Intellectual Property Law and Development in Namibia: Harnessing the Law on Geographical Indications in the Realization of Vision 2030

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By submitting this thesis, I declare that the entirety of the work contained herein is my original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated), and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Signature Signed by candidate

Date 14 October 2023

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"Thus far, the LORD has helped us." 1 Samuel 7:12

DEDICATION

This thesis is for the little girl who moved from enrolment in a primary school in the *Onembaba* and *Ongha* villages in northern Namibia to obtaining a Doctor of Philosophy degree from Africa's first-class institution of higher learning.

This thesis, similarly, is dedicated to my mother, *Nashitalwe Frondina Ndinelao Angala*. I am because you are.

Equally, this thesis is dedicated to Puleinge Ihuhua, *omuholike wange*. Thank you.

Finally, I dedicate this thesis to the Namibian house; your development best is yet to come.

ABSTRACT

Intellectual property involves the creation of the mind with commercial and/or moral value. Geographical Indications (GI) are a species of intellectual property. A GI is a sign used to identify a product's origin. Furthermore, it indicates the product's quality, characteristics, and reputation associated with that territory or origin. GI rights themselves also have the potential to drive economic development.

The thesis considers the absence of a sui generis system for the protection of GIs in Namibia, thereby entreating a discourse on whether there is a need for a stand-alone GI framework. The thesis also sets out the national and international framework for trademark protection as this is one of the vehicles some countries, including Namibia, have opted to use to protect GIs. Additionally, a comparative examination of the approaches of South Africa and India in the protection of GIs is undertaken to provide the various available, as well as potential, regimes for GI protection in Namibia.

The thesis correspondingly sets out the role that GI protection can play in advancing Namibia's developmental objectives. It is postulated that GIs are a tool that can be used to advance the developmental objectives of Namibia as set out in the Vision 2030 and Harambee Prosperity Plans. The thesis establishes that GIs in Namibia find protection through the application of trademark laws; however, there is limited specific reference and consideration paid to GI promotion in the formulated developmental objectives of Namibia.

The findings in the thesis, therefore, call for a need to incorporate GI protection and promotion in the country's developmental policy objectives. This alignment of law and objectives will enable the full realisation of the developmental potential of GIs in Namibia.

Keywords: Intellectual Property Rights, Geographical Indications, Trademarks, Development, Namibia, Sui Generis legislation

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LIST OF ABBREVIATIONS

AfCFTA	African Continental Free Trade Area
AO	Appellations of Origin
ARIPO	African Regional Intellectual Property Organization
AU	African Union
BIPA	Business and Intellectual Property Authority
EPA	Economic Partnership Agreement
EU	European Union
GI	Geographical Indications
GDP	Gross Domestic Product
GRN	Government of the Republic of Namibia
HDI	Human Development Index
HPP	Harambee Prosperity Plan
IK	Indigenous Knowledge
IP	Intellectual Property
IPA	Industrial Property Act
IPR	Intellectual Property Right
IPRs	Intellectual Property Rights
NCCI	Namibia Chamber of Commerce and Industry
NCL	Nice Classification
NDP	National Development Plan
NDPs	National Development Plans
NPC	National Planning Commission
OAPI	African Intellectual Property Organization
PAIPO	Pan African Intellectual Property Organization
SADC	Southern African Development Community
SWA	South West Africa
SWAPO	South West Africa People's organisation
TCE	Traditional Cultural Expressions
TM	Trademark
TNDP	Transitional National Development Plan

TRIPS	Trade-Related Aspects of Intellectual Property
UN	United Nations
UNCSD	United Nations Commission on Sustainable Development
UNDP	United Nations Development Programme
US	United States
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

CHAPTER 1: INTRODUCTION TO THE STUDY

1.1. Introduction

The primary research question to be addressed in this thesis is: what should the GI protection legal framework in Namibia entail to support the development objectives of Vision 2030? GI protection is a special category for protecting agricultural and manufactured goods when the good bears a reputation for quality attributable primarily to a particular geographic origin.[1] Illustrations of known GIs are Café de Colombia, Kampot Pepper, Penja Pepper, Tequila, Basmati rice, Darjeeling tea, and Bordeaux wine. Namibia has an invaluable array of products linked to its culture, traditions and natural biodiversity, representing the untapped potential for the Intellectual Property (IP) tool of Geographical Indications (GI). Examples of these GI capacity products in Namibia are dates, grapes, cereal crops, beef,[2] *eedingu*,[3] fish, wine, gin, organic oils, textiles and leather products, to name a few. Furthermore, it has been stated by the African Union (AU) that the following unregistered GI potential commodities are available in Namibia: Heuningbos Kalahari Melon Seed, Karakoel pelt, Haidoo plant, and Maroela Oil.[4]

Namibia does not have a dedicated sui generis legal regime or policy for GI protection. It is understood that GIs, in their nature, have the potential to increase the value of protected goods for the reason that the quality, reputation attached, the resources, i.e., techniques of production, species, landscape, culture or even the environment that are employed in the creation of the GI product, are considered as attributes which increase the value of the product.[5] A GI, as such, acts as a quality indicator that may increase demand for the product and ultimately contribute to economic development.[6]

Crucially, in October 2019, Namibia launched its National Intellectual Property Policy and Strategy (2019 to 2024), aimed at providing a framework for integrating intellectual property into national and developmental policies and strategies and fostering IP as a tool for development.[7]

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1 Maskus, E *Intellectual Property Rights in the Global Economy* (2000) ch 3, 56.

2 'The natural production environment and growth stimulant free meat makes Namibian meat attractive to niche markets' Ministry of Industrialization and Trade. Available at https://mit.gov.na/agriculture-sector.

3 Dried meat.

4 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023, 63.

5 Maskus op cit note 1 at 73.

6 Bramley, C & Kirsten, J F 'Exploring the Economic Rationale for protecting Geographical Indications in Agriculture' (2007) 46 *Agrekon* 69.

7 GRN *National Intellectual Property Policy Strategy (NIPPS)* (2019) 22.

From the outset, this strategy and policy is a move in the right direction as it will pave the way for strengthening the intellectual property legal and policy framework, including GI protection.

1.2. Problem Statement

Intellectual Property Rights (IPRs) generally and GIs specifically have the potential to aid in the development of the economy. As a producer of goods within its agricultural and manufacturing industries, which can be identified as originating from its geographic region, Namibia could benefit from taking advantage of GI protection – in pursuit of the country's developmental objectives. However, Namibia's IP laws, which could be used to promote IPRs, including GIs, and consequently promote its developmental plans, were for a long time considered outdated and only started receiving attention relatively recently through an IP needs assessment audit in 2015.[8] The national law as it stands presently concerning GIs and how it is aligned to developmental objectives may, therefore, not foster a favourable environment for the protection of such products. Therefore, the question of whether the current legal position on GI protection adequately promotes development bears consideration.

1.3. Research question

In order to comprehensively respond to the primary question of what should the GI protection legal framework in Namibia entail in order to support the development objectives of Vision 2030, the study also addresses the following subsidiary questions:

1.3.1 How are GIs defined?

1.3.2 Do GIs have the potential to advance the development of states?

1.3.3 How has Namibia incorporated GIs in its development objectives?

1.3.4 Is provision made for GI protection on the international and regional levels?

1.3.5 Does Namibia have a legal framework for GI protection?

1.3.6 Do the legal frameworks on GIs in South Africa and India differ from Namibia?

1.3.7 What should a GI framework in Namibia look like?

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8 The report of this IP Audit is discussed below under Chapter 5, at 5.5.

1.4. Hypothesis

GIs, as a form of IP Protection, can aid states' development. The GI acts as a quality indicator that may increase the value of protected goods and the product's demand, ultimately contributing to economic growth and development. Namibia, as a developing country which has goods of GI capacity, could greatly benefit from a GI system that allows protection for agricultural and manufactured goods, the characteristics and qualities of which are tied to the country and its environment. An adequately constituted GI regime can, therefore, contribute to the attainment of Vision 2030 and the country's national development goals.

1.5. Research Context

This section introduces the Namibian context and the state of development at the point of submission of this thesis. A reflection of the current developmental position of Namibia is provided in anticipation of the discussion to follow in Chapters 2 to 6 and the eventual consideration of how the promotion of GIs can assist with the country's developmental objectives.

Namibia, situated in Southern Africa, shares a border with Angola, Botswana, South Africa, Zambia and Zimbabwe. The country is 825,419 KM² and has a population size of 2.534 million. Having obtained independence from South Africa in 1990, Namibia is presently in its 33rd year of independence. Following the attainment of democracy in 1990, the government has been committed to social, political and economic freedom. At independence, the structure of the Namibian economy was primarily made up of agriculture, mining and government.[9] The National Planning Commission (NPC) reported in the year 2020 that the structure of the then 30-year-old Namibia remained significantly similar to the way it was at independence;[10] the tertiary industry is the most significant contributor to the Gross Domestic Product (GDP), followed by the primary and secondary industries. The manufacturing sector, which falls in the secondary sector and could benefit from GI protection, was reported to not have made significant contributions to the GDP at the time of Namibia's three decades of independence.[11] Furthermore, it was observed that the agricultural sector, a significant sector within Namibia and another potential beneficiary of GI

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9 Sherbourne, R *Guide to the Namibian Economy 2017* (2017) 22.

10 GRN *Namibia's 30 Years Developmental Journey* (2020) 20.

11 GRN *Namibia's 30 Years Developmental Journey* (2020) 20.

protection, performed poorly between 1990 and 2018, resulting in a spill over effect of poor performance within the primary sector of the economy.[12]

> 'Since Independence, Namibia has succeeded in generating positive economic growth almost every year and this has led to a steady rise in average incomes. However, growth has relied largely on a relatively limited range of exports to a limited range of markets and remains heavily dependent on the minerals sector. The reality is that Namibia has benefited from the global boom in resources but has not succeeded in engineering more fundamental economic transformation. Growth has fallen far short of what is required to substantially reduce levels of poverty and unemployment and is nowhere near what is needed to attain Vision 2030 and high income status. Namibia progresses through its third decade of nationhood as an upper middle-income country facing the familiar challenge of how to produce and export new products to new markets and thereby generate growth and jobs for the mass of the population'.[13]

The position as expressed above also found echo in the identification of the following setbacks within the developmental journey of Namibia: [14] high levels of unemployment, especially amongst the youth, income inequality, gender-related issues, corruption, lack of basic infrastructure, access to proper sanitation, and housing.

However, the situation is not all ominous because Namibia does have home-grown goods such as oombeke oil, marula oil and moringa oil, nara oil, bath soaps and lip butters. There is, moreover, value addition that has been made towards mahangu produce in the form of the local manufacture of cookies, dairy products, and beverages. Some of these goods can be GI-capacity goods and could have the potential to aid Namibia's economic development.

The research on Namibia's developmental objectives and the role that GIs can play in advancing those objectives is therefore relevant for several reasons: firstly, it aims to assess the current protection of GI capacity goods in Namibia and compare that with the type of legal protection provided for in the identified jurisdictions of South Africa and India which have been chosen for the reasons cited below at 1.7; secondly, although there has been research undertaken on the potential role of IPRs generally, and GI protection specifically in advancing development,[15]

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[12] GRN *Namibia's 30 Years Developmental Journey* (2020) p20.
[13] Sherbourne op cit note 9 at 19.
[14] GRN *Namibia's 30 Years Developmental Journey* (2020) p13.
[15] Various literature has explored the subject and will be reviewed in Chapters 3, 4, and 5.

there is a dearth of GI law and economic development research focusing on Namibia.[16] It is therefore hoped that this thesis will serve as a legal source for the further development of GI law in Namibia. The thesis at hand, consequently, can be considered a contribution to the discourse on GIs and their legal protection within the African context in light of the continent's developmental agenda.

1.6. Conceptual Framework

In an attempt to address the research question adequately, there is a need to refer to a set of concepts. These concepts inform the research and provide the theoretical framework for responding to the questions. Hereunder is a brief explanation of these concepts, several of which are addressed in more detail in subsequent chapters.

1.6.1. Intellectual Property Rights

The exclusive rights one has towards products resulting from intellectual activity is known as IP rights.[17] Although this study focuses on GI rights, it is worth noting that there are other recognized IPRs.

