

PROTECTION OF GEOGRAPHICAL INDICATIONS IN KENYA

BY

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ABSTRACT

This research is inspired by the pivotal role that protection of geographical indications has on specific products all over the world. The study aims to explicate all the possible legal avenues that are available to protect geographical indications in Kenya and unearth the best most effective route taking into account the existing protection systems in Kenya. This study employed both the qualitative and quantitative methods to collect data including the use of questionnaires. Due to the investigative and collective case study relating to examination of international, regional and national legal instruments, various treatises and studies were consulted. Various case studies looking at best practices in the European Union, the USA, China and African states and their protection regimes were comparatively studied. The rationale was that they have had a big market share and successful systems in protecting GIs. Questionnaires were administered mainly to consumers to substantiate the hypothesis that consumers are willing to pay more for speciality goods and were aware of linking products to their geographical areas. 79.9% of the respondents in this study were willing to pay more for the goods. From the findings of the research 94.1% of the respondents preferred products based on their unique quality or other characteristics. 64.7% of the respondents were not aware of and could not define the term geographical indications. 55.9% of the respondents recommended a separate system of protection and adoption of specific labels. The desk research coupled with the technical experts responses in part A and B narrowed down to a sui generis GIs system as the most preferred and effective system of protecting GIs. On the strength of the findings of this study various recommendations have been explored and future research areas are suggested. It is envisaged that the recommendations in the long run will remedy the exportation of raw products that deny the producers getting premium prices for the sweat of their brow.

DECLARATION

This research project is my original work except where sources have been acknowledged. The work has never been submitted, nor will it ever be, to another university in the awarding of a degree.

Elvine Beryl Apiyo Opiyo Date

Signature

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Signature

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DEDICATION

This research paper is dedicated to God, my husband, Walter Owaga and my three children David, Talya and Kyla.

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CHAPTER 1

1.1 INTRODUCTION

Intellectual property is intangible property that is as a result of creations of the mind. It is broadly separated into industrial property and literary and artistic works commonly referred to as copyright and related rights. The rationale behind protecting these creations of the mind is to encourage more creativity in the bid to enhance technological advancement. Industrial property includes trademarks, patents industrial designs and geographical indications (GIs).

Over time, market dynamics are changing at a very fast pace. Consumers are more cognizant of the quality linked to products and not the products per se, this is evident especially in the food sector. Product proliferation and differentiation is increasingly now linked to the quality of goods. The emerging trend is that consumers are more concerned with food safety and demand for assurance for quality rather than solely relying on the traditional commonly known trademarks alone.

In Kenya, agriculture is the 2nd largest contributor to the GDP after the service sector, through its major cash crops such as tea, coffee and horticultural products especially cut flowers. The significance of protecting these products especially in ensuring that value addition is achieved in the country before exportation of such products through the Intellectual Property (IP) system cannot be gainsaid.

The concept of GIs has evolved from the basic concept that people are generally able to link goods emanating from a certain area, locality or region to some special quality attributable to the climate, soil or other human factors making the goods distinct. Consumers are increasingly aware of such products and are willing to pay more for that extra special quality.

However, protection of GIs has and still is the most neglected form of intellectual property in Kenya as compared to the other IP titles; this is as per the Swiss Kenya GI (SKGI) Project (2009) findings and statistics on filings from the IP office. Although most of the developed nations have embraced the concept, the developing and least developed nations, including Kenya, are slowly moving towards understanding and embracing the importance of protecting GIs.

The developing countries have a myriad of agricultural and handicraft products that are potentially viable to benefit from such protection. The EU therefore has teamed up with developing countries and joined the “friends of GIs” informal group to champion protection for other products in addition to wines and spirits in the TRIPS Agreement.

It is therefore vital to consider the best possible mode of protection for GIs due to the growing consumer realization and the fact that they are drawn to particular products because of the geographical areas and quality link. It is similarly critical to ensure that such products are protected and such rights are effectively enforceable, because in the extreme flip side, there is a tremendous growth of unscrupulous dealers taking advantage of these unique indications. These traders trade under the guise that their

goods are from those particular well known regions mainly to free ride on genuine producer's goods goodwill to make money faster at the expense of the genuine traders and unsuspecting consumers.

This paper shall look into the protection of Geographical indications in Kenya basically to establish whether the protection of geographical indications should be left as it is, that is, currently incorporated in the existing laws or whether a *sui generis* GIs system is more practicable and beneficial to the major stakeholders and to the economy of Kenya.

1.2 BACKGROUND

1.2.1 THE HISTORY AND DEVELOPMENT OF GEOGRAPHICAL INDICATIONS

Trademarks have generally been used since time immemorial in relation to food products as a badge of guarantee on the source or origin for particular products. This has been so since at least the end of the 19th century and such protection was based on the common law tort of passing off and laws against false trade descriptions.

The concept of protecting GIs is fairly recent, before the use of the term 'GIs', two different terms were commonly used, that is, appellations of origin and indications of source. The latter simply indicated that the goods originated from the specific geographical region for example, "Made in Kenya" whilst the former simply meant that the product was from a certain geographical region but in addition the quality of the product was attributable to the geographical area for instance the soil, climate

and/or human factors. The term GI now generally incorporates the two terms defined above, that is, the geographical area and the quality link to the area.

Historically, the law of geographical indications has been in existence for over 100 years in Europe. The naming of products as per the place of origin is very ancient, according to O'Connor (2004: P.21), in former Yugoslavia the Charter of Steven 1, governed the sale of wine as far back as 1222. In the 19th century, specifically 1919 in France, the first form of modern recognition of protection of GIs to collective unions was enacted for the protection of appellations of origin due to the growth of foreign and domestic trade especially in the wine industry. Several other laws were enacted thereafter such as that of 30th July 1935. The 1935 decree distinguished inter alia, Appellations of origin and Indications of Source. On 2nd July 1990, the Appellations of origin structure in France was extended to agricultural foods and dairy products in addition to wines following the success of the 1935 Decree. [O'Connor, (2004)].

Thereafter, the European Community through its Regulation, EEC No.2081/92 of 14th July 1992, enacted laws for the protection of GIs that is PDOs and PGIs for agricultural products and foodstuffs. The second regulation was EEC No.1493/99 on common organization of the market in wine. The laws continued and still continue to evolve as and when the need arises.

GIs were protected in accordance with national laws and the laws were based on each nation's priorities. In the 19th Century however due to the upsurge of foreign commercial trade, national laws were not sufficient anymore because products were

often imitated outside of the country of origin. As a result, several International treaties relating to the protection of intellectual property included provisions on the protection of GIs.

Internationally, the Paris Convention on the Protection of Industrial Property adopted in 1883, (Paris Convention) was the first to provide for appellations of origin and indications of source mainly to remedy the national territoriality weakness, where products were imitated outside the country of origin. The Paris Convention however, made a distinction between trademarks and GIs without defining either concept. Other treaties that followed were; the Madrid Agreement for the Repression of False and Deceptive Indications of source on Goods of 1891, which basically adopted rules for the repression of false and deceptive indications of source. (Madrid Agreement).

The international convention on the use of Appellations of origin and Denominations of 1951, also known as the Stresa Convention was principally adopted for the protection of designations with relation to cheeses. The Convention elicited very few signatories most of which emanated from the European countries. The Convention basically pioneered and established the protection system for the use of appellations of origin and denominations of products. This principle was confirmed in the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 31 October 1958. (Lisbon Agreement).

The World Trade Organization (WTO) members developed the agreement known as Trade Related Aspects of Intellectual Property (TRIPS) Agreement of 1994 which is Annex 1C of the Marrakech Agreement establishing the WTO, providing minimum

standards for contracting parties for protection of GIs. The Agreement provides a higher level of protection for GIs for wines and spirits, subject to a number of exceptions.

Kenya is a member of the Paris Convention and the TRIPS Agreement and is therefore obliged to provide protection for GIs in its domestic laws. Through its Constitution of 2010, Kenya established a monist state meaning all conventions it ratifies automatically becomes part of her national laws.

In Kenya, GIs may be registered under Section 40A (5) of the Trade Marks Act, CAP 506 of the Laws of Kenya as collective marks, GIs can similarly be registered as certification marks. There is currently no *sui generis* system of protection for GIs. The IP office in Kenya, the Kenya Industrial Property Institute (KIPI) with the help of Swiss Intellectual Property Institute in 2009 through a technical assistance project made proposals for the drafting instructions for GIs Bill which is yet to be enacted as law.

1.3 STATEMENT OF THE PROBLEM

The main issue at hand is that regardless of the proposed *sui generis* GI system for the protection of GIs in Kenya, it is apparent that the current system available for protecting geographical indications may not be appropriately used, based on the current trade mark registrations. The insertion of Section 40 A(5) of the Trade Marks Act, CAP 506 of the Laws of Kenya to register GIs as collective marks was

seemingly as a result of pressure from the TRIPS council on Kenya to ensure full compliance with the TRIPS Agreement with relation to GIs.

The thrust of the problem in Kenya is that most of the country's major agricultural products that have been identified as potential GI products such as tea and coffee are major export earners but are mostly sold in their raw form bringing very little returns to the producers who are major investors in ensuring the quality of these products are maintained. The question that arises is whether a GIs law is the solution to ensure full exploitation of these potential GI products. If the answer to the former question is in the affirmative it then raises further queries as to whether such a law would guarantee premium prices and ensure better returns trickle back to producers.

Studies in the field of geographical indications have only concentrated on the feasibility of such a protection system based on potential GI products and not necessarily on the type of protection that is viable and suitable for the protection of GIs in Kenya.

The impact of market forces in relation to enterprises using geographical names registered as trademarks also pose a threat and resistance to the proposed *sui generis* GI system, the ultimate issue is what kind of protection should be provided for?

1.4 PURPOSE OF THE STUDY

The concept of GIs is fairly new in Africa and most developing countries do not have specific laws on the subject and those that have are either not using the laws with

very few geographical indications having been registered in developing countries. The same is true for Kenya; the purpose of this study is to therefore analyze the existing legislative framework with respect to the Protection of GIs in Kenya *vis a vis* a *sui generis* GI system of protection.

1.5 OBJECTIVES OF THE STUDY

The main objectives of this study are to:

1. Critically analyze the international instruments available for the protection of geographical indications and their relevance in determining national legislative framework for the protection of geographical indications in Kenya.
2. Examine the existing and proposed legislative framework for the protection of geographical indications in Kenya.
3. Examine the level of awareness, needs of the relevant stakeholders and their preferred system for protection of geographical indications in Kenya.
4. Investigate and explore the possibility of *sui generis* GI system and other possible options or combination of all possible protection avenues for geographical indications in Kenya and the envisaged impact on the economy.
5. To analyse the efficacy of GI Protection in Kenya based on existing legislative framework, Potential GI products and other forms of protection.

1.6 RESEARCH QUESTIONS

The study sought to answer the following questions:-

1. What international instruments govern the protection of geographical indications in Kenya?
2. What are the existing and proposed legislative frameworks available for the protection of GIs in Kenya and are they being adequately used?
3. What is the level of awareness, needs and preferred system of the key stakeholders in the field protection of geographical indications in Kenya?
4. What is the most suitable and viable recommended protection for geographical indications in Kenya based on the findings?
5. What is the envisaged effect of protection of potential geographical indications products in Kenya on the economy of Kenya?

