



DIVERSITY OF NATIONAL LEGAL APPROACHES FOR PROTECTION OF GEOGRAPHICAL INDICATION IN AFRICA: RETHINKING THE BEST OPTION FOR TANZANIA

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Abstract:

The study was centered on the main objective of examining three approaches of protection of geographical indications which trademark system, sue generis system and the unfair competition system. This paper is intended to study various approaches of legal framework for protection of geographical indications as applied in different countries with the view of ascertaining the strength and weakness of each approach in order to recommended the right approach for Tanzania. The main problem which prompted the study is results from flexibility of the system for protection of geographical indications allowed by the WTO Agreement on Trade Related Aspects of Intellectual Property Rights of 1994. On part of methodology, the study is qualitative in nature and uses mainly secondary date derived by using documentary review of various international legal instruments, reports, legal text books, articles and conference papers based on protection of geographical indications. Data were analyzed by using content analysis in which the researcher sorted data basing on the relevancy of the content on the study objectives of the study. Generally, the findings has revealed that, apparently states protects geographical indications by using trademark laws, sue generis or specific laws and unfair competition system. However, the more comprehensive and effective approach that Tanzania can adopt is the sue generis system because it provided for specific standards for protection of geographical indications which cannot be mixed with trade mark or competition laws.

Keywords:

Africa, Trade, Law

1. Introduction

Protection of geographical indications as a separate category of intellectual property rights has been a matter of heated debate across the world. Some national laws protect it as a separate intellectual property right under sue generis system, few protect it as a trademark through collective and certification mark and other protect it as an aspect of unfair competition under the fair competition laws. This multiplicity or diversification of laws has created uncertainty on recognition of the right and the real scope of the right. This study is interested much to examine the three approaches with the view of ascertaining the appropriate approach that can be applied in Tanzanian context.

2. Definitions of Key Concepts

In course of examining the legal framework for protection of geographical indications, it is important to define some key concepts appearing in the title of the study for more understanding within the context of this study. One of the most important terminology or concepts to be defined is geographical indications as opposed to other similar or related terminologies like appellation of origin.

2.1. Geographical Indications

Literature reveals that, in any debate relating to protection of geographical indication, one of the challenges is often the daunting task of defining the subject matter covered by the word geographical indications. A clear definition of geographical indications is important to define the scope of protectable geographical indications by distinguishing geographical indications from other categories of intellectual property rights like trademarks. The definition of geographical indications is provided in different legal documents with almost similar wording. The TRIPS Agreement is the benchmark of defining geographical indication. The Agreement defines geographical indication to mean; -

Indications which identify goods as originating in the territory of a Member or region or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographic origin. The definition of geographical indications by the TRIPS Agreement highlights the scope and conditions for protection of geographical indications. According to the definition of geographical indication provided by TRIPS Agreement, for a geographical name to qualify for protection as geographical indications; it should be the name of a geographical area found in a region or country or locality where the product originates. The goods using the name must originate in the particular geographical area or locality within the territory of the country they indicate. This is also called geographical nexus. Also, the particular goods must have quality or reputation which is essentially attributed from their place of origin. These unique attributes may be measured in terms of taste, aroma, touch or appearance which distinguishes the geographical indication products from similar products produced in other areas. The use of the word 'indication' in the definition includes use of a geographical name, figurative representation of the name of a place or any combination of them conveying or suggesting that the goods which they indicate originate in that particular place to which the indication points. This place may be a city/region or country/territory which is famous for producing or manufacturing that particular product.

2.2. Diversity of Legal Systems

In this context, diversity of legal systems is used to mean the existence of several approaches of protection of geographical indications across states ranging from trademark laws, sue generis law and unfair competition systems used by the respective states to protect geographical indications in their national systems.

3. Background to the Problem

Recently geographical indications have been commonly used by business enterprises and producer groups in both developed and developing countries to market certain distinctive products. Studies shows that, consumers are willing to pay premium price to products identified by using indications of origin.

The history of protection of geographical indications is connected to industrial revolution in Europe in the 19th Century. The first country to design a law on protection of geographical indications was France in 1825. The French law was by then intended to prevent false indication of source of industrial goods. The law was mainly implemented by imposing criminal sanction to people who were found guilty of false indication of origin of goods. Later in 1919, the French Parliament realized that the quality of certain products especially agro products were very much connected to their place of origin basing on natural, human, climatic factors and method of production. Therefore, French decided to make a law on protection of geographical origin of some goods such as cheese and wine. This being domestic law with no international recognition triggered for international movements on the protection of Geographical Indications.

At the international level, the law on protection of geographical indications started with the Paris Convention on Indications of Source in 1883. This Convention prevents the use of false indication of source of goods which are likely to mislead consumers as to the true origin of the goods. It also prohibits acts of unfair competition which are likely to affect consumers. However, the Paris Convention talks about protection of Indication of Source of goods without any express recognition of protection of geographical indications. The Paris Convention provides for minimum level of protection of indication of source without any connection between the source of the goods and reflection of quality of the goods. The weakness of the Paris Convention raised member's interests to extend the scope of protection covered by the Convention.