Key IPRs include:[18] Copyrights related to creative works; Patents granted for inventions; Trademarks granted towards marks used to set apart in trade the products or services of one trader from comparable products and services of another;[19] Industrial and functional designs related to the visual aesthetic appearance of a product or article; Trade secrets which comprise information relating to business or industry which is confidential and has economic value- the disclosure thereof falling within the exclusive mandate of the owner;[20] Plant Breeders' rights, which is an exclusive right granted to breeders of new plant varieties; Utility Models, which is protection, in some countries, availed for minor inventions and the system of protection is similar to that of

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16 It has been stated that there aren't many GIs acknowledged in Africa. Furthermore, determining the socio-economic benefit of GI protection in Africa requires detailed country-by-country and product-by-product analysis. See South Centre. 2017. The TRIPS and WTO Negotiations: Stakes for Africa- Analytical Note, SC/DIIP/AN/TRIPS/1, 71.

17 Ramsden, P *A Guide to Intellectual Property Law* (2011) 2.

18 See the WIPO website. https://www.wipo.int/.

19 WIPO. Trademarks. https://www.wipo.int/trademarks/en/.

20 van der Merwe, A et al *Law of Intellectual Property in South Africa 2nd ed*. (2016) 93. Trade secrets are also known as undisclosed information.

patent protection; and Traditional Knowledge protection which relates to the protection of works or assets based on or derived from the knowledge held by traditional communities.

The different categories of IP protection may overlap, but they differ in substance and extent of protection. In addition, While one of the main goals of IP protection is to give right holders exclusive rights and bar unauthorised users for a set amount of time so that creators and innovators can profit from their labour and time investments, another crucial goal is to fairly balance the interests of these works' creators and users.[21]

1.6.2. Geographical Indications (GIs)

Having briefly introduced the various types of IPRs above, it is now necessary to set out a more detailed explanation of GIs that are the focus of this research.

GI rights are a special category of rights afforded for the protection of agricultural and manufactured goods when the good bears a reputation for a quality that can be primarily attributed to a particular place of origin.[22] Although services are also covered by GI protection in some countries, including Azerbaijan, Croatia, Jamaica, Moldova, Saint Lucia, Singapore, and some others, they must be associated with a particular type of good, originate in a specific area, and possess 'qualities, reputations, or other characteristics that are unmistakably' linked to that location.[23]

Geographical indications can be traced back to ancient Egypt when brick-makers would indicate the origin of the bricks and stones they used to build pyramids as an indication of quality.[24] The idea of GI protection then emerged in the 17th Century among European Countries which owned internationally competitive regional products of an indigenous nature and who wanted to

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[21] Braga, P Fink, C & Sepulveda, C *Intellectual Property Rights and Economic Development* (1998) 3.

[22] Maskus op cit note 1 at 56. Also, Kireeva, I & O'Connor, B 'Geographical Indications and the TRIPS Agreement: What Protection is Provided to Geographical Indications in WTO Members' (2010) 13 (2) *Journal of World Intellectual Property* 275, states that "geographic indications" (GIs) are markers identifying a good as having originated in the territory of a particular country, or a specific region or locality therein, when the good in question possesses a particular quality, reputation, or other characteristic that is primarily related to its place of origin.

[23] Kireeva & O'Connor op cit note 22 at 275.

[24] van Wyk, M ''The legal protection of geographical indications' (2006) 47(1) *Codicillus* 40. According to Grote, GIs were employed by Egyptian brick-makers to signify the origin-related resistivity of the bricks and stones used to construct the pyramids. They were also employed in ancient Greece as symbols of excellence for Thasos wine. U Grote 'Environmental Labelling, Protected Geographical Indications and the Interests of Developing Countries' (2009) 10 (1) *Estey Centre Journal of International Law and Trade Policy* 96.

have a means to protect the indications of origin of these products.[25] This set the wheels in motion for the international multilateral system of GI protection.[26] GIs have found varied definitions in different international instruments, discussed below in Chapter 4.

GI is wide enough to cover names and symbols previously incorporated into the definitions of 'indication of source' or 'appellation of origin' (AO).[27] A look at some international agreements reveals the following: the Paris Convention for the Protection of Industrial Property of 1883 (Paris Convention) uses the phrase ‘indication of source’ in Articles 1(2) and 10,[28] while the Madrid Agreement on Indications of Source (also known as the ‘Madrid Agreement on Indications of Source’), which was established in 1891, makes extensive use of it.[29] These two agreements do not define what is meant by 'indication of source'; however, Article 1(1) of the Madrid Agreement on Indications of Source contains language that defines the term. Accordingly:

> ‘all goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.’

Therefore, a source indicator could be defined as a reference to a country or a location, as the country or place where a product was initially manufactured.[30] Source identifiers include mentioning a nation's name on a product or statements like 'produced in...'[31]

The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958 (Lisbon Agreement) defines 'appellation of origin'.[32] For appellations of origin that are already shielded by national law in one of the states that have ratified that Lisbon

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25 Suh J & MacPherson A ‘The Impact of Geographical Indication on the Revitalisation of a Regional Economy: A case study of ‘Boseong’ Green tea’ (2007) 39 (4) *WILEY* 519.

26 By signing and observing multilateral agreements, geographical indicators have a second option for attaining worldwide protection. See WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 12.

27 Creditt, E C ‘‘Terroir v. trademarks: the debate over geographical indications and expansions to the TRIPs agreement’ (2009) 11 (2) *Vanderbilt Journal of Entertainment and Technology Law* 429 -430.

28 WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 4.

29 Ibid at 4.

30 Ibid at 4.

31 Ibid at 4.

32 Ibid at 5.

Agreement, the Agreement creates a worldwide protection system. Protection is contingent upon an appellation of origin's worldwide registration.[33] According to Article (21) of the Lisbon Agreement:

> ‘appellation of origin” means the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors’.

Article 1(2) of the Paris Convention specifically mentions appellations of origin as being protected as industrial property. They are terms for geographical indications applied to products when they have a certain quality or trait that can be solely or mainly attributed to their place of origin. [34] Under this definition, an appellation of origin can be seen as a unique indication of source because the product for which it is used must have attributes and traits that are entirely or primarily due to its origin.[35] Protected appellations of origin include 'Bordeaux' for wine, 'Noix de Grenoble' for nuts, 'Tequila' for alcoholic beverages, and 'Jaffa' for oranges.[36]

The TRIPS Agreement's Article 22.1, which will be further discussed below at 4.2, defines GIs. This concept appears to be based on the definition of appellation of origin included in Article 2 of the Lisbon Agreement.[37] But in several ways, it differs from Article 2 of the Lisbon Agreement. While Article 2 of the Lisbon Agreement defines appellations of origin as ‘the geographical name of a country, region, or locality, which serves to designate a product [...]’, Article 2 of the TRIPS Agreement defines appellations of origin as ‘indications which identify a good [...].’[38]

It is critical to emphasise the distinction between source indications and appellations of origin.[39] In order to use an appellation of origin, there must be a strong connection between the product and the region of production.[40] The product's characteristics that are exclusively or mainly related to its place of origin, such as the climate, the soil, or the customary production methods,

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33 Ibid at 5.
34 Ibid at 9.
35 Ibid at 5.
36 Ibid at 5.
37 Ibid at 5-6.
38 Ibid at 5-6.
39 WIPO Intellectual Property Handbook (2008) 121.
40 Ibid at 121.

make up this qualitative link. [41] On the other hand, using an indication of source merely relies on the fact that the product in issue is from the region identified by the indication of source.[42] Appellations of origin can be considered a specific type of source indication.[43] In everyday usage, the term 'indication of source' has evolved to denote indications of source that are not considered as appellations of origin, despite the term's conventional usage, which refers to all appellations of origin.[44]

When the definitions of geographical indication, appellation of origin, and indicator of source are contrasted, the following is evident:[45] The most general term is ‘indication of source’. Both a geographic indicator and an appellation of origin are included.[46] The only prerequisite for indications of source is that the item for which the indication of source is utilised must come from a specific region.[47] Indications of source, i.e. the definition of geographical indication under the TRIPS Agreement, does not appear to cover indications of source whose use on products does not suggest a specific quality, reputation, or attribute of such products.[48] Compared to appellations of origin, geographic indicators have a broader definition.[49] In other words, not all appellations of origin are geographical indications, but all geographical indications are appellations of origin.[50]

O'Connor goes into more detail about the connections between appellations or designations of origin, geographical indications, and indications of source.[51] The importance of GIs and source indicators for all appellations or designations of origin must be emphasised,[52] for the reason that not all indications of source are covered by the concept of GIs since not all indications of source necessarily have the quality, reputation, or other aspects of the good that are primarily tied to its geographical origin.[53] Additionally, Not every geographical indication qualifies as an appellation

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[41] Ibid at 121.
[42] Ibid at 121.
[43] Ibid at 121.
[44] Ibid at 121.
[45] WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 6.
[46] Ibid at 6.
[47] Ibid at 6.
[48] Ibid at 6.
[49] Ibid at 6.
[50] Ibid at 6.
[51] Kireeva & O’Connor op cit note 22 at 296.
[52] Kireeva & O’Connor op cit note 22 at 296.
[53] Kireeva & O’Connor op cit note 22 at 296.

of origin because not all are actual places.[54] The quality features of products bearing geographical indications (GIs) and appellations of origin (AO) must, as such, be derived from their origins.[55]

1.6.3. Trademarks

A trademark is used in commerce to separate the products or services of one trader from comparable products and services of another.[56] Trademarks are discussed herein because some countries use trademarks to protect GI capacity goods, typically either through collective or certification marks.[57] Countries have different definitions of collective marks, certification marks, and guarantee marks.[58]

Collective marks aim to indicate that the goods and services stem from producers and providers who have membership in an association, thereby distinguishing those goods and services from those of producers and providers who do not form part of that collective.[59] Examples of collective marks are the South African Essential Oil Producers' Association (SAEOPA), the Institute of Chartered Accountants of Namibia (ICAN), and the Namibia Charcoal Association (NCA).[60]

Certification marks certify a particular characteristic about a product.[61] By assigning a certification mark on a good or service, the trader uses a specific characteristic of such goods and services to differentiate them from products and services without certification.[62] Examples of certification marks are the inclusion of the 'CFC free' on aerosol sprays to indicate that the contents

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54 Kireeva & O'Connor op cit note 22 at 296.

55 Grote op cit note 24 at 98.

56 WIPO. Trademarks available at https://www.wipo.int/trademarks/en/; also see WIPO Intellectual Property Handbook (2008) 123.

57 O'Connor, B *The law of Geographical Indications* (2004) 26.

58 WIPO Intellectual Property Handbook (2008) 123.

59 Reimers, M & van der Merwe, M 'Trade Marks' in O Dean & A Dyer (Eds) in Dean & Dyer *Introduction to Intellectual Property Law (*2014) 99.

60 A collective mark designates an association whose members use it to indicate that they meet the association's established membership standards may include a need for geographic origin. The assigning of that mark indicates that its owner has independently certified that the products or services to which it is applied possess specifically defined features (such as being produced by traditional production methods in a defined place). See D Gangjee 'Quibbling siblings: conflicts between trademarks and geographical indications' (2007) 82(3) *Chicago-Kent Law Review* 1261.

61 Certification markings identify specific attributes, such as geographical origin, of the products or services on which they are used. See WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 7.

62 Reimers & van der Merwe op cit note 59 at 99.

are free from chlorofluorocarbons or the affixing of the 'Pure Wool' mark, which indicates to the consumer that the item bearing the mark is made from pure wool. Another example of such a mark is the 'Silk Mark', which indicates that the product is made of pure silk.

A business can demonstrate that its product complies with the requirements set out by the owner of the mark by using a registered certification mark.[63] The mark's purpose may be to certify that the work or labour on the goods or services was done by members of a union or other organisation and that the material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services, or that the goods or services are of regional or other origin.[64]

The two types of trademarks are similar in that they both serve a distinctive function, which allows for registration of marks which would not ordinarily be registrable under trademark regulations, such as geographic terms, registrable as collective or certification marks.[65] It has been noted that it might be challenging to tell collective markings from certification marks and that there is more of a formal distinction than a substantive one.[66] The two types of marks differ in that the owner of the certification mark is an independent body which provides the certification, in contrast, the association owns the collective marks, and only the members thereof may trade in goods and services bearing the collective mark. A collective mark or certification mark may, depending on the relevant national law, indicate, among other things, the country of origin of goods or services and so may, in some circumstances, be acceptable for the protection of a GI.[67] Collective and Certification marks will be discussed in further detail in Chapters 4, 5 and 6 below, which deal with GI protection internationally, regionally and nationally.

Trademarks differ from GIs, however, in that even though the mark may indicate quality and possess the reputation attached to the source or producer, the mark may not necessarily represent the country of origin of the item to which it is affixed. GIs are always an indicator of the origin of the good and serve the purpose of indicating the quality and reputation. This said, both IPRs can

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63 Watson, K W 'Reign of *Terroir*: How to Resist Europe's Efforts to Control Common Food Names as Geographical Indications (2016) 787 *CATO Institute* 3 available at: http://ssrn.com/abstract=2784907.