1.7 SIGNIFICANCE OF THE STUDY

This study is premised on an analysis of all possible routes available for the effective protection of geographical indications in Kenya based on best practices as it seeks to establish the suitability and practicability of the proposed system of protection considering the peculiarities of the Kenyan situation and economy.

The Kenyan populace understands the concept of linking products to their place of origin and many consumers of GI potential products are willing to pay higher prices for such products. Several studies have been conducted for some of the Kenyan

products and the same have revealed that there are many potential products that can be protected as GIs. This is very well understood by the producers. It is argued in these studies that value addition for these products linked with their geographical areas in the country will ensure that producers get premium prices for their products which will have a positive ripple effect on rural development and in the long run the economy of the country.

The missing link that continues to linger is, what is the best possible protection mechanism that will ensure that these objectives are met? This is the vital question that this research paper seeks to answer so as to create a factual platform to inform the government institutions involved in the proposal and implementation of the missing link.

1.8 SCOPE OF THE STUDY

This study shall focus on Kenya and the suitable protection that should be afforded for geographical indications. The study shall also assess the relevant policies in Kenya that regulate protection of geographical indications and their impact on the legislative framework on the protection of geographical indications. The target shall be the major stakeholders in the geographical indications system, the government institutions envisaged to implement the geographical indications law and the bottlenecks that are likely to be encountered in the process.

1.9 LIMITATIONS

Several limitations are envisaged in the collection of data through both primary and secondary data collection methods in the form of interviews, questionnaires and literature review (desk/library research). The limitations are inter alia, access to the

informants, inaccessible terrains in terms of rural areas, limited dissemination of questionnaires and poor response from informants, language barrier and illiteracy for those stakeholders in the rural areas. Other limitations may be animosity by producers due to many promises by government and non-governmental organisations that in the long run take advantage of them and exploit them unfairly. Lack of resources to develop instruments to get feedback from informants and accessibility of updated laws for comparative studies and access to literature in the area of geographical indications is similarly a possible challenge.

1.1.0 STRUCTURE OF THE STUDY

This study shall look into the following areas .Chapter 1 shall be the introduction of geographical indication protection, evolution and importance of the subject in both the international and national arena.

Chapter 2 shall look at literature review in terms of what has already been studied which is relevant and within the scope of this study. An analysis of all the literature collected shall be made and a position made from what is available and that which is to be studied in order to determine the best suitable protection for geographical indications in Kenya.

Chapter 3 will evaluate the research methodology and determining the existing and proposed legal frameworks available in the international and national levels for the protection of geographical indications. A comparative analysis of the legislative systems shall also be looked at so as to consider best practices.

Chapter 4 will analyze the research findings taking into account the research methodology.

Chapter 5 will draw conclusion based on analysis of the findings and thereafter relevant recommendations on the way forward will be given.

1.1.1 DEFINITION OF KEY TERMS:

Several terms will be used in this research paper and hereunder defined as:

Appellation of Origin:

An appellation of origin represents a more restrictive category of GIs. Article 2 of the Lisbon Agreement defines Appellations of Origin as:

‘Geographical name of a country, region or specific place which serves to designate a product originating therein. The characteristic qualities of which are due exclusively or essentially to geographical environment including natural or human factors or both.’

Geographical Indication:

According to the TRIPS Agreement in Article 22, geographical indications are defined as;

“Indications which identify a good as originating in the territory of a member ,or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical region.”

Indications of Source

The term indication of source is encountered in the Paris Convention in Articles 1(2) and 10. Similarly it is contained in the Madrid Agreement for the Repression of False or Deceptive indications of source on goods of 1891. There is no implicit definition of the term but Article 1(1) of the Madrid Agreement clarifies the meaning. The definition of indication of source can be inferred from the Article as:

“Indications referring to a country or to a place in that country, as being the country or place in that country or place of origin of a product.”

“Indication of source refers to a sign that simply indicates that a product originates from specific geographical region, in particular some countries. Therefore even if the indication of source refers to a geographic name (the country name), it is different from the geographical indication and appellation of origin that refer to a specific quality.”

Protected Designation of Origin (PDO)

The designation where the product must be produced AND processed within the defined geographical area, exhibiting qualities or characteristics essentially due to the

geographical area. A PDO is the name of a place or a region used to describe an agricultural product or a foodstuff, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

Protected Geographical Indication (PGI)

The GI where the product must be produced OR processed in the geographical area, or both. The PGI allows greater flexibility in the conditions so long as the products exhibits specific quality, reputation or other characteristics that are attributable to that area. Therefore, so long as some unique contribution is made in the defined geographical area, which can be the production and/or processing and/or preparation, the PGI need not include any aspects of human contributions and local know-how contained in the PDO.

Sui generis

In Latin the expression literally means unique in its characteristics or of its own kind. In intellectual property law this expression is mainly used to identify a legal classification that exists independently of other categorizations due to its uniqueness or the specific creation of an entitlement or obligation.

1.1.2 CONCLUSION:

There is the need to safeguard and protect the potential GI products in Kenya at any cost so as to ensure that producers gain from the sweat of their brow, in terms of getting premium prices and ultimately maintaining the quality standards for their

niche products. Those in the supply chain similarly are also to be fairly compensated at each stage.

The issue at hand is whether the existence of the current geographical indications protection specifically through the trade mark law system has been of assistance to them. The issue that we seek to resolve is what is the best system of protection that can be afforded the potential GI products in Kenya?

This study shall basically unearth the best possible protection regime and whether this is necessary taking into light the already available trade mark system of protection. The study is mainly focused on a qualitative approach as part of the research methodology and implementing agencies are targeted to give this crucial information.

The results of the study shall therefore inform on the way forward as regards the protection of GIs in Kenya taking into consideration its international and regional obligations *vis a vis* what is currently happening worldwide in the field of GIs.

The following treatises were looked at in relation to protection of GIs .The studies mainly converge on the issue of product proliferation and consideration whilst drafting laws. An interesting discussion on the definition of GIs as relates the type of protection system to be adopted is similarly looked into in chapter 2.

CHAPTER 2

LITERATURE REVIEW

2.1 INTRODUCTION

Several related topics on the protection of GIs in Kenya and in the world over have been discussed and are still being discussed. This chapter shall explore the existing legal avenues for the protection of GIs, first and foremost internationally, regionally and nationally, if any. The same shall be looked at based on what is already existing highlighting the gaps that the research seeks to fill in this area.

The following sub-themes have been singled out from the papers that shall be reviewed:

- i. The legal avenues for protection of geographical indications internationally and nationally.
 - a) Definition of GIs and its impact on type of protection system
 - b) System of protection based on products.
 - c) *Sui generis* system and other available legal avenues.
- ii. The strengths and weaknesses of different legal regimes for protection of geographical indications.
 - a) The existing potential GI products and the existing protection afforded to the products.
 - b) The economic impact of GIs in developing countries.

2.2 The Legal Avenues for the Protection of Geographical Indications.

Geographical indications are either protected as trademarks either as collective marks or certification marks. They can similarly be protected using specific sui generis GI laws or laws focusing on business practices such as unfair competition laws or protection against passing off, Rangnekar (2003). Several studies converge at this point on the protection avenues available and all agree on the protection heads herein discussed.

The protection of GIs is largely based on a country's international and regional obligations as this inform what type of protection they opt for, Cerkia (2009) .A numbers of treaties provide for the protection of GIs as herein above detailed. The World Intellectual Property Organization (WIPO) administers several treaties that provide for the protection of GIs; these include the Paris Convention, the Lisbon Agreement and the Madrid Agreement. The WTO on the other hand administers the TRIPS Agreement.

a) Definition of GIs and its impact on type of protection system

A geographical indication is generally defined as an indication that designates a product as coming from a certain place and that the product's characteristics are inextricably tied to the place of origin.

A geographical indication may be generally defined as:

“a place or country name that identifies a product of which quality, reputation or other characteristics are attributable to the origin. A GI signals to consumers that the goods have special characteristics as a result of their geographical origin.

Therefore a GI is more than an Indication of source, which just indicates the provenance of the product (such as “made in” without referring to a certain quality.

Article 22(1) of the TRIPS Agreement defines a Geographical indication as:

“An indication used to identify a good coming from a specific location, territory, region in that territory having a given quality, reputation or other characteristics that essentially attributable to the geographical region.”

It is necessary to note that the TRIPS definition has been accredited as one of the definition of GIs that is all encompassing and is widely adopted in many legislation, Thevenold (2006). The Kenya proposed law on GIs adopts the TRIPS definition as well.

The European commission Regulation No.2082/92 of 14th July 1992, Article 2 defines a geographical indication as:

“.. the name of a region, 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.”

North America Free Trade Agreement is an agreement between the United States, Canada and Mexico entered into force on January 1, 1994, Article 1721 of the agreement defines GIs as:

“2. geographical indication means any indication that identifies a good as originating in the territory of a Party, or a region or locality in that territory, where a particular quality ,reputation or other characteristic of the good is essentially attributable to its geographical origin.”

This definition is similar, if not identical to the TRIPS definition herein above .The Lisbon Agreement is currently under review and it is proposed that the TRIPS definition be adopted in its bid to expand to GIs. A working group on development of the Lisbon system has been set up by WIPO. Does this mean that this is the best definition? Or better still, how does the definition translate into regulation and finally into practice? Is there room to consider the Lisbon system in Kenya based on its membership and the current changes being proposed?

There is not much emphasis laid on the definition as per the literature reviewed in international treaties and national legislation with respect to the protection of geographical indications. However the definition is vital in determining the scope of protection and the subject matter of protection which needs to be considered when adopting legislation.

The subject matter is in relation to whether protection will cover agricultural or industrial goods. This ordinarily extends to handicraft goods and manufactured goods. The point of departure is usually at this very point. The extension debate is on the stand point that the TRIPS Agreement in Article 23(1)-(4) grants additional protection for wines and spirits. The differential protection afforded to wines and spirits is argued to have favoured those at the time who agitated for the same solely because their countries mainly produced wines.

The proponents for extension therefore want other products to be granted the same protection. The TRIPS Definition also does not include services as part of the definition. Whilst this research is not concerned with the extension debate, it is paramount to note that the consideration of the definition as it relates to the subject matter is necessary to inform this research what is the best possible system(s) of protection to be adopted in Kenya.

This is a major gap that this research also seeks to explore in determining which is the best kind of protection that should be afforded with due consideration of the definition of international treaties on the subject of geographical indications and other pieces of legislation related to the same in Kenya.

Professor Odek in his book “Protection of Geographical Indications in Kenya and the TRIPS Agreement” only explains the meaning of GIs, indication of source, appellations of origin and PDO. He explains that the term GI encompasses both indications of source and appellations of origin without necessarily commenting on how Kenya ended up adopting the TRIPS definition for the proposed law and why the same was chosen.

It has been noted that, in comparison to other TRIPS obligations, implementation of Article 22 has occurred in the most diverse and uncoordinated manner (Watal, 2001, P.264). It is argued that the varied and diverse legal systems in the WTO member states are as a result of the definition.