Another round of deliberating measures for addressing deceptive indications of source started in Madrid and it ended by members adopting the Madrid Agreement for Repression of False or Deceptive Indication of Source of

Origin of 1891. The weaknesses of the Madrid Agreement also led into another diplomats conference in Lisbon in 1958 to discuss the law on the protection of Appellation of Origin with the view of extending the scope of the Paris Convention by connecting indication of source of goods and environmental attributes of the geographical area where the goods originates. This conference adopted the Lisbon Agreement for Protection of Appellation of Origin and their International Registration. The Lisbon Agreement provides for the protection of the use of names of geographical areas of a country, region of a country or its locality in a manner that indicates that the goods originates in that place where a certain special quality or characteristics are attributes basing on natural or human factors. The protection is intended to avoid the usurpation or imitation of the use of the mark. According to this agreement, names of geographical areas which reflects on exclusive quality of the goods must be protected as appellation of origin under the World Intellectual Property Organization system.

In 1990, the WIPO Committee of Experts on the protection of geographical indications started working on a new international treaty for the protection of geographical indications. This was intended to address the limitation of scope of protection of appellation of origin under the Lisbon Agreement and the Paris Convention. In their discussion, the committee resolved that contracting parties should be free to choose the manner of protecting geographical indications and the meeting did not come into consensus of the international treaty.

A breakthrough on the protection of geographical indications was witnessed in 1994 with the establishment of the World Trade Organization and the adoption of the World Trade Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement). This Agreement came into force in 1995 and it provides the minimum standards for the protection of geographical indication at international level. It also provides for obligation to the member states to enact domestic laws on the protection of geographical indications. Geographical indication is defined under Article 22 of the TRIPS Agreement. The provision does not provide for the manner or method of protecting Geographical Indications or to put it clear, the Agreement has allowed flexibility of modality and conditions of protecting Geographical Indication under domestic laws.

4. Statement of the Problem

Tanzania is a member of TRIPS Agreement which provides for protection of geographical indications as an intellectual property right. The TRIPS Agreement imposes mandatory obligations on member states to enact domestic laws to protect geographical indications from abuse. According to the TRIPS Agreement;

Members shall provide for legal means for interested parties to prevent (a) the use of any means in the designation or presentation of goods that indicate that the goods in question originate in a geographical area other than the true place of origin in manner which misleads the public as to geographical origin of the goods. (b) Any use which constitutes an act of unfair competition within the meaning of Article (10) of the Paris Convention.

However, the TRIPS Agreement allows members to adopt their own approach of protection of geographical indication. According to the agreement,

...members shall be free to determine the appropriate method of implementing the provision of this agreement within their own legal system and practice.

This flexibility has led to diversity of domestic laws on protection of geographical indications has been the source of uncertainty on domestic recognition of geographical indication as an intellectual right. This uncertainty calling for more debate on the appropriate approach of protection which offers effective protection of geographical indication.

Absence of effective and harmonized legal system for domestic protection of geographical indications is denying interested parties their right to protect potential geographical indications available in their areas and is also attracting infringement from unauthorized companies. Therefore, this study aims to research on the effective method of protection of geographical indication that Tanzania can adopt to protect her potential geographical indications products like the kyela rice, Kilimanjaro coffee and Zanzibar cloves.

5. Objectives of the Study

The main objective of the study is to examine the appropriate approach of legal framework for protection of geographical indications as between the trade mark laws, sue generis laws and unfair competition laws. The specific objectives include; first, to examine different approaches of protection of geographical indications: First, to explore the strength and weakness of every approach of protection of geographical indications and third, to recommend the appropriate legal framework that can suite Tanzania context.

6. Literature Review

This part reviews various pieces of literature which talk about protection of geographical indications in order to get more understanding of the concept of geographical indications, its nature of protection and the need for their protection by domestic laws. At the end, the researcher identifies legal gaps noted from the reviewed literature in order to justify the need of conducting this study.

John, Egelyng and Lokina discuss various crops with potential of geographical indications protection in Tanzania. In their discussion they state that, 'Tanzania does not have a legal framework on geographical indications and this is denying interested parties the right to protect potential geographical indications of their products.' The three authors further point out that, Tanzania has big opportunity to advance in export of geographical indications products to international market as well as in domestic market if the products will be protected as geographical indications for Tanzania. They note that, geographical indications can be used as a government policy to build alliance of farmers to market their commercial crops, traditional crops and handcrafts made in safari destinations.

The article discussed above is focused on studying the potential geographical indications products that need to be protected in Tanzania. It discusses the unique attributes of the said potential products for purposes of protection. The Article does not address the issues of legal and institutional framework for protection of geographical indications. The objective of the study was to identify the existence and characteristics of food origin products in Tanzania that have the potential for geographical indications certification. There is no objective relating to examination of the legal framework for protection of geographical indications.

Paul and Bullu in their analysis of various international and domestic laws on protection of intellectual property rights in Tanzania provide that, Tanzania is lacking National Intellectual Property Policy. Most intellectual property laws are weak and outdated in many respects. The authors further observe that;

...currently in Tanzania there is no law to protect trade secrets, geographical indications and the industrial designs despite the fact that Tanzania is committed to protect certain tourist attractions under the geographical indications.

