The International Protection of Geographical Indications: The Asian Experience

I. Introduction

Geographical indications (GIs) are increasingly being seen as a useful intellectual property rights for developing countries because of its potential to localise economic control, promote rural socio-economic development and enable economic returns to holders of traditional knowledge. Some of these factors lie at the heart of the demand for stronger protection for products other than wines and spirits at the TRIPs Council (Rangnekar, 2003). However, actualising this latent potential within GIs requires the development of complementary institutions and cooperation of all interested parties throughout the product's supply chain; though there appears to be no singular and common pattern amongst successful GI-products (Rangnekar, 2004).

Unlike some provisions in the TRIPs Agreement, such as those concerning product patents in certain technology areas (viz., pharmaceuticals and agricultural chemicals, cf. Article 65.4)[1], provisions for GIs do not exceptions allowing for for delayed implementation. Thus, developing countries and countries in transition face an implementation deadline of 1 January 2000 (cf. Articles 65.2 and 65.3, respectively) and least developed countries face an implementation deadline of 1 January 2006 (cf. Article 66.1). The obligation under Section 3 (Part II) is non-specific; in that, articles 22 and 23 require the provision of 'legal means' for the protection of GIs to be available for 'interested parties'[2,3]. To be clear, the Agreement neither specifies the preferred legal means nor does it identify the range of legal options. Commentators suggest that this reflects the diverse range of legal means for the protection of IGOs (Indications of Geographical Origins)[4] existing at the time of Uruguay Round negotiations (Knaak, 1996; Gervais, 1998; Watal, 2001). While this allows considerable room for manoeuvre, a principle supported by Article 1.1 that expressly states that Members "shall be free to determine the appropriate method of implementing the provisions of this Agreement", it is necessary that legally imaginative implementation remains consistent with the Agreement and is open to examination through the WTO's dispute settlement process. Importantly, particularly for *demandeurs*, is achieving a level of consistency and harmony as countries come

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[1] All references are to articles in the TRIPs Agreement, unless indicated otherwise.

[2] The fundamental difference between articles 22 and 23 is in terms of the scope of protection and not in terms of the obligation in respect of legal means.

[3] The term 'interested parties' is defined in the Paris Convention (cf. Article 10(2)). See UNCTAD/ICTSD (2003) and Conrad (1996) for a discussion of the term.

[4] The WTO Secretariat (2001a) adopts this term as a common denominator to refer to the various terms and instruments used by member countries to indicate the geographical origin of goods, in order to avoid confusion with specific terms that are otherwise legally defined, e.g. geographical indications, indications of source and appellations of origin. A similar convention is adopted in this paper. Thus, the term 'geographical indications' is used only where reference is to

into compliance with their GI-related obligations under the Agreement so as to achieve *effective* international protection of GIs.

Two legal policy questions need to be resolved while implementing the obligation:

- What should be the preferred 'legal means' for implementing Section 3?
- How should the hierarchy in the levels of protection under Section 3 be implemented in national systems?

This paper is devoted to these questions. It begins by briefly mapping the legal options available for the protection of GIs: laws focussing on business practice, trademarks and special means. It then proceeds to discuss the two legal issues noted above: the preferred legal means and how the hierarchy in the level of protection can be implemented in domestic law. Evidence from Asia is reported. With this background the paper identifies and discusses some issues for further consideration: how to secure stronger protection and what steps need to be taken to actualise the latent potential in GI-protection. The discussion here is presented with empirical evidence from case studies of GI-products. An annex presents evidence from the recent experience of the Tea Board of India with respect to the protection of Darjeeling tea.

1. Implementation Options – the 'legal means'[5]

When implementing their obligations at the TRIPs Agreement concerning GIs, policy makers, legislatures and interested parties need to focus on the twin issues of the preferred legal means and how the hierarchy in the level of protection will be implemented in domestic law. Here we briefly map out the broad contours of the legal means available. The Secretariat, under the mandate in Article 24.2[6], collated responses to a 'checklist of questions concerning national regimes for the protection of GIs'. This exercise produced information on the different legal means available for the protection of GIs (WTO, 2001a)[7], where three approaches have been identified: laws focussing on business practices, trademarks and special measures.

<u>Laws focussing on business practices:</u> The measures available here are a broad set of laws designed to protect the integrity of trade and safeguard the reliance of consumers on authentic representations concerning the origin of goods and services. The protection of IGOs occurs from within these provisions as there are no specific measures for the positive protection of IGOs. In particular, producers are not endowed

[5] Those interested in exploring the nature of the obligation in detail are directed to UNCTAD/ICTSD (2003).

[6] Article 24.2 mandates the Council for TRIPs, inter alia, to play the role of a *watch dog* over "application of the provisions of this Section". In 1996 the first review of the provisions began, which led to the preparation of a checklist of questions concerning various aspects of national regimes (see IP/C/13 and IP/C/13/Add.1) for the protection of GIs.

[7] Some 37 members responded to the checklist of questions. Thus, the information, while useful, remains incomplete. Apart from a couple of 'countries in transition', the respondents were developed countries.

with a right to the IGO. The measures include laws concerning unfair competition, product labelling, advertising, food and health safety, etc. Here, the issue is "not whether the IGO as such is eligible for protection but whether a specific act involving the use of an IGO has contravened the general standards contained in the law relating to unfair competition, consumer protection, trade description, food standards, etc." (para 11)[8]. In common law jurisdictions, similar provisions exist under "passing off" (e.g. Canada, China, Hong Kong, and UK). The rationale for protection hinges on the harm encountered to a business when the goodwill between them and consumers, substantially crystallised in a sign, is damaged. This may occur when the use of the indication confuses or misleads the public about the true origin of the good or service. This has been classically stated by Lord Halisbury: "nobody has any right to represent his goods as the goods of somebody else"[9]. Naturally, for the public to be misled, it is necessary that they have formed a sufficient association between the good or service and its origin, i.e. the indication is considered distinctive and not deemed a generic term (e.g. 'china' with respect to porcelain). There are other uses of an IGO that, while not misleading, can be considered against the ethic of honest commercial activity, such as free-riding on the goodwill of others through either the use an IGO or evocation of the same through other means. This free-riding is considered damaging and could dilute the reputation of the IGO. For instance, the use of an IGO in translated form with de-localising words and terms that convey true origin, e.g. Champagne-like Sparkling Wine or California Chablis, would not be misleading the public. However, these practices are essentially free-riding on the goodwill built by the distinctive sign and might through such use dilute the reputation of the sign[10].

<u>Trademark law:</u> Trademarks must necessarily be distinctive and differentiated so as to fulfil its role of identifying the source of goods and conveying reputational information to consumers (Economides, 1988). Consequently, different categories of words are excluded from being included within trademarks: functional terms (e.g. serrated in relation to knives), descriptive terms (e.g., 'smooth' in relation to skin lotion) and generic terms (e.g. microwave, car). This prohibition extends to include geographical terms as they are considered descriptive. In the US, the common law principle has a stronger prohibition as expressed in *re Charles S. Loeb Pipes, Inc* (190 USQ 238, 242 [TTAB 1975]): exclusive rights to geographic names are disallowed "so as [not] to preclude others who have business in the same area and deal in similar articles from truthfully representing to the public that their goods or services originate from the same place and from using the geographic term in connection with such goods and services". Blakeney (2001) notes that including geographic terms within a

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[8] All references are to the Secretariat's study (WTO, 2001a), unless indicated otherwise.

[9] *Reddaway v. Barnham* [1896] A.C. 199 at 204, 13 R.P.C. 218 at 224; quoted in Cornish (1999, p619).

[10] Some notable court decisions in this regard are *Wineworths Group Ltd. V. Comite Interprofessionel du Vin de Champagne*, 2 NZLR 327 [1991]; *Bollinger (J) v. Costa Brava Wine Company Ltd.* (1959) 3 All ER 800; *John Walker & Sons Ltd. V. Henry Ost & Company Ltd.* (1970) 2 All ER 106. To be clear, in common law jurisdictions, IGOs are protected entirely on the basis of the reputation (*qua* goodwill) that they enjoy without the need for prior registration.

trademark has the persistent threat of rendering the appellation generic as its distinctiveness is eroded, as in 'Swiss Cheese', 'Worcestershire Sauce', and 'Chablis'. Yet, there are real and conceivable situations when geographical terms are contained in a trademark, such as when no deception occurs or the use of the geographical term is entirely fanciful[11] or when an enterprise's reputation has endowed the geographical term with secondary meaning (Harte-Bavendamm, 2000; Blakeney, 2001). Relevant examples here include 'Thames' for stationery, 'Mont Blanc' for high quality writing equipment, and 'Oxford University Press' for books, to name a few.