Professor Odek brings to play the issue of PDOs in his book, The EU at the regional front deals with the term together with PGIs. It is apparent that most people use the

terms interchangeably especially those from developing countries. The main distinction of these two terms from the onset in any legislation will determine whether certain activities are performed at the geographical area. The EU allows for that by virtue of adopting these two definitions. A PDO has as a pre-requisite requirement that the production, processing and preparation take place in the defined geographical area whereas for a PGI it is not mandatory. Another difference is that for a PDO the geographical environment is due to its inherent natural and human factors. Would such a system and differentiation be considered in Kenya? Is the TRIPS definition adequate?

In conclusion, it must be noted that there is no harmonised definition used in the countries where a sui generis GI system is available. On the contrary, the definitions vary significantly; some being very broad, some very narrow. As a result, stakeholders have to deal with local requirements which can be very different from one to another. Furthermore, a protected GI name in a country under a sui generis law might not be able to secure similar protection in another country due to the fact that it would not meet the GI definition, for example, a product protected as an indication of source in a country might not be protectable as an appellation of origin in another country. The lack of harmonised approach on the GI definition arguably creates additional barriers to the protection of non-agricultural products bearing a geographical name in the EEA countries and Switzerland.

In view of the foregoing, the research shall investigate first and foremost whether or not the definition plays a key role in choosing the best kind of system of protection not necessarily the *sui generis* GI system alone. The definition is therefore to be

reviewed in the Kenyan context taking into consideration her international obligations and whether it affects the type of legal system that would be adopted. Most of the literature reviewed just give a definition as per the treaties but in this research we shall go further to discuss its role. Let us now look at the second limb of literature review based on the products.

b) System of Protection Based on Products.

The subject matter of protection is what determines the scope of protection for the various products that would be considered for protection through a geographical indications system. Suffice it to note that certain jurisdictions have in addition to products provided for protection of services.

The issue at hand is whether the type of products should restrictively determine the kind of protection system or whether the type of protection should be based on other factors. There are several studies that have been conducted based on the products that would be protected by geographical indications, emphasis has been laid on the type of products that would be protected and rightly so, as this is usually the first step in determining feasibility for setting up a GI system.

The INSIGHT, ORIGIN and AGRIDEA study (2009) on goods other than wines and spirits and agricultural or foodstuff identifies four types of legal instruments based primarily on the non-agricultural products in EU that is:

- 1) Consumer deception and unfair competition laws
- 2) Specific laws protecting non-agricultural products
- 3) Trade marks &

4) *Sui generis* GI system

Under this four heads each type of preferred legal system was assessed based on the products in question. The study shows that the legal protection differs from one product to another and from one country to the other. This research seeks to explore the types of legal systems available in Kenya and specifically determine whether the current system is sufficient or the proposed law should be adopted based on Kenya's peculiar products or should other factors also be considered.

The Kenyan feasibility study conducted in May 2007, for the project in the area of GIs by Daniel P. Keller revealed several GI potential products in Kenya, that is, coffee, tea, soft stone, wild silk, honey and handicrafts. The viability of the GI project between Switzerland and Kenya was based on the above mentioned potential products and the fact that it was mentioned that Kenya has inadequate legal means of protecting GIs. This was the major consideration that was made and consultations on the same were mainly made to the IP office and the producers of these products.

It is evident that no consideration was made based on viability of the GI system taking up a *sui generis* model on factors such as costs, inter agency capabilities and coordination in the implementation of such a system. The project was fully funded by the Switzerland IP office and because of the incentive, it seems the Kenya IP office relied on the feasibility study as the basis for opting for a *sui generis* type of protection that resulted in drafting of their proposed law. Suffice it to note that the project stalled because the proposed law has not been tabled before parliament.

The ACP study on empirical evidence on GIs by Dr. Thierry Coulet and Professor Blackeney dated 6th June 2011 also singles out tea as a potential GI product in Kenya, in addition to all the products herein above listed in the feasibility study by Keller. No preferred system for the products is recommended in the study.

It is crucial at this juncture to espouse that many products have been isolated as potential GI products but at the same time it has been established in a study surveying the laws in 161 countries that only a small number of products actually are legally protected, O'Connor and Kireeva (2007). Most of these products were found to be in the OECD countries with a vast majority on wines and spirits. Through the study it can be deduced that the influence of OECD countries played a major role in the adoption of higher protection for wines and spirits in the TRIPS agreement as against the other products.

The issues that arise from the Kenyan feasibility study and the ACP study is that beyond the potential products singled out, was due consideration was taken or was the proposed *sui generis* GI law selected due to the pressure from the donating partner? Is this kind of system in the long run, for the benefit of Kenyans or the Swiss? It has been noted that developing nations must look beyond donor funds in determining what kind of legislation they would adopt.

c) Sui Generis GI System Versus Other Legal Avenues

The literature reviewed concludes that each legal system is peculiar to a nation's history and economic situation. The ORIGIN, REDD study similarly conclude that

each type of protection system has its merits and demerits. The EU seems to support the *sui generis* GI system as against the unfair competition laws and trademarks laws whilst the US advocates for the trademarks system.

Several studies reviewed are based on the peculiar circumstances of those nations and not Kenya. The Insight study looks at the general comparison of the legal avenues with no specific country context. The studies reviewed converge at this point giving a general comparison of the different legal avenues on a general level. The same tests shall be applied in Kenya taking into consideration its international obligations.

.....when it comes to GI protection as a form of intellectual property, countries fall into three categories

- a) Those that do so by means of GI specific laws or sui generis systems*
- b) Those that do so through a trade mark system or other legal or administrative means; and*
- c) Those that do not formally recognize or protect GIs.(origin based protection study)*

This paper shall also compare the EU and USA GI system because of the market share both command with respect to the protection of GIs, the approach based on these findings but not only stop there but further go beyond that and look at the cost implications for Kenya taking into account that the economic capabilities of both as against that of Kenya. It is concluded that a *sui generis* type of GI system was adopted by EU but consideration should be given to trade mark law system out of the

country. Finally the study still concludes that there are merits and demerits for each system and choosing the best kind of protection must be based on historic and economic situation of a country.

2.3 Strengths and weaknesses of Different Legal Regimes

a) Existing potential GI products and the existing protection afforded to the products

From the above discussion, the four types of protection systems are the major options available when considering to set up a GI System .It is therefore important to review the literature that analyse the types of protection systems. Which type is the best, should Kenya take a multi- protection system or a stand- alone type of system. What are the strengths and weakness of these types of protection systems?

In Linking people, places and products produced by FAO and SINERGI (2009), it is noted that the guide gives only a general analysis of the different legal regimes without necessarily touching on the best possible type of preferred system of protection.

The ORIGIN and REDD final report of 2013 on GIs protection for non- agricultural products in the internal market, looks at the strengths and weaknesses of the different legal regimes. It is concluded in the study that each system has its strengths and weaknesses. It is found that trade mark law offers a user friendly legal instrument to protect EU products within and beyond the EU market unlike unfair competition and consumer deception laws that do not offer such protection abroad. It is concluded

that third party transfers are however impossible in trade mark law regime system for protecting GIs.

1) The Consumer Deception Laws.

On consumer deception and unfair competition laws, the study came up with the following findings.

- a) That the law is focused on consumers and not producers directly;
- b) That 1 out of 28 products studied were protected under the law of unfair competition; and
- c) That other non-agricultural product studied also benefited from the above standard level of protection but also relied on additional instruments to have higher level of protection.

On specific laws, it was concluded that 2 out of 28 of the non-agricultural products were protected through the GI system. This was explained as basically a specific ad hoc national law with extensive protection on GIs. The question that one would ask is whether there is any relationship between products and the kind of protection given to them. The study shall look at the specific goods that were studied in-depth and examine the interrelationship. The findings in the study suggest that there is a relationship.

2) Trade Marks Law

It was found that 15 out of the 18 and 2 Chinese non-agricultural products were protected under national trade marks laws and sometimes in combination with other legal instruments either as word, figurative, collective or certification marks. It was further noted that the best protection for producer's outside the country of origin was trademarks protection.

3) *Sui Generis* GI System

11 of the studied products were protected by *sui generis* GI system, 7 of which were EU products. The *sui generis* GI protection system was found to be the most extensive protection together with other specific laws. It was further noted that a major advantage of the *sui generis* GI system extends to public authorities providing protection.

It is clear from the analysis that EU prefers a *sui generis* GI system for most of its products over the other avenues. The United States of America in the same study was found to prefer the trade mark system of protection as against the *sui generis* system. Some countries on the other hand employ both trademarks and specific regime for protection of GIs for instance India and the EU.

Several studies show that there are varied types of protection systems but the bottom line is that the four heads are the main available avenues for protection. The *sui generis* GI system is lauded for the fact that it gives an indefinite protection. It is however noted that the same has not been explored for non-agricultural products in the EU. It is vital to note that the EU always conducts a feasibility study as it contemplates enhancing protection for particular goods. The EU countries have a *sui*

generis GI system for protection of agricultural goods and foodstuff and for wines and spirits.

From the ORIGIN study a lot can be grasped in terms of the strengths and weaknesses of the different types of protection regimes however it should be borne in mind that the study is limited to non-agricultural goods and the scope is the EU countries.

Throughout the reviewed literature it is apparent that what is imminent is the fact that each legal regime system should be considered based on either the products in question or economic and historic standpoints. A determination must also be made on the subject matter. This is one of the aspects that will be considered as we determine which protection system is best for Kenya. It is also vital to note that countries mainly choose a legal regime that favours the kind of products they have, not forgetting the costs that come with it. This is what has not been explored in Kenya in terms of the literature reviewed.

b) Economic Impact of GIs in developing countries

The impact of geographical indications as per the literature reviewed is mostly often analyzed based on the economic benefits that emanate mostly geared towards rural development and economic growth due to premium prices on goods. It is also necessary to review the impact based on the geographical names that are registered as trademarks and the transition thereof and the envisaged resistance that is contemplated must also be taken into account. Odek (2005) lists all the benefits that

generally accrue as a result of establishing a GI protection system but gives no linkage to the envisaged practical benefits based on the GI protection system.

The Cost of protection must always be taken into consideration. The cost of development and adoption of a GI system is usually not easy to quantify in advance, Belletti et al, (2007). It is although vital to consider this aspect while proposing a GI protection system.

In the ORIGIN study it was found that the choice of protection was greatly influenced by the cost of registration. It was similarly noted that some jurisdictions imposed fees on registration whereas others did not. In some, GIs were protected automatically whether registered or not whereas in one cited country registration was mandatory but there was no fees imposed on applicants. It is with keen interest that these specific countries shall be reviewed so as to compare such costs with those that are envisaged in Kenya. Further in-depth studies on cost and economic impact still need to be advanced.

It was established that 21 out of 28 products studied had a codified collective standard of production and clear rules guiding production, only 15 out of the 28 products had a certification system. It was concluded that 15 products had no control mechanism to verify that the conditions set out in the standards of production were complied with duly exposing a major problem with the *sui generis* GI system of protection in the EU. Most of the challenges of the *sui generis* GI system are connected to the cost factor. The cost of protection is therefore key in determining which legal tool a producer would opt for to protect GIs over the other available means. Cerkia *et al* (2009) in a WIPO study on Economics of Intellectual property

made the following findings; the study is written to determine the cost effectiveness of legal protection, economic performance of goods and legal system chosen with regard to sales.

