

INTELLECTUAL PROPERTY TOOLS FOR PRODUCTS BASED ON BIOCULTURAL HERITAGE

A legal review of geographical indications, trademarks and protection from unfair competition

GRAHAM DUTFIELD – 2011



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SHAPING
SUSTAINABLE
MARKETS

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Shaping Sustainable Markets

Shaping Sustainable Markets is the new flagship research project for the Sustainable Markets Group at IIED.

Can markets be 'governed' to better benefit people and planet? This project explores the individual and combined impact of market governance mechanisms on sustainable development to find out what works where and why. Some of these mechanisms are well established. Others are innovative ideas yet to be tested in the real world.

We want to improve and broaden understanding of how market governance mechanisms can be designed and used to secure livelihoods and protect environments. Find out more about our work at <http://shapingsustainablemarkets.iied.org>.

We welcome your comments on this publication or other aspects of Shaping Sustainable Markets. Please contact emma.blackmore@iied.org.

Disclaimer

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ACRONYMS AND ABBREVIATIONS

GI	geographical indication
IP	intellectual property
PDO	Protected Denomination of Origin
PGI	Protected Geographical Indication
TM	trademark
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSG	Traditional Speciality Guaranteed
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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A legal review of geographical indications, trademarks
and protection from unfair competition

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SUMMARY

Tools of intellectual property, such as trademarks and geographical indications (GIs), can protect and promote products based on biocultural heritage (the interaction between indigenous culture, knowledge and biodiversity), such as traditional foods and medicines. If the circumstances are right, this could result in increased income for communities selling these products, conservation of biodiversity and preservation of cultural values – thus contributing to sustainable development.

This legal review draws primarily on experience in Europe, where GIs and trademarks have been most widely used to date. Developing-country experience is less extensive, and is referenced briefly, where possible, notably India's recent experience with GIs.

Intellectual property (IP) law is used mostly by large and powerful corporations, and does not easily accommodate the collective interests of groups and communities. Small producers and indigenous communities face significant difficulties in acquiring IP rights in important markets, in using them to maximise income, and in enforcing them in courts. It is also difficult for them to prevent or punish the misappropriation or misuse of elements of their biocultural heritage through others making inappropriate IP claims or otherwise.

However, particular forms of IP – geographical indications and trademarks – can be better suited to use by groups or associations of small producers. These designations can recognise and support group rights. If used appropriately and under the control of local communities, they can promote biocultural heritage and support sustainable development. Small-scale agricultural and foodstuff producers in Europe have found that both GIs and trademarks have helped to protect and promote traditional methods and products. How far could this apply to small-scale producers

and indigenous communities in developing countries?

Indigenous groups may also want legal protection of certain biocultural heritage-based products that is not necessarily associated with registered trademarks or geographical indications. The relevant laws may be non-existent or unsuitable, for example if registration of a trademark or indication requires complicated or costly formalities. In such cases, the law on unfair competition may provide some assistance where competitors commit acts of bad faith. All members of the World Trade Organization (WTO) must comply with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. This requires certain minimum standards of IP protection in member countries' national or regional laws, including on the protection from unfair competition, as per Article 10*bis* of the Paris Convention for the Protection of Industrial Property. However, despite its importance, unfair competition law is not particularly well elaborated in developing countries.

Most developing countries see a value in GIs and more and more countries are passing GI legislation. Furthermore, they generally agree with the European Union's position on extending the additional protection available under TRIPS for wines and spirits to all other products. But beyond that the consensus breaks down. Some developing countries are concerned that since most of the world's GIs, especially those with well-established market positions, are European, increased intellectual property rents will in the short to medium term accrue to Europe while sales of their products that compete with GI-protected European ones will be harmed.

While Europe's experience may offer useful learning for developing countries, it is important to bear in mind the very different legal, economic, social and political contexts of different countries.

There are some well-known and long-established geographical indications in developing countries that have all been quite successful: Darjeeling tea from India, Jamaica Blue Mountain coffee, tequila from Mexico, and coffees from Colombia and Guatemala. However, these are prestigious products, with goodwill and profitable exports established long before their GI registration. Furthermore, in some cases, production and supply is dominated by large firms and these are able to capture most of the value (e.g. tequila).

India introduced laws on GIs relatively recently, in 1999. Despite a complex system of registration, 153 GIs have been registered to date, indicating that India at least sees advantage in GIs. However, IP mechanisms need to be designed appropriately. The very narrow definition of a product, for example, can lead to the abandonment of plant varieties, thereby undermining biodiversity conservation. In the case of 100 per cent blue agave tequila, a single plant variety is mentioned in the GI specification. Consequently, other varieties have fallen into disuse in large areas of Mexico. Governance of the GI mechanism, and the distribution of costs, benefits and risks among different stakeholders, are also vital; if limited political interests dominate a GI, the poorest producers can be excluded. In this case, a badly designed GI would be worse than having no GI at all.

One recent study has argued that if designed appropriately, geographical indications, trademarks and unfair competition law may serve to promote 'biocultural heritage-based products'. However, achieving appropriate design – mechanisms specific to the contexts in which they will be applied – is likely to be a significant challenge for developing countries and producers, requiring:

- strong organisational and institutional structures to maintain, market and monitor the geographical indication
- equitable participation among producers and enterprises in a region
- the existence of strong market partners (for producers) who can help to promote and market biocultural products over the long term
- effective legal protection at the domestic level (Giovannucci *et al.*, 2009).

Creating these conditions is not easy, but some developing countries have already been able to benefit from geographical indications and trademarks.

For GIs and trademarks to promote biocultural heritage and support sustainable development, the products involved have to be attractive to consumers. They also have to be appropriately priced and marketed. Protection through enforcement of IP rights is challenging for small producers, although this is one contribution to safeguarding their survival. While IP rights can add value to local biodiversity, they do not automatically encourage the sustainable management of natural resources. Other factors, such as land rights, will also play a role here. Local conflict resolution and equitable governance institutions are also important in managing the use of IP rights by communities of small producers. With careful design and use, GIs and trademarks have the potential to benefit indigenous communities and small producers.

FOREWORD

Shaping Sustainable Markets is the flagship research initiative of the Sustainable Markets Group at IIED. It explores the design, use and impact of market governance mechanisms in relation to sustainable development, aiming to improve their future design and implementation and ultimately their contribution to sustainable development. It also proposes the use of new 'innovative' mechanisms that have yet to be implemented but could be beneficial for sustainable development.

This paper reviews the potential of geographical indications and trademarks to protect and promote biocultural products of small producers in developing countries, and thereby contribute to sustainable development. It examines relevant international legal frameworks and legislation, and cases from Europe, where there is most experience to date. It also explores the potential of unfair competition law as a complementary protection mechanism.

The long history of benefit of GIs and trademarks for small producers and traditional products in Europe suggests that they could also provide important benefits for small producers in developing countries rich in traditional knowledge. Unlike other intellectual property tools, GIs and trademarks can protect group rights and link a product to a particular territory and production process, which makes them seem particularly suitable for protecting the products derived from the collective biocultural heritage of indigenous people.

GIs and trademarks could enable developing countries and communities to better exploit the rise in consumer demand for natural products such as health foods and herbal medicines, while enhancing incentives for conservation of threatened biodiversity. They could increase incomes for the rural poor and enable them to benefit equitably from the use of their traditional knowledge and genetic resources. As such, they provide a potential tool not only for reducing poverty but for implementing international agreements which require the conservation of genetic resources and equitable sharing of benefits from their use: the Convention on Biological Diversity, which requires countries to 'respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles'; the Nagoya Protocol on Access and Benefit-Sharing; and the FAO's International Treaty on Plant Genetic Resources.

While this paper focuses largely on the legal aspects of the market governance mechanisms in question, other factors also determine their impact on sustainable development. For example, a geographical indication may legally protect the products and commercial rights of small producers in developing countries, but existing market structures and balance of power are also important. In particular, large companies are better placed than small actors to enforce their rights. Legal tools therefore need to be considered in light of the capacity of different actors to enter into and enforce contracts and manage private rights.

Similarly, the global context in which legal negotiations and 'trade bargaining' take place ultimately determines the formation of international laws. These negotiations are inextricably linked to the power of the various stakeholders involved (or excluded), and involve complex trade-offs between various outcomes and actors, who are seeking advantages for themselves in the kinds of rules produced.