The above does indicate that measures under trademark law provide for negative protection of IGOs by denying the inclusion of such terms within trademarks. The Secretariat's survey notes that in some jurisdictions, IGOs can be protected as collective, guarantee or certificate marks (Box 1). For instance in the US, the exception to granting exclusive rights in geographic names, contained in s.45 of the Lanham Act, allows for certification marks[12]. It is premised on the principle that the mark is owned by one person who has the clear intention to let others use the mark while certifying the quality and origin of the good (Conrad, 1996, p21). As such, the certification process brings it closest to the Roman law tradition of appellations (see OECD, 2000, pp9-10).

Box 1
Certification marks and collective marks

Both these legal signs are found in common law jurisdictions and share important similarities, such as their collective ownership and principle of non-use by the owner.

Certification marks are marks which indicate the goods or services on which they are used have specific qualities, produced in a particular way, have met a service standard and maybe, though not necessarily, of certain geographical origin. As a general rule the owner of a certification mark does not 'use' the mark but licenses it to other enterprises and certifies that the goods or services carrying the mark are of a certain quality. These are frequently used by bodies certifying industrial standards and are used by anybody that meets the standards set by the owner of the certification mark. Examples include the "Woolmark" certification mark and the Bureau Veritas mark to signify sea-worthiness.

Collective marks are owned by a collective body like a trade association and serve to

[11] Geographical terms can be used in an entirely fanciful manner, such as *Antarctica* Mango, wherein consumers are neither misled nor deceived about the product's origin or qualities.

[12] Under s.45, certification marks denoting 'regional or other origin' may be registered. The registration must be accompanied by specifications that constitute the basis of the certification. Examples of certification marks that are registered under this provision include 'Idaho' for potatoes and onions, 'Real California Cheese' for cheese, 'Napa Valley Reserve' for still and sparkling wines, 'Pride of New York' for agricultural products produced or processed in New York, and 'Ohio River Valley' as a recognised viticulture area (Beresford, 1999). Other certification marks protected either in the US or Canada include 'Darjeeling' for tea, 'Stilton' for cheese, 'Swiss' for chocolate, 'Roquefort' for cheese, 'Suisse/Swiss' for chocolate, 'Indian spices' for spices, 'Freiburger' for cheese and 'Ceylon' for tea.

indicate that goods or services displaying the mark are produced by an enterprise that is a member of the collective body. As membership to the association entails some qualifying standards, the collective mark is a distinctive sign conveying the said standards (i.e. quality, origin, etc.) of the trade association. Examples include the mark "CPA" to indicate members of the Society of Certified Public Accountants.

Source: OECD (2000), Vivas and Muller (2001)

Special means of protection: Included within this category are legal means that provide for the *sui generis* protection of IGOs[13], and those provisions that exist in some jurisdictions for special protection of IGOs within other laws (e.g. trademarks, marketing[14] and labelling[15] laws). Much like trademarks, IGOs are part of the larger family of distinctive signs and protected for similar reasons: protection of the role of signs as indicators of source and securing the integrity of information channels between consumers and producers (Rangnekar, 2004). In addition, in some jurisdictions there is deeply embedded tradition within which the products are located; hence the need to protect them: "This protection constitutes a legitimate safeguard of rights acquired by generations of producers of a region who have imposed on themselves a certain number of rules and disciplines" (*Institut national des appellations d'origine*, the French regulatory body, quoted in Moran, 1993).

The Secretariat's survey found that where countries adopted a *sui generis* system this largely tended to incorporate an explicit *ex ante* registration system that is either formal or through an administrative mechanism. A notable exception in this respect is Australia where for spirits (other than spirits which are either wine or grape products) there is no requirement for prior registration (see van Caengem 2004 for details)[16]. Protection through a *sui generis* system is predicated on linking quality, origin and good. At issue here is more than a link between a product and its place of origin, but that the distinguishing characteristics of the product derive from the human and physical area of origin (cf. article 22.1; see WTO, *op. cit.*, para 31). This triple connection between product, place of origin and quality remains difficult to unambiguously define since quality is socio-cultural configured (Moran, 1993, pp266-67; Bérard and Marchenay, 1996, pp238-39). The Secretariat survey points to variations in key elements of the system protecting IGOs. For instance, the definition differs, with some circumscribing the application to a list of products[17] or qualifying it

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[13] EEC 2081/92.

[14] E.g. Marketing Act, Norway (WTO, 2001a, fn. 3).

[15] E.g. Bureau of Alcohol, Tobacco and Firearms, USA (WTO, *op. cit.*, fn. 4).

[16] Other exceptions include Germany, Korea, Liechtenstein, Norway, Peru, Sweden, and Switzerland (WTO, *op. cit.*, fn. 27).

[17] For example, in Hungary provides the TRIPS definition for products other than agricultural products and foodstuffs and require that production, processing, and preparation takes place in the designated area. The EC and its Member states follow Article 22.1 in respect of agricultural products and foodstuffs with the additional requirement that production and/or processing and/or preparation take place in the defined geographical area (EEC 2081/92).

with additional phrases[18]. Finally, there are variations in the measures that seek to ensure the link between the good, quality and the designated area of origin. These variations include differences in the treatment of geographical units which vary from political/administrative units[19] to *sui generis* geographical areas[20]. Measures to link the good and its geographical area of origin vary from demands for all[21] or some[22] stages of production to occur in the designated area to a requirement for raw material to originate in the designated geographical area[23]. Even while there are also a range of qualifying adjectives attached to quality, characteristics and reputation – established, particular, given – the survey concludes that it is difficult to determine what significance might be attached to the use of each term.

As a general rule, any person who meets the specifications defining the IGO is entitled to the use the protected indication – and become a member of the *club* (see, box 2). As recently noted in the *Parma Ham*[24] case, the specifications have a dual role: they are codes that must be obeyed by producers within the designated region and are a negative obligation on third parties, breach of which may give rise to civil and/or criminal penalties. In this manner the specifications delimit membership to the *club* (see box 2).

Box 2   ***Geographical Indications as 'Clubs'***
Goods have traditionally been defined in terms of polar extremes of 'private' goods or 'public' goods. However, most real-world examples tend to fall within these polar extremes where either excludability is problematic or rivalry in consumption incomplete. Of particular interest is a sub-type of a public good – 'club goods' Cornes and Sandler (1996) define clubs as "voluntary group of individuals who derive mutual benefit from sharing one or more the following: production costs, the membership

[18] For example, in Ecuador an additional phrase "including natural and human factors" is introduced. Probably more notable is the French law, which adheres more closely to Article 2 of the Lisbon Agreement and with respect to agricultural products has additional requirements such as *notoriété dûment établie*" (i.e. well-established notoriety) for the grant of *appellations d'origine contrôlées*.

[19] E.g., continents, regions within a territory, state, county, *département*, canton, commune, village, etc.

[20] E.g., specified wine growing area, restricted viniculture zone, small locality or combination of localities, etc.

[21] The EC Regulation No. 2081/92 is notable here.

[22] In the US for wines, to qualify for protection, 75% of wine must be derived from fruit grown in the designated area. In some US states the requirement is higher, such as in Oregon where it is 100%.

[23] This is often seen in the case of wines, where the requirement is for the grape to originate in the designated area (e.g. table wines in the EC, wines in Canada) (WTO, *op. cit.*, fn 100).

[24] *Consorzio del Prosciutti di Parma & Salumficio S. Rita SpA v Asda Stores Ltd & Hygrade Foods Ltd*, C-108/01 ECR. The case is briefly discussed in Rangnekar (2004).

characteristics or a good characterised by excludable benefits".

A shared characteristic of club goods is the existence of an exclusion mechanism (e.g. tolls, membership criterion). Tolls charge users of the club good and thus internalise congestion costs associated with a unit of utilisation while membership criterion responds to the absence of a 'right to exclude' that characterises the 'right to use' agents possess of a common pool resource.

GIs are derived from a deep collective level of activity - notably, local know-how, cultural repertoires, and the symbiotic relationship between reputation and geography. In a regulatory sense, it is the 'mode of production', i.e., the codification of stabilised cultural repertoire, that defines club membership. These specifications elaborate the method of producing/processing the product and also clarify the basis for its reputation and renown; thus, differentiating it from others within the same product category. Only products that follow and uphold the specifications may use the protected label and become a member of the GI club.

