

UNIVERSITY OF PRETORIA
FACULTY OF LAW
CENTRE FOR HUMAN RIGHTS

**PROTECTION OF GEOGRAPHICAL INDICATIONS: TO BE
OR NOT TO BE IN THE EAC-EU FINAL EPA?**

**COURSE: LL.M IN INTERNATIONAL TRADE AND
INVESTMENT LAW OF AFRICA**

STUDENT NAME: KENNEDI WILLIAM MAKAFU

STUDENT NUMBER: 29723494

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DEDICATION

This work is dedicated with immense love to my parents late **William Mohamed Makafu and Eva U. Salingo**, who have always devoted their efforts to ensure their beloved son become a lawyer. May God rest his soul in eternal peace, Amen!!!!!!

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LIST OF STATUTES/TREATIES

MUNICIPAL LEGISLATION

- The Tanzania Coffee Industry Act 23 2001
- The Tanzania Coffee Regulations of 2003
- The Tanzania Food and Drugs and Cosmetics Act 1 2003
- The Tanzania Tea Industry Act 3 1997
- The Tanzania Cooperative Societies Act 20 2003
- The Uganda Trade Marks Act, Cap. 217 of 2000
- The Kenya Trade Marks Act Cap 506
- The Kenya Trade and Service Marks Regulations G.N. No. 40 of March 2000
-

CONVENTIONS AND TREATIES

- Madrid Agreement Concerning the International Registration of Marks, 1891
- The Lisbon Agreement for the protection of Appellations of Origin and their International Registration, 1958
- The Paris Convention for the protection of Industrial Property, 1883
- The World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights, 1994.
- The General Agreement on Tariffs and Trade 1947
- East African Community, Treaty for the Establishment of the East African Community, 1999.

LIST OF ABBREVIATIONS

Art.....	Article
CAP.....	Common Agricultural Policy
Cap.....	Chapter
COM.....	Communication
EAC.....	East African Community
EC.....	European Community
EPAs.....	Economic Partnership Agreements
ESA.....	Eastern and Southern Africa
EU.....	European Union
GATT.....	General Agreement on Tariff and Trade 1994
GIs.....	Geographical Indications
GoK.....	Government of Kenya
KIPI.....	Kenya Industrial Property Institute
KISCOOP.....	Kisii Cooperative
KyeCu.....	Kyela Cooperative Union
LDCs.....	Least Developed Countries
MFN.....	Most Favoured Nation
Mt.....	Mountain
NGOs.....	None Governmental Organisations
OLP.....	Origin Labelled Products
Para.....	Paragraph
PDO.....	Protected Designation of Origin
PGI.....	Protected Geographical Indication
RoO.....	Rules of Origins
SADC.....	Southern Africa Development Community
Sec.....	Section

SPS.....Sanitary and Phyto-sanitary Measures
TASHTDA.....Tanzania Small Holders Tea Development Agency
TBK.....Tea Board of Kenya
TBT..... Technical Barriers on Trade
TRIPS..... Trade Related Aspects of Intellectual Property
Rights
U.N.T.S..... United Nations Treaty Series
UK.....United Kingdom
US.....United States of America
WIPO.....World Intellectual Property Organisation
WTO.....World Trade Organisation

ABSTRACT

The topic dealt by this study is about protection of GIs, and the problem attempted is what should be the position of the EAC regarding the protection of GIs in the final EPA negotiations with the EU? In addressing this problem, the paper hypothesised that, there are abundant potential GIs in the EAC and their protection can result to profound positive economic contribution to the region. Hence, EAC should opt for the protection of GIs in the final EPA text with the EU. Moreover, most potential GIs found in the EAC are agro-based products of which their production costs are less than EU's GIs, because of comparative advantage in agricultural production.

It follows therefore that, in addressing the said problem the paper runs as follows. Chapter one addresses historical overview of the ACP-EU relations that resulted to the current EPA's negotiations, objectives and principles of EPA, and lastly the current status of EAC-EPA negotiations. Whereas in chapter three meaning of the term GI, Legal frameworks used to protect GIs are comprehensively examined. Also in this chapter the feasibility of EAC legal framework for protecting GIs is also explored.

Chapter four addresses the economic rationale and associated benefits of protecting GIs, and the requisite conditions needed for a product to qualify GI status. Whilst chapter five addresses potential GIs found in the EAC partner states, policies and legal frameworks available to administer such potential GIs. Chapter six covers general conclusion for various findings observed by the study and provides recommendations as to which position should EAC opt, reasons for the same and also addresses possible areas for future research.

Conclusively, the paper after intense observations, recommends the EAC to opt for inclusion of the GIs in the final EPA text. The reason being that, there are several economic, social and ecological benefits accrued from protecting GIs. However in the course of implementations, there are certain costs associated with changes in the newly introduced institutions, policy

and legal structural reforms etc. Due to these expenses the paper recommends proper utilisation of the existing institutions to reduce administrative costs etc.

CHAPTER ONE

PROTECTION OF GEOGRAPHICAL INDICATIONS: TO BE OR NOT TO BE IN THE EAC-EU FINAL EPA?

1.1 Background of the Problem

The East African Community (EAC) was reborn in 2000 after its collapse in 1977. Currently, it comprises five partner states namely; Kenya, Uganda, Rwanda, Burundi and the united republic of Tanzania. The core objective of the Community is to promote free trade but with a mission of having political federation. The Community successfully established a Customs Union in 2005 and the East African Common Market in November 2009.¹ Also the EAC initialled interim Economic Partnership Agreement (EPA) with the EU in November 2007, with the aim of finalising the comprehensive EPA on July 2009.

In the said interim EPA, both parties are WTO members. And at multilateral level protection of Geographical Indications (GIs) has posed political and economic debate amongst members.² Fundamentally, the debate is not divided along traditional North-South lines, because in most cases Northern countries such as the USA and the EU tend to unite while

¹ See <http://www.eac.int/epa-neg/eac/eu> (accessed 10 November 2009).

² It is to be noted earlier that intellectual property covers a wide range of intangible rights; among others is the Geographical Indications which is the case of this paper.

discussing contentious issues against Southern countries in the WTO.³ There are two groups, one supporting the EU position which includes even developing countries in the south and the other group is led by the USA which is supported also by some southern developing countries such as Namibia.

However what is in the core is that; the EU proposes among other things the extension of GIs protection to cover products other than wines and spirits and the establishment of multilateral registration system. Behind EU there are countries such as Kenya, Nigeria and Egypt as African countries. US on the other hand deny the need of extending GIs protection as the current legal frameworks augurs well, and it will be costly to introduce new system of administration internationally.⁴

In the EAC treaty, intellectual property is not an area of common interest, even if so by necessary implication, partner states have no legal obligation to adhere to any minimum standard of protection apart from those put by the TRIPS. It should also be noted that, in the ongoing EPA negotiations EAC partner states negotiate with the EU as a bloc. However, its partner states have divergent views at multilateral level on the issue of protecting GIs. Kenya joined the EU in calling for stricter and wider protection. On the other hand Uganda, Tanzania, Burundi and Rwanda have not shown any express orientation of supporting either EU or US.⁵

It should also be noted that, EAC partner states are interested with Singapore issues as well as GIs protection due to their relevancy in trade relations.⁶ Nevertheless, they do not want to be included in the ongoing EPA negotiation simply because Singapore issues are not yet finalised in the ongoing Doha negotiation.⁷ And, in the ongoing final EPA negotiations it is clear that EU is pushing for inclusion of GIs in the final EPA text, as it did to the one signed with the CALIFORUM region. Meanwhile, it is also evident that, EAC partner states have no agreeable common stand as a bloc of what should be their position on the issue of protecting GIs.

³ D Rangnekar 'The Socio economic of GIs: A review of empirical evidence from Europe Capacity building project on intellectual property rights and sustainable development' UNCTAD/ICTSD (2003b) 23.

⁴ n 2 above.

⁵ I Carboli 'expanding the protection of geographical indications of origin under TRIPS: 'old' debate or 'new' opportunity?' (2006) 182 *Marquette Intellectual Property Law Review Journal* 194.

⁶ SN Karingi 'Interim Economic Partnership Agreement point to the classic RTAs after all: should African Countries really be worried?' African Trade Policy Centre United Nation Economic Commission for Africa, Addis Ababa (2009) 19.

⁷ Also, EAC partner states are of the view that, concluding agreement with any third party including the EU while the position over Singapore issues at multilateral level is not yet settled will not be a worth decision, Moreover, Singapore issues generally are perceived to be very far from the states' borders when considering trade barriers hence their inclusion is not a matter of urgency even if are necessary in the prosperity of international trade.

1.2 Problem Statement

In the EAC-EU interim EPA text, both parties agreed to finalise comprehensive final EPA on 27 July 2009 at the latest. However, this has been extended to early 2010. The Rendezvous Clause in the interim EPA text stipulates clearly that, intellectual property be among the areas to be finalised before or on the aforesaid date.⁸ Moreover strict Protection of GIs is the EU's preference at multilateral level.⁹ But, due to stiff opposition which is facing in the Doha negotiations, EU seems to accomplish the said mission via the ongoing EPA negotiations with various regional integrations. Even in the EAC-EU final EPA negotiations it is pushing EAC to accept strict GIs rules of protection. In the proposed EU intellectual property rights text, EU has included TRIPS plus elements which should be included in the final EPA text.

Moreover as noted above EU is supported by Kenya multilaterally whilst the rest of the EAC partner states are not supporting GIs protection¹⁰ Furthermore in response to the EU proposed intellectual property rights framework text, EAC partner states are of the view that;

Despite the fact that all partner states have acceded to the TRIPS agreement, time is not yet opportune to negotiate a TRIPS plus agreement with third parties including the EU. Such negotiations will not be viable given the present capacity constraints that confront and limit the ability of the partner states to implement key elements of the Trips agreement.¹¹

This entails that, EAC is not ready to negotiate any TRIPS plus agreement despite the fact that the EU has already tabled a proposed framework text.¹² Ultimately, EAC partner states should have one common stand as a bloc on this issue against EU despite their divergent interests over protection of GIs at multilateral level as well as at regional level.

The problem attempted by this study following the illustration above is; what should be the position of the EAC partner states concerning the protection of GIs in the final EPA negotiations? In other words, should GIs protection be considered among other points of strength by EAC partner states in finalising EPA negotiations?

1.3 Objectives of the Research

⁸ Art 37(e)(iv) of the Agreement Establishing an Interim Framework for an Economic Partnership Agreement between EAC and EU.

⁹Carboli (n 4 above) 19.

¹⁰ Karingi (n 5 above) 30.

¹¹ East African Community: Dedicated Session on Trade Related Issues 18th to 22nd May 2009 Dar es Salaam Tanzania, Reference Number EAC/TF/.../2009.

¹² Annex VI of the East African Community Secretariat: East African Community Preparatory Meeting for the 7th EAC-EC-EPA Technical official negotiations held in Kigali Rwanda from 2nd to 6th March 2009.

The general objective of this research is to examine and provide sound recommendations, which EAC partner states should opt regarding the protection of GIs in the final EPA's negotiations with the EU.

Specific Objectives

The specific objectives of this study are as follows:

- i) To examine whether there are potential GIs and their economic rationale of protecting them in the EAC.
- ii) To explore various existing legal frameworks for protecting GIs in the EAC partner states as well as those applicable at multilateral level.
- iii) To explore the possible pros and cons of protecting GIs in the EAC.
- iv) To examine possible institutional, policy, legal and economic structural reforms and their implications associated with protecting GIs in the EAC.

1.4 Thesis Statement and Research Questions

In this study, it is argued that, there are abundant potential GIs in the EAC and their protection can result to profound positive economic contribution to the region. Hence, EAC should opt for the protection of GIs in the final EPA text with the EU. Most of the potential GIs found in the EAC are agro-based products of which their production costs are less than EU's GIs, because of comparative advantage in agricultural production. Meanwhile, structural reform costs' on policy, institutional and legal framework for GIs protection in the EAC are less than the perceived advantages of protecting them.

The following research questions were used for argument construction of the thesis statement as well as attempting the research problem.

- i) What is the nature of the on going EPA negotiations?
- ii) What is the existing legal framework for GIs protection at multilateral, regional, and national levels?
- iii) What is the economic rationale for GIs protection in the EAC and the conditions necessary for protecting them?
- iv) Are there any potential GIs in the EAC?
- v) Are the existing EAC policies and legal frameworks feasible for protecting GIs?
- vi) What are the probable positive and negative impacts of GIs protection in the EAC?

vii) Which position should EAC adopt?

1.5 Significance of the Research

This study has tremendous significance economically, legally and socially to EAC partner states, EU as well as in the world of academia. The research reveals the available potential GIs and the economic rationale of protecting them in the EAC and the possible structural reforms required for implementation as well as the possible economic, policy, legal and social constraints associated with such changes. Therefore, relevant governments in the EAC partner states as well as the EU shall have an opportunity to make an informed decision as to whether they should incorporate GIs protection or not in the final EPA's negotiations.

The study further poses an opportunity for academics to make analysis on the relevance of GIs contribution in the African context. As, most of the researches have been conducted in the EU context and other parts of the world such as USA etc. Furthermore, the study affords the forum for debates to stakeholders on whether the protection of GIs should be extended or not at multilateral level as well as region level, in an African context taking into mind the offensive and defensive interests of African countries.

1.6 Preliminary Literature Review

Despite the fact that GIs are perceived to be a new category of intellectual property rights, several scholarly literatures exist addressing the nature, purpose and legalistic character of this type of intangible rights.¹³ Moreover, commentators appreciate the fact that GIs and Trademarks resemble, especially on the purpose of identifying particular goods from others of similar type.¹⁴

Due to such resemblances in terms of their roles, two groups have emerged internationally regarding the system of protection as to which should be adopted over the other. The first group includes those who consider GIs as a mechanism for protectionism and unfair competition in the market.¹⁵ This group consider trademarks as enough intangible rights that can serve the purpose GIs is perceived to be serving.¹⁶

¹³ Carboli (n 4 above) 194.

¹⁴ J Hughes 'The spirited debate over Geographical Indications' (2003) 10 *European Economic Law Journal* 47.

¹⁵ J Flodgren 'Geographical Indications and Trademarks: Synergies and Conflict in the International Market' (2009) <http://www.origin-gi.com/> (accessed 11 October 2009).

¹⁶ Hughes (n 13 above) 48.

Trademarks serves almost the same purpose served by the GIs, however, one can not deny the fact that GIs does something more than what trademarks does.¹⁷ For instance the trademark law commands that any mark must be distinctive in nature in order to qualify for registration. However most of the GIs are descriptive marks representing geographical names of the regions where products comes from; hence, they can not be protected under the trademark law.

GIs protects collective rights of the regions whilst trademarks protect individual rights.¹⁸ *Sui generis* system seem to accommodate well the need of protecting GIs, even though GIs are as well protected under trademark system as collective, certification or guarantee marks.

Among other contentious issues in the Doha Negotiations is the protection of GIs. It is the debate led by two economic giant blocs in the world, US on the one hand and EU on the other. The EU argues that, the protection afforded to wines and spirits should also be extended to other categories of products qualifying as GIs in the WTO TRIPS law.¹⁹

In addition, EU advocates the need of having a multilateral registration system for protected GIs. On the other hand, US claim that the protection afforded to GIs other than wines and spirits via trademarks laws are feasible. Also, the need of having multilateral registration system is unnecessary, as will increase unwelcome administrative costs that might not be affordable by developing and LDCs.²⁰ Furthermore, continued protection of GIs will disrupt the existing market and cause unfair competition as well as cost of remarketing.

The on going debate reflects the facts prevailed during the negotiations resulted the TRIPS agreement. The legal basis of the debate falls within the TRIPS provisions that seem to be ambiguous in terms of interpretation, hence, warranting both sides to take advantage of the ambiguities. It is unfortunate that neither the panel nor the Appellate Body had an opportunity to interpret the relevant provisions under debate. Article 24, which attracts further negotiations amongst members, is at the core of the debate.²¹

¹⁷ D Kastur 'International protection of Geographical Indications with special reference to Darjeeling tea' (2006) 9 *The Journal of World Intellectual Property* 461.

¹⁸ n 13 above.

¹⁹ HV Chandola 'Basmati rice: geographical indication or mis-indication' (2006) 9 *The Journal of World Intellectual Property*.

²⁰ n 13 above.

²¹ Art 24.1 provides that; 'Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Art 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context note that the scope of these negotiations was later extended to cover also spirits of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations'.

Article 24.1 provides a basis for future negotiations. The reference in the first sentence to ‘individual GIs’ suggests that Members intended to address indications on an identifier-by-identifier basis, as opposed to a product class-by-product class basis. The term “individual” is an adjective or noun referring to a single item.²² It would be difficult to construe the term ‘individual GIs’ as referring to something other than particular names suggesting territories.

