



Geographical Indications, Biodiversity and Traditional Knowledge: Obligations and Opportunities for the Kingdom of Saudi Arabia

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Abstract

This article examines the Kingdom of Saudi Arabia's legal obligations in one area of intellectual property law, namely, geographical indications (GI). It considers the opportunities for improving the existing legal framework from both a domestic and an international perspective. After an introduction, Section 2 presents a survey of the existing domestic and international laws pertaining to the protection of GIs. Section 3 outlines the relationship between GIs, biodiversity and traditional knowledge. Section 4 summarizes some of the latest developments and points of debate regarding increased protection of GIs. Finally, Section 5 puts forward several recommendations for improving the protection of GIs in the Kingdom of Saudi Arabia.

Keywords

intellectual property; geographical indications; biodiversity; traditional knowledge; Kingdom of Saudi Arabia

1. Introduction

Intellectual property (IP) law regulates the creation, use and exploitation of mental or creative labour.² The term 'intellectual property' covers a range

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² L. Bently and B. Sherman, *Intellectual Property Law*, 3rd edn. (London: Oxford, 2009) 1.

of property rights including copyright, patents, designs, trade secrets, and trademarks. There are a number of differences between these forms of intellectual property, but they all share one essential characteristic: they all establish property protection over intangible things such as ideas, inventions and information.³

The last of those listed, *i.e.*, trademark law, protects the goodwill in marketing information such as logos, names, letters, symbols, emblems, colours, and any combination of those things. Trademarks are well known amongst the public: they serve to distinguish the products of one company from those of another. When a consumer sees the word, image and colours associated with, say, 'Coca-Cola', they expect to imbibe a particular product from a particular company with a particular flavour. The symbols of the Coca-Cola Company have created in the minds of consumers an expectation of a certain quality of product. For that reason, no other company is allowed to use Coca-Cola's words, symbols, devices and slogans. There is a need to both protect the consumer (to make sure that they receive what they think they are purchasing and not a sub-standard imitation) and also to protect the brand (against cheap imitations which might not be as good as the original and which might ultimately lead the public to think less of the brand—and perhaps buy less of it).

Thus, when consumers buy a product with a familiar trademark, those consumers can be assured of the true commercial origin (and, therefore, the quality) of the product. Yet trademarks can be used to identify not just a company of origin but also a geographical region of origin. For example, if a consumer purchases 'Gorgonzola cheese', 'Champagne', 'Bordeaux wine', a 'Mowbray pie' or 'Demerara sugar', the consumer assumes that the product originates from the specific region which is associated with the name of the product.⁴ When a product name has a geographical aspect to it, it is known as a 'geographical indication' (GI). According to the World Intellectual Property Organization (WIPO), a 'geographical indication' is a sign used on goods that have a specific origin and possess qualities, reputation or characteristics that are essentially attributable to that place of origin.⁵

³ *Ibid.*, p. 2.

⁴ GIs are not limited to food products; they could also cover handicrafts and other products (for example, Bohemian crystal).

⁵ WIPO, "About Geographical Indications", available at: http://www.wipo.int/geo_indications/en/about.html [last accessed on 13 March 2011].

1.1. *Definition*

The definition of ‘geographical indications’ has been the subject of considerable debate. The term was defined at an international level through the adoption of the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1994:

[geographical indications are]...indications which identify a good as originating in the territory of a [WTO] Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.⁶

Geographical Indications are a form of intellectual property. They are like a collective trademark: “the indicator is limited in use to a defined group using a specified process, traditional to, or identified with, a specific locale”.⁷ A GI is a place name which identifies the geographical source of a good and signifies a distinctive quality, reputation or other characteristic of that geographical source.⁸ In its simplest sense, a GI is a sign placed on products which have a clearly established place of origin and which possess qualities and reputation derived from that place of origin.

There can be clear economic incentives for producers to try to associate their product with a region that has a sound reputation for producing that particular product. The reference to the particular region will arguably help the producer to sell their product to consumers who are seeking out particular qualities and characteristics—whether the product be cheese, coffee, wine, pies or anything else. There is also an argument that protecting GIs creates an economic incentive to invest in the product. Without the protection of the GI (so the argument goes), there would be less incentive to producers to invest in the development and marketing of a product knowing that others could use the reputation which is built up for their own benefit. The rationale for protecting GIs was concisely stated in a New Zealand Court of Appeal decision:

⁶ Article 22.1 of the TRIPS Agreement.

⁷ C. May, *The World Intellectual Property Organization* (London: Routledge, 2007) 7.

⁸ World Trade Organization, TRIPS: Geographical Indications—Background—the Current Situation (2005): available from http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm.

Champagne is a geographical name [...] goodwill will be damaged if someone else uses the name in relation to a product in such a manner as to deceive purchasers into believing the product has the characteristics of products normally associated with the name when it does not.⁹

Clearly, there is a need to protect and constrain the use of GIs from both the consumers' and the producers' perspectives and, to meet that need, international and domestic laws have been drafted and (to varying extents) implemented. The following section attempts to outline some of those legal provisions.

