

**PROTECTION OF GEOGRAPHICAL INDICATIONS  
IN CARICOM COUNTRIES**

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## INTRODUCTION

The adoption of the TRIPS Agreement represented an important step for the international recognition of geographical indications. However, significant controversies still dominate the discussion of this issue at WTO and other fora. Thus, considerable disagreement exists about the modes of implementing the registration of geographical indications under article 23.4 of said Agreement. Moreover, a number of developed and developing countries have proposed to expand the special protection only available today for wines and spirits to other products<sup>1</sup>.

Interestingly, unlike the case of public health, in the area of geographical indications there is no North-South divide, but different groups -inclusive of developed and developing countries alike- hold diverging positions on several critical issues<sup>2</sup>. This reflects different perceptions on the economic value of geographical indications to promote the commercialization of domestic products, as well as on the implications of the recognition of foreign geographical indications in the local economy.

Many developing countries have shown considerable enthusiasm about the possible benefits that could be derived from an increased protection of geographical indications. While, as discussed below, there are some examples of geographical indications from developing countries that have gained recognition in world markets, the largest number of such indications today belongs to developed countries, notably European countries<sup>3</sup>. A key issue is, therefore, the extent to which developing countries with different production structures and natural endowments may be better off with a broader protection of geographical indications.

This paper is structured as follows. It discusses, first, the definition of “geographical indications” and the modes of protection thereof. Second, it reviews the current multilateral rules for protection. Third, the paper examines the existing national systems for protecting Geographical Indications in some CARICOM countries<sup>4</sup>. Fourth, it discusses some economic aspects of geographical indications. It describes the type of products, particularly those other than wines and spirits, that may benefit from geographical indications and discusses the value added by their use. Fifth, the paper examines the desirability, feasibility and prospects for protecting geographical indications originating within CARICOM. Sixth, in the light of the previous analysis, the negotiations in course on geographical indications in the framework of WTO and FTAA are reviewed. Seventh, the different proposals for the establishment of an international system for registration of geographical indications of wines (and spirits) are examined. Finally, the main implications of the previous analysis are discussed.

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<sup>1</sup> This issue is to be addressed as part of the “Implementation-related issues and concerns” defined by the WTO Doha Ministerial Conference (see Ministerial Declaration, WT/MIN(01)/DEC/1, para. 12 and 18).

<sup>2</sup> See, e.g. Rangnekar, 2002.

<sup>3</sup> There are 518 denominations of origin registered in Europe, distributed by products as follows: 138 cheeses; 106 fruits and vegetables; 80 fresh meat category; 58 fatty materials (essentially olive oils); 52 processed meat products (Vital, 1999, p. 53).

<sup>4</sup> It was not possible to examine the Competition laws in force in CARICOM countries, therefore, only the Intellectual Property laws have been examined.

## 1. DEFINITIONS AND MODES OF PROTECTION

### 1.1 Terminology

There are few areas of intellectual property law where definitions are as diverse as in the area of geographical indications. Any study on the matter, therefore, needs to clarify the concepts used in order to avoid misunderstandings and permit to adequately assess the available policy options.

A geographical indication of source is a sign used in connection with goods in order to indicate their geographical origin. Conceptually, two main types of geographical indications of source may be distinguished:

- (a) Simple, quality-neutral geographical indications of source (like 'made in ...'), where there is no suggestion of a direct linkage between attributes of the products and their geographical origin. The use of an indication of source on a given product is merely subject to the condition that this product originates from the place designated by the indication of source.
- (b) Qualified geographical indications having a particular descriptive meaning because the characteristics, quality or reputation of products are essentially attributable to a country, region or locality. These indications consist of a name which is used to *designate* a product<sup>5</sup>. They are often called "appellations of origin".

Geographical indications may also be classified as *direct* and *indirect*. Though geographical indications generally consist of geographical names ("direct" indications), they may also be based on non-geographical names<sup>6</sup> or symbols<sup>7</sup>, if perceived by the public as identifying certain geographical origin. These are generally called "indirect" geographical indications.

In accordance with the European approach –which has influenced the provisions in the TRIPS Agreement– geographical indications constitute a component of *intellectual property* if the designated product possesses characteristics, reputation or quality that are essentially attributable to its geographical origin (Beier and Knaak, 1994, p. 26). That is, this concept applies only to *qualified* indications. Simple geographical indications not possessing such attributes may also be protected against misuse, under the discipline of unfair competition, consumer protection or trademark law<sup>8</sup>, but they are not one of the categories of intellectual property that WTO Members are bound to protect.

There are significant differences in the terminology used in national laws and international

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<sup>5</sup> Geographical indications or appellations of origin are often considered a sub-category of the indications of source. See, e.g. WIPO, 1998, p. 115-116.

<sup>6</sup> This is the case, for instance, of "Mozart-Kugeln" which is associated by the consumer with Austria, and "Ouzo" and "Grappa" associated with Greece and Italy, respectively.

<sup>7</sup> Some symbols may be capable of indicating the origin of goods without literally naming its place of origin. Examples are the Eiffel Tower for Paris, the Matterhorn for Switzerland, the Tower Bridge for London, the colors of the French flag for cigarettes, the statue of Liberty, etc. See, e.g., Actes du Colloque de Lausanne (1983).

<sup>8</sup> By preventing, in the latter case, the registration of geographical marks (see in this respect article 6.1 and 6 quinquies B, of the Paris Convention).

treaties on this subject. The expression “geographical indication” - which appeared only recently in international negotiations- is, as defined in the TRIPS Agreement, very similar to the concept of “appellation of origin” as defined in Article 2 of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (hereinafter the “Lisbon Agreement”) of 1958. It also probably covers the so-called “designation of origin”<sup>9</sup> and the “protected geographical indication” as provided for in the EC Council Regulation No. 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs<sup>10</sup>. There are, however, differences between the concepts provided for in these three instruments, as indicated by Table 1.

**Table 1: DEFINITION OF GEOGRAPHICAL INDICATION**

LISBON – 1958	TRIPS- 1994	EC 1992
Product	Good	Agricultural Product Foodstuff
Geographical Name: Country, Region, Locality	Geographical Indication, Country, Region, Locality	Name: Country (exceptional cases). Region, Specific Place
Quality or characteristics due exclusively or essentially to	Quality or reputation or other characteristics attributable to	Quality or characteristics due exclusively or essentially to
geographical environment: natural and human factors	geographical origin	geographical environment: natural and human factors production, processing and preparation in defined area

Source: based on Audier, 1997, p. 241-242.

In contrast, “geographical indication” as defined in these three instruments, does not cover the wider concept of “indication of source” as contained in the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (hereinafter “the Madrid Agreement”) of 1981, nor does it cover the words “geographical indication” such as provided in Article 1712 of the NAFTA Agreement, which seems to be equivalent to the concept of “indication of source” (Gevers, 1995, p. 147-148)<sup>11</sup>.

<sup>9</sup> “Appellation d’origine” in French.

<sup>10</sup> This Regulation provides for the protection as intellectual property of indications of origin which are used for products whose quality or characteristics are primarily or exclusively dependent upon the respective geographical region.

<sup>11</sup> It should be noted, however, that WIPO has opted to use the term “geographical indication” in its widest possible meaning to describe names and symbols regardless of whether they indicate that the qualities of a given product are due to its geographical origin (such as appellations of origin), or they merely indicate the place of origin of a product (such as indications of source). This concept is *not* adopted in this report.

## 1.2 Modes of Protection

Not only there are deep terminological differences in the area of geographical indications. There are also significant divergences with regard to the modes of and the purpose of protection. As discussed below, the TRIPS Agreement has left broad room for manoeuvre to determine how geographical indications are to be protected at the national level.

Knowledge about the different forms of protection available in different countries is useful as an input for the design and implementation of national laws, particularly for those countries that are adopting new rules on the matter. Most importantly, such knowledge is crucial for the international enforcement of rights based on geographical indications. For example, the approaches for the defence and enforcement of a geographical indication from Trinidad and Tobago will considerably differ in Europe as compared to the United States. While in the former geographical indications receive, under certain conditions, special protection, in the latter protection is conferred in a variety of ways, including unfair competition, federal (such as trademark law) and state statutes and regulations. In particular, the US Trademark Act of 1946, as amended, provides for the protection of geographical indications as certification marks (Beresford, 1999, p. 42).

Various alternatives have been developed in national and international law for the protection of geographical indications:

- “absolute” protection against use by any non-authorized party of the indication whether the public may be misled or not, as established, for instance, by the French law of May 6, 1919 (which recognized “appellations of origin” and laid down the conditions for their protection), the EC Council Regulation No. 2081/92, the Lisbon Agreement, and article 23 of the TRIPS Agreement (only for wines and spirits). This special title or *sui generis* protection is based on a public or administrative act (WIPO, 1998, p. 118-119).
- protection against the use of an indication which is deceptive or misleads the public, as provided for by the Madrid Agreement and by article 21.2 (a) and 21.3 of the TRIPS Agreement in the framework of trademark law;
- protection against acts of unfair competition committed with the use of geographical indications, as provided under article 10<sup>bis</sup> of the Paris Convention;
- protection against acts of “passing-off”, as provided for in common-law countries<sup>12</sup>.
- protection against the ‘false’ use of an indication, when it does not indicate the true origin of the product. This protection –established, for instance, under Article 10(1) of the Paris Convention- does not extend to indications which may mislead the public but are not false (for example, where certain geographical areas in different countries have the same name but only one of those areas is known for particular products).

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<sup>12</sup> “Passing-off” is misrepresenting one’s business goods or services as another’s, to the latter’s injury. This approach has been followed, for instance, in United Kingdom (see, e.g., Blakeney, 2001)

- protection as collective or certification mark<sup>13</sup>, which may be registered by the government or by a private entity<sup>14</sup>.

The available modes of protection have been classified by the WTO Secretariat<sup>15</sup> in three categories, as summarized in Box 1<sup>16</sup>.

**Box 1: CATEGORIES OF PROTECTION FOR GEOGRAPHICAL INDICATION**

(1) Regulations focusing on business practices

The basic issue under these regulations (such as unfair competition, consumer protection, trade descriptions, labeling and food standards) is not whether the geographical indication as such is eligible for protection but, rather, whether a specific act involving the use of a geographical indication has contravened standards contained in laws covering such acts.

(2) Trademark law

Trademark law may provide two types of protection for geographical indications: against the registration and use of geographical indications as trademarks, or through collective, guarantee or certification marks.

(3) *Sui generis* protection

A third category of regulations comprises of laws and regulations specifically dedicated to the protection of geographical indications.

<sup>13</sup> While in principle a geographical name is not protectable (unless distinctive of the products or services) as a trademark, the US law allows for this possibility. Under section 45 of the Lanham Act, it is possible to register a certification mark of "regional or other origin" of goods. The registration must be accompanied by the criteria that need to be met to use the certification.