The interpretation of this provision has nevertheless been the source of considerable controversy in the TRIPS Council. Delegations contest on the question whether Article 24.1 is limited to GIs for wines and spirits, or whether it authorises negotiations for extension of protection of goods other than wines and spirits.²³ Members opposing such extension argue that the terms ‘individual GIs under Article 23’, relate exclusively to the goods covered by Article 23.

Members calling for extension claim that, provisions of article 24.1 are of general application to all products and the reference to article 23 does not relate to products contained therein but to a means of additional protection to be provided.²⁴ To support their view, members refer article 24.2, which authorizes the TRIPS Council to keep under review the application of GIs provisions.

With respect to this mandated review, the TRIPS Council reported to the 1996 Singapore Ministerial that inputs from delegations on the issue of scope should be permitted. The supporters of extension consider this reference by the TRIPS Council to the ‘scope’ of the review to support negotiations on extension in the above sense.²⁵ So far, this interpretative issue has not been settled.²⁶

²² The New Shorter Oxford English Dictionary defines ‘individual’ as a noun and adjective as ‘3 Existing as a separate indivisible identity; numerically one; single, as distinct from others of the same kind; particular, 4 of pertaining or peculiar to a single person or thing, rather than a group; characteristic of an individual’.

²³ D Rangnekar ‘Geographical Indications a review of proposals at the TRIPS Council: extending article 23 to products other than Wines and Spirits’, UNCTAD, ICTSD, Geneva 2003. <http://www.iprsonline.org/unctadictsd/projectoutputs.htm#casestudies> (Accessed 09 November 2009).

²⁴ See the Communication from Bulgaria, the Czech Republic, Egypt, Iceland, India, Kenya, Liechtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey (IP/C/W/204, para 12).

²⁵ See the Communication (Revision) from Bulgaria, the Czech Republic, Egypt, Iceland, India, Kenya, Liechtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey (IP/C/W/204/Rev.1, para 14). 390.

²⁶ Rangnekar (n 22 above) 45.

On the issue of economic contribution of GIs, commentators admit the role done by GIs on market differentiation hence adding value to the products.²⁷ However, many researches evaluating benefits and economic rationale of protecting GIs were done outside Africa. Insignificant empirical researches were done in the African context. Moreover, those conducted for Africa, aimed at persuading African countries as to which position they should join at the multilateral debate in the ongoing Doha negotiations.²⁸

Despite the fact that there are several potential GIs in the EAC. No researches were conducted to examine possible benefits which GIs might exert in the region.²⁹ Moreover, EAC hesitate to negotiate GIs protection in the final EPA, whilst internationally the position is not clear. It follows therefore that, denying or rushing into protecting GIs without analysing possible economic contribution and other associated implications to the region seem to be unfounded decision.

Therefore following such lacuna, it is the thrust of this study to fill the existing gap by conducting a study that will examine the availability of potential GIs in the region, and the possible economic contribution of such GIs,³⁰ the legal frameworks in the region if augurs well the quest of protecting GIs and the possible implications of introducing structural reforms.

1.7 Research Methodology

The study was explorative in nature, coupled with desk and library based research. Comparative approach was adopted especially while borrowing the experience of protecting GIs by various EU member states versus the experience found in the EAC. Although the study is legalistic based, the research problem as well as the objectives of the research necessitated the investigation of different economic concepts and theories underlying the protection of GIs.

Additionally, internet based research has been employed significantly, in looking information from different secondary sources such as text books, relevant journal articles, study reports

²⁷ World Intellectual Property Organization (2003), 'international framework for the protection of trademarks and geographical indications' International Bureau of WIPO, WIPO/TM/BEY/03/1, (WIPO, 2003*b*).

²⁸ C Grant 'Geographical Indications Implication for African' <http://www.geographicindications.com> (accessed 12 October 2009).

²⁹ J Otieno-Odek 'the way ahead – What future for geographical indications?' Paper presented at the Worldwide Symposium on Geographical Indications, Parma, Italy June 27th to 29th 2005, <http://www.origin-gi.com/categories.php?catid=7> (accessed 12 October 2009).

³⁰ However economic analysis undertaken by the study involves economic theories which are theoretical based but coupled with some empirical evidence depending on the availability of data in the region.

on GIs etc. Also, relevant legislation or treaties responsible for GIs protection were looked upon. Qualitative analysis is the method used to analyse data.

1.8 Chapters Overview

Chapter one is an introductory chapter covering, background to the study, problem statement, thesis statement and research questions, significance and objective of the study, literature review, methodology and limitations of the study.

Chapter two addresses historical overview of the ACP-EU relations that resulted to the current EPA's negotiations, objectives and principles of EPA, and lastly the current status of EAC-EPA negotiations.

In chapter three meaning of the term GI, Legal frameworks used to protect GIs are comprehensively examined. Also in this chapter the feasibility of EAC legal framework for protecting GIs is also explored.

Chapter four addresses the economic rationale and associated benefits of protecting GIs, and the requisite conditions needed for a product to qualify GI registration.

Chapter five addresses potential GIs found in the EAC partner states, policies and legal frameworks available to administer such potential GIs.

Chapter six covers general conclusion for various findings observed by the study and provides recommendations as to which position should EAC opt, reasons for the same and also addresses possible areas for future research.

1.9 Delineation and Limitation of the Study

The study was done from 01/08/2009 to 30/01/2010. And it focused on information relating to Kenya, Tanzania, and Uganda. Information about Rwanda and Burundi are not given due to language problem as the researcher lacks mastery on French language, which is the official language of the named countries, hence hindering access of information.

1.10 Assumption Underlying the Study

The underlying assumption of this study is that, there are abundant potential GIs in the EAC and the existing partner states' legal framework can accommodate the protection of such GIs.

Additionally, the costs of implementing institutional and legal reforms are reasonable to justify the protection of GIs.

CHAPTER TWO

CONTEXTUALISING THE EU-EAC RELATIONSHIP WHICH RESULTED THE CURRENT EPA NEGOTIATIONS.

2.1 INTRODUCTION

As noted in chapter one the core aim of this research is to find out which position should the EAC take in the ongoing final EPA negotiations. Following the same root, this chapter attempts to trace the origin of the relation between the EU and ACP countries as well as what caused the so called EPA that seems to be very contentious currently. This approach has been taken deliberately because it is not worthwhile to discuss substantive provisions of the EPA text while the jurisprudence behind it is not known.

After addressing the historical backdrop of the EU-EAC relationship, this chapter address as well the objectives governing the ongoing EPA negotiations. Lastly, it examine thoroughly the status of the EU- EAC final EPA negotiations with the aim of knowing what are the conflicting views and interests that seem contentious amongst parties whilst related to GIs protection.

2.2 HISTORICAL BACKDROP OF THE EU-AFRICA RELATIONSHIP

2.2.1 Decolonization and the Yaoundé Convention era

The relationship between EU and Africa has its way back since the very creation of the European Community.³¹ The Treaty of Rome had express provisions recognizing the relationship between Africa by then as colonies of some of the founding members.³² It was the insistence of France, which had variety of colonies, and wanted to extend its economic interests outside community members.³³ The agreement gave both member states and their colonial dependencies preferential trade access of which EU and Africa enjoyed preferential trade terms vis-à-vis third parties.³⁴ These rather pleasing beginnings provided a lasting legacy for the EU's relationship with Africa. Hence, one can hurriedly conclude by saying that it is the historical ties rather than need which have ever been the criterion for determining preferential trade and aid relations between these two blocks.³⁵

The relationship was initially reorganised following the independence of African countries in early 1960s, through the Yaoundé Conventions of 1963 and 1969.³⁶ The same acknowledged, largely the political independence of the associate states; and joint institutions were further established to foster the relation, among others including an Association Council and a Parliamentary Conference.³⁷ However, scholars have pointed out that, the main driving force of this relationship was the continued economic interests of the EU's member states in Africa. This self-interest was reflected in the fact that preferential trade access remained reciprocal even if in the end it turned to be non reciprocal.³⁸

2.2.2 Lomé Convention I

This period witnessed the reappraisal of the EU-Africa relationship following the confirmation of the United Kingdom membership in the 1973. All Commonwealth members who were at par in terms of development with the Yaoundé signatories were automatically annexed to the relationship, hence forming the known African Caribbean Pacific (ACP)

³¹ SR Hurt 'Trade agreements between Europe and Africa', Pambazuka News Broadcast (2005) 99 <http://www.pambazuka.org/en/category/features/30549> (Accessed 07 November 2009) and also see 'Economic Partnership Agreements: territorial conquest by economic means?' Pambazuka News 20 February 2008 216, <http://www.pambazuka.org/en/issue/216> (Accessed 07 November 2009).

³² Karingi (n 5 above) 12 and Carboli (n 7 above) 20.

³³ Karingi (n 5 above).

³⁴ Karingi (n 5 above).

³⁵ Carboli (n 6 above) 14.

³⁶ Karingi (n 5 above) 17.

³⁷ Carboli (n 6 above).

³⁸ Karingi (n 5 above).

group of countries.³⁹ It should also be noted that the introduction of Generalised System of Preferences (GSP) by EU in 1971, reduced the dominance of francophone Africa in the relationship. The GSP in essence meant to reduce EU's external tariff for trade with all developing countries and not only with 18 Yaoundé signatories.⁴⁰

Following the enlargement caused by the joining of the ACP countries, EU sought a need of negotiating another agreement, and as a result the Lomé Convention was concluded.⁴¹ The ACP countries negotiated jointly against EU despite the fact that it was a heterogeneous group of states. The ACP group unity was strengthened by the global context of the early 1970s, whereby, the world witnessed the collapse of the Bretton Woods System.⁴² This necessitated ACP states to increase the desire of improving their position in the world economy. As a result the ACP states adopted a negotiating stance with the EU based closely to the New International Economic Order agenda.

Despite ACP countries joint efforts in negotiation, the final agreement though distantly reflected the prevailed global circumstances. The concessions previously enjoyed by the ACP were qualified, to the extent that, trade relations shifted from being reciprocal based to preferential based over market access for ACP exports.⁴³ Moreover, EU further limited the export of African agricultural commodities, by the non-inclusion of products covered in the EU's Common Agricultural Policy (CAP). Stringent rules of origin and safeguard clauses that allowed EU to retain significant degree of control over trade matters were introduced.⁴⁴

2.2.3 From Lomé to Cotonou

The period between Lomé I and the advent of Cotonou Agreement largely consisted of the new neo-liberal EU ideology. Such ideology had adverse impacts to the relations between EU and ACP, EU imposed further restrictions on the concessions which was made for ACP

³⁹ H Strydom 'from mandates to economic partnerships: return to proper statehood' (2007) 7 *African Human Rights Law Journal*. and also see S Bilal & A Walker *economic partnership agreements and the future of the ACP group*, Background Note for the 6th ACP Summit of Heads of States and Government 2-3 October (2008), Accra, Ghana.

⁴⁰ S Bilal 'Redefining ACP-EU Trade Relations: Economic Partnership Agreements ECDPM Seminar: The Cotonou Partnership Agreement: What role in a changing world?' Maastricht, 18-19 December 2006. And also see Strydom (n 41 above).

⁴¹ Hurt (n 32 above).

⁴² J Chisholm 'The European Union and the ACP states: A changing relationship' (2009) 21, http://euca.dal.ca/Files/Jennifer_Chisholm_2009.pdf (accessed 07 November 2009).

⁴³ Chisholm (n 43 above) 8.

⁴⁴ Hurt (n 32 above) 18 and n 47 below.

countries in the Lomé I.⁴⁵ Finally such neo-liberal thinking coupled with other reasons is believed to have yielded the 2000 Cotonou Agreement.⁴⁶

A strong shift towards neo-liberal thinking in the global North coupled with the Third World debt crisis, significantly, altered the context of the EU's relations with Africa. Lomé IV, which was signed in 1989 witnessed the reflection of the then introduced Bretton Wood institutions' insistence over structural adjustment programme which EU also adopted.⁴⁷ In defending its adoption EU claimed that it had devised a more pragmatic approach than that adopted by the IMF and World Bank, which would take greater account of the impact of such policies on vulnerable groups.

The publishing of the 1996 Green Paper by the European Commission suggests the genesis of the Cotonou Agreement. The paper assessed and suggested the need of overhauling the EU-Africa relationship;⁴⁸ and urged for increase in conditionality attached to aid and a shift in trade policy towards the benefits of multilateral trade liberalisation rather than preferential regimes.⁴⁹ These concerns were partially addressed in the mid-term review of Lomé IV.

Also, the creation of the WTO and the associated pressures for multilateral trade liberalisation made the EU's preferential trade relationship unsustainable, due to lack of reciprocity. Additionally, even the effectiveness of non-reciprocal trade preferences was questioned, as exports from the ACP group showed a steady decline in proportion of total exports to the EU.⁵⁰

In 2000 the EC proposed a new trade and development regime, the Cotonou Agreement, with the central objectives of reducing poverty, and promoting the sustainable development and gradual integration of ACP countries into the world economy. The Cotonou Agreement, which covers the period 2000-2020, comprises of co-operation in three pillars: political, development, economic and trade cooperation. Under the economic and trade pillar, the EU

⁴⁵ ⁴⁵ Hurt (n 32 above); H Strydom 'From Mandates to Economic Partnerships: Return to Proper Statehood' (2007) 7 *African Human Rights Law Journal*.

⁴⁶ Hurt (n 32 above) 23.

⁴⁷ T Parfitt 'The decline of Eurafica? Lomé mid-term review', review of African political economy' (1996) 53-66

⁴⁸ W Brown, *the European Union and Africa: The Restructuring of North-South Relations* (2002) 30.

⁴⁹ European Commission Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21st Century: Challenges and Options for a New Partnership, (1996) COM (96) 570, 20 November, Brussels: European Community quoted from SR Hurt (2005) Trade agreements between Europe and Africa, Pambazuka News Broadcast <http://www.pambazuka.org/en/category/features/30549> (Accessed 07 November 2009).

⁵⁰ SR Hurt 'Co-operation and coercion? The Cotonou Agreement between the European Union and ACP states and the end of the Lomé Convention', *Third World Quarterly*, (2003) 24 (1): 161-176.

and ACP agreed to conclude new trading arrangements compatible with WTO provisions, which would be called EPAs.

Furthermore, the abandonment of the Lomé Convention in favour of the Cotonou Agreement was exacerbated by the 1990s significant changes in geo-politics and global economy.⁵¹ The period saw the EU shifting its priorities to Central and Eastern Europe following its expansion programme.⁵² This was evidenced on the aid package which ACP countries received. Moreover, the influence of the hegemony of neo-liberal development thinking is apparent in the EU's claim that the Cotonou Agreement and the negotiation of EPAs are necessary to meet the global rules of free trade embodied in the WTO.

Hurt has different view on this as to him the same neglects the obvious fact that the rules of the WTO are not 'fixed and immutable' but a 'political construct'. Thus, he further ponders that if the focus of the EU's relationship was truly developmental it could seek to alter the very rules of the multilateral trading system that it claims limit its options.⁵³ Thus, EU firmly saw fit to implement its benefits, thus the coming of the Cotonou Agreement and subsequently the EPAs which should have been finalised in 2007.

2.3 THE EAC-EU INTERIM EPA NEGOTIATIONS

2,3,1 Overview of the EPAs

As noted above, the EPA is an evolution of long historical ties between Europe and ACP countries.⁵⁴ It came about due to a requirement to reformulate ACP-EU trade relations which conforms with WTO rules, as the existed relations lacked reciprocity and was discriminatory to third parties, thus, contravening WTO fundamental principle that prohibits discrimination amongst members in doing trade eventualities.⁵⁵ A waiver was granted to the EU to change its trade preferences with the condition that they should be in conformity with the WTO rules by January 2008.⁵⁶

⁵¹ Hurt (n 51 above) 24.

⁵² n 50 above.

⁵³ Hurt (n 51 above) 25.

⁵⁴ Billal (n 41 above) 12.

⁵⁵ M. Killander 'Europe and the Return to 'Proper Statehood' in Africa-A Reply to Strydom', (2007) 7 *African Human Rights Law Journal*.

⁵⁶ Hangi M. & Mkenda B. 'Status of EAC-EC Economic Partnership Agreements (EPA) and An assessment of Revenue and Development implications: Tanzanian case': Civil Society Responses on 'Building an Inclusive East Africa Community' Regional Workshop Report 2009 20. http://www.cuts-grc.org/pdf/GRC-BIEAC_RegionalWorkshop_Report-Apr27-28_2009.pdf (accessed 07 November 2009).

As response and efforts for compliance with WTO rules in September 2002, phase-1 EPA negotiations were initially launched in Brussels and were concluded in July 2003. The ongoing phase-2, negotiations were initiated between the EU and different regional configurations. The EU put a demand that ACP countries form themselves into compatible regional configurations to hasten the negotiations and to be able to negotiate agreements that suited their varied needs.⁵⁷

Six regional blocs were formed, one each in the Caribbean (CARIFORUM) and the Pacific (PACP) regions, and four in Africa: Western Africa (ECOWAS), Central Africa (CEMAC), Eastern and Southern Africa (ESA), and Southern Africa (SADC). Later, towards the end of 2007, as the deadline culminated another sub-group emerged from both the ESA and SADC configurations comprising of East African Community (EAC) countries.