It is needless to state that developing countries must at all costs consider the cost of establishing a separate GI system in addition to the trade mark system. the activities that will and must be considered as per the literature reviewed are the cost of administration of a GI system, product identification that includes setting up of rules most commonly referred to as the code of practices, delimitation of the specific area and organisation of producers, ensuring quality control mechanisms both within such organisations and externally .The producers should also envisage the costs of maintaining and enforcing their rights in case of infringement and misuse of their indications. Are developing countries really up to the task of establishing such a system?

In determining the best possible protection for GIs in Kenya the cost implications must be explored, the literature reviewed encourages that the cost implication of *sui generis* GI system especially must be taken into consideration.

In the study it was found that it was difficult to draw conclusions on the effectiveness of each legal instrument with regard to enforcement of rights. It is clear that effectiveness of each legal system stems from the national laws and the enforceability of rights granted by such laws. In Kenya this can only be determined by looking first at the existing laws and whether the rights granted therein are so far enforceable and then thereafter proposals may be made on the way forward.

It was similarly found that IP protection for non-agricultural goods in the EU was quite recent, several bi-lateral agreements have been signed but there appears to be no comprehensive and consistent approach towards their protection. That the legal protection available was diverse based on national laws, with each having its merits and demerits based on national historical or economic conditions.

The *sui generis* GI system seems to provide extensive protection together with specific laws as compared to trade marks law. All third countries studied preferred a *sui generis* GI system but in China products in addition enjoy trade mark law.

Trade mark protection of GIs outside the country of origin was the most preferred system as it is the only available way to secure effective protection in all export countries of importance to producers. Looking at the conclusions drawn in the study, in choosing the kind of protection that is best suited for any country, including Kenya, various factors should be considered: the number of products protected using the various protectable legal avenues, those that exist first and foremost so as to establish whether there is need to propose another or other additional avenues of protection.

Several literature reviewed reveal that in determining the benefits of GIs to the economy one must ask what is the market focus, meaning, it is necessary to determine the focus of trade. Are the goods to be exported or are they to be sold in the domestic market or both. It is also paramount to determine whether such foreign countries have any means of protecting the products in their territories. The historic and economic capability of a country is therefore crucial in determining which type of protection to adopt.

While going through this particular study it is notable that the results of the developing countries in the studies reviewed are vital and shall be borne in mind as we consider which type of protection system should be adopted. The EU protection system will also be considered as it is part of the friends of GI informal group agitating at the WTO discussions for inclusion of other products at the same level as that of wines and spirits. The EU on their part has the same interest as to inclusion of agricultural products and handicrafts in the TRIPS Agreement just as the developing countries.

2.4 CONCLUSION

The literature reviewed has considerably assisted in building up the rationale behind ensuring whether the current system of protection in Kenya with respect to protection of GIs is adequate. The scholarly writings and journals have added to the insight that this study focuses on. The study shall now embark on a keen assessment of the legal avenues specifically employed in Kenya and her obligations internationally in informing whether a sui generis GI system is needed as an addition to the already existing trade mark system.

A broad based multi-year research effort in the EU has independently concluded that there are a number of valid reasons for developing GIs which include:

- Improving access to markets
- Preserving biodiversity and preventing bio-piracy
- Protecting traditional know how

- Supporting community or collective rural development initiatives
- Reducing market price fluctuations
- Improving market governance (labelling and fraud rules, standards, traceability).

The main benefits taking into consideration the foregoing can be summarized to include the following heads, economic benefits, employment, culture, governance and environment. The economic benefits envisaged in Kenya has been linked to rural development and mainly premium prices on GI Products or services, Odek (2005). This touches on the core of the problem the study seeks to answer .value addition and desisting from selling raw materials. The question however is whether the current legal avenues in Kenya are adequate in mitigating these problems or is a sui generis GI system the best route to achieve premium prices for potential products and the above benefits?

It can be concluded taking cognisance of the literature reviewed, that each country must be studied separately taking into consideration its historical and international obligations. From the foregoing, it is also noted that studies reveal that products do play a crucial role and in Kenya a feasibility study on sui generis system based on GI potential products has been conducted. The efficacy of the current system of protection as against a sui generis GI system has not been explored and therefore products are still sold in raw form and are overtly misrepresented out of the country's borders. What other additional factors should be considered apart from products while considering the feasibility of a sui generis GI system?

Finally, it is in my view critical to first ensure that the existing avenues are exhausted before embarking on drafting new laws. What would be the justification for a sui generis GI system for Kenya? Is it necessary? Will it be used to complement the existing avenues or to compete with those avenues?

CHAPTER 3

LEGAL INSTRUMENTS FOR THE PROTECTION OF GEOGRAPHICAL INDICATIONS

3.0: INTRODUCTION

This Chapter shall look at all the relevant pieces of legislation that are in relation to the protection of GIs internationally, regionally and nationally. The international instruments that have specifically been signed and ratified by Kenya shall be looked at and the implications of the same on the national legislation and the current system of protecting geographical indications.

The specific form of protection in a given country must be in accordance with the country's international undertakings and treaties, such as the TRIPS Agreement and possibly the Lisbon Agreement. The working group asked and received permission from Lisbon Assembly to convene a diplomatic conference in 2015 for purposes of substantively expanding the Lisbon treaty to include geographical indications.

At the national level, many options exist to protect origin-based traditional products. These can include: specific or *sui generis* laws protecting GIs; trade mark laws, particularly, but not exclusively, in the form of certification marks or collective marks; laws against unfair competition; consumer fraud protection laws for example, those for truth in labelling; and specific laws or decrees that recognize individual GIs.

Several similar legislations across the world that are similar to the Kenya legislation and those that have been adopted with similar circumstances as Kenya shall be analyzed and a conclusion shall thereafter be drawn based on the findings as to the appropriateness or lack thereof of the current system of protection of GIs in Kenya. Specifically, we shall look at EU and US who have a big market share worldwide and their respective GI systems.

The research was mainly informed by the qualitative research methodology. Most of the legal instruments and examination of the same was based on desk research, previous studies, and consultative interviews with experts in the IP office and producer regulators. Questionnaires were also administered herein annex 1. One of the critical issues that confronted me while conducting the study was how to devise a convincing methodology that would ensure that objective of the research is achieved. The questionnaire was divided into three parts. The questionnaire was sector specific. Part A mainly targeted the technical part of the research in respect to protection of GIs in Kenya. The questions in part A and B were supplemented by interviews due to the technical nature of questions.

Given the goals of the study (see Chapter 1) it would be expected that both qualitative and quantitative data would be produced. Creswell (2003) suggests that qualitative and quantitative data maybe combined to expand an understanding from one data set to another or to confirm findings from different data sources. In this study both were used to corroborate each other.

The target population sample was randomly picked and 50 Respondents were to answer the part C of the questionnaire mainly focusing on consumer awareness as the

end user stakeholder. The simple random sampling technique (Omidiran & Sanni, 2001) and purposive random sampling technique were employed with only 34 Respondents giving their feedback. The Respondents comprised of knowledgeable persons such as lawyers, IP experts, and ordinary people with little knowledge of IP.

The questionnaire is divided into 3 parts. The answers sought were technical in nature this formed part A of the questionnaire, the target group was IP office officers specifically under the GI unit. Part B was mainly on producer organisations and the target were producers but mainly the 2 major regulators Tea Board of Kenya and Coffee Board of Kenya handling the two major cash crops.

On research ethics the Respondents were assured of confidentiality and given an option to omit their personal details.

3.1: International Legal Instruments

There are a number of international treaties with respect to GIs. The main treaties are manned by the World intellectual Property organisation and the World Trade Organization. It is clear that the specific form of protection lies in a country's international obligations as herein above quoted.

Article 2(6), Kenya Constitution, 2010 of the Kenya Constitution states that:

“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.”

This in strict sense means that Kenya is a monist state, international law does not need to be translated to national law. The act of ratifying an international treaty immediately incorporates that international law into national law.

A general overview of the international state of affairs as far as geographical indications is concerned reveals the following treaties; the Paris Convention of 1883 now with 175 signatory states, The Madrid Agreement of 1891, now with 56 contracting parties (and 78 for the updated 1989 Madrid Protocol-84 distinct contracting parties in total for the Madrid System), the Lisbon Agreement of 1958 with 28 Members and 159 members for the current TRIPS Agreement. WIPO administers the Madrid and Lisbon Agreements.

The treaties that have been signed by Kenya in relation to GIs are;

- a) The Paris Convention On the Protection of Industrial Property 1883
- b) The TRIPS Agreement

3.2: The Paris Convention

The Paris Convention is the first major convention designed to facilitate the protection of industrial property beyond national borders. The treaty was first concluded in Brussels on 20th March 1883. The treaty has been revised severally since its adoption, that is in 1925, 1934, 1958 and 1967. The Paris Convention has been one of the first conventions to deal with international protection of GIs as

“indications of source” and appellations of origin” without necessarily defining either of these terms nor explicitly defining the preferred form of protection.

The Paris Convention specifically in Article 1(2) gives a definition of the protectable subject matter as indications of source, appellations of origin and advocates for repression of unfair competition.

Article 9 outlines the rights of industrial property and provides the right of seizure or containment of fraudulent products for aggrieved parties, only if the seizure option is part of the country’s legal instruments.

Article 10 concerns itself with the obligation on members to protect indications of source against direct or indirect use of false indications as to the source of product, identity of the producer, manufacturer or trader. It does not include appellation of origin though since appellation of origin is by definition an indication of source, this Article can be construed to apply to both terms.

The Convention provides remedies with respect to unlawful use of indications of source in Article 9 and 10 bis of the Convention which prohibits the use of false indications or deceptive marks either directly or indirectly.

Member states are at liberty to provide suitable legal mechanism to the extent of which the same is squarely left at each member’s discretion.

3.3 The TRIPS Agreement

The TRIPS Agreement has made the most significant progress in terms of international protection of GIs administered under the auspices of the WTO. The WTO was mandated in 1995 as an inter-governmental organization to regulate

international trade. The organisation therefore provides a platform internationally for trade negotiations with respect to goods and services of its members.

Members are under obligation to provide the most suitable type of protection mechanism within their own legal system.

The Agreement has the most recent additions to what is desired by most countries internationally, a whole section is dedicated to GIs. Section 3, Article 22 and 23 of the Agreement defines geographical indications and gives the parameters of protection in relation to the scope of protection and the subject matter. Article 24 of the Agreement provides for exceptions that can be adopted either partly or wholly by member states whilst implementing the provisions of Articles 22 and 23.

The TRIPS Agreement obliges members to implement the laid down procedures as minimum standards in their national legislations. Article 22 further incorporates the provisions of the Paris Convention in relation to unfair competition (Article 10bis).

The implication is that each member state has to adhere to the minimum standards but is free to provide a more extensive protection in their legislation with respect to protection of GIs.

3.4 The Provisions of the Paris Convention and TRIPS Agreement- an In-depth Analysis.

The definition of GIs in the TRIPS Agreement has been adopted in other international instruments. Most nations in their GI legislation have adopted the TRIPS definition which is applauded as one of the best definitions since it incorporates both the concept of indications of source and appellations of origin.

It can also be noted that the Agreement incorporates the provisions of the Paris Convention in relation to GIs. Let us have an in-depth look at the provisions of the two conventions.

Article 22.1 of the agreement stipulates:

“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.

Although the United States opt to use the trade mark system to register GIs as certification and collective marks within their territory, in contradistinction with their free trade agreements for example the North America Free Trade Agreement (NAFTA) provision dealing with GIs, is in conformity with the TRIPS definition.