<sup>14</sup> "Collective marks" are owned and used by a group of producers -generally the members of an association- and may serve to distinguish the geographical origin or other common characteristics of certain products. The group or collectivity that owns the mark does not use it directly, but via its members. These marks are principally designed to guarantee certain product characteristics (quality, nature or origin) for consumers. The submission of regulations for the use of the mark is normally required for the acquisition of a collective mark.

"Certification marks" are generally found in common law countries. They also aim at guaranteeing certain characteristics or quality of products, and may be used by any person (even if not belonging to a particular group or association) that complies with specified standards. The use of a certification mark is subject to the authorization of its owner, who does not trade himself with the mark but should ensure that the relevant standards are complied with by the authorized users. The verification by the owner of a certification mark of compliance with specified standards, means that this instrument in the common law system comes closest to the *sui generis* system established in some countries regarding "appellations of origin" (OECD, 2000, p.9). In some countries (e.g. the USA) when a certification mark consists solely or essentially of a geographical term, normally the authority that exercises control over its use is a governmental body or a body operating under governmental authorization. Examples of registered certification marks in the USA include "Idaho", "Real California Cheese", "Napa Valley Reserve", "Pride of New York", "Ohio River Valley". See Beresford, 1999, p. 42-43.

<sup>15</sup> See IP/C/W/253 of 4 April 2001.

<sup>16</sup> See De Sousa, 2001, p. 4.



Generally, these different categories of protection coexist in a single country. For instance, the legal forms of protection for geographical indications available in the USA include measures of categories (1) and (2)<sup>17</sup>. In other countries (e.g. in Europe) there are also regulations of type (3) especially for foodstuffs, wines and spirits.

In addition, "protection" of a geographical indication may mean:

- (a) the right to prevent unauthorized persons from using geographical indications, either for products that do not originate from the geographical place indicated, or not complying with the prescribed quality standards.
- (b) the right to prevent a geographical indication from becoming a generic expression<sup>18</sup>. This aspect of protection is dealt with, for example, by the Lisbon Agreement<sup>19</sup>.

## **2. MULTILATERAL PROTECTION OF GEOGRAPHICAL INDICATIONS**

Three international conventions established before the TRIPS Agreement contain rules relating to geographical indications or appellations of origin: the Paris Convention, the Madrid Agreement and the Lisbon Agreement<sup>20</sup>.

### **2.1 Paris Convention**

The Paris Convention (as revised in 1925, 1934, 1958 and 1967) includes the protection of "indications of source or appellations of origin" (Article 1.2) but does not define these concepts<sup>21</sup>.

The obligation to protect indications of source is specifically provided for in Article 10 of the Convention, but there are no special provisions therein for the protection of appellations of origin. Nevertheless, it has been interpreted that Articles 9, 10 and 10<sup>ter</sup> are applicable to appellations of origin since each appellation of origin, by definition, constitutes an indication

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<sup>17</sup> With respect to registration of geographical indications as certification marks, applicants must submit a copy of the standards established to determine whether others may use the certification mark on their goods and/or in connection with their services. 37 C.F.R. 2.61 (b). the standard need not be original with the applicant. They may be standards established by another party; such as specifications promulgated by a government agency or standards developed through research of a private research organization. See Beresford, 1999, p. 39-40.

<sup>18</sup> Once its distinctiveness is lost, the indication loses its protection. In many cases, a geographical name is regarded in one country as a protected geographical indication while it is considered to be generic in another country. Thus, "Champagne" and "Chablis" are only allowed in Europe to be used for products originating from a certain geographical area and produced according to certain quality standards, while in the United States of America they are regarded as being semi-generic names. "Port" and "Sherry" have been deemed customary terms in South Africa (Stern, 1999, p. 33).

<sup>19</sup> See, e.g. WIPO, 1998, p. 116.

<sup>20</sup> There are also several other plurilateral and bilateral agreements on specific products (for instance, the Stressa Convention on Cheese, 1951).

<sup>21</sup> According to WIPO, "indication of source" means any expression or sign used to indicate that a product or service originates in a country, a region or a specific place, whereas "appellation of origin" means the 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 the geographical environment, including natural or human factors or both natural and human factors" (WIPO, 1998, p.115-116).

of source under said Convention<sup>22</sup>.

Article 10(1) -the basic provision of the Paris Convention on indications of source- provides that the sanctions prescribed by Article 9 in respect of goods unlawfully bearing a trademark or trade name apply to any use of a "false indication of the source" of a product. "False indication of source" means, in this context, that no indications of source (or appellations of origin) can be used if they refer to a geographical area from which the products in question do not originate<sup>23</sup>. Article 10(1), however, does not apply to indications which may mislead the public, but are not false.

Article 9 establishes that seizure upon importation must be provided for, or at least prohibition of importation or seizure inside the country but, if those sanctions did not exist in a particular country, the actions and remedies available in such cases are to be applied. In the case of indications of source, requests for the seizure of such infringing goods can be made by any producer, manufacturer or merchant established in the locality falsely indicated as the source (article 10.2), or by federations and associations representing them when the action by such entities is allowed by the national legislation (article 10<sup>ter</sup> 2).

Article 10<sup>bis</sup> of the Paris Convention on the protection against unfair competition is also relevant. It provides a basis for protection against the use of confusing, false or misleading geographical indications.

## **2.2 Madrid Agreement**

The Madrid Agreement is a special agreement within the framework of the Paris Union that aims at the repression not only of false but also of deceptive indications of source<sup>24</sup>. This agreement provides that any product bearing a false or deceptive<sup>25</sup> indication by which one of the States party to it or place situated therein is directly or indirectly indicated as being the country or place of origin must be seized on importation into any of the States party to the Madrid Agreement (article 1).

Articles 1 and 2 of the Agreement specify the cases and the manner in which seizure or similar measures may be requested and carried out. However, there is no provision allowing private parties to directly request such measures. States parties to the Agreement may provide that such parties apply through a public prosecutor or any other competent authority.

Article 3<sup>bis</sup> obliges the States party to the Madrid Agreement to prohibit the use, in connection

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<sup>22</sup> See, e.g., WIPO, 1998, p. 120.

<sup>23</sup> Ibidem.

<sup>24</sup> The Agreement has thirty Member States, none of them a CARICOM country.

<sup>25</sup> Deceptive indications are those that are literally true, but nevertheless misleading: "where two geographical areas, possibly in two different countries, have the same denomination but only one of them so far has been used for the purposes of an indication of source for certain products, and such indication is used for products originating from the other geographical area in a way that the public believes that the products originate from the first area ... then such use is considered as a deceptive use because the public believes that the products originate from the geographical area for which the indication traditionally has been used" (Beaumer, 1999, p. 17).

with the sale or display or offering for sale of any goods, of all indications capable of deceiving the public as to the source of the goods<sup>27</sup>. Article 4 provides that the courts of each country have to decide what appellations, on account of their generic character, do not fall within the provisions of the Madrid Agreement. Only regional appellations concerning the source of products of the vine are excluded from this reservation, leading to an “absolute” protection for the latter (WIPO, 1998, p. 121).

### 2.3 Lisbon Agreement

The Lisbon Agreement protects *appellations of origin*, that is, indications in respect of products that possess special characteristics and features of quality attributable to their geographical origin. For the purposes of this Agreement, appellation of origin means

*“the geographical name of a country, region, or locality which serves to designate a product originated therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors”* (article 2(1)).

There are three important elements in this definition:

- the appellation must be the geographical name of a country, region or locality, thus excluding *indirect* geographical indications;
- the appellation of origin must serve to designate a product originating in the country, region or locality referred to;
- the “quality and characteristics” must be due exclusively or essentially to the geographical environment.

The Lisbon Agreement provides that the countries party to it undertake to protect on their territories, in accordance with the terms of the Agreement, the appellation of origin of products of the other countries party to the Lisbon Agreement, recognized and protected as such in the country of origin<sup>28</sup> and registered at the International Bureau of the World Intellectual Property Organization (WIPO). It is not sufficient for the country involved to protect its appellations under a general law. Each appellation has to benefit from distinct and express protection, stemming from a specific official or administrative act (see Box 2). The reason for such a requirement is that specific elements of the protection such as the geographical area, the lawful users of the appellation and the nature of the product linked to a given quality, must be determined (WIPO, 1998, p. 122).

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<sup>27</sup> Article 3 authorizes a vendor to indicate his name or address on goods coming from a country other than that in which the sale takes place, but obliges him, if he does so, to have his name or address accompanied by an exact indication in clear characters of the country or place of manufacture or production, or by some other indication sufficient to avoid any error as to the true source of the wares.

<sup>28</sup> Article 2(2) defines the country of origin as being “the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation.”

**Box 2: INTERNATIONAL REGISTRATION UNDER THE LISBON AGREEMENT**

International registration must be applied for by the competent Office of the country of origin, in the name of any natural persons or legal entities, public or private, having a right to use the appellation according to the applicable national legislation. The International Bureau of WIPO has no competence to examine the application with respect to substance; it may only make an examination as to form. Under Article 5(2) of the Lisbon Agreement, the International Bureau notifies the registration without delay to the Offices of the countries party to the Lisbon Agreement.

In accordance with Article 5(3) to (5), the Office of any State party to the Lisbon Agreement may, within a period of one year from the receipt of the notification of registration, declare that it cannot ensure the protection of a given appellation, indicating the grounds for refusal as discretionally determined by each country. The registered appellation enjoys protection in all countries not having refused it. However, if third parties had been using the appellation prior to the notification of the registration, the Office of that country may grant them a maximum of two years in which to terminate such use (Article 5(6)).

The protection conferred by international registration is unlimited in time. Article 6 provides that an appellation that has been granted protection cannot be deemed to have become generic, as long as it is protected as an appellation of origin in the country of origin. Article 7 provides that the registration need not be renewed and is subject to payment of a single fee. An international registration ceases to have effect only in two cases: either the registered appellation has become a generic name in the country of origin, or the international registration has been canceled by the International Bureau at the request of the Office of the country of origin.

Source: WIPO, 1998, p. 122-123.

The Lisbon Agreement has only been ratified by a very limited number of countries<sup>29</sup>, and has been largely ignored in current debates on the implementation of article 23 of the TRIPS Agreement. As noted by one commentator, “one problem was that accession was confined to those nations which protected appellations of origin ‘as such’. Thus, states which protected this form of intellectual property under unfair competition or consumer protection laws were locked out. Also the Agreement did not make exception for geographic indications which had already become generic in member states” (Blakeney, 2001).

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<sup>29</sup> Twenty States are party to the Lisbon Agreement; only one (Haiti) is also a CARICOM member.

## 2.4 The TRIPS Agreement

Section 3 of Part II of the TRIPS Agreement contains a set of international rules on geographical indications with an almost universal applicability and enforceability. The scope of protection for geographical indications under the TRIPS Agreement may be characterized as follows:

- i. Protection is limited to *qualified* geographical indications. For the purposes of the TRIPS Agreement protection needs only to be granted to:

"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" (article 22.1).

Though this definition resembles the one contained in the Lisbon Agreement, it adds "reputation" as one of the conditions that (like quality *or* other characteristic) an indication may meet in order to attract protection under the Agreement.