The study has discussed the major challenges inherent in the legal system dealing with protection of intellectual property in Tanzania. According to the authors, Tanzania is currently facing three major challenges, inadequate manpower, financial constraints and weak and outdated laws to govern protection of geographical indications and other intellectual property rights in Tanzania. In the end, the study recommended Tanzania to engage into serious process of enacting a policy and law on protection of geographical indication. This calls for Tanzania to do a study on which approach is appropriate and effective in Tanzanian context.

The work by Paul and Bull is too general; covering all intellectual properties without focusing on specific intellectual property rights. The article has not covered most of the issues discussed in the present study especially examination of different approaches of protection of geographical indication. From the above observation, one may note that more work is needed to extend the study to address the key issues relating multiplicity of domestic laws on protection of geographical indications in Tanzania.

Calboli discusses protection of geographical indications focusing on the heated debate between those who supports protection of Geographical Indications and those who opposes their protection. According to the author, protection of Geographical Indications have historically been the matter of heated debate. Countries have long quarreled about the extent of protection of geographical indications. European countries have traditionally advocated that geographical indications should be protected because they identify unique qualities, characteristics and reputation of the product to their place of origin thus should others use the Geographical Indications improperly consumers would be confused as to the origin of the product. On the other hand, United States does not recognize geographical indications as a new intellectual property right contending that, Geographical Indications are generic terms in their country of origin as such consumers could not be confused as to origin of products identified by those terms. According to Calboli, this kind of debate has delayed negotiations to enhance protection of Geographical Indications and it has made protection of Geographical Indications not to produce the intended results.

Caboli further observes that, TRIPS Agreement requires all signatories to establish minimum standards for the protection for Geographical Indications through their national laws. However, the adoption of TRIPS and its imposition have not been welcomed in all member countries. The author of the article further states that, the purpose of the paper was not to provide for deep analysis of Geographical Indications or to elaborate on the nature of geographical indications and validity of the theories for their protection. The study by Caboli discusses protection

of geographical indications at international level. The present study focuses on protection of geographical indications within Tanzanian context.

Giovannucci et. al discusses the current trend of protection of geographical indications globally and the factors that can enable effective protection of geographical indication for the benefit of producers. According to the authors, there are currently more than 10,000 protected geographical indications internationally with estimated value of USD 50 billion. Geographical indications are now perceived as an opportunity in many countries that have unique physical and cultural attractions that can be translated into product differentiation.

The authors further states that, good choice of legal system for protection of geographical indications will promote effective monitoring and enforcement of geographical indication and reduce the likelihood of fraud that can compromise the reputation of the geographical indication and its legal validity.

The author also argues that, the practical experience from case studies of countries which have taken steps to protect geographical indications suggests that, for geographical indications to be successfully protected there must be effective legal protection which include strong domestic legal framework for protection of geographical indication. The authors have tried to discuss existence of sound legal framework as one of the important aspects for promoting geographical indications but their study does not go further into detail to discuss the effectiveness of the legal frameworks in protecting geographical indications.

Mangistic, discusses challenges of managing geographical indications in Africa focusing on opportunities, experiences and challenges. According to the author, one of the major challenges of harnessing the potential geographical indications found in Africa is lack of harmonized or inadequate legal framework for protecting geographical indications. Majority of the African countries including Tanzania do not have a law that specifically governs the protection of geographical indications.

The author further points out that, in countries where there is no specific law dealing with Geographical Indications, the potential Geographical Indications in those countries may be protected using trademark and unfair competition laws. The author recommends that, if African countries would like to benefit from their potential geographical indications, a lot has to be done which includes, 'strengthening or putting in place adequate legal framework for protection of geographical indication'.

The study also provides for limitation of using trademark system stating that, 'trademark law often excludes geographical indications from being protected as trademark unless they have secondary meaning.' However, the study does not discuss the legal and institutional framework for the protection of geographical indications in Tanzania.

Giovanni, Alessandro and Andrea illustrate the effect of protection of Geographical Indications in developing countries. In their view, protection of Geographical Indications in developing countries offers a lot of benefits; it supports local agro food system, promotes sustainable development in rural areas, reduces unfair competition from abuse or misuse of GIs by free riders, offers market opportunity for GI products and assists in rural poverty reduction.

The above authors are also of the opinion that despite the benefits derived from protection of GIs, there is still lack of systematic research on the effect of GIs on firm profitability, on agro-food system and on environmental and social impact. According to the authors, the existing studies seem to address more on the challenges of GIs rather than their opportunities. UNCTAD study titled 'why geographical indications for least developing countries' is of the view that, in order to promote local farmers or producers in international market where competition is stiff, many developing countries need to develop quality names or brands for their products through protection of Geographical Indications. The study further observes that GIs protection can promote development of local community.

The study refers a number of countries as case studies on protection of Geographical Indications. The cited countries are those which have made initiatives to recognize and protect GIs using different approaches; some under Trade Mark laws like Ethiopia and Cambodia while others under sui generis system (special GIs legislation) like Mozambique. At the end, the study presents the general challenges observed from different countries that have attempted to protect Geographical Indications. According to this study, developing countries face considerable challenges when implementing geographical indications registration because of weak institutional framework and regulatory framework. According to the author many countries are lacking national legal framework for protection of geographical indication and when it does exist, it is incomplete. Also, the study talks about general issues surrounding protection of Geographical Indications in Africa. The present study examines the problem of

multiplicity of legal framework for protection of geographical indications in relation to choice of appropriate legal framework for Tanzania context.