64 Watson op cit note 63 at 3.

65 Reimers & van der Merwe op cit note 59 at 100.

66 WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 11.

67 Ibid at 10, where it is provided that under standard trademark law, certification marks can be used to protect GIs.

assist in identifying in the course of trade the commodities and services of one producer from comparable goods and services of other producers.

1.6.4. Development Planning

Waterston[68] proposed a working definition of development planning as follows:

> a deliberate and continuing attempt [by a country's government] to accelerate the rate of economic and social progress and to alter institutional arrangements which were considered to block the attainment of this goal.

The development planning process, therefore, involves formulating a national programme of action for achieving developmental objectives- a type of ideal that not only sets out the objectives of the government but also demonstrates how it intends to tackle the country's problems.[69] Countries, in their development planning processes, can consider the protection of GIs as a tool to be used to attain developmental objectives**.** The concept of development planning bears significant discussion because National Development Plans (NDPs) manifest the development planning of states. This thesis aims to assess how GIs can contribute to attaining Namibia's developmental objectives, therefore necessitating a brief discussion of the concept of development planning.[70] This will be done in Chapter 3.2.

In this context, Namibia's overall Vision 2030 and its revolving plans, as well as the *Harambee* Prosperity Plans, will be considered, and a determination will be made as to whether provision is made for GI protection or promotion therein.

1.7. Research Methodology

The enquiry was undertaken by way of desktop research. A combination of doctrinal, theoretical, and comparison research frameworks were employed in this study. As far as the doctrinal approach is concerned, emphasis has been placed on existing academic literature, applicable national legislation, policy documents, as well as international treaties and instruments which relate, directly or indirectly, to the topic of this thesis. Relevant case law was also considered.

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68 Waterston, A *Development Planning: Lessons of Experience* (1969) 21.

69 United Nations Economic Commission for Africa *Planning for Africa's development Lessons, insights, and messages from past and present experiences* (2016) Economic Commission for Africa, Addis Ababa 3.

70 See Chapter 3.

However, a theoretical research framework was needed to explore ideas and approaches that are not fully rooted in, or even completely detached from, the legal *status quo*. An example of a theory employed is the law and economics theory, which provides that the ideal way to think about the law is as a social tool that can help promote economic efficiency.[71] It has been stated that legal systems are always related to the particular period of history in which they appear, and as such, economic factors are of significance in the construction and interpretation of laws that apply in the commercial and industrial age.[72]

In the past, much legal research and education tended to ignore the impact of a country's legal system on that country's economy and vice versa.[73] It must, however, be admitted that economics is always a part of any legal system.[74] The economic analysis of law has two branches:[75] One branch, dating back at least to Adam Smith, is the economic analysis of the laws that govern explicit markets—the laws that govern 'the economic system' in the ordinary sense of the term, and the other branch, which can be said to have its origins in the work of Jeremy Bentham a generation after Smith, is the economic analysis of the laws regulating non-market behaviour - accidents, crime, marriage, unemployment. infection, as well as the law and policies, self-processing. This economic analysis of law involves two styles of analysis:[76] the first style of analysis is classically called positive analysis, and the second style of analysis is normative analysis: the positive analysis asks what predictions we can make as to the likely economic impacts of the pattern of economic activities and distributive of the policy, given how people are likely to respond to the particular incentives or disincentives created by the policy.[77] On the other hand, the normative analysis of law asks:[78] is it likely that this particular transaction or this particular proposed policy or legal change will improve the situation of the individuals concerned in terms

71 Butler, B E 'Law and Economics' in *Internet Encyclopaedia of Philosophy* available at https://iep.utm.edu/law-econ/.

72 Timlin, W H 'Economics and Jurisprudence' (1921) 4 *Marquette Law Review* 177 at 182. Further, states that 'the economic cause … is always a factor in the production of legal rules', at 182. One can therefore not discount the role of the law in economics or the role of economics in formulating law.

73 Trebilcock, M J 'An Introduction to Law and Economics' (1997) 8 Monash University Law Review pp123-158, at 123.

74 Posner, R A 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) *The Journal of Legal Studies* pp. 399-458, at 463.

75 Posner, R A 'Some Uses and Abuses of Economics in Law ' (1979) 46 *The University of Chicago Law Review* pp. 281-306*, at 281-282.*

76 Trebilcock op cit note 73 at 125.

77 Trebilcock op cit note 73 at 125

78 Trebilcock op cit note 73 at 132

of their perception of their own well-being? Posner[79] provides that the vital goal of substantive legal regulations is to improve economic efficiency.[80] Two claims relating to efficiency have been proffered to this end:[81] there is the positive claim, which provides that Common law rules are efficient, and there is the normative claim, which provides that common law ought to be efficient. Tyagi,[82] reinforcing this provides that economic analysis of law can be defined as the analysis of law from an efficiency perspective to analyse whether it is effective in achieving its objectives. It has been stated that the economics of law is not limited to a particular branch of law; instead, it attempts to popularize economic concepts and methods within legal knowledge.[83]

In the premise, the efficiency analyses can be used to guide legal practice concerning GIs and trademarks. This thesis, therefore, considers the regulation of GIs in light of economic development for Namibia and the quest to become an industrialized nation. This is not to say that the law and economics theory is the only theory that can be used to substantiate the promotion of GI protection, nor is it implied here that using an economic approach to law to assess whether existing GI legislation is effective will give priority to sui generis GI protection over trademarks. Herein, the theory is applied to measure whether the current GI law in Namibia is effective enough in light of development goals or whether a different approach should be considered.

Finally, a comparison of select legal regimes was employed in the study to examine how GI rights are addressed in identified countries nearer to Namibia in terms of development. It is hoped that this method of legal comparison will provide guidelines on possible future developments, identify potential difficulties that may be encountered and provide a foundation for analysis of the Namibian legal position concerning GIs and trademarks. The countries for comparison, South Africa and India, were carefully chosen for the following reasons: South Africa is considered an emerging sound economy, and Namibia shares close historical and legal ties. South Africa, in compliance with its TRIPS obligations,[84] provides for GI protection through a

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79 Posner (1973) op cit note at 401.

80 Markov, M ‘Economic Theory of Law’ (2011) 2 Economic Alternatives p 90-98, at 93.

81 Posner (1979) op cit note 75, at 284-287.

82 Tyagi, K ‘Introduction to Law and Economics’ (2013) Available at SSRN: https://ssrn.com/abstract=2330251 or http://dx.doi.org/10.2139/ssrn.2330251, p2.

83 Markov, M ‘Economic Theory of Law’ (2011) 2 Economic Alternatives p 90-98, at 93. He also refers to Posner, in his paper 'Economic Analysis of Law' demonstrates that the economic approach can be applied effectively in almost all areas of law. See Markov (2011) at 93.

84 Part II of Section 3 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of 1994.

combination of laws governing unfair competition, trademarks registration, consumer protection, and administrative schemes[85] in order to safeguard wine GIs. Regarding trademark protection and registration, GIs in South Africa can find registration through collective marks. This is also the current position in Namibia since the coming into force of the Industrial Property Act of 2012; therein, GIs may also be registered as certification marks. Despite the absence of a specific law related to GI protection, it has nonetheless been stated that South Africa provides 'adequate' protection of GIs.[86]

The global south state of India, on the other hand, has adopted a *sui generis* GI protection system through the promulgation of the Geographical Indications of Goods (Registration and Protection)Act of 1994 and the Rules to the Act of 2002, which relates to the procedure of GI applications and filing thereof. The Act has also extended this protection to enable the government to decide which GI products need higher protection under the Act. India is a developing country with a long and established framework for GI protection since the promulgation of its Act in 1994, and the view is that the Indian experience may assist Namibia. More specifically, the *sui generis* system of India will assist in assessing whether Namibia should consider protecting GIs along the same lines.

The approaches of these countries are discussed in Chapter 6 below.

1.8. Chapter Outline

This thesis is divided into seven chapters, including this introductory chapter.

Chapter two takes a closer look at development planning as a concept, as well as the right to development. This is necessary to provide a foundation for the discussion on the need for

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85 When geographical indications are applied to products whose marketing is governed by an administrative approval system, that method may also be used to regulate the use of the geographical indications that have been assigned to those products. See WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 12. The Swiss Ordinance Governing the Appellation "Switzerland" or "Swiss" for Watches is one example of this type of geographical indication protection. The Ordinance sets detailed standards for labelling, specifies the circumstances under which the terms "Swiss" and "Switzerland" may be used for watches, and establishes a foundation for sanctions when the laws are broken. See WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 4.

86 van Der Merwe, A 'Geographical Indication Protection in South Africa with Particular Reference to Wines and to the EU' (2009) 10 (1) *The Estey Centre Journal of International Law and Trade Policy* 192.

effective implementation of development plans. This is followed by examining Namibia's Development Plans under the country's Vision 2030 and the *Harambee* Prosperity Plans I and II. These Plans are assessed, and the positioning of GIs within them is determined.

Chapter three provides an overview of GIs. A discussion of the IP right of geographical indication and its potential to drive development is undertaken. As the protection of goods of origin is sometimes provided for through collective and certification marks, the law on trademarks is also discussed.

Chapter four then looks at the international and regional instruments applicable to GI protection and, by extension, trademarks. Finally, the chapter also looks at the proposed extensions for GI protection to all goods under the WTO TRIPS Agreement, similar to that currently granted to wines and spirits. This is a relevant consideration because the current provisions of TRIPs provide differentiated treatment of GI capacity goods and services from wines and spirits, which has resulted in notable contestation. Namibia, though small, has producers of wines and spirits. Consequently, a discussion on GIs without reference to it would be incomplete.

After that, chapter five deals with the *status quo* of IP protection in Namibia generally and GI, specifically, setting out the domestic instruments. The chapter also looks at the findings of the Namibian IP Audit, which was undertaken in 2016 and consequently paved the way for developing the National Intellectual Property Policy and Strategy for Namibia from 2019 to 2024. This IP Policy and Strategy will also be considered in this chapter.

Based on the examination in the preceding chapters, chapter six examines the GI protection law systems in two chosen jurisdictions of India and South Africa. This is done with a view of identifying different approaches available for GI protection as a guide for the possible direction which Namibia could take with regard to its own GI protection.

Finally, chapter seven summarises the findings of this thesis, offers conclusions and aims to respond to the overall research question of what a GI protection framework that aids developmental objectives in Namibia should look like.

CHAPTER 2: NAMIBIA'S DEVELOPMENT PLANS

> 'Countries forewarned and forearmed are better able than ever before to avoid pitfalls and plan with reasonable assurance of success'.
>
> *Albert Waterston*[87]

2.1. Introduction

Chapter two aims to set out a discussion on development and the development planning process. The chapter will cover the right to development and address development planning in the context of Namibia, indicating the place of IPRs and GIs in the development plans of Namibia. The chapter is aimed at addressing research question 1.3.3 (how has Namibia incorporated GIs in its development objectives?).

2.2. The Concept of Development

Todaro and Smith[88] define development as 'the process of improving the quality of all human lives and capabilities by raising people's levels of living, self-esteem, and freedom'. It, therefore, goes beyond economics,[89] but also forms society's patterns of life.[90] These views on development align with that of the United Nations (UN) as set out in Resolution 41/128, which comprised the Declaration of the Right to Development. Therein, a recognition by the General Assembly's development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the far distribution of the benefits resulting therefrom'.[91] Unless otherwise stated, all reference to development in this thesis can be inferred to be within the context of the definition provided above and development as recognised by the UN.

This thesis proposes that one cannot discuss development without deliberating on the right to development. As such, the discussion on the right to development aptly follows below.

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87 Waterston op cit note 68 at IX.
88 Todaro, M P & Smith, S C *Economic Development* 12th edition (2015) 7.
89 Spicker, P 'Economic Development' in *The Poverty of Nations: A Relational Perspective* (2020) 53–66.
90 Spicker op cit note 89 at 53–66.
91 The preamble of the UN General Assembly Declaration on the Right to Development; available at http://www.un.org/documents/ga/res/41/a41r128.htm;

2.2.1. The Right to Development

Development has been stated to be a right of all [wo]men,[92] and is described as a third-generation right or solidarity right.[93] The UN's 1986 Declaration on the Right to Development provides the following in its Article 1(1):

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.[94]

Adopting this declaration is considered the most important achievement of the 41st Session of the UN General Assembly held on 04 December 1986.[95] As a right, development must be founded on the recognition that every being must live a free and worthy life within his or her community and implies a right of development for underdeveloped nations and peoples.[96] At a global consultative meeting on the right to development held in Geneva in 1990, criteria for measuring human progress were proposed: [97] conditions of life, such as food and health; conditions of work, such as income; equality of access to resources, such as fair distribution of basic resources; and participation, which relates to matters such as representation. Developmental progress is, therefore, only justified if it has the consequence of improving all persons' economic, social and cultural aspects.[98]

In the quest to attain its developmental objectives, Namibia must consider development as a right and strive to ensure that all living in the land benefit in the form of improved conditions of life inclusive of economic, social, cultural and political aspects. Only then can development be accurately measured.