- ii. Protection extends to any good i.e. it covers not only food and agricultural products (the main domain of concern for geographical indications) but also manufactured products (e.g. watches, textiles, etc.) where certain characteristics, reputation or quality may be attributed to its geographical origin. It has also been discussed whether geographical indications, as defined, may cover *services* and not only physical goods<sup>30</sup>. Though such an interpretation is unlikely to prevail if a dispute were brought to a panel in WTO, Members may consider to extend protection of geographical indications to services, as currently provided for in a few countries<sup>31</sup>.
- iii. Protection is not limited to "direct" indications of origin, but embraces "the use of any means in the designation or representation of a good that indicates or suggests" a certain geographical origin (Article 22.2.b).
- iv. The use of homonymous geographical indications is prevented when though literally true as to the territory, region or locality in which the goods originate, they falsely represent to the public that the goods originate in another territory (article 22.4).
- v. A special, stronger, protection is provided for geographical indications for wines and spirits. The extent of this special protection is further discussed below.

Under the TRIPS Agreement, Members have considerable leeway to determine the *means* to protect geographical indications:

"In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

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<sup>30</sup> See, e.g. Beresford, 1999, p. 45.

<sup>31</sup> Such as in Peru, Liechtenstein and Switzerland. See IP/C/W/253.

- (a) The use of any means in the designation or representation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
- (b) any use which constitutes an act of unfair competition within the meaning of Article 10<sup>bis</sup> of the Paris Convention (1967)" (Article 21.2).

Members should, however, apply trademark law in a manner consistent with said protection. A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin" (Article 22.3).

Nevertheless, the Agreement shall not affect the eligibility or validity of trademarks applied for, registered or acquired through use in good faith, which are identical to a geographical indication, if they were applied for or the rights acquired before the date of application of the TRIPS Agreement provisions in the relevant Member or before the geographical indication is protected in its country of origin, (Article 24.5). In cases where the previous conditions are not met Members may, in addition, subject the right to challenge a trademark applied for or acquired to a five years time limit.

Members are not obliged to recognize rights relating to geographical indications if these are identical with a term "customary in common language as the common name" for certain goods or services in those countries (Article 24.6). The same applies to the "products of the vine for which the relevant indication is identical with the customary name of a grape of a variety" existing as of the date of entry into force of the TRIPS Agreement.

Article 23 contains a number of rules<sup>32</sup> specifically related to geographical indications providing for an additional protection to wines and spirits. There is not a wider coverage in terms of the

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<sup>32</sup> "1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "imitation" or the like.

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

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22 above. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that the consumers are not misled.

4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for Trade-Related Aspects of Intellectual Property Rights concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system" (Article 23).

type of protected indications (only those covered by the definition of Article 22.1). The additional protection stems from the following:

- there is no need to prove that the public is misled or that there is unfair competition;
- the exclusion of "delocalizing" additions, i.e., references to the "type" or "style" of a product which allude to its true geographical origin;
- a provision stronger than the general one (Article 22.3) with respect to the refusal and invalidation of trademarks for wines which contain or consist of a protected indication;
- the establishment of a multilateral system of notification and registration for wines is provided for.

However, the continued use of a geographical indication of another Member identifying wines and spirits shall not be affected where such a use takes place "in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least ten years preceding the date of the Ministerial Meeting concluding the Uruguay Round of Multilateral Trade Negotiations or (b) in good faith preceding that date" (Article 24.4).

In addition to the exceptions mentioned above, Article 24.8 and 24.9 specifically excludes the application of Section 3 as follows:

"8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, his name or his predecessor in business, except where such name is used in such a manner as to mislead the public.

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

In an unique provision (Article 24.1) in the whole Agreement, Members undertake "to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23" (i.e., those relating to wines and spirits). The exceptions provided for in article 24 shall not be used to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. This means that, despite that Members are not obliged to confer protection in cases governed by an exception (see Article 1 of the TRIPS Agreement), they may be forced to enter into negotiations. The Council for TRIOS can also undertake consultations and "action as may be agreed to facilitate the operation and further the objectives of this Section" (Article 24.2).

### 3. GEOGRAPHICAL INDICATIONS IN CARICOM COUNTRIES

Antigua and Barbuda, Barbados, Trinidad and Tobago, St. Lucia, Dominica and Jamaica have *sui generis* legislation drafted or already in force<sup>33</sup>. Belize is the only country in the region to protect geographical indications as certification marks under its Trademark Act (Chapter 257)<sup>34</sup>. Grenada's Industrial Property Bill provides for the protection of geographical indications through a clause on collective marks (section 39), which does not allow licensing of such marks. Surinam may also follow a trademarks-based approach<sup>35</sup>. Guyana, St. Kitts & Nevis, Saint Vincent and the Grenadines and Surinam do not yet have legislation that protects geographical indications<sup>36</sup>. Haiti has adhered to the Lisbon Agreement which requires, as mentioned, a *sui generis* protection.

Trinidad and Tobago was the first country in the region to adopt a *sui generis* regime for the protection of geographical indications (Geographical Indications Act No. 20 of 1996, as amended by Act No. 18 of 2000). The regime was substantially based on the draft model law prepared by WIPO<sup>37</sup>.

In line with the TRIPS Agreement, it defined "geographical indication" as

“an indication which identifies a good as originating in the territory of a country, 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” (article 2).

The protection conferred, also in line with said Agreement, enables interested parties to prevent the use of indications in a manner which would mislead the public, or that would be contrary to honest business practices within the meaning of Article 10<sup>bis</sup> of the Paris Convention. The law also provides for an “absolute” protection with regard to geographical indications identifying wines or spirits not originating in the place indicated in the geographical indication in question, even where the true indication of the goods is indicated and the geographical indication is used in translation accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like (article 3). Interestingly, proceedings may be initiated by “any interested person” or “any group of producers or consumers”.

Article 4 of the commented Act establishes that protection is available irrespective of registration in Trinidad and Tobago. However, registration raises a rebuttable *presumption* that the indication that has been registered is a geographical indication within the meaning of Section 2. Further, as provided for under Article 22.4 of the TRIPS Agreement, the law stipulates that protection will be available against the use of geographical indications which, though literally true as to the origin of the goods in question, falsely represent to the public that the goods originate in another territory.

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<sup>33</sup> See VanDuzer and Gervais, 2002.

<sup>34</sup> Available at [www.belizeaw.org](http://www.belizeaw.org).

<sup>35</sup> Communication from Malcolm Spence, July 26, 2002.

<sup>36</sup> See VanDuzer and Gervais, 2002.

<sup>37</sup> See WIPO, “Draft Act on the protection of geographical indications for [country] and commentary on its main provisions”, available at <http://www.wipo.int/cfdiplaw/en/trips/index.htm>.



In the case of homonymous indications for wines, protection shall be accorded to each indication –as permitted by Article 23.3 of the TRIPS Agreement- provided that there is no false representation to the public about the origin of the products. The Controller will determine in these cases the conditions for use “in order to ensure equitable treatment of the producers and to ensure that consumers are not misled” (article 5).

According to article 11 of the law, “only producers carrying on their activity in the geographical area specified in the Register shall have the right to use a registered geographical indication, in the course of trade, with respect to the products specified in the Register, provided that such products possess the quality, reputation or other characteristic specified in the Register”.

The law also includes special provisions concerning the registration and cancellation of a trademark “which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in Trinidad and Tobago is of such a nature as to mislead the public as to the true place of origin” (article 17). Moreover, the registration of a trademark for wines which contains or consists of a geographical indication identifying wines or of a trademark for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated by the Controller, on his own motion or at the request of an interested party, with respect to such wines or spirits not having this origin (article 18).

Finally, article 19 provides exceptions to the protection of geographical indications based on prior use or the customary meaning of the indication in the country. It also provides for the validity, under certain conditions, of trademarks applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith<sup>38</sup>.

It should also be noted that article 46.1 of the Cotonou Agreement (June 2000) highlights the Parties’ obligation to protect geographical indications 1. “in line with the international standards with a view to reducing distortions and impediments to bilateral trade”. In addition, article 46.5 makes it clear that the protection of such indications should include “appellations of origin”.

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<sup>38</sup> The laws passed or to be adopted in Antigua and Barbuda, Barbados, St. Lucia, Dominica and Jamaica have followed the same model and, *brevitatis causa*, are not described here.

## **4. ECONOMIC ASPECTS OF GEOGRAPHICAL INDICATIONS**

### **4.1 Functions**

Geographical indications have three basic functions. They provide information about

- The name of a product;
- The geographical origin of the product;
- A given quality, reputation or characteristics attributable to a geographical area (Gevers, 1995, p. 148-149).

Like in the case of trademarks, the use of a geographical indication permits the consumer to associate a name or other sign to directly unobservable attributes of a product. In both cases, the “information asymmetry”<sup>39</sup> that prevails in most markets can be addressed. Consumers’ transaction costs are reduced as far as the consumer can rely on his previous experience (or on the experience transmitted by others) to choose a product among other options.

Though geographical indications and trademarks perform similar functions there are also important differences: a geographical indication identifies a geographical area where one or several enterprises are located that produce the product for which the geographical indication is used, while a trademark identifies the enterprise which offers certain products or services on the market. Thus, the use of a geographical indication may be combined with a trademark which identifies a *specific* producer within the geographical area<sup>40</sup>.

A basic feature of a geographical indication is that each and every producer which is located in the area to which the geographical indication refers has the right to use the said indication for the products originating in the said area, generally subject to compliance with certain quality and other requirements. It is the *generic* designation of a product pointing out that it comes from a specific region, when the product enjoys certain qualities or reputation essentially deriving from that region.

A geographical indication successful in the market becomes an asset of the producers authorized to use it, since it generates accumulated goodwill. Without such protection, it would be difficult for such producers to appropriate the benefits from maintaining the quality or other attributes of their products and would, hence, have little or no incentive to invest for that purpose. The connection between product and region allows for niche marketing, brand development and extracting value from reputable indications (Rangnekar, 2002, p. 6). According to WIPO,

“Geographical indications are understood by consumers to denote the origin and the quality of products. Many of them have acquired valuable reputations which, if not adequately protected, may be misrepresented by dishonest commercial operators. False use of geographical indications by unauthorised parties is detrimental to consumers and legitimate producers. The former are deceived and led into believing to buy a genuine product with specific qualities and characteristics, while they in fact get a worthless

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<sup>39</sup> This asymmetry exists because sellers have much better information with regard to the unobservable features of a product than the buyer (Goldstein, 1993, p. 16). See also Grossman and Shapiro, 1988.

<sup>40</sup> See, e.g. Gevers, 1995, p. 148.

imitation. The latter suffer damage because valuable business is taken away from them and the established reputation for their products is damaged” (WIPO, 2002).

Geographical indications are increasingly recognised as a tool for securing consumers’ loyalty by establishing the link between product attributes and the geographical origin. In economic terms, a geographical indication essentially permits to increase producers’ rents based on *product differentiation*, that is, a form of *monopolistic competition* prevalent in the modern economy where there are elements of both monopoly and perfect competition<sup>41</sup>.