2.3.2 Objectives and Principles of EPAs

Generally, the general objectives of EPAs as agreed in the Cotonou Agreement includes among others the need; to support reduction and eventual elimination of poverty in ACP countries, in ways that should lead to their sustainable development.⁵⁸ Enhancement of regional integration among EAC partner states is viewed by the EU as a crucial foot step or avenue through which EAC partner states would gradually integrate with the rest of the world economy; hence the same will contribute to the notion of poverty reduction and sustainable development in the region.⁵⁹

The EPAs are thus supposed to aid the existing regional integration efforts in the region and policy measures as well as programmatic activities that will support such integration of partner states. Increase of productivity and supply capacities, support for trade development, and promotion of economic diversification of EAC partner states are necessary for expanding trade and in supporting regional integration⁶⁰.

The EPAs negotiations be interim or final are supposed to honour the following principles⁶¹:

- Be oriented to sustainable development needs by being consistent with EAC's development strategies, support and improve the ongoing EAC partner states unity

⁵⁷ Mkenda & Hangi (n 57 above) 27.

⁵⁸ P Alves et al 'Africa's challenges in international trade and regional integration: what role for Europe?' (2009) 17.

⁵⁹ S Bilal 'EPAs: to be or not to be?' (2009) 15.

⁶⁰ Alves (n 59 above) 30.

⁶¹ Mkenda & Hangi (n 57 above).

and solidarity, preserve and improve preferential access of EAC exports to the European markets.

- Be compatible with WTO rules, provide special and differential treatment to EAC partner states based on their varied development status, entail reciprocity in liberalisation but must provide flexibility for asymmetry in liberalisation.
- Be sustainable and locally owned, hence must mainstream the participation of other stakeholders such as private sector and civil society organisations other than central government as equal partners.

2.3.3 Current Status of the EU-EAC EPA Negotiations

The East African Community core objective among others is to promote free trade, with an ultimate aim of forming a political union. There has been a speedy progress in cementing the integration of the region that culminated in a customs union in 2005 and common market in November 2009. In the ongoing negotiations partner states negotiate as a bloc despite their divergent interests nationally and internationally.

The Community commenced negotiation with the EU lately in 2007 due to multiple memberships of its members. In November 2007 the Community initialled interim EPA containing only trade in goods, and the full agreement, which is still being negotiated, was expected to be concluded on 27 July 2009.⁶²

The initialled agreement is made up of some key sections: general provisions, market access for trade in goods, development cooperation, fisheries agreement which seem to be exhaustive as compared to other areas agreed, dispute settlement, and areas for further negotiations.⁶³ Issues that have been left for further negotiations are listed in a Rendezvous Clause in Article 37 covering among others; intellectual property rights, customs and trade facilitation etc.

However, of relevant to this study are intellectual property rights which include GIs. In the ongoing final EPA negotiations EU has proposed a framework text for protecting GIs which is TRIPS plus. The text contains commitments which EAC have not undertaken under the WTO law or other multilateral agreements.

⁶² EAC-EU Framework of Interim EPA, and also see Fact sheet on the interim Economic Partnership Agreements an Overview of the Interim Agreements. http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142188.pdf (Accessed on 07 November 2009).

⁶³ n 63 above.

In the EU proposed intellectual property rights text, provisions relating to protection of geographical indications are found in article 676. Art. 6.1 deals with protection of GIs in the territories of both parties, however GIs which are not protected in the country of origin will not be registered and protected in the foreign countries.⁶⁴ Unfortunately, in the proposed text there is no article providing the meaning of GI.⁶⁵ Meanwhile, EAC partner states are obliged to establish system of protecting GIs not later than 1st January 2014. Lastly, both parties shall discuss within the committee upon the effective implementation of protecting GIs and exchange of information on policy and legislative framework for GIs protection.

Article 6.2 provides the terms of protection; both parties shall protect registered GIs in their respective territories indefinitely according to their respective legal system and practice.⁶⁶ Such protection will be only for goods originating in the parties territories and which qualifies to the relevant product specifications.⁶⁷ Moreover, parties should prohibit and prevent the use of misleading GIs which constitute the act of unfair competition as provided under art 10bis of the Paris Convention. Translated form of indications for similar goods not originating to the true geographical place such as 'kind', 'style', 'imitation' ... or other expression of the sort shall be prevented and prohibited.⁶⁸

Protected GIs may be cancelled where justifiable; the procedure to be applicable for the same shall allow interested third parties to intervene. Meanwhile the relevant authorities must enforce the protection from their own initiatives as requested by the interested parties who applies⁶⁹. Improper use of the terms applicable in the EAC [such as champagne] shall cease not later than 1st January 2010⁷⁰ (emphasis is mine)

Article 6.4 deals with the protection of generic terms, plant varieties and animal breeds; generic terms shall not be protected as GIs, also homonymous GIs as matter of equity shall be protected provided consumers are not misled the true origin of such homonym GIs. However, if a third party GI is homonym with a registered GI of wine in nature then the provision of article 23(3) of the TRIPS agreement shall apply.⁷¹

⁶⁴ Art 6.1.1 of the proposed EU intellectual property rights text in the final EU-EAC EPA negotiation.

⁶⁵ It is doubtful as to whether the meaning of the term GI in the proposed EU text will be that adopted in the TRIPS agreement rather than the two tier system of protection applicable in the EU's CAP.

⁶⁶ This means that the two tier system applicable in the EU shall be a practice which will also be used to register EAC GIs needing to be registered in the EU. It is doubtful whether EAC'S GIs can afford to be registered as PDO in the EU.

⁶⁷ Art 6.2.2 of the proposed EU's intellectual property rights text

⁶⁸ Art 6.2.4 of the proposed EU's intellectual property rights text.

⁶⁹ Art 6.2.5 and 6.2.5 of the proposed intellectual property rights text.

⁷⁰ Art 6.3 of the proposed EU's intellectual property rights text.

⁷¹ Art 6.4 of the proposed EU's intellectual property rights text.

Article 6.5 deals with the relationship between a geographical indication vis-à-vis a trademark. A GI shall not be registered if it conflict with existing reputable trademark to avoid consumers' confusion. Similarly no trademark shall be registered if it conflicts or contains a geographical name of an existing GI. Meanwhile, no later than 1st January 2014 parties agree to commence negotiations relating to protection of GIs in their respective territories. Additionally, EU proposed the adoption of registration of GIs as applied in the internet.⁷²

On the other hand, EAC denies from entering any agreement with third parties including EU on any TRIPS plus commitments regarding protection of GIs. And it has directed its secretariat and EPA negotiators to conduct study on the following references:-

- i) 'Conduct a study to determine to what extent the draft EPA text reflects partner states position advanced at the WTO and WIPO on GIs...
- ii) Conduct assessment and evaluation of main partner states' GIs products to determine the benefits of extensive GIs commitments in the EPA provisions...'

Thus, this study via coming chapters' addresses in verbatim and extensor the named references, in line with the research questions outlined in the first chapter. With the intention of evaluating as to what position should EAC take, whether to accept extensive GIs protection commitments or not as proposed by the EU.

2.4 CONCLUDING REMARKS

The discussion above reveals that the ongoing EPA negotiation is the result of long term relationship existed between the EU and ACP countries. Following the formation of the EC after the end of the Second World War, some of the six founder members found the need of incorporating their colonies in the union. French speaking countries in Africa were the first to benefit the result of the integration. Initially the relationship was reciprocal based, but after England joined the community in 1960s its former colonies were enjoined in the relationship and subsequently the relationship turned to be none reciprocal.

Several amendments were done to make the relationship meaningful to both parties; however the dream did not materialise as ACP countries faced supply side constraints of which insignificant goods from Africa found access in the European Market. Following such

⁷² Art 6.7 of the proposed EU's intellectual property rights text provides that, electronic commerce as GIs is concerned should be adopted as agreed by the WIPO member states in the Thirty-Sixth Series of Meetings of the Assemblies of the Member States of WIPO, of 24 September to 4 October 2001.

challenges in 1990 EU and ACP countries met in Cotonou and restructured the relationship. However the agreement met faced stiff challenges following the formation of the WTO whereby third parties to the relationship argued that, the relationship was against WTO MFN principle as well as lacked reciprocity amongst members.

Moreover the chapter reveals further that, in order to adhere to the WTO obligations EU applied for waiver which was in fact given but with limitation that the relationship should be restructured. The EU and ACP countries had to make reciprocal based relationship which is to be called EPA. To effect EPA arrangements EU formulated several configurations for EPA negotiations, and among other configuration formed was the EAC formed in late 2007.

For negotiation with the EU, EAC partner states agreed to negotiate jointly as a bloc. The interim EPA agreement reached had commitments provided in the rendezvous clause that, for those areas not agreed both parties will comprehensively discuss and agree at the latest on late July 2009. Holistically intellectual property rights was among other contentious issue left, and in the current final EPA negotiation, EU has proposed a framework text regarding protection of GIs which is TRIPS plus. On the other hand following such a proposed framework text, EAC has refused to incorporate the protection of GIs with any third parties including the EU. However it has directed its secretariat to conduct meaningful research to see on whether it will be worthwhile to warranty protection of GIs in the community.

CHAPTER THREE

3.0 VARIOUS LEGAL FRAMEWORKS PROTECTING GIs

3.1 INTRODUCTION

Given the economic implications of GIs, the legal protection of this intellectual property right plays a significant role in commercial relations.⁷³ Without such protection GIs run the risk of being wrongfully used by unscrupulous businessmen and companies, because they can misappropriate the benefits accruing from the goodwill and reputation associated with such GIs, by way of misleading the consumers.⁷⁴

Such misuse may end up hampering the goodwill and reputation associated with these indications over long run. In order to rule out any unscrupulous use of GIs, and to exploit fully the commercial potential of this intellectual property right, It is utmost important that; countries ensure adequate protection for their own GIs nationally. Effective protection is also needed internationally, because national legislation which applies to only one country is not

⁷³ Kastur (n 16 above) 463.

⁷⁴ n 16 above.

sufficient in the context of globalised economy, where products keep travelling beyond national borders.⁷⁵

The need for a globally accepted law with respect to the protection of GIs has been on the international agenda for a long time and in the recent past, has emerged as one of the important instruments of intellectual property protection.⁷⁶ In this chapter the paper elucidates various legal frameworks used to protect GIs internationally, regionally as well as nationally. Meaning of the term GI is first given to provide an understanding of the concept regardless of what meaning the term/concept has been given by different specific treaty/convention.

The chapter also, discusses the legal background prevailed before the coming into force of the TRIPS agreement. Thus, the Paris Convention, the Madrid Agreement, and the Lisbon Agreement are examined in detail as they contributed a lot in the development of the concept globally. The WTO law relating to protection of GIs is further discussed following the discussion of the pre TRIPS multilateral agreements. Thereafter, the EU and EAC legal frameworks protecting GIs is discussed to make a comparative analysis of the two regions as they are the ones who are party to the EPA. Lastly, various forms of protecting GIs nationally as reported by the WTO secretariat is discussed but with specific reference to EAC partner states legal frameworks. Concluding remarks are given at the end of the chapter to summarise the observation noted throughout the chapter.

3.2 General Meaning of Geographical Indication (GI)

The term geographical indication affords various interpretations due to different meaning associated to the term in various places and at different times. This results to ambiguities in the use of basic terms. According to Hughes J the term affords three different meanings noted hereunder.⁷⁷

- i) A geographic word is a noun or adjective that names or denotes a geographic place.
- ii) A geographic indication is any word, phrase, or symbol that designates the place where a product was produced regardless of reputation.
- iii) A geographical indication (GI) is any word, phrase, or symbol attached to a product that designates the place where a product was produced and that place has a reputation for producing that product with particular desirable qualities.

⁷⁵ Chandola (n 18 above) 321.

⁷⁶ Chandola (n 18 above) 323.

⁷⁷ This definition is similar to, but has some differences with, the tripartite vocabulary introduced in A Conrad 'the protection of geographical indications in the TRIPS agreement', the trademark reporter 1996 13 -14.

The jurisprudence of GI law reveals that, it is built by two types of notions expressing the “land/qualities” connections. The first notion expresses the product’s qualities that come ‘essentially’ and or ‘uniquely’ from the producing region. Indeed this is the traditional core of GI jurisprudence all over the world.⁷⁸ The second notion is that of which a region’s product has a reputation for certain qualities, but the product qualities are not claimed to be unique to the producing region, commonly denoted as ‘non-unique land/qualities connection’.⁷⁹

GIs usually includes geographic words, names, symbols, images or adjectives denoting places. If it is a geographic word then it must be coupled with the generic term for the product for instance Irish whiskey, however, the word may stand alone for example Scotch.⁸⁰ Many of the GIs are those which derived directly their respective geographical names where they are produced. Meanwhile, there are some of the most famous GIs are actually the ports of embarkation for the producing region.⁸¹ Nonetheless and despite resistance to the idea historically⁸² names of countries can be protected as GIs in at least some legal systems such as Canadian whiskey, Colombian coffee etc.

Rarely geographic indications are terms or identifiers that are not names of places. Such types of GIs are those which are commonly known as indirect geographical indications.⁸³ Another good example of an indirect geographical indication could be a bottle style that has been historically used to denote certain types of product from one particular region and, thereby, becomes identified with that type of wine.

3.3 PRE-TRIPS MULTILATERAL LEGAL DEVELOPMENT OF GEOGRAPHICAL INDICATIONS

⁷⁸ On this category there are French *appellation d'origine*, *denominazione de Origine* in Italy or *denominações de origem* in Portugal to mention but a few jurisdiction.

⁷⁹ A good example of this category is the Germany system of law relating to protection of GIs which does not command the uniqueness of the product’s qualities being exclusively from the producing regions.

⁸⁰ Typically, the places are towns, villages, or sub-national geographic regions: states Idaho potatoes, provinces, departments Cognac, or counties Bourbon.

⁸¹ For instance Porto wine, Bourbon whiskey, and Bordeaux wines all take their name from the region’s shipping port, not the region. Similarly, Parmesan cheese, named for Parma, originated – and is still produced best – in the Reggio nell’Emilia district which is across the Enza River from the district (and city) of Parma.

⁸² For example in 1975, the European Communities argued against Germany's claim that ‘Sekt’ was an indirect geographical indication, partly on the grounds that ‘the Federal [German] Government gave no example demonstrating that the territory of a whole country may also be the subject of an indirect indication of origin,’ EC v. Germany Judgement. French law does not permit country names to be protected appellations d’origine and, according to the California Wine Export Program, country names like “American” do not qualify as geographical indications under EU wine doctrine. See California Wine Export Program, 2000 European Union Wine Labelling Regulations Memo at 2-3.

⁸³ The best example is the word ‘claret’ as used in the British Isles. The word was derived from the French word ‘*clairet*,’ in Britain ‘claret’ came to refer exclusively to red Bordeaux wines.

GIs protection dates back for many decades as noted above, it received multilateral recognition since late 19th century.⁸⁴ Several multilateral agreements and many more bilateral agreements were signed. For instance US entered into a bilateral agreement with Portugal on the use of *Porto* as early as 1910 and there was a complex web of such treaties among European states.⁸⁵

3.3.1 The Paris Convention for the Protection of Industrial Property

The Paris Convention on Industrial Property was established in 1883, and is considered to be the first multilateral agreement that sought to recognise the protection of GIs.⁸⁶ TRIPS Agreement incorporated the substantive standards of the Paris Convention by extending the coverage of some of its provisions.⁸⁷ Article 1 of the Convention provides among other things the ‘indications of source or appellations of origin’, however the actual treaty obligations are cast at the more general level of what commentators have called geographical identifiers.

The substantive obligations related to geographic identifiers as provided in Articles 10 and 10bis of the Convention are derivative on obligations regarding trademarks.⁸⁸ The Convention via article 9 requires countries to seize ‘on importation’ goods unlawfully bearing a trademark or trade name.⁸⁹ If seizure is not available as a matter of domestic law, then member states shall without any undue delay prohibit importation of such goods or may exercise seizure inside the country.⁹⁰ Article 10 provides *inter alia* that:

*‘The provisions of the preceding Article ... shall apply in case of direct or indirect use of false indication of the source of the goods or the identity of the producer, manufacturer, or merchant’.*⁹¹

The last disjunctive phrase (or the identity of the producer ...) makes it clear though impliedly that the prior phrase (‘false indication of the source of the goods’) means ‘geographic’

⁸⁴ It is further believed by commentators that European Union’s own internal efforts at geographical indications law set the stage for both the present international standards.

⁸⁵ C BUHL *Le droit des noms géographiques* (1997) 327 (listing some of France’s bilateral treaty’s prior to EU competence in this area) quoted from J Hughes (n 5 above).

⁸⁶ For an account of the origins of the Paris Convention, see P Stephen & I Ladas ‘Patents, and Trademarks and Related Rights: National and International Protection’ (1975) 310.