Source: Rangnekar, *mimeo*

Not surprisingly, there tend not to be provisions for licensing an IGO. This is understandable in that it would defeat the very basis of IGOs – its foundation in geography (Blakeney, 2001; Moran, 1993)[25]. Moreover, as IGOs recognised under *sui generis* schemes are 'public rights' there are no provisions for licensing (WTO, 2001a, p43-4). Monitoring of the system largely occurs through quasi-public or public authorities that represent the different interested parties producing the IGO. These bodies are endowed with the power to enforce the rights and secure compliance with the specifications defining the IGO. The Secretariat's survey concludes that "protection conferred by special means of protection is stronger …", largely on account of the explicit expression of unauthorised uses[26] (WTO, 2001a, p49-50). In some instances, anyone not entitled to use the IGO for the product for which it is registered may be enjoined from doing so regardless of impact on the public (Conrad, 1996).

2. Designing domestic regimes

Policy-makers and interested parties are faced with implementing an obligation under the TRIPs Agreement that cuts across a wide array of sectors that also interfaces with obligations under other multilateral treaties – not least those concerning the

[25] Note the response of New Zealand quoted in the WTO Survey: "as the use of an IGO in relation to a specified good must be by someone in the geographical origin protected by the IGO, it is unlikely that an IGO could be licensed" (WTO, 2001a, p44).

[26] This is probably best exemplified by the European Communities Regulation in respect of agricultural products and foodstuffs, EEC 2081/92, see in particular Article 13 for the scope of protection.

conservation, use and development of plant genetic resources[27]. Moreover, there is growing expectation that certain obligations, such as the subject of this paper, have substantial positive spillovers with respect to a range of domestic policy objectives. A careful consideration or a mapping of the full set of issues is beyond the scope of this paper. Presently, the paper points out some of the issues that require further analysis by national decision-makers. The set of issues can be broadly separated into two groups: international (legal) obligations and domestic socio-economic factors. There is an obvious interplay between the two.

2.1 International legal obligations

When moving into implementation mode, policy-makers and interested parties are necessarily seeking *the* ideal or optimal legal means. An 'ideal' or 'optimal' system is significantly contingent on a range of parameters and varies between countries and changes with time. Thus, consideration has to be given to the different priorities and objectives of the country. For instance, in the case of GIs, it would be pertinent to consider various factors concerning the protection of traditional and established products, the importance of supporting rural socio-economic development, the aim to secure returns to holders of traditional/indigenous knowledge[28] and costs associated with the system. Some of these points are briefly elaborated in the following sub-section.

Following from section 1 above, not only are member countries free to select the appropriate means for implementing the obligations in respect of GIs, but there are a number of different legal means available that are consistent with the TRIPs obligation. In this respect, it is useful to note that most jurisdictions allow a multiplicity of legal means to coexist. This is amply demonstrated in the WTO Secretariat study referenced above. In some jurisdictions it is the case that the legal means for CTMs and GIs coexist. Notable in this respect is the Andean Community of Nations Decision No. 486[29] that provides for the legal protection of GIs and CTMs (Vivas-Eugui, 2001). While cross-protection is not permitted: a foreign CTM can be protected as a CTM and a foreign GI as a GI. In India, a country with a common law tradition, decisions invoking the principle of passing-off exist (e.g. *Dyer Meakin Breweries v. The Scotch Whisky Association*, AIR 1980 Delhi 25), while, on the other hand, CTMs are allowed under the Trademark Act, 1999. Interestingly, an indication with much commercial interest, Darjeeling, has been protected as a CTM under the

[27] This follows from observing the preponderance of GI-products that are constituted by plant genetic resources. Beyond noting the need for considerations of the interface between the obligations under TRIPs with those arising from other treaties, the paper does not explore this point.

[28] Readers are reminded that traditional knowledge is not protected per se (see Rangnekar, 2004).

[29] Andean Community of Nations Decision No. 486 on the Common Industrial Rights Regime, enacted on 14 September 2000, entering into force on 1 December 2000 (www.comunidadadina.org).

predecessor of the 1999 Act (i.e. the Trade and Merchandise Marks Act, 1958). With the passage of the Geographical Indication of Goods (Registration and Protection) Act (1999) and the framing of the rules in 2003, it remains to be seen what the Tea Board of India, the owners of the CTM, decide to do in terms of protecting the Darjeeling indication. Clearly, jurisdictions have multiple legal mechanisms for the protection of GIs. However, implementing the GI obligation under the TRIPs Agreement is widely seen as a choice between the 'trademark route' and the 'sui generis system' route (see Addor and Grazioli, 2002; Blakeney, 2001; Rangnekar, 2003).

Table 1 brings together some of the key comparisons between GIs and CTMs. Here, we highlight a couple of factors that differentiate the two legal routes. GIs are considered a general descriptor that all traders within a designated geographical area use for a particular good that exhibits certain qualities. In contrast, a CTM is a sign used to distinguish the products of a particular (group of) trader(s) from those of other traders. While 'geographical origin' may be a particular distinguishing factor, it is neither a necessary imperative for protection nor is it sufficient. Underlying this is a collective dimension: GIs tend to be public/collective rights while CTMs tend to be private (and at times, collective) rights. This difference is reflected in the protection offered: in the case of GIs, all parties within the geographical area (i.e., the club, see box 2) are protected against misappropriation of the indication, whereas only the owner and licensee of a CTM are protected (Blakeney, 2001). In this respect, Beresford (1999: p43) makes an interesting point: "When a geographical term is used as a certification mark, two elements are of basic concern: first, preserving the freedom of all persons in the region to use the term and, second, preventing abuses or illegal uses of the mark …. Normally a private individual is not in the best position to fulfil these objectives satisfactorily. The government of a region, 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".

Table 1
Comparing GIs and Certification Trade Marks

	Geographical Indications	***Certification Trade Marks***
Objective	Protection of indication linking a good's origin and the quality/reputation on account of this origin. In addition, in some jurisdictions, it is a legacy to be protected (e.g. EEC 2081/92).	Protect the certification and/or guarantee of a good's particular characteristics (e.g., use of raw materials, quality, service), which may – though not necessarily – include geographical origin.
Ownership	Mainly a public/collective right; most often (say, under EEC 2081/92) the indication is owned by the State or parastatal institution. In principle, anyone meeting the good's specifications can use the indication.	Mainly a private (and, at times, collective) right owned by the trade association or producer group; at times even by the government. Parties interested in using the mark must seek a license from the owner.
Duration of protection	Protection begins with registration and continues until	Protection begins with grant of mark and must be renewed

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	Geographical Indications	***Certification Trade Marks***
	the conditions justifying protection are upheld, i.e. product specifications are maintained.	periodically (usually 10 years).
Scope of protection	Often, proscribed list of unauthorised actions exists; certain product categories (e.g., wines and spirits) enjoy stronger protection; no automatic collateral protection against use of protected indication on other products	Use only permitted to licensees; collateral protection against use of mark on other products exists
Enforcement	The rights are enforced through a mix of public (*ex officio*) and private actions.	Protection is a result of private actions by the trade association that owns the CTM.
Administration	The regulating council, often a consortium (e.g. *Comite Interprofessionel du Vin de Champagne*) representing firms in the product's supply chain, administers compliance and regulates trade.	The association of manufacturers (e.g. *The Woolmark Company*, owners of the Woolmark™) who own the certification mark administers the mark.
Inspection	An independent agency or the government (cf. Article 10, EEC 2081/92) undertakes inspection of compliance with standards stipulated in the indication.	Owner of the certification mark oversees inspection of compliance to standards stipulated at the time of registering the mark.

Source: Various (See Rangnekar, 2004, and sources therein)

Following on from the notion of club goods, a GI cannot be transferred between owners nor can it be licensed to producers outside the designated geographical area. In contrast, CTMs are essentially licensed to users by the owner. This difference allows GIs to develop a stronger localisation of economic control within the designated geographical area. In comparison, a CTM allows for wider licensing that is not restricted by production taking place in a designated geographical area (e.g. the case of *Bleu de Bresse*, see Rangnekar, 2003). To state the point differently, the GI 'Honduran' Banana can only be used for Bananas from Honduras, whereas 'Chiquita Bananas' can be used on any banana (see, Addor and Grazioli, 2002, p873).

