities for TRIPS-Related Issues (GI Register, GI Extension and Disclosure requirement).

WTO Document WT/MIN(01)DEC/1 – Doha Ministerial Declaration.

WTO Document WT/MIN(01)/17 – Decision on Implementation-related Issues and Concerns.

WIPO Documents SCT/3/6; SCT/5/3; SCT/8/5; SCT/9/4; and SCT/10/4 on various aspects of GIs.

Useful websites

European Commission Development of Labelled Products, Humanity, Innovation and Sustainability (DOLPHINS) website - http://ec.europa.eu/research/agriculture/projects/qlrt_1999_30593_en.htm

FAO GIs Programme website - <http://www.foodquality-origin.org/eng/index.html>

Geographic Indications - <http://www.geographicindications.com/index.htm>

IPRSONLINE - <http://www.iprsonline.org>

WIPO Collection of Laws for Electronic Access (CLEA) webpage - <http://www.wipo.int/clea/en>

WTO TRIPS Gateway - http://www.wto.org/english/tratop_e/TRIPS_e/TRIPS_e.htm

BIOTRADE Initiative - <http://www.biotrade.org>