⁸⁷ For instance article 22(2) of the TRIPS agreement incorporated the use of article 10bis of the Paris Convention dealing with unfair competition.

⁸⁸ Article 10ter also provides procedural components for enforcement of unfair competition and false indications: Art 10ter(1) requires a member state to provide ‘appropriate legal remedies’ to nationals of other member states, while 10ter(2) seeks to ensure that ‘federations and associations representing interested industrialists, producers, or merchants’ to enforce Article 10 and 10bis rights.

⁸⁹ Art 9(1) of the Paris Convention.

⁹⁰ Art 9(5) of the Paris Convention.

⁹¹ Art 10(1) of the Paris Convention.

source. Reading between lines, the Convention has no provision that defines an ‘indication’, thus; apparently the link between product qualities and producing region is not a requisite requirement for protection. Thus, article 10 obligation appears to require legal protection of ‘geographic’ identifiers generally.⁹²

The Paris Convention also includes Article 10bis, which provides that member states are generally ‘bound to assure to nationals of such countries effective protection against unfair competition’.⁹³ And, specifies that ‘any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.’⁹⁴ Moreover, it prohibit ‘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, and the suitability for their purpose, or the quantity of the goods’.⁹⁵

Article 10bis (3) could be interpreted to apply to GIs, but its drafting history reveals contrary as its language was added to the Convention at the 1958 Lisbon Revision Conference and originated in a proposal from the Austrian delegation.⁹⁶ The US insisted that the phrase ‘the origin’ be removed from the provision, muscularly asserting that 10bis (3) should not be interpreted as creating a treaty obligation vis-à-vis the land or qualities nexus of GIs.⁹⁷

3.3.2 Madrid Agreement

The narrow scope of Article 10 of the Paris Convention might have helped the acceleration towards the prompt return to the notion of GIs at the end of 19th century. When, the Madrid Agreement of 1891 came into being.⁹⁸ Various diplomatic conferences met to amend the Madrid Agreement, still the treaty remain a diplomatic dead-ends. However, it potentially showed the development of legal protection for geographic identifiers, as it altered the Paris Convention standards in a few ways.

⁹² The provisions apply to ‘Made in Japan’ et cetera on any goods. Art 10 dates back to the original Paris Convention and is now an obligation on all WTO members through Art 2(1) of the TRIPS Agreement.

⁹³ Art 10bis (1) of the Paris Convention.

⁹⁴ Art 10bis (2) of the Paris Convention.

⁹⁵ Paris Convention art 10bis(3)(3) Art 10bis(3) appears generally aimed at false or misleading advertising vis-à-vis competitors, i.e. ‘allegations’ in 10bis(3)(2) and (3) and ‘acts [which] . . . create confusion . . . with the establishment, the goods, or the...activities, of a competitor’ (10bis(3)(1)), but the 10bis(3)(3) inclusion of ‘indications: seems to return to issues of product labelling.

⁹⁶ The original language proposed by Austria was to create a prohibition where the indication was “liable to mislead the public as to the nature, the “origin”, the manufacturing process, the characteristics, and the suitability for their purpose, or the quantity of the goods.

⁹⁷ J Thomas et al *Protection of geographic denominations: domestic and international* (1979) 69 TMR 199- 203.

⁹⁸ Madrid Arrangement on the suppression of false or misleading indications of provenance of 14 April 1891, 828 U.N.T.S. 163 (last revised at Stockholm on 14 July 1967).

Firstly, whereas article 10 of the Paris Convention requires false indications to be seized on importation, article 1(1) of the Madrid Agreement provides that ‘all goods bearing a false or deceptive indication by which . . . a place . . . is directly or indirectly indicated as being the country or place or origin shall be seized on importation . . .’⁹⁹ Explicitly this marked an expansion of liability to include the effect of the designation on the consumer.¹⁰⁰

Secondly, at its diplomatic conference held in 1934 the Madrid Agreement added article 3bis, that expanded the commitment of fighting false or deceptive marks or source indications ‘appearing on signs, advertisements, invoices, . . . or any other communication’. That marked a shift from a focus on deceptively marked goods to fighting deception throughout channels of commerce.¹⁰¹

Furthermore, Madrid Agreement introduced for the first time wine-specific rules into a modern multilateral treaty. Article 4 of the agreement provides that: ‘The courts of each country shall decide what appellations, on account of their generic character, do not fall within the provisions of this Agreement, regional appellations concerning the source of products of the vine being, however, excluded from the reservation specified by this article’.¹⁰²

3.3.3 Lisbon Agreement¹⁰³

In 1958 concerned countries concluded a multilateral convention dealing with international registration of GIs, similar to the international registration system of trademarks established lately in the 19th century.¹⁰⁴ The Lisbon Agreement focuses unswervingly on GIs, however, using the term ‘appellations of origin’. Article 2(1) of the agreement provides that:

⁹⁹ Note that this may expand the Paris Article 10 coverage less than first appears because Paris Article 10 already applied to ‘indirect use of false indication of the source of the goods’ which would seem to capture many, if not most, practices that could be called deceptive, but not directly false.

¹⁰⁰ A standard of a ‘false’ designation seems to require less analysis of the consumer’s reaction to the designation in the sense that the plain meaning of the word renders it true or false in relation to the goods to which it is attached.

¹⁰¹ It is worth noting that instead of using ‘false or deceptive’ formulation of Article 1(1), the standard in Article 3bis is ‘capable of deceiving the public’, arguably reaching a wider field of messages, just as likelihood of confusion is a looser standard than confusion and likelihood of dilution is a looser standard than (actual) dilution, for more details see <[http://clea.wipo.int/lpbin/lpext.dll?f=file\[ibrowse-j.htm](http://clea.wipo.int/lpbin/lpext.dll?f=file[ibrowse-j.htm) (Accessed 07 November 2009).

¹⁰² In other words, while the Madrid obligations applied to geographical identifications, Art 4 permits a national court determination that a geographical identifications or identifier has become generic within that country, effectively triggering a treaty-level reservation concerning that word. However, it then immediately eliminates this possibility vis-à-vis terms of viniculture e.g. Chianti etc.

¹⁰³ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 31 October 1958

¹⁰⁴ As of 15 July 2001, there were only 20 states which are parties to the Lisbon Agreement and participating in its WIPO-administered registration system. This group includes nine European countries, only three of which are EU members (France, Portugal, and Italy); six states on the African continent (Algeria, Burkina Faso, Congo, Gabon, Togo, and Tunisia), four countries in the Americas (Mexico, Cuba, Costa Rica, and Haiti), and Israel.

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

Two things are found in this foundational definition. Firstly, the definition seems to exclude indirect GIs.¹⁰⁵ Secondly, the definition requires that the land/qualities connection be ‘exclusive or essential’. The mechanism for protecting GIs in the member states’ territories is not specified by the agreement, hence allowing members to determine proper system depending on the circumstances.

Once a GI is protected in its country of origin and duly registered with the WIPO, all other member countries are required to protect that GI within their own borders. The scope of protection is broad as provided explicitly by article 3:

*‘Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind’, ‘type,’ ‘make,’ ‘imitation,’ or the like’.*¹⁰⁶

The agreement calls protection against usurpation or imitation even if the true origin of the product is indicated or the appellation is used in the translated form or accompanied by terms such as ‘kind’, ‘type’, ‘make’, ‘imitation’ or the like.¹⁰⁷ The appellation of origin applies to a smaller number of indicators than does indications of source. Henceforth one can conclude that all appellations of origin are indications of source, whereas not all indications of source are appellations of origin.

The extent of protection against ‘usurpation’ by the agreement is unclear. However, usurpation under French law entails protection against any use likely to divert or weaken the reputation of the GI. Whether or not protection against ‘usurpation’ follows French standard or something similar to U.S. dilution law, it unquestionably decouples legal protection from any kind of consumer confusion.

Lisbon Agreement allows members to decline protection for GIs which has become generic in their territories. However, article 6 provides that once a GI has been recognized in a

¹⁰⁵ For instance, bottle shapes words, phrases, and symbols which serves as GIs, but are not geographic names.

¹⁰⁶ Art 3 of the Lisbon Agreement.

¹⁰⁷ See art 3 of the Lisbon Agreement.

country pursuant to the treaty regime, then it can never be declared a generic term.¹⁰⁸ Refusal by reason of genericness is allowed only during the initial application of the GI. Subsequent perception that the protected GI has become generic is not allowed by the agreement as provided in article 5(3).¹⁰⁹

3.3.4 WTO TRIPS Agreement

The WTO TRIPS Agreement of 1994 is the leading multilateral legal framework governing protection of GIs as known today. The provisions of this agreement has received enormous acceptance as compared with other multilateral agreements concluded before it. TRIPS Agreement of course takes advantage of what they call single undertaking adopted by WTO law. TRIPS provisions applicable today reflects the Dunkel Draft text of December 1991.¹¹⁰ The only substantive difference is the limited scope of the continued and similar use of exception under Article 24.4 of the Dunkel Draft. While the former referred only to GIs identifying wines, TRIPS extended this exemption to spirits.

Article 22(1) provides a definition of GIs, which has two principle elements that are considered to be international standards developed beyond what existed before TRIPS. It provides *inter alia*:-

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

From the definition, indications which may be given protection includes those which are not verbal by its nature, rather even images, symbols, packaging etc are also included.¹¹¹ However, services are excluded from protection, but protection extends to even non

¹⁰⁸ ‘An appellation which has been granted protection in one of the countries of the Special Union pursuant to the procedure under Article 5 cannot, in that country, be deemed to have become generic, as long as it is protected as an appellation of origin in the country of origin’.

¹⁰⁹ Provides that ‘(3) The Office of any country may declare that it cannot ensure the protection of an appellation of origin whose registration has been notified to it, but only in so far as its declaration is notified to the International Bureau, together with an indication of the grounds thereof, within a period of one year from the receipt of the notification of registration, and provided that such declaration is not detrimental, in the country concerned, to the other forms of protection of the appellation which the owner thereof may be entitled to claim under Article 4’. The reference to Article 4 establishes that this kind of administrative ‘reservation’ vis-à-vis a particular GI will not automatically denude the GI.

¹¹⁰ Note that the numbering of the provisions on geographical indications is the same in the Dunkel Draft and the TRIPS Agreement.

¹¹¹ Examples of indirect GIs are such as the Eiffel Tower for Paris, the Matterhorn for Switzerland or the Tower Bridge for London. See WIPO Intellectual property Handbook: Policy, Law and Use p 121.

agricultural food products. Still, for all practical purposes, the law of geographical indications is about foodstuffs.

Moreover, the definition does not mention expressly whether ‘human factor’¹¹² is among other criterion that falls within the ambit of ‘...quality, reputation or other characteristics...’ Some commentators do argue that, such silence means ‘human factor’ is not included, because, other multilateral agreements expressly incorporated it. However, others consider ‘human factor’ to have been included, they argue that the history of the negotiation which resulted to the definition does not show any proposed draft which opposed the need of including ‘human factor’ as proposed by the EU. Hence, Dunkel’s draft should be interpreted to have incorporated ‘human factor’.

The definition further commands the need of connectivity between the qualities in question vis-à-vis a producing geographic region. The article needs the quality of a good be “essentially attributable” to the geographical region where it is produced. Majority think this is a lax standard when compared to that imposed by the Lisbon Agreement, which requires the good to have a quality which is ‘due exclusively’ or ‘essentially’ to the land where it is produced.

However, Hughes finds both standards the same because ‘exclusively’ and ‘essentially’ has the same coverage. If particular geographic region A is essential for producing product qualities Z, surely that means no other geographic region will do as a product input. But that is the same thing as saying that region A has exclusivity for qualities Z. If geographic region B can also produce product qualities Z, then ‘A’ is not ‘exclusive’, but neither is it ‘essential’. However, there is no legal pronouncement to uphold any of the conflicting view up to now.

For ensuring common standards of the agreement, article 22(2) set down two basic operative requirements applicable for all GIs:

‘In respect of geographical indications, members shall provide the legal means for interested parties to prevent;

¹¹² Human factor entails special professional traditions of the producers established in the geographical area concerned. Also see WIPO (n 119 above) 127.

- a) *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 that misleads the public as to the geographical origin of the good;*
- b) *Any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967)'.*

Firstly, the article requires WTO members to provide legal mechanisms for protecting GIs from which, any person who uses any designation or presentation which signifies that the good in question comes from certain geographical region. While, in fact does not come from such named geographical region. And due to such signification if the 'public is misled,' then such use of deceptive indication should be prevented.

However, commentators have argued that to what extend should a public be considered to have been misled? The agreement is silent over the matter and does not provide even the meaning of the term 'public', thus leaving members with discretion to fill the lacuna. Secondly, the article impliedly extend the coverage of article 10bis of the Paris Convention in the definition provided under art 22(1) of the TRIPS, on the prevention of unfair competition.¹¹³

The standards set under article 22 are qualified by article 23 which provide additional protection for GIs relating to wines and spirits. The extension is two fold; firstly, relates to cancellation of existing registered trademarks and secondly, use of trademarks bearing false indication denoting wines and spirits even if the public is not misled. it does not matter whether the use of such a label or trademark is in translated form such as 'type' 'kind' 'style' or the like so that the public is not misled. However the provision of this article is subject to exceptions provided under article 24. Generally it provides that:

'Each Member shall provide the 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 the goods is indicated or the

¹¹³J Hughes contends that in the negotiation of Article 10bis in 1958, the United States delegation objected to the words 'the origin' in the original Austrian proposal. The provision had to be reworded so as *not* to extend to geographical indications. Thus, the definition of GI in TRIPS Article 22(1) and the 'incorporation' of 10bis in TRIPS Article 22(2)(b) implicitly expands Article 10bis coverage without formally saying so 107 and amounts to a U.S. concession on what it would not concede in 1958.

*geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like.*¹¹⁴

Article 24(1) and (2) concern the WTO obligations on continuing negotiations, also article 24(3) is simply a prohibition on back-tracking. TRIPS obligations are a floor, not a justification to 'diminish the protection of GIs existed prior to the entry into force of the agreement. Article 24(4) through (9) provides an array of limitations and exceptions to the GIs obligations in articles 22 and 23.

Article 24(4) is a grandfathering clause with limited conditions. It is specific to GIs for wines or spirits protected in country X, whilst producers in country Y were already using that geographic word in connection with goods or services. Article 24(6) excludes obligation of protecting GIs which have accidentally through historical usage became generic.

3.4 REGIONAL LEGAL FRAMEWORK FOR GIs PROTECTION

3.4.1 The European Union

The EU as a leader of the members aspiring for extension of GIs protection has a long tradition of protecting GIs, even before the coming into force of the TRIPS agreement. EU protects GIs under *sui generis* system. Following the enunciation of the CAP, the EC issued directives and regulations to govern registration for effective protection of GIs.¹¹⁵ EC Regulation No 510/2006 replaced Regulation No 2081/92, provides dual system of protecting GIs using the notion of Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI).¹¹⁶ PDOs and PGIs need registration in order to be protected as GIs. But they can not refer to wine or spirits.¹¹⁷ Wines and spirits in the EU have specific regulation governing their protection.¹¹⁸

¹¹⁴ The footnote to the text is written as 'Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action'.

¹¹⁵ M Blakeney 'Proposals for the international regulation of geographical indications' (2001) 4 *Journal of World Intellectual Property* 629 - 652.

¹¹⁶ D Kasturi, 'Select issues and debates around geographical indications with particular reference to India' (2008) 42 *Journal of World Trade* 461 - 507.

¹¹⁷ J Hughes 'Champagne, Feta, and Bourbon - the spirited debate about geographical indications' (2006) 58 *Hastings Law Journal* 299.

¹¹⁸ F Addor & A Grazioli 'Geographical indications beyond Wines and Spirits: a roadmap for a better protection for geographical indications in the WTO/TRIPS Agreement' (2002) 5 *The Journal of World Intellectual Property* 865 - 898.

Although defined slightly differently, both notions include specific requirements as to the geographical origin of the products.¹¹⁹ The link between the product and its origin is crucial, and it has been shown that 40% of the consumers in the EU ‘would pay a 10 percent premium for origin-guaranteed products’.¹²⁰ The economic importance is clear, and becomes even clearer when assessed.¹²¹

3.4.2 The East African Community

Unlike the EU, the EAC treaty, protocols and annexes neither provide the mechanism for protecting intellectual property rights nor GIs in particular. By implications the EAC treaty’s objectives stylishly provides intellectual property rights, as the community calls for having market driven economy for trade in goods and service.¹²²

However, it is impracticable to have harmonious business relations without respecting intellectual property rights amongst trade actors. That is why even if intellectual property is not a common goal of the EAC; still, members are contracting party to multilateral and regional intellectual property forums such as ARIPO.¹²³ Generally, the EAC legal framework doesn’t provide effective legal protection for GIs as the legal framework is silent about it.¹²⁴

3.5 NATIONAL LEGAL FRAMEWORKS PROTECTING GIs

3.5.1 Various Forms of Protecting GIs

There are significant divergences, with regard the purposes and the modes of protecting GIs at national level.¹²⁵ These differences in approaches by countries have to do to a large extent with the historical backdrop. As in some countries the reputation of certain products goes

¹¹⁹ GE Evans & M Blakeney ‘the protection of geographical indications after Doha: Quo Vadis?’ (2006) 9 *Journal of International Economic Law* 575 – 614.

