Protection of Geographical Indications in Kenya

EU/ARIPO/KIPI Workshop on Geographical Indications

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Kenya Industrial Property Institute

Tea Farms-Mount Kenya

Kenyan Tea-Mount Kenya Area

Kenyan Coffee

Kenyan Coffee

Kenyan Coffee

What is a GI?

- Most of us are aware of Geographical Indications (GI) products.
- Examples: **Champagne**, **Gruyere Cheese, Scotch whisky**, **Idaho Potatoes** and **Solingen knives**.
- Majority originate from more developed regions.Some are from developing regions e.g. **Argane Oil**, **Basmati Rice** & **Cafe de Columbia.**
- **No universally accepted** definition of a GI. In Kenya the following is the proposed definition of a GI (as envisaged in the draft legislation)
- "***Geographical indication" means an indication which identifies a product as originating from a territory, or a region or locality where a given quality, reputation or other characteristics of the product are exclusively or essentially attributable to its geographical origin;***
- ***"Indication" includes any name, traditional designation, geographical, or figurative representation or any combination thereof conveying or suggesting the geographical origin of goods to which it applies;***

GIs as a branding tool

- The function of GIs in branding is similar to that of trademarks except that while trademarks identify the product with the owner, GIs mainly identify the product with the origin.

- Another major difference between trademarks and GIs is that while the former can be assigned to willing enterpreneurs to capitalise and market them, GIs cannot be assigned and are rooted to the origin.

- While trademarks are private rights and thus easier to enforce, GIs are “public rights” (belonging to groups of individuals in a certain region, co-op societies, government bodies etc.) and thus harder to enforce in case of infringement.

- While trademarks may have some qualities-defined or undefined,GIs have unique qualities, reputation or other attributes that attract and assure the consuming public.

Motivation for Kenya In Protecting Geographical Indications

- Famous Kenyan products –coffee, tea
- Other products-handicrafts, carvings, soapstone
- Horticultural products, flowers
- Other plant based products: Aloe-vera, Bixa, Gum Arabic
- Low returns despite famous reputation
- Agriculture's high contribution to the country's GDP
- Most farmers-rural based, small farm sizes
- High rural-urban migration/Need to accelerate growth of rural areas/devolution model with county based focus for rural development.

Feasibility of GIs in Kenya

- A feasibility study was done in May 2007 by the Swiss Intellectual Property Institute.
- A number of products/producers had been pre-selected from available literature.
- A number of producers/organizations targeted for study.
- Interviews/collection of information.
- Field visits: done in Wamunyu and Nyeri.
- Other literature was also used.
- After positive results, a Technical Cooperation Project on GIs between Kenya (KIPI) and Switzerland (IPI) was approved. Some work was done from the recommendations.
- Another study done in March 2011 by EU-ACP brought similar findings.
- Latest study done earlier this year-EU/REDD: Tentative results out.

Organizations/Producers Interviewed (in the 2007 study)

- Kenya Industrial Property Institute
- The Tea Board of Kenya-TBK
- The Coffee Board of Kenya-CBK
- International Centre for Insect Physiology & Ecology-ICIPE
- New Kenya Cooperative Creameries Limited-KCC
- Kenya Wine Agencies Limited-KWAL
- Horticultural Crops Development Authority-HCDA
- Honey Care Africa
- Wamunyu Handicraft Industries
- Gathuthi Tea Factory-Nyeri
- Mukurwe-ini Coffee Cooperative Society
- Java Coffee House

Results of the Feasibility Study (2007)

- Kenya has a high potential of GIs
- Country has significant potential of GIs with a number of GI products identified.
- Products with highest potential-coffee, tea, soapstone, honey & wild silk
- Potential for dairy industry, handicrafts, horticulture limited
- Country has incomplete legal framework on the subject*
- Market familiar with the legal concept of GIs
- Cases of misuse/misrepresentations identified
- Many products well researched & documented
- Quality labels widely used
- Export products undergo a strict quality control mechanism
- Producer associations reasonably well informed