IIED is now supplementing this legal review with new case studies exploring the applicability and impact of geographical indications and collective trademarks in developing countries. This will highlight both legal and non-legal factors that determine the impact of geographical indications and trademarks for developing country producers – as well as filling the existing knowledge gap of developing-country experience.

We welcome comments and suggestions on this report, and contributions of other research and experiences. Please send these to emma.blackmore@iied.org.

Emma Blackmore, Series Editor
Shaping Sustainable Markets, IIED

GIs and trademarks
can offer potential for
developing country
communities

INTRODUCTION

Products developed by indigenous peoples and traditional societies, such as traditional food crops and medicines, can protect biodiversity and provide an important source of income. This review explores the intellectual property tools of geographical indications, trademarks and rules of unfair competition for promoting these products, and protecting them from misappropriation, misuse and imitation. Limited market access is an important driver of loss of traditional crop varieties and contributes to the loss of biodiversity and traditional knowledge. This paper explores whether intellectual property rights could improve incomes, market access and livelihoods, while conserving biodiversity, and thus contribute to sustainable development. The report draws mostly on experience in Europe, which is more extensive and better documented, but also looks at relevant experience in India and other developing countries.

Existing law on intellectual property (IP) is far from ideal for promoting products which are derived from the interaction between indigenous culture, knowledge and biodiversity, and are developed and held collectively. However, some IP rights, like geographical indications and trademarks, could be useful if used appropriately, as they can protect group rights. Even if rights to trademarks or geographical indications are unavailable, law on unfair competition may help to prevent certain unreasonable acts by others, such as dishonest claims of product origin.

This review considers to what extent the proper use of intellectual property tools has a constructive role to play in marketing products based on biocultural heritage (Box 1). Section 1 introduces some principles of intellectual property, and looks at how this approach might benefit traditional peoples and societies. Section 2 looks in more detail at geographical indications, as used in Europe, and considers the potential for their use more widely. Section 3 focuses on trademarks, using the UK examples of Stilton Cheese and Harris Tweed. Section 4 looks at the possibilities for preventing unauthorised sales by other traders, and how law on unfair competition might be applied to protect traditional products and their originating cultures. Section 5 focuses on experience and potential of IP in developing countries. The conclusion discusses the role of GIs and trademarks, sometimes known as 'soft' IP rights, in promoting sustainable development. It outlines the advantages and challenges offered by geographical indications and trademarks compared to other IP rights and identifies the need for further research, focusing specifically on experiences in the developing world.

BOX 1: WHAT IS BIOCULTURAL HERITAGE?

The concept of biocultural heritage embraces not just knowledge, innovations, practices and technologies, but the biological, cultural and spiritual context from which these emerge and are continually renewed. This holistic context also incorporates the customary norms that regulate traditional knowledge. Divorcing traditional knowledge from this context will lead to its erosion and eventual disappearance.

The Convention on Biological Diversity (CBD) defines biocultural heritage as:

The knowledge, innovations, and practices of indigenous and local communities which are often collectively held and inextricably linked to traditional resources and lands and waters traditionally occupied and used by indigenous and local communities; including the diversity of genes, varieties, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities.

(CBD Secretariat, 2009:11)

By emphasising collective rather than individual rights, and addressing biodiversity and culture together, this concept reflects the holistic approach of many indigenous and local communities. This concept is also linked to knowledge as 'heritage' as opposed to 'property', thereby reflecting its custodianship and intergenerational character.

Products based on biocultural heritage have characteristics specific to each particular mix of local biodiversity and culture of an indigenous people or traditional society. These peoples and societies comprise communities living close to the land whose livelihoods are *relatively* unaffected by industrialisation and the mechanical and chemical outputs of modern industry.¹ Products based on biocultural heritage include, but are not necessarily limited to:

- traditional crop varieties, and products harvested or processed from them
- processed foods and beverages
- traditional medicines
- handicrafts and other manufactured goods made partly or wholly from natural products.

For further information on biocultural heritage see www.bioculturalheritage.org.

1. 'Relatively' is emphasised here, as few communities choose to exist in a 'bubble of traditionality' even if it were still possible to do so.

ONE

INTELLECTUAL PROPERTY AND BIOCULTURAL HERITAGE: AN UNEASY FIT

INTELLECTUAL PROPERTY IN THE MODERN ECONOMY

The term intellectual property (IP) refers to a set of legal regimes that define rights in relation to inventions, literary and artistic works, distinctive signs and other marketable productions of the creative mind. These rights enable owners to control the use of these productions in certain ways and for certain periods. Patents, copyright and trademarks are the longest-established tools of intellectual property. Other rights include industrial designs, trade secrets, plant-variety protection, layout designs of integrated circuits, and geographical indications. IP rights confer certain privileges on owners, who are normally individuals, joint owners or entities having legal personality.² The latter are usually businesses but may sometimes be government or other non-profit institutions.

The nature and use of intellectual property in the modern economy give rise to four main concerns regarding their potential to protect the biocultural heritage of indigenous communities:

- 1 **The individuality of intellectual property.** IP rights tend to be possessed by individual or joint owners – either persons or entities legally regarded as persons. Ownership by entities is increasingly common nowadays, and these entities are usually businesses. Like other property rights, intellectual property does not easily accommodate the collective interests of groups and communities as it does for businesses.
- 2 **From personal property to impersonal business assets.** IP rights can be used to protect the material and moral interests of individual creative achievements. However, in the modern economy, IP rights are designed primarily to serve as business assets held and controlled mostly by companies existing to make a profit. The most successful firms acquire these rights in important markets, use them to maximise income, and enforce them in courts. For indigenous communities, trade, especially at local and national levels, may be extremely important but is not the reason for their existence. Intellectual property management and marketing strategy is a challenge for any business, and is unlikely to be a key strength of an indigenous community.

2. All natural persons are recognised as individuals under the laws of most countries. Other entities, such as corporations and registered charities, may also be recognised as legal 'persons' under the law. This gives them a legal identity separate from any individual people such as directors, shareholders and trustees. This treatment of collective entities as natural persons is of course a legal fiction, but is well established in the legal systems of most nations.

- 3 **The private nature of intellectual property rights.** Intellectual property rights are private rights, as affirmed in the international TRIPS Agreement (Box 2), which must be protected by the holders of those rights. It is more difficult for indigenous communities, than corporations for example, to prevent misuse or misappropriation of elements of their biocultural heritage through inappropriate IP claims or otherwise.³
- 4 **The narrow focus of intellectual property.** IP rights protect rights over the intellectual aspect of an invention alone and not over the product to which it relates or the context from which it emerges. This separation of intangible and tangible elements runs contrary to the holistic worldview of indigenous peoples.

BOX 2: AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is administered by the World Trade Organization (WTO). All 153 members of the WTO must comply with the TRIPS Agreement, which requires certain minimum standards of intellectual property protection in members' national or regional laws.⁴ This does not mean their laws have to be identical – certain flexibilities are permissible. The key point here is that enforcement is largely the responsibility of the rights holders, and large companies are better placed than small actors to enforce their rights, especially when products are moved across national borders.

3. See UNCTAD-ICTSD (2005) *Resource Handbook on TRIPS and Development*. Cambridge University Press, Cambridge. (See www.iprsonline.org/unctadictsd/ResourceBookIndex.htm.)

4. This figure includes the European Union, Hong Kong, Macao and Taiwan (Chinese Taipei). Russia, Iran and Syria are among the non-members. The WTO provides an up-to-date list of members and observers (www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

THE POTENTIAL OF IP RIGHTS TO CONTRIBUTE TO SUSTAINABLE DEVELOPMENT

In this study, the potential of geographical indications (GIs) and trademarks is considered as a means of protecting and promoting biocultural heritage-based products. This could help to generate income that enhances the economic viability of traditional lifestyles, without compromising the deeply-rooted cultural and legal norms that sustain this heritage. There are two reasons why such an investigation is worthwhile (despite the limitations of IP in this context):

- 1 GIs and trademarks can be used to protect shared or group rights, rather than granting exclusive individual or joint rights – hence they are sometimes termed ‘soft IPRs’. They can also link a product with a particular territory and traditional process.
- 2 There is a long history of benefit from GIs and trademarks to small producers in Europe.