¹²⁰ L Montén ‘Geographical indications of origin: should they be protected and why? – An analysis of the issue from the U.S. and EU perspectives’ (2006) 22 *Santa Clara Computer and High-Technology Law Journal* 315 – 349.

¹²¹ D Pick et al ‘Geographical Indications and the Competitive Provision of Quality in Agricultural Markets’ (2008) 90 *American Journal of Agricultural Economics* 794 – 812.

¹²² Similar approach was adopted by Uganda Law Reform Commission in 2006 while proposing amendment for trademark laws by giving broad interpretation of article 8(1) (a) and (b) of the EAC Treaty to encompasses intellectual property rights. Also art 103 of the treaty calls upon harmonisation of intellectual property rights policies and legal frameworks amongst partner states with a view of establishing common policy and legal framework in the region.

¹²³ All EAC partner states are member of WTO, ARIPO and some of the WIPO administered treaties.

¹²⁴ Similarly in the ongoing EAC-EU EPA negotiation intellectual property was suspended together with other Singapore issues for future deliberations this implies that the same are not of common concern in the mean time.

¹²⁵ For instance Kenya protects GIs via trademarks law as collective marks, while the rest of the EAC members have no legal mechanism for protection apart from passing off.

back centuries and their continual importance reflects the intertwining of commerce, history, culture and regional or local pride.¹²⁶

TRIPS do not command WTO members to adopt certain specific mode of protecting GIs. Members determine the appropriate modes for implementing the agreement in their legal frameworks.¹²⁷ TRIPS council review has noted different ways used by members for protecting GIs. These ways have been classified into three broad categories, namely; a) horizontal laws focusing on business practices, b) trademark laws and c) special means of protection.¹²⁸

3.5.2 Laws Focusing on Business Practices

Under this mode GIs are practically protected by all members via laws focusing on business practices. This category covers laws which, while not specifically providing for the protection of GIs, do prohibit business practices which can involve misuse of GIs.¹²⁹ Many of these laws relate to the suppression of unfair competition or the protection of consumers. Either in general terms or specifically regarding matters such as labelling of products, health protection and food safety.¹³⁰ ‘Common Law such as ‘passing off’ also applies. In legal proceedings under such laws, the question at stake will normally be whether the practices prescribed by the law have occurred, not whether particular term should be determined to have the status of a protected GI’.¹³¹

Under unfair competition and consumer protection laws an important factor is the extent to which the geographical term in question is known as a GI to the public. If it is not so known or it has become generic term then protection is not granted. Similarly where passing off is applicable, complainants are supposed to demonstrate that a) their product have acquired good will with the purchasing public, b) misrepresentation by the defendant is likely to lead the public to believe that the products offered are those of the plaintiff and c) damages or a likelihood of damages resulted from such use’.¹³²

¹²⁶ The World Trade Report: ‘exploring the linkage between the domestic policy environment and international trade’ (2004) 72.

¹²⁷ Kastur (n 16 above) 322.

¹²⁸ n 131 above.

¹²⁹ n 16 above.

¹³⁰ n 131 above.

¹³¹ n 131 above.

¹³² n 16 above.

In the light of the EAC partner states, horizontal law which has been utilized largely is the action for Passing Off. It features in Kenya, Uganda and Tanzania due to colonial reason. As, these countries at certain point in time were colonized by England. Common Law principle of Passing Off was imported and later was incorporated into the said partner states' legal systems after independence. Meanwhile, even if passing off has been utilized in several actions, still claimants were not praying for their rights over geographic names. But rather they used to back up actions brought upon infringement of trademarks.¹³³

3.5.3 Trademarks Law

GIs may be protected within the trademark system as collective, certification or guarantee marks. 'While these terms are used somewhat differently in different countries, generally speaking, a collective mark protects a specific sign which belongs to a group of enterprises and is used by members for their goods or services. A certification or guarantee mark protects a specific sign which belong to a legal entity supervising or laying down standards for goods or services. Regulation governing the use of such marks must be submitted as part of the registration procedure.'¹³⁴

The regulation for collective marks defines the group of companies eligible to use the mark. In some countries these regulations must include a provision to the effect that any person whose goods or services originates in a geographical area concerned and fulfil the conditions set out in the regulations shall be eligible to become a member of the association and shall be admitted to the group of persons having authority to use the mark. In the case of certification or guarantee marks, common characteristics are established that relate to materials, production methods, geographic origin and or other criteria.

However, the primary purpose of certification or guarantee mark is to perform a guarantee function or certify certain characteristics. It is normally required that, they be accessible to anyone who meets the conditions for use.¹³⁵ Ugandan trademark law¹³⁶ incorporate certification marks, though is not couched to accommodate GIs protection as is the case for

¹³³ For instance in the case of CPC International Inc. V. Zainab Grain Millers, Civil Appeal No 49 of 1995 of the Court of Appeal of Tanzania (Unreported) it was observed in part by the Justices of Appeal that: "it is a settled principle that in matters of Passing Off, a prima facie case could well be shown if upon consideration of the close similarity between the trade marks complained of was in balance such as to cause deception or confusion on the part of consumers.

¹³⁴ World Trade Report (n 131 above) 75.

¹³⁵ n 141 above.

¹³⁶ Sec 39 of the Trade Marks Act Cap. 217 of 2000 deals with certification mark (of the laws of Uganda).

US' collective and certification marks. Only Kenya protects well GIs under collective marks.¹³⁷

3.5.4 Special Protection

This category covers those laws specifically dedicated to protect GIs, or special protection of GIs contained in other laws such as marketing. Some of these laws provide *sui generis* protection that relate to products with specifically defined characteristics or methods of production. In general, the protection provided under this category is stronger than that available under other categories. Meanwhile, these different categories of protection do co-exist in a single country sometimes.¹³⁸

3.6 CONCLUDING REMARKS

From the foregoing discussion it is concluded that, the concept of GIs dates back for centuries. It has been understood differently depending on the jurisdiction's perception. However, what is in the core is, for a product to benefit from GI protection it must have qualities which are in one way or another linked to its place of origin. Globally, GIs have been given protection even before the coming of TRIPS Agreement.

The Paris Convention prohibited the use of deceptive geographic identifiers by allowing seizure on importation. The Madrid Agreement extended the concept and lastly the Lisbon Agreement introduced strict requirements for a product to earn GI status. When the TRIPS came into being, it borrowed some of the aspects dealt by the treaties established before it.

The chapter reveals further that, under the TRIPS agreement protection of GIs is two folds. Firstly, protection given under article 22 obligates members to protect GIs where there is confusion in the eyes of the public in terms of application, as well as if the use of such GI constitutes an act of unfair competition. Secondly, under article 23 the agreement obligates members to give stricter protection for GIs of wine and spirit type, and such protection should be afforded regardless the public is misled or not.

Also, it is clear the EU has a long tradition of protecting GIs, and this has made it to have coherent and comprehensive legal framework for protecting them, whilst, its counterpart EAC has no even a common policy for protecting GIs. There are various forms of protecting

¹³⁷ Sec 40A (5) of the Trade Marks Act Cap 506 (of the laws of Kenya) mention expressly the protection of GIs as collective and or collective marks.

¹³⁸ n 131 above.

GIs nationally; Kenya protects GIs using trademarks law as collective marks. Other EAC partner states have no specific legislation for protecting GIs. They only resort the use of Passing Off and competition law.

CHAPTER FOUR

4.0 BENEFITS OF PROTECTING GIs AND THE REQUISITE CONDITIONS FOR THEIR PROTECTION

4.1 INTRODUCTION

This chapter addresses benefits of protecting GIs economically and socially. Also it points out what are the requisite requirements needed for a product to qualify from acquiring GI status. The chapter starts by elucidating economic benefits accrued from protecting GIs, followed by discussion on social benefits. Requirements such as specificity, reputation, coordination and others are examined in detail to elaborate the requisite requirements for

registering a product as a GI. Concluding remarks are given at the end to sum up important areas addressed by the whole chapter.

4.2 RATIONALE OF PROTECTING GIs

4.2.1 Economic Benefits

The economic rationale behind protecting GIs rests in the following limbs: firstly, the need to regulate information asymmetry between producers and consumers. The regulation done by GIs shields the consumers from misleading information on the origin of products and also protect producers against the dilution of an indication.

Secondly, creation of monopolistic market access, exerted by products differentiation as opposed to standardisation in production. Thirdly, contribution to rural development resulted by equitable distribution of products added value that flows across the whole chain down to rural farmers.¹³⁹ Fourthly, socio-economic benefits accruing from spill over effects resulted by the reputation of the GIs.¹⁴⁰

As a tool of regulating asymmetric information, economists have classified goods into three types, namely; search goods, experience goods and credence goods. Most agro-products are experience and credence goods, the qualities of experience goods can not be known to the consumers immediately otherwise by frequent purchases. Whereas, most GIs are credence goods of which their attributes such as qualities and production process can not be known easily by the consumers. Even if repeatedly purchased unless, producers communicate with consumers by guaranteeing the qualities which subsequently become apparent and appreciable by consumers.¹⁴¹

Reputation communicated through distinctive signs plays an important economic role of signalling a certain level of quality that consumers learn to expect.¹⁴² By maintaining minimum level of quality, and asserting this to consumers, producers of reputable products can charge a price premium.¹⁴³ GIs serve to recognise the essential role that geographic, climatic factors and or human know-how play in the end quality of a product. Therefore, GIs rewards goodwill and reputation created by a group of producers.

¹³⁹ The redistribution of added value to actors throughout the product chain is a potential benefit to rural development by quality products such as GIs.

¹⁴⁰ C Folkesson 'Geographical indications and rural development in the EU' unpublished masters dissertation, Lund university, 2008 14.

¹⁴¹ Rangnekar (n 2 above) 16.

¹⁴² Folkesson (n 147 above) 15.

¹⁴³ Bresse poultry in France receives quadruple the commodity price of poultry meat, read Babcock 2003.

The informative meaning of geographical names is emphasized in order to reduce information asymmetries.¹⁴⁴ Where the place of origin is used as an attribute, resources of the region are used to increase the value of the product. The value added derived from these resources, leads to product differentiation which consequently result to creation of niche markets.

The collective monopolies resulting from institutionalisation process provide producers within origin labelled niche market, opportunity to protect and enhance their market by transforming the value added into an economic rent.¹⁴⁵ Although this premium may be small, differentiating products by origin, restricting supply and creating barriers to entry, acts as a powerful marketing tool. By excluding other similar goods from market access, thereby securing a certain amount of market share.¹⁴⁶

Moreover, indirect added value may come to rural regions through tourism. Researchers draw a link between local foods and gastronomy with tourism, illustrating that the specific processes involved with food linked to a particular region can invite tourism¹⁴⁷. Tourism may add value to a rural area through tourism associated services and also sales of food products.¹⁴⁸

Because of the link with particular geographical areas, GIs can not be owned by one or few owners. And can not be licensed, their use strictly depends on their tie with the geographical place they identify.¹⁴⁹ Moreover, GIs are traditionally owned and exercised collectively by all individuals living and producing products in those geographical areas.¹⁵⁰ In developing countries context GIs provide a tool by which rural producers can enter niche markets and earn associated premiums, thereby improving their living conditions.¹⁵¹

Conclusively, asymmetric information in the case of GIs justifies protection. This protection shields the consumers against misleading information on the origin of products, and it protects producers against the dilution of an indication, allowing producers to receive price

¹⁴⁴ n 2 above.

¹⁴⁵ Rangnekar (n 2 above) 17.

¹⁴⁶ J Murdoch et al 'Quality, nature, and embeddedness: some theoretical considerations in the context of the food sector' (2000) 107.

¹⁴⁷ J Bessièrè 'Local Development and Heritage: Traditional Food and Cuisine as Tourist Attractions in Rural Areas' (1998) 21.

¹⁴⁸ Bessièrè (n147 above) 22.

¹⁴⁹ D Kastur 'International protection of Geographical Indications with special reference to Darjeeling tea' (2006) 6 *the Journal of World Intellectual Property* 461.

¹⁵⁰ A Pacciani et al (2001) 'The Role of typical product in fostering Rural Development and the effects of Regulation,' (EC) 2081/92 73 Seminar of the European Association of Agricultural Economists, ANCONA, 28-30 June

¹⁵¹ Folkesson (n 147 above) 17.

premiums.¹⁵² GIs are differentiated agricultural goods, and because of their association with the area of production they constitute an immobile comparative advantage to this area.

Producing specific products is often assumed to be more profitable than generic agricultural production because differentiation generates a degree of market power to the producers. Furthermore, specific products are likely to have specific characteristics, which, if recognized by consumers, can generate a price premium for the producer.¹⁵³ Production of GIs products may also have broader, indirect effects on for example employment generation, and can act as a marketing tool for a region.

4.2.2 Social Benefits of GIs

Fairness is among other benefits of protecting GIs, by fairness in this context means the protection against unfair competition. Unfair competition leads to market failures as it makes the market unsustainable. GIs intend to protect the producers within a region that establish a differentiated product from being usurped by producers external to the protected region therefore from unfair competition.

What makes consumers' willingness to pay premium price for GIs products are the qualities guaranteed on them. To maintain quality assurance is very costive, hence any usurpation in the market will easily lead to market failure as GIs producers won't be able to recoup the cost of production incurred.¹⁵⁴

Simultaneously, protection of GIs increases production, create local jobs and prevent rural exodus in rural areas.¹⁵⁵ For instance Italian food industry in Tuscany and Emilia-Romagna is booming due to new investments in GI protected food items.¹⁵⁶ Development predominantly is urban centered as opposed to rural areas, this has caused exodus of rural population to urban areas. Then a shift in focus from urban to rural development strategies may slow or even reverse this exodus.¹⁵⁷

¹⁵² n 160 above.

¹⁵³ n 162 above.

¹⁵⁴ Only 6,000 million pounds of 'Antigua Coffee' are produced in Antigua, Guatemala, whilst 50,000 million pounds are sold under the name of 'Antigua coffee around the world.

¹⁵⁵ O'Connor and Company (n 159 above) 74.

¹⁵⁶ BA Babcock 'Geographical Indications, Property Rights, and Value-Added Agriculture' (2003) 9(4); Furthermore, GI protected cheeses support the milk supply from most of the cattle of northern Italy and the sheep of southern Italy; see GA Belletti 'OLP sector in Italy' development of origin labeled products: humanity, innovation and sustainability (2001) 9.

¹⁵⁷ O'Connor and Company is of the view that creation of local jobs through the protection of GIs can be among other factor that may influence rural exodus.

GIs plays vital role in preserving traditional knowledge, the conservation of traditional knowledge is an important social aspect of sustainable rural development in any country. The use of natural methods in processing as well as in other ways of producing GIs products has proved to be one of the ways with which traditional knowledge is preserved. For instance many farmers producing the PDO Jersey Royal Potatoes use seaweed harvested from Jersey beaches as a natural fertilizer.¹⁵⁸

Social cohesion is another potential benefit to rural development mentioned in agro-food literatures that addresses the benefits of protecting indication of sources such as GIs. Collectivity nature of GI helps local community work together sharing information and to face local problems.¹⁵⁹ For example according to HCC annual general report of 2006, farmers dealing with the production of PDO Welsh Lamb do check their competitiveness by benchmarking.¹⁶⁰

4.3 CONDITIONS NEEDED TO ENABLE PRODUCT QUALIFY A GI STATUS

A mere fact that a product in question has a link with certain geographical name does not automatically entitle such a product to acquire a GI status. Generally for a potential GI to qualify and have *ex ante* GI protected status, certain endogenous and exogenous conditions serves to strengthen the product niche status.

However, above all the success of any product entering a niche market depends on the consumers trust over product and their willingness to pay the premium in exchange of a product guaranteed qualities. Thus, hereunder are number of factors that contribute to the success of a potential product aspiring to acquire and succeed as GI.

4.3.1 Product specificity

¹⁵⁸ This practice dates back to 12th century; most of the work is done by hands due to the steepness of the slopes. The PDO Jersey Royal Potato is therefore contributing to sustainable rural development, both through the conservation of traditional knowledge and sustainable agricultural practices. See <http://www.jerseyroyals.co.uk/> (accessed 12 December 2009).

¹⁵⁹ Arfini et al 'OLP characteristics evolution problems and opportunities development of origin labeled products; humanity, innovation and sustainability' (2003) 12.

¹⁶⁰ Meat Production Wales (HCC) gathers information on costs of production in lamb farms across Wales; this information is then disseminated amongst farmers so that they can compare their costs to those of their colleagues, in order to become more competitive.