Of course, the economic value of geographical indications is not limited to the additional rents they may generate to producers. There are also other, less quantifiable, benefits such as the possibility of generating employment, increasing income or retaining population in certain regions<sup>42</sup>.

## **4.2 Range of Covered Products**

Geographical indications historically originated and have to a great extent been related to wines and spirits. Thus, around 70% of the indications registered under the Lisbon Agreement come from two product categories: wines and wine products and spirits<sup>43</sup>.

However, geographical indications may be applied to a wide range of products which are “land-based” other than wines and spirits, such as dairy products, poultry and plant products. For instance, agricultural products account for 6.7% of the registration under the Lisbon Agreement, and cheese for 6.5% of the total<sup>44</sup>. Manufactured products or handicrafts may also be distinguished with geographical indications. Examples of protected geographical indications are provided in Box 3.

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<sup>41</sup> See, e.g., Mansfield, 1994, p. 385.

<sup>42</sup> “Thanks to the designation of origin which gives more value to the product and thus makes it possible to obtain a selling price higher than the one of a standard cheese, there is maintenance on the spot of the population which would otherwise leave the mountain area to seek work in the urban centers” (Vital, 1999, p. 52).

<sup>43</sup> See Escudero, 2001.

<sup>44</sup> Ibidem.

**Box 3:           EXAMPLES OF PROTECTED GEOGRAPHICAL INDICATIONS**

**Bulgaria:** Bulgarian yoghurt, Traminer from Khan Kroum (wine), Merlou from Sakar (wine)  
**Canada:** Canadian Rye Whisky, Canadian Whisky, Fraser Valley, Okanagan Valley, Similkameen Valley, Vancouver Island  
**Czech Republic:** Pilsen and Budweis (beers), various vines, liqueurs, Saaz hops, Auscha hops, Jablonec jewellery, Bohemia crystal, Vamberk lace  
**European Union:** Champagne, Sherry, Porto, Chianti, Samos, Rheinhessen, Moselle Luxembourgeoise, Mittleburgenland (all wines); Cognac, Brandy de Jerez, Grappa di Barolo, Berliner Kummel, Genièvre Flandres Artois, Scotch Whisky, Irish Whiskey, Tsikoudia (from Crete) (all spirits); and a range of other products, such as Newcastle brown ale, Scottish beef, Orkney beef, Orkney lamb, Jersey Royal potatoes, Cornish Clotted Cream, Cabrales, Roquefort, Gorgonzola, Aziete de Moura, Olive de Kalamata, Opperdoezer Ronde, Wachauer Marille, Danablu, Lübecker Marzipan, Svecia, Queijo do Pico, Coquille Saint-Jacques des Côtes-d'Amour, Jamón de Huelva, Lammefjordsgulerod  
**Hungary:** Eger (wine), Szatmar (plum)  
**Liechtenstein:** Malbuner (meat products), Balzer (Hi-tech products)  
**Slovak Republic:** Korytnická minerálna voda (mineral water), Karpatská perla (wine), Modranská majolika (hand-painted pottery), Piešťanské bahno (healing mud)  
**United States:** Idaho, (potatoes and onions), Real California Cheese, Napa Valley Reserve (still and sparkling wines), Pride of New York (agricultural products), Ohio River Valley (viticulture area).

Source: WTO News – 1998 News Items ([www.wto.org](http://www.wto.org)); Rangnekar, 2002, p. 6.

**4.3   Measuring Value Added**

Geographical indications, like trademarks and other forms of intellectual property rights, permit to charge consumers a “premium” above marginal costs. How large such a premium could be is dependent on a number of factors, such as market size, degree of competition with substitutes, consumers perceptions about the linkage of an indication with product attributes, and demand elasticity. Some geographical indications may be suitable, for instance, to address “niche markets” (such as markets for “organic” products), though there are obvious limits to the size of such markets<sup>45</sup>.

For example, it has been noted that the selling price of the “Poulet de Bresse” is four times the price of the standard chicken. The olive oil “Riviera Ligure” (Italy) is sold for 30% more than the anonymous olive oil (Vital, 1999, p. 52). The price of “Roccamerano” cheese (from Alto Monferrato, Italy) is reported to have increased by 100% and the supply is insufficient to satisfy the growing demand (Pinna, 20002, p. 47).

A Eurobarometer poll, carried out from 29 October 1998 to 10 December 1998 in the 15 European Member States on a sample of 16.214 persons gave the following information:

“Question: “If the products of which the origin is guaranteed cost 10% more than

<sup>45</sup> In the 1990s, locally produced foodstuffs accounted for 10.6% of the total foodstuffs market in France, 10.7% in Italy, 6.7% in Spain and 5.2% in Portugal,. See, Rangnekar, 2002, p. 14.

those that you usually buy, would you buy them?, 43% answered YES.

“And if they cost 20% more” (question raised only to those which has answered YES the previous question), 19% answered YES.

“And if they cost 30% more” (question raised only to those which has answered YES the previous question), 31% answered YES” (Vital, 1999, p. 52).

As indicated by these examples, there are cases in which consumers exhibit a preference for authentic and distinctive products associated to a particular region, and are willing to pay a premium price. Sales of agricultural products and foodstuff under European protected designations of origin are reported to grow at a 5-10% rate a year, and to have reached Euro 7,7 billion in 2001, 56,8% of which corresponding to cheese and 36,9% to salami and ham. Almost 20% of the total (in value) was exported (Pinna, 2002, p. 45). The growth of market segments like “organic” is evidence that select consumers recognise and value the product-place association in foodstuffs. It has also been noted, however, that

“a range of developments involving packaging and preservation, processing and distribution, production and marketing, have fundamentally weakened the product’s territorial and land-based associations embedded in the consumer’s mind. The movement of products from their territory of origin and their production/processing in other locales suggests that in certain instances technical aspects of production/processing can override features of the product that are intrinsically linked to its area of origin” (Rangnekar, 2002, p. 14).

Different approaches have been developed to measure the economic value of intellectual property rights from a microeconomic and macroeconomic perspective<sup>46</sup>. The economic ‘value’ of an intellectual property right is, for the user thereof, the representation, on a given date, of all the future benefits obtainable from such a right, expressed as a single sum of money (Smith and Parr, 1994, p. 140). Such value is an objective and quantifiable concept based on the value added by the intangible assets protected by intellectual property rights. It is not, therefore, a subjective valuation (by the holder of the right or the user), but an estimate of the value of those intangible assets as reflected in factors’ remuneration.

Seeking to quantify the current and, particularly, the potential, value generated by the use of a geographical indication is an extremely difficult task, since different values may be added by such use depending on the sector of activity in question, the means of production and marketing methods applied, the types of products involved, and demand elasticity, among other factors. Often geographical indications improve the marketing conditions of luxury goods for which consumers are prepared to pay a price considerably higher than for substitutes, but this is not always the case. Hence, geographical indications, like trademarks, may in some cases play a decisive role in generating a premium over and above the price of equivalent goods, while in other cases their contribution cannot be distinguished from that attributable to the product in itself.

There are many possible ways of evaluating the value added by intellectual property at the

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<sup>46</sup> The following presentation - partially based on Correa, 2000- deals with the microeconomic perspective only.

enterprise level. These methods include the following:

#### **4.3.1 Price of the Final Product**

A series of studies on the economic value of intellectual property has sought to quantify its importance on the basis of the price that the consumer pays in the marketplace for the product or service. This provides an approximate, albeit rather rough, estimate of the value of the intangible asset linked to the product or service in question.

However, the price depends on the costs of production, distribution and marketing, including advertising, and also on the firm's profit margin. The greater the latter's market power (depending on the number of other suppliers, product differentiation, promotion and advertising) the greater the cost/benefit ratio is likely to be, though this does not necessarily reflect a greater value of the intellectual property. Conversely, an efficient producer who competes on the basis of price may achieve a final price lower than that of his competitors, which does not necessarily mean a smaller intellectual property content. In other words, the final price of the product that incorporates an intellectual property component is a poor indicator of the value of the intellectual property itself.

#### **4.3.2 The 'Market Value' Approach**

This approach is based on an examination of the price at which an intellectual property right may be exchanged within a context where the parties have freedom to contract (that is, where there is no compulsion to do so) and have reasonably full information, and where the price fixed is fair to both parties (that is, the terms obtained do not give one party an advantage over the other). Since geographical indications, by definition, can only be used by the producers located in a specific area<sup>47</sup>, this method does not provide much guidance in this context<sup>48</sup>.

#### **4.3.3 The Cost-Based Approach**

This method is based on the calculation of what would cost to construct a 'replica' of the asset in question. The replacement or reproduction cost is frequently used in the insurance sector for purposes of providing indemnification for a damage or loss incurred. The cost of an intellectual property asset may be calculated on the basis of an examination of the values corresponding to: (a) the original cost of acquisition; (b) the book value of the asset (if it has been recorded); and (c) an estimate of the investment that would be needed to attain a 'replica' of the right in question (in terms of generating net profits). The cost of 're-creating' the value of an intellectual property asset may be estimated by calculating the costs that would need to

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<sup>47</sup> An exception to this principle has been mentioned in relation to the licensing of the indication *Bleu de Bresse* to cheese producers in other countries. However, this evidence appears to be mistaken: according to French authorities the indication is not protected nor registered under the relevant legislation ([www.francefromage.com](http://www.francefromage.com)). See Rangnekar, 2002, p. 15.

<sup>48</sup> For this method to be applied there should ideally be an 'active' market with a certain number of transactions that can be taken as a basis of reference; information must be accessible on the terms of such transactions; and the values must be adjusted over a period of time with, in particular, to allow comparability between various transactions on intellectual property (Smith and Parr, 1994, pp. 144-5).

he incurred, such as overheads, advertising, etc.

The cost-based approach may be based on an estimate of the historic cost, that is, what has been invested in developing an intellectual property asset. In the case of a geographical indication, for example, such costs may include infrastructure and training for quality control, expenses for the acquisition and defense of rights, testing with potential consumers, research on consumer preferences, packaging, and costs for launching and advertising the product.

However, the cost of reproducing an asset may tell little about the *profits* that may actually be obtained from an asset. The cost of developing a new brand (to replace an existing one) may be higher or lower, depending on many different factors, than the profits that it may generate. In addition, the cost-based method, although relatively simple to apply, does not take into account such limitations as possible future market and profitability trends (Smith and Parr, 1994, p. 204).

#### **4.3.4 Contribution to Profits**

Another approach is based on the calculation of the contribution made by various forms of intellectual property to a firm's profits. Geographical indications may typically perform as an "active" intellectual property right, that is, a right that enables producers to generate a price differential ('premium price'). One of the general methods proposed as a means of measuring the contribution that intellectual property makes to the profits of a firm consists in breaking down its assets into four elements: firstly, monetary assets (net working capital); secondly, tangible assets (buildings, machinery, etc.); thirdly, intangible assets (skills and qualifications of the workforce, distribution networks, customers, contractual relations, etc.); and, finally, intellectual property<sup>49</sup>. The method is based on the calculation of the weighted average cost of capital, defined as the minimum weighted rate of return that should be generated for each element so as to satisfy the expectations of investors. The application of this method depends on access to the firm's economic and financial data. The economic benefits are assessed free of interest payments, so as to reflect exclusively the profits gained from the firm's commercial operations.