Another important consideration would be the differences in costs of the legal means. These costs would include the expense of setting up the necessary infrastructure and institutions, the running costs of the system and by extension the costs to be incurred by interested parties in acquiring and enforcing their rights. Finally, it is useful to consider the relationship between domestic action and the international protection of GIs. By adopting one of the different legal means, the country is signalling where it would like to locate itself in the wider debate concerning the international protection of GIs. Thus, policy makers and interested parties would need to consider the wider international ramifications of their choice of domestic regime. For effective international protection through CTMs it would be necessary and essential for the relevant body (e.g. trade association, producer group, regional authority) to secure protection in key overseas jurisdictions. Conrad (1996) correctly recognises that multiple registrations would pose a problem for economically less-endowed groups. The problems with internationalising a *sui generis* system tend to be less theoretical and more practical and (at times, insurmountably) political. Here, deliberations concerning the multilateral register for wines and spirits and GI-extension stand testimony to these practical and political problems[30]. A centralised register seems more effective and less susceptible to vagaries present in other legal means (Conrad, 1996) and developing countries might find it useful to agree a common list of protected indications (Watal, 2001).

2.2 Domestic Considerations

Many countries from Asia are active members of the *demandeur* group for GI-extension at Geneva. This would suggest a domestic constituency interested in effective international protection of GIs. Relevant in this consideration would be the following sectors: agriculture, agri-food processing, a variety of rural and handicraft industries and sectors where small-scale and cottage industries proliferate. The diversity of potential sectors where GIs might be useful itself poses a challenge for designing an effective and accessible domestic regime. Here, we draw attention to some – though not all – factors that require closer attention while designing domestic policy.

- The state of GI-sectors

A fundamental prerequisite would be a survey of the potential GIs that might qualify for legal means for protection. This information would shed useful insights into the ‘economic’ interests at stake. Given the very likely significance of agricultural and rural based products, it would be useful to gather information on the status of these sectors. Of importance would be information concerning the ‘mode of production’ and what priorities and goals are being set by interested parties within these sectors. As GI-protection is contingent on the ‘mode of production’, the relevant parties would need to consider the potential trade-offs between maintaining a particular ‘mode of production’ and foregoing other options.

[30] For instance, Members opposing GI-extension agree that, in principle, all products should be treated equally and the hierarchy does not have any legal rationale and yet oppose GI-extension (Rangnekar, 2003, pp31-32).

- The cultural context of GI-products

Culture plays an important role in configuring and contextualising GI-products – not only in terms of stabilising particular repertoires of 'good farming' but also in terms of notions of authenticity and origin of products. As protection transforms cultural values into economic value and re-organises supply chains, it also impinges on existing patterns of use of the protected products (and their intermediate inputs).

- The supply chain of GI products

A common theme in case studies examining the development of GI products relates to the problems faced in re-organising well entrenched supply chain relationships (see Rangnekar, 2004). Different agents across the supply chains need to cooperate in maintaining the integrity of their 'club' whilst simultaneously they compete for market shares and share of the accruing rents. Albisu (2002) observes that it is difficult to motivate actors to change their existing commercial and distribution channels. Equally, at issue are questions concerning the capacity of different participants in the supply chain and the goals and priorities of these participants.

- The market for GI-products

Much like trademarks, GIs are intrinsically concerned with buying and selling. It is imperative that market analysis and forecasting is undertaken as part of the review of designing domestic protection regimes. While in some instances the markets might be international, it could very well be the case that products have local and regional markets. The assessment should also consider the possibilities of future strategic alliances (e.g. tie-ups with other producer groups and retailers), policy options (e.g. bilateral agreements, market access agreements), and marketing routes (e.g. use of socially constructed labels like 'organic', 'fair trade', etc.) that might enable superior marketing. In this respect, European case studies suggest that marketing is the weakest link in the product's supply chain (Rangnekar, 2004, p33).

3. Resolving the hierarchy in the level of protection

A highly contentious issue concerning GIs at the TRIPs Agreement is the hierarchy in the level of protection between 'wines and spirits' (Article 23) on the one hand and 'other products' (Article 22) on the other hand (Addor and Grazioli, 2002; Rangnekar, 2003). Ever since the Seattle Ministerial, a variety of members have been demanding resolution to this hierarchy through removing the restriction of Article 23 to wines and spirits. Interestingly, member countries opposing the demand of GI-extension agree that there is no legal or other rationale for the basis of a hierarchy in the level of protection under Section 3: "If the extension discussion were purely one of intellectual property policy, it would make sense to treat all products in the same manner legally" (WTO, 2002a, para 3)[31]. As such, the problem is about revisiting the Uruguay Round bargain and re-configuring the balance of obligations. Eventually, the Doha Ministerial Declaration instructed the TRIPs Council to discuss a range of 'outstanding implementation issues', where GI-extension exists as *Tiret 87* of the Compilation of Outstanding Implementation Issues (WTO, 2001c). Yet, this has remained contested at the various special and regular sessions of the TRIPs Council[32]. For instance, at the regular session in June 2002 where a proposal (WTO, 2002b), submitted by Switzerland on behalf of 20 countries that included the EC, on undertaking GI-extension was submitted, a number of countries (e.g., the US, Australia, Argentina, Canada, New Zealand, and Uruguay) expressed that it was inappropriate to present proposals or modalities as no negotiating mandate existed. Lack of progress on GI-extension has also stalled negotiations concerning the multilateral register. Notable in this respect is the suggestion at the April 2003 special session of the TRIPs Council by Bulgaria (supported by EU, Switzerland, Kenya, India, Thailand, among others) that all references to "wines and spirits" in the draft text be replaced by products "protected under Article 23 of the TRIPs Agreement". The logic is clear: the multilateral system would be expanded to include products other than wines and spirits should Members agree to GI-extension. Such are the differences that WTO Director-General Panitchpadki has personally intervened by hosting informal consultations on the issue of GI-extensions in May 2003.

As regards the hierarchy in the level of protection, Members have three options:

- Option One – Replicate the hierarchy: Offer 'wines and spirits' additional protection as in the Agreement and offer 'other products' only the lower level of protection as provided for in the Agreement.

- Option Two – Remove the hierarchy: Make the higher level of protection of Article 23 the standard in national law; thus, available to all goods irrespective of their product category.

- Option Three – Maintain a flexible hierarchy: This would entail implementing Section 3's hierarchy in domestic law, but removing Article 23's restriction of being applicable only to wines and spirits. Consequently, other product categories or particular goods might be awarded the higher level of protection.

[31] It is only fair to reproduce the remainder of the statement where the multilateral dimension to trade negotiations is well expressed: "However, we note that the WTO TRIPS Council discussions take place in the context of trade policy and the additional protection provided geographical indications for wines and spirits resulted from the Uruguay Round of multilateral trade negotiations".

[32] See http://www.iprsonline.org/ictsd/news.htm#GI for news about TRIPs Council negotiations on the Doha Mandate for GIs.

It would seem obvious that *demandeurs* for GI-extension should uniformly adopt the second option and make available the higher level of protection of Article 23 to all goods. Anything to the contrary would appear paradoxical: why demand something at Geneva and provide it in domestic law when it is legally possible to do so? However, as noted above, designing and implementing national law in this area is highly complex. There are additional issues to be considered.

There are different short-run (and long-run) implications for each of the three options. Prima facie, as with any other intellectual property right, there will be some re-distribution of 'rents' based on the premise that by making imitation and market entry more difficult the mark-ups that (true) producers can charge/earn will increase. No doubt, this scenario is contingent on the nature of the product (e.g. the price elasticity of demand) and its market (e.g. supply chains and product positioning strategies of competitors, including availability of substitutes). To expand, making available GIs – and in particular the stronger level of protection – prohibits the use of an indication and <u>not</u> the production of goods that were initially sold under the now-protected indication. In as much as the grant of protection will change market shares, there will be some redistribution of income flows between different classes of producers. Clearly, this begs close economic analysis. For instance, offering the higher level of protection across all product categories (option 2) would widen the group of beneficiaries to include firms (and their supply chains) in product categories outside the 'wines and spirit' sector. However, this benefit should be set against possible costs to be incurred by those groups of producers (and their supply chains) that use indications of others (i.e. domestic and foreign nationals) under provisions in Article 22. Thus, there will be some (short-run) domestic market disruption as GI-product supply chains are reorganised.

4. The implementation of GI obligations in Asia – a selective review

A detailed analysis of the implementation of GI obligations within the Asia region is much beyond the scope of this paper, not least because of the difficulty in accessing and organising the source material. Focussing on the two policy questions noted above, we make the following observations.

China[33]

There are striking, though somewhat surprising, similarities between the Chinese approach and the manner in which appellations are protected in France[34]. This may reflect a similar, though substantially deeper and longer, tradition of stabilising and

[33] Based on Huang (2003), unless indicated otherwise.