Parwar writes on the importance of Geographical Indications in growing economy. According to the author, Geographical Indications have been given the status of intellectual property since the product gets more value commercially by mere association with a particular place. Geographical Indications helps to indicate the source of the goods which in turn relates with the quality of the goods. The author further argues that, “if any name of goods is related to a name of a particular place and that place has indicative powers, protection can be claimed.” In his observation, Parwar further adds that, there is no single owner of a Geographical Indications or to put it clear, single person who have authority to exclude other persons or enterprises from the use of a geographical indications.

Hirko writes on the importance of Geographical Indications in the Ethiopian context. According to the author, significances of protecting GIs are divided into economic and non-economic significances. In Economic significances, GIs helps to bridge information asymmetry between the producers and consumers by providing customers with accurate information of the origin and quality of the goods. It also protects the GIs from misappropriation by dishonest commercial operators and further protects the GIs against ‘free riding’ by others who want to use the GIs without responsibility. Moreover, protection of GIs encourages local producers to build partnership with others to work on the quality standards together and it increases financial benefits.

According to Hirko, non-economic benefits include protecting traditional and indigenous knowledge which is used for promoting development of bioscience, biotechnology, food security and human health. In the author’s opinion, another non-economic advantage is providing incentive to indigenous people surrounding the protected GIs. In his overall findings, the author observes that protection of GIs is not the same across nations due to flexibility of the international agreements which provide for different levels of protecting GIs.

Hirko analyses protection of geographical indications under the Ethiopia Trademark Proclamation of 2006. According to the author, trademark system allows protection of geographical indications as a collective trademark. However, the author argues that the collective trademark offers narrow scope of protecting geographical indications due to the requirement of distinctiveness of indication to be registered as collective trademarks.

According to the author, the Ethiopian trademark system does not offer a guaranteed protection of Geographical Indication. The author recommends that ‘legislative reforms should be carefully introduced to design the system to ensure effective and adequate protection of geographical indications with a view of giving incentive to the producers or farmers.’ This work is important in this study because it shows the weakness of trademark system in protecting geographical indications.

After reviewing various pieces of literature, the researcher has observed that; the law on protection of geographical indications is still in infant stage. There is inadequate literature which focuses on issues of protection of Geographical Indications in Tanzania. The available literatures generally reveal that, the major challenge in protecting of geographical indications in Tanzania is lack of specific law which provides for protection of geographical indications in the country.

7. Methodology

On part of methodology, the study is qualitative in nature. The researcher is studying the legal text of various instruments starting from international laws to national laws. The study mainly uses secondary data derived from documentary review of various international legal instruments, reports, legal text books, articles and conference papers based on protection of geographical indications. Data collected were analyzed by using content analysis in which the researcher used literary and purposive interpretation to analyses the data in line with the study objectives.

8. Findings on Approaches of Protection of Geographical Indication

The TRIPs Agreement provides for obligation of member states to make domestic laws on protection of geographical indication. The Agreement further provides for the states freedom to choose which approach is best basing on their national history and economic background. This part of the Article presents the status of the legal approaches on protection of geographical indications and later examines the strength and weakness of each approach.

Existing literatures reveal that, there are three common national legal approaches of protection of geographical indications namely; trademark system, sue generis system and unfair competition system. The diversity of the

approaches on protection of geographical indication across states is mainly attributed by flexibility of the TRIPS Agreement itself. Under the TRIPS Agreement, members are free to determine the appropriate method of implementing the provision of the agreement within their legal system and practice.

One of the WIPO publication titled 'Geographical Indication; An Introduction' published in 2021 observed that, 'there are three main modalities of protecting geographical indication which are sui generis system, collective and certification marks system and one relating to unfair business practices.' The publication further points out the effect of the multiplicity on scope and recognition of geographical indications for purposes of protection noting that, 'the multiplicity has raised important question on two major issues; conditions for protection of geographical indication and the scope of protection.'

It can be also noted that, the World Intellectual Property Indication Report published by WIPO in 2018 observes the issues of diversity of national approaches on protection of geographical indications and its implication in recognition of geographical indications. According to the report ...

"It is important to note that, GIs can be protected through a variety of legal means; sui generis system, trademark law, international agreements and other national means."

The quotation above implies more verities, it points out international agreements and other national means. This means there are even other more approaches. The effect of this multiplicity or diversity is observed by WIPO that, it makes it challenging to document which ones are trademarks and which ones are geographical indications. According to WIPO, this diversity is causing challenge to obtain complete picture of all geographical indication protected in any particular country. In other words, the diversity is causing difficulty on recognition of geographical indication not only for purposes of management of the indications but also enforcement.

The question to be addressed at the end of the study is why do states opt one approach and abandon the other? what is the strength and weakness of each system in order to decide which approach is more appropriate for Tanzanian? This section briefly explains the nature, strength and weaknesses of each approach.

8.1. Trademark System

Trademark law is one of the common approaches of protecting geographical indication. In this system, there are two levels of protection provided, the first level deals with protection of the indication against registration of misleading marks that are likely to confuse the consumers as to the true geographical origin of the goods and the second level is concerned with protection of the indication against unauthorized users.