Group rights rather than individual rights

Geographical indications (GIs) and trademarks are capable of recognising and supporting *group rights* as opposed to the individual or joint rights of individual persons or businesses (Spence, 2007: 283). What is the difference between group rights and joint rights? With joint rights, there is a single right but more than one individual may own it. For example, a patent may be owned by a single company but it can alternatively be held by two or more joint inventors. The idea of a group right is that a certification trademark or geographical indication is available for a potentially large number of individuals to use. They may do so irrespective of whether they are

separate from each other and in competition, have a close relationship and operate as a ‘club’, or whether the situation is somewhere in between.

For example, several producers of sparkling wine are authorised to use the name ‘Champagne’ on their produce, and several cheese-makers can call their cheese ‘Stilton’. The producers are all trying to attract consumers to their own produce but all have a common interest in protecting the integrity of the name or indication. Not only is this group-rights aspect of GIs and trademarks more culturally appropriate, but if local producers sharing the same indication or mark are willing to stand together, they have much greater ability to protect their rights and interests than a single producer operating alone.

Europe: a successful model?

The second reason for considering IP for traditional societies worldwide is that small-scale producers of agricultural products and foodstuffs in Europe have found both geographical indications and trademarks to be highly beneficial. It becomes reasonable to wonder whether these could also be useful tools for indigenous communities trading in similar types of product. The most successful GIs in developing countries to date apply to coffees from Colombia, Guatemala and Jamaica, tequila from Mexico, and Darjeeling tea from India. These have long been prestigious products for which a high reputation was already present, and have generated quite profitable exports over some time. Consequently, special efforts tend to be made to promote and protect such products internationally, either by governments or trade associations. For this reason, these products are different from many products produced by communities in developing countries which cannot in most cases rely upon such support.



TWO

GEOGRAPHICAL INDICATIONS AND THEIR FEASIBILITY

DEVELOPMENT OF GEOGRAPHICAL INDICATIONS

Geographical indications (GIs) are a unique form of intellectual property. Unlike patents, copyright or trademarks, they are not themselves a discrete and universally accepted category of IP rights. Different countries may well protect them under original and specific (*sui generis*) geographical indications laws, as in the European Union and India. But they may alternatively – or additionally – be protected largely or completely under the following:

- an appellation (or designation) of origin regime;
- trademark law, or in some countries influenced by English law under the common law tort of passing off⁵ as with unregistered trademarks; or
- indirectly through unfair competition law.

They may, in fact, be embedded within areas of law and regulation other than intellectual property according to the underlying purpose of protecting them, such as:

- consumer protection rules relating to trade descriptions or food product labelling;
- cultural heritage regulations and policies; or
- rural development regulations and policies.

Geographical indications have an extremely short history if we regard them as a distinct form of intellectual property. GIs are newer than the other intellectual property rights covered in TRIPS and

in previous multilateral treaties. The term 'geographical indication' was first used during the Uruguay Round of trade negotiations of the late 1980s and early 1990s, in proposals made by the European Community and by Switzerland.

Perhaps it is best to think of 'geographical indication' as a convenient catch-all term for a variety of mostly currently-existing laws and regulations concerning products that are differentiated by possessing features or a reputation attributable to their spatial origins. In this sense, GIs have a much longer history. Related terms like indications of source and appellations of origin were included in the 1891 Madrid Agreement on the Repression of False or Deceptive Indications of Source in Goods, and in the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Protection (Gervais, 1998: 188).

Perhaps the longest-established regime of geographical indications is the French appellations of origin system for products considered distinctively local, due to a combination of traditional expertise and highly localised natural conditions. This system evolved in response to problems of illegal labelling and overproduction. A government agency validates *Appellation d'Origine Contrôlée*, so that producers of wines, cheeses and other foodstuffs, whose goods are renowned for their distinctive qualities and geographic origins, are protected from those who would undermine or exploit their good reputation by making similar, but false, claims.⁶

5. The tort of passing off was first enunciated by Lord Langdale in the landmark 1842 case of *Perry v Truefit*: "A man is not to sell his own goods under the pretence that they are the goods of another man". The case itself involved a hair product known as Medicated Mexican Balm. See: <http://uk.practicallaw.com/4-107-4875?q=passing%20off>.

6. For some interesting articles on the system as it operates in France, see Bérard *et al.* (2005).

Geographical indications are defined in the TRIPS Agreement, and members of the World Trade Organization (WTO) are required to permit legal action to protect them (Box 3). Article 23 of the Agreement deals solely with wines and spirits, which are subject to additional protection. The provisions of this article aim to enable interested parties to prevent use of the indication where the origin of the product is elsewhere *even if* the true origin is indicated or if the GI "is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like". To give an example, countries should make it possible to prevent the use of a French indication like 'Chablis' by a wine-producer in such phrases as 'Californian Chablis' or 'Chablis-style white wine'. In other words, consumers do not have to have been misled for use of the indication to be prevented. In addition, it must be possible to refuse or invalidate a trademark that contains or consists of a geographical indication on wines and spirits that have the origin indicated by the mark. For many developing countries, there is no fair reason to provide this stronger protection exclusively for wines and spirits. However, it does not follow that they would all like this additional protection to be extended to all types of product. There is currently no consensus on this issue, and developing countries are on both sides of the debate.

Geographical indications are a unique form of intellectual property

BOX 3: KEY PROVISIONS ON GEOGRAPHICAL INDICATIONS IN
THE TRIPS AGREEMENT

ARTICLE 22: PROTECTION OF GEOGRAPHICAL INDICATIONS

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.
2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:
 - (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 which 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).
3. A Member shall, ex officio if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.
4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

ARTICLE 24: INTERNATIONAL NEGOTIATIONS' EXCEPTIONS

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

GEOGRAPHICAL INDICATIONS IN THE EUROPEAN UNION

Europe has led the conceptualisation and promotion of geographical indications, and the formulation of related rights and regulations. For agriculture and foodstuffs, the European Union has three legal instruments:⁷

- 1 Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs
- 2 Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs
- 3 Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed.

Under these Regulations, Europe has three types of registered geographical indication:

- 1 Protected Designation of Origin (PDO)
- 2 Protected Geographical Indication (PGI)
- 3 Traditional Speciality Guaranteed (TSG).

Although Europe has longer experience and relative wealth, both of which mean that GIs are well established, the objectives of these regulations do seem to be consistent with those that indigenous groups might also consider relevant and important. Thus, the preamble of Regulation 510/2006 notes:

The promotion of products having certain characteristics can be of considerable benefit to the rural economy, particularly in less-favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas.

Article 2 of the same Regulation provides definitions of PDOs and PGIs.

A designation of origin is:

the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country,
- the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and
- the production, processing and preparation of which take place in the defined geographical area.

A geographical indication means:

the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country, and
- which possesses a specific quality, reputation or other characteristics attributable to that geographical origin, and
- the production and/or processing and/or preparation of which take place in the defined geographical area.

7. These three Regulations do not cover wines and spirits, which are protected separately.

TWO. GEOGRAPHICAL INDICATIONS AND THEIR FEASIBILITY CONTINUED

The two definitions are similar but the requirements for a PDO are somewhat more stringent in two senses. First, the 'geographical environment' with its 'natural and human factors' is more or less *wholly* responsible for the product or foodstuff's positive features. PGIs also emphasise geography but place-origin is the determining factor, rather than any special environmental and human factors. Moreover, the responsibility of geography for the specialness of the product is expressed in less absolute terms: 'attributable to' rather than 'essentially or exclusively due to'. Second, PDOs require that production, processing and preparation of the product all take place in the geographical area, while PGIs require only that at least one of these be carried out in the area. Like patents and trademarks (see Section 3), PDOs and PGIs must be registered. The Regulation explains the procedures for this.

Both PDOs and PGIs are more suitable for protecting biocultural heritage-based products than other IP rights: not only by providing for group rights, but also by linking a product with a geographical area. This means they could link a product to a particular indigenous territory and culture – thereby helping to protect the context from which it emerged. The PDO's emphasis on "natural and human factors" lends itself particularly well to the protection of products based on distinct biological and cultural factors.