Recommended Pilot GI Products

Product/ Producer or Regulator

- Tea-Tea Board of Kenya
- Coffee-Coffee Board of Kenya
- Yatta Wine, Papaya Wine-Kenya Wine Agencies Limited (a Govt Body corporate)
- Kisii Soapstone-KISCOOP
- Wamunyu Handicrafts-Wamunyu Handcrafts Association
- Wild Honey and Wild Silk-ICIPE
- Voi Oranges and Ngoe Mangoes-HCDA

Protection of Geographical Names as Trademarks-The Trademarks Act Cap 506

Due to the General principle that individual trademarks must not be descriptive or deceptive, geographical terms cannot serve as trademarks, unless they have acquired distinctive character through use, or their use is fanciful and therefore, not deceiving as to the origin of goods on which the trademarks are used.

However, this rule does not apply to certification marks and collective marks.

Certification Marks I

- Marks, which indicate that the goods or services on which they are used have specific qualities, which may also include geographical origin. The owner of a certification mark undertakes to certify that all goods or services on which the certification mark is used have those qualities. The owner of a certification mark does not have the right to the use of the mark.Generally referred to as the *Anti-use principle.*

- Part VII Section 40 of the Trade Marks Act defines Certification Trade Marks as “ A mark adapted in relation to any goods to distinguish in the course of trade goods or other characteristic from goods not so certified shall be registrable as a certification trade mark in Part A of the register in respect of those goods in the name, as proprietor thereof, of that person: Provided that a mark shall not be so registrable in the name of a person who carries on a trade in goods of the kind certified”.

- Producers who comply with the standards of production as defined (and deposited with the Registrar of Trade Marks) by the owner of the certification mark have the right to use that mark.

Certification Marks II

- Given for compliance with defined standards.
- May be used by anyone whose products meet established standards
- Owned by a certifying body-collectively used
- Certifying body must be competent to certify
- Rules governing similar to those of collective marks.
- Certifying body normally does not use the mark.
- Local examples KBS mark, others from the horticultural industry..
- International example-the Woolmark (100% wool)

Collective Marks I

- In practice, difficult to distinguish collective marks from certification marks; difference is one of form rather than substance. Membership usually upon compliance of certain rules, e.g. the geographical area of production of the goods on which the collective mark is used or standards of production of such goods.

- Another substantial difference between the two; owners of collective marks are regularly not barred from using the mark themselves.

- Collective marks enforced under The Trademarks Act (as amended in 2002)

- A collective mark is defined: “A mark capable of distinguishing, in the course of trade, the goods or services of persons who are members of an association, from goods or services of persons who are not members of such an association, shall on application in the prescribed manner, be registrable as a collective mark in respect of the goods or services in the name of such an association”.

Collective Marks II

- Collectively owned by associations or cooperative societies.
- Set of criteria for using- e.g. Standards or locality
- Individual companies/members may use mark
- Used by several members
- Rules/regulations governing use
- Possible examples -MWEA RICE, AHERO Sugar, Reg. “Echuchuka”-Turkana aloe vera
- Used in some countries e.g. USA, as an alternative to GIs-Darjeeling tea.

Who Can Use a Collective Mark?

- Use of a collective mark is limited to members of the association which owns the mark.
- Anyone else who is not a member of that association does not have any right to use the mark.
- This is regardless of the quality or characteristics of the goods or services which they supply.
- However, fulfilment of the quality or those characteristics should enable one be admitted to use the mark.

Regulations Governing Registration of Collective/Certification Marks

- Must satisfy conditions of a trademark.
- Indication of geographical origin.
- Mark should not be misleading.
- Regulations to govern use of the mark./Approval of regulations by Registrar.
- Regulations to be open to inspection.
- Amendment of Regulations.
- Infringement: Rights of authorized users.
- Grounds for revocation of registration/Grounds for invalidity of registration.