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92 Dalal, K L 'Man's Right to Development' (1988) 15 (2) *India International Centre Quarterly* 89-96 at 90.

93 Human rights are divided into three generations: first-generation human rights, which are civil and political rights, such as the right to life, dignity, or freedom of speech; second-generation rights, which are social and economic rights held and exercised collectively by all people, such as the right to education; and third-generation rights, which are considered as solidarity rights because, on top of requiring affirmative action from the state for realisation, they also require that individuals act in the realisation thereof. See Ruppel, O C *'Third-generation human rights and the protection of the environment in Namibia' in Horn, N & Bösl, A Human Rights and the Rule of Law in Namibia (2008) Konrad Adenauer Foundation, Windhoek* 102-103.

94 Article 1.1. of the UN General Assembly Declaration on the Right to Development; available at http://www.un.org/documents/ga/res/41/a41r128.htm;

95 Dalal op cit note 92 at 89-90.

96 Dalal op cit note 92 at 91.

97 Hallgren, R 'The UN and the Right to Development' (1990) 22/23 (4) *Peace Research* 31-41 at 38-39.

98 Dalal op cit note 92 at 91.

Vandenhole[99] provides that if the right to development is considered as placing the government of a developing country in a position of both debtor and creditor, then the state owes a duty to its people to allow and encourage the full right to development of its citizens. He, however, provides that there is no consensus as to whether the human right to development is an 'individual right', 'collective right' or both.[100] Despite this absence of consensus, states worldwide are utilising their full potential to exercise their right to development by engaging in development planning, aiming to not only grow their economies but also improve individual lives.

Tethered to development and the right thereof, this thesis also considers the concept of sustainable development. The concept is discussed below.

2.2.2. Sustainable Development

The principle of sustainable development was first coined and defined in the Brundtland Report as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[101] It has three fundamental objectives: economic development, social welfare, and environmental development.[102] It calls for the working together of three elements: social development, economic growth and environmental sustainability.[103]

The Brundtland Report and its definition of sustainable development was the foundation of the UN Conference on Environment and Development, also known as the Earth Summit, in Rio de Janeiro in 1992, where the United Nations Commission on Sustainable Development (UNCSD) was created.[104] The Earth Summit concluded that sustainable development as a concept was a goal attainable for all people of the world.[105] After that, and in recognition of this right to development, followed a series of Conferences[106] wherein states adopted goals geared towards development on

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99 Vandenhole, W 'The Human Right to Development as a Paradox' (2003) 36 (3) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 377-404 at 393.

100 Vandenhole op cit note 99 at 385.

101 Brundtland, G H 'Report of the World Commission on Environment and Development: Our Common Future' (1987) available at http://www.un-documents.net/our-common-future.pdf. Also see Ruppel, O C & Ruppel-Schlichting. K (eds.) *Environmental Law and Policy in Namibia: Towards making Africa the Tree of Life* (2016) Hans Seidel Foundation, Windhoek 64.

102 Ruppel & Ruppel-Schlichting op cit note 101 at 64.

103 Ruppel & Ruppel-Schlichting op cit note 101 at 64.

104 Available at https://www.un.org/en/conferences/environment/rio1992.

105 Available at https://www.un.org/en/conferences/environment/rio1992.

106 The first conference of note was the International Conference on Population and Development (ICPD) where a Programme of Action was adopted by consensus, available at https://www.unfpa.org/publications/international-conference-population-and-development-programme-

an international level, which prompted national initiatives aimed at attaining these goals. This culminated in the formulation of the Sustainable Development Goals.[107]

It was in 2012 when the United Nations Conference on Sustainable Development, also known as Rio+20, was held in Rio de Janeiro. At this Conference, Sustainable Development Goals were developed, which built onto the Millennium Development Goals (2000-2015).[108] In 2015, at the UN Sustainable Development Summit, the 2030 Agenda for Sustainable Development, containing 17 Sustainable Development Goals (SDGs) with 169 targets, was adopted. These SDGs are:[109]

> Goal 1. End poverty in all its forms everywhere;
>
> Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture;
>
> Goal 3. Ensure healthy lives and promote well-being for all at all ages;
>
> Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all;
>
> Goal 5. Achieve gender equality and empower all women and girls;

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action. This programme informed the creation of the Millennium Development Goals (2000-2015), available at https://www.unfpa.org/events/international-conference-population-and-development-icpd. This was followed by the Millennium Summit held in New York in 2000, where 189 member states of the UN adopted the Millennium Declaration and its eight Millennium Development Goals (MDGs) available at https://undocs.org/en/A/RES/55/2, which are an undertaking by member states to:

a. Eradicate extreme poverty and hunger.
b. Achieve universal primary education.
c. Promote gender equality and empower women.
d. Reduce child mortality
e. Improve maternal health
f. Combat HIV/AIDS, malaria, and other diseases
g. Ensure environmental sustainability
h. Develop a global partnership for the development

The World Summit on Sustainable Development followed the Millennium Summit held in 2002, where a resolution on Sustainable Development was passed, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/C.2/57/L.83&Lang=E.

In terms of this, states decided to adopt sustainable development as a key element of the overarching framework for United Nations activities, in particular for achieving the internationally agreed development goals, including those contained in the United Nations Millennium Declaration, and to give overall political direction to the implementation of Agenda 21 and its review. See General Assembly Resolution A/C.2/57/L.38, 2 available at https://www.un.org/ga/search/view_doc.asp?symbol=A/C.2/57/L.83&Lang=E.

107 Available at https://www.unfpa.org/events/international-conference-population-and-development-icpd.

108 UN. Available at https://sustainabledevelopment.un.org/rio20.

109 UN. Transforming our world: the 2030 Agenda for Sustainable Development Resolution A/RES/70/1, 14. Available at https://sustainabledevelopment.un.org/post2015/transformingourworld.

Goal 6. Ensure availability and sustainable management of water and sanitation for all;

Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all;

Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all;

Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation;

Goal 10. Reduce inequality within and among countries;

Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable;

Goal 12. Ensure sustainable consumption and production patterns;

Goal 13. Take urgent action to combat climate change and its impacts;

Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development;

Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems; sustainably manage forests; combat desertification and halt and reverse land degradation and halt biodiversity loss;

Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels and

Goal 17. Strengthen the means of implementation and revitalise the global partnership for sustainable development.

The exposition above relating to the coming into being of the SDGs was necessary because the SDGs are relevant to any discussion on IPRs and, therefore, bear mention in this thesis. More specifically, WIPO[110] has stated that innovation is essential for the attainment of the SDGs. As a potential enabler for innovation, IP thus has a central role to play in facilitating the attainment of SDG 9, as well as a direct impact on the achievement of SDGs 2, 3, 6, 7, 8, 11 and 13.[111] IP can also be used as a policy tool for the attainment of SDGs 5, 10 and 12.[112] States should, therefore,

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110 WIPO 'WIPO and the Sustainable Development Goals Innovation Driving Human Progress' (2019) available at https://www.wipo.int/publications/en/details.jsp?id=4354, 2.

111 WIPO 'WIPO and the Sustainable Development Goals Innovation Driving Human Progress' (2019) 12.

112 WIPO 'WIPO and the Sustainable Development Goals Innovation Driving Human Progress' (2019) 12.

consider IPRs as tools that can be used to achieve sustainable development goals, and Namibia is no exception. These goals can be incorporated into the development planning of states.

Countries can assess whether they have reached their developmental goals by using development indicators. Development indicators can be defined as the 'qualitative expressions of movement towards the various goals or values'[113] set down by states. There are several development indicators available for use by states, such as Gross National Product (GNP), Gross Domestic Product (GDP), Human Development Index (HDI), Infant Mortality rate, Literacy rate, and Life expectancy, to mention a few. Consideration needs to be paid to the role that law can play in advancing development.

Law and development involves the transformation of legal systems with the aim to promote economic, political and social development.[114] Much of the current debate about law and development is not about whether legal reform is possible or has the potential to promote development but about the appropriate types of legal reform.[115] The law and economics approach, therefore, refers to the application of empirical economic theories and methods to the central institutions of the legal system.[116] An important conclusion from the legal and economics literature is that economic analysis can be useful in designing legal system reforms.[117]

It is contended that each area of law can be described as a means to achieve desired social goals, and these goals appear to be the same for every area of law in every country in the world.[118] As a country which has formulated developmental objectives, Namibia can use the law and economics approach to advance these objectives.

When it comes to IPRs, they intersect with crucial aspects of human growth and development.[119] In light of this, there exists, therefore, an increased need to balance private rights and public interests. Article 7 of TRIPS among other things provides for '…the mutual advantage

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113 McGranahan, D ‘Development Indicators and Development Models’ (1972) 8 (3) *The Journal of Development Studies* 91-102 at 95.

114 Son, B N ‘Law and Development Theory: A Dialogical Engagement (2019) 51 George Washington International Law Review 65-104, p65.

115 Davis, K. E., & Trebilcock, M. J. ‘The Relationship between Law and Development: Optimists versus Skeptics’ (2008) 56 *The American Journal of Comparative Law* 895–946, at 917.

116 Posner, R A ‘The Economic Approach to Law’ (1975) 53 *Texas Law Review* 757-782, at 759.

117 Posner (1975) op cit note 116 at 764.

118 Garoupa, N & Ulen, T S ‘Comparative Law and Economics: Aspirations and Hard Realities’ (2021) 69 *American Journal of Comparative Law* 664-688, at 671

119 Wong, T ‘Intellectual Property through the Lens of Human Development’ in T Wong & G Dutfield (eds) *Intellectual Property and Human Development: Current Trends and Future Scenarios* (2011) Cambridge University Press 1.

of producers and users of technological knowledge, and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'. This provision, on the one hand, concerns the intended balance that needs to be reflected between the interests of private stakeholders who depend on the incentive for creativity and innovation brought on by IP protection. And on the other hand, the expected benefit for society in accessing these creations, as well as the transfer and dissemination of technology. There is, furthermore, a need to look at how IP may impact social dimensions. It is as such argued that the balancing should consider the improvement of the human condition.[120]

This thesis will hence focus on measuring development progress by considering the aspect of human development.

2.2.3. Human Development

Human development is measured through the Human Development Index (HDI). This index measures the average progress made by a nation in three key areas of human development: health,[121] knowledge,[122] and income.[123] It does not cover aspects such as social and political freedom, protection against violence, insanity and discrimination.[124] It is, however, an alternative to conventional measures of national development. The HDI assumes that economic growth does not necessarily equate to human development or increased well-being but focuses on the impact on people rather than the economy; after all, people are the wealth of nations.[125] Though not a comprehensive measure, by considering averages, the HDI can provide a more comprehensive view of the state of the nation's development by accounting for advancements in health, education, and income rather than income alone.[126] The incorporation of these factors, therefore, regards them as indicators of human flourishing.[127]

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[120] J.J. Osei-Tuto ''Human Development as an Intellectual Property Metric' (2016) 90 (3) *St. John's L. Rev* 711-743 712.

[121] Life expectancy at birth.

[122] Expected years of schooling for a school-age child in a country today with the mean years prior schooling for adults aged 25 and older.

[123] PPP adjusted per capita Gross National Income (GNI).

[124] Reyles, D Z 'The Human Development Index (HDI)' *Oxford Poverty and Human Development* 4

[125] OECD 'Human Development Report 2004' 127.

[126] OECD 'Human Development Report 2004' 128

[127] Osei-Tuto op cit note 120 at 724.

The value of the HDI is between 0 and 1; the closer a state is to 1, the higher its human development is deemed to be. The HDI includes both economic and non-economic factors.[128] Although still evolving, the UN Development Programme (UNDP) has been using this tool and producing country reports since 1990. HDI factors are then put forward as possible metrics for developing IP laws and policies.[129] These criteria for measuring human development at the national level may provide some insight into how IP laws affect the advancement of humanity. The HDI has been criticised for its non-consideration of the inequalities that exist within countries. Grimm et al[130] provide that there is a possibility that a country will have a high HDI, but there would be an unequal distribution of development within that state. This must, therefore, be noted in any assessment of the actual development of the state measured in terms of the HDI.