For the purposes of calculating the economic contribution of each element, in particular the contribution of intellectual property, a rate of return is assigned to each of the assets mentioned above. That means allocating a value to each kind of asset, taking as a basis the book (accountancy) value and calculating the 'excess' profits defined as the residual capital flow value obtained over and above that attributable to the normal returns in the type of business in question<sup>50</sup>.

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<sup>49</sup> As noted above, the use of a geographical indication may be combined with a trademark owned by a particular producer.

<sup>50</sup> Obviously, various difficulties arise in the application of this method. Firstly, firms may market a range of products and services that are affected in various ways by intellectual property rights. Secondly, it is not easy to determine what the profit is and, therefore, the rate of 'normal' return in any particular industry. Thirdly, it is not easy either to estimate the asset value of the intangible assets and the intellectual property, as a basis for calculating the rate of return.

#### 4.4 Costs

Creating value in the market through a geographical indication normally requires *investment* such as in production methods, development of reliable supplies of raw materials, quality controls, etc. Hence, there are costs to be borne by title-holders of geographical indications –whether States or private parties- that may not be trivial.

Exploiting a geographical indications also requires an effective marketing effort to guide and develop consumer perceptions. As noted by Tregear et al (1998),

“... consumer perceptions of regionality are tied closely to perceived authenticity. More specifically, official designation of a food as regional may not be sufficient to convey authentic regionality to consumers: consumers also appear to infer regionality from, for example, a product’s physical attributes, place of purchase or consumption and communicated heritage. Marketing techniques are critical therefore in conveying authenticity and enhancing the attractiveness of regional foods. The success of policy measures such as EU 2081/92 or regional food promotion schemes may therefore hinge upon careful consideration and implementation of wider marketing techniques for regional foods” (p. 392)<sup>51</sup>.

In addition to direct investment, the use of a geographical indication requires control by an authority (or owner of a certification mark) in order to ensure that the characteristics of the products and quality standards are met. For instance, for the recognition of a quality wine under an appellation of origin, it is necessary, taking into account the traditional conditions of production, to define and verify for each quality wine

- the delimitation of the production area;
- vine varieties;
- cultivation methods;
- minimum natural alcoholic strength by volume;
- yield per hectare;
- analysis and assessment of organoleptic characteristics (Vital, 1999, p. 56).

The sophisticated system of verification for quality wines applied in South Africa is described in Box 4<sup>52</sup>.

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<sup>51</sup> Quoted in Rangnekar, 2002, p. 14.

<sup>52</sup> See also van Niekerk, 1999, p. 79-88.



**Box 4: CERTIFICATION SYSTEM FOR WINES IN SOUTH AFRICA**

Officials who are appointed in terms of The Liquor Products Act, are given the right to take random samples of alcohol products from both the premises of producers and from liquor outlets and to analyze these so as to ensure that each product complies with all legal requirements, and that it carries no prohibited indications or indications which the producer is not entitled to use, and no misleading indications. Where such samples are found to contravene the legislation, the officials are entitled to seize the products and call upon the responsible persons to rectify the defects, failing which, criminal proceedings could be instituted. This does not extend only to wines intended for the domestic market, but to all wines intended for export, where origin-related-claims must be substantiated and certificates of origin issued by the Wine & Spirits Board. No claims on origin may be made, unless such claim has been verified and certified by the Wine & Spirit Board.

Where a producer intends producing a wine of origin, he is obliged to notify the Board of his intention to do so before harvesting grapes, and to give the relevant officials of the Board an opportunity to verify the origin and cultivar of the grapes concerned. This ensures that the claims of the producer are true from the outset and adhered to throughout the production process. On applying for final certification, the Board requires that samples of all labels are submitted to it and checks each and every indication on the labels to ensure that all legal requirements have been met, correspond with the product, and are not prohibited or misleading.

Source: Stern, 1999, p. 34.

The verification of compliance with established standards generally require the regular testing of samples. In some cases, an authority certifies (and mark with a seal) origin and quality. The costs of such activities may be financed via a fee charged on producers or supported by States. However, the implementation of controls may not be simple, since it may require a large number of trained people to undertake inspections and penalize deviations from approved standards, while ensuring that such standards are controlled and applied in a uniform manner<sup>53</sup>.

Finally, in addition to the cost associated to the acquisition of rights over geographical indications, and of those necessary to defend the indication against infringement or loss of its distinctive character (see next section), countries introducing protection in this field should consider the possible losses emerging from the closing down of domestic activities based on the use of foreign geographical indications that become protected. Such losses may be more or less significant depending on the circumstances, and on the extent to which the exceptions allowed by the TRIPS Agreement are provided for and applicable.

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<sup>53</sup> Some Italian producers of "zucchine" of Liguria and Sannio, have been reported, for instance, to have abandoned their attempts to get recognition of a geographical indications, in view of the severe controls required (Panni, 2002, p. 47).

## 5. PROTECTING GEOGRAPHICAL INDICATIONS FROM CARICOM COUNTRIES

In examining the costs and benefits for CARICOM countries of protecting geographical indications, several legal and economic factors need to be taken into account. In doing this analysis, due consideration should be given to the different types of geographical indications that may be protected and to the diverse modalities of protection that may be applied. For instance, registration-based systems are likely to entail higher transaction costs than systems based on the regulation of business conduct.

### 5.1 Identifying Geographical Indications

A geographical indication, unlike a trademark, is identified rather than “created”. The same term may be differently perceived by different linguistic communities across countries or within one country. The fundamental question is, in effect, the extent to which a certain name (or symbol) serves to *identify a good as originating in a certain location*. Any claim for protection of a geographical indication critically hinges on whether it effectively indicates a link between certain goods and a location (Taubman, 2001, p. 6-7). For instance, some developing countries have in the last few years identified geographical indications, such as “Basmati” rice (India), “Nuoc mam” (fish-based sauce from the island of Fu Quoc, Vietnam). “Long Jin” tea (China)<sup>54</sup>, “Chuau cacao” and “Cocuy Pecayero” spirit (Venezuela)<sup>55</sup>.

Possible candidates (subject to further examination) of geographical indications in the CARICOM may be the following<sup>56</sup>:

Stan Creek	(the name of a place in Belize that produces pepper sauces for export to the US)
Mayan King	(also used on a product from Belize)
Hairoun	(a native Amerindian word used on a beer)
Demerara	(sugar – and other products)
Blue Mountain Coffee	(a Jamaican product popular in Japan)
Sea Island Cotton	(long fibred cotton often blended with other shorter fibred cottons)
Caribbean rums	(rum produced in most islands in the region)
Montserrat Hills	(Trinidad's high quality cocoa beans)

The extent to which claims on these names can be articulated, will depend on its identification function, subject to national law and to the laws of countries where protection is potentially sought. Possible conflicts with existing trademarks should be carefully investigated.

### 5.2 Designing the Domestic Regime

As mentioned, there are different modalities for the protection of geographical indications. There are two basic approaches: establishment of a *sui generis* form of protection for geographical indications, as provided for in continental Europe, or application of a common-

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<sup>54</sup> See, e.g., Girardeau, 1999, p. 75.

<sup>55</sup> See Vivas Eugui and Ruiz Müller, 2001, p. 14.

<sup>56</sup> Communication by M. Spence, July 1, 2002.

law approach based on certification trademarks and other regulations on business conduct. The main differences between the *sui generis* and trademark law are summarized in Table 2.

**Table 2: DIFFERENCES BETWEEN THE *SUI GENERIS* AND THE CERTIFICATION TRADEMARK SYSTEMS**

<i>Sui Generis</i> Protection	Certification Trademark (CTM)
<p>The indication belongs to the State and the administration corresponds to the regulating authority. It is a public or a private property right.</p> <p>Mainly designed to protect identification of the origin and its link with quality and reputation. Must be protected as from date of registration up until the conditions that justified protection persist.</p> <p>Protection for GIs is based on <i>ex officio</i> and private actions.</p> <p>They have regulation for homonymous GI. Inspection is performed by an independent agency or government.</p> <p>There is no automatic collateral protection against use in other products.</p>	<p>It is a private right, but governments may own TCM. The property and the administration belongs to an association of manufacturers or producers, or to government.</p> <p>They are designed to certify quality, characteristics, origin, materials, etc.</p> <p>They have to be renewed after a certain period of time. Fees have to be paid for each renewal. The protection of CTM is based on actions by TCM owners.</p> <p>The issue of homonymous CTMs does not exist. There must be just one right holder. Inspection is performed by the TCM owner, government or another authorized party.</p> <p>They have collateral protection, against use in other products.</p>

Source: based on Vivas Eugui, 2001; OECD, 2000, p. 9-10.

One key difference between certification marks and geographical indications protected under a *sui generis* regime (like European appellations of origin), is that in the latter case the group or association of producers must demonstrate the existence of a special link between the characteristics of the product and its geographical origin, and

“must also undertake that production, processing and preparation will take place in the geographical area specified. These conditions do not apply for registration of a certification mark which is based on the intention of the group and which is free to define the rules for users in line with the characteristics it chooses. This does not exclude the possibility that the owner of a certification mark includes, should he so wish, the existence of a special tie between the characteristics of the product and its geographical origin in the certification standards of the product” (OECD, 2000, p. 10).

Though in the case of certification marks, the owner may perform verification of compliance with users’ rules, this is often done by the government or a government authorized agency. Geographical indications are deemed to belong (under a special regime or certification marks) to governments and not private parties. Public intervention is important for three main reasons:

- preserving the freedom of all producers in the region to use the geographical indication, provided they comply with the established requirements for that purpose;
- preventing abuses or illegal uses of the indication, including non-conformity of products with norms, a task that generally rests with (regional or local) governments;
- enforcing the rights domestically and in foreign countries, either by the producers themselves or through the government (e.g. a public prosecutor).

In the USA, for instance, it is considered that normally a private individual is not in the best position to preserve the freedom of all persons in the region to use the term, and to prevent abuses or illegal uses of the mark which would be detrimental to all those entitled to use the mark. Hence,

“The government of a region would be the logical authority to control the use of the name of the region. The government, either directly or through a body to which it has given authority, would have power to preserve the right of all persons and to prevent abuse or illegal use of the mark “ (Rademeyer, 1999, p. 42- 43).