Here are a few examples of both:

A Protected Designation of Origin: Feta cheese

Feta is a white cheese stored in brine and made from sheep's milk or a mix of sheep's and goat's milk from local breeds and made using traditional methods. It was registered in 2002 as a cheese made in certain areas of Greece. As is often the case with GIs, the product has for quite some time

been produced elsewhere. The question then arises as to whether it is fair to grant a GI when a reasonably objective case could be made for its having become a generic term for damp salty, white sheep or goat milk cheese, and that the public was not misled into thinking that non-Greek feta is really Greek. Nonetheless, in 2005, the Court of Justice of the European Union ruled it illegal for any cheese produced outside Greece to be called 'feta', despite the fact that in Denmark, Germany and France locally made cheeses with the word 'feta' in the name had been sold for several decades. Feta is not in fact the name of a place but is the Greek word for 'slice'

A Protected Geographical Indication: Cornish pasty

A pasty is a type of meat and vegetable pie commonly associated with the English county of Cornwall, which is one of the poorest parts of the country and has suffered the consequences of the closing down of its mining industry and cultural erosion including loss of its own language. In 2011 'Cornish pasty' was granted PGI status recognising it as an important aspect of the county's 'culinary heritage', and acknowledging also that (i) the general public tends to associate pasties with Cornwall and (ii) that pasty making does seem to be taken quite seriously there as compared to other parts of England where they were also made. On the other hand, 'Cornish' pasties have been produced outside the county for a very long time and there is no particular reason to suppose that making them in Cornwall and from ingredients sourced within the county results in a product that is different in quality or in any other way from pasties made elsewhere. After all, it is not regarded as a particularly high quality product and no special skill is required to make them. Indeed, there is some documentary evidence to suggest that pasties originate not

from Cornwall but the neighbouring county of Devon (BBC, 2006). Despite this, all existing producers outside Cornwall must cease using the indication unless they have by request been granted a three-year phase out period. They can, of course, continue to call their products pasties; they just have to discontinue using the word 'Cornish'.

The Traditional Speciality Guaranteed (TSG) mark is for products that are traditional in the sense of being used, according to Article 2 of Regulation 509/2006, 'on the Community market for a time period showing transmission between generations; this time period should be the one generally ascribed to one human generation, at least 25 years'. It is not necessary that TSG products be produced in a particular area. This feature makes TSGs rather interesting. After all, many indigenous peoples have been forced to inhabit areas other than their original territories yet continue to make traditional products. Two European examples of TSG products are Traditionally Farmed Gloucestershire Old Spots Pork and Pizza Napoletana. These two names can be used by producers anywhere in Europe: there is no requirement to produce only in Gloucestershire or Naples; but only those products produced according to the specifications laid out by the TSG can actually use the mark. In the former case, the TSG is controlled by the Gloucestershire Old Spots Pig Breeders Club. As for the latter, two associations in the city of Naples applied for the TSG, with three organisations made responsible for verifying compliance with the specification. It is worth noting that the Regulations provide two alternatives: either the name of the product can be used by third parties without authorisation from the holders of the TSG; or else use of the name is reserved for producers who have been granted permission by the holder. But in both cases, the

TSG sign can only be used by authorised producers.

In describing a type of IP right, it is essential to go beyond the subject matter and consider the scope of the rights: what acts by third parties are rights holders entitled to prevent? Article 13.1 (Protection) of Regulation 510/2006 protects GIs against the following acts:

- (a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or insofar as using the name exploits the reputation of the protected name;
- (b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar;
- (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;
- (d) any other practice liable to mislead the consumer as to the true origin of the product.

Similar but less detailed language can be found in Article 17 of Regulation 509/2006 on Traditional Specialities Guaranteed.

Geographical indications have become quite controversial in recent years. Several WTO members do not consider a special GIs regime of the kind existing in the European Union to be

necessary. A few of them have other concerns too, such as the possibility that an existing trademark with a similar or identical name to a GI will have reduced protection, and also that the register established under the EU regulations is discriminatory.

Australia and the United States made a formal complaint against the European Community for its methods of protecting GIs, which it was alleged was incompatible with the TRIPS Agreement in certain respects. The WTO Dispute Panel did not fully accept the position of Australia and the US, but did concur with the complainants' view that the Regulation violated the national treatment provision in TRIPS by discriminating against foreign nationals seeking to have their GIs registered in Europe (WTO, 2005).

CAN GIS SUPPORT DEVELOPING COUNTRY PRODUCERS?

Geographical indications are included in the TRIPS agreement largely at the instigation of the European Commission and certain EU member states. However, GIs have for several years been promoted as a concession to developing countries, as a means of using intellectual property to protect categories of local rural knowledge that developing countries possess in abundance. In particular, the European Union and the Swiss government are very keen to promote GIs worldwide by arguing that this part of TRIPS can potentially provide substantial gains for developing countries. This seems plausible when one considers that GIs are especially appropriate for the produce of small-scale producers and cultivators – and for handicrafts and other hand-made items, as well as foods and beverages (Moran, 1993).

GIs appear to be a subject on which developing countries could adopt a unified stance. Indeed, generally speaking, developing countries consider the additional protection extended to wines and spirits as typical of the lack of balance in TRIPS. Beyond this, the consensus starts to break down. The issue of GIs at the WTO TRIPS negotiations have, in many cases, been highly divisive between and among both developed and developing countries. The proposal to extend the additional GIs' protection for wines and spirits to other types of product under TRIPS has met fierce resistance from some developing countries, often led by Argentina. Part of the objection stems from concern in many developing countries formerly colonised by European countries (where many products would already be covered by European Geographical Indication) that the extension of protection could undermine local business – and increase IP rents to Europe in the short to medium term.

However, others contend that extending the additional protection of GIs to all product types would be beneficial for developing countries, since many developing countries are rich in traditional knowledge, having applications in agriculture, food production and small-scale manufacturing. In this way, GIs have potential for developing and exploiting lucrative markets for natural products, including those manufactured by resource-poor farming communities. Understandably, these countries will then tend to favour the extension of additional GI protection to cover all products, not just beverages. Assessing the feasibility of the proposed rights is complicated by the limited experience of GIs in developing countries. Moreover, lessons from Europe may not be entirely transferable to the very different economic conditions of developing countries.



THREE COLLECTIVE AND CERTIFICATION TRADEMARKS AND THEIR FEASIBILITY

TYPES OF TRADEMARK AND THEIR RELATION TO GEOGRAPHICAL INDICATIONS

In countries like the United States and the United Kingdom, geographical indications tend to be protected under trademark law. In the United States, Idaho potatoes and Florida oranges, for example, are protected as certification marks. Two well-known British certification trademarks are Stilton Cheese and Harris Tweed, as discussed below. Trademarks are similar in function to geographical indications, the difference being that a GI necessarily identifies a product with a particular territory, whereas a trademark identifies a product with a trade origin, which may be a place but is likely to be a company (Moran, 1993).

Trademarks are distinctive signs, which communicate information to consumers concerning products carrying the mark, such as their business origin and characteristics. Often, a trademark has a single owner, usually a company, and the owner has the exclusive right to use it for certain classes of product. Protection is normally indefinite, though some national laws require that this be subject to continuous use of the mark. Ownership of a trademark may be shared by a group of producers, each of whom will have the right to use the mark. Such trademarks are known as collective marks. Alternatively, an association may own a trademark but allow producers to use the mark subject to certain conditions established by the association. This is a certification trademark.

Under the Paris Convention for the Protection of Industrial Property (1883), trademarks can be refused or invalidated if they are deemed as 'contrary to morality or public order and, in particular, of such a nature as to deceive the public'. In the United Kingdom, this provision includes marks which have 'criminal connotations, those with religious connotations, and explicit/taboo signs' (Patent Office (1994) in Zografos, 2010).

With collective trademarks, ownership is held by an association representing the group. Certification marks are somewhat different in that ownership and right to use are separate. The association owning a certification trademark must have regulations stating:

who is authorised to use the mark, the characteristics to be certified by the mark, how the certifying body is to test those characteristics and supervise the use of the mark, the fees to be paid in connection with the administration of the certification scheme and the procedures for resolving disputes

(Zografos, 2010: 105).

The characteristics to be certified must of course be ones that are favourable to consumers. This highlights the importance of knowing the market in which one wishes to trade. Consumers may be looking for high ethical or environmental standards, when authenticity is likely to be very important. Consumers want to be sure that the product is 'the real thing' and does come from the place of its stated origin.

STILTON CHEESE AND HARRIS TWEED

Stilton Cheese

Stilton is a popular British cheese made by hand using a recipe at least 300 years old.⁸ The cheese is named after a village in the East Midlands located on the old Great North Road from London to the North. Travellers on this route were served a local cheese that became commonly known as Stilton.