This thesis argues that IP protection, specifically GIs,, can contribute to human development. Osei-Tuto[131] writes arguing in favour of considering human development as a way to gauge the consequences of IP laws. It is highlighted that the use of the human development index to measure the contribution of IP to development will not necessarily mean that there will be less IP protection.[132] A good example of this is when traditional communities use GIs to protect their products. This avenue, therefore, empowers some communities by providing them with the means to protect and exploit their cultural heritage. With this IP protection, there can also be an ancillary potential to promote human development. [133]

In this regard, there is potential for increased protection, resulting in the possibility of promoting human development and, consequently, empowerment of communities. Countries, whether developed or developing, all have a common interest in advancing human development, as shown by the wide range of WTO conflicts pertaining to IP rights and public health issues.[134]

An assertion is made that the effect that the minimum IP standards set out in the TRIPS Agreement have on the various facets of human development is the source of international

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128 Osei-Tuto op cit note 120 at 728.
129 Osei-Tuto op cit note 120 at 730.
130 Grimm, M et al 'Inequality in Human Development: An Empirical Assessment of 32 Countries'(2010) 97 (2) *Social Indicators Research* 191-211 at 192.
131 Osei-Tuto op cit note 120 at 713
132 Osei-Tuto op cit note 120 at 717.
133 Osei-Tuto op cit note 120 at 717-718.
134 Osei-Tuto op cit note 120 at 718.

unhappiness with these standards.[135] As a result, the goal of IP law and policy should shift to human growth. This blending of the two objectives forms part of the goals of the WIPO Development Agenda, which speaks to balancing IP protection with the public interest and providing of capacity for protecting domestic creations.[136] Human progress is thus moved to the centre of the development and interpretation of IP laws.[137] Relevant laws that consider human development can ensure better protection for those entitled to benefit from identified rights.[138]

When it comes to different areas in which IP rights are granted, the contribution of these to human advancement might go beyond what any monetary value could capture.[139]This is evident in the case of pharmaceuticals;[140] the human condition can be improved or even rescued once medications are made available to individuals who need them; disclosure enables others to create and invent further; finally, the inventor could benefit financially and perhaps feel satisfied. These are indications of aspects of human development. The converse can, of course, also be true because IPRs can easily be used to limit access to medicine and increase the prices of pharmaceuticals.

Notwithstanding, arguing for human development as a measurement for development covers most of what IP law seeks to accomplish and, therefore, provides a good basis for measuring the potential effect of IP. Whether the advancement of the human condition is for individual rights holders or the public interest will not hinder the IP effect for as long as humanity benefits. For GIs, this will mean that a community residing in the GI area will be the benefactor of the assignment of the rights. What needs to be determined is whether Namibia has planned its development by using IP as one of the tools to promote human development.

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135 Osei-Tuto op cit note 120 at 719. It is further stated that these standards do not necessarily fit all countries; whilst they may be more relevant for states that are industrialised, they may be ill-suited to developing and less developed countries. See Osei-Tuto op cit note 120 at 715...

136 Cluster A sets out the following objectives:

> 10."To assist Member States to develop and improve national intellectual property institutional capacity through further development of infrastructure and other facilities with a view to making national intellectual property institutions more efficient and promote fair balance between intellectual property protection and the public interest. This technical assistance should also be extended to sub-regional and regional organisations dealing with intellectual property".
>
> 11. "To assist Member States to strengthen national capacity for protection of domestic creations, innovations and inventions and to support development of national scientific and technological infrastructure, where appropriate, in accordance with WIPO's mandate".

137 Osei-Tuto op cit note 120 at 731.

138 The case of "The Lion Sleeps Tonight" is an apt example of this.

139 Osei-Tuto op cit note 120 at 724.

140 Osei-Tuto op cit note 120 at 724.

2.3. Introduction to Development Planning

The preceding discussion established that sustainable development, which can be measured through human progress, should be the goal of all states. Further, human progress can be measured through the HDI. This necessitates a discussion on how states plan their development and how IP can be incorporated therein. Development planning is, therefore, a necessary topic to cover because it serves as an introduction to the philosophy and rationale behind the development plans that will be discussed below at 2.4. These speak to the sub-research question number 1.3.3(has Namibia incorporated GIs in its development objectives)

An exact definition of development planning, which is mutually acceptable, is not easy to provide. This is because of the existing differences between states concerning their objectives and practices.[141] The definition, therefore, needs to be structured in such a way that it is neither too exclusive nor too inclusive. Waterston[142] proposed a working definition of development planning as follows:

> a country was considered to be engaged in development planning if its government made a deliberate and continuing attempt to accelerate the rate of economic and social progress and to alter institutional arrangements which were considered to block the attainment of this goal.

Development plans can be considered an economic toolbox to promote conditions for economic advancement and social progress.[143]All countries undertake some development planning. National Development Plans (NDPs) are therefore a manifestation of the development planning of states. This process, involves formulating a national programme of action aimed at achieving

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141 Waterston op cit note 68 at 20. Also, see O G Simmons 'Population Policy Analysis and Development Planning' (1984) 18 (4) *The Journal of Developing Areas* 433-448 at 433, and A W Lewis (2004) *Development planning* Routledge at 1.

142 Waterston op cit note 68 at 21. Simmons quotes Robinson W C (ed) *Population and Development Planning* Population (1975) Council New York 2 and provides the following as a definition:

> 'Development planning is essentially an effort to focus on the key problems, both structural and dynamic, facing a country and to mobilise resources-public and private, domestic and foreign-to deal with these problems.... Thus, a development plan assigns a priority to, let us say, transport and communications; draws up programs and projects to meet the chosen goal; accumulates resources to finance the projects; and then sees the projects undertaken and completed. Overall planning is the road-map to development, but specific projects and programs are the paved roads leading there.'

143 Waterston op cit note 68 at 20.

developmental objectives, which not only sets out the government's objectives but also demonstrates how it intends to tackle the country's problems.[144]

The definition of development planning, as stated, has the effect of including states which make some attempt at development planning, whether at an advanced level or not; it further takes into consideration all states, despite the type of economy they have in place. It is on the definition provided above by Waterston that the rest of the discussion on development planning within this thesis will be based because the development plans of Namibia set out a programme of action which sets out objectives and how the nation intends to tackle the problem within it.

By 1965, development planning had only been in practice for a little over 35 years,[145] with the Soviet Union being the first country recorded to have implemented a systematic development plan in 1929.[146] Since then, more and more countries have realised that there is a need to improve their living standards and that the economic-policy tool of development planning could be used to that end. Development planning was already present in 35 independent states on the African continent by 1965.[147] Though a long one, the process of development planning in Africa, when compared to Asia, cannot be said to have brought about as much transformational growth.[148]

a) Implementation of Development Plans

Development planning has been instrumental in promoting economic growth in less developed countries.[149] There have been clear expansions within the sectors of transportation, communications, ports, power, and industry, as well as in the community facilities within many countries. For this reason, states continue to adopt development plans, and in Africa specifically, states have put in place revolving plans for development in the hope of yielding results, with some having shown some success.[150] A good example of successful development planning by a state is

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144 United Nations Economic Commission for Africa *Planning for Africa's development Lessons, insights, and messages from past and present experiences* (2016) 3.

145 Waterston op cit note 68 at 4.

146 Waterston op cit note 68 at 29.

147 Waterston op cit note 68 at 37.

148 United Nations Economic Commission for Africa *Planning for Africa's development Lessons, insights, and messages from past and present experiences* (2016) vii.

149 Waterston op cit note 68 at 293.

150 Examples of states and their revolving development plans: Cabo Verde 1975-1990,1991-2000, 2001-present; Cameroon 1960-87,1988-2009 2009-present; Ethiopia 1941-73,1974-91, 1991-present; Ghana 1900-56,1951-1966,1966-83,1983-1996, 1996-present; Nigeria 1945-61,1962-85,1986-88,1990-2000, 2004-present; Seychelles 1977-1991,1991-2008,2008-present; South Africa Pre-1994 Apartheid, 1994-

that of Tunisia.[151] This nation-state has gone through five decades of development plans. In this period, Tunisia successfully implemented 11 plans and has been identified as a notable state in this area, especially regarding monitoring and evaluation, one from which other states could learn.[152]

However, the measure of the success of development plans should, be carefully assessed. Whether some or all objectives have been met could be used as indicators of successful implementation of development plans. It is agreed that, to be successful, development plans need to 'have pre-determined and well-defined objectives; be controlled by a central authority; strive for optimal utilisation of factors of production and adhere to objectives within a given interval of time'.[153]

It can safely be stated that plans will fail outright if not implemented properly. Failure of development plans will likely manifest due to the following causal factors:[154] unduly ambitious targets, poor financial controls, widespread failure of governments to maintain the discipline implicit in their plans, token efforts to co-ordinate economic and financial policies as required by plans, absence of general criteria and procedures for selecting projects and programs in accordance with plan objectives, and finally, inadequate project selection and preparation. These factors will result in the failure of development plans, no matter how good they may be.

Similarly, Killick[155] stated that the poor performance of development plans can be attributed to the following causes:

1. Deficiencies in the plans: they tend to be over-ambitious, to be based upon inappropriately specified macro-models, to be insufficiently specific about policies and projects, to overlook important non-economic considerations, and to fail to incorporate adequate administrative provision for their implementation.

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present; Tunisia 1956-1971,1970s-early 1980s,Mid-1980s-1996,1997-2011 3 five-year plans; Uganda 1961-80 3 five-year plans,1980-97,2000-present, 1986-present Five-year plans. United Nations Economic Commission for Africa *Planning for Africa's development Lessons, insights and messages from past and present experiences* (2016) 13-22.

151 United Nations Economic Commission for Africa *Planning for Africa's Development Lessons, insights and messages from past and present experiences* (2016) 62.

152 Ibid

153 United Nations Economic Commission for Africa *Planning for Africa's development Lessons, insights and messages from past and present experiences* (2016) 3.

154 Waterston op cit note 68 at 367.

155 Killick, T 'The Possibilities of Development Planning' (1976) 28 (2) *Oxford Economic Papers* 161-184, at 164.

2. Inadequate resources: incomplete and unreliable data; too few economists and other planning personnel.
3. Unanticipated dislocations to domestic economic activity: adverse movements in terms of trade, irregular flows of development aid, and unplanned changes in the private sector.
4. Institutional weaknesses: failures to locate the planning agency appropriately in the machinery of government; failures of communication between planners, administrators, and their political masters; the importation of institutional arrangements unsuited to local circumstances.
5. Failings of the administrative civil service: cumbersome bureaucratic procedures; excessive caution and resistance to innovations; personal and departmental rivalries; lack of concern with economic considerations.'

Though the above factors may not always be present in any given state, their influence is not without merit. The probability of at least one of them being present is high; the addressing thereof is, as such, quite crucial if development plans are to be successfully implemented and realised.

Therefore, development planning can greatly benefit the country in its aim to improve the living standards of its people as long as there is proper implementation, monitoring and evaluation. According to Bhende,[156]one of the ways in which objectives of development planning can be attained is through development programming, which is carried out through two steps.[157] Firstly, the determination of the general rate of economic development which the state seeks to attain through the following measures needs to be done: national income, consumption, savings, investments, or employment- namely, economic targets. Secondly, the state must select key sectors that are of major importance to its economy and require government intervention. Projects should thereafter be designed aimed at expanding the identified sectors. It is recommended that, with the continuous change in the economy of the state, these programmes and policies should be thought of as a continuous process and not an end in themselves.[158] In this way, adaptations can be made in accordance with the change in the economy because, though the future can be imagined, the unfolding of reality may quite often be different.

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[156] Bhende, V P "Development Planning for developing countries (1964) 10 (4) *Management Science* 796-809 at 797.

[157] Bhende op cit note 156 at 799.

[158] Bhende op cit note 156 at 808.

It has been acknowledged in the *Harambee* Prosperity Plan II (HPPII) document that Namibia's progress and the results achieved are grounded on the efforts invested in planning and implementation of the successive NDPs, the *Harambee* Prosperity Plan I (HPPI) and HPPII, amongst others.[159] Namibia's development planning will be considered below, and a determination will be made on how IPRs generally and GIs specifically have been incorporated into the NDPs.