Another important aspect to comparatively examine *sui generis* protection vs. certification marks is the extent to which any producer in the designated geographical area is able to use the protected indication, provided that the user rules (for the certification mark) or the product specifications (for the appellation of origin) are complied with. While *sui generis* systems, in principle, provide for such a possibility, laws on certification marks may offer similar opportunities. For instance, in Canada, one section of the trademark law deals specifically with *certification marks descriptive of the place of origin*. If a certification mark is descriptive of the place of origin, the owner (the administrative authority of a country, state, province or municipality, or a commercial association having an office or representative in that area) shall permit the use of the mark in association with any wares or services produced or performed in the area of which the mark is descriptive (OECD, 2000, p. 20).

However, under any of such systems collusive conduct to limit entry by new producers, or to perform other anti-competitive practices, is possible and has been determined in a number of cases in European countries (OECD, 2000, p. 15-20). This suggests that the establishment of protection for geographical indications –like other titles of intellectual property - should be accompanied by *effective competition policies*, an area in which most developing countries are still rather weak<sup>57</sup>.

It should be noted that the potential use of geographical indications to protect traditional (including indigenous) knowledge has been raised in many fora and examined by many commentators<sup>58</sup>. However, though the use of a geographical indication may be associated to the use of certain traditional knowledge (for instance, a particular process that determines peculiar characteristics of a product) a geographical indications *does not protect the underlying knowledge as such* which –in the absence of other forms of protection- could be used by third

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<sup>57</sup> In many developing countries, including the Caribbean, no competition laws have been enacted, while in many others there is little tradition in effectively applying competition laws. See, e.g. Correa, 1999.

<sup>58</sup> See, e.g. GRULAC, 2000; Correa, 2001; WIPO document GRTKF/IC/3/7.

parties without restrictions based on the existence of such indication. This means that the title-holder/s of a geographical indication may prevent, where their rights are recognized, the commercialization of the same products under their indication, but not competition from firms that use their knowledge and sell under a different name or trademark.

### 5.3 Protecting Geographical Indications Abroad

Whatever the domestic form of protection is, given that no true international protection exists for geographical indications, any country wishing to protect its own indications abroad would have to comply with the laws and regulations of *each* country where protection is sought. This implies to accommodate the demand for protection to the particular legal system applied in the targeted country.

In some cases, protection requires a formal application and registration of the indication. In others (including countries where special protection is available) no registration is needed. The procedures to be followed, the substantive provisions to be complied with, as well as the remedies available for cases of infringement, may also vary according to the products involved. For instance, in Europe there exist only two specialized regulations at the European level, one for wines and spirits and the other on agricultural products and foodstuffs<sup>59</sup>. There is no general European protection for geographical indications; therefore, national laws should be complied with for other products<sup>60</sup>. In addition, foreign geographical indications may not be fully subjected to the national treatment principle enshrined in the Paris Convention and the TRIPS Agreement<sup>61</sup>.

In the USA, as mentioned, geographical indications are protected under the trademark law, but wine related geographical indications are regulated under the Federal Alcohol Administration Act and the regulations issued by the Federal Bureau of Tobacco, Alcohol & Firearms<sup>62</sup>. In the

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<sup>59</sup> Foodstuffs include beer, natural mineral waters and spring waters, beverages made from plant extracts, bread, pastry, cakes, confectionery, biscuits and other baker's wares, natural gums and resins; agricultural products include hay; essential oils; cork; cochineal (raw product of animal origin) Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (Annexes I and II).

<sup>60</sup> Some national laws also contain provisions with regard to particular types of *use* of geographical indications, such as advertising, labeling, and the sale of products that do not meet the requirements for use of a geographical indication (see IP/C/W/253, para. 107).

<sup>61</sup> Thus, the USA requested consultations under the WTO dispute settlement rules, regarding the protection of trademarks and geographical indications for agricultural products and foodstuffs in the European Communities. The US stated in its request that "the European Communities' Regulation 2081/92, as amended, does not provide national treatment with respect to geographical indications, and does not provide sufficient protection to pre-existing trademarks that are similar or identical to a geographical indication. This situation appears to be inconsistent with the European Communities' obligations under the TRIPS Agreement, including but not necessarily limited to Articles 3, 16, 24, 63 and 65 of the TRIPS Agreement" (IP/D/19).

<sup>62</sup> See, e.g. O'Brien, 1997, p. 163. The Bureau of Alcohol, Tobacco and Firearms (ATF) controls the terms that may be used on the label of any wine or spirits sold in the United States. ATF maintains a list of geographical indications that have been notified by third countries. There are more than 400 geographical indications from Europe on their list. No one, except the listed owner, can use such a geographical indication on a label approved by ATF (Beresford, 1999, p. 45).

case of the Andean Community Regime Decision 486,<sup>63</sup> there is both a special protection for geographical indications and certification marks. This permits the protection of foreign geographical indications as such and foreign certification marks as certification marks only. Cross protection is not allowed<sup>64</sup>.

The acquisition of rights over geographical indications in foreign countries, therefore, requires dealing with different legal systems, and is likely to require substantial resources and sophisticated expertise.

## **5.4 Enforcement**

Things are further complicated when there is a need to effectively enforce a geographical indication in a foreign country, assuming that the conditions for acquiring the respective rights have been met.

In some countries, public authorities have the right, or the duty, to initiate enforcement proceedings, but this is not always available for the benefit of foreign geographical indications<sup>65</sup>. Right holders would normally need to initiate such proceedings, which are generally very costly and lengthy<sup>66</sup> especially when –as it is the case under many national laws– the plaintiff has to prove false or deceptive use, or compliance with the specified conditions for use of a geographical indication. Of course, systems with prior registration may imply significant costs for acquiring the rights, but this may lead to smaller costs for enforcement.

The remedies available against infringement significantly differ across countries. As mentioned, the TRIPS Agreement leaves Members wide flexibility to determine both the mode of protection and the scope of the rights conferred. In some cases, such as when the discipline of unfair competition is applied, no exclusive rights are conferred, but only the right to prosecute those responsible for unfair commercial practices.<sup>67</sup>

## **5.5 Bilateral Agreements**

An option that may be explored to ensure the protection of geographical indications abroad is to negotiate bilateral agreements with other countries. The European Union, not surprisingly, has been active in promoting such agreements<sup>68</sup>, particularly for wines. According to article 46.4 of the Cotonou Agreement

“The Community, its Member States and the ACP States may consider the conclusion of agreements aimed at protecting trademarks and geographical indications for products of particular interest of either Party”.

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<sup>63</sup> Andean Decision 486 on Industrial Property. 14 September 2000.

<sup>64</sup> See, e.g. Vivas Eugui, 2001.

<sup>65</sup> See IP/C/W/253, para. 100 and 136; see also De Sousa, 2001, p. 10.

<sup>66</sup> In the USA, for instance, the costs of a typical patent infringement suit are estimated to run to \$1-3 million; moreover, litigation is a lengthy process (see Correa, 2002).

<sup>67</sup> See, e.g. Ladas, 1975; Kamperman Sanders, 1997.

<sup>68</sup> It concluded agreements, for instance, with Australia, Hungary, Bulgaria, Switzerland and Romania.

Of course, entering into such bilateral agreements would generally mean the recognition of foreign geographical indications, probably a large number thereof if the European Union is a counterpart. As mentioned before, unless appropriate exceptions (as allowed by the TRIPS Agreement) for names in common use are established, the recognition of such foreign indications may, in some cases, prevent the continuous use of a certain denomination by domestic industries, with the ensuing losses in terms of employment and value added.

## **6. DEVELOPING A NEGOTIATING STANCE IN WTO AND FTAA**

### **6.1 Debates in WTO**

The debates on geographical indications at the Council for TRIPS have covered three broad areas<sup>69</sup>: review under article 24.2, further negotiations (article 24.1) and establishment of a multilateral system of notification and registration for wines (article 23.4)<sup>70</sup>.

### **6.2 Review under Article 24.2.**

The examination of laws and regulations started in November 1996 for those Members obliged to comply with the TRIPS Agreement at that time. A checklist of questions was prepared concerning national protection of geographical indications, and 37 sets of responses were received. A summary paper based on such responses was prepared by the WTO Secretariat, upon the Council's request<sup>71</sup>. Such examination showed significant differences in the way of implementing the provisions on geographical indications at the national level (Wasescha, 1999, p. 23).

Considerable debate has surrounded the scope of the review under article 24.2 of the TRIPS Agreement. For some developing and developed countries, the mandate to "review the application of the provisions of this Section" includes not only an examination of the implementation of such provisions by Members but also provide an opportunity for possible changes in those provisions in order to improve available protection. However, this view is not shared by all Members. As a result, there are two main positions on article 24.1.

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<sup>69</sup>It is also important to note that work on geographical indications has also taken place in the framework of WIPO. At its fifth session, the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications considered a study prepared by the International Bureau on possible solutions for conflicts between geographical indications and trademarks, and for conflicts between homonymous geographical indications (SCT/5/3). However, the Committee did not comment on the substance of that paper, but asked the International Bureau to supplement it and to add issues such as the historical background of the protection of geographical indications, a clarification of the nature of the rights in geographical indication, a discipline of the different existing systems for the protection of geographical indications and an investigation of the problems existing in obtaining effective protection for geographical indications in other countries. This paper (SCT/6/3) was prepared by the International Bureau and submitted to the SCT at its sixth session. Discussion of that paper will continue at the seventh session of the SCT.

<sup>70</sup> This latter issue is considered below, in section 7.

<sup>71</sup> See Review under article 24 of the application of the provisions of the section of the TRIPS Agreement on geographical indications. Summary of the responses to the checklist of questions (IP/C/13 and ADD. 1), IP/C/W/253.

- (1) any review or negotiation must fall under the principles of increasing protection and not refusal of present or future negotiations;
- (2) there is no link between the review and negotiations for increased protection or the establishment of a multilateral register on wines<sup>72</sup>.

### **6.3 Further Negotiations**

Article 24.1, as mentioned above, provides for further negotiations aimed at “increasing the protection of individual geographical indications under article 23”. Strong differences on the interpretation of this mandate have emerged at the Council for TRIPS.

#### **(a) Extension of Protection for Products other than Wines and Spirits**

For a group of countries, negotiations within WTO should aim at *increasing* protection for products other than wines and spirits. Proposals have been made for the expansion of the product areas that must benefit from the higher level of protection presently only required under the TRIPS Agreement for wines and spirits to other agricultural and handicraft products, for example, rice, tea, beer, etc.

Those proposals aim at obtaining for other products the same type of “absolute” protection conferred to geographical indications for wines and spirits. A distinct advantage of such protection is that there is no need to prove unfair commercial practices or that the public is misled (as is the case under Article 22). Any person or entity that does not produce within the territory alluded by a geographical indication could be prevented from using the corresponding denomination. This, of course, enormously facilitates the enforcement of rights, though right holders must still face the substantial costs that litigation in the intellectual property area generally entails. A further advantage of absolute protection is that it would permit *ex officio* action by a WTO Members against false indications of origin, thus reducing the cost of protection in foreign markets.

Several developed and developing countries have indicated interest in an extended protection. Turkey (WT/GC/W/249) and the Czech Republic, for instance, have demanded an additional protection for specific foodstuffs and handicraft products. In the case of the latter, it especially seeks an enhanced protection “for beers which are particularly vulnerable to imitation, counterfeit and usurpation and whose protection of such indications against consumer deception is insufficient and trademark protection is not satisfactory due to its formal requirements such as registration and the use requirement” (WT/GC/W/206).