Stilton Cheese has been protected by a certification trademark since 1966, and has been a European PDO since 1996, which ensures protection throughout the European Union and obviates the need to apply for trademark protection in every member country. The owner of the mark is the Stilton Cheesemakers' Association, founded to look after the interests of the producers and to ensure that standards are maintained at licensed dairies. Six of the eight dairies are members of the Association, the other two being licensees of the trademark and the PDO. The marks are the word 'Stilton' and the logo of the Association, which includes a cylindrical block of cheese with a slice missing and a crown on top.

In order to use the name 'Stilton', the regulations require that a cheese must:

- be made only in the three counties of Leicestershire, Derbyshire and Nottinghamshire, from local milk which is pasteurised before use
- be made only in a traditional cylindrical shape

- be allowed to form its own crust or coat
- be un-pressed
- have delicate blue veins radiating from the centre
- have a taste profile typical of Stilton.

The cheese market is highly competitive. Because the prestige of British cheese is not especially high in Europe or elsewhere, marketing Stilton internationally involves a serious challenge. In this respect, the Stilton Cheesemakers' Association has been successful, and Stilton is both popular in the UK and exported to about 40 countries (Stilton Cheesemakers' Association, 2011). Ironically, the village of Stilton is outside the three specified counties, and so cheese made in Stilton cannot be called Stilton.

Harris Tweed

Harris Tweed is a cloth made in certain Scottish islands forming part of an area known as the Outer Hebrides.⁹ It is hand-woven and made from wool spun and dyed there. This relatively remote area of Scotland has been known for producing fine quality hand-made cloth for several centuries. It remains to a large extent a cottage industry. From the mid-nineteenth century, when the cloth became popular throughout the UK, the wool was locally produced and either dyed with vegetable dyes or used in its natural state. After dyeing, mixing, oiling, teasing and carding, spinning was done by women on a spinning-wheel. Until the end of that century, weaving was done with a manually operated shuttle. Subsequently, it was washed and finished.

8. Most of the information presented here comes from the website of the Stilton Cheesemakers' Association (www.stiltoncheese.com/).

9. Most of the information presented here comes from the website of the Harris Tweed Authority (<http://www.harristweed.org/>).

THREE. COLLECTIVE AND CERTIFICATION TRADEMARKS AND THEIR FEASIBILITY CONTINUED

Around the beginning of the twentieth century, a degree of modernisation took place and production increased in consequence. Following a meeting of producers, the Harris Tweed Association was established to apply for a trademark that would help the producers compete in a market in which industrial spinning mills able to mass produce cloth were threatening to force out the small producers. The Harris Tweed mark, which was granted in 1909, comprises the words "Harris Tweed" with an orb and a Maltese cross and has since become very well known. The official definition of Harris Tweed then was "a tweed, hand-spun, hand-woven and dyed by the crofters and cottars in the Outer Hebrides".

In 1934, the trademark definition was changed to the following: "Harris Tweed means a tweed made from pure virgin wool produced in Scotland, spun, dyed and finished in Outer Hebrides and hand-woven by the islanders at their own homes in the Islands of Lewis, Harris, Uist, Barra and their several purtenances and all known as the Outer Hebrides." This of course allows for increased production while ensuring that it was still at least to some extent a tradition-bound cottage industry, albeit less so than before.

Production reached a peak in 1966, but subsequently began to contract as Harris Tweed became less popular. Moreover, the British textiles industry, once the world's largest, was about to begin shrinking in the face of competition from lower cost producers overseas. In order to be more competitive, it was felt necessary to retrain weavers, introduce tougher standards and better meet new demands including for softer, lighter cloth.

In 1993, the UK government came to the producers' aid by passing the Harris Tweed Act. The law set up the Harris Tweed Authority, a statutory body, in place of the Harris Tweed Association. Under the Act, Harris Tweed has a new definition as follows:

Harris Tweed means a tweed which has been hand woven by the islanders at their homes in the Outer Hebrides, finished in the islands of Harris, Lewis, North Uist, Benbecula, South Uist and Barra and their several purtenances (The Outer Hebrides) and made from pure virgin wool dyed and spun in the Outer Hebrides.

THE IMPORTANCE OF MARKET KNOWLEDGE AND SUPPORT

Currently, Harris Tweed is quite fashionable and is doing well. Nonetheless, there have been times when it looked in danger of terminal decline, which was the reason for government intervention through legislation. Stilton Cheese, on the other hand, has not been perceived as needing state intervention. This highlights the fact that GIs and certification trademarks for traditional goods are useless without good standards of quality control and marketing, and up-to-date information on markets including foreign ones if the products are to be exported. Even then, success is far from guaranteed. As shown in the case of Harris Tweed, certification trademark regulations may need periodic revision, to accommodate changes in how products are made.

As with GIs, when a once-local product becomes generic it can no longer be protected. This has been the fate of products named after places including Cheddar cheese and Dijon mustard, which can now be produced anywhere. However, re-localisation may be possible, and a partial re-localisation has been achieved with Cheddar cheese. There is now a Protected Designation of Origin (PDO) on 'West Country Farmhouse Cheddar', although the permitted area of production is far larger than the village of Cheddar.

With political will, some supposedly generic products can be completely re-localised. This has been the case for sherry, a fortified wine named after the Jerez district of Spain.¹⁰ 'Cyprus sherry', sold under that name since the 1930s, has thus had to be re-named 'Cyprus fortified wine'. The naming of South African wines sold in that country as sherry and port had to be phased out under the terms of the 2000 European Union and South Africa Free Trade Agreement. Feta is another good example (see above).

GIs and certification trademarks are useless without quality control and effective marketing

10. Similarly, 'blue denim' is a corruption of 'bleu de Nîmes'. The French origin of the cloth used to make jeans is no longer well known (Pickstone, 2000: 20).

FOUR

LEGAL PROTECTION FROM UNFAIR COMPETITION

PRINCIPLES OF UNFAIR COMPETITION

Unfair competition is covered in the TRIPS Agreement and in the Paris Convention for the Protection of Industrial Property, administered by the World Intellectual Property Organization (WIPO). Laws on unfair competition, to prevent misappropriation, misuse and imitation, can help to protect biocultural heritage-based products. As with geographical indications, and unlike trademark law in which standards tend to be broadly similar across jurisdictions, unfair competition can be regulated in various ways. All WTO members must comply with TRIPS by adopting compatible national legislation, whether in the form of new laws or revised existing ones.

Indigenous groups may want legal protection of their biocultural heritage-based products that is *not* associated with registered trademarks or geographical indications. There may not be appropriate laws, or existing ones may be unsuitable, for example if registration of a mark or indication requires complicated or costly formalities that are difficult for them to comply with. In this case, law on unfair competition may provide some, albeit limited, assistance where competitors act unreasonably.

With or without intellectual property protection, indigenous groups and communities engaged in trade are likely to encounter efforts by others to compete with their products in ways which may be illegal. According to Article 10*bis* of the Paris Convention for the Protection of Industrial

Property, the following acts are prohibited on the grounds of constituting unfair competition:

- all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
- false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
- indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

This section of the Paris Convention is incorporated by reference into the TRIPS Agreement, and is also referred to explicitly in the context of geographical indications.

Many countries have a general law on unfair competition that is based on fault or wrongdoing. Any infringement of an intellectual property right invariably involves fault or wrongdoing on the part of the imitator. This could involve products that dilute or undermine the goodwill,¹¹ trust, reputation, distinctiveness and commercial value protected and/or enhanced by a geographical indication or trademark. While serving to punish the conduct of the imitator, unfair competition laws can indirectly protect proprietary rights, and in this manner can be employed to supplement the protection of an innovation. What about situations

11. This term is often used in the context of trademarks. It refers to the positive connotations commonly directed to favoured products or producers by consumers that is a source of economic value. The goodwill may lie in the product or the producer or even in the mark itself. Goodwill may be reduced by the existence of low-quality imitations on the market, though the opposite effect is possible if the value attached to authenticity ('the real thing') in the minds of consumers increases. Goodwill can also diminish if producers become complacent and allow quality to drop.

where no intellectual property rights are involved? Legal action may still be possible if the acts committed arise from dishonesty or bad faith, as shown in the following section on Europe. The problem for indigenous peoples is that legal action is normally expensive unless *pro bono* legal services are available. Also, unfair competition law is not particularly well elaborated in developing countries. Given its importance, much more needs to be done to develop this area of law.