The pioneers of trade mark system are countries like Australia, Canada, China and the United States of America. Most of the countries which uses trademark laws registers geographical indications as collective mark or certification marks. United States is one of the champions of the use of trademark system.

Under the trademark system, a geographical Indication is not treated as a separate intellectual property rights but rather it is registers as a trademark on some special conditions. One of the major conditions is that the mark must be distinctive and that, the mark can be used by more than one person as long as the user comply with established standards. Under the trademark approach, the mark is subjected to some specifications approved by association of producer of a certain product which apply for registration to become part of the collective mark. The specifications can limit the use of the mark only in connection to goods that are specifically produced by producers of a particular geographical origin. A good example of trademark that is used as collective mark is Permignano Reggiano which is used is branding chees in Italy. The question is how far is this approach capable of providing effective protection of Geographical Indication in terms of scope/coverage.

In Africa this approach is used by Ethiopia in protecting its geographical indication over various brands of coffee. In East Africa, trademark system is also used for protecting various products in Kenya which includes the Kenyan coffee. However, literature explaining the effectiveness of trademark system shows that, there is inadequate level of protection of geographical indications under existing trademark laws which is primarily designed for ordinary trademarks.

In a survey conducted by World Intellectual Property Organization (WIPO) in 2018 WIPO did collect global statistics of registered geographical indication from 82 countries. This was done by taking the name of a country, number of geographical indications registered in the specific country and the approach used by each country to protect geographical indications. The findings from the survey of geographical indications done by WIPO reveal that, 17 countries out of the 86 countries surveyed used trademark system as the approach of protection of

Geographical Indication. The WIPO statistic implies that, only 19.7% of the surveyed counties used trademark while the rest 80.3 % used other approaches like sue generis approach.

Trademark system is used in some countries to protect geographical indications alongside ordinary trade and service marks. Those countries who have maintained trademarks defend their position that, geographical indications are not distinctive category of intellectual property rights but rather type of special trademarks. United States of America is one of the defenders of the trademarks system basing on their stand that geographical indications lack distinctiveness to qualify for protection as a separate right.

Trademarks convey information about the origin of the goods or service they apply and enable consumers to associate a particular quality with the goods or service. Trademarks inform consumers about the source of the goods or services because they identify the goods as originating from a particular company.

The Strength of Trademark System in Protection of Geographical Indication

The countries which used trademark system to protect geographical indications have opted to use this system basing on its strength over other forms of protection of geographical indications and some other historical and economic factors observed from the use of trademarks systems as opposed to other forms of protection. Some of the strength that favors the use of trademark system in protection of geographical indications are noted hereunder.

Trademark system is used to certify the origin of the goods for consumers protection. When consumers are looking for origin-based goods, they want to get assurance that the goods they purchase are authentic origin-based goods. This task is well accomplished by use of certification mark in which the certifying authority approves the goods as containing particular the quality. According to OriGIN...

Certification mark indicate that the product or service for which they are used have particular characteristics (given geographical origin for instance). In this regard, the certification mark can be descriptive and can be used to protect geographical indication without the need to prove a secondary meaning.

Trademarks system protect consumers from confusing marks. An application for registration geographical indications may be refused registration under trademark system if it is identical to a trademark previously applied for registration if it is proved that there is likelihood of the mark to cause confusion with an existing trademark. This is one of the major strengths of using trademark system to register geographical indications. Once a product is registered as a trademark of a particular group or producer; no any other person is allowed to register as similar mark to avoid confusion with existing marks. According to Hirko, the prohibition against registration of trademark is likely to deceive or mislead the public as to geographical origin of the goods reinforces the protection of collective trademarks with similar scope to the protection of geographical indications under article 22(2)(a) of the TRIPs Agreement.

Furthermore, trademark system prohibits the registration of certain trademarks consisting of false indication of geographical origin of the goods and it allows the registrar to invalidate any trademark register which contains false geographical indication as to origin of the goods in a manner which misleads the public as to true origin of the goods or its special quality or characteristics .

Also, trademark system applies the principle of 'first in time, first in right.' This principle is applied in trade mark law to avoid registration of a trade mark similar to exiting trade mark. In protection of geographical indication, this principle can be used to prevent registration of an indication that is similar to a previous registered indication. In this regard OriGIN observes that, it is crucial in the field of geographical indication to recall the implication derived from the basic principle of trademark law the first in time firsts in right which prevents producers from seeking registration of trademark for a geographical name if another party has already registered such name in good faith.

The Limitations of Trademark Laws in Protection of Geographical Indication

Limitations of using trademark laws in to protecting geographical indications are derived mainly by comparing the TRIPs standards or requirements for eligibility of registration of geographical indications in contrast with the provision of trademark laws governing registration of geographical indications as collective or certification marks. Most of the registrability conditions covered by trademark system are not compatible with geographical indications standards.

One of the limitations of using trademark law to protect geographical indication is in terms of its effectiveness and adequacy to protect geographical indications. Authors have tried to analyze the adequacy of trademark law on protection of geographical indication from different points of view. Sileshi Hirko from Ethiopia has analyzed the use of trademark system for protection of geographical indication in Ethiopia and noted that ...