2.4. Namibia's Development Planning

Namibia has undertaken the process of development planning, thereby promoting the right to development discussed above in 2.2.1. It is worth noting that the principles of sustainable development explained above provided the bedrock for the formulation of Namibia's Vision 2030.[160] Vision 2030 will be discussed below, as well as the action Plans that have been formulated in pursuance of that Vision.

a) Introduction to Vision 2030

Namibia's Vision 2030, launched in 2004, came about because of the realisation that it is the responsibility of government to promote social welfare, profitability and public interest.[161] To this end, the Namibian government adopted planning as a management tool to help ensure effective decision-making.[162] Namibia's development plan Vision 2030 identifies problems the nation faces as well as objectives for addressing those issues. It is worth noting that this is in line with the definition of development planning set out above in 2.3. The overall Vision is of '[a] prosperous and industrialised Namibia developed by her human resources, enjoying peace, harmony and political stability'.[163]

Namibia subscribed to the concept of sustainable development after the 1992 Earth Summit, also known as the United Nations Convention on Environment and Development, and the World Summit for Sustainable Development in Johannesburg in 2002.[164] Vision 2030 provides that it is the duty of society to ensure that the needs of the current generation are met by

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159 NPC 'Harambee Prosperity Plan- Action Plan of the Government towards Economic Recovery and Inclusive Growth' (2021) 6.

160 NPC 'Republic of Namibia Vision 2030: Policy Framework for Long-term National Development: Summary' (2004) 19.

161 Ibid at 18.

162 Ibid at 15.

163 Ibid at 15.

164 Ibid at 19.

development while ensuring that future generations have the unlimited ability to meet their own needs.[165]

The process of formulating Vision 2030 called for identifying and carefully analysing national problems. The following elements were identified as key issues from which Vision 2030 was drafted, and all succeeding plans were written:[166]

1. Inequalities and social welfare;
2. Peace and political stability;
3. Human resources development;
4. Institutional and capacity building;
5. Macro-economic issues;
6. Population, health and development;
7. Natural resources and the environment;
8. Knowledge;
9. Information and technology; and
10. Factors of the external environment.

Vision 2030 outlines the following objectives, which are to:

a) Ensure that Namibia is a fair, gender-responsive, caring and committed nation in which all citizens can fulfil their potential in a safe and decent living environment;
b) Create and consolidate a legitimate, effective and democratic political system (under the constitution) and an equitable, tolerant and free society that is characterised by sustainable and equitable development and effective institutions, which guarantee peace and stability;
c) Develop diversified, competent and highly productive human resources and institutions; fully utilising human potential, achieving efficient and effective delivery of customer-focused services, which are competitive not only nationally but also regionally and internationally;

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[165] Ibid at 38.

[166] NPC. *Chapter 3: Namibia Vision 2030* 38, available at http://www.gov.na/documents/10181/12976/Chapter_3.pdf/efc55d20-136b-4f42-9781-ddb30d5359f7.

d) Transform Namibia into an industrialised country of equal opportunities, which is globally competitive, realising its maximum growth potential on a sustainable basis, with improved quality of life for all Namibians;
e) Ensure a healthy, food secure and breastfeeding nation in which all preventable, infectious and parasitic diseases are under secure control and in which people enjoy a high standard of living, with access to quality education, health and other vital services, in an atmosphere of sustainable population growth and development;
f) Ensure the development of Namibia's 'Natural capital' and its sustainable utilisation for the benefit of the country's social, economic and ecological well-being;
g) Accomplish the transformation of Namibia into a knowledge-based, highly competitive, industrialised and eco-friendly nation with sustainable economic growth and high quality of life; and
h) Achieve stability, full regional integration and democratised international relations, transforming from an aid recipient country to a provider of development assistance.

The above objectives have since been translated into the NDPs: the implementation strategies and integrated programmes that set out specific targets of Vision 2030. These NDPs are discussed below; emphasis is placed on the HPP2 as this is currently underway.

a) Transitional National Development Plan (TNDP) (1991/1992 to 1993/1994)

This Plan ran for three years after independence in what is termed a transitional period. In these three years, between 1991 and 1994, the government steered itself to improve the well-being of the Namibian People.[167] A noteworthy instrument that was adopted by parliament is the National Planning Commission Act 15 of 1994, which provides, among other things, for the functions and powers of the National Planning Commission. This Commission is tasked with planning national priorities and the direction of national development. This establishment is in line with Article 129 of the Constitution of Namibia, which provides for the establishment of such a Commission.

The TNDP did not set any explicit targets.[168] The TNDP also did not specifically speak to the issue of intellectual property and/or GI protection; however, the Copyright and Neighbouring

[167] GRN Chapter 1: NDP1 13.
[168] Ibid at 16.

Rights Act was promulgated in 1994, when the transitional phase came to an end. The Act, however, only came into force on 15 March 1996.

b) National Development Plan (NDP) 1 (1995/1996 to 1999/2000)

This five-year Plan started running after the completion of the TNDP. It is referred to as a medium-term development Plan under Vision 2030. The overarching goals within NDP 1 are:[169] i) Reviving and sustaining economic growth; ii) Creating employment; iii) Reducing inequalities in income distribution; and iv) Eradicating poverty. To reach these goals, three targets were formulated under NDP 1,[170] and these were (1) economic,[171] (2) social,[172] and (3) political goals.[173] Under NDP 1, the Namibian government furthermore formulated the overall strategies to achieve the objectives. There was no specific reference to intellectual property / GI promotion or protection in NDP 1. Unsurprisingly, the NDP did not result in any frameworks concerning intellectual property law generally or geographical indications specifically.

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169 GRN Chapter 3: NDP1 3.

170 Ibid at 3.

171
- a. To formulate and carry out a vigorous and top-priority human resources development programme open to all Namibians, especially the unemployed,
- b. To expand the role of the private sector and foreign investment in the economy,
- c. To maintain inflation at a level not exceeding that of Namibia's main regional trading partners,
- d. To maintain CMA membership and parity with the rand and to work with CMA partners to liberalise exchange controls,
- e. To improve levels of household food security nationally with an ultimate goal aim of achieving food self-sufficiency,
- f. To diversify import sources and export markets to increase trade with other southern African countries,
- g. To promote productive sectors with high potential for growth, such as manufacturing, fisheries, tourism, agriculture and mining, and
- h. To promote, support and encourage national development of appropriate science and technology.

172
- a. To reduce the population growth rate to below 3.0% by 2010 (currently 3.1%-3.3%),
- b. To reduce the total fertility rate to 4.5 per woman by 2010 (currently 5.4),
- c. To increase life expectancy to 63 years by 2000 (currently 60),
- d. To promote and support the development of sport and indigenous culture, and
- e. To increase the literacy rate to 80% by the year 2000 (currently 76% — self-reported).

173
- a. To reduce existing regional imbalances, and
- b. To support and encourage increased participation of women, youth and other marginalised groups in the economic development activities of the country.

c) National Development Plan (NDP) 2 (2001/2002 to 2005/2006)

Under NDP 2, it was acknowledged that although there were some achievements reported under NPD 1, there were also major constraints[174] encountered, and as such, there was a need to retain the NDP1 objectives under this new Plan, with five more objectives added.[175] The objectives were:[176]i)To promote economic empowerment; ii) To reduce regional development inequalities; iii) To promote gender equality and equity; iv) To enhance environmental and ecological sustainability; and v) To combat the further spread of HIV/AIDS. As a measure of the above developmental objectives, the NDP2 also formulated targets[177]and strategies aimed at attaining the objectives.[178]

There is no specific mention of intellectual property / GI promotion or protection in NDP 2 either. However, it has been reported that during the NDP 2 period, inputs were provided to legislative developments in this area, in particular with relation to the implementation in 1996 of the Copyrights and Neighbouring Rights Act of 1994.[179] However, no frameworks were created in order to protect or advance other aspects of intellectual property law, including geographical indications.

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174 These constraints were listed in the GRN 'Chapter 3-Volume 1: NDP2' at 50 as:

> 34. The targeted budget deficit of 3% was not achieved due to a lack of adequate revenue and increasing current expenditure by the government.
> 35. Unemployment increased due to population growth, drought, new employment initiatives, mining retrenchment, and mining closures.
> 36. Despite the efforts undertaken to address the labour situation in the country, some constraints could not be addressed in the short term. These include a poor educational profile indicating that 15 % of the population is without education, and about 54% receive primary education only. These long-term problems need to be addressed during the NDP2 Plan and beyond.
> 37. Lack of qualified teachers, especially in English, Mathematics and Life Skills. A shortage of professional and skilled human resources continues to exist in all the key sectors of the national economy and constitutes an important constraint. In an effort to address the situation, the government formulated a Human Resources Plan, which will be implemented during NDP2 and beyond.
> 38. The combined effects of the Asian economic crisis, the vulnerability of the economy as a result of commodity prices, weather and oceanic conditions, and sluggish increase in fixed capital investment since 1994 have led to low increases in Gross National Income per capita.
> 39. Factors external to the economy have lately played major roles in determining the pace of growth and direction of development of the economy. One of them is drought, which has become a frequent characteristic of the economy. Drought significantly impacts the agriculture sector and the economy as a whole. The other factor has been the poor performance of some regional and international trading partners

175 GRN 'Chapter 3-Volume 1: NDP2' 50.

176 Ibid at 50-51.

177 GRN 'Chapter 3-Volume 1: NDP2' 54-55.

178 Ibid at 55.

179 GRN 'NDP 3: Volume 1 (2008) 224. It is worth noting that this Act was promulgated in 1994, during the NDP 2 period.

d) National Development Plan (NDP) 3 (2007/2008 to 2011/2012)

This NDP differs from NDPs 1 and 2. One of the ways in which it is different is that the Plan is based on the broad objectives of Vision 2030.[180] Rather than formulating its own set of objectives, NDP 3 sought to translate the Vision 2030 objectives into concrete policies and plans. The overall objectives and respective goals under NDP 3 were[181] i) A competitive economy,[182] ii) Productive utilisation of natural resources and environmental sustainability,[183]iii) Knowledge-based economy and a technology-driven nation,[184] iv) Quality of life,[185] v) Equality and social welfare,[186] vi) Peace, security and political stability,[187]vii) Regional and international stability and integration.[188] Importantly, NDP 3 contained numerous references to IP rights, namely:

1. A measure of economic competitiveness mentioned was the use of patents and intellectual property rights protection.;[189]
2. NDP 3 provided that a policy on Indigenous Knowledge (IK) and related intellectual property rights needed to be developed to ensure that local peoples are benefiting from the commercialisation of the knowledge they hold.[190] Once IK is commercialised, it may contribute to poverty reduction in rural communities;[191]

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180 Ibid at ix.

181 Ibid at 47- 279.

182 Goal: Increased Equality in Income Distribution,
Goal: Increased and Sustainable Economic Growth,
Goal: Increased Employment,
Goal: Increased Smart Partnerships and Private Sector Development,
Goal: Highly Developed and Reliable Infrastructure.

183 Goal: Optimal and Sustainable Utilisation of Renewable and Non-Renewable Resources,
Goal: Environmental Sustainability,
Goal: Adequate Supply of Qualified, Productive and Competitive.

184 Goal: Innovative and Productive Usage of Technology and Research and Development.

185 Goal: Affordable and Quality Healthcare,
Goal: Reduced Spread of HIV/AIDS and its Effects,
Goal: Eradication of Extreme Poverty and Hunger.

186 Goal: Reduced Inequality and Social Welfare,
Goal: A Society Imbued with Culture, Tradition and Morality,
Goal: Gender Equality.

187 Goal: Enhanced and Sustained Participatory Democracy,
Goal: Strengthened Rule of Law and Social Justice,
Goal: Internal Security and Territorial Integrity.

188 Goal: Enhanced and Sustained Participatory Democracy,
Goal: Strengthened Rule of Law and Social Justice,
Goal: Internal Security and Territorial Integrity.