UNFAIR COMPETITION IN EUROPE

In Europe, the general principle is that the imitation of products is allowed if they are not protected by other IP laws (WIPO, 1994: paragraph 61). This is especially so in the absence of further and special circumstances, such as behaviour contrary to ethical business practices.¹² German unfair competition law prohibits all acts of competition that are unfair and capable of materially distorting competition by harming competitors, consumers or other market participants. There is no definite duration of protection, which varies from case to case. In general, German courts will offer protection against unfair competition, sometimes to IP-protected products, for a 'reasonable period' to enable producers to exploit their competitive advantage.

German law assumes that there should be nothing to impede the copying of an innovation, in the absence of intellectual property protection (Rohnke, 1990). Thus, merely copying a competitor's product is not necessarily against the law, especially where the product has been

initially protected under an intellectual property right that has since expired. The courts will protect against the copying of products under the unfair competition laws only where additional elements or circumstances are present, such as:

- misleading customers, and disloyalty
- causing confusion and/or unfair exploitation of goodwill
- obstructing producers from exploiting economic benefits of their products
- direct misappropriation and/or regular and systematic copying.

Copying another person's product is generally allowed in the name of free trade and competition, especially where confusion is not an issue. However, 'direct misappropriation' or slavish copying of another's product is sometimes viewed as unfair. This is because the imitators are making direct use of the original producers' work or product without incurring any expense – benefiting from the original producers' money, skill and labour, without investing any of their own. There are three main requirements for direct misappropriation to be found unlawful:

- 1 the work sought to be protected must have some characteristics worthy of protection, that is, there must be evidence of investment in the work or a certain distinctive character of the product
- 2 the copying must have caused some actual damage to the creator of the work
- 3 the imitator could reasonably have used or made something different from the original product.

12. See, generally, Dutfield and Suthersanen (2007); Suthersanen (2010), chapter 9.4.

FOUR. LEGAL PROTECTION FROM UNFAIR COMPETITION CONTINUED

In France, law on unfair competition (*concurrency déloyale*) provides remedies for any civil or legal wrong based on the finding of 'fault'.¹³ Unfair competition is argued most often, concerning IP, on confusion, rival disparagement or unlawful attacks. As a fundamental principle, in the absence of any intellectual property rights, any product can be freely appropriated. However, this liberty is limited where it causes commercial harm and where an imitation is made for an unfair purpose or if the resulting confusion between products cannot be justified on other grounds.

In summary, the general principles governing imitation of products in European law are:

- copying an item in the public domain cannot amount to fault
- unfair competition law cannot be invoked as it is not a civil wrong to reproduce an unprotected object even if harm is caused – a further element is required
- the reproduction of products belonging to the public domain is wrong if this is done with a view to creating public confusion concerning the origin of products sold
- the taking of fruits of another's industry and investment is unjust enrichment and parasitic competition (*concurrency parasitaire*) (Kamperman Sanders, 1997: 29).

This summary of legal principles in Europe is offered as an example. It is important to understand how unfair competition is defined and regulated in the specific jurisdictions in which goods are produced and marketed.

13. The law of unfair competition is not governed by special texts but is part of the civil law as governed by Article 1382 of the French Civil Code. Some actions are also based on Article 1383 of the Civil Code, which covers acts of negligence. In general, there are two main areas of unfair competition that concern intellectual property rights: *concurrency déloyale* (which addresses issues of interference with and obstruction of competition) and *concurrency parasitaire* (which deals with the usurpation of the plaintiff's distinctive achievement to the defendant's benefit).



FIVE EXPERIENCE WITH GIS IN DEVELOPING COUNTRIES

About 90 per cent of existing geographical indications are from the OECD countries, and so experience of GIs in developing countries is limited (Giovannucci *et al.*, 2009: xvii). There are some well-known GIs in developing countries that have been quite successful, such as Darjeeling tea, Jamaica Blue Mountain coffee, tequila, and coffees from Colombia and Guatemala.

Darjeeling tea, for example, is grown across 87 plantations and 17,500 hectares in India. Ten million kilograms are produced each year, 70-80 per cent of which is exported – earning approximately US\$30 million a year (*ibid*). Jamaican Blue Mountain coffee is estimated to be grown by 7,700 farmers across 5000 hectares, 97 per cent of whom are defined as small. Eighty-three per cent of Jamaican coffee is exported to Japan. In the period 2000 to 2005 the average yearly value of trade in Jamaican Blue Mountain coffee was US\$26 million (*ibid*).

However, these are prestigious products, with a history of goodwill and profitable exports pre-dating their GI status. By contrast, for small-scale and widely-dispersed producers, such as coffee producers in Ethiopia, boundary-setting, standardisation, organising producers, and quality-control measures can be very difficult, if not impossible, to establish.

Much of the existing research focuses on export markets for trademarked or GI products, but local or domestic markets may be equally important for the trade of products with reputations linked to particular places, and can offer a vital first point for market access. Indeed, local recognition is likely to be necessary to gather enough momentum to market a product internationally.

One challenge is that a product may originate in more than one country. A good example is basmati rice, which is grown in both India and Pakistan. The two countries have been unable to agree on a common definition of the term.

Another example of such a product is Pisco, a grape brandy associated with both Peru and Chile. In this case, though, it has not prevented producers from acquiring GI protection in overseas markets. Chile protected 'Pisco' as early as 1943. Chile's early designation is despite the fact that Pisco is a city and province of the neighbouring country of Peru where the drink originates. Chilean and Peruvian Pisco differ in terms of definition, grape type, alcoholic content, and (obviously) designated growing area, and this does not make cooperation between the two countries at all easy. In India, the Peruvian government's application to register 'Pisco' was opposed by Chile. Accepting that the word was used in both countries, the registrar accepted the indication 'Peruvian Pisco'. In Thailand, on the other hand, Peru has succeeded in registering 'Pisco' as a GI (Ministry of Commerce of Thailand, 2005). Peru has registered 'Pisco' as an appellation of origin under the Lisbon Agreement but several state parties to the Agreement have indicated their intention of refusing the appellation on their territories, mostly because they accept Chile's right to market their drink under the same name.

In Europe, the government of Peru has registered “Pisco” under the relevant EU Regulation on spirits (European Commission, 2008). According to the technical file submitted with the European GI application (European Commission, 2011), there are three types differentiated by type of grape and fermentation level: Pisco Puro, Pisco Acholado and Pisco Mosto Verde. As far as ‘capturing’ the whole supply chain, the file goes quite far, claiming ‘all the stages of processing “Pisco”, from growing the vine, processing the grape and bottling the final product, are carried out in the “Pisco-making area”’. The area is far more expansive than the city or province of Pisco, covering numerous provinces and departments.

Chile has also had successes in getting trade parties to accept the designations “Pisco” and “Chilean Pisco”, mostly through bilateral trade agreements. While cooperation including sharing the indication would appear to be the obvious way forward, agreeing on common specifications and regulations may prove difficult. The same may be said for basmati rice, a commercially successful product that is grown in both India and Pakistan. In both cases, achieving such cooperation is not just a technical challenge, but a political, social and cultural one too (Rangnekar and Kumar, 2010).

If it proves impossible to cooperate on the definition, what we have are two different products having the same name. The issue of homonymous products is covered in TRIPS, but only for wines. Accordingly, co-existence of both indications must be allowed. How this is to be done is left up to WTO members but the producers concerned must be treated equitably and consumers must not be misled.

INTRODUCING GIS IN INDIA

India was one of the first developing countries to pass a TRIPS-compliant law on geographical indications: The Geographical Indications of Goods (Registration and Protection) Act of 1999. The Indian government appears to have been motivated to do so by: the furore surrounding a notorious United States patent relating to basmati rice, as well as trademarks being granted claiming the “mati” part of the word in combination with other prefixes; concerns about the substantial quantity of tea being falsely labelled as Darjeeling; and a conviction that GIs are suitable for many products in which India has a competitive advantage.

According to this law, an applicant to register a GI may be:

Any association of persons or producer or any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods, who are desirous of registering a geographical indication in relation to such goods.

(The Geographical Indications of Goods (Registration and Protection) Act 1999, Chapter III, Section 11(1)).

The 1999 Act is supplemented by implementing rules adopted in 2002. Section 32 of these explains the procedures for acquiring a GI, as quoted in full in Box 4.