[34] The element of surprise is somewhat diminished when we take note of the cooperation between China and France in this matter. Beginning with cooperation between the relevant ministries in the two countries in 1995, China and France have taken steps towards bilateral protection of GIs and enlargening domestic markets for food products from their respective countries.

codifying particular modes of producing products and localised cultural control over the same. Prior to the enactment of the TRIPs Agreement, IGOs were protected through provisions in the Trademark Act, 1982 (and its subsequent revisions)[35]. China, having joined the Paris Convention in 1985, made provisions for protecting IGOs through CTMs. In particular, the *Trademark Act, 2001* and the *Rules on Registration and Administration of Collective and Certification Marks* (as amended in 2003) have provisions for the protection of GIs through CTMs. Presently, nearly 100 CTMs have been protected (Wagle, 2004). It is with the introduction of the General Administration for Quality, Supervision, Inspection and Quarantine (AQSIQ) that a system similar to the French *AOC* has been instituted. By November 2003, there were over 100 applications for GI protection under this mechanism, of which 49 were approved (Wagle, 2004). However, the duality of protection systems has raised concerns about inter-departmental coordination, and more importantly, on the interface and relationship between TMs and GIs.

India

The debate surrounding GIs in India have been significantly configured by experience with two lucrative export earners: Basmati rice and Darjeeling tea. The RiceTec patent granted in 1997, part of longer effort to enter this lucrative market, involves novel rice lines that are semi-dwarf in stature, substantially photoperiod insensitive, and high yielding with Basmati-like properties. When the government (and for that matter civil society organisations in India and the US) eventually challenged the patent, the strategy was to question the 'inventive step' and 'novelty' of the patent – and not on the grounds that 'Basmati' is essentially a GI (see Rangnekar, 1999). In the case of Darjeeling tea, it is widely stated in trade journals that about 80% of globally-traded Darjeeling tea is counterfeit. Much of this comes from Kenya, Sri Lanka and Nepal (Niranjan Rao, 2003). However, remedial action, in part using CTMs and GIs, has been adopted by the Tea Board of India (see Annex).

IGOs could secure protection in India through a number of different legal means. The Trade and Merchandise Mark Act (1959) allowed protection through CTMs and passing-off action. Replaced by the Trade Mark Act 1999, where provisions for CTMs exist in Chapter IX (Sections 69 to 78). Scotch whisky is one of the products that has used passing-off actions in Indian courts. Being a common law country, it is possible to secure protection by proving reputation and goodwill enjoyed by the indication in India. The second set of measures available is the *Consumer Protection Act* and the *Monopolies and Restrictive Trade Practices Act*. It is possible through these legal measures to initiate action against untrue representation. However, it is in fulfilling obligations arising out of the TRIPs Agreement and deciding to provide positive protection for GIs that the legislature decided to implement a *sui generis* system.

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[35] Other legal measures include the *Anti-unfair Competition Act* (enacted December 1993) and the *Product Quality Act* (enacted December 1993).

Meeting the implementation deadline, the *Geographical Indications of Goods (Registration and Protection) Act*, 1999 was notified in the Gazette of India on December 30, 1999. The rules were notified on March 8, 2002 and the Act came into force in September 2003. There are some important features of the Indian approach. For instance, the Act specifies that registration of geographical indications is mandatory; indicating that unregistered GIs are not protected (Section 20.1). The Rules make provisions for apex bodies that oversee and coordinate particular products (e.g. the Tea Board, Coffee Board and the Spice Board). Even while the Act follows the TRIPs definition for GIs (Article 22.1), it specifies in an explanatory note that "For the purposes of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that Country, region or locality, as the case may be". As regards the hierarchy in the level of protection in the TRIPs Agreement the Indian legislature adopted option 3. Section 22.2 makes this higher level of protection available, but in such a manner that the Government could extend enhanced protection to other products through a notification. Importantly, every extension of enhanced protection need not entail an amendment to the Act; it can be done through a notification.

With a long and deep tradition of localised foods and products and well codified modes of production for these products, there is no dearth of potential candidates for GI-protection. The following are some of the products that have been mentioned in relation to the Act: Sambhalpuri cotton from Orissa, Alphonso mangoes from Maharashtra, Pochampalli silk from Andhra Pradesh, Mysore silk and Mysore sandalwood from Karnataka, Malabar pepper and Wyanadan turmeric from Kerala, Feni from Goa, and Pashmina shawls from Kashmir to name only a few. A few products have already secured protection, such as Mysore sandalwood. However, protection for a significant export earner, Basmati, has not yet been sought and concern remains about Darjeeling tea (see Annex).

Indonesia

The experience of Indonesia in implementing its TRIPs obligations highlights in stark reality some of the problems faced by many developing country members. Even while the TRIPs 2000 deadline was fast approaching, Indonesia had drafted a host of legislation and simultaneously completed a WTO compliance questionnaire in mid-2000. However, domestic opposition and other socio-economic upheavals – along with inter-related bureaucratic problems – delayed actual implementation. Consequently, in 2001, it was placed on US's S301 Priority Watch List and had to accept an Action Plan in April 2001 for implementing and enforcing IP laws (Redfearn, 2001). Within Indonesia's Trademark Law No. 15 of 2001 there are measures (Articles 56-60) that provide for the protection of GIs and 'Source of Origin'. Further provisions for the protection of GIs exist in Article 1365 (Civil Code), applying the principle of passing off, and Articles 382bis and 393 (Criminal Code), applying the principle of unfair competition. It is not exactly clear how the hierarchy in the protection for GIs has been resolved (see also Wagle, 2004).

Malaysia

Prior to the TRIPs Agreement, provisions existed for the negative protection of GIs – or more correctly, appellations of origin and indicators of source under section 10 of the Trademark Act, 1976 and Part II of the Trade Description Act, 1972 (Kandan, 1998). In addition, there are common-law legal means of passing-off actions. However, domestic interest groups pressured the government to implement a *sui generis* legislation for GIs. Thus, in 2000, the Cabinet approved the tabling of the Geographical Indications Act, 2000. This legislation, along with accompanying regulations, came into force in August 2001. The following year an amendment was passed to clarify provisions (e.g. the GI/TM interface), articulate procedures (e.g. who are 'interested parties') and acknowledge new developments (e.g. the establishment of the Intellectual Property Corporation of Malaysia[36]). Under this law, the scope or coverage follows the TRIPs definition of Article 22.1; though with the added clarification that 'goods' "means any natural or agricultural product or any product of handicraft or industry" (Section 2 of the Act). As regards the question of the hierarchy in the TRIPs Agreement, Malaysia has decided to replicate the same in its national law; thus, adopting option one. Accordingly, wines and spirits are awarded a higher level of protection pursuant to Section 5(1)(d). In contrast, other products can only avail of the lower level of protection (cf. Section 5(1)(a) to (c)). It has been suggested by Kandan (op. cit.) that for a country like Malaysia, which neither has a substantial domestic industry in wines and spirits nor imports these products in major quantities it may not have to bear a heavy burden in offering a higher level of protection to them.

Pakistan

As with India, the debate on introducing the GI provisions under the TRIPs Agreement came into focus through the debate on RiceTec's Basmati patent. However, despite some, though limited, civil society activity on the Basmati patent, little effective action followed from the government. A variety of products are widely considered as potential candidates for protection: Peshawari Chappal, Kashmiree Shawls, Multani Sohan Halwa and Nehari (Khursheedkhan, 2001). As regards legal protection in Pakistan, GIs can avail of indirect protection through the Trademark Ordinance, 2001, which still awaits coming into force. Importantly, more extensive protection is envisioned in the draft legislation for GIs, *Geographical Indications of Goods (Registration and Protection)*, which awaits approval and enactment. Interestingly, there are media reports concerning Pakistan's effort to get US support in protecting 100 GIs through a special treaty (Ahmed, 2003).

[36] Set up under the *Intellectual Property Corporation of Malaysia Act, 2002*, the Corporation is designed to take over the functions and powers of specific government departments, viz., Intellectual Property Division of the Ministry of Domestic Trade and Consumer Affairs. The Corporation will oversee the various IP legislations enacted by the government, administer and enforce them, undertake all administrative duties in regard to IP and also safeguard and represent Malaysian interest with respect to IP (see Shahbudin, 2002).