2. Domestic and International Legal Protection of Geographical Indications

2.1. International Law Pertaining to Geographical Indications

The most important international agreement which protects GIs is the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).¹⁰ TRIPS was the first multilateral agreement to deal with GIs, and it has received a broad level of support. Article 22 of the TRIPS Agreement requires that all members make available the legal means to prevent the use of a GI that either indicates or suggests that a product originates in a geographical area other than the true place of origin, in a manner than misleads the public as to the geographical origin, or that constitutes an act of unfair competition. Under Article 22, the holder of a GI trademark must show that consumers have been misled as to the true origin of the product or that the use amounts to an act of unfair competition. This is quite a high standard for any plaintiff to meet. Article 22 of TRIPS applies to all types of goods.

2.2. Wines and Spirits versus Other Types of Goods

Under the TRIPS Agreement, some types of goods are given an extra level of protection (and a lower standard for potential plaintiffs to meet). Article 23

⁹ *Wineworths Group Ltd. v. Comite Interprofessionel du Vin de Champagne*, 2 NZLR 327 [1991] per Gault J.

¹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33ILM 1197 (1994).

of the TRIPS Agreement prohibits any use of a GI on wines or spirits that do not originate in the designated geographical region. This means that wines and spirits are treated differently to other products. A plaintiff who alleges that their GI has been infringed only needs to prove that the product in question does not come from the region with which it is being associated. There is no need for the plaintiff to prove that consumers are being misled or that there is unfair competition. Wines and spirits are given a higher level of protection compared to other products, perhaps because the geographical origin is so important to those types of products, but more likely because their collective economic worth is seen as needing a better level of protection (and thus the producers of wines and spirits have been better at advocating for themselves and their products).

2.3. Domestic Law in the Kingdom of Saudi Arabia

Before analyzing further the reasons why there is different treatment of GIs, and analyzing the debate that currently exists in this area, it is worth pausing to examine the ways in which Kingdom of Saudi Arabia (KSA) has sought to fulfil its obligations under the TRIPS Agreement by protecting GIs in its domestic legislation.¹¹ In term of domestic law, the obvious starting point is the Basic Law which was implemented by Royal Order on 5 March 1992.¹² The Basic Law contains many of the fundamental laws which are the basis of government in the KSA and, as such, is a constitutional-type document.¹³ The Basic Law does not explicitly refer to intellectual property but it does ensure the protection of all forms of property¹⁴ and it ensures the protection of cultural heritage.¹⁵ The KSA is both a member of the World Trade Organization (WTO) and is a signatory to the TRIPS Agreement which came into force in the KSA on 11 December 2005. The most important domestic law regarding GIs is the Law of

¹¹ By virtue of Article 22.2 of the TRIPS Agreement, all member states (KSA is a member state) must provide interested parties with the legal means to prevent “use of any means in the designation or presentation of the good that misleads the public as to the geographical origin of the good” and “use that constitutes unfair competition under Article 10 of the Paris Convention”.

¹² Basic System by the Royal Order No. (A.90), entered into force on 5 March 1992.

¹³ Note, however, that the Basic Law is not the Constitution: the Basic Law states that the Constitution of the KSA is the Qur’an and the Sunnah.

¹⁴ Basic Law, *supra* note 12, Article 17.

¹⁵ *Ibid.*, Article 29.

Trademarks 2002.¹⁶ The Law of Trademarks is a comprehensive law consisting of 58 articles relating to the registration and protection of trademarks. The Law of Trademarks is supplemented by the Implementing Regulations of Trademark Law 2002. For the purposes of this article, the most relevant article of the Law of Trademarks is Article 2:

The following signs, emblems, flags and others listed below shall not be considered or registered a trademark:

(a) Signs without any specific distinction and which are descriptions of characteristics or which are no more than common names which are by custom given to the products or services. [...]

(f) Geographical names if their use is liable to create confusion as to the source of the products or services or their origin or liable to monopolize notice of origin or name the source without rightful justification...

Article 2(f) of the Law of Trademarks provides that a geographical name, or GI, can be included in a registered trademark as long as two hurdles are overcome: first, the use of that geographical indication does not create confusion as to the source of the product or service, and, secondly, as long as it is not liable to monopolize the notice of origin or name without “rightful justification”. It is the author’s opinion that the KSA is hereby attempting to provide some special protection for geographical indications. If the GI in the trademark does not confuse consumers, then it will pass the first hurdle. If the product or service originates from the stated region, then that would arguably create a ‘rightful justification’ for establishing a monopoly over the use of that place of origin. Both hurdles would probably be satisfied if the product or service in question originates in or is produced mainly within the place suggested by the use of the GI. It is hard to know exactly what is meant by ‘rightful justification’ since it is not defined or explained further in the legislation. It is unclear whether the product/service would have to be partially, mainly or completely produced in the particular region.

One of the questions which may arise from the above legislative provision is whether this provision affords adequate protection to GIs or whether another system could be implemented, perhaps creating a national or regional register for GIs, which would provide a better level of protection. This point will be taken up again later in Section 4.

¹⁶ Law of Trademarks (including provisions on Geographical Indications), Royal Decree No. M/21, 28 Jumada I 1423/7 August 2002.