NAFTA in Article 1721 provides that: For purposes of the agreement:

2. Geographical indication means any indication that identifies a good as originating in the territory of a Party, or a region or locality in that territory, where a particular quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

It is apparent that certain main issues arise from the definition of GIs;

The TRIPS Definition is limited to goods and might be construed to mean that services are not included. Looking at the draft TRIPS Agreement during the Uruguay Round negotiations the preferred term was product. The unified proposal, of

23/7/90(MTN.NGN.NG11/W/76, placed services within brackets, meaning there was no consensus on whether to include services. A subsequent draft of the Agreement known as the Brussels draft replaced the term product with “good” and simultaneously removed the bracketed word, services. The inference therefore is that services was not intended to be included in the TRIPS Agreement scope of protection, unless it is argued that the word “good” incorporates both terms.

Several countries provide for protection of services such as Liechtenstein, Peru and Switzerland. Others are Azerbaijan, Bahrain, Croatia and Singapore.

The TRIPS Agreement generally provides broadly for two types of protection, a higher protection for wines and spirits and a lower one for other products.

The definition of GIs in the TRIPS Agreement includes appellations of origin since the Lisbon Agreement limits it to the quality and characteristics of a product attributable to its geographical origin, whereas the TRIPS Agreement mentions reputation as well. (Addor and Grazioli, 2002). Further the definition in TRIPS does not cover all indications of source due to the requirement of characteristics, quality and reputation linked to the geographical origin.

Addor and Grazioli summarize the definition of the three terms in this table:

Table 1 Summary of indications of source (Madrid Agreement), GIS (Trips Agreement) and Appellations of Origin (Lisbon Agreement)

Indications of Source	- geographical origin (direct or indirect)
Geographical Indications	- geographical origin (direct or indirect)
Appellations of origin	- geographical origin (direct or indirect)

The Latin America states definition of GIs with the USA agreements have served to clarify that;

1. Geographical indications can be formed by signs or combination of signs and not only geographical names.
2. Collective and certification marks can be used to protect geographical indications, i.e. the trade mark system can be one of the mechanisms provided for in legislation for protecting GIs.
3. Regardless of the system of protection it must be transparent, require minimum number of formalities, protection can be filed by interested parties without government intervention, applications must be published, opposition procedures provided for, prior rights take precedence.

The definition therefore as per the summary by Addor and Grazioli suggests that the TRIPS definition is more comprehensive in real sense incorporates the other two terms separately. It can also be considered whether both *sui generis* and trade mark systems will be used in Kenya together or independently taking into account both the EU and American approach.

3.5 Regional Protection

Kenya at the moment has no regional agreement with respect to GIs. In 2009, during the planning phase of the Swiss Kenya GI project, part of the milestones to be achieved in the project was the signing of a bilateral agreement between Kenya and Switzerland upon Kenya enacting a *sui generis* GI law.

Regionally, Kenya is a member of ARIPO which was mandated and is in the process of developing a GI law for its 18 member states. At the moment Kenya is not a member of the Banjul protocol therefore does not use the trade mark system regionally either.

Table 2 Protection System and Treaty Memberships in Africa

Country	GI Legal Regime	WTO Member	Paris Member	Lisbon Member	Madrid Member (A)
Algeria	Sui generis	5/4/13	1/3/1966	5/7/72	5/7/72
Angola	Trade Marks	23/11/96	27/12/07	No	No
Benin	Sui generis	26/2/96	10/1/67	No	No
Botswana	Trade Marks	31/5/95	15/4/98	No	No
Burkina Faso	Sui generis	3/6/95	19/11/96	2/9/75	No
Burundi	Trade Marks	23/7/95	3/9/77	No	No
Cameroon	Sui generis	13/12/95	10/5/64	No	No
Central African Republic	Sui generis	31/5/95	19/11/63	No	No
Chad	Sui generis	19/10/96	19/11/63	No	No
Congo Republic	Sui generis	27/3/97	2/9/63	16/11/77	No
DRC Congo	Sui generis	1/1/97	31/9/75	No	No
Egypt	Trade Marks	30/6/95	1/7/51	No	1/7/92
Equatorial Guinea	Sui generis	No	26/6/97	No	No
Ethiopia	Trade Marks	No	No	No	No
Gabon	Sui generis	1/1/95	29/2/64	10/6/75	No
Gambia	Trade Marks	23/10/96	21/192	No	No

Ghana	Sui generis	1/1/95	28/9/76	No	No
Guinea	Sui generis	25/10/95	5/2/82	No	No
Guinea Bissau	Sui generis	31/5/95	28/6/88	No	No
Ivory Coast	Sui generis	No	No	No	No
KENYA	Trade Marks	1/1/95	14/6/65	No	26/6/98
Lesotho	Trade Marks	31/5/95	28/9/89	No	12/2/99
Liberia	Trade Marks	No	27/8/94	No	25/12/95
Libya	Trade Marks	No	28/9/76	No	No
Madagascar	Trade Marks	17/11/95	21/12/63	No	No
Malawi	Trade Marks	31/5/95	6/7/64	No	No
Mali	Sui generis	31/5/95	1/3/83	No	No
Mauritania	Sui generis	31/5/95	11/4/65	No	No
Mauritius	Sui generis	1/1/95	24/9/76	No	No
Morocco	Sui generis	1/1/95	30/7/17	31/10/58	30/7/17
Mozambique	Sui generis	26/8/91	9/7/98	No	7/10/98
Namibia	Trade Marks	1/1/95	1/1/04	No	30/6/04
Niger	Sui generis	13/12/96	5/7/64	No	No
Nigeria	Trade Marks	1/1/95	2/9/63	No	No
Rwanda	Trade Marks	26/5/96	1/3/84	No	No
Senegal	Sui generis	1/1/95	21/12/63	No	No
Seychelles	Trade Marks	No	7/11/02	No	No
Sierra Leone	Trade Marks	23/7/95	17/6/97	No	17/6/97
South Africa	Trade Marks(Exce	1/1/95	1/12/47	No	No

	pt wines and spirits)				
Sudan	Trade Marks		16/4/84	No	16/5/84
S. Sudan	?			No	No
Swaziland	Trade Marks	1/1/95	12/5/91	No	14/1298
Tanzania	Trade Marks	1/1/95	No	No	No
Togo	Sui generis	31/5/95	10/9/67	30/4/75	No
Tunisia	Sui generis	29/3/95	7/7/84	31/10/73	No
Uganda	Trade Marks	1/1/95	14/6/65	No	No
Zambia	Trade Marks	1/1/95	6/4/65	No	No
Zimbabwe	Sui generis	5/3/95	18/4/80	No	No

Source: Author but GI System data from ARIPO, WTO AND WIPO .

It is noted from the above table that 25 countries out of the 48 African countries have adopted a sui generis GI system. It is crucial to benchmark with countries that have similar international obligations and those that Kenya is likely to trade with regionally. It is similarly notable that the East African countries mainly have trade mark systems.

3.6 The EU and USA GI Protection System

Protection in the European Union is of utmost importance as a benchmark for developing countries since this system has successfully been operating for quite a long time. One element of a successful strategy is to understand the GI systems in the two largest country markets; EU and the United States. The EU uses a stand-alone system of legislation and regulations specifically for GIs while the US incorporates GIs as a section of its existing intellectual property legislation.

The EU has the greatest number of GIs of any region, most of which are wines and spirits. In 2007 to 2008 it was estimated that EU registered 6,021 GIs of which 5200 were wines and spirits and 821 foods. [O'Connor et al (2007)].

Collective marks in the USA are limiting by the fact that they are only owned by the collective group and sometimes the marks owner, may use the mark.

Certification marks are more or less the same as collective marks save for the fact that the owners do not use them commercially. The owners of certification marks may not discriminately refuse to certify goods that meet the established criteria for certification. This is the closest parallel to appellations of origin (OECD,2000).The US certification system is closest to the EU style protection for GIs, registered effectively Darjeeling tea, Mosel wine, and Jamaican blue mountain coffee foreign GIs registered as certification marks in the US. US certification system allows weaker ties to origin and quality since standards at quality are set privately to whatever level preferred by the owner unlike the EU PDO/PGI system requiring link between quality and origin. A single certification mark in US can be tied to various products, producers and processors. Improved market access and lower marketing costs may have the effect that products are all not at premium prices. The process of application in the US is invariably simpler than in the EU.

The *Sui generis* GI system is more predictable e.g. the EU has a consistent logo for all registered names, easier for consumers to recognize even if they are not familiar with the products. The EU System is based on two categories that is, PDO and PGI.

Kerr cautions that while there may well be benefits available from established GIs such as those in the EU, there is no certainty that similar benefits would accrue to producers in developing countries (Kerr, 2006). Most successful GIs are the product of years of promotion and commercial alliances are usually at the heart of success. There is considerable dependence on the private sector and marketing methods (Tregear et al.1998).

3.7 The USA GI System

Nearly 1000 registered certification marks, mostly for wines and spirits and a number being foreign marks, the trade mark system does not discriminate against foreigners and the same treatment is accorded to all applicants who meet the registration requirements.

The difference between the EU system and the US is that the EU concentrates on rural development unlike the US that handles property rights as exclusively private.

3.8 CHINA

China maintains 2 parallel and independent systems; trademarks and special label system (similar to EU PDO/PGI System).The GI under the special label programme may subsequently be registered as certification or collective marks (Wang, 2006).It is evident in China that a number of producers are taking the latter form of protection. The Ministry of Agriculture on the other hand is also establishing a GI initiative focusing on environmental protection and traditional agricultural methods.

In China, one cannot obtain registration by virtue of use unlike common law countries. Article 16(2) of China trade marks law is similar to the TRIPS definition save for the addition of:

“.... attributable to its natural or human factors...” added at the end, the definition in full states,

“identify a particular good as originating in a region, where a given quality, reputation or other characteristic of good is essentially attributable to its natural or human factors.” the definition includes products or services.

The system resembles *sui generis* GI system different from USA Certification system.

3.9 Legal Protection of GIs in Kenya

3.9.1 The Legal Instruments

Kenya protects GIs currently either as certification marks and collective marks. The same is reinforced by unfair competition laws, common law of tort of passing off together with the above international instruments herein above discussed.

The Competition Act, 2010 was adopted in Kenya to deal with matters of unfair competition, incorporating the provisions of the Paris Convention in as far as false and misleading representations are concerned. It is clear that the competition Act mainly protects consumers from unfair market conduct. Part VI of the Act is dedicated solely to consumer protection. Section 55(b) (iii) stipulates that:

A person commits an offence if he makes a falsely or misleading representation concerning the place of origin of goods. This Act is fairly new and therefore has not been sufficiently used especially with respect to protection for GIs.

Having looked at the certification and collective trade mark systems in various jurisdictions there is not much difference in Kenya. The basic definitions are given in Odek's book, protection of GIs in Kenya and TRIPS Agreement at part two of the book.

Section 40 of Part VII of the Trade marks Act defines a certification mark as "that denotes and distinguishes certain characteristics in the course of trade from those not certified". The only condition is in the proviso that stipulates that the certifying person shall not trade in the certified goods.

There must be rules governing its use and the standards laid down that distinguish the goods must be open to anyone who adheres to them. The Kenya Bureau of Standards (KEBS) is an accredited certifying body in Kenya and its mark is well known within the country.