The Indian delegation has argued that:

“it is an anomaly that the higher level of protection is available only for wines and spirits. It is proposed that such higher level of protection should be available for goods other than wines and spirits also. This would be helpful for products of export interest like basmati rice, Darjeeling tea, alphonso mangoes, Kohlapuri slippers in the case of

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<sup>72</sup> See Vivas Eugui, 2000.



India. It is India's belief that there are other Members of the WTO who would be interested in higher level of protection to products of export interest to them like Bulgarian yoghurt, Czech Pilsen beer, many agricultural products of the European Union, Hungarian Szatmar plums and so on. There is a need to expedite work already initiated in the Council for TRIPS in this regard, under Article 24, so that benefits arising out of the TRIPS Agreement in this area are spread out wider" (WT/GC/W/147).

The proposals relating to the expansion of the products covered by an additional protection have been supported by a number of developing countries, such as Egypt (WT/GC/W/136), Cuba, Dominican Republic, Honduras, Indonesia, Nicaragua and Pakistan (WT/GC/W/208), the African Group (WT/GC/W/302) and Venezuela (WT/GC/W/282). Bulgaria, the Czech Republic, Egypt, Iceland, India, Kenya, Liechtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey also presented a document<sup>73</sup> supporting an extension to other products and proposing a "basket approach" that would take into consideration the issue of extension as a full component of the built-in agenda<sup>74</sup>.

#### **(b) Increasing protection for individual geographical indications**

For another group of countries, there is no mandate under article 24.1 to extend the "absolute" protection conferred to wines and spirits to other products. As noted above, the Doha Ministerial Conference decided to address this issue as part of the "Implementation-related issues and concerns" defined by the WTO Doha Ministerial Conference<sup>75</sup>. However, Argentina indicated that the extension of geographical indication to products other than wines and spirits can not be treated as part of the "outstanding implementation issues" and that "consensus will be required to launch negotiations on these issues"<sup>76</sup>.

The proposals for extending protection have found opposition from many developed and developing countries, such as USA, Australia, and Argentina. The main arguments of Members that propose and reject an extension of protection are summarized in Table 3.

<sup>73</sup> IP/C/W/204/Rev.1

<sup>74</sup> See, e.g. Vivas Eugui, 2000.

<sup>75</sup> Ministerial Declaration, WT/MIN(01)/DEC/1, para. 12 and 18.

<sup>76</sup> Communication from Argentina, WT/MIN(01)/W/8. Other countries, however, responded that negotiations on the extension of protection did not require additional consensus. See the Communication from Bulgaria, Kenya, India and Sri Lanka, WT/MIN(01)/W/9, 13 November 2001, and the Communication from Bulgaria, the Czech Republic, the European Communities and its Member States, Hungary, Liechtenstein, Kenya, Mauritius, Nigeria, Pakistan, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey, WT/MIN(01)/W/11. 14 November 2001.

**Table 3: ARGUMENTS PRO AND AGAINST INCREASED PROTECTION TO PRODUCTS OTHER THAN WINES AND SPIRITS**

<b>For increased protection</b>	<b>Against increased protection</b>
<p>(a) additional protection of geographical indications for all products adds value for exports because it increases the chances of market access for such goods;</p> <p>(b) without the additional protection, free-riding is possible and there is a risk that geographical indications will become generic over time;</p> <p>(c) the test contained in Article 22, which currently applies to products other than wines and spirits, leads to legal uncertainty in the enforcement of protection for geographical indications;</p> <p>(d) Article 22 places a costly burden of proof on the producer entitled to use a geographical indication to show that the public has been misled, or that there has been an act of unfair competition.</p>	<p>(a) the legal and administrative costs associated with extending the scope of Article 23.1 would be significant;</p> <p>(b) there is no evidence of failure of Article 22 to protect geographical indications for products other than wines and spirits;</p> <p>(c) there is no evidence to indicate whether extending the scope of Article 23.1 to products other than wine and spirits would result in more effective protection than is already afforded to those products under Article 22;</p> <p>(d) additional protection could close-off future market access opportunities for emerging industries and result in uncertainty concerning the continued use in existing markets;</p> <p>(d) consumer confusion would be caused through the disappearance of terms customarily used to identify products which will, in turn, increase search and transaction costs for consumers and potentially prices as well.</p>

Source: De Sousa, 2001, p. 8-9.

## 6.4 Proposals for the FTAA

Several proposals have been made in the context of negotiations of a Free Trade Agreement for the Americas (FTAA) in relation to geographical indications<sup>77</sup>, which show great differences among the parties on the level of protection to be accorded. While some parties look for standards that would essentially reproduce those established by the TRIPS Agreement, others aim at strengthening protection beyond such standards. For instance, it has been proposed that geographical indications and appellations of origin on “natural, agricultural, handcraft or industrial products” of each of the Parties be recognized in the other States “for exclusive use in products originating in that location”. Further, “appellations of origin protected in one Party shall not be considered common or generic for distinguishing a good

<sup>77</sup> See, e.g. FTAA.TNC/w/133/Rev.1, July 3, 2001.

while it continues to be protected in the country of origin”.

It has also been proposed that the declaration of protection of an appellation of origin “be made *ex-officio* or at the request of persons who can prove a legitimate interest, understood as a natural or juridical persons directly engaged in the extraction, production or manufacture of the goods to be covered by the appellation of origin as well as producer associations. State, departmental, provincial or municipal authorities shall also be considered interested parties when the appellations of origin in question are located within their jurisdiction”.

According to one of the tabled proposals, Article 6<sup>bis</sup> of the Paris Convention (which deals with well-known trademarks) should apply, *mutatis mutandis*, to geographical indications. In determining whether a geographical indication is well-known, Parties should take account of the knowledge of the geographical indication in the relevant sector of the public, including knowledge in the Party concerned which has been obtained as a result of the promotion of the geographical indication. It has also been suggested that Parties should not require that the reputation of the geographical indication extend beyond the sector of the public that normally deals with the relevant goods or services, or that the geographical indication be registered.

Finally, it has also been proposed to extend protection against the use of trademarks that reproduce, imitate or include a protected appellation of origin for the same goods or for *different* goods where such use “would result in a likelihood of confusion or of association with the appellation, or taking an unfair advantage of their good will”.

The strong differences revealed by the proposals so far made suggest that the debates already going on in WTO may be reproduced in the context of the FTAA. Unlike in the case of patents and other categories of intellectual property rights, a divide between the developed (USA and Canada) and the developing countries of the Americas is unlikely in the area of geographical indications, since the USA does not consider itself a beneficiary of a GIs system nor does it share the European rationale for the protection of geographical indications (Vivas Eugui, 2000). Rather, alliances may arise between those developing countries in the region favoring an expansion of protection for products other than wines and spirits (such as Dominican Republic, Honduras, Nicaragua) and those countries opposing to any changes in the TRIPS standards or to levels in FTAA higher than in the TRIPS Agreement.

One of the arguments of those opposing TRIPS-plus levels of protection in FTAA is that, because of the applicability of the most-favored-nation clause, any concession made within FTAA will have to be immediately and unconditionally extended to all other Members of WTO. Many see the European countries as the main potential beneficiaries of TRIPS-plus standards of protection for geographical indications and consider that, in the light of the continuous protectionist European policies in agriculture, such a concession would confer Europe an advantage without any trade compensation on the European side, and reduce the negotiation capacity of FTAA countries vis-a-vis the European Union in the current WTO Round and in bilateral agreements.

Unless particular interests in increasing protection are identified, CARICOM countries should strategically seek to keep the standards of protection in this field in line with those admitted under the TRIPS Agreement, as reflected, for instance, in the legislation of Trinidad and Tobago.

## 7. ESTABLISHMENT OF A MULTILATERAL SYSTEM OF NOTIFICATION AND REGISTRATION

Significant differences exist with regard to the ways for implementation of article 23.4, which mandates the establishment of an international notification and registration system for wines.

The coverage of the proposed system has been one of the areas of controversy. While said article only refers to *wines*, some Members<sup>78</sup> have sought to develop a system covering *spirits* as well<sup>79</sup>. In fact, the WTO Doha Ministerial Conference agreed “to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference” (para. 18)<sup>80</sup>.

The European Communities and their Member States proposed<sup>81</sup> an international registration system for such indications where under registered indications would be automatically protected in the participating Members, subject to a procedure for dealing with oppositions from each Member who considers that a geographical indication is not eligible for protection in its territory (Box 5).

### **Box 5: EC PROPOSAL FOR A REGISTRATION AND NOTIFICATION SYSTEM**

#### *Submission (i.e., application)*

Members wishing to avail themselves of the registration facility may send applications to the WTO Secretariat with the list of geographical indications recognized and protected in their country of origin and elements of proof that the geographical indication corresponds to the definition of Article 22.1 of the TRIPS Agreement;

Members will have to notify the WTO Secretariat regional and multilateral agreements as well as the list of geographical indications.

#### *Notification*

By the WTO Secretariat of the dossier (list of indications and elements of proof) to all WTO Members.

#### *Opposition procedure*

Time limit for opposition: 1 year.

<sup>78</sup> Notably Mexico and the United States on account of their production of tequila and bourbon, respectively (Vivas Eugui, 2000, p. 210).

<sup>79</sup> The Ministerial Declaration of Singapore (1996) had endorsed the Council for TRIPS report, which in its para. 34 stated that “... in regard to geographical indications ... The Council will initiate ... preliminary work on issues relevant to the negotiations specified in Article 23.4 of the TRIPS Agreement for wines. Issues relevant to a notification and registration system for spirits will be part of this preliminary work ... [which] would be conducted without prejudice to the rights and obligations of members under the TRIPS Agreement”.

<sup>80</sup> See Ministerial Declaration, WT/MIN(01)/DEC/1, para. 18.

<sup>81</sup> See IP/C/W/107, 28 July 1998.

Grounds for refusing protection:

- the name does not fulfill the requirements of a geographical indication under Art. 22.1 of the TRIPS Agreement;
- the geographical indication is not protected in the country of origin;
- the geographical indication has become a generic or is the customary name of a grape variety in the third country on 1 January 1995;
- the geographical indication, although literally true falsely represents that the goods originate from the territory.

*Negotiation between the parties*

\*In case of homonymous indications;

\*In case of prior use of trademarks.

*Legal effects*

\*full and indefinite protection of geographical indications one year after notification in all WTO Members;

\*no effect pending opposition procedure;

\*opposition mechanism (yet to be developed);

\*in case of successful opposition, the Member is not obliged to apply the principle of full and indefinite protection.

*Publication*

\*definitive lists of geographical indications to be published (one for wines and one for spirits), including references to the relevant national legislation;

\*updating when additional lists of geographical indications.