Sri Lanka

Greatly motivated by Ceylon tea industry (exports of approx. US$725mn per annum and employing over 1Mn), in July 2003 the government passed GI provision under the Intellectual Property Act (Intellectual Property Act No. 36 of 2003). This Act is designed at implementing a variety of TRIPs obligations and was deeply contested within the country from a variety of quarters. For instance, health activists challenged the constitutional validity of the Act in the Supreme Court. The Court observed that a number of provisions were inconsistent with the Constitution, which eventually led to revisions that incorporated additional TRIPs-compliant safeguards. In the case of GIs, the Ceylon Chamber of Commerce expressed their opposition to the replication of the hierarchy in TRIPs in the draft legislation (Anon., 2001). In particular, the Chamber demanded that the higher level of protection offered to wines and spirits be extended to key products like Ceylon tea, blue sapphire, and cinnamon. Much of these sentiments are reflected in the GI provisions in the Intellectual Property Act No. 36 of 2003 (see part IX, chapter XXXIII). For instance, the additional level of protection under TRIPs that is provided to wines and spirits is extended to agricultural products. Two features of the system in Sri Lanka require closer attention. Firstly, GI protection is also offered through Trademark laws. This raises questions concerning the interface between the two instruments (i.e. GIs and CTMs), the status of the exceptions within TRIPs and the issue of cross-protection. Secondly, as Sri Lanka has not opted for a registration system, some commentators have raised concerns about the functionality and level of protection offered by the new provisions.

Thailand

Even while the Thai mission has been a consistent *demandeur* for GI-extension at the TRIPs Council, the government has found it difficult to legislate at home. The draft legislation was rejected five times in Parliament; most notably in March 2003 it was criticised for its failure to protect indigenous plant and animal varieties. Apart from the widely noted candidate product Hom Mali (commonly known as jasmine rice), a number of well-known products can benefit from GI-protection. These include salted eggs of ''Chaiya'' originating from the region of Surat Thani, Thai silk, and durian from the province of Nonthaburi, to name a few. The legislation – the *Geographical Indications Act, B. E. 2546*, was eventually passed by Parliament in March 2004 and came into force, with the corresponding regulations, in April 2004. This law covers all goods, explicitly including natural and agricultural products and products from industry and the handicrafts sector. As regards the hierarchy in TRIPs, the legislation adopts option 3: flexible hierarchy. Thus, section 27 (Chapter 4) provides for Article 22-like protection and section 28 (Chapter 5) corresponds to TRIPs' higher-level of protection (Article 23). However, Chapter 5 (Protection of geographical indication for specific goods) allows for Ministerial Regulations to be promulgated that would deem particular "types of goods to be specific goods"; thus, resulting in them being offered the higher-level of protection (i.e. section 28). Concomitant with the coming into force of this law, the Ministry also declared rice, silk, wines and spirits as specific goods. Complimenting the passage of this legislation are other public policy measures that aim to support the effort to develop and commercialise GIs. Notable in this respect is the 'One Tambon, One Product' programme that was launched in 2003. The programme aims to select 60 community products, organise their supply chains, upgrade and certify their quality with the intention of expanding their markets (domestic and international) (Wagle, 2004).

Vietnam

The dual pressures of a bilateral trade agreement with the US (concluded in 2000) and negotiations to join the World Trade Organisation (initiated in 1999) saw Vietnam draft and enact a host of intellectual property legislations. The interest to secure protection for GI-products has been appreciated in Vietnam following adverse experiences with a number of their traditional products in international markets (e.g. Phu Quoc, which we discuss below, and Ngoc Link, discussed by Thanh Lam (2003)). Interestingly, a framework for protection existed in previous legislation. Notably, Article 785 of Civil Code (1995) provides protection for appellations of origin, the definition following the Lisbon Agreement (Van Bay, 2001). Van Bay (op. cit.) also notes that Civil Code Decree 63/CP (1996) in Article 14 makes provisions for the grant of certificates for the use of (protected) appellations of origin in production and trade. While these measures tend to focus on an appellation of origin like subject matter, Decree 54/2000/ND-CP introduces Geographical Indication in Vietnam. Commenting on the legislation, Van Bay (op. cit) suggests that it provides for a higher level of protection to all product categories; thus, adopting option two (cf. Section 3). Available information indicates that a couple of domestic GIs (Phu Quoc and Moc Chau) and a French appellation (Cognac) have been granted protection (Wagle, 2004). However, there are a number of candidate products for protection: Ngoc Linh (rice cakes), Buon Ma Thuot (coffee), Hoa Loc (mangoes), Hung Longen and Nang Huong (rice) (Thanh Loc, 2003). Supporting these products is a Ministry of Trade programme, backed by a budget of US$49 million, aimed at product standards and quality and developing labels.

The experience with Phu Quoc – a sauce made from salted anchovies that is fermented in wooden barrels – is instructive[37]. The sauce is made on the island of Phu Quoc where a particular variety of anchovies proliferate. Here, some 90 producers make about 10 million litres of the sauce of which only ½ million is exported. Apart from a US embargo, exports even in the EU and Japan are limited by the presence of *fake* and *counterfeit* Phu Quoc sauce, often sold under trademarks allegedly owned by Thai enterprises. Recently, Unilever has teamed up with a local consortium to secure a license to use the Phu Quoc appellation. This involves a ten-year contract that sees Unilever investing US$1 million to upgrade production facilities. The contract also obliges Unilever to not display its Knorr trademark prominently on the label. Thus, potentially, or at least theoretically, avoiding confusion between a well-known trademark and an appellation of origin, while also limiting free-riding. Yet, some commentators remain wary of the wider consequences of the tie-up: will the product's distinctive qualities be transformed by the demands of Unilever's desire to penetrate new consumer markets?

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[37] This paragraph is based on Wagle (2004) and a variety of media sources.

5. Issues for further consideration

The introduction of GIs (IPRs for that matter) on their own will not generate the transformations that they are often allegedly connected with. Appropriate collateral institutions and a variety of other policy measures and marketing strategies need to accompany the introduction of GIs to achieve the suggested transformations. Equally, these measures need to accompany the introduction of GIs to ameliorate potential dislocations. Here we focus on a selection of issues that relate to GIs.

5.1 Securing *stronger* protection – the case of generics

Under Article 24(6)[38], an exception to the obligation to protect GIs exists for those indications that have become 'customary name' for the goods in question in the country of protection (e.g. 'china' for porcelain or 'cheddar' in association with cheese). The issue of generics also figures in the GI-extension debate where, it is suggested, the low standards of protection offered by Article 22 allows for 'free-riding' on the reputation; thus, eventually rendering the indication 'generic' (WTO, 2002b; see Rangnekar, 2003 for a discussion). This problem, it is argued, is aggravated by the undue burden, in comparison to Article 23, in enforcing GI-protection in overseas jurisdictions. By way of illustration, reference is often made to US Bureau of Alcohol, Tobacco and Firearms' practice of denoting a certain wine and spirit names as either 'generic' or 'semi-generic' (e.g., Champagne, Burgundy and Chablis)[39]. Consequently, these names can be used as long as the correct place of origin is conjoined with the name (e.g. California Chablis).

Even while the GI-extension debate continues at the TRIPs Council, interested parties need to consider taking remedial action in key export markets through the following: fighting cases under provisions of unfair competition, passing off etc.; filing submissions for the cancellation of trademarks; and launching strategies (marketing and intellectual property protection) to protect and promote the distinctiveness of the product. Noteworthy in this respect are the measures taken by the Tea Board, India to protect Darjeeling – a not inexpensive strategy that has costed US$200,000 over the last four years (see Annex). It may also be useful for *demandeurs* to document and build evidence of these problems as a means of laying the foundation for a grievance to be taken to WTO Dispute Settlement Board in the future. The absence of *hard* evidence has hindered the *demandeurs* case for GI-extension (Rangnekar, 2003).

[38] Here, the exception to protection under Article 24(4), which is restricted to wines and spirits, must also be considered.

[39] Brody (1999) contends that US federal legislation enacted in 1997 contravenes its obligation under TRIPs by strengthening American producers' ability to use false or inaccurate but non-misleading GIs.

5.2 Securing *stronger* protection – the case of bilateral agreements

Closely following the problem with generics are issues resulting from the territoriality of IPRs. Each Member decides *independently* which indications fulfil the standards of protection of its domestic law[40]. With the diversity of legal means, *demandeurs* for strong and effective protection might consider alternative routes for securing effective protection in other jurisdictions. In this respect, negotiating bilateral agreements with other countries might be an option to consider. In this respect, mention is necessarily made of European Union's bilateral agreements with Australia, Hungary, Bulgaria, Switzerland, Mexico, South Africa and Romania – to name a few.