189 GRN 'NDP 3: Volume 1 (2008) 47.

190 Ibid at 152.

191 Ibid at 152.

3. The NDP also made reference to utility patents,[192] as well as traditional knowledge,[193] and indigenous knowledge systems;[194]
4. The NDP 3 acknowledged that Namibia's IP protection system was functional, although efforts were still required to further strengthen IP protection and make the system pro-poor.[195]

NDP 3 did not, however make specific reference, within its objectives or goals, the protection of GIs.

e) National Development Plan (NDP) 4 (2012/2013 to 2016/2017)

The overarching goals which were adopted in terms of NDP4 are: i) High and sustained economic growth, ii) Increased income equality and iii) Employment creation. To reach these goals, NDP4 identified certain key areas of focus, which were meant to create the necessary momentum for higher economic growth. More specifically, during the NDP4 period, the economic sectors of Logistics, Tourism, Manufacturing, and Agriculture enjoyed priority status.[196] The philosophy of NDP4 was to provide direction geared towards high-level national priorities, desired outcomes, and strategic initiatives.[197]

Concerning IP rights, NDP 4 does not report on or make specific reference to IPRs generally or GIs specifically. However, it was in this period that the Industrial Property Act of 2012 was promulgated. It can also be construed that the development of this statute began in the period of NDP 3. In this Act, specific reference is made to GIs. Within the period of NDP 4, the IP needs assessment, which resulted in the Audit report on the state of Intellectual Property protection in Namibia, was undertaken and reported in 2016. This Audit report highlighted the need for a GI framework for Namibia and is discussed at 5.5 below.

f) National Development Plan (NDP) 5 (2017/2018 to 2021/2022)

Namibia has been in the upper-middle-income category, as defined by the World Bank, since 2009. NDP5 aimed to graduate Namibia to a high-income country which would move it out of what is

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192 Ibid at 155.
193 Ibid at 157.
194 Ibid at 150, 154, 159.
195 Ibid at 155.
196 NDP4. Available at *http://www.npc.gov.na/?wpfb_dl=37*.
197 NDP4. Available at *http://www.npc.gov.na/?wpfb_dl=37*.

sometimes referred to as 'the middle-income trap':[198] on the one hand, not being able to compete fully against more advanced economies with high levels of innovation and value-adding activities, and, on the other, not being able to compete with the less developed economies, which typically offer relatively cheaper labour.[199] The pillars on which NDP5 was based are i) Economic progression, ii) Social transformation, iii) Environmental sustainability, and iv) Good governance.

These aligned well with the eradication of poverty and inequalities as outlined in Vision 2030 as well as the HPPI, which is discussed below.[200] The NDP5 also included what it referred to as 'game changers', i.e. acts aimed at moving the country from a 'reactive, input-based economy' towards a 'proactive, high-performing economy'.[201] According to the NDP5, these game-changers are:[202] i) Increase investment and infrastructure development; ii) Increase productivity in agriculture, especially for small-holder farmers; iii) Invest in quality technical skills development; iv) Improve value-addition in natural resources; v) Achieve industrial development through local procurement.

Numbers ii) and iv), in particular, fit in well with the argument of promoting GI protection and using these to improve the lives of Namibian people. Within the context of this thesis, it is important to note that NDP5 outlined a vision for both agricultural and manufacturing industries, which are indeed closely linked to GI rights. This is because GIs are primarily assigned to goods which are of an agricultural or manufactured nature, and therefore, the NDP5 vision for these sectors could have been assisted by the promotion of and assigning of GI rights.

To break away from the 'middle-income trap', Namibia needed – according to NDP 5 – to diversify its range of exports through value addition. NDP5 states that good governance that protects a sound investment climate and business review is needed.[203] The agricultural sector supports more than 70% of the Namibian population and employs a third of the working force.[204] It is acknowledged that the agricultural sector is thus critical for food security and livelihood.

During the NDP 5 period, the Industrial Property Act of 2012 came into force in August 2018. Furthermore, it was in this period that the National Intellectual Property Policy and Strategy

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198 NDP4. Available at *http://www.npc.gov.na/?wpfb_dl=37*.
199 NPC 'Namibia's 5th National Development Plan- Working towards prosperity' (2017) 5
200 Ibid at 7.
201 Ibid at 7.
202 Ibid at 7.
203 Ibid at 18.
204 Ibid at 20.

(NIPPS) was formulated. One can clearly see that there has been an incremental effort in recognising the need to promote IP in Namibia from NDP 3 onwards. A report on the performance of NDP 5 was not available at the finalisation of this thesis and, as such, could not be reviewed.

There is presently no draft of NDP6 available; however, the National Planning Commission, in its approved Annual Procurement Plan for 2022/2023,[205] indicated that it obtained approval for the procurement of venue hire to undertake the preparation of NDP6 sensitisation and formulation in all 14 regions of the country. Although at the time of submission of this thesis, the formulation process for NDP6 had been launched, there was yet to be a draft Plan available for review.

g) Harambee Prosperity Plan I (HPPI) (2016-2020)

During NDP 4, the inaugural Harambee Prosperity Plan (HPP) was launched in 2016. '*Harambee*' is a Kiswahili word for 'pull together in the same direction'.[206] The Plan calls for all Namibians to work towards a common purpose- in this case, prosperity. The HPPI aimed to supplement and complement the long-term national goal for prosperity. It is a planning tool of the government, a targeted action plan aimed at accelerating development, which is more flexible. The HPPI further aims at fast-tracking development in areas where progress thus far has been deemed insufficient.[207] Having recognised that the world we live in is constantly introducing new ways of doing things and that there are externalities beyond the control of any one government which can result in plans being thrown out of balance, the HPPI is more flexible in its approach to attain the goals and targets set within it.[208]

HPPI is made up of five pillars: (i) Effective governance, (ii) Economic advancement, (iii) Social progression, (iv) Infrastructure development, and (v) International relations and cooperation. For the purposes of this thesis, pillars one, two and three warrant closer attention because of the fact that IPRs, specifically GIs, are legal aspects that fall within governance, and economic advancement also speaks to the discussion at the hand of GIs and economic development. This thesis assesses the potential impact that a legislative framework for GI capacity

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205 See htttps://www.npc.gov.na/wp-contet/uploads/2022/09/APP-NPC-approved22.23-rotated-1.pdf

206 NPC 'Harambee Prosperity Plan- Action Plan of the Government towards Economic Recovery and Inclusive Growth' (2021) 4.

207 Ibid at 6.

208 Ibid at 6.

goods might have on development, which can include economic advancement and social progression, and which can be viewed to be in line with the definition of development provided above at 2.2. The HPPI highlights that the Namibian regulatory framework must facilitate the achievement of the competitive agenda, thereby ensuring a better chance of achieving the pillar of economic advancement.[209] There are proposed strategies and actions outlined that are set to be developed to assist the attainment of this sub-pillar.[210]

Under the HPPI, reference to intellectual property is made in relation to the need to promulgate the Business and Intellectual Property Authority Act in order to ensure that the Authority (BIPA) is fully set up.[211] The BIPA Act was promulgated on 16 January 2017, making BIPA a fully operational State-Owned enterprise.[212] Furthermore, it was also in this period that the Industrial Property Act came into force, and the NIPPS was formulated.

h) Harambee Prosperity Plan II (HPPII) (2021-2025)

The current HPPII builds on the progress made through the inaugural HPPI and aims to solidify the idea of an inclusive and prosperous Namibia which is united.[213] The HPPII prioritised commitments from the South West Africa People's Organization (SWAPO) Party Manifesto of 2019, the NDP5, the African Union Agenda 2063, the SDGs, as well the contributions of citizens, which came from the Town Hall meetings of 2019.[214] The execution of this Plan will be with due consideration of the COVID-19 pandemic and its resulting health, social, and economic effects. The aim is to ensure that Namibia is poised to respond to domestic socioeconomic challenges and global opportunities during and after the COVID-19 pandemic.[215] The HPPII maintains the same five pillars of HPPI, namely (i) Effective governance, (ii) Economic advancement, (iii) Social progression, (iv) Infrastructure development, and (v) International relations and cooperation, which were discussed above in relation to HPPI.[216] Under the HPPII, reference to intellectual

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[209] Ibid at 33.
[210] Ibid at 34.
[211] Ibid at 34.
[212] See https://www.bipa.na/business-categories/.
[213] NPC ‘Harambee Prosperity Plan- Action Plan of the Government towards Economic Recovery and Inclusive Growth’ (2021) 6.
[214] Ibid at 7.
[215] Ibid at 10.
[216] Ibid at 10.

property is made in relation to the fact that the Business and Intellectual Property Authority Act was promulgated under the HPPI period.[217]

As indicated above, the discussion in this thesis can be linked to four of the five pillars of the HPP. The thesis will only look at three of the above pillars because the GI legal framework speaks to the goal for effective governance and, if linked to development objectives, may lead to economic advancement and social progression. The rule of law is the fifth goal under the pillar of effective governance in HPPII. The goal recognises that maintaining the rule of law is a critical factor in the successful implementation of the NDPs and the HPPII.[218] The Goal does not make any specific reference to IP. Goal 2 of the economic advancement pillar speaks to enhancing engaging in activities that 'unlock the economic potential of the Agricultural sector',[219] which ties into the discussion of this thesis because GI rights are also tied to agricultural goods which may have GI capacity.

2.5. Conclusion

Development planning is key for any state which intends to move away from the development level it presently occupies. The planning process, though fixed in outcomes, needs to be flexible in strategies so that it allows for room to account for changes which may provide better ways of doing things. Namibia can thus be commended for having divided its thirty-year Vision into five-year plans. Further, within its revolving five-year plans, there are set goals as well as identified strategies for attaining these goals, which are included within the NDP documents. Because the plans have expiration dates, Vision 2030 expects the implementers, at the end of each NDP cycle of five years, to answer, firstly, whether the country is on course with the Vision and, secondly, whether there are alternative strategies in place to divert, facilitate or stop the development.[220]

This is in line with international practice[221] and is an indication that the country acknowledges that there is a need to continuously engage the mission and Vision due to the dynamic nature of the unfolding reality of the world. This dialogue between mission and Vision

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217 Ibid at 11.
218 Ibid at 25.
219 Ibid at 28.
220 Ibid at 57.
221 Ibid at 57.

enables the adaptation of the mission to any change that may arise and allows for the adoption of emerging and useful tools in addressing the future - without changing the Vision.[222]

The HPPII sets out targets which the country aims to have attained by respective completion dates. Notably, the HPPII provides, among other things, a need to review laws that impede development. It will be assessed below in Chapter three whether GI protection can be an effective tool for development. From the assessment of the plans above, it is clear that Namibia has incrementally begun to incorporate IP in its developmental objectives. As demonstrated, there was no specific reference made to GI promotion in the plans; however, the promulgation of the Industrial Property Act of 2012 contains provisions relating to GI protection, and it can be argued that there was, therefore, some effort made to protect GI capacity goods in Namibia, though not specified as an individual goal forming part of the plans considered in this chapter. The corresponding sections of the Industrial Property Act and common law provisions will be discussed below in Chapter 5.

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[222] NPC 'Republic of Namibia Vision 2030: Policy Framework for Long-term National Development: Summary’ (2004) 57.

CHAPTER 3: GEOGRAPHICAL INDICATION (GI) PROTECTION AND DEVELOPMENT

3.1. Introduction

The IPRs of Trademarks and GI will be covered in this chapter, along with the potential roles they play in advancing the developmental objectives of states. It will begin with a more general discussion of the differing viewpoints on the link between IPRs and development and then focus on GIs, Trademarks and their capacity to contribute to development. The chapter aims to assess the possible contribution that GIs and Trademarks can have on development, which will assist in addressing research questions 1.3.1 (how are GIs defined?) and 1.3.2 (do GIs have the potential to advance the development of states?).

3.2. IPRs and Development

The question of whether IPRs have a positive or negative impact on development and the economy has been a subject of debate for some time. Consequently, various studies have been undertaken to assess the impact of IPRs on the economies of states.[223] Some of the arguments presented are based on the belief that the more protection one affords, the better it is for development. In contrast, others argue that too much IP protection can have the opposite effect.[224]

Falvey et al[225] indicate that though it may appear that IPR protection may not indicate growth-enhancing effects, which are significant when it comes to middle-income countries, they have not found any evidence that IPR protection leads to a reduction in the development of economies. It has been established that IP law in itself is an essential factor and driver of development.[226] Ahmed et al[227] suggest a close link between intellectual property rights and economic growth. In contrast to developing economies, the association between IPRs and

223 Adams, S 'Intellectual Property Rights, Innovation, and Economic Growth in Sub-Saharan Africa' (2011) 28 (1) *Journal of Third World Studies* 231–243 at 231.

224 Bramley, C et al 'The economics of geographical indications: towards a conceptual framework for geographical indication research in developing countries' in WIPO *The economics of intellectual property, suggestions for further research in developing countries and countries with economies in transition* (2009) 109-149 at 117.

225 Falvey, R et al 'Intellectual Property Rights and Economic Growth' (2006) 10 (4) *Review of Development Economics* 700-719at 712.

226 Ncube, C B 'Harnessing Intellectual property for Development: Some thoughts on an appropriate theoretical framework' (2013) 16 *PER* 4: 370 at 372.

227 Ahmed, N et al. 'Intellectual Property Rights and Economic Development: A Case Study of Pakistan' (2021) 7 (1) *Journal for Historical Studies* 157-174 at 159.

development is more substantial and widespread in developed countries. A study was conducted on ninety-five nations, and it was found that IPR protection favours development in developed countries.[228] Additionally, another study indicated that there is a favourable correlation between IPR and economic success after analysing evidence from 122 nations.[229]

Reference has been made by Oguamanam and Dagne to the World Bank's findings that some of the countries regarded as the richest in the last three decades were those whose exports comprised mostly IP-based products.[230] Oguamanam and Dagne further argue that one way in which producers can improve their position in international trade is to utilise IP-based strategies.