Product specificity entails the obviousness of the product from which it can be easily defined and differentiated from other similar products. That is to say a potential GI must have distinguishing characteristics that differentiate it from similar substitute products produced from other regions. Such differentiable product's characteristics or qualities are the corner stone from which different legal frameworks finds necessary to protect those products as GIs. Product differentiation depend much from its specific characteristics and also consumers' perception whether they perceive it positively.

Sylvander and Lassaut identified the conditions which product's specificity depends.¹⁶¹ Firstly, they contend that, a product must have measurable characteristics which are unequivocally different from those of similar products. They further sub divide such measurable and discernible characteristics into two categories a) those which can be easily identified by a consumer while consuming or in the course of purchasing process.

And, b) indiscernible characteristics which to a large extent entail production characteristics, which are the results of technological influence and thus differentiate the product from other similar products. Secondly, consumers' perception, they should perceive the product to be different, through product's attributes such as nutritional values and or taste together with distinctiveness of the product's designation.

Even the French concepts of *terroir* and *typicity* are also rooted with the concept of specificity, as they all develop a sense of place.¹⁶² From the concepts, the stronger the link to the region the more attractive GI will be, as it becomes a manifestation of locality.¹⁶³ The *terroir* concept is founded on the belief that specific territories have particular special and unique characteristics which are due to a particular geographical environment with its inherent natural and human factors. Thus, by *terroir* concept products that originate from such specific environment are believed to be special and distinct from other similar products produced in other regions.¹⁶⁴

The French Sustainable Development Commission defined the term *terroir* as 'a territorial entity with patrimonial values that stem from the complex and long term relationships

¹⁶¹ B Sylvander 'development of origin labeled product: humanity, innovation and sustainability' (2004) 47.

¹⁶² n 161 above.

¹⁶³ n 161 above.

¹⁶⁴ n 161 above.

cultural, social, ecological and economic features'.¹⁶⁵ It follows therefore that the concept *terroir* entails a distinct relationship of the communities and natural environment that has shaped the landscape. It is further believed that, those specific characteristics of the said regions are the ones that influence unique product's characteristics and qualities when coupled with human factors associated during production processes.¹⁶⁶

However, the said characteristics should not only be specific but also 'typical', because they depend on a place that have a link with a product and are the result of production conditions that are solely located in a particular region. The term *typicity* according to Barjolle and Sylvander affords two meanings namely: horizontal and vertical typicity.¹⁶⁷ By horizontal typicity it means, a product is specific to the extent that it is different and unique and therefore relates to a given region (typical of...).

And, typicity in verticality simply supplements horizontal one by cushioning combination of natural and human factors used in production of the products. Hence, making a product not easily produced elsewhere as is uniquely linked with local *savoir faire*. From the observation above, typicity entails endogenic components of the products rooted in an historical and geographical environment specific to the region of origin.

The core of any GI is its link between a *terroir* and a product as reflected by its typicity, which together enshrines product's specificity.¹⁶⁸ Thus, for GIs producers to excel they need to delimit production area. And above all, they are supposed to prepare production code that provides the typicity of the product. A well defined product's typicity coupled with strong regulated production process leads to higher product specificity resulting to proper maintenance product's quality.¹⁶⁹

It follows therefore that, the origin labels are not quality labels in the sense that product in question need not to be of higher quality than its substitutes. But it rather implies quality in

¹⁶⁵ Grant (n 173 below) 80.

¹⁶⁶ Grant (n 173 below) 81.

¹⁶⁷ See Barjolle & Sylvander 'Competitive position of some PDO cheeses on their own reference market: identification of the key success factors' (2002) as quoted by Grant (n 173 below) 81.

¹⁶⁸ Grant (n 173 below) 83.

¹⁶⁹ Barjolle & Sylvander (n 167 above) 120.

terms of its specificity.¹⁷⁰ And by specificity it means, quality reflected from unique characteristics or qualities of a product which differentiate it from its substitutes and which are the results of the products link to the region of origin and shared standards.¹⁷¹ Thus, specificity serves the purpose of product differentiation that serves origin labelled products to be much competitive in the market.¹⁷²

However it is to be noted also that competitiveness of the product is reflected through its “price and or quality”. Thence due to higher production costs associated with producing origin labelled products. It is worthwhile for the products’ specificity be based on quality rather than price in differentiating itself from other similar substitute’s products that acts as competitors.

4.3.2 Product reputation

The concept of reputation is closely related to the concept of specificity. Generally reputation is based on the distinctiveness of the products characteristics that facilitates its differentiation. Thus, Grant C is of the view that “the stronger a product’s identity based on its specificity, the more likely it is to develop reputation”¹⁷³. It is so because the distinguishing features of the product which are linked to its region of origin has accelerated it to acquire identity which has been transformed into reputation.

Thus, the mutual reciprocity between specificity and reputation is; product’s specificity leads to reputation of which subsequently allows the benefits associated with specificity to transpire.¹⁷⁴ Indeed product’s reputation is among other factors that enable a producer to earn a premium based on its specificity and a consumer to be willing to buy such a product in exchange of a guaranteed quality.¹⁷⁵

Moreover, for a product to legally acquire GI status it must have unquestionable reputation. This is a core requisite requirement provided and accepted by multilateral agreements such as TRIPS. Thus, it is the reputation that commands consumers to buy a product at premium

¹⁷⁰ n 161 above.

¹⁷¹ n 169 above.

¹⁷² n 169 above.

¹⁷³ C Grant ‘geographical indications and agricultural products investigating their relevance in a South African context’ unpublished masters dissertation university of Pretoria (2006) 59.

¹⁷⁴ n 173 above.

¹⁷⁵ n 167 above.

price. And, producers are ready to incur immense cost of production, in order to maintain product's specificity hence quality assurance. The said reputation in turn becomes a collective asset of the region where a product is produced.¹⁷⁶

Practically, decision as to whether a product in question affords a GI status should first be examined by looking into the historical presence of a product at a particular locality. And secondly, whether the said product managed to differentiate itself and hence acquired a reputation. Lastly, consumers' knowledge is important as to product's specificity resulted to differentiation which in turn made it reputable, as it is their knowledge that will command willingness to pay premium price.¹⁷⁷

Various jurisdictions have different criteria as to whether the acquired product's reputation made it potential to assume a GI status.¹⁷⁸ Reputation at local, national or regional level is important in assessing product's reputation.¹⁷⁹ Various ways such as promotional campaigns, advertisements etc, for the product can be used to facilitate reputation. However, success of products' reputation is sustainably backed up by institutionalisation of reputation in legal instruments.¹⁸⁰

4.3.3 Co-ordination and Co-operation

Unlike trademarks which are distinctive signs owned exclusively by an enterprise. GIs are signs which are collectively owned by the group of persons where a product is produced. Thus, due to such heterogeneous nature of the actors involved in production, the need for efficient co-ordination and close co-operation is highly needed.¹⁸¹ At the end product should be seen as if it was co-ordinated by one enterprise.

The diversity of actors in origin labelled products results to diverse objectives, which go beyond the need of profit maximisation, hence including other socio-cultural objectives. This can well be illustrated by the EU valorisation system for origin labelled products under EU Regulation 2081/92 which encompasses three groups of participants namely; producers or processors, regulators and inspection agencies.¹⁸²

¹⁷⁶ Grant (n 173 above) 84.

¹⁷⁷ Grant (n 173 above) 85.

¹⁷⁸ Sylvander (n 161 above) 54.

¹⁷⁹ n 178 above.

¹⁸⁰ n 178 above.

¹⁸¹ Chappuis & Sans (n 184 below) 19.

¹⁸² n 181 above.

There are several advantages accruing from collective co-ordination and close co-operation of actors involved in production. Among other advantages as per Menard are;¹⁸³

- i) Increased economies of scale in the acquisition of information,
- ii) Effective risk countering *intra se* upon unanticipated contingencies,
- iii) Adverse selection and moral hazard mitigation, and
- iv) Production increase due to positive developed sense of responsibility.

Due to heterogeneous nature of actors and the possible hindrances that can be encountered while producing GIs, Chappuis and Sans does consider the following aspects to be considered at collective level¹⁸⁴;

- i) defining the origin labelled product,
- ii) control of production according to Code of Practice in order to maintain uniformity,
- iii) information distribution on technical aspects, available extension services and marketing environment,
- iv) promotion of origin labelled product done by disseminating costs via collected fees amongst actors,
- v) Political lobbying is important especially in the EU, because the PDO are registered by the EU, and,
- vi) Management of production volumes in order to ensure supply chains hence stabilising the market by price fluctuation reduction.

4.3.4 Institutional support

For sustainable success of potential GI institutional support is crucial. This can be in various forms such as financial support, advisory boards, regulations etc. By institutions here means, any inter professional private entities, public institutions or any institutions vested powers as such in the Code of Practice.¹⁸⁵ The state can also support by enacting legislation protecting GIs hence providing the instruments of institutional guarantee and also in controlling supply in order to avoid market failure.¹⁸⁶

¹⁸³ C Menard 'Enforcement procedures and governance structures: what relationship? In; institutions, contracts and organization' (2000) 24.

¹⁸⁴ JM Chappuis & P Sans 'actors co-ordination: governance structures and institutions in supply chain of protected designation of origin' (2000) 18.

¹⁸⁵ Barjolle (n 189 below) 43.

¹⁸⁶ Chappuis & Sans (n 184 above) 56.

It should also be noted that, state or any public institutions are advised to support GIs, because, they are public goods though produced and owned by private actors. Also, have diverse objectives which have direct and indirect impacts to public socio-cultural objectives such as ecologically and biodiversity.¹⁸⁷ All those objectives necessitate state's intervention where necessary, though sometimes state's interest may conflict with those of private actors who look solely on profit maximisation.¹⁸⁸

4.3.5 Market attractiveness

Attractiveness of the market is another factor to be considered by a potential GI that aspire to excel sustainably. Generally, attractiveness of the market entails the characteristics of the market of which the product will be sold. Despite the specificity of the product resulting to reputation, market condition is also important and has to be assessed carefully for GI's success.

The following are the factors to be taken into consideration in assessing market attractiveness according to Barjolle;¹⁸⁹

- i) the size and growth potential of the market,
- ii) structure of the partners down stream in the supply chain,
- iii) barriers to entry into a market,
- iv) margin of profit reached in the past,
- v) economic stability of the market, and
- vi) Intensity of competition and the image of the sector and or the region where a GI is produced.

Generally, potential GI should be perceived positively by consumers, and region's image always facilitates to evoke positive emotions over product in question. Product's images such as being ozone friendly, environmental friendly, organic product etc, accelerate product acceptability by consumers locally, nationally and internationally.

4.4 CONCLUDING REMARKS

Discussion above points out that, there are number of benefits exerted by protected GIs. The benefits range from those relating to economic contribution, social and ecological benefits.

¹⁸⁷ n 186 above.

¹⁸⁸ n 186 above.

¹⁸⁹ Barjolle et al 'competitive position of some PDO cheeses on their own reference market: identification of the key success factors' (2002).

Economically, GIs solve out information asymmetry existing between the producers and consumers over the qualities of goods in question. They facilitate differentiation from substitutable products hence monopolise the market by creating ‘niche market’.

Also, GIs are economically worthwhile as they add value to products which is distributed to the whole chain of production, hence creating extensive and sustainable rural development. On the side of consumers, they guarantee constant qualities of the products they purchase with premium prices.

Socially, GIs has profound benefits such as preservation of traditional knowledge, creation of local jobs, reduction of rural exodus, creation of social cohesion, maintenance of fairness etc. Lastly, the chapter provides conditions that enable a product to qualify for GI status. It is provided that, there are number of factors to be taken into mind namely; specificity, reputation, co-ordination, attractiveness of the market and institutional support

CHAPTER FIVE

5.0 SELECTED CASE STUDIES FROM EAC’S POTENTIAL GIs

5.1 INTRODUCTION

Chapter four addressed the benefits as well as conditions to be taken into consideration for a product to qualify a GI status. Such conditions are the result of the experience borrowed from the EU. In this chapter selected EAC’s potential GIs are examined with a view of comparing with the factors discussed in chapter four. In order to find out whether such GIs can be registered and manage to find market in the EU as well as within the EAC.

The chapter starts by addressing potential GIs found in Kenya, the legal and policy framework of the country is also elucidated. Thereafter, potential Tanzanian GIs are examined as well as policy and legal framework of the country. Discussion about Uganda is limited to policy and legal framework, selected potential Ugandan GIs such as Waragi and

Bark Cloth are not discussed in detail due to lack of information. Moreover the rest of EAC partner states namely Rwanda and Burundi are not discussed due to inaccessibility of data caused by none masterly of French language of the researcher. At the end of the chapter concluding remarks are given.

5.2 KENYA

Kenyan government is preparing to implement GIs protection in its legal system in order to enable its producers to benefits from it and to take measures against illegitimate uses of Kenyan GIs. Following the Memorandum of Understanding between Kenya and Switzerland, Kenya Institute of Intellectual Property (KIPI) will be assisted in drafting a comprehensive and coherent national GI legislation.

5.2.1 Policy and legal framework

Among other founder members of the WTO is Kenya, and due to single undertaking principle, Kenya is a party to the TRIPS agreement since June 1995. And it has ratified a number of WIPO administered treaties. KIPI is the sole government institution responsible for administration of industry property rights in the country. Via the Industrial Property Act of 2001 it is mandated to administer among others the protection of patents, utility models, industrial designs and other industrial property rights.

The Trademarks Act Cap 506 mandates the KIPI managing director to be the Registrar of Trademarks. And it is expected that after the coming into force of the anticipated Geographical Indications Act, the same director will be the registrar of GIs. Currently, Kenyan GIs are protected under Cap 506 as collective or certification marks via sections 40 and 40A. Unfortunately, GIs registration has never been utilised fully up to now.

Evidence shows that up to September 2006 KIPI received only one application for collective marks by ECHUCHUKA¹⁹⁰. The reason for such an inefficient registration system is due to absence of rules and regulations supposed to govern the operationalisation of the parent Act. Cap 506 is not TRIPS compatible in its entirety as it is silent about the registration of foreign GIs in Kenya. Thus, this necessitates the need of enacting a coherent and comprehensive GIs legislation.

¹⁹⁰ This is an association dealing with the production of Aloe-Vera cosmetic products.

Following the same quest, Kenya is in the process of enacting a bill on the protection of GIs. The draft bill was prepared since 2001. And by now KIPi has been mandated to incorporate necessary changes following lapse of time and thorough stakeholders' consultations.

5.2.2 Potential Kenyan GIs

Kenya has significant number of potential GIs products that may qualify for protection as GIs, ranging from coffee, tea, soap stones, etc. Conditions to establish and use GIs in Kenya are favourable due to the fact that the market is familiar with the concept of linking the quality and reputation of a product to its place of origin. This is evidenced by the rampant use of misleading source of origins in marketing products.

Unlike other EAC partner states, many Kenyan products are well researched and documented.¹⁹¹ Also for major export products such as coffee, tea and horticultural products, there are stringent quality control mechanism and are well legally regulated. Institutional structure to manage many potential GIs are in place, for instance most of the associations are in the form of co-operative societies and some are administered by specific crop boards established by the Acts of parliament. Hereunder are some of the selected potential GIs that may qualify for protection.

5.2.3 Kenyan Tea

In the world, Kenya is the third largest producer of tea and it produces quality black tea comparable to Ceylon and Darjeeling tea. Tea is the leading foreign exchange earner as compared to other export products. Tea is grown on tropical volcanic red soil in areas with well distributed rainfall ranging between 1200mm and 1400mm per year, alternating with long sunny days. It is to be known that tea production in Kenya is labour intensive. The livelihood of more than three millions people depends directly or indirectly on tea.¹⁹²

Processing and growing of tea is done in rural areas, hence signifying potential socio-economic contribution to the local communities' development. High quality teas are made

¹⁹¹ Thus the information for "cahier de charge" and mapping of geographical area are to a large extent available.

¹⁹² See the Swiss-Kenyan Project on Geographical Indications (SKGI) signed on 12 March 2009.

from upper two leaves and a bud. Young shoots are plucked in regular cycles and immediately processed in proximity of production areas.¹⁹³

Quality of tea is linked to geographical areas where it is produced; there are four major producing regions namely; Mount Kenya, Nandi, Mau West and Aberdare with relatively clear territories mapped out by the Tea Board. Processing method is already clearly documented. West and East of Great Rift Valley are the main regions growing tea with attitudes ranging from 1500mm to 2700mm.

Moreover, tea industry is highly regulated; the total planted area is over 1400 hectares in average which results in around 328,500 metric tons of processed tea. Around 95% of the production is exported. As it is not possible to significantly expand the tea growing area, the GoK now aims at increasing yields and value addition.¹⁹⁴

The Tea Board of Kenya is a statutory body established by the Tea Act Cap 343 under the Ministry of Agriculture. It is responsible to regulate and to promote the tea industry and to facilitate research into all aspects of tea growing and manufacturing. The TBK has diversified from its regulatory functions towards promoting and marketing tea.