3. Relationship between Geographical Indications, Biodiversity and Traditional Knowledge

It has already been mentioned that some products and services deserve special trademark protection due to the fact that they originate from a specific region or are the result of a long-established process which is unique to a particular area. There is a close and increasingly recognized connection between GIs and two other areas: biodiversity and traditional knowledge. To date, discussion in the GI debate has often been peppered by examples of famous regional products, often (but not exclusively) originating in Europe such as cheese (Stilton, Gorgonzola, Parmesan), ham (Parma), alcoholic beverages (Bordeaux wine, Champagne, Tequila) coffee (Café Colombia) tea (Darjeeling) and other similar products. Yet since we are writing in the context of the KSA, it might be more appropriate to think in terms of dates, mineral water or honey as well as non-food products such as locally made handcrafts including traditional dresses.¹⁷

In a developing country such as the KSA, which has a long agricultural heritage as well as a rich cultural heritage, there are bound to be many examples of products and services which are specific to a particular region and which others might try to capitalize upon by using that regional name—even if the ‘copy cat’ product is not from the region with which it is being associated. What is also becoming clear is that there is an overlap of interests between GIs, biodiversity and traditional knowledge. That connection is explored further in the discussion below.

3.1. *Introduction: the Relationship between GIs and Biodiversity*

The KSA is a country which is rich in terms of biodiversity.¹⁸ There are considered to be 2,250 species of flowering plants in Saudi Arabia of which

¹⁷ Potential Saudi GI examples might include the distinctive hand-made dresses from Abhā, which is also famous for producing honey. An example from another country in the Middle East region could be the famous Aleppo soap made from olive oil, locally known as ‘saboon gar’. Many of the most famous Saudi hand-made products are displayed annually at the 2-week long “Janadriyyah Heritage and Culture Festival”, held this year from 13–30 April 2011. For more information, see www.janadriah.org.sa [last accessed 20 April 2011].

¹⁸ ‘Biological diversity’ means the “variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.”: Convention on Biological Diversity, concluded at Rio de Janeiro on 5 June 1992. This came into force in the KSA on 1 January 2002.

some 246 species are considered regionally endemic.¹⁹ About 450 species (18%) of flowering plants have direct benefits to human beings and some 334 species (13.4%) are used in folk medicine or are known to have medicinal value. The biodiversity of Saudi Arabia stems from its pivotal location between African and Eurasia which allows elements of both regions to intermingle.²⁰ The KSA is already acutely aware of the need to protect its biodiversity. It has taken several steps to try to protect its biodiversity including becoming a signatory to the United Nation Convention on Biological Diversity, as well as forming a National Biodiversity Committee which has prepared a National Biodiversity Strategy. Significantly, the KSA has been taking a number of practical measures to achieve its strategic goals in the area of biodiversity protection (including enhancing public education and environmental awareness, building capacity of personnel in the conservation field and establishing new protected areas).²¹ Clearly, this is an important issue for KSA, and it is looking for the means to increase protection of its biodiversity.

There is an intersection of related interests at play between biodiversity, agriculture, intellectual property and economics. Before addressing these inter-relationships, a brief analysis of two other regions is undertaken: the European Union and Andean countries. Both are mentioned below followed by a return to the discussion of the linkages between biodiversity, GIs and economics. Both regions have a strong agricultural sector, yet they differ in terms of their record on GIs: globally, the EU has the oldest and possibly most complex method for protecting GIs whilst the Andean states are developing countries which are trying to capitalise on the future potential of GIs. Both provide interesting contrasts and comparisons for the KSA which has a strong agricultural sector and is also a developing nation which has come relatively late to the concept of IP protection for GIs.

3.2. *European Union and the Protection of GIs*

The European Union (EU) has long recognized the relationship between the inter-related areas of agricultural development and the legal protections of GIs. The EU has a Common Agricultural Policy (CAP) which is

¹⁹ Convention on Biodiversity, Country Profile—Saudi Arabia, available at: <http://cbd.int/countries/profile.shtml?country=sa> [last accessed on 11 March 2011].

²⁰ *Ibid.*

²¹ *Ibid.*

fundamentally changing from being based on quantity to being based on quality:

There is a movement within the EU away from support for unlimited production towards promotion of quality products, which should be able to compete with less protection against imported foodstuffs. *And the increased protection of GIs is a key element in the EU's quality policy.*²² (emphasis added)

In the EU, the new 'quality-focused' agricultural policy aims to create better employment in rural areas and motivate young people to continue to be involved with agricultural activity. The protection of GIs in the EU—both domestically and internationally—lies at the heart of the EU's agricultural policy.²³ It is claimed to be an economic fact that "GIs increase production, create local jobs and reduce rural exodus".²⁴ Recognition of GIs helps producers to obtain a premium price for their quality products that are produced in accordance with traditional recipes in specified places. After a product gains GI protection, it is typical for the production to increase as well as the price the product fetches at market.²⁵ There are many parallels between the problems being faced in the EU's rural sector (unemployment, rural–urban drift) and the rural sector in many developing countries. The alleged benefits²⁶ that greater GI protection brings to rural communities in the EU should be noted by policy makers and legislators in the KSA.