Collective marks were introduced by the amendment in 2002 of the Trade Marks Act. Section 40(5) of the Act in effect amounted to inclusion of geographical indications as collective marks. The amendment was as a result of implementing the country's WTO obligations in the TRIPS Agreement.

From the records in the Trade Marks Registry and the ACP study by Prof. Blackeney the following statistics on registrations have been compiled.

Table 3 Data on Registration of Collective and Certification marks in Kenya

Name of Product	Name of Mark	Name of Applicant	Type of protection	Registration No.	Nice classification	Date of Protection
Aloe Vera	Echuchuka	Turkana Bio Aloe Organization	Collective mark	59849	Class 3 for cosmetics.	25/9/06
Coffee	Coffee Kenya,so rich,so kenyan	Coffee Board of Kenya	Certification mark	66945	Class 30	25/11/09
Tea	Mark of origin	Tea Board of Kenya	Certification mark	65335	Classes 16,25 and 30	15/4/09
Jewellery, textile&foot wear	Maasai	Maasai community Trust	Collective mark	69058	Classes 14,18,24,25 and 41	25/8/10

From the statistics, it is noted that the two main regulating bodies in the tea and coffee industry apply on behalf of the tea and coffee producers and therefore have certification marks. Only 4 trademarks are registered in the trade marks registry as compared to the marks registered nationally and under Madrid system.

The issue at hand is whether the 4 marks is representative of what is on the ground? It is apparent that producers are not applying to register collective marks as GIs and opt for individual trademarks. Could it be due to the benefits that accrue from trade marks as opposed to collective marks and proposed GI system?

Let us embark on the similarities and differences of the protection regimes in light of these statistics. First and foremost these can be summed up to be the general similarities between trademarks and GIs.

Table 4 Similarities between Trademarks and GIs

Similarities
Both trademarks and GIs are Source identifiers
Guarantee quality
Valuable business interests and assets
Both require rules that regulate their use.

Cotton summarizes and adopts the following comparison of trademarks , collective and certification marks.

Table 5 Comparison of Trade Marks, Certification and Collective Marks

Trade Marks and Collective marks	Certification marks
Acquired distinctiveness required for GIs	Acquired distinctiveness not necessarily required for geographical terms.
Anyone can own trade mark but GI normally Government body, producer, group associations, cooperatives own collective marks	Owner is usually a government body or association on behalf of producers in a geographical region.
Owner controls use, collective marks, group membership required.	Certifier may not discriminately refuse to certify products that meet standards.
Owner can use marks and license	Mark used other than owner
Mark for the name can apply to any product	Applies to specified product(s)
Rewards producers and collectives who have commercialized geographical term as a source identifier.	Can be applied for prior marks to commercialize e.g the USA.

Source : Adopted from Cotton,2008

It is prudent to note that this comparison confirms the position of Kenya as well in as far as the fact that a person who certifies products cannot use the same unlike collective trademarks. A more elaborate comparison is hereunder considered and Kenyan situation incorporated therein.

Table 6 Showing Main differences between *sui generis* GI, Certification and Collective Trademarks

	<i>SUI GENERIS</i> GI	CERTIFICATION	COLLECTIVE
Right Holder	Private right with strong involvement of public authorities (definition, implementation, enforcement.) There is often no definition of the owner of the right, as the public definition of the legitimate users makes it unnecessary. Identification/recognition is provided by the state and the administration corresponds to the regulating council. Kenya provides both options (Association or competent authority)	Private right The intellectual property and administration belong to a firm or an association which cannot directly use the certification mark.	Private right. The intellectual property and administration belong to an association of manufacturers or producers.
Definition	General definition applying to all GIs at the national level. (PDOs and PGIS under European regulation 510/2006), Kenya adopts the TRIPS Definition.	Rules and requirements defined and controlled by owner of the mark.	Rules defined by the owner, either through specific requirements or restrictions on the range of authorized users (e.g. membership of an association)
Purpose	To protect the authentic designation of origin of a given product and the link between the origin of a product and its quality and reputation.	To certify quality, characteristics, geographical origin and/or a method of	To indicate membership to an association or a

		production e.t.c.	group sharing product quality, characteri stics, place of origin, and/or materials e.t.c
Duration of Protectio n	<p>In principle, protected from the date of registration until the conditions of registration cease to exist.</p> <p>Generally no need to renew the registration</p> <p>Registration is often free of administrative charges for applicants</p> <p>In Kenya, duration is indefinite; in addition some are protected even without registration. Therefore cease upon the conditions that necessitated the protection have ceased to exist.</p> <p>It is proposed that the registered GIs be renewed after every 5 years.</p> <p>The application shall not be free of administrative costs.</p>	<p>Must be renewed after certain period. (10 years in Kenya).</p> <p>There are fees for application of a TM and for each renewal of registration.</p>	<p>Must be renewed after certain period. (10 years in Kenya).</p> <p>There are fees for applicatio n of a TM and for each renewal of registrati on.</p>
Basis of Protectio n	Based on the actions of nationals authorities (if provided by law) as well as private actions .Kenya has both options as well as per proposed Bill.	Based on private actions only	Based on private actions only.
Scope of protectio n	Exclusivity of denomination use (at least for identical/similar products)and often an associated characteristics (shape, packaging, e.t.c)	<p>Generally a combined trade mark (verbal and graphic elements)</p> <p>Exclusivity on geographical denomination may be granted only as an exception to</p>	

		the general rules(public domain, distinctiveness, descriptive nature)	
Use	<p>Close link between GI and specific product, in some cases, different types of the same product may also be labelled with the GI.</p> <p>Open to any producer who can meet the requirements for use of the GI or the certification mark. Similar as the Kenya Proposed Law.</p>	Open to any Producer who can meet the requirements for use of the GI or the certification mark.	Members hip in the association upon which entitlement to use the collective mark may be restricted upon a decision by members.
Marketing issues	The pre-existing reputation of the denomination and/or the GI Registrations a quality sign per se may mean that less marketing is needed, thereby lowering costs.	High investments in advertising are necessary to establish the trade mark reputation in the market.	

Source : linking people, places and products, guide to GIs modified by author

The sui generis GI system from the above is favourable to the EU whilst the USA protects GIs as certification marks and China regarded as a developing country has both the two systems running concurrently. Kenya has drafted a proposed sui generis GI law envisaged to enhance the protection of its potential GI products.

3.9.2 The Proposed Geographical Indications Law

The Kenya Industrial Property Institute with the assistance of the Swiss Intellectual Property Institute and external experts drafted *sui generis* GI law. The Drafting instructions have been prepared and the Bill covers the following key issues;

3.9.3 Key Highlights of the Bill:

Definition of GI

The Bill adopts the TRIPS definition that incorporates the term product. Services are not mentioned in the Bill. This is plausible since the introduction of services for Kenya at this preliminary stage may be difficult to identify. The TRIPS definition is lauded as one of the broadest definition available.

The Bill further clarifies that an indication:

Includes any name, traditional designations, geographical, or figurative representation or any combination thereof conveying or suggesting the geographical origin of goods to which it applies.

This definition notably includes trademarks as part of indications. This is an all inclusive definition that covers and clarifies even beyond the TRIPS agreement incorporating even traditional designations.

The Bill is to be administered by KIPi which is also a well calculated move instead of creating another autonomous body that would be very expensive.

Table 7 Showing various countries that have adopted different definitions

Country/organisation	Definition	Source
ARIPO	GI, Same wording as TRIPS.	Bangui Agreement, 1977 revised in 1999.
EU	<p>PDO: 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.</p> <p>PGI: 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, 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.</p>	EC Regulation 2081/92 on PDOs and PGIs.
India	<p>Indication which identifies such goods as agricultural goods, natural goods or manufactured in the territory of a country, or a region or locality in that territory where a given quality, reputation or characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or processing or preparation of the goods concerned takes place in such territory, region or locality as the case may be.</p> <p>For the purpose of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country,</p>	GI ACT, 1999.

	region or locality, as the case may be,	
Switzerland	<p>Indications of source: any direct or indirect reference to the geographical origin of the products or services, including any reference to properties or quality which relate to geographical origin.</p> <p>PDO and PGIs same wording as EU regulations</p> <p>PDOS: Can be used for wines originating from a geographically defined area such as cantons, a region, a community, a place, a chatteau or a domain ,if the wines comply with the requirements of the first category of quality, and with the requirements defined by the canton regarding the delimitation of viticultural areas, the grape varieties, the methods of cultivation, the sugar content, the yield per hectare, the methods of vinification and the organoleptic test.</p>	<p>Federal law on Trade marks and Indications of Source,1994.</p> <p>Federal Ordinance on PDOs and PGIs, 1997.</p> <p>Federal Ordinance on Wine ,1968.</p>

Source: Thevenod-Mottet, 2006

The definition determines the type of protection system that has been chosen by a particular country. From the foregoing discussions it is noted that the adoption of the TRIPS definition is a good start for Kenya as it is widely used. It is generally concluded that a GI framework should as a legal basis provide both a definition of GI (the concept) and a mechanism to recognize GIs. The mechanism to recognize GIs should specify the producers who hold the right to use and the tools to be used to prevent the use GI products which do not comply with the agreed rules of use. (Belletti and Marescotti, 2006.).

From the above requirement it is clear that a good GI framework should determine the scope of protection and secondly the enforcement of such protection should also be invariably provided.

The Bill provides for the right of use clearly demarcating parameters of those allowed to use and those that upon application may apply to be admitted to use the GI in Section 15 and enforcement in Part V.

Part II of the Bill deals with administration of GIs that is vested on the Registrar of GIs who shall be the same as the Registrar of Trade marks. The plurality of duties on the Registrar makes the administration easier in that it ensures that the same person with trademarks knowledge handles GI matters. This system is also cost effective rather than establishing a new parallel entity.

Part III deals with protection of GIs and Part IV is on the procedures on actual registration. Section 5 of the proposed Bill grants automatic protection whether or not the GI has been registered. The question that immediately comes to mind is then what will be the benefit of registering and on the flipside the disadvantage of not doing so? Why should applicants avail their applications and go through the rigours of registration and the associated cost, if they will be afforded protection automatically?

As rightly quoted severally herein above historical considerations are vital in determining which type of protection system to use. In Kenya trademarks are protected whether they are registered or not such that anyone violating another's

right can still be brought to book. This is mainly a principle under common law countries known as passing off. The same rationale was used.

Section 6 deals with homonymous GIs and how they are to be dealt with. This section adopts the TRIPS exception for homonymous GIs but for all products unlike TRIPS Agreement in Article 23(3) that only recognizes these GIs for wines and spirits. Is it possible for the proposed Bill to extend exception beyond wines and spirits? Yes because TRIPS should only give minimum requirements therefore it can be inferred that extension would be tantamount to going TRIPS plus.

Section 12 states that administration of the GI is on the applicant once it has been registered and the same may be transferred for as long as the particularities of the GI are maintained.

The term of the GI is indefinite but a maintenance fee for the registration of GI will be after 5 years as prescribed by KIPi. Section 15 of Part IV deals with the right of use. It further provides that the Registrar may admit a producer who complies with the requirements.

Section 16 provides for labelling but it is not clear whether there will be a specific identification label for protected GI in addition to the word "registered geographical indication" as is the case in the EU. A register for the registered GIs is provided for at Section 19 of the proposed Bill.