Besides generic promotion campaigns the TBK aims now at using quality marks (owned by the tea industry as whole) and GIs to create higher value added to tea. They have specific plans to register four GIs which would be used in parallel to the existing brands and quality marks.¹⁹⁵ Where possible they also try to combine the use of GIs with fair trade labels.

Setting up a tea manufacturing plant requires a licence; so far, the TBK has licensed 62 smallholder-owned factories and 39 private estate companies. 60% of the tea is produced in the smallholder estates, the rest in large estates.¹⁹⁶ Most of the tea is sold in bulk through an auction in Mombasa. Prices are relatively low and after tea leaves the port, the national or regional identity as perceived by the consumer is broken.

Also within the country teas are mainly sold under brand names rather than by using indication of origin, even though the Kenyan consumers link the quality of tea to its specific origin. The use of GIs in addition to the existing quality marks might help to sell more tea as

¹⁹³ n 192 above.

¹⁹⁴ SKGI (n 192 above) 11.

¹⁹⁵ n 194 above.

¹⁹⁶ SKGI (n 192 above) 12.

a local speciality, both nationally and internationally. The main export markets are US, UK, Germany, Italy and Japan.

5.2.4 Kenyan Coffee

Coffee is an important contributor to foreign currency earnings, fourth after tourism, horticulture and tea. Farm incomes, employment and food security of around 700,000 small coffee farmers belonging to co-operative societies depend on coffee cultivation. The current cultivation area is around 170,000ha of which 75.5% is planted by cooperatives and 24.5% by estates.¹⁹⁷

Most of the coffee produced in Kenya is mild Arabica. 70% of the produced coffee comes from the central and eastern regions. Mt Kenya region produces the “top coffee”. Territories are clearly mapped and coffee from different regions has its specific characteristic features.¹⁹⁸ The production of coffee is a relatively complex process, whereas each production step is important to obtain a good quality product.

Coffee plants needs around 18-36 months to mature depending on the variety. Ripe berries are carefully sorted to remove undesired materials. They further undergo pulping process to remove the outer skin at coffee washing stations, after pulping the beans are sorted in water to remove the sugary pulp (mucilage). The process known as wet fermentation, takes 36-72 hours to accomplish. The wet parchment is sun dried cautiously to lower the moisture content from 65% to 10.5-12.5%. The process is completed at the conditioning bins, which takes about 2-8 weeks. The dry parchment is hulled, polished and graded into seven standard grades¹⁹⁹.

The coffee industry is highly regulated. The Coffee Board is the regulatory agency and incharge of promoting coffee. Recently there is a significant move to deregulate and liberalise coffee industry. Coffee traders are doubtful on the success of registering coffee as GIs, Whilst Coffee Board and producers are committed and interested on the move.

Main challenges for a successful application of GIs in Kenya are; Kenya produces one of the best coffees in the world, but 97% of the national production is exported in raw form i.e. not roasted. Most coffee is used for blending (mixed with coffee from other countries), as

¹⁹⁷ SKGI (n 192 above) 13.

¹⁹⁸ n 197 above.

¹⁹⁹ Standards grades are such as AA, AB, C, T, TT, PB and E.

different markets require different types of coffee blends and roasting. For such products, a geographical link can not be established.²⁰⁰

5.2.5 Kisii Soapstone

Kisii soapstone can only be found in an area of approximately 1 sq km in the district of Nyanza province.²⁰¹ The name refers to a geographical area.²⁰² Reserves are estimated to be seven millions tons. Soapstone is mainly composed of mineral talc and rich in magnesium.²⁰³ It is used in manifold ways for handicrafts,²⁰⁴ medical purpose,²⁰⁵ as well as insecticide.

Soapstone powder mixed with a binder can be used as raw material for ceramics instead of Cray. And when burned in a kiln with temperatures ranging from 11,000 to 15,000 centigrade, soapstone gets harder and becomes resistant. Other application includes making of loof tiles and production of electrical insulators as it can be easily shaped.

Handicrafts produced from Kisii soapstone have a long tradition. Moreover, handicrafts produced have a typical style.²⁰⁶ Around ninety percent of production is exported mainly to the EU, US, Japan, China, New Zealand and Australia. The reputation is in the first place attributed to the soapstone and not the individual artist. Some of the soapstone is exported as raw material, hence processed and then sold as Kisii soapstone artefacts in other countries.

There is an association of local producers known as KISCOOP, reportedly with 100 female and 300 male producers each of them with an average of five children and five assistants. Soapstone processing seems to be the main source of revenues in that geographical region. Some of the sculptures and other artworks have received international recognition.²⁰⁷

5.2.6 Honey

Honey from Kenya is of high quality, but relatively expensive compared to products of competitors in other countries. Quality of honey is distinctively different according to the

²⁰⁰ n 197 above.

²⁰¹ It is located approximately 400 km North West from Nairobi.

²⁰² Kisii is only used to identify soapstone from the region.

²⁰³ Soapstone is also known as stealite, or soap rock.

²⁰⁴ Used for sculpturing, carving and as stone printing.

²⁰⁵ Is; used for treating stomach ache, pregnant women and stopping bleeding.

²⁰⁶ Has several hundreds of years back as proved by historical archaeological relics.

²⁰⁷ For instance one of sculpture was commissioned for the UN Building in New York.

geographical area it has been produced. Honey production has a long tradition. Honey is sold both under trademarks and under geographical names.²⁰⁸

A sign that quality is in the eye of consumers-linked to geographical origin, are cases of misleading use of designation of sources to market honey. Possible GIs would be Kitui honey, Yatta honey, Turkana honey, Mwingi honey, West Pokot honey and Baringo honey. The Kenya Honey Council is the national producers association.

5.2.7 Wild Silk

Wild silk is produced by some local communities according to traditional local technique, which was improved with assistance from ICIPE. For instance in MWEA the silk worm used is a hybrid of the wild species found in the area and the domestic strain, but not mulberry worms that are used for normal silk. Farmers collect eggs in the bush and breed them in mosquito net cages. When cocoons are harvested, some of the pupae are allowed to mature and fly back to the acacia bushes.

Wild silk is sold as raw material and not yet branded. Wild silk production is suitable particularly for dry areas where otherwise agricultural production is difficult. Competence centre again is ICIPE. Naturally coloured wild silk is of excellent quality and archives very high prices in the international market. Production processes are well documented and the territory is well delimited.

5.3 TANZANIA

Unlike Kenya the notion of geographical indications as a distinct intellectual property rights is quiet new to majority Tanzanian's consumers as well as producers. However many are aware that, some of the products quality are directly linked to specific geographical regions where they originate. For instance Tanzania has crops such as Kyela rice and Kilimanjaro coffee with distinctive appellation and qualities. Consumers are aware of the fact, hence making those products to have high reputation that attracts higher prices as compared to substitute products.

5.3.1 Policy and Legal framework

Tanzania has no specific policy and legislation governing the protection of GIs, despite the fact that it is the founder members of WTO and party to the TRIPS agreement.²⁰⁹ One could

²⁰⁸ Often an indication of source is always added e.g. 100% pure bee honey from Baringo or Yatta

expect that the newly enacted Trade and Service Marks Act, 1986 could protect GIs in the form of certification or collective marks. Because the regulations to the principal Act was enacted when Tanzania was already a party to the TRIPS agreement.²¹⁰

Meanwhile, there are minimal efforts which might lead to a policy and later to a national legislation for GIs. Other EAC founder partner states are in the process of enacting specific GI legislation. Then this might trigger Tanzania to initiate the process, just for the quest of having uniform and coherent EAC intellectual property legal framework.²¹¹

The Office of the Registrar of Plant Breeders' Rights of the Ministry of Agriculture and Cooperatives is the one charged with agricultural GIs. However, currently the office is running under human and material resource constraints, thus, it may not be easy to indicate when the issue of GIs will start being given adequate consideration.²¹²

5.3.2 POTENTIAL TANZANIAN GIs

There are number of products in the country which might qualify as GIs. However, there is no research conducted to evaluate and assess which products may qualify registration and hence be protected as GIs. Also even those products which have reputation linked to their place of origin are not well defined and their production processes are not documented.

The only exception is for those products administered by statutory bodies, for instance traditional cash crops which are the major foreign exchange earner such as coffee, tea, cashew nuts, cotton, coconut, sisal, pyrethrum and tobacco are governed and regulated by specific "Crop Boards".

²⁰⁹ It also signed and ratified a number of WIPO administered treaties such as the WIPO Convention, since December 1983, Paris Convention (Industrial Property), since June 1963, Berne Convention (Literary and Artistic Works), since July 1994, PCT (Patents), since September 1999 and Nice Agreement (International Classification of Goods and Services), since September 1999. And is a member of ARIPO since October 1983.

²¹⁰ See Trade and Service Marks Regulations G.N. No. 40 of March 2000

²¹¹ See art 103 of the Treaty for the establishment of the East African Community (EAC-Treaty), stipulates that EAC member states undertake to "... promote development of science and technology within the community through ... the harmonisation of policies on commercialisation of technologies and promotion and protection of intellectual property rights".

²¹² The only hope is that, Business Registrations and Licensing Agency (BRELA) falling under the Ministry of Trade and Industry has recently being mandated to register and administer industrial property as well as trade and service marks, and it is the one which is much engaged even in the EPA negotiations thence with time it is presumed to be the same office which will push further the notion of GIs protection as it might be the office responsible for their registration when the Act will be enacted.

Other products are administered by producers associations mostly which are in the form of registered co-operative societies. However, other products are well organised and administered by private producers associations such as horticultural products.²¹³ Hereunder are some of the products which have reputation linked to their place of origin.

5.3.3 The Tea Industry

The tea industry in Tanzania is highly regulated, due to the fact that, before 1993 Tanzania still embraced planned economy as opposed to free market economy. As result of 1993 reforms that aimed at making the country move with the pace of globalisation and integrated economy. The Tea Industry Act was enacted to respond to agricultural trade liberalization policies.

The Act established the Tanzania Tea Board and the Tanzania Small Holders Tea Development Agency (TASHTDA). The Board took over regulatory functions of the Tea Authority, whilst TASHTDA mandates were on promotion, development of tea production amongst the smallholders and support tea research and extension services. Commercial functions of the Authority, which included tea estates and tea processing factories, were hived off to the private sector when tea estates were privatized. The Tea Board now registers tea farmers and licenses processors and exporters of tea as part of its functions.

Tea is among other major traditional export products, hence contributing a lot to the country's economy. All areas producing teas are well defined and delimited. Production and processing process are documented in order to maintain quality. Linking product's quality from its place of origin as perceived by Consumers is well recognised in Tanzania.

However what is not known is the notion of marketing such products using place names for the sake of adding value to the products. Teas from Mufindi, Lushoto, Lupembe and Kilimanjaro have known reputation locally and internationally hence protecting them using

²¹³ Demands for the establishment of an organization to regulate the horticultural industry have been presented by stakeholders to the Ministry of Agriculture, Food Security and Cooperatives. The demands however, come with a condition that the organization to be established should be a private based organization and that the Government should be involved. These demands send the Government into policy dilemma because currently there is no clear policy for the Government to have stakes in a private organization, probably under a PPP arrangement.

their geographical names could add their value, hence contributing development to local communities producing the product.

5.3.4 The Coffee Industry

As was the case for tea industry, 1993 reforms had significant impact to the coffee industry. Coffee is a major foreign exchange earner to the country. Also, Tanzania produces one of the best quality coffees in the world. Coffee industry is highly regulated in order to cater for the international compliance. The 1993 amendments to the Coffee Marketing Board Act of 1984 divested from the Board all commercial oriented functions and empowered the Board to perform regulatory and promotional functions. In 2001 the need to enhance competition, control coffee quality and involve stakeholders in the management of the Board, resulted the passing of the Coffee Industry Act of 2001.

Coffee producers apart from statutory bodies have their own co-operative unions and other associations which act as an institutional structure for administering welfare and quality assurance. Production areas are well delimited. Moreover, production and processing process are documented and highly regulated.

Even under coffee industry the notion of linking quality of the products to place of origin is well known, as some of the coffee produced in Kilimanjaro region has attained remarkable reputation in the local market as well as in the world market. Kilimanjaro coffee, seem to be a potential GI in this industry in the country owing to its current reputation in the market.

5.3.5 Kyela rice

Kyela District found in the southern highlands of Tanzania is within Mbeya region, which is among other eight regions in the country considered to be main producer of staple foods²¹⁴. Kyela is renowned for paddy/rice production in the country as well as in the EAC. Kyela rice is of higher quality attributable to its place of origin. The rice produced in this region has unique taste and aroma which other substitutable products do not possess. The reputation is directly linked to the region not to varieties or specific producers.

²¹⁴ The district is densely populated as in 2005 census it has a population of about 175,000 people.

Varieties which are found and produced in Kyela are also produced in other areas within the country, but the taste and aroma are not the same as those produced in Kyela.²¹⁵ People have tried to interchange varieties, however, the result seem to be the same, hence making them believe that it is the geographical climate and the soil found in Kyela which influences the unique taste and aroma of rice produced in the region²¹⁶.

The reputation of Kyela rice is not overemphasised; neighbouring countries such as Malawi, Zambia and Mozambique traders are flooding in the region to buy Kyela rice. Kyela rice has its specific price in the market; even consumers are willing to pay premium price. This has accelerated producers to free ride, as they sell other rice not from Kyela by marketing them as rice from Kyela.

Kyela Cooperative Union (KyeCu) is the only cooperative union responsible for promoting, marketing, provision of extension services and other related responsibilities for rice producers within the district.²¹⁷ The area where paddy is raised is well delimited and the method of production are documented and well known to the producers.

Kyela's climate is influenced by Lake Nyasa's humidity which borders it in the side where Tanzania borders Malawi. The place is warm and humid as costal regions such as Dar es Salaam which is along Indian Ocean. Rice is cultivated in the highly fertile soil on the flood plains of several rivers flowing from the mountain ranges found in Rungwe district.²¹⁸

The place receives heavy rainfall during rain season which frequently causes floods.²¹⁹ Following such reputation, it is economic worthwhile to protect Kyela rice as GI. In order to add much value for it, hence contribute development to locals who innocently and unknowingly are free rided by other producers in the market.

²¹⁵ Paddy variety grown in Kyela is called *Oryza glaberrima stend*

²¹⁶ Alluvial, poorly drained with high clay content is the type of soil found in the Kyela flood plain, and in the highland side the type of soil found is weathered red clay, leached and acidic. Thus, this type of soil associated with high annual rainfall ranging from 2726mm to 2820 do influence the taste and aroma of the rice produced in the region.

²¹⁷ The union was registered in 1995 with registration number 5560 under Cooperative Societies Act

²¹⁸ The district is characterised of having frequent floods every year which in one way or another has contributed to the place for having fertile soil.

²¹⁹ The following rivers are the ones which pour water in the Kyela flood plain, namely; Lufilyo, Mbaka, Kiwira and Songwe.

It is to be noted also that production of rice is labour intensive, and local communities produce using traditional methods as the production processes are less mechanised. Globally, reputable rice such as Basmati rice is currently protected as GI under Indian Law and in the US is as well protected under trademark law. The same has caused the dispute between Indian producers and the company which produces paddy varieties in the US using Basmati name.

5.6 UGANDA

5.6.1 Existing Policy and Legal Framework

The country lacks comprehensive intellectual property rights policy and legal framework, hence need to develop it. The current existing framework is not exhaustively TRIPS compatible, and the system generally is too fragmented.²²⁰ Up to now it is only the Copyright and Neighbouring Rights which is TRIPS compatible. In 2009 the Ugandan cabinet passed the Geographical Indication Bill of which up to now is waiting for blessings from other state organs.

The Uganda Registration and Service Bureau is not yet fully operational as the agency does not possess the resources to perform substantive patent examinations which are outsourced to ARIPO. Generally, institutions responsible for administering intellectual property rights are not coordinated at all and lack adequate staffing and resources too. The existing Ugandan potential GIs are such as Ugandan Bark cloth,²²¹ Waragi alcohol etc.

5.7 CONCLUDING REMARKS

From the chapter it is evident that in the EAC there are some products which might qualify and be registered as GIs. However, great problem as per the discussion is the policy and legal frameworks which do not cater for proper protection of GIs. For instance Kenya has been protecting GIs using collective or certification marks under trademarks law, still insignificant number of GIs has been registered due to lack of directives and regulations to effect the same.

Uganda and Kenya are in the process of enacting specific legislation for governing protection of GIs. Awareness to both consumers and producers about GI concept is another challenge facing EAC. Moreover, lack of clear specificity of certain potential products, as well as

²²⁰ And it is to be noted earlier that the country committed herself to meet TRIPS standards not later than first July 2013.

²²¹ See workshop on the protection and administration of Geographical Indications in Uganda, held at Imperial Royale Hotel, Kampala 16th July 2009.

documented production process and delimiting place of origin. Are other challenges which have to be addressed by the EAC partner states if they will decide to opt for protection of GIs.