3.3. *Categories of GI Protection in the European Union*

Pursuing its economic policy of 'quality over quantity', the EU has implemented a raft of measures over the years to control the way that agricultural

²² O'Connor & Company, "Geographical Indications and the Challenges for ACP Countries: A Discussion Paper" available online at: <http://agritrade.cta.int/> [last accessed on 11 March 2011].

²³ *Ibid.*, p. 3.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ The phrase 'alleged benefits' is used here to allude to the fact that there is an ongoing debate in this area as to the real economic benefits to producers in developing countries of improved GI protection. Some scholars would argue that the jury is still out on who would be the winners and who would be the losers if stronger GI standards are implemented internationally. For a summary of this debate, see the special issue of the *Estey Centre Journal of International Law and Trade Policy* 10(1) 2009 on the law and economics of geographical indications.

products are described and labelled.²⁷ It would be safe to say that the EU countries have led the way in the realm of GI protection.²⁸ The EU has had legislation in place since at least 1992 to protect the reputation of regional foods, to eliminate unfair competition and to protect consumers from being misled by non-genuine products. There are basically three regimes: Protected Designation of Origin (PDO), Protected Geographical Indications (PGI) and Traditional Specialty Guaranteed (TSG). The PDO is the name of an area, a specific place or (in some cases) a country. To receive the protection, the entire product must be prepared, processed and produced within the specific region. It is also necessary to show that the quality or characteristic of the product are 'essentially or exclusively due to a particular geographic environment with its inherent natural and human factors'.²⁹ The PGI is the name of an area, a specific place or, in exceptional cases, the name of a country used as a description of an agricultural product or foodstuff. To receive PGI status, the product must originate in the specific place, region or country. The product or foodstuff must also possess a specific quality, reputation or other characteristic attributable to that geographic origin. Finally, the TSG is a term given to traditional foods and recipes registered under the Traditional Specialties Regulations of 2006. For a name to be registered as a TSG it must be specific, express the specific character of the foodstuff or product, and be traditional or established by custom.³⁰

A complete list of products which have achieved one of the three classifications is available online. There is an extensive list of more than 1,000 products. The above-mentioned regimes operate within the EU, but there is no unconditional protection for these names on products made and sold outside the EU. The EU has been entering into a number of bilateral agree-

²⁷ Bently and Sherman, *supra* note 2, p. 975.

²⁸ There are a number of relevant conventions, aside from the TRIPS Agreement, which protect GIs in Europe, including the 1883 Paris Convention for the Protection of Industrial Property, the 1891 Madrid Agreement for the Repression of False or Misleading Indications of Source on Goods, the 1951 Stresa Convention on Designations of Origin for Cheese and the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration. A discussion of these agreements is beyond the scope of this article which focuses mainly on the TRIPs Agreement and future possible agreements.

²⁹ Bently and Sherman, *supra* note 2, p. 978.

³⁰ *Ibid.*

ments to achieve some level of enforcement³¹ but there is, as yet, no multilateral register which operates internationally. This issue will be discussed in Section 2 and taken up again in Section 4.

3.4. *Andean States*

The EU is not the only region to have awoken to the economic potential of GIs. Many other countries and regions have looked to the example set by the EU and have tried to learn from the way in which the EU has managed to implement a system of protecting the geographic origins of its agricultural products. Poverty in rural areas of Andean countries³² is rapidly expanding and traditional agriculture—in the way that it is currently practiced—is not providing adequate employment and income to reverse this trend.³³ There are parallels between Andean agriculture and the KSA. Andean countries have a dual agriculture sector: commercial and peasant agriculture. Commercial agriculture depends on renewed genetic materials including hybrid seeds, high levels of agrochemical inputs and mechanization. In peasant agriculture, there is high dependence on local seeds derived from the domestication of biodiversity and traditional cultural practices.

Some Andean scholars and writers, amidst a backdrop of worsening rural poverty, are calling for an increased level of protection for GIs.³⁴ There are three rationales: to protect the value and identification of local differentiated products; to encourage alliances among producers and processor to standardize their production and processing practices; and to facilitate access to market where consumers have shown a preference for such distinct products. Andean scholars suggest that the GI potential in their countries is substantial: “hundreds of products—in both domesticated and natural environments—have been noted as possible candidates for these instruments”.³⁵ This would, it is suggested, be one of the first steps for the KSA to take: to identify which food and handicraft products would be suitable for some form of GI protection. This would go hand-in-hand with

³¹ Bilateral agreements have been entered into between the EU and Australia, Canada, Chile, Colombia, Mexico and South Africa. Most of the bilateral agreements have been based on wine and/or coffee and/or cheese products.

³² The Andean Community of Nations is a customs union which consists of Bolivia, Colombia, Ecuador and Peru.

³³ C. Pomareda and J. Paz, “Geographical Indications and the protection of biodiversity in Andean countries”, *Bridges Trade BioRes Review* 4(1) 2010.