Examples of Registered GIs

- Registered as Collective/Certification Marks
- Echuchuka”- unique aloe vera found near Lake Turkana
- “Coffee Kenya-So Rich So Kenyan”-Coffee Board of Kenya
- “The Finest Kenyan Tea”, Mark of Origin-Tea Board of Kenya
- “Maasai/Masaai” Trademark for various cultural products.
- Others (Kenya Bureau of Standards, Kenya National Accreditations Services)

The Draft Geographical Indications Bill 2011

Definitions

- Geographical indication" means an indication which identifies a product as originating from a territory, or a region or locality where a given quality, reputation or other characteristics of the product are exclusively or essentially attributable to its geographical origin;

- “indication” includes any name, traditional designation, geographical, or figurative representation or any combination thereof conveying or suggesting the geographical origin of goods to which it applies;

- To be administered by KIPI

- Registrar of Trademarks=Registrar of Geographical Indications

- Operational details to covered in separate presentation (from KIPI)

Obtaining Protection in Other Countries

- Kenya has not yet acceded to either of the two international GI agreements (Madrid and Lisbon) concerning the protection of GIs. Only option for mutual protection of GIs with other countries would be bilateral agreements.

- Kenya is a member of both the Madrid Agreement and Protocol since 1998.

- Bilateral agreements typically concluded between two countries on the basis of reciprocity in order to increase protection of the countries' respective geographical indications. No Bilateral on GIs in Kenya.

- May be independent treaties or form part of a wider trade agreement. May simply provide for a prohibition of use of the other party's GIs for goods (usually listed in annexes to the agreements) not having that origin.

- They may also go further and provide for extra-territorial application of the other country's national law, concerning the protection of GIs.

The need for GIs in Kenya

- Development of brands is the only way to remove the Kenyan coffee and tea farmers from commodity status and sustained competition.
- The fact that Kenya's teas and coffees are highly sought after for blending means they are already unique in themselves and that the producers stand to gain through value adding and branding.
- This is easier for tea-sold as a finished poduct but slightly harder for coffee mainly sold as a raw product-green coffee.
- The coffee and teas coming from Kenya are not homogeneous though they are mainly mixed and sold that way.
- About five different regions have been positively identified with particular products characteristics associated with unique qualities.
- For Kenyan tea, the buyers-mainly from Pakistan know particular tea gardens(factories-rural based) like "Gathuthi", "Makomboki" etc. from where they insist on sourcing their tea produce for resale while heavily blended.
- The irony is that the same unscruplous traders resell these teas using the well-known garden names (with no proprietary rights).
- The market ends up selling more production of a certain tea garden than the actual production done in that particular season!

The need for GIs In Kenya II

- Commodities that have not been branded are usually unable to withstand the vagaries of the economic weather.

- Selling the produce as commmodities only enriches the sellers at the top level of the value chain and there is little trickle effect (if any) to the producers.

- Kenyan coffee farmers on average are earning about USD 1.50 a kilo but the same coffees have been known to fetch up to 200 pounds a kilo in some London cafes. Low returns-decline in total coffee acreage to urbanization.

- International coffee shops market the coffees under some names denoting specific regions within Kenya meaning their use of “Kenyan GIs” is paying them handsome dividends but not so for the poor Kenyan farmers who sell the crop as a commodity.

Expected Challenges For GIs Use

- The current value chain setup in the coffee industry in terms of marketing may be hard to sell to, the idea of GIs; They may prefer the status quo to remain due to obvious advantages.
- The bulk of Kenyan coffee has seen a decline in quality, even as the country goes branding; sustaining the quality may be a tall order especially so from the thousands of rural based farmers with poor crop husbandry.
- The low volumes of the crop (coffee) may not easily allow for differentiation of the products due to volumes of scale during pulping, milling and transporting the crop. This may however be dictated by the prevailing prices if they can be maintained.
- Demarcating the the GI zones could be contentious for those producers who will feel left out.
- The country does not have a long history of protecting GIs, some bodies (For example INAO-France) may need to be created to oversee GIs certification.
- Lots of awareness raising activities also needed in order to sell the idea of GIs to the producers.
- Cost of producing GIs and marketing especially abroad could be prohibitive.
- Enforcement-especially abroad costly; Some Kenyan geographical names are already being misused in certain countries.

Thanks for your attention!

Ahsante Sana! Merci Beaucoup!

To receive a copy of these slides/contact the presenter, please send an e-mail to: <gmramba@kipi.go.ke> or <rambajeff@gmail.com>

Note: The views expressed herein are the author's views and are not necessarily the views of the Kenya Industrial Property Institute nor of the Kenyan Government.