BOX 4: INDIA'S GEOGRAPHICAL INDICATIONS OF GOODS (REGISTRATION AND PROTECTION) RULES, 2002

32(1). Content of application: Every application for the registration of a geographical indication shall be made in the prescribed forms and shall contain the following:

(1) a statement as to how the geographical indication serves to designate the goods as originating from the concerned territory of the country or region or locality in the country, as the case may be, in respect of specific quality, reputation or other characteristics which are due exclusively or essentially to the geographical environment, with its inherent natural and human factors, and the production, processing or preparation of which takes place in such territory, region or locality as the case may be;

(2) the class of goods to which the geographical indication relates shall apply;

(3) the geographical map of the territory of the country or region or locality in the country in which the goods are produced or originate or are being manufactured;

(4) the particulars regarding the appearance of the geographical indication as to whether it is comprised of the words or figurative elements or both;

(5) a statement containing such particulars of the producers of the concerned goods proposed to be initially registered. The statement may contain such other particulars of the producers mentioned in Section 11(2)

(f) including a collective reference to all the producers of the goods in respect of which the application is made;

(6) the statement contained in the application shall also include the following:

(a) an affidavit as to how the applicant claim [sic] to represent the interest of the association of persons or producers or any organization or authority established by or under any law;

(b) the standards benchmark for the use of the geographical indication or the industry standard as regards the production, exploitation, making or manufacture of the goods having specific quality, reputation, or other characteristic of such goods that is essentially attributable to its geographical origin with the detailed description of the human creativity involved, if any or other characteristic from the definite territory of the country, region or locality in the country, as the case may be;

(c) the particulars of the mechanism to ensure that the standards, quality, integrity and consistency or other special characteristic in respect of the goods to which the geographical indication relates which are maintained by the producers, maker or manufacturers of the goods, as the case may be;

(d) three certified copies of the map of the territory, region or locality showing the title, name of publisher and date of issue along with the application;

(e) the particulars of special human skill involved or the uniqueness of the geographical environment or other inherent characteristics associated with the geographical indication to which the application relates;

(f) the full name and address of the association of persons or organisation or authority representing the interest of the producers of the concerned goods;

(g) particulars of the inspection structure, if any, to regulate the use of the geographical indication in respect of the goods for which application is made in the definite territory region or locality mentioned in the application;

(h) where the geographical indication is a homonymous indication to an already registered geographical indication, the material factors differentiating the application from the registered geographical indications and particulars of protective measures adopted by the applicant to ensure consumers of such goods are not confused or misled or confused [sic] in consequence of such registration.

Despite the complexities of acquiring a GI, 153 have been registered in India

Despite the complexity of the procedure for acquiring a GI in India, 153 had been registered by July 2011. There are 41 for agricultural products, 97 for handicrafts, 12 for manufactured goods including beverages, and three for foodstuffs. Here are a few examples: Bhalia Wheat, Mahabaleshwar Strawberry, Nashik Grapes (agricultural products); Channapatna dolls and toys, Hand-made Carpet of Bhadohi; Mysore Silk (handicrafts); Feni, Mysore Sandalwood Oil, Nashik Valley Wine (manufactures); and Hyderabad Haleem (foodstuff). There are five foreign registrations in India, all of which are foods or beverages: Champagne (France), Napa Valley wine (USA), Parma Ham (Italy), Peruvian Pisco (Peru) and Scotch Whisky (UK) (Geographical Indications Registry, 2011). While the benefits of the system have been uneven, and it is of course still early days, a recent review suggests there have been successes (Das, 2010).

An empirical study of the registration of Feni, an alcoholic drink based on cashews, highlights some of the challenges posed by the formalities in India (Rangnekar, 2010). The Feni GI was registered by the Department for Science and Technology of the government of the state of Goa and a producer association called the Goa Cashew Feni Distillers and Bottlers Association. The GI users are both competitors and 'cooperators'. They must adhere to registered specifications but, as with other older GIs worldwide, characteristics of the product and manufacturing techniques will evolve including the possible abandonment of long-established cultural norms where these hinder the scale-up of production to meet increased market demand. It is early days in the life of this GI, but many small Feni producers are unaware of the existence of the GI. Consequently, these manufacturers are not benefiting from this IP right, and may well not be

making Feni in conformity with the approved specifications submitted in the registration application.

The example of Feni shows that a geographical indication may not be used by every producer of the same good. In this case, both registered and unregistered Feni exists on the market. The two entities that registered the GI do not appear to be compelling all Feni producers either to comply with the specifications and join the 'club' or to cede their right to market their product as Feni. However, they could try to do this and, arguably, doing so would help to preserve the image of Feni as a distinctive product.

IMPLICATIONS OF GIS FOR BIODIVERSITY AND LIVELIHOODS

How a GI is defined can have implications for biodiversity and livelihoods. Perversely, a very narrow definition of a GI product may incentivise uniformity over diversity. For example, the specification may be drawn so that producers are permitted to use only one crop species or variety where others could perfectly reasonably be used too. In the case of the Mexican spirit, tequila, which is the oldest non-European geographical indication, only one agave variety may be used for 100 per cent blue agave tequilas and these are not allowed to have added sugars. In consequence, many other varieties of *Agave tequilana* are no longer being grown. In some cases, greater flexibility may be possible without jeopardising the high reputation of the product. One approach is to allow differentiation within the indication. A good example is Scotch Whisky, a geographical indication that accommodates differentiation into, for example, blended malts and single malts. Returning to tequila, in addition to 100 per cent blue agave tequilas, tequilas mixtos need only contain 51 per cent blue agave and

FIVE. EXPERIENCE WITH GIS IN DEVELOPING COUNTRIES CONTINUED

sugars may come from other types of plant (especially sugar cane). There are also five age categories: *joven*, *reposado*, *añejo* and *extra añejo*. While such flexibility could be seen as a positive development in the sense that it may encourage the cultivation of a wider variety of agaves, allowing use of sugar from cane rather dilutes the distinctiveness of tequila as a type of spirit. Indeed, this reduction in the required blue agave content suited the large producers as it lowered costs and made sugar supplies more reliable.

It is possible to counter the trend of GI specification towards uniformity, while also exploring new marketing possibilities by differentiating protected products within a given GI. For example, the protected GI 'Scotch whisky' covers a beverage that can be divided into several distinct categories, for example, blended malts and single malts. Similarly, the protected Mexican beverage mezcal can include Types 1 and 2 mezcal, blended mezcal, single mezcal, and *mezcal papalote de Guerrero*.

In a recent report for the International Trade Centre, Giovannucci *et al.*, (2009) highlight both advantages and disadvantages of GIs. They identify conditions for success, drawing on case studies in both the developed and developing world (Box 5, no.2). On the one hand, GIs 'can offer a comprehensive framework for rural development since they can positively encompass issues of economic competitiveness, stakeholder equity, environmental stewardship, and socio-cultural value'. On the other hand, especially if the GI is poorly designed or inadequately governed, 'badly managed GIs can be dominated by limited political interests or just a few enterprises. In some cases, GIs can exclude the poorest producers or even stimulate inappropriate outcomes such as the dissolution of traditional practices or the destruction of biodiversity' (Giovannucci *et al.*, 2009: 118).

If badly designed or governed, GIs can exclude the poorest producers

BOX 5: EFFECTIVE USE OF GIS AND TRADEMARKS FOR BIOCULTURAL HERITAGE-BASED PRODUCTS

Giovanucci *et al.*, (2009) identify four conditions of success, generally applicable both to geographical indications and to collective and certification trademarks.

1. **Strong organisational and institutional structures** to maintain, market and monitor the GI, including core processes of: (i) identifying and fairly demarcating a GI, (ii) organising existing practices and standards, and (iii) establishing a plan to protect and market the GI. These all require building local institutions and management structures with a long-term commitment to participatory methods of cooperation.
2. **Equitable participation** among the producers and enterprises in a GI region. 'Equitable' is defined here as the participating residents of a GI region sharing reasonably in not only costs and benefits but also in the control and decisions regarding their public assets.
3. **Strong market partners** committed to promote and commercialise over the long term. Many GI market successes are the result of mutually beneficial business relations. Through these, consistent market positioning and effective commercialisation have led to a long-term market presence.
4. **Effective legal protection** including a strong domestic GI system. Fraudulent products and marketing can compromise both a GI's reputation and its legal validity. Carefully chosen protection options will permit effective monitoring and enforcement in relevant markets to reduce fraud.