³⁴ *Ibid.*

³⁵ *Ibid.*

increased institutional capacity to deal with the opportunities that GIs pose. A national strategy is needed in this area, an idea which is taken up in Section 4.

3.5. Biodiversity

Having briefly discussed the EU and Andean experiences with protecting GIs, we return to the question of the connection between GIs and biodiversity which was touched upon at the beginning of Section 2. On the one hand, one might argue that GIs have a limited capacity to help protect biodiversity. One might argue that GIs are not the right vehicle for enhancing biodiversity protection although patents might have some potential. On the other hand, it is argued that biodiversity must be protected *in situ* by governments and society by:

... preserving the ecosystem, facilitating living conditions of native populations while they learn to use biodiversity to generate market products and to allow scientific work that leads towards future products of industry and biotechnology.³⁶

The major threats to biodiversity are habitat destruction and fragmentation, over-grazing, over-hunting, changes to intensive modern agricultural practices, pollution, recreational activities, expansion of urban areas and exotic, invasive species.³⁷ Aside from the fact that the KSA has obligations under the UN Convention on Biodiversity to take steps to protect its biodiversity, it is also apparent that conservation and the sustainable use of resources are enshrined in Islamic law and Islamic principles.³⁸ Increasing the legal protection of GIs will not be the main plank in the strategy for protecting biodiversity but surely it has a role to play. If agricultural communities are given the opportunity to develop their traditional practices and products and are then given a market incentive in the form of GI pro-

³⁶ *Ibid.*, p. 3.

³⁷ Convention on Biodiversity, Country Profile—Saudi Arabia, available at: <http://www.cbd.int/countires/profile.shtml?country=sa> [last accessed on 13 March 2011].

³⁸ A discussion of the relationship between environmentalism, sustainability and Islam is beyond the scope of this article, suffice to say that there is ample evidence in Islamic Sharī'ah to support the notion that Muslims are obliged to make every effort to conserve their resources and not ruin the environment in which they live. For multiple Qur'ānic references to the relationship between mankind and the environment, see A. Nasir, "Islam and the Protection of the Environment", *Journal Islam Today*, 13 (1416 H/1995 CE) available at: <http://www.isesco.org.ma/english/publications/islamtoday/13/P5.php> [last accessed 20 April 2011].

tection for their unique products, this might also enhance environmental protection. It seems to be a two-way street: in order to develop new products that might be suitable for GI protection, the environment must be protected until that development can occur; meanwhile, protecting the environment and the biodiversity that currently exists in KSA will give people the opportunity to see the potential of, say, flowering plants in medicinal products which might eventually become identified with a specific geographic region and thereby gain GI protection and labelling. The connection between GI protection and biodiversity protection go hand-in-hand. The future potential in this area needs to be seriously considered by policy makers in the KSA.

3.6. *Traditional Knowledge*

A number of observers as well as the WTO have noted that there is a strong connection between GIs and traditional or indigenous knowledge. Deliberations at the WTO have reflected upon the beneficial relationship between GIs and wider efforts at protecting indigenous peoples' knowledge. WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is due to meet for its Eighteenth Session Geneva in May 2011. At that meeting it will discuss progress in this area including a document prepared by the Secretariat, *The Protection of Traditional Knowledge: Revised Objectives and Principles*.³⁹ The relationship between traditional knowledge and GIs is arguably quite strong. In the KSA, there are many different areas where this overlap might occur, including the production of foodstuffs and handcrafts. The protection of GIs and the protection of traditional knowledge are closely connected. This is an area which ought to be of particular interest to the KSA.

4. **Current Areas of Debate**

Section 4 surveys some of the GI-related issues that are currently being debated. At a domestic level, the author is not aware of any current issues being debated in terms of increasing domestic GI protection in the KSA. At the international level, however, there has been a great deal of interest in at least three key areas. First, members of the World Trade Organization

³⁹ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 10 January 2011, WIPO/GRTKF/IC/18/5.

(WTO) have been participating in ongoing discussions which aim to create a multilateral register for geographical indications for wines and spirits. This will be referred to here as ‘the multilateral register’ issue. Second, there is an ongoing debate amongst states and scholars as to why the TRIPS Agreement provides greater protection to wines and spirits than to other products (such as coffee, tea, cheese and handcrafts). This will be referred to here as ‘the extension issue’. Thirdly, there is a debate on the wisdom of promoting greater GI protection for *any* products, the argument being that giving a small group of producers monopoly rights over geographical names will potentially become a non-tariff method of creating trade barriers. This will not be discussed at length here. The point being made by some writers in this area is that no one should be able to ‘own’ geographic names, whether they be the names of villages, regions or countries. The argument is one that is often made by countries which have benefited from immigrants from the ‘Old World’ who have brought products with them and then produced them under the same name in the ‘New World’. This is a much wider argument and a full exploration of it is beyond the scope of this article.