Part V is on establishment of tribunal, where appeals shall lie and the various offences. This basically caters for enforcement mechanism. Punitive measures are

employed in the Bill to act as deterrence against those infringing on the rights of users. (See section 24).

The Proposed Bill is yet to be tabled in parliament for debate and approval.

3.9.4 CONCLUSION

Having studied the international ,regional and national situation in Kenya with respect to the laws governing protection of GIs and the proposed law, it is safe to conclude that Kenya has some form of protection that governs its GI products whether or not it is effective is what needs to be determined.

The proposed law is in compliance with the TRIPS Agreement provisions when looked at as a whole. The proposed law notably goes beyond the protection of wines and spirits and provides for protection of other agricultural products such as handicrafts. It is indeed plausible for Kenya to draft its laws in conformity with its unique situation and not due to pressure from donating foreign partners.

The EU from the above discussion adopts laws targeted to benefit its users after due consideration is made and studies conducted to justify such proposals or amendments. The proposed law provides for protection of GIs whether they are registered or not. Most of the producers operate in small scale and therefore the provision will be a good motivator to ensure that infringements of their indications are reduced. The TRIPS definition and scope adopted is all encompassing and thereby will adequately protect all the identified potential products in Kenya.

The maintenance fee proposed after every 5 years is similarly a reality in Kenya in terms of the implementation by the proposed institution in ensuring that the system is

effectively run by its own funds and ensuring it is sustainable and independent in enforcing and asserting itself.

Similarities and differences of the protection systems cut across the globe and it is clear that each must be assessed in a country's context. In the study, Kenya has conformed to best practices in adopting the proposed sui generis GI law.

The results of this study with their analysis and the consequent conclusions drawn will constitute the main focus of chapter 4 which follows.

CHAPTER 4

DATA PRESENTATION AND ANALYSIS

4.1 INTRODUCTION

The main focus of this study was to critically analyze Kenya's international and regional obligations as against the already existing national legal instruments so as to establish the best form of protection for geographical indications so as to address the issue of export of raw materials that deny the producers of their legitimate profits and avoid misleading indications out of the country's borders.

As discussed in Chapter 3, the main method used in this research was qualitative in view of the object and examination of legal instruments and the examination of all possible routes of protection of GIs. This chapter shall look in depth at the results of the study and analysis based on the findings and the research questions shall be explored.

4.2 Legal Instruments on Protection of GIs

The Constitution of Kenya recognizes intellectual property and it being a monist state Kenya was found to have signed and ratified two major treaties that incorporate protection of GIs internationally. The Paris Convention and the TRIPS Agreement. The Madrid Agreement was considered while studying the situation regionally specifically in Africa so far as the registration of trademarks is concerned.

The Madrid Agreement and Protocol provide an avenue for the international protection of trade marks in this case collective and certification marks using one filing system and designating the countries of one's choice.

It should be borne in mind that these international agreements came into play in order to eradicate trade barriers and harmonize laws such that investors and traders would comfortably trade in other territories and still have their indications protected from misrepresentation and misuse.

In Kenya, as earlier mentioned, agriculture is the mainstay of the economy. It was found that tea and coffee are major exports and earn the country major revenue. The tea research foundation shows that over 90% of what is produced is exported. Selling these commodities in bulk and raw form denies the stakeholders and the country from benefiting and getting premium prices for their products that in essence stifles the economy.

It is noted that nationally only 4 trademarks that are closely linked to the concept of GIs are registered, out of the 4 trademarks 2 certification and 2 collective marks. Out of the comparisons on the protection systems in Table 6 it was established that a certifying body cannot use the mark in question. This is deduced to infer that the certifying body should be independent so as to ensure all the requirements are adhered to and the same is assessed impartially. The central issue then is whether the current system in Kenya is working or not. The USA assessed for comparison purposes registers GIs as certification marks but still enjoys a large market share.

The costs of registration using the current protection system was studied which amounts to 12,000 Kenya shillings per class for locals an equivalent of roughly 120 USD and 410 USD for foreign applicants per class. The proposed costs are still in draft form and are slightly higher than those of the current trade mark system. The regulators from both major sectors complained that the fees were hefty for the

producers. The procedures were also said to be complicated especially in enforcement.

Can we from the foregoing conclude and state that the current protection systems are being adequately used? Will a new separate proposal address these issues?

The technical expert from KIPi and the Producer organizations allude to the fact that a sui generis system is what is needed to curb the current challenges. One major contributor to the low registrations was the fact that there were no regulations drafted after insertion of Section 40(5) of the trade marks Act to guide the implementation of registration of collective marks as geographical indications.

4.3 Awareness and Needs of Stakeholders.

The following tables are a summary of Part C of the questionnaire analyzed using the SPSS software to gauge consumer awareness as key players in the identification and purchase of the end products.

Market access is a very important factor to consider when establishing a GI system and consumer feedback is vital (Brunori, 2006). The focus of the respondents picked was on the Kenya domestic market with the assumption that the responses would in the long run give an overview of the international market with modifications here and there.

For the first question on whether there were any preferred goods, it was crucial to determine whether consumers were really capable of linking goods with certain geographical areas. 94.1% of the Respondents as analyzed in table 8 were able to link their favourite products with special characteristics or unique qualities.

Table 8 CQ1. Do you have any products that you prefer based on unique quality or other characteristic?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	32	94.1	94.1	94.1
	No	2	5.9	5.9	100.0
	Total	34	100.0	100.0	

On the issue as to whether consumers understood the meaning of geographical indications it was found that 64.7% of the respondents did not understand and most had not heard of the term as compared to 35.35% of the respondents who were aware of the term. The producer organisations were able to define it, so were the officers at the IP office. This was reported to be as a result of training of all staff of KIPi courtesy of the Swiss Kenya project in the trade mark division and of the stakeholders involving those in tea, coffee, soft stone and handicrafts sector.

It was however noted that most of the respondents knew the concept but did not know that the linkage of their favourite products was referred to as geographical indications. Lack of Awareness was similarly mentioned in the ORIGIN study.

Table 9 CQ2. Are you aware of the term geographical indications?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	12	35.3	35.3	35.3
	No	22	64.7	64.7	100.0
	Total	34	100.0	100.0	

Geographical indications attract a higher price than the ordinary goods therefore it was vital to investigate whether consumers would be willing to pay more for such products. An overwhelming 79.4% of the respondents in table 10 below could

identify and pay more for the same. This is a vital consideration when considering the development of GI system under market dynamics, Brunori (2006).

Table 10 CQ3. Are you willing to pay more for those goods?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	27	79.4	79.4	79.4
	No	7	20.6	20.6	100.0
	Total	34	100.0	100.0	

To further analyse the questions asked a cross-tabulation of the two questions that address market access from the consumers perspective reveal that consumers are able to pay more for speciality goods.94.1% of the respondents were aware of special goods and were willing to pay for them.

Table 11 CQ1. Do you have any products that you prefer based on unique quality or other characteristic? * CQ3 Are you willing to pay more for those goods? Cross tabulation

		CQ3 Are you willing to pay more for those goods?		Total
		Yes	No	
CQ1. Do you have any products that you prefer based on unique quality or other characteristic?	Yes	25	7	32
		2	0	2
	No	27	7	34
Total				

Table 12 CQ1. Do you have any products that you prefer based on unique quality or other characteristic? * CQ3 Are you willing to pay more for those goods? Cross tabulation ---Column Percent % within CQ3 Are you willing to pay more for those goods?

		CQ3 Are you willing to pay more for those goods?		Total
		Yes	No	
Do you have any products that you prefer based on unique quality or other characteristic?	Yes	92.6%	100.0%	94.1%
		7.4%		5.9%
	No	100.0%	100.0%	100.0%

Table 13 CQ4. Do you know of any recourse in case what you buy is not what you wanted to buy?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	13	38.2	38.2	38.2
	No	21	61.8	61.8	100.0
	Total	34	100.0	100.0	

Another variable that was tested was on enforcement in a quest to answer the needs of the consumers as stakeholders, only a paltry 20% of the respondents had heard of the proposed law. The technical part of the questionnaire that was administered as a guide to the subsequent interviews done revealed that the producers were aware of the proposed GI law. This is based on the assumption that the regulators who represent and apply on their behalf were aware.

Table 14 CQ6. Have you heard of the proposed GI protection system?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	7	20.6	20.6	20.6
	No	27	79.4	79.4	100.0
	Total	34	100.0	100.0	

Table 15 CQ7. Would you recommend a separate system of protection and specific labels guaranteeing?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	19	55.9	55.9	55.9
	No	15	44.1	44.1	100.0
	Total	34	100.0	100.0	

55% of the respondents recommended a separate system of protection giving reasons that the system would address the issue of counterfeits and guarantee quality. The reasons all touched on counterfeits showing that this was a big challenge in identifying and causing confusion to consumers. The standards body, KEBS was tasked to ensure strict measures were adhered to.

4.4 Possible avenues for protection of GIs and Efficacy of the Current system of protection.

Through the desk research and the questions 1-5 on Part A of the questionnaire used as a guide while conducting the interview, the results corroborated the desk research and therefore we were able to establish the existing legal regime in Kenya. The following were singled out as avenues of protection.

1. Trade mark system-either as collective and certification marks. 4 such trade marks were registered with 2 out of the 4 registered as collective marks.

2. Laws against unfair business practices and geared towards consumer protection this is *vides* the Competition Act, 2010.
3. Common law tort of passing off.
4. Proposed sui generis GI law-drafting instructions for a GI Bill yet to be approved and published as a Bill and tabled before parliament for enactment.

Questions 6 and 7 of part A of the questionnaire were geared towards establishing Kenya's international and regional obligations. As earlier discussed these obligations affect the existing laws and those that are to be proposed. It was noted that Kenya is a member of the Paris Convention and the TRIPS Agreement directly related to protection of GIs. Kenya is also a member of the Madrid Agreement and Protocol concerning international registration of trade marks. The treaties basically ensure that the principles of national treatment in Article 3 of the TRIPS Agreement and the most favoured nation treatment in Article 4 of the Agreement are followed so as to promote international trade

The efficacy of the current trademarks system was assessed by investigating the number of registrations in the trade mark register, the costs of registration and whether the system was working or not based on its strengths and weaknesses. (See questions 8-12, part A of the Annex herein. Mr. Geoffrey Ramba, head of GI Unit, KIPi, intimated that the major weakness has been implementation of section 40(5) of the Trade Marks Act, CAP 506 since no regulations have been drafted in Kenya since 2002 when the law was amended).

It was concluded that based on the studies conducted by Keller in 2007 and the REDD study of 2011 (still a draft) there is justification to develop a sui generis

system because the current system is not working. It was however noted that by virtue of the registrations there was an array of hope that the current system was nevertheless still capable of working.

It is envisaged that if the proposed law is enacted, the prices of speciality products would fetch higher prices and producer goods would no longer be sold in raw form. The resultant effect would therefore be better returns to producers. This is corroborated by willingness of consumers to pay more as analyzed in part C of the questionnaire (94.6% of the respondents willing to pay more).

The producer organisations on the other hand state that the costs and procedures of the current system are rigorous and take time. The producers are optimistic that the enactment of the draft Bill would result to better premiums for producers and middlemen in the value chain.