...there is inadequate level of protection of GIs under existing trademark laws which is primarily designed for ordinary trademarks.

Sileshi Hirko further argues that, to use trademark law for protecting geographical indication render most of geographical indication unprotectable because trademark law requires a trademark to be distinctive while most of the geographical indications are descriptive names of geographical areas. In his view, non-dispensation of the requirement of distinctiveness for protection of Geographical indication in existing trademark law for protecting Geographical Indication is a basic pitfall in existing trademark system. Insisting on this point the author observes that ...

...as the requirement for distinctiveness provided for ordinary trademark is similarly required for collective trademarks, most GIs are in effect excluded as they primarily designate geographical origin. The requirement excludes most of geographical names which are descriptive despite of their capability to serve as GIs in the context of the definition under the TRIPS Agreement. This is against the interest of most producers as they cannot get legal protection for descriptive GIs for their products for want of distinctiveness. This is the fundamental drawback of the existing collective trademark system to acquire protection for GIs.

The above quotation is very fundamental for examining the suitability of trademark system for protection of Geographical Indication in Tanzania. The observation from Ethiopia shows that, trademark system is not relevant approach for protection of geographical indications because the system excludes the protection of descriptive geographical names used in indicating potential geographical indications products like Kyela rice, Kilimanjaro organic coffee, Dodoma wine or Zanzibar cloves.

The study by Sileshi further observes that, although the Ethiopian Trademark Proclamation mention the registration of collective trademark which can be used to protect Geographical Indication, the Act cannot cover most of Geographical Indications because it was not primarily designed to protect Geographical Indication. This impliedly means that, to protect Geographical Indication in the same way as trademarks are protected limits the scope of coverage of protection of Geographical Indications.

In his conclusion, Hirko observes that, the weakness of the trademark system in Ethiopia calls for appropriate legislative reforms in the trademark law or the adoption of a new mode of protection to ensure conformity with the provision of the TRIPS Agreement. However, the author does not point out which option is better between the trademark system and adoption of specific law for protection of Geographical indication.

Another major challenge of using trademark system in protecting Geographical Indication is based on monopoly of trademarks. Once a person is allowed to register a Geographical indication under trademark law it implies monopoly of the mark by the proprietor. In the view of various authors, a Geographical indication cannot be registered as a trademark because trademarks are monopolized by the individual proprietor something which is not proper for Geographical Indication. A geographical indication cannot be monopolized because it reflects common interests.

Another fundamental drawback of trademarks is that they must be renewed after every certain period of time like seven or ten years. One of the conditions governing registered trademark is renewal after a certain period of time. This is not the case under *sue generis* system where geographical indications are protected for indefinite duration (no need for renewal) because the attributes which are used to distinguish the goods exist continuously.

Also, literature show that trademarks are normally designed to indicate the source of the goods but not quality of the goods they indicate. Geographical indications are used to identify goods as originating in a certain geographical area where a given quality, reputation or other characteristic of the goods is essentially attributed to its geographical origin.' Geographical indications must indicate the quality of the goods in connection with the place of origin of the goods. Geographical indications are totally different from trade and service marks which means a visible sign used or proposed to be used in connection with or in relation to goods or services for the purpose of distinguishing in course of trade or business the goods or services of a person from those of others. The purpose of trademark is only to distinguish goods of one producer or suppliers from those of others but not to show the quality of the goods they indicate and are subject to the conditions for registration which generally are not compatible with the conditions and standards for protection of geographical indications.

Another challenge of protecting geographical indications under trademark system is the need to prove secondary meaning of the indication in labeling. Short of proof of secondary meaning, the geographical indication becomes generic name hence not qualified for protection as an intellectual property right. However, with the *sue generis*

system, there is no need of proving secondary meaning. A geographical name used in a product is protected when it is proved that it reflects on the unique quality of the goods originating in the particular geographical area.

Also it is difficult to enforce geographical indications registered as certification or collective mark because the right holders must always prove that customers were confused by the infringing geographical indication which is very costly especially when the infringement took place in a foreign country.

8.2. The Sue Generis System

The sue generis system is regarded as a law of its own kind. It is a specific law designed only for protection of Geographical Indication separate from the trademark laws or fair competition laws. This system involves enacting a special Geographical Indication Act which covers all matters pertaining to the protection of geographical indications. It commonly covers the definition, appointment of the registrar, registration conditions, procedures of handling applications for registration of the geographical indications, offences and penalties upon infringements. This system is commonly used in the EU countries for protection of wine and spirit, agricultural products and food stuffs.

According to the WTO, sue generis comes from a Latin maxim which means 'of its own kind' which is used to describe a legal classification that exist independent of other categorization because of its uniqueness or as a result of the specific creation of an entitlement or obligation. There are a lot of terminologies that are used for describing sue generis rights in protecting geographical indications such as appellation of origin, protected designation of origin, protected geographical indications and geographical indication.

In countries like Uganda and India there is a specific law for protection of Geographical Indications. The sue generis system offers a special commitment to protection of GIs because the sue generis system has effective coverage of special issues affecting geographical indications a peculiar category of intellectual property rights that cannot be mixed with other categories like trademarks.