4.1. *The Multilateral Register Issue*

Formal meetings have been ongoing between members of the WTO to try to reach an agreement on a system for registering GIs for wines and spirits that would protect these products amongst all WTO states. The protection afforded by the EU’s system (discussed in Section 2) only provides protection within the EU and within states that have a bilateral agreement with the EU. The idea is that there would be a multilateral register which would protect the registered products in all WTO member states. On 3 March 2011, it was reported that in less than 2 months, a complete text on the proposed multilateral register had been drafted but, because of all the divergent views, the 9-page document contained 208 pieces of rival text.⁴⁰ The production of the draft text is seen as a positive development after more than 13 years of negotiations. However, there are still major differences between the various groups. Their respective proposals show that there are fundamental differences in approach to be overcome before a multilateral register becomes a reality.

⁴⁰ WTO “Geographical indications draft completed swiftly but with 208 differences”, 3 March 2011, available at: http://www.wto.org/english/news_e/news11_e/trip_ss_03mar11_e.htm [last accessed on 13 March 2011].

Two main groups formed in the GI negotiations—the so-called ‘Joint Proposal’ group (consisting of Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, the Republic of Korea, Mexico, New Zealand, Nicaragua, Chinese Taipei, South Africa and the US)⁴¹—have put forward a proposal whereby members would choose whether to participate in the register. The IP authorities of the member states would decide whether to provide protection for GIs within their countries. The other group, sometimes referred to as the ‘W/52’ group, consists of over 100 WTO members including Albania, China, Colombia, Ecuador, the EU, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey and the ACP Group.⁴² The W/52 group envisages a system applying to all members, although members could choose whether to register their own geographical indications. This group advocates a more compulsory-type system wherein a GI registration would amount to *prima facie* evidence that the term meets the definition of a geographical indication and deserves protection within their country.⁴³ At the time of writing it is still unclear which group’s proposals will garner more support.

4.2. *The Extension Issue*

The debate in this area surrounds the two different forms of protection for GIs, discussed above. Article 22 of TRIPS stipulates that the owner of an infringed GI must show that consumers have been misled by the allegedly infringing label or that the sale of the item was an act of unfair competition. However, as mentioned above, Article 23 provides greater protection for wines and spirits since it requires a plaintiff to show only that the product on which the GI is used does not originate in the geographic area identified by its indication. There is no need for wines and spirits producers to prove that consumers have been misled by the use of the geographic name. In other words, wines and spirits are given a higher level of protection (and a lower threshold for plaintiffs to meet to succeed in legal action). There has been considerable debate as to why Article 23 of TRIPS

⁴¹ See Proposed Draft TRIPS Council Decision on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits, TN/IP/W/10/Rev.2, 24 July 2008, commonly referred to as ‘the Joint Proposal’.

⁴² The ACP group consists of 79 African, Caribbean and Pacific Island states.

⁴³ See Draft Modalities for TRIPS Related Issues, TN/C/W/52, 19 July 2008.

should afford special protection for wines and spirits and not extend this broader level protection to all products (all foods and handicrafts). It is difficult to see why a line has been drawn between products in this way. The issue has been taken up by scholars and states alike. States are clearly divided on this issue. The W/52 group in the WTO negotiations, which consists of over 100 WTO states including the ACP group, the African Group and the EU, has submitted a proposal which would extend the enhanced protection currently given to wines and spirits to all products. This proposal is opposed by the other main group, the Joint Proposal group, which includes the USA. Academic writers have also discussed this distinction arguing that there is no justification for treating varying types of goods differently, especially since the definition of “geographical indications” in TRIPS does not differentiate between product types.⁴⁴

The reason why the TRIPS Agreement and the proposed multilateral register offer a higher level of protection to wines and spirits over all other goods might be quite simple. Perhaps wines and spirits producers are more organized and more able to advocate for an international framework which protects their position. Small-scale producers of other products may not be able to band together whilst the powerful liquor industry seems particularly effective at lobbying for its position. It is submitted that there is no real reason why some GIs should be given more protection than others. In fact, the small-scale producers and cottage-industries arguably need greater protection for their goods simply because they are small, fragmented and less able to protect their IP in a global marketplace. Unfortunately, this does not seem to be an argument which the current round of GI negotiations is likely to address anytime soon. The Chairperson of the WTO-sponsored negotiations, Darlington Mwape of Zambia, noted in his March 2011 report that considerable time was spent talking about whether the draft text on the multilateral register should extend to other products (rather than being limited exclusively to wine and spirits) and he noted that this “extension” discussion “has not been to my liking”.⁴⁵ Apparently, the parameters of the multilateral register negotiations have already been set—and extending the register beyond wines and spirits is not on the agenda.

⁴⁴ For a full discussion of the arguments, see Lang, G., “On the Need to Expand Article 23 of the TRIPS Agreement” *Duke Journal of Comparative and International Law* 16 (2006) 487.

⁴⁵ See Excerpt from the Chairperson’s Report, 3 March 2011.

5. Recommendations

It is suggested that the protection of geographical indications is an area that creates substantial opportunities for the KSA. The following recommendations need not be taken as whole: perhaps some might be considered more useful, practical or timely than others.