CONCLUSION

This study finds that geographical indications, trademarks and law on unfair competition, if designed appropriately, may serve to promote products based on biocultural heritage. These tools of intellectual property can help to generate income that enhances the economic viability of traditional lifestyles without compromising deeply-rooted cultural and legal norms concerning access, use and exchange, which sustain subsistence economies and biodiversity.

However, evidence suggests that achieving 'appropriate design' is not straightforward – as outlined below. The legal, institutional and economic contexts in which GIs or trademarks are applied will determine their efficacy as a mechanism to promote sustainable development and biocultural heritage. A GI that is poorly designed, without consideration of the contexts in which it will be applied, may be worse than applying nothing at all, because it could favour more powerful actors rather than small producers.

GIs and trademarks
need to be designed
appropriately

THE ROLE OF 'SOFT' IP RIGHTS IN PROMOTING SUSTAINABLE DEVELOPMENT

Can GIs and trademarks improve income and livelihoods for indigenous people and traditional societies?

For GIs and trademarks to be beneficial, indigenous people and traditional societies must generate products attractive to consumers. However, even with IP protection, there is no guarantee that the sale of any products will be profitable. Optimal pricing strategy may well be a case of trial and error. Therefore, there is definitely some risk in investing time, effort and money producing and manufacturing products for trade, especially when markets are distant. It is likely that those groups best able to take advantage of GIs and trademarks will be the least isolated and most experienced in dealing with outsiders and non-indigenous people. The income generated also depends on the number of competitors in the market with similar or identical products.

Can GIs and trademarks protect traditional products from misappropriation, misuse and imitation?

Enforcing IP protection is a key issue, and a major challenge. What can indigenous groups do when others are free-riding on their products or falsely associating their own products with those of the indigenous group? While affordable legal expertise may be difficult to obtain, the holding of an IP right by indigenous or traditional producers can only help. It does at least mean they can take legal action to prevent infringement and claim damages or a share of profits. Without an IP right, it is possible that no laws are being broken and grounds for any legal action by communities may be weak or absent. Litigating on the grounds of unfair competition may be possible, but this area of law is not harmonised internationally and may

not be well developed in many legal jurisdictions of developing countries.

Can these rights conserve biodiversity and support indigenous cultural values?

While IP rights can add value to local biodiversity, this alone will not necessarily encourage sustainable management of natural resources. Other factors such as land rights, tenurial systems and cultural values also affect incentives for conservation. Because GIs and trademarks can be held by groups, they seem most appropriate for communities and products derived from collective biocultural heritage, in contrast to other IP rights that tend to vest ownership in individuals and corporate entities. Expanded commercialisation forces communities to decide how far they wish to invest in and depend on trade in certain products. Experience suggests that this can cause internal dispute, for example if the products have important cultural and spiritual associations, or if the revenues are not shared equitably. Increased commercialisation could also undermine traditional cultural values by increasing integration with Western markets, and could lead to the abandonment of traditional practices in order to scale-up production. At the same time, however, a collectively owned IP right could provide an impetus for communities to strengthen their collective values and cultural identity.

ADVANTAGES AND CHALLENGES OF GIS AND TMS COMPARED TO OTHER IP RIGHTS

Geographical indications and trademarks offer a number of advantages not shared by other intellectual property rights in the context of this study. However, there are challenges too.

Trust and reputation

Advantage: Geographical indications and trademarks can help producers to exploit trust and reputation that already exist among consumers. Arguably, they can also help to build trust and reputation in products hitherto not widely marketed.

Challenge: GIs and trademarks are not a panacea. Attention must always be given to other means of maintaining trust and high reputation, such as quality control, appropriate pricing, attractive packaging and marketing.

Acquiring the rights

Advantage: Subject to the performance of certain formalities necessary for registration, such as the submission of a detailed product specification, the acquisition of a GI can be relatively inexpensive compared to some other intellectual property rights, especially patents. Acquiring and maintaining trademarks may also be fairly inexpensive.

Challenge: This requires appropriate and 'user-friendly' national or regional legislation and administrative procedures. Some European national GI systems feature considerable government involvement and can be highly bureaucratic. Collective and certification trademarks may not be available under national laws, and will in any case entail the establishment of a producers' association. Many countries require that trademarks be periodically renewed.

Group rights

Advantage: Geographical indications and collective and certification trademarks can protect group rights for some types of product. This means that the rights are potentially available for use by a large number of individuals and small-scale producers, whether working together or in competition. This aspect of GIs and trademarks is more culturally appropriate for indigenous people and local communities, which regard traditional knowledge and related biodiversity as their common heritage.

Challenge: Operating as a club may be extremely difficult, especially if the distribution of producers is widely dispersed.

Strength in numbers: monitoring and enforcement

Advantage: A practical advantage of group rights is that local producers sharing the same indication or mark working together have much greater ability to protect their rights and interests than a single producer operating alone. Monitoring and policing of the GI or trademark can be performed by an association owning the mark rather than any of the producers.

Challenge: Free legal services may sometimes be available through lawyer organisations like Public Interest Intellectual Property Advisors and Protimos. However, contesting misappropriation is otherwise usually very expensive if not practically impossible in some countries.

Challenging misappropriation

Advantage: Misappropriation, misuse and imitation may take place in some markets. However, under the TRIPS Agreement, such behaviour can be challenged in a country where no GI is registered as long as registration is made in the home country.

Challenge: As the TRIPS Agreement makes clear,¹⁴ to take action domestically or from another country, the GI must be in current use and protected under national or regional law. Otherwise, there may be little recourse available.

14. Article 24.9: 'There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.'

FURTHER RESEARCH

Further research is needed to explore (1) the applicability of geographical indications and trademarks to developing-country settings and to indigenous communities, and (2) the impact of GIs and trademarks on sustainable development and biocultural heritage. This is likely to be most useful where research is based on primary case studies – which are largely lacking and which can offer wider lessons for the developing world.

The need for this kind of work is now greater than ever, given the potential of such market based tools to promote both biodiversity conservation and poverty reduction objectives. The Nagoya Protocol on Access to genetic resources and Benefit-Sharing, recently adopted under the Convention on Biological Diversity, establishes an obligation on governments to promote equitable benefit-sharing for the use of traditional knowledge and genetic resources held by indigenous and local communities. Similarly, the FAO's Treaty on Plant Genetic Resources for Food and Agriculture requires the protection of farmers' rights through equitable benefit-sharing from the use of genetic resources and traditional knowledge. At the same time, markets for natural and organic products such as herbal medicines and health foods are growing both North and South, and consumers are increasingly demanding quality assurance.

The IIED Shaping Sustainable Markets series is now supplementing this legal review with primary research, initially on the impact of a collective trademark in a Potato Park in Peru, and the use of geographical indications in India. We hope that this research will help to improve knowledge and understanding of the conditions under which these tools can contribute to sustainable development and protect biocultural heritage-based products – for policy-makers, businesses and development practitioners.

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INTELLECTUAL PROPERTY TOOLS FOR PRODUCTS BASED ON BIOCULTURAL HERITAGE

A LEGAL REVIEW OF GEOGRAPHICAL INDICATIONS, TRADEMARKS AND PROTECTION FROM UNFAIR COMPETITION

Products developed by indigenous peoples and traditional societies, such as food crops and medicines, can protect biodiversity and provide an important source of income. This review explores the intellectual property (IP) tools of geographical indications, trademarks and rules of unfair competition for promoting these products, and protecting them from misappropriation, misuse and imitation, and assesses their potential to contribute to sustainable development.

Intellectual property law is used mostly by large and powerful corporations, and does not easily accommodate the collective interests of groups and communities. Small producers and indigenous communities face significant difficulties in acquiring IP rights in important markets. But particular forms of IP – such as

geographical indications and trademarks, which can recognise and support group rights – may be better suited to use by groups or associations of small producers and may help protect their biocultural heritage.

This legal review draws primarily on experience in Europe, where GIs and trademarks have been most widely used to date, but also includes experience from developing countries, such as India's recent experience with geographical indications.

The review suggests that achieving appropriate design of intellectual property tools will be a significant challenge for developing countries and producers, requiring strong organisational and institutional structures, equitable participation among producers, strong market partners who can help to promote biocultural products over the long term, and effective legal protection. Some developing countries have already been able to benefit from geographical indications and trademarks. With careful design and use, these IP tools could promote products based on biocultural heritage and economically benefit indigenous communities and small producers.



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