CHAPTER SIX

6.0 CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION

The general objective of this study was to examine and hence provide sound recommendations which EAC should opt regarding the protection of GIs in the final EPA's negotiations with the EU. The main objective was supported by the following specific

objectives: examination of existing EAC potential GIs and the economic rationale of protecting them.

Exploration of existing legal frameworks for protecting GIs in the EAC partner states as well as those applicable at multilateral level. Assessment of possible pros and cons associated with protecting GIs in the EAC. And examination of possible institutional, policy, legal and economic structural reforms, and their implications associated with protecting GIs in the EAC.

This chapter revisits the research problem and objectives set out in chapter one, and evaluates them in the light of discussion done under chapter two, three, four and five. Thereafter conclusion is drawn as to the possible benefits and impacts which EAC as a bloc might earn and or face from protecting GIs.

Based on such conclusion, recommendations are given focusing on which position should EAC opt in the final EPA negotiations and the reasons thereof to back up the option, other relevant concerns which have to be addressed by the EAC. Lastly areas for future research are provided to fill the lacuna left by this study.

6.2 REVISITING THE RESEARCH PROBLEM

Chapter one provided a background to the problem by stressing that, the protection of GIs at multilateral level is among other contentious issue that delays the Doha negotiations. In line with the protection of GIs, two blocs are in contest. The first one is the bloc led by the EU which prays for extension of protection afforded to wines and spirits to include even other type of GIs. As well as formulation of multilateral register for all registered GIs.

The second bloc is led by the US, whose generally oppose the idea of extending protection of GIs apart from that given to products of wines and spirits, and also they refute the notion of establishing multilateral registration system as it will create unnecessary costs to the WTO members.

In the light of that debate Kenya is among other allies of the EU group, whilst the rest of the EAC partner states seem not to be in any group. On the other hand in the ongoing EPA negotiations, EAC partner states negotiate jointly as a bloc, unfortunately when it comes to the issue of GIs protection partner states have divergent interests. Kenya as is the case at multilateral level, join the EU on the issue of including GIs in the final EPA text, while the

rest of the partner states hesitate to agree the notion. Thus within the EAC there is no agreeable common stand to be advanced against the EU.

Following the commitment provided in the rendezvous clause in the interim framework EPA text. Both parties agreed to finalise all the issues provided therein in the final EPA negotiations. And for the same in the ongoing final EPA negotiations, EU has proposed a GIs framework text which is TRIPS plus. And EAC partner states are refusing to enter any agreement with third party including EU on this issue until the position is finalised at multilateral level.

Thus, in the light of such divergence, the objective of this study was to examine and hence provide a sound recommendation as to which option should EAC as a bloc opt in the ongoing final EPA negotiations. And it was further stated in the thesis statement that, there are abundant potential GIs in the EAC and their protection can result to profound and positive economic contribution to the region, hence EAC should opt for the protection of GIs in the final EPA text with the EU.

Most potential GIs found in the EAC are agro-based products of which their production cost is less costive than EU related products.²²² Moreover, structural reforms' costs on policy, institutional and legal framework for GIs protection in the EAC are less than the perceived advantages of protecting them.

6.3 CONCLUDING THE THESIS STATEMENT

The analysis done in chapter two, three, four and five served to address the thesis statement, by investigating and evaluating various aspects relating to protection of GIs. The study proceeded by looking the nature of relationship between EU and ACP countries in chapter two. The aim was to investigate the nature and reasons as to why there is this EPA negotiation throughout ACP countries and EAC in particular.

And, it was found that, the relationship started soon after the formation of the EC, and it was reciprocal based initially. However, with time the relationship was restructured and became non reciprocal. Following the establishment of the WTO, non reciprocal type of relationship was against its core principles and other relevant provisions.

²²² This is due to the fact that EAC has comparative advantage in agricultural production in comparison with the EU.

Hence EU had to apply for waiver in order to have a moratorium for restructuring the relationship with ACP countries. It is from such quest the EPA negotiations came into being, forcing even EAC partner states to come into the table with the EU to negotiate various socio-economic matters, including protection of GIs the case of this study.

Chapter three addressed the concept of GI as understood in various legal systems, generally it is seen that the concept addresses products which have qualities linked to their geographic origin. Moreover the chapter discussed various legal framework used to protect GIs at multilateral, regional as well as at national level.

The discussion elucidated legal development of GIs protection internationally; by examining multilateral agreement concluded before the coming into force of the TRIPS agreement, followed by thorough venture of the TRIPS provisions dealing with the protection of GIs. Lastly, EU and EAC legal framework for GIs protection was reviewed followed by various forms of protecting GIs at national level, whilst with the orientation of looking into EAC partner states legal mechanisms for GIs protection,

Chapter four investigated various benefits which are the result of protecting GIs generally. Also the chapter addressed various factors for *ex ante* assessment if a product is to be protected as GI. Following the discussion in chapter four, which acted as a model for comparing with the result obtained in chapter five that addressed possible potential GIs found in the EAC partner states and the relevant environment surrounding them.

From the discussion in chapter five it is concluded that, EAC have number of products which has reputation and unique qualities in the world market, hence qualifying to be considered as GIs at regional level as well as at multilateral level.²²³ The list for potential qualifying GIs in the region is quite reasonable to the extent that they can contribute enormously in the EAC economy.

The following is none exhaustive list of potential GIs which are found in the EAC, namely; Mt. Kenya coffee, Gathuthi tea, Kisii tea, Kericho tea, kangeta, miraa, meru potato, kikuyu grass, Mombasa mango, Machakos mango, Asembo mango, Muranga bananas and Kisii bananas. Livestock hproducts include Molo lamb, Kitengela ostrich meat, Omena fish and Mursik milk. Other products are Keringeti mineral water and Victoria mineral water;

²²³ Discussion paper (2005) 'GIs and the challenges for Africa' <http://agritrade.cta.int/> (Accessed 13 October 2009)

Minerals such as Tsavonite and Magadi soda as well as industrial products such as the Kenyan kiondo.

Other GI products include Naivasha wine, Kakamega Papaya, Kakamega omukombera and Tilapia fish from Lake Victoria and Tilapia fish from Lake Turkana. Handicrafts would include Kisii soapstone, Akamba carvings, Maasai attire and beads.⁷ Enhanced protection of GI can also be used to protect small scale producers of Aloe Vera, Machakos Honey and Bixa, [found in Kenya], Konyagi (alcohol), Kilimanjaro coffee, M'Bigoiu for sculptures, Kyela rice, Tabora mango, Dodoma wine, Kilimanjaro lager, Serengeti lager and Kilimanjaro mineral water, Cloves from Zanzibar, Mufindi tea, Rungwe tea [found in Tanzania], Waragi alcohol, Ugandan Bark cloth found in Uganda to mention but a few.²²⁴

It follows therefore that, EAC might reap much benefits by protecting GIs, due to the fact that, GIs act as developmental tool in a wider sense. They have profound benefits not only to producers, but also to consumers and local communities. They create added value and improve market access, while providing for the protection of local know-how and natural resources. As such,

Moreover, GIs are considered to be a tool for promoting Rural Development, as they have positive socio-economic impact on local communities. They increase production, create local jobs and help producers to obtain premium price for their products in exchange for guarantees offered to consumers on production methods and quality. Furthermore, as GIs facilitate better redistribution of the added value in the production chain, they bring value to the land of origin and also have other indirect positive effects, such as in tourism industry.

EAC producers will also use GIs as a tool for securing market access. It is empirically proven that GIs encourage variety and diversity of production. They allow producers to market differentiated products with specific characteristics that are clearly identifiable. As such, GIs are an excellent market access tool. Meanwhile in the context of globalised markets, consumers are increasingly looking for unique quality products with a specific origin.

²²⁴ J Otieno-Odek 'The way ahead – what future for geographical indications?' Paper presented at the Worldwide Symposium on Geographical Indications, Parma, Italy June 27th to 29th 2005 <http://www.origin-gi.com/categories.php?catid=7> (Accessed 12 October 2009).

EAC has diverse natural resources, biodiversity and traditional knowledge which need to be preserved. Thus, with the protection of GIs which are considered to be a tool for promoting and encouraging the preservation of biodiversity, local know-how, natural resources and food security, protecting them might be a parallel benefit of protecting them.

Generally it has been seen under chapter four that, GIs prevent standardization of food by ensuring that producers offer consumers unique and different products, in doing so, they might contribute the preservation of EAC biodiversity. Lastly, GIs cherishes culture by facilitating social cohesion, by making producers work together and solve common problems, this also might be among other benefits which EAC might reap from protecting GIs.

However on the other side of the coin, it is evident from the study that, protecting GIs in the EAC will be associated with certain negative impacts. GIs protection might be a barrier to trade in terms of market access. For instance certain existing products in the market will have to be relabeled. This is a concern to those products which are now sold while labeled a misleading source of origin in the public eyes.

Moreover the extension would involve extra costs for governments, administratively and financially. Because of the need of restructuring the existing legal framework as well as managing the institutions that will govern GIs: As it have been seen in chapter four that, institutional support from the government and other NGOs is necessary for GIs success. On the other hand producers will incur extra costs due to trade and production disruption. And consumers might suffer costs associated with the so called “consumer confusion” if any.

6.4 RECOMMENDATIONS

In concluding the thesis statement it is shown that EAC partner states have several potential GIs that qualify for registration. And there are number of economic, social and ecological benefits for protecting GIs. Meanwhile, though legal and institutional structure are not adequately built, still there are several existing institutions which if coordinated and utilised can cater the need of protecting GIs in the region. Thus, following the above observations it is recommended that EAC opt for protecting GIs in the final EPA as further justified hereunder:-

Firstly, EAC partner states’ economy depends to a large extent on the contribution of agriculture. And it is further evident that EAC has a comparative advantage over EU in terms

of agriculture. Meanwhile improved trade in agriculture is among other point of strength pushed by EAC in the ongoing EPA negotiations and Doha Negotiations too.

Hence from the same angle, many of the EAC GIs are agricultural related products of which their recognition and protection might add much value and hence gain niche markets in the EU market. Hence, protecting GIs can mean scoring two goals in a round by the EAC, due to the fact that EAC partner states have been praying for a long time over fair and accessible agricultural trade liberalization in the world market and EU in particular.

Secondly, it is obvious that with the exception of Kenya the rest of EAC partner states are LDCs and can not compete with EU in terms of trade in goods as they have insignificant amount of products to trade with. Hence the only obvious hope is fair agricultural liberalisation which is linked in one way or another with protection of GIs. And EAC is considered to have a comparative advantage over EU, and as noted above most of EAC's GIs are agro-based products.

In the EU-EAC previous non reciprocal trade arrangement, trade in goods did not account any pleasing substantive economic contribution to the EAC: The reasons being that it was coupled with a lot of stricter restrictions laid by the EU, such as TBTs and SPS and lack of quality and competitive tradable goods by the EAC in the EU market.²²⁵ While on the other hand EAC agro-based products met stiff unfair competition from EU producers, because of the EU's CAP policy advocating subsidisation to farmers. Therefore with this divergence GIs can act as a tool of harmonisation between EU and EAC partner states interests.

Thirdly, The Rules of Origin advocated by the EU over trade in goods makes almost impossible for EAC partner states to have the benefits of accessing EU market, as the latest EU's offer on RoO (Regulation COM (2007) 717 final, November 13 2007), which will be applied until a 'Full EPA' comes into force, contains only minor improvements to existing rules (which considers a product to 'originate' in the preferential trade partner when it is wholly produced, or 'wholly obtained' there.

However, even those stricter RoO to the EAC, are still disputed by several EU member states which perceive them to be too lax.²²⁶ And in the Interim EU-EAC framework EPA text there

²²⁵ Chisholm J (2009) The European Union and the ACP States: A Changing Relationship, Dalhousie University, Department of Political Science http://euce.dal.ca/Files/Jennifer_Chisholm_2009.pdf (accessed 02 November 2009)

²²⁶ Oxfam International Concerns With Initialled 'Interim EPA' Texts Friday, 07 December 2007 https://sslsites.de/stopepa.de/img/Oxfam_International_Evaluation_Of_InterimEPAs.pdf (accessed 10 November 2009)

is only general language under article 12, about the need to review these rules of origin. But in terms of actual commitments, the EU is only committing to consider the possibility of offering more ‘development-friendly’ Rules of Origins in the future.

Meanwhile, many EAC manufactured goods are constituted by either imported materials or products containing local and imported materials, and such goods must be ‘substantially transformed’ locally, in accordance with the RoO for the product to be considered as originating in the EAC. Only originating goods qualify for preferential market access in the EU. Thus, embracing recognition of GIs, EAC partner states might lessen this burdensome of proving the originality of the product, as the names of the product [GIs] are enough *res ipsa loquitor* for that sake, hence reaping the benefits of EU market access easily.

Fourthly, there is no stiff competition between EAC’s GIs and EU’s GIs in the EU as well as in the EAC markets. EU have registered many wines and spirits types of GIs while such types of products are not produced in the EAC, even if are produced are not bearing the EU GIs’ names as is the case for US brands. The absence of such relatedness lessens the cost of relabeling EAC products which could have been required to rename and remarket their products after the introduction of GIs protection.

US has been discontent with the extension of GIs to include other products apart from wines and spirits, simply because of the historical ties with EU which led its citizens to name products with their tradition or place of origin in Europe. It follows therefore that most of the EU’s claimed GIs to be covered includes many of the US brands which have been registered as trademarks in US and hence it fears the cost of relabeling and remarketing again. However this is not the case in the EAC GIs *vis-à-vis* EU’s GIs.

Fifthly, the changing attitude of EU consumers of preferring organic, quality or reputable goods of geographic origin renders necessary for EAC partner states to recognise and protect their GIs of which some have already attained reputation in the EU markets²²⁷. Otherwise even if EU will grant duty free quota free market access, it will not be of any help to EAC producers if they will not meet the expectations of the EU consumers who have developed the aforesaid attitude in making choice over products to be consumed. Thus, learning EU

²²⁷ n 33 above.

consumers' habit over demand and expectations from goods becomes a matter of essence in the part of EAC producers. On the same, GIs has proved tremendous success in this regard.

Moreover it is further recommended that for EAC to have an appreciable result over GIs protection it has to agree with the EU on the reasonable standards for protection. Because EU has been protecting GIs for more than a century, and it has developed a well founded institutions to govern the same which is not the case for EAC. Hence, EU should not impose those strict standards which it uses in recognising its GIs in the final EPA.

Otherwise GIs recognised in the EAC might not be recognised and protected in the EU, because of stringent rules of recognition applicable in the EU. For instance the EU's Council Regulation No 1082/92 provides two levels of protecting GIs, the first is the one governing PDO while the second one is that governing PGI. Therefore this kind of complexity should be harmonised in the final EPA so that a fair and certain standard comes into play.

Also in order to reduce the administrative costs for restructuring or reintroducing new legal framework and institutions for GIs protection, EAC partner states can use the existing legal environment with a minimum amendment to protect GIs as an interim measures. This is allowed by the WTO as WTO members have been allowed to adopt any mechanisms to facilitate protection of GIs provided they do honour the minimum requirements set in the TRIPS Agreement. Moreover there is no set in model or standards under WTO rules which binds members to comply with *mutatis mutandis*.

Meanwhile, it is evident that most of the EAC's GIs are agro-based hence they are even governed by specific Marketing Boards and some are under Co-operative Societies. Hence with this fact it is easy to regulate the standards adored by the consumers and at the same time it reduces the costs of managing and re-establishing new institutions to monitor the existing GIs. Moreover for those which does not belong to any of the aforesaid institutions can also be regulated by the existing institutions governing other intellectual property rights such as those institutions administering industrial property rights and or trademarks registrations, as it was recommended above that as an interim measures the existing law can be couched to cater the need of protecting GIs as well.

6.5 AREAS FOR FUTURE RESEARCH

The complexity of the research problem has made it difficult to address all relevant matters without going beyond the scope of the study. However the study addressed several basic aspects relating to protection of GIs in an EAC context. However much research remains to be done within the EAC, and the following are suggestion on what should be done in future relating to GIs protection in the EAC:

Firstly, in future research aiming at knowing all possible existing potential GIs in the community should be conducted. The list shown in the study is just a limited sample to be adopted if any. Moreover for those potential GIs which will be surveyed, research should be done to see whether factors such as specificity, coordination et cetera are specifically relevant in the context of EAC.

Secondly, Research aiming at evaluating previous market performance of the existing potential GIs in EAC, is important in order to fix a benchmark for comparison when specific product will be protected vis-à-vis its previous performance. Also research aimed at looking the performance of EAC potential GIs in the EU is very relevant because. A product can be protected in the community as GI, but the targeted market in this regard is the EU market. Therefore EU's consumers' perception over EAC GIs should be studied to evaluate possible chances of winning the market.

Thirdly, multidisciplinary researches involving technical assessment of product's quality vis-à-vis the soil, climate or local know how used in producing such product. Also researches aiming of knowing what makes EAC's consumers perceive certain product "reputable", is it because of the characteristics attributable from its place of origin or simply the guaranteed quality assured by the brand name?

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