1. *The Ministry of Commerce should consider creating a working group which would examine the potential benefits and prospects of increased GI protection.* The proposed 'GI working group' within the Ministry of Commerce would probably examine the existing level of protection offered by Saudi law (see point 2 below) as well as the international framework (see point 3 below). It would also identify the potential products (food and non-food) across the KSA that might benefit from special GI protection. It would provide a cost-benefit analysis of the economic benefits that would flow from special GI protection as against the costs of establishing the protection. This analysis would necessarily require an examination of the economic potential for marketing the GI products domestically, regionally and internationally.
2. *Revise Article 1 of the Law of Trademarks and strengthen the domestic legislative protection of GIs.* The law as it currently stands will not allow a GI to be registered as part of a trademark if it would cause confusion as to the origin of the product. Perhaps this law could be amended and a specific law drafted that would better define a GI and also create a register for GIs. As for the former, an enhanced and strengthened GI law could define a GI more specifically as "an indication that identifies a product as originating in the territory of a country, or a region or locality in that territory, where a given quality, or reputation, or other characteristic, of the product is essentially attributable to its geographical origin." As for the latter, it is possible that establishing a national register for GIs would enhance their protection domestically and abroad. New Zealand is one country which has recently passed legislation to protect GIs. The Geographical Indications (Wine and Spirits) Registration Act 2006⁴⁶ is directed at the protection of wines and spirits—which are clearly not products that the KSA would be seeking to protect—but the overall structure and content of that law would be

⁴⁶ Geographical Indications (Wine and Spirits) Registration Act 2006 No 60, Public Act. The Act is available online at New Zealand Legislation: Acts <http://www.legislation.govt.nz/act/public/2006/0060/latest/DLM390756.html> [last accessed on 21 March 2011].

a useful starting point if the KSA wanted to draft legislation to protect all GIs. The New Zealand legislation does establish a register and that could be used as a model if the KSA or even the GCC wanted to create something similar. An amended law could also consider the length of time for which a registered GI would be effective.

3. *Advocate for a multilateral register of GIs through the WTO negotiations.* It has been mentioned in Section 3 that much of the recent international discussion regarding GIs has focused on the efforts to implement a multilateral register for wines and spirits. The KSA is an Islamic country where the sale and consumption of alcohol is prohibited. When joining the WTO, the KSA's representative stated that "the production, sale, consumption and import of alcoholic beverages [is] prohibited in Shari'ah and, thus, geographical indications of origin of wines and spirits [are] not protected."⁴⁷ This being the case, the KSA might take the view that the international discussion on the multilateral register is of no direct relevance to it and therefore it need not play an active role. It is submitted that this is a flawed approach. The W/52 group within the WTO that supports extending the protection afforded to wines and spirits in Article 23 to all products also supports a multilateral register for all products, not just wines and spirits.⁴⁸ It was noted above that the current negotiations look as though they will not result in a multilateral register for anything other than wines and spirits. However, if the KSA possesses products that have special geographical qualities, it may find that it would be in the KSA's own best interests to join the call for a multilateral register. If there were a multilateral register for all products, the KSA could potentially register a reservation that it would not protect wines and spirits, just as it did when it joined the WTO. The wider interests of producers in the KSA should be taken into account by advocating strongly for a multilateral register for all products. It remains unclear to the writer what the KSA's position is regarding the establishment of a multilateral register.
4. *Advocate for an extension of Article 23 beyond wines and spirits.* There has been a great deal of discussion and academic writing on whether the higher protection afforded to wines and spirits in Article 23 of the

⁴⁷ See Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, WT/ACC/SAU/61, 1 November 2005, §256.

⁴⁸ For discussion, see *ibid.* and accompanying text. This group is referred to in the context of the WTO negotiations as the W/52 group.

TRIPS Agreement should be extended to all goods. This issue is linked to the issue of establishing a multilateral register. As mentioned in Section 3, there are two schools of thought and states have divided into two 'camps': the USA, Australia, New Zealand, several Latin American states and others (the Joint Proposal group) who object to extending the Article 23 protection to anything other than wines and spirits, versus the EU, China, Brazil, the ACP states and other developing nations (the W/52 group) which would like to see all products protected in the way that wines and spirits are presently protected. This is a heated argument and proponents of one view are most unlikely to be swayed that their position is incorrect. This author takes the view that there is no conceptual reason why wines and spirits should be signalled out above all other products for special protection. Naturally, some countries would not want to extend the protection to all products because it would require some goods to be re-labelled and re-packaged. The arguments for and against extension have been examined elsewhere and are not rehearsed again here.⁴⁹ It is submitted that the KSA ought to be firmly on the side of 'Article 23 extension' because if all goods were protected it would mean that any products which possessed a GI linked to the KSA (as identified by the proposed Ministry of Commerce working group, see Point 1 above) would be protected internationally.

5. Consider implementing a KSA or GCC register similar to the EU. The final suggestion is for the KSA to consider regional co-ordination with other GCC states regarding improved protection of GIs.⁵⁰ All six of the GCC states are signatories to both the WIPO Convention and the TRIPS Agreement.⁵¹ All GCC states have implemented trademark laws, albeit with slightly different definitions and slightly differing

⁴⁹ See Lang, *supra* note 51.