Bilateral agreements are known to allow for TRIPs-plus measures (Drahos, 2001; GRAIN, 2001). This is easily borne out by looking at the various post-Uruguay Round bilateral agreements concerning trade and investment that either the US or EU have sought (see www.bilaterals.org). For instance, in the case of GIs, there exist possibilities for securing protection for those indications that would otherwise be deemed to fall within one or another of the exceptions in the TRIPs Agreement. Here note the June 2003 agreement signed by Canada and the EU concerning the use of generic names for wines and spirits in Canada. As part of the Agreement, Canada will phase out the generic classification of 21 EU wine and spirit names in three phases. This includes names like Champagne, Sherry, Bourgogne/Burgundy, Bordeaux, Chianti, and Malaga[41].

Bilateral agreements also lower transaction costs for enterprises seeking protection in overseas jurisdictions. As enterprises associated with GIs tend to small and/or family run, this is considered crucial. However, in adopting this route, governments will need to consider wider merits/demerits of the bilateral agreement. It is also not immediately likely that the EU's success in securing bilateral agreements involving GIs will be replicated by another WTO member country – in particular, countries from the Asian region. To put it quite simply: bilateral agreements might be a non-starter.

5.3 Defining geographical indications to localise economic control

At the heart and foundation of the GI-system are the specifications that delineate members of the 'GI-club': only products and enterprises that uphold the specifications may bear and use the protection indication (cf. box 2). The specifications are essentially the codification of historically stabilised methods of producing the product

[40] To clarify, the problem is neither with the principle of territoriality nor with the principle of independence; rather the problem is with the wide diversity of legal means available.

[41] One of the reciprocal elements is for the EU to protect Rye Whisky as a distinctive Canadian product.

(table 2)[42]. Consequently, the basis for exclusion could be any element of the specifications:

- Raw materials: The source of milk used in cheese production, at times detailing even the feed used and the grazing grounds.

- Production and processing: The treatment of milk and the method of ripening the cheese.

- Localisation: Defining the region where any of the above must take place. In this respect, *Chevrotin* is significant as the cheese is entirely farm-based.

Table 2: **Examples of Protected IGOs in the European Community**		
Product	***Description***	***Specifications***
Spressa delle Giudicarie (Italy)	It is a compact, cylindrical, medium-hard cheese, made from raw milk, distinguished by its straight or slightly convex heel; its crust is either greyish-brown or dark ochre in colour	Milk used comes from cows of the Rendena (native), Bruna, Grigio Alpina, Frisona (Friesian) and Pezzata Rossa breeds fed on permanent pasture hay; milk production and the making and ripening of the cheese all take place in the Giudicarie, Chiese, Rendena and Ledro valleys, in municipalities situated in the province of Trento.
Valençay (France)	A soft cheese made from goat's milk in the shape of a truncated pyramid, ripened, with a surface mould which is mostly light grey to blue grey in colour.	The milk used comes from Alpine or Saanen goats, or animals obtained by crossing these two breeds. The goats must have pasturage. The goats must be fed with raw materials produced in the geographical area. Under no circumstances may the cheeses be removed from the place of ripening and marketed before the eleventh day from the date

[42] All applications for protection under EEC2081/92, pursuant to Article 6(2), must necessarily submit details of 'proof of origin', where evidence of the historical origins of the product and its association to the region is elaborated.

Table 2: **Examples of Protected IGOs in the European Community**

Product	***Description***	***Specifications***
		of renneting.
Pecorino di Filiano (Italy)	A hard cheese made with whole ewe's milk obtained by one or two milkings; varies in colour between white and, in the case of the more mature product, straw yellow; rind bearing typical basketwork traces	Milk used comes from sheep of the breeds Gentile di Puglia and di Lucania, Leccese, Comisana and Sarda, and crossbreeds; milk is produced and processed and the cheese matured within the area defined, which is made up of thirty communes in the province of Potenza (region of Basilicata) lying in the Apennines between the Monte Vulture massif and the high mountain of Muro Lucano.
Chevrotin (France)	A cylindrical cheese made exclusively from goat's milk;	The cheese is exclusively a farm product; milk used is always from a single herd; and comes from Alpine breeds of goat.
Source: Based on applications for registration of PDOs/PGIs submitted under EEC2081/92		

The policy question confronting interested parties concerns the level of *localisation* that results from the specifications of a product. To an extent, neither is there an *a priori* basis for formulating an approach nor is there free-will. Each product and its historically stabilised mode of production will substantially determine the broad parameters of the specifications. However, greater the specifications are tied to the region; the greater will be the *share* of economic returns that are locally appropriated. The size of *total* economic returns is another matter.

Intertwined with this localisation is the nature of protection that legislation offers and the complementary strategies of product differentiation (for the latter see the next sub-section). In terms of legal protection, Article 13(1) of EEC 2081/92 probably sets the high water mark. Not only is there a direct prohibition of the use of the indication on products that do not meet the specifications; but sub-paragraphs of Article 13 deepen the exclusivity of the 'club' by protecting the indication against misuse (i.e. more or less identical use), imitation (i.e. use that is capable of causing confusion) or 'evocation' (i.e. use through reference or in translated form with delocalising adjuncts).

5.4 Defining geographical indications to segment markets

Economists generally agree that, with complementary institutions in place, IPRs help deepening and widening markets by rationalising the flow of information. As with TMs, GIs are closely associated with strategies of product differentiation. Thus, interested parties need to focus on alleviating informational asymmetries faced by consumers and building on their reputation (i.e. the consumer's expectation of certain level of quality). Central in this respect are efforts devoted to ensuring compliance to the specifications (i.e. maintaining authenticity) and strategies to promote distinctiveness (i.e. brand development).

Consumer research demonstrates that consumers use a variety of indicators to build perceptions of 'origin' and 'quality' which include, but are not restricted to, labels of origin (i.e. IGOs) (Treager et al., 2002). Yet, there is an awareness of and, importantly, a high-level of dependence on these labels: between ⅔ and ¾ of the respondents always sought collective labels and about ¼ always sought the firm's brand (table 3). Arfini's (2000) research also reports that many consumers (>70%) could not remember the name of the firm producing the product. The evidence vindicates the importance of collective labels.

TABLE 3: **Consumer Trust and Consortium Labels**

	Parmigiano-Reggiano Cheese			Parma Ham		
	1	2	3	1	2	3
Consumers looking for Consortia label (%)	75.8	19.6	4.5	66.9	24.9	8.2
Consumers looking for firm brand (%)	29.5	33.2	33.9	22.8	39.7	34.8

Note: 1 = always; 2 = sometimes; 3 = never

Source: Arfini, 2000.

The population of consumers can be differentiated and segmented into a number of categories based on various socio-economic indicators (e.g., geographical location, sex, age, profession, etc.). Thus, it is imperative that marketing and distribution of the product tap into as wide a range of possible factors through the use of the indication, other distinctive signs, packaging, marketing outlets, etc. It is also possible to generate a range of differentiated products that fall within and/or around the protected indication; thus, appealing to a wider and more differentiated population of consumers. This portfolio would consist of rather similar products that are differentiated by price and other product-quality characteristics.

Table 4: Product differentiation

The Scotch Reference Point	Mezcal Product Differentiation	Description
Pure malt whisky	100% Agave	Type I Mezcal – Distilled from juices

	Mezcal	that contain sugars only from agaves; hence 100% Agave.
Scotch whisky	Mexican Mezcal	Type II Mezcal – Distilled from a mix that contains 80% of agave sugars and 20% of non-agave sugars.
Blended malts	Blended Mezcal	Made with Mezcal of different agaves and possibly blended from different distilleries.
Single malts	Single Mezcal	Made from Mezcal from a single distillery; sometimes from a single distillation batch.
Speyside single malt	Mezcal Papalote de Guerrero	A Mezcal from a specific Agave (Papalote) and specific region (Guerrero).

Source: Jorge Larson Guerra, personal communication, 21 August 2003; Mezcal Regulation Council (www.oaxaca.gob.mx)

An illustrative example of this strategy is exhibited by Mezcal from Mexico, where apart from the two GI products there are a range of other product groups (e.g. blends, single distillations, etc.) that have been developed (cf. table 4). Certain products (e.g. spirits, teas, coffees, cheese) might lend themselves easily to this strategy because of the opportunity to generate product groups (e.g., blends, single distillations, single estate products, different maturation methods and periods) around the protected indication.

Conclusion

The paper raises and addresses a series of policy questions concerning the implementation of TRIPs Agreement obligation in respect of GIs. The obligation in respect of GIs are for 'legal means' and remains non-specific; thus, allowing wide latitude in designing domestic legal regimes. The paper focuses on two legal issues: (a) what should be the preferred legal means and (b) how should the hierarchy in the level of protection be resolved in national implementing measures?