*Alterations (i.e., changes) in the multilateral register*

\*addition of new geographical indications;

\*possibility for each Member to request re-examination of a geographical indication in two cases: the indication has ceased to be protected or it has fallen into disuse.

Source: (Wasescha, 1999, p.25)

The EC proposal would lead to a significant strengthening of the international protection of geographical indications, particularly as it would ensure indefinite protection of all internationally registered indications, one year after notification, in *all* WTO Members.

On the other hand, United States and Japan envisaged the development of an international database of geographical indications to which Members would be expected to have reference in the operation of their national systems. The US-Japanese proposal was later on endorsed by Canada and Chile<sup>82</sup>. The main characteristics of this system are described in Box 6.

<sup>82</sup> See IP/C/W/133 of 11 March 1999 and 133/Rev.1 of 26 July 1999.

**Box 6: US-JAPAN PROPOSAL FOR A REGISTRATION AND NOTIFICATION SYSTEM**

Notification
<ul style="list-style-type: none"> <li>• The system proposed is voluntary and participation in the system can be terminated at any time;</li> <li>• A Member wishing to participate submits a list of domestic geographical indications for "covered products", with an indication of the date, if any, on which protection will expire;</li> <li>• All other multilateral agreements under which each of the notified geographical indications is protected;</li> <li>• Notifications are to be made once or twice a year to avoid an administrative burden.</li> </ul>
Registration
<ul style="list-style-type: none"> <li>• The registration system proposed consists in a data base compiling all notified geographical indications for covered products;</li> <li>• Two identical or similar geographical indications may be submitted by more than one Member, provided the indication is recognized by each notifying Member in accordance with its national regime;</li> <li>• Transparency is ensured through distribution of lists of geographical indications to all Members and through the WTO web site;</li> <li>• The WTO Secretariat is in charge of the administrative management of the database (additions, deletions) on the basis of the notifications.</li> </ul>
Legal Effects
<ul style="list-style-type: none"> <li>• Participating Members agree to "refer to" the WTO lists of notified geographical indications for covered products when making decisions to provide protection for geographical indications for such products in accordance with their national legislation;</li> <li>• Appeals from, or objections to, any decision (grant or rejection) concerning a particular geographical indication must be made at the national level at the request of appropriate interested parties;</li> <li>• Notwithstanding the above (i.e., whether there is a registration or not in the data base), geographical indications in accordance with national legislation are entitled to protection under Section 3.</li> </ul>
Review
After two years from the establishment of the system.

Source: (Wassescha, 1999, p.26).

This proposal aims at not creating additional obligations (or diminish the rights and obligations) contained in Section 3 of the TRIPS Agreement, and at not imposing burdensome procedures on Members and the WTO Secretariat. The system is based on a voluntary approach.

Finally, Hungary suggested the involvement of WIPO in order to alleviate the administrative burden of management a new notification and registration system<sup>83</sup>, and proposed alternative approaches to the system delineated by the EC and their Member States (see Box 7).

<sup>83</sup> See Wassescha, 1999, p. 27).

**Box 7: HUNGARIAN PROPOSAL**

The system proposed by the EC involving direct bilateral consultations in the case of disagreement regarding registration of a geographical indication should be supplemented with a multilateral procedure that would apply where bilateral negotiations do not yield a settlement. In justification of its proposal, Hungary has stated that, amongst other things, the possibility to seek a solution of a multilateral character is necessary to ensure that smaller WTO Members enjoy the same opportunities for representing their legitimate commercial interests as larger ones. Under the proposal, if, within the 18-month period prescribed under the EC proposal, negotiations following a Member's challenge of a notified geographical indication have not led to a mutually satisfactory result, the dispute will be submitted to binding arbitration. Geographical indications that have been successfully challenged on the basis of the definition contained in Article 22.1 or because they are false pursuant to Article 22.4 will not be registered. Members who successfully challenge protection on the basis of the exception for generic terms (Article 24.6) will not have to protect the geographical indication, even though they cannot prevent entry of the geographical indication in the register on this ground. The same would apply in respect of challenges based on the exceptions contained in Article 24.4 for prior use and Article 24.5 for pre-existing trademarks. Registration will only have effect in Members participating in the system.

Source: Taubman, 2001, p. 6.

Developing countries have not submitted a proposal on their own on this issue. Though, as mentioned, some of them actively pursue the enhancement of protection for products other than wines and spirits, others oppose it. If other proposals are not made and developing countries remain divided, in the end they may have to support the European or the United States and Japan proposal on the matter.

**8. IMPLICATIONS FOR CARICOM COUNTRIES**

In the light of the previous analysis, some conclusions and recommendations relevant for CARICOM countries may be drawn.

Great regulatory diversity exists in the field of geographical indications. Legal concepts, modes of protection and available remedies significantly vary among countries, despite the minimum standards adopted by the TRIPS Agreement. This means that there is considerable leeway for WTO Members to devise their own systems of protection, but also that obtaining the international recognition of domestic geographical indications is a very complex task.

Members may opt for *sui generis* systems of protection or for applying other disciplines, such as regulations controlling business acts or trademark law. Collective or certifications marks may be used to protect geographical indications. Considerable differences in relation to, *inter alia*, specifications for use, control, defense, and duration exist between these two approaches.

A geographical indication cannot be *created* but it can be *identified* and *developed*. Its recognition depends on the public perception, and its value on proper management of production and commercialization.

The use of geographical indications may allow Members to charge a premium price for indicated products, as consumers may be willing to pay more for products of certain origin (given perceived superior or particular attributes). Such premium would vary according to the type of product and market situation. A particular market study *per product* will be required to estimate the possible value added by the use and protection of Caribbean geographical indications.

The protection of geographical indications may bring benefits but also entails costs, namely:

- investments are necessary to develop and maintain the reputation of a geographical indication (quality controls, marketing, publicity, etc.);
- the costs of acquiring and enforcing rights may be significant, especially in foreign countries;
- the recognition of foreign geographical indications may lead to the closing down, in some cases, of local production activities.

In any protection system for geographical indications the involvement of governments (unlike other areas of intellectual property rights) is important in relation to their recognition (including registration if mandated or optional), control over the use and enforcement. This means that implementing protection for geographical indications will normally require public involvement and funding.

Discussions in WTO have shown a range of diverging interests and views, and the emergence of a complex web of alliances involving developed and developing countries. Members' positions have been largely determined by their own policies and perceptions about the benefits and costs of a broad and strong protection for geographical indications. European countries (including Switzerland), with a long tradition on the matter and in possession of a large number of geographical indications to be potentially protected globally<sup>84</sup>, not surprisingly favor a system that facilitates protection and enforcement of such indications in all Member States. Other Members with a shorter history as independent States, which received immigrants who brought with them the names of their places of origin (giving rise to "homonymous" indications), are more cautious on the subject and fear that, on balance, an enhanced protection in this area may prejudice rather than benefit their trade interests.

These differences reflect themselves in the discussions on the establishment of an international system of notification and registration for wines (and spirits). Quite obviously, the Members who are most enthusiastic about the establishment of a comprehensive system are those (such as the European countries) with a large number of geographical indications for wines. Other Members, as mentioned, are reluctant to introduce a system that may directly or indirectly increase the level of protection available today. In particular, some Members resist the creation of a system that would grant further trade advantages precisely to those Members that keep high barriers in the field of agriculture. In considering the CARICOM position on this matter,

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<sup>84</sup> In addition to the 118 already registered geographical indications for agricultural products and foodstuff, there might be in Italy at least 3.558 products that may potentially seek recognition under geographical indications (interview with the Italian Minister of Agriculture and Forestry Policy, reported by Pinna, 2002, p. 46).



the following considerations seem relevant:

First, quality wine production is concentrated in a few countries, such as some European countries<sup>85</sup>, United States, Chile, South Africa, Australia and Argentina. Expectedly, other countries may have little interest in a system that (like the one proposed by EC) would significantly improve the possibility of enforcing foreign geographical indications.

Second, article 23.4 asks for a system to “facilitate protection of geographical indications for wines”, and not for a system to strengthen or expand such protection.

Third, the system should include “notification” and “registration” of geographical indications. Registration of intellectual property rights is in some cases (e.g. trademarks, patents), required for the acquisition of rights, but in other cases (e.g. copyright) it only provides a presumption of title-hood and does not create any rights. National laws on geographical indications considerably diverge on this issue, including systems without prior recognition even in cases where special protection is conferred<sup>86</sup>. Notification and registration may, as argued by some countries, be related to transparency without creating further legal effects.

Fourth, the system should apply to geographical indications “eligible for protection in those Members participating in the system” (article 23.4). This wording suggests that the system is to be based on voluntary rather than binding participation.

Fifth, the establishment of the system as proposed by the EC would require, in practice, to conduct trade-related negotiations for just one single tariff-line product, a process that many Members regard as too burdensome and unjustified<sup>87</sup>.

Finally, an opposition system as suggested in the European proposal may be expensive for many developing countries, and may put them in a weak position where homonymous geographical indications exist<sup>88</sup>.

Some developed and developing countries have proposed in WTO to raise the standards of protection for products other than wines and spirits. Proposals with a similar aim have been made in the context of FTAA negotiations. This approach, if successful, may entail some limited benefits and many costs for CARICOM countries. Among the possible benefits the following may be mentioned:

- Retaining labour and other production factors in certain geographical areas if domestic geographical indications can be identified and successfully developed
- Facilitating investments (e.g. in advertisement) otherwise unaffordable for individual producers

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<sup>85</sup> Thus, out of 831 geographical indications registered under the Lisbon Agreement, 70,3% belong to West European countries, 23,3% to East European countries and only 6,3% to developing countries (Algeria, Cuba, Mexico, Tunisia) parties to the Agreement.

<sup>86</sup> See IP/C/W/253, 4 April 2001, p. 13.

<sup>87</sup> See Vivas Eugui, 2001.

<sup>88</sup> *Ibidem*.

- Increasing the value of local production, especially for export, by developing niche markets and reaching high income consumers.

On the other hand, the possible costs include:

- The need to make concessions in other areas under negotiation in WTO or FTAA in exchange for the support for an increased protection of geographical indications
- Even if an increased protection of domestic geographical indications were obtained, potential exports may need to comply with other standards (e.g. sanitary and phytosanitary measures). Geographical indications do not guarantee immediate market access<sup>89</sup>.
- In order to develop geographical indications, investment will be necessary for quality (or other) controls, certification of compliance with norms, marketing, etc. It is difficult to determine the size of these investments, which may be substantial.
- Since the majority of the currently recognized geographical indications belong to some developed countries (notably in Europe), increased protection may mainly favour those countries rather than domestic producers.

In sum, domestic geographical indications on products other than wines and spirits may receive in CARICOM countries protection according to article 22 of the TRIPS Agreement. Any proposal to increase the level of protection available under WTO rules or to be established in the FTAA, should be carefully assessed in terms of costs and benefits and development impact. *A priori* there would not seem to exist solid reasons suggesting that CARICOM countries should join the countries seeking broader protection in this field.

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<sup>89</sup> See Vivas Eugui, 2001.

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