⁵⁰ The Co-operation Council for the Arab States of the Gulf, commonly referred to as the Gulf Co-operation Council (GCC) consists of the United Arab Emirates, The Kingdom of Bahrain, the KSA, the Sultanate of Oman, Qatar and Kuwait. For further information on the GCC and its areas of co-operation, see <http://www.gcc-sg.org/eng/index.html> [last accessed on 2 April 2011].

⁵¹ In the UAE, the WIPO Convention came into force on 24 September 1974 and the TRIPS Agreement on 10 April 1996; in Bahrain the respective entering into force dates were 22 June 1995 and 1 January 1995; in Oman WIPO and TRIPs came into effect on 19 February 1997 and 9 November 2000; Qatar saw them enter into force on 3 September 1976 and 13 January 1996 and Kuwait on 14 July 1998 and 1 January 1995, respectively. Being a signatory to TRIPS means that WTO member states must provide for minimum standards of protection in member states' domestic laws.

levels of protection for GIs.⁵² Oman is one GCC state which potentially allows a wide array of people to benefit from the protected GI⁵³ and it has even gone so far as to establish a national register for GIs.⁵⁴ In light of the fact that GCC states already co-operate in a number of areas including trademark law,⁵⁵ and in light of the fact that all GCC states seem to share a commonality of purpose in protecting GIs, perhaps a regional *register* could be established for all the GCC states, similar to that created by the EU although (unlike the EU) perhaps with only one designation and one label. If the KSA was able to enter into discussions with other GCC states on ways in which they could protect their products within this region, it might then be possible to negotiate bilateral agreements between the GCC as a trading bloc and other states for the protection of GCC-registered GIs in the same way in which the EU has entered bilateral agreements with other states to protect its unique products. This is a step which could easily be taken, given that the GCC already negotiates as a bloc when entering into free-trade agreements with other states.⁵⁶ This recommendation would probably be a

⁵² See Trademark Law No. 37 of 1992 (UAE) as subsequently amended, entered into force on 12 January 1993; Law No. 16 of 2005 on the Protection of Geographical Indications (Bahrain); Royal Decree No. 40/2000 Promulgating the Law on the Protection of Geographical indications, entered into force on 21 May 2000 (Oman); Law No. 9 of 2002 on Trademarks, Commercial Indications and Industrial Designs (Qatar); Law No. 64 of 1999 Concerning Intellectual Property Rights (Kuwait).

⁵³ See Royal Decree No. 40/2000 Promulgating the Law on the Protection of Geographical Indications (Oman) Article 2 which states that “Competent authorities, natural persons or any interest group of producers or consumers of any natural, agricultural, industrial or handicraft products having a distinctive characteristic or reputation attributable to their geographical origin, and any person trading such articles shall have the right to enjoy protection under this Law.”

⁵⁴ *Ibid.*, Article 3. Note that under Omani Law, a GI will benefit from protection whether it is registered or not.

⁵⁵ On 10 December 2006 the GCC Supreme Council approved the GCC Unified Trademark Law; see the Closing Statement of the 27th Session of the Supreme Council of the Arab Gulf Co-operation Council (GCC), 9–10 December 2006/18–19 Dhu-l-Qādah, available from the GCC website at: <http://www.gcc-sg.org/eng/indexf5cf.html?action=SecShow&ID=129> [last accessed 2 April 2011]. The law attempts to unify a number of practices across the GCC states and increase penalties but it does not provide for a GCC-wide trademark register. The law does not come into effect until all six countries have approved it domestically. It has been approved by Saudi Arabia, Qatar and the UAE. To the author’s knowledge, Oman, Bahrain and Kuwait have yet to approve it.

⁵⁶ For example, the free-trade agreement entered into between the GCC and Singapore in 2008, see The Final Communiqué of the 29th Session of the Supreme Council of the

substitute for advocating for a global multilateral register but it might also serve a purpose in the interim in boosting production of the particular GI products as well as increasing consumer awareness of these special products.

6. Conclusions

The registration and protection of Geographical Indications should be an area of evolving interest and concern in the KSA: that is essentially the point made in this article. The current law does provide for the possible registration of trademarks which incorporate a GI but it has been argued here that there is much more that could and should be done to develop this area, legally and economically. The lead ought ideally to come from the Ministry of Commerce but lawyers who practice in this field should also become involved and active in the debate. The argument that has been put forward here is that the KSA should focus on this area as an area of potential economic benefit for the KSA, especially since there are likely spin-offs for protecting biodiversity, traditional knowledge and promoting the continuation of traditional arts and crafts. This article does not seek to provide the 'last word' on the topic; rather it seeks to begin a debate about whether the KSA could do more to investigate the potential benefits. The recommendations that have been put forward here range from taking action in the domestic sphere to taking a more active role in the international debate. If this paper manages to ignite a discussion and ultimately prompt some closer examination as to what GI protection might contribute to a developing and modernizing economy in the KSA, then it will have achieved its main objective.

Arab Gulf Co-operation Council (GCC), 29–30 December 2008/102 Muharram 1430 H, available from the GCC website at: <http://www.gcc-sg.org/eng/index6be7.html?action=Sec-Show&ID=290> [last accessed on 2 April 2011].