4.5 CONCLUSION

The results of the study confirm and corroborate the earlier studies on protection of GIs that there are indeed legal avenues of protecting GIs, Odek (2005). It is similarly found that several African countries have adopted a *sui generis* GI system. Notably however, East Africa is still lagging behind in developing a *sui generis* GI system. The EU is successfully running a *sui generis* GI system for their products while the USA on the other hand is similarly successfully protecting GIs as certification marks.

The efficacy of the current system of protecting GIs in Kenya lies behind the country's peculiar circumstances and capabilities. The cost of establishing an effective system was found to be an important factor so much so for developing

nations, including Kenya. The feedback from this study already reveals that the users are convinced that the cost of registration and maintenance of their trademarks is very high. Establishing a new system all together must involve the concerted efforts of all stakeholders so that they are convinced that the added costs that come with a new system will work for their benefit.

Finally, considering the fact that the current structure has a problem does not necessarily mean that a separate new system should be established but on the other hand as intimated by the experts at the IP office it can also be enhanced to ensure more registrations are recorded. China has both systems of GIs and trade marks, although a culprit in counterfeit issues and misleading indications, the two seem to have a system that is working to their advantage.

In view of the foregoing, what should Kenya do to ensure that the laws it has and that which is envisaged to be proposed is the best and would positively impact on producers and all stakeholders, at the same time the economy of the country? The type of protection is to be considered taking into account that no one system is perfect. Chapter 5 looks at the conclusions and recommendations based on these findings.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

It can be noted that Kenya is moving towards adopting a sui generis GI system in addition to the current trade mark system plus the unfair competition laws. Daniele Giovanucci with inputs from Sautier and Van de Kop (2004) and Brunori (2006) developed a checklist on factors to consider when deciding to develop a successful GI system. We shall look at some of them in considering the above findings for Kenya so as to lead us to informed conclusions and recommendations that will eventually address the issue of Kenya's speciality agricultural products being sold raw and in bulk such as tea and coffee.

The results of the study show that the current trade mark law system is weak in terms of registrations and the fact that there are no regulations to implement the inclusion of collective marks as GIs in the law. The following shall be considered in the checklist to inform the recommendations.

5.2 Clarity and organized consensus:

It is stated that failure to develop a clear definition and community consensus would be likely to hinder all the subsequent GI development processes. It is important to include all the stakeholders so as to ensure that the system works well. This has two limbs of recommendations, awareness raising and stakeholder involvement.

1. Awareness-it is apparent that awareness still remains a stinging issue in Kenya this was consistent in responses received in Part A-C of the questionnaire. KIPi should consider running awareness programs and involving more stakeholders such as consumer representatives. This also has an implication on the Competition Act showing that its effect is yet to be felt. Most consumers still do not know about GIs and do not know any recourse they have in case they are misled.
2. Equitable participation: it is recommended that the institution with the lead role in establishing and developing the system, KIPi identify and involve all the stakeholders. The GI experts from the study were not able to identify all the stakeholders meaning they did not consider all the stakeholders while drafting the proposed law. KIPi should consider those that will block the development of GI system and especially lobby for political backing. This has been a major problem such that the first law was drafted in 2001 took seven years lying at the Attorney General's chambers and the 2009 draft Bill is still at the AG's. KIPi should re-strategize and involve more stakeholders' especially the private sector as established in the study so that they all put pressure on the government to enact the draft Bill. The multi nationals already using the indications as trademarks should similarly be brought on board to avoid resistance from all possible fronts. Article 24 of TRIPS Agreement on exceptions on prior right trade mark holders incorporated in the proposed law should be explained to the multi nationals to convince them that their interests are catered for in the proposed law.

3. Delineation from the study is an area that can elicit a lot of controversy in most of the countries that have a sui generis GI system. A preliminary delineation should be done based on the studies done on coffee and tea and availed to producers in readiness for the enactment of the proposed law. Various studies conducted have established different areas with teas and coffee with special quality and characteristics. In the tea sector studies by the tea research foundation have identified areas including Mt.Kenya, Aberdare's, Kericho, Nandi and Kisii Highlands. The exercise will reduce the envisaged costs and eliminate all conceivable setbacks that may arise during delimitation.
4. Implementing regulations should be drafted to address the gap in Section 40(5) of the Trade Marks Act so that in the interim before enactment of the proposed law. The section should have defined procedures as to know exactly how collective marks are to be registered as GIs.
5. It is also recommended that the trade mark system be used together with the proposed law. The rationale behind this is the fact that if the proposed law does not work there is a fall back system for protection of GIs. Similarly, trademarks are easy to enforce out of the country as found in the ORIGIN study.
6. Strong market partners such as the EU should be brought on board. The Swiss Kenya GI project was a step in the right direction and such arrangements should be entered into in the form of bilateral agreements. This will in turn invoke the international law of reciprocity which TRIPS Agreement also adopts, such that each of the countries recognize each other's

GIs in their respective territories, especially since Kenya's market focus for its products is foreign based.

7. The proposed GI law should be fast tracked and enacted as it is envisaged to positively impact on the economy. The law will act as an incentive to producers due to increase in price premiums. Value addition within the country will ensure that the Kenyan producer exports finished products.
8. Specific labels should be incorporated after consultation with key stakeholders because from the study it is clear that consumers need proper identifiers for their preferred speciality goods.
9. A cost benefit analysis should be done to establish the envisaged costs of development and administration of an effective GI system.
10. Kenya should consider joining the Lisbon system upon revision of the agreement to see the impact it will have on rural development. Incorporating the concept of PDOs and PGIs may very well ensure that the main activities are done in the defined delimited area. The direct impact of this will decongest the urban areas creating employment, encouraging direct investment inter alia and this will eventually enhance the country's economy.
11. Kenya should consider acceding to the Banjul Protocol administered by ARIPO so as to be more involved regionally and due to the fact that Kenya is instrumental in the review currently ongoing to incorporate geographical indications in ARIPO.

5.3 CONCLUSION

Kenya has to consider overhauling its laws that are related to protection of GIs. It should be borne in mind that first and foremost it is important to strengthen the existing avenues as studied before embarking on a new law.

Awareness raising should be the first strategy to ensure that all key stakeholders come on board and realize the importance of adoption of the proposed GI law and its resultant positive effects on the economy.

While acknowledging the potential benefits that can be attributed to a sui generis GI system, GIs may not necessarily help the poorest or richest of countries, unless they are properly structured. The hard truth is that GIs are not for everyone.

The dynamics are such that the dominant parties such as the multinationals may still take a large share of the benefits if there is an imbalance of power or where there is lack of stringent measures for equitable distribution. Whichever way the country chooses to go, the proposed law in Kenya gives an indication that it is focused towards a sui generis GI system.

Value addition in the country will reduce the losses created by blending and numerous misleading indications abroad with relation to Kenyan key products such as tea and coffee. However, this is an important step for Kenya to make taking into consideration the recommendations above. A country can never be ready enough.

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APPENDIX 1: QUESTIONNAIRE

The following survey is in partial fulfilment of Ms. Elvine Opiyo's Masters Degree in Intellectual Property with Africa University, Zimbabwe. This questionnaire is therefore a tool that will assist to garner information with respect to protection of geographical indication with specific reference to Kenya. Confidentiality shall be maintained and the inclusion of your name and personal details is optional. Please note that your responses will remain strictly confidential and will only be used for academic purposes.

Kindly indicate your answer by ticking where appropriate and use separate sheets where necessary?

Name (optional):.....

Organisation.....

Email address.....

PART A: TECHNICAL

1. Does Kenya have a GI protection system?.....**Yes No**

2. If the answer in question 1 above is yes please specify which system.....

.....

.....

3. When was the GI Regime 1st established?.....

.....

4. What necessitated the establishment of the regime?.....

-
-
5. What international treaties with respect to GIs has Kenya ratified?.....
-
-
-
6. Does Kenya have any bilateral agreements entered with any countries
-**Yes No**
- if yes, which ones.....
-
7. How does the international treaties and regional arrangements affect the current system?.....
-
8. How many GIs are protected in Kenya using the current system? Please give details, specify which type of protection was opted for, registration numbers, class and any other details, if any.....
-
-
-
-
9. In your opinion based on your answer in question 8, is the system being used currently working, please give reasons for your answer?.....

.....
.....
.....
.....

10. What are the costs of application for the current system? (Please give breakdown).....

.....
.....
.....
.....

11. Please specify the strengths and weaknesses of the current system if any.....

.....
.....
.....

12. What necessitated the establishment of proposed GI law?.....

.....
.....
.....

13. Are there any targeted products that would benefit from the establishment of the proposed law? If yes please specify..... **Yes** **No**

-
-
14. What are the proposed costs for the Proposed GI law? (Please give breakdown).....
-
-
-
-
-
-
15. Which criteria was used to single out the these products?.....
-
-
-
16. Who are the stakeholders envisaged to benefit from the proposed system?.....
-
-
-
17. Who will assist producers to draft rules? If yes, for how long?.....
-
-
-
18. Who are envisaged to benefit from proposed system? any losses envisaged for any stakeholders?.....

-
-
-
19. Are the producers for the sui generis GI system?.....**Yes** **No**
-
20. Do the producers understand the concept of GIs? is awareness an issue?(please explain).....
-
-
21. Will the proposed law be used together with the existing law or independently?.....**Yes** **No**
22. Why is the proposed law not being implemented?.....
-
-

PART B: PRODUCER ORGANISATIONS

1. What products do you produce? (please specify).....
-
-
-
2. Do these products have any special quality or characteristic, please specify, if any?.....
-

-
-
3. Do you know of any protection regime for your products currently available?
4. if yes, please specify.....**Yes No**
-
-
-
5. Has any of these products been registered? if yes, how are they registered?(please give details of registration).....**Yes No**
-
-
-
6. Are there any benefits in registering or protecting your products based on your answer to question 3?.....
-
-
7. What impact has registration had on your products? Is there any benefit accrued?.....
-
-
-
-

8. Are you satisfied with the existing legal protection system? (Please give reasons).....

9. Is the protection system costly?.....**Yes No**

10. If you have used the registration system, are the procedures easy to understand? please specify(optional).....

11. Do you know what geographical indications are? **Yes No**
 If yes, please define and explain.....

12. Would you recommend a separate system of protection for your products and why?.....

13. Are your products for the domestic or foreign market?.....

14. Which system of protection is best, based on your answer in question 13?
what challenges do you encounter in the domestic and/or foreign
market?.....

.....
.....
.....

15. Any other suggestions for an effective system of protecting your goods and
any other comments?.....

.....
.....

PART C: CONSUMERS

1. Do you have any products that you prefer based on unique quality or other
characteristic? If yes, please specify..... **Yes No**

2. Are you aware of the term geographical indications, if yes
explain..... **Yes No**

.....
.....

3. Are you willing to pay more for those goods?..... **Yes No**

4. Do you know of any recourse in case what you buy is not what you wanted to
buy..... **Yes No**

5. How do you identify your preferred goods?.....

.....
.....
6. Have you heard of the proposed GI protection system?.....**Yes** **No**

.....
7. Would you recommend a separate system of protection and specific labels guaranteeing quality , if yes please specify why.....**Yes** **No**

.....
.....
8. Any other comment or suggestion on how to ensure that consumers buy the right products?.....

.....
.....
Thank you for taking your time to fill in the questionnaire.