The Strength of Sue Generis System in Protection of Geographical Indications

The sue generis system is considered to be the most appropriate way of protecting geographical indications because of its wide coverage of substantive issues relating to protection of this category of geographical indications. OriGIn observes that, protection of geographical indications under sue generis system benefits from a solid legal framework. A similar observation is made by Rangnekar who is of the view that, dedicated special geographical indication law tend to provide for stronger protection.

Sue generis system creates geographical indications as a separate intellectual property right. This is very important for effective protection of geographical indications because the sue generis law requires the registration procedures to provide for special controls for the product specifications which are quite different from those used for protection of trade marks or other rights which are incompatible with geographical indications.

Sue generis being a law which specifically governs geographical indication has wider coverage than other approaches. This approach covers important matters like definition of geographical indications, specifications for protectable geographical indications, conditions for registration of potential geographical indications, ownership of geographical indications and institutions dealing with registration of geographical indication as special IP right. These matters cannot be fused into trade mark system because the system was traditionally not meant for geographical indications.

The sue generis system offers effective systems for enforcement of the right in case of infringement because it establishes special institutional system dealing specifically with monitoring the implementation of the law. For example, the law will normally establish a bureau dealing with registration and deregistration of the indications and designate a court that will enforce the crimes relating to infringement of the right. According to OriGIn, in the countries that uses sue generis system there are public authorities that have the obligation to intervene to ensure the right is respected.

Organization for International Geographical indications network (OrGIn) insists that, under sue generis law, protected names benefit from solid legal framework. They are protected against direct commercial use of a GI even when the indication or origin is used to mention the true geographical origin or with delocalizing expression. They are protected against imitation or evocation. OrGIn further observes that, practice demonstrates that, sue generis system to protect GI responds much more to needs of producers than legal framework based on trademarks /including certification and collective marks.'

Unlike trademark system, sue generis laws provides for unlimited time of protection of Geographical Indications. This means that there is no need for renewal of the indication when protected under sue generis system. Under sue

generis system, the protection of a geographical name does not need to acquire secondary meaning in order to be actionable or protected as an intellectual property right. The only important criteria is registration.

Limitations on the use of Sue Generis System to Protect Geographical Indication

Countries which use trademark system has one main reason to defend their position, that geographical indication is not a new intellectual property right but rather it is a trade mark like any other trademark except that this trade mark certify the original of the content it indicates. Therefore the use of sue generis system is condemned as being unnecessary repetition of trademark laws.

Other literature points out that, the use of sue generis system on top of trademark system is additional cost. The use of sue generis will imply putting in place new organization and administrative machinery that will be responsible for registration and enforcement of geographical indications something which have cost implication to the government .

Also sue generis system is challenged for being unfamiliar to most of the population in developing countries. During interview majority of respondents seems to know trade mark system but they were not aware of geographical indication. Therefore, creating a new law for protection of Geographical Indications alone will be putting another complication in the already existing problem.

8.3. Unfair Competition System

Fair competition law is a branch of law which provides for measures and remedy against unlawful and dishonest business practices. The purpose of fair competition law is to protect consumers against the effect of unfair competition trade practices by dishonest suppliers or producers. This approach of protection is normally used parallel with other laws therefore it is non-exclusive means of protection.

In Tanzania the fair competition is governed by the Fair Competition Act. The preamble of the Act is very clear that it is designed to promote and protect offensive competition in trade and commerce and to protect consumers from unfair and misleading market conducts. Although the Act does not expressly mention protection of Geographical Indication but its objectives impliedly applies on matters relating to geographical indications especially when there is the use of misleading indication of true origin of goods. Unfair competition is defined as any act of competition which is contrary to honest practice in industrial or commercial matters.

The use of Competition law to protect geographical indication draws its legitimacy from the TRIPS Agreement and the Paris Convention. The TRIPS Agreement provides for the duty of the states to enact domestic laws which will regulate acts of unfair competition in relation to geographical indication. The Agreement provides that...

...In respect of Geographical Indication, members shall provide the legal means for interested parties to prevent(b) any use which constitutes an act of unfair competition within the meaning of Article 10 bis of the Paris Convention (1967).

On the other side, the Paris Convention provides that, 'the countries of the Union are bound to assure the nationals of such countries effective protection against unfair competition. The Paris Convention further defines unfair competition as any act of competition contrary to honest practice in industrial or commercial matters. The Agreement also provides for the list of acts which constitutes unfair competition and it further states that...

...The following acts in particular shall be prohibited (3) ...Indications or allegations the use of which in course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics and the suitability for their purpose or the quality of the goods'

The Paris Convention further creates the cardinal test of proving violation of the geographical indication under fair competition system. According to this provision, in order to succeed in a case of violation of geographical indications under the fair competition system, one must prove that the act in question was capable of misleading the public. Compensation will be paid if the act was capable of misleading the public as to true origin of the goods in dispute. This is very difficult to prove because it deals with individual persons state of mind.

The Strength of Unfair Competition Laws in Protecting Geographical Indications

This system is basically interested with defensive protection of geographical indications by restricting unauthorized people from imitating or using the indications in a manner that will constitute unfair competition. The law for protection against acts of unfair competition or passing off is meant to provide a remedy against illicit commercial acts such as false or misleading indication of origin of goods in the course of trade.