Using the WTO Secretariat's (WTO, 2001a) analysis, section one reviewed the three legal mechanisms protecting IGOs: laws focussing on business practices, trademark law, and special measures. The mechanisms through which protection is made available and the problems/potentials of internationalising the measures are briefly discussed. There it is noted that the scope of protection made available through special measures, in particular EEC 2081/92, is relatively stronger, in part because of the clear prohibition on specific transactions. Even while this option is administratively heavy in comparison to other legal means, the difficulties with internationalising this option are more political and practical then theoretical. With this background, Section two sets out some of the considerations in selecting amongst these options, with a particular focus on comparing GIs with Certification Marks (cf. table 1). At issue is how GIs are considered and framed by interested parties and public authorities: how should the collectivity and tradition associated with GIs be recognised and protected? In addition, there are a number of domestic considerations (cf. section 2.2). The paper notes that there is a proclivity – at least in some jurisdictions – of favouring a public route in protecting GIs. It is also the case that private individuals are not always best placed to adequately fulfil the objectives of protecting the heritage and collectivity associated with GIs. In particular, actualising the potential associated with GIs requires the support of public authorities.

Section 3 focused on resolving the hierarchy in the level of protection and identified three options: replicating the hierarchy, removing the hierarchy or allowing for a flexible hierarchy. Removing the hierarchy would entail providing the higher level of protection to all goods. While the benefits of this option for a country with an export market in GIs are easy to see, the costs must also be acknowledged. Costs would include the disruption to existing production and trade by those who use the GIs of others. This question begs deeper economic analysis. Section four briefly reviews the experience in implementing GIs in the Asia region, drawing attention to how these two legal questions have been addressed.

Section five identified a number of areas for further consideration in respect of actualising the potential of GI-protection. *Demandeurs* remain concerned about the exceptions to GI-protection and the hierarchy in the level of protection. Possible options are to pursue infringement cases in overseas jurisdictions, engage in stronger marketing and 'brand' development and seek bilateral agreements for stronger GI-protection. Some of these strategies have been adopted by the Tea Board of India in relation to Darjeeling tea and the Annex reports this experience.

Much of the potential of GIs emerges from the possibilities of localising economic control – or as this paper suggests in defining the 'club' (box 2). The paper drew attention to the importance of how specifications of the GI product can enhance local economic control. As 'clubs' are composed of members that may not necessarily be similarly endowed or desiring similar ends we face a typical collective action problem. Thus, in addition to the availability of legal protection of GIs, a variety of collateral institutions are necessary.

Annex: Protecting Darjeeling Tea[43]

Even while the tea plant is indigenous to India and China, the cultivation of the plant – in particular its production as a plantation crop – began with the British colonialists in the 1830s-1850s. According to records, the first commercial tea plantations were planted in Darjeeling in 1852 using seeds raised in government nurseries[44]. By 1866, Darjeeling had 39 gardens producing a crop of 21,000 kgs which more than tripled in less than five years. Presently, there are about 86 gardens, covering an area of 19,000 hectares, producing between 10-11Mn kgs annually that earned exports of US$30Mn. These gardens employ 52Mn people on a permanent basis and an additional 15,000 during the plucking season.

Darjeeling tea is a distinct tea that is widely considered the 'Champagne of teas' on account of the unique geographical location, the type of tea plant and the processing method. The slopes of the Darjeeling hills (c. 700-2000 meters) are in the shadows of the snow-clad Kanchenjunga peak and possess its own micro-climate. The green leafs of the Darjeeling tea are hand-picked before sunrise and mainly by women. These leafs are processed by the 'Orthodox' method and oxidised for 2-4 hours. The particular flavour and fragrance of Darjeeling tea is said to be on account of 'tipping' – the hairy buds and leaves of the tea plant. The particular plant, the location of the gardens and the processing method contribute to the distinctiveness of Darjeeling tea (box 3).

Box 3: Defining Darjeeling Tea
Area: Tea which has been cultivated, grown, produced, manufactured and processed in scheduled tea gardens in the hilly areas of Sardar Sub-division, only hilly areas of Kalimpong Sub-division comprising of Samabeong Tea Estate, Ambiok Tea Estate, Mission Hill Tea Estate and Kumai Tea Estate and Kurseong Sub-division excluding the areas in jurisdiction list 20, 21, 23, 24, 29, 31 and 33 comprising Subtiguri Sub-division of New Chumta Tea Estate, Simulbari and Marionbari Tea Estate of Kurseong Police Station in Kurseong Sub-division of the district of Darjeeling in the State of West Bengal, India. ***Production:*** Tea, which has been processed and manufactured in a factory, located in the aforesaid area, which, when brewed, has a distinctive, naturally accruing aroma and taste with light tea liquor and infused leaf of which has a distinctive fragrance

There are a number of problems facing the Darjeeling tea gardens in India:

[43] This is based on the following sources: Das (2003), Nirnajan Rao (2003) and various media sources.

[44] The other main production area for tea in India is in the Brahmaputra valley in the state of Assam in the North-East of India. However, Assam tea is a distinctly different tea.

- *Counterfeit tea:* Trade journals have widely noted that a substantial amount of internationally traded Darjeeling tea is counterfeit. In fact, some estimate that four times the amount of tea produced in Darjeeling is counterfeit: in other words 80% of globally traded Darjeeling tea is counterfeit. Most of this tea comes from Kenya, Sri Lanka and Nepal. It is also suggested that tea produced in Nepal is exported to India and then passed off as Darjeeling tea.

- *Price differentials:* The difference between the international retail price and the auction price for Darjeeling tea varies between 500-1000% and can even rise to 5000%. This reflects the underlying structure of the industry and supply chains. While trade in Darjeeling tea was initially and entirely controlled by the British; today, the market-end of the supply chain is controlled by foreign blending and marketing companies. As Das (2003, p7) comments: "Except for 'single-estate' teas, Darjeeling tea is sold under the brand name of the foreign blender/packer".

- *Changing market situation:* Over the last decade or so there have been substantial changes in the global tea market – some with distinct implications for the Darjeeling tea segment. These changes include the break-up of the Soviet bloc, the changing tea consumption patterns (e.g. tea bags, instant and chilled tea and vending machines), and the emergence of new exporting countries (e.g. Kenya, Malawi). All of these factors, and here including the excessive levels of counterfeit Darjeeling tea, have placed an adverse pressure on the price of tea.

Box 4: Darjeeling logo

The Tea Board of India, working in close association with the Darjeeling Planters' Association and the Government of India, has taken a number of steps to protect and promote Darjeeling tea by preventing passing-off and infringement whilst also protecting the intrinsic flavour of Darjeeling tea. These steps broadly span across the 'issues for further consideration' noted earlier, notably, defining geographical indications to simultaneously localise economic control and segment the market. A logo for Darjeeling tea was developed in 1983 (box 4) and registered in 1986 in a number of overseas jurisdictions as a Trademark and/or CTM (UK, USA, Canada, Japan, Egypt and a number of European countries). Domestic protection was sought by registering the logo and the word "Darjeeling" as a CTM under the Trade and Merchandise Mark Act, 1958 in the late 1980s. Later, the Tea Board – the owner of the logo and the CTM on 'Darjeeling' – also secured protection in key overseas markets/jurisdictions over the word 'Darjeeling'. There are media reports indicating that an application for GI protection may also be submitted.

As noted earlier (section 5.4), the central role of signs and symbols that differentiate products is to alleviate informational asymmetries faced by consumers and allow producers to build reputation. In this respect, the Tea Board has undertaken important steps at developing mechanisms for ensuring the authenticity of Darjeeling upto the moment the consignments leave Indian shores. Under the Tea (Marketing and Distribution) Control Order, 2000, Certificates of Origin are issued for tea exports to ensure the integrity of consignments leaving Indian shores. The next hurdle will be to develop mechanisms for ensuring authenticity (and by extension removing counterfeiting) at the retail end of the supply chain where foreign blenders and marketers dominate.

A final element of the strategy is to focus on enforcement. Moving beyond securing an IPR, the Tea Board has expended significant resources at enforcing their rights in different jurisdictions. This has involved hiring an international watch agency, Belgium based Compumark, to detect all uses of the word 'Darjeeling'. Consequently, the reputation of the word and its association with a particular quality of tea from a specific region will be retained. In addition, the Tea Board has also pursued infringements of its rights by challenging attempts to register the word Darjeeling – and has been successful in a fair number of cases.

The experience with Darjeeling is a useful example of how active strategies have to be launched to protect an indication from being rendered generic. However, this does not come cheaply: pursuing this strategy of acquiring legal rights, hiring an international watch agency and fighting infringement has costed the Tea Board about Rs. 9.4Mn (approx. US$200,000) in four years (1999-2003).

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