The study done by Hirko in Ethiopia observes that, unfair competition laws complements trademark or sue generis system especially when the geographical indication is not registered. In the absence of such protection under

trademark law, this system fills that gap and primarily ensures protection of unregistered Geographical Indications against acts of unfair competition. This system is recommended for being adequate in imposing sanction to create fear for people from misusing the registered indication through seizure of infringing goods. It is therefore effective for enforcement purposes.

The Standing Committee on the law of trademarks, industrial design and geographical indications describes the strength of fair competition law basing on course of action provided by this approach against unfair competition. According to the Committee, the national law for the protection against unfair competition, passing off and unregistered geographical indication provides for course of action of traders against competitor who perform commercial acts which are considered to be contrary to honest business practices.

The findings also have revealed that, unfair competition law provides for effective remedy in the event of occurrence of acts of unfair competition through seizure and destruction of the goods complained to have committed an act of unfair competition. Also, the laws allow the court to award compensation to the victim of unfair competition acts.

The unfair competition law is also commented for protecting consumers rights against dishonest trade practices. One of the major challenges of international trade transaction is dishonest practices by traders who use a geographical indication to indicate that the goods are quality goods originating in a particular region for goods which are not truly originating in the indicated region. Under the Paris Convention, unfair competition acts which are intended to mislead consumers as to true origin of the goods. It is therefore the purpose of fair competition laws to protect consumers from these unfair practices.

The Limitations of Unfair Competition System in Protecting Geographical Indications

Despite the strength of unfair competition law in protecting customers and putting in place effective means of enforcing violation of geographical indication laws, the system has also been challenged for having common pitfall.

One of the major limitation or weakness of this system is that it does not create intellectual property right in real sense. Reviewed literature observes that Unfair competition law does not create an intellectual property right but they intend to enforce the existing or registered rights. The system only prohibits such unfair competition acts which may harm consumers especially the use of false indication of origin of goods in the manner which misleads the consumers. According to OriGIN, the protection against unfair competition serves to protect traders and producers from unauthorized use of the geographical indication names instead of creating an intellectual property rights over those names.

The purpose of this law is to prevent the abuse of existing Intellectual Property Rights by imposing sanction for their abuse in unfair trade conducts but not to create a real intellectual property right. It is based on defensive approach of protection of intellectual property rights.

Another weakness of competition law is that it is very hard to prove the action for unfair competition. The law has complex requirements to be fulfilled by the plaintiff. In order to succeed in an action for unfair competition, the plaintiff must prove three important issues; there was an established market for the goods ; the market of the goods established substantial reputation and last the use of the indications caused confusion or was misleading to the customers. The burden of proving all these is on the plaintiff something which is very hard to prove especially when the infringement took place in a foreign country.

Also, competition laws are challenged for lacking self-existence. This law cannot exist alone to protect intellectual property rights. It must co-exist with another main law which creates the rights. The system enforces rights which are already existing in other laws by creating offences and putting punishment for the violation of the Act. Competition laws are important to supplement the gap left by other systems like trademark system. When the indication is not fully registered under the trademark mark system it can be enforced under the competition law as an act of unfair competition which infringes consumers rights.

9. Conclusion

Diversity of the law on protection of geographical is caused by the TRIPS Agreement. The common approached of protection of geographical indications are trademarks system, sue generis system and the unfair competition system. A close examination of the three approaches has revealed that, sue generis system is the best approach because it recognizes geographical indication as a separate category of intellectual property rights and as such it provides for clear scope and standards of protection which are specifically designed for protection of geographical indications. If Tanzania will embark on protection of its geographical indications the best option is to use sue generis system. This

system is used in European Union and other common law countries like India whose legal system resemble to that of Tanzania.

The study has revealed that, trademark system is only applied because of lack of specific law. One author has noted that, it is only due to proximity between trade mark and geographical indication and in the absence of specific law that practice suggest that both matters can be protected by similar system such as trademark laws. This imply that, those countries which are using trademarks has not opted to use the same but it is just because of lacking a specific law they find themselves using trademark law by default . The study has further revealed that, the standards of protection of geographical indications provided by Article 22 of the TRIPS Agreement are not compatible with the conditions for protection of geographical indications since trademark system was not designed for protection of geographical indication.

On use of unfair competition law, the study has revealed that, this system does not create any intellectual property rights that can be protected as an intellectual property right. The system only protects the integrity of trade and consumer expectation about the geographical origin of the product. It cannot exist alone without other laws which creates the right.

10. Recommendation

In order to have a comprehensive legal framework for protection of geographical indications in Tanzania, sue generis system is proposed and recommended. This law is comprehensive and effective for protection of geographical indications. In East Africa, sue generis is used in Uganda, and Rwanda. Kenya is in transition from trademark laws to sue generis law. However, the law must reflect a comprehensive definition of geographical indications which covers Tanzania context. Also, the proposed law must define clear standards for registration of geographical indications and the procedures for dealing with applications for registration of geographical indications. The law must further provide for competent organization that will supervise or administer the laws and its powers. Finally, the law must contain an effective means or mechanism for dealing with infringement of the protected geographical indications.

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