Pouris & Pouris[231] state that the empirical literature as to whether IPRs support economic development is contradictory and set out the differing views of various researchers as follows: according to them, Lerner, having studied the major changes in the patent laws of more than 70 countries for 150 years and correlated them with the number of patents granted in these countries, found that, in general, strengthening patent rights will increase patent applications by foreign assignees, but has no effect on domestic applications.[232] They also made reference to Lippoldt's review of the relevant literature studying the empirical links between the national intellectual property environment, international trade, foreign direct investment, and licensing, which found that, in general, stronger intellectual property rights tend to promote trade, foreign direct investment, and licensing in developing countries.[233] It has also been asserted that the relationship between IP laws and economic development has been misconstrued.[234] Formerly, the premise was that if a developing country implemented an IP system similar to that in developed countries, economic development would automatically follow; this is, however, not always the case.

Samuel[235] makes reference to Helpman, who pointed out that if anyone benefits from intellectual property protection, it is certainly not the global South (i.e. developing countries).[236]

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[228] Ahmed et al. op cit note 227 at 159.

[229] Ahmed et al op cit note 227 at 159.

[230] Oguamanam, C & Dagne, T 'Geographical Indication (GI) options for Ethiopian Coffee and Ghanaian Cocoa' in de Beer, J et al (eds) *Innovation, Intellectual Property and Development Narratives in Africa* (2014) 79 UCT Press, Claremont.

[231] Pouris, A & Pouris, A 'Patents and Economic Development in South Africa: Managing Intellectual Property Right' (2011)107(11-12) *South African Journal of Science* 232-237 at 3.

[232] Pouris & Pouris op cit note 231 at 3.

[233] Pouris & Pouris op cit note 231 at 3.

[234] Ncube (2013) op cit note 226 at 372.

[235] Samuel, A 'Intellectual Property Rights, Innovation, and Economic Growth in Sub- Saharan Africa' (2011) 28 (1) *Journal of Third World Studies* 231-243 at 231.

[236] Samuel op cit note 235 at 231.

Samuel argues that the straightforward assertion that improved intellectual property rights in underdeveloped nations will spur quicker economic growth, thereby showing that the expansion of intellectual property rights and the economy go hand in hand. is not supported by experience in the context of sub-Saharan African countries.[237] Instead, research findings and literature reviews suggest that for countries in sub-Saharan Africa to benefit from IPR protection, they may need to strengthen their capacity to use IPR, build policies to promote competitive markets and implement competitive intellectual property rights standards.[238] Therefore, a 'one-size-fits-all' approach to harmonising IP rights may not bring the expected benefits to all stakeholders.[239]

The question of whether intellectual property regimes, having succeeded for wealthy countries, may also operate similarly for developing countries must be evaluated against other unrelated considerations.[240] Intellectual property regimes have not been adapted to suit local situations, as evidenced by how these laws have been received; most were inherited from colonialism. Simply said, these rules have not been successful for developing African nations.[241] Therefore, those laws must be updated to meet the demands and goals of these nations' development.[242]

Eicher and Newiak[243] found that if intellectual property rights are properly applied, they can have a powerful impact on development. Ofili[244] evaluated the possible influence of IPR protection on development through empirical and quantitative studies and came to the following conclusion:

> …having a strong IPRs regime in a country alone cannot turn around the economic fortunes of that country... it is not enough for a country … to have sound IPRs laws. It has to, aside from taking enforcement seriously, also complement these laws with measures such as establishing pro-competition IPRs standards, ensuring that the market environment is

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[237] Samuel op cit note 235 at 240.
[238] Samuel op cit note 235 at 240.
[239] Samuel op cit note 235 at 240.
[240] Adewopo, A The Global Intellectual Property System and Sub-Saharan Africa – A Prognostic Reflection' (2002) 33 (4) *University of Toledo Law Review* 4 p749 -772.
[241] Adewopo op cit note 240 at 754 -755.
[242] Adewopo op cit note 240 at 754 -755.
[243] Eicher, T S & Newiak, M 'Intellectual property rights as development determinants'(2013) 46 (1) *The Canadian Journal of Economics / Revue canadienne d'Economique* 4-22 at 19.
[244] Ofili, O *Intellectual Property Rights Protection and Economic Growth: The Case of Nigeria* (2014) European Scientific Institute, Republic of Macedonia 139.

competitive, creating complementary competition policies and developing internal capacity to create, absorb and use IPRs.

Although intellectual property is not the only engine of a prosperous economy, it is one of the main policy complements that drive development; one of the key indicators of the economy's health is the preservation of intellectual property rights.[245] The government's awareness, acceptance, and political backing of the protection of intellectual property rights, therefore, plays an important role in countries' efforts to achieve a fundamental transformation towards a knowledge-based economy.[246] IP can be an indispensable tool for development, yet at the same time, it may also hamper sustainable development.[247]

Economic development is dependent upon innovations and creativity.[248] De Beer *et al*[249] indicate that there are differing views that exist with regard to how IP protection interacts with this innovation and creativity. The main two are: firstly, too much protection would raise costs for any future innovation and creativity, which may ultimately discourage potential innovators and have a negative effect on investment and, in due course, human development. Secondly, too little protection has the potential to take away any incentive for investment from a substantial number of potential innovators, which may, in turn, threaten development. Any IP protection that is imposed, therefore, needs to be fitting to the economy it relates to or tailored to its local context.

In order to ensure that IP is used as a tool to encourage social and economic development, contextually relevant IP systems in Africa would take into account and adapt to the distinctive innovation and creativity environment on the continent.[250] To achieve this, IP needs to be designed

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[245] Dixon, A N 'Intellectual Property: Powerhouse for Innovation and Economic Growth' (a.m.) ICC Commission on Intellectual Property 11. Macroeconomic stability, the quality of governance, the rule of law, the business environment, education and labour productivity, and the quality of infrastructure are also important factors contributing to economic growth.

[246] Dixon op cit note 245 at 11.

[247] Pistorius, T 'The Impact of Intellectual Property Law and Policy on Sustainable Development' (2007) 32 *South African Yearbook on International Law* 376-394 at 387. This position is supported by O Baker et al. 'Innovation, Intellectual Property and Development: A better set of Approaches for the 21st Century' (2017), available at http://cepr.net/images/stories/reports/baker-jayadev-stiglitz-innovation-ip-development-2017-07.pdf at 34, who provide that state that a strong IPR regime may not necessarily result in developing a domestic industry but can rather become a barrier for that industry, which would otherwise have developed without the IP regime.

[248] de Beer, J et al (eds) *Innovation, Intellectual property and Development Narratives in Africa* (2014) UCT Press, Claremont, 2.

[249] de Beer et al op cit note 248 at 2.

[250] Adebola, T Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA Intellectual Property, (IP), Protocol' (2020) 1 *African Journal of International Economic Law*, 233-290 at 235.

according to the needs, circumstances, and priorities of the continent.[251] Therefore, the emphasis is that intellectual property reform alone may not produce the expected development results and that whether intellectual property rights are beneficial depends on some prerequisites (such as an effective education system, adequate supervision, and an enabling environment for companies).

The above review of literature on the role of IPRs in development paints an interesting picture in that the authors do not completely deny the potential of IPRs to contribute to or even drive development. Therefore, while one should be very careful to just assume that there is not a general, positive and automatic correlation between strong IP protection frameworks and development in developing countries, there appears to be at least some positive contribution of such protection (or at least of certain types of IPR protection) if crafted in a context-specific and sensible kind of a way.

3.3. GIs, Trademarks and development

Having discussed the potential impact of IPRs generally on development, it is now necessary to assess, more specifically, the potential impact of GIs on development. For the reason that some countries use trademark laws to protect GIs, the two regimes will be discussed hereunder as it pertains to their individual functions, as well as the relationship between trademarks and GIs.

3.3.1. Functions of Trademarks and GIs

a) Trademarks(TM)

A TM 'proclaims to all who would see, certain facts about an article or serve'.[252] Greenberg,[253] argues that these proclamations that are made through signs branding can be traced as far back as the bible and refers to examples such as the marking placed on Cain in Genesis 4:15 and the branding of the cattle of Laban and Jacob in order to distinguish them from one another in Genesis 30:33. Furthermore, the ruins of Egyptian temples contain bricks bearing marks of origin,[254] and the Chinese used marks on their pottery, which indicated the name of the period Emperor, and others indicated the maker of the pot or the origin thereof.[255]

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251 Adebola (2020) op cit note 250 at 235.

252 Greenberg, A S 'The Ancient Lineage of Trade-Marks' (1951) 33 (12) Journal of the Patent Office Society 876-887 at 876.

253 Greenberg op cit note 252 at 876.

254 Greenberg op cit note 252 at 877.

255 Greenberg op cit note 252 at 878.

It is argued that over four centuries prior to 1970, trademarks were used to identify the source of the goods the mark was attached to or the ownership thereof.[256] Over time, however, a trademark has come to be understood as an indicator of the connection between the same source or channels as that of other goods that a consumer has bought that they were satisfied with and which bore the same mark, one that they are accustomed to.[257] A trademark serves not only to indicate the goodwill related to a product but also serves to create and perpetuate that goodwill because the more distinctive the mark, and therefore clearly imprinted in the mind of the consumer, the more effective it is in selling the products.[258] In the US case of *Hanover Star Milling Co. v. Metcalf* 1916 240 U.S. 403 it was stated that:

> '[w]here a party has been in the habit of labelling his goods with a distinctive mark, so that purchasers recognise goods thus marked as being of his production, others are debarred from applying the same mark to goods of the same description, because to do so would in effect represent their goods to be of his production and would tend to deprive him the primary and proper function of a trademark, which is to identify the origin or ownership of the article to which it is affixed, of the profit he might make through the sale of the goods which the purchaser intended to buy'.[259]

The function of trademarks that is fundamental to the IPR is the identification and distinguishing of products.[260] The identifying function is often described with reference to the benefits that are conferred on consumers in that the mark that has been affixed to a product assists them in returning to purchase products which they found to be satisfactory and to, conversely, stay away from those they found to be unsatisfactory.[261]

Trademarks furthermore serve the function of communicating to consumers because they are able to associate all information that relates to a product and attribute that information to products which carry the mark.[262] Ancillary to the function of identification and distinguishing of

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256 Schechter, F I 'The Rational Basis of Trademark Protection' (1970) 60(3) *The Trademark Reporter* 334 at 335.
257 Schechter op cit note 256 at 336.
258 Schechter op cit note 256 at 338.
259 Paragraph 412.
260 Strasser, M 'The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context' (2000) 10 (X) *Fordham Intellectual Property, Media & Entertainment Law Journal* 375-432 at 380.
261 Strasser op cit note 260 at 380.
262 Strasser op cit note 260 at 382 – 386.

products;[263] is the identification of the source of the product.[264] Trademarks also contribute to enhancing efficiency.[265] It is averred that by ensuring ease of identification of products in the marketplace, consumer costs are lessened.[266] In light of the above, trademarks can, therefore, be said to serve the following functions: communicate the source of the product, communicate the goodwill, perpetuate the goodwill, distinguish between other products and producers, identify goods and producers, provide a quality guarantee, enhance efficiency by reducing consumer search costs.

b) Geographical Indications

'It must be emphasised that the first function of GIs - indeed, their primary *raison d'etre* - is not the restriction of international trade with a view towards the safeguarding of culture. Rather, GI mechanisms have been founded on a combined quasi-intellectual property/ consumer protection platform. Their initial justification is the prevention of fraud,[267] of "passing off" a good as if it has been sourced from where it has not, ostensibly preventing the dilution of a geographical production area's reputation by low quality-or simply different-quality -produce from another region'.[268]

Geographic place names have been used to convey more than just origin for thousands of years.[269] Hughes[270] indicates that there are three primary uses for geographic terms in product names, labels, and advertising; these are '1) to communicate geographic source, (2) to communicate (nongeographic) product qualities, and (3) to create evocative value'. The traditional argument for

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263 Strasser op cit note 260 at 418
264 Strasser op cit note 260 at 420.
265 Gangjee op cit note 60 at 1258
266 Gangjee op cit note 60 at 1258-1259
267 The use of a specific geographical designation for products or services that are not local can be deceptive and lead to consumer fraud. See WIPO Intellectual Property Handbook (2008) 124. Also see, Ferrari, M 'The narratives of geographical indications' (2014) 10 (2) *International Journal of Law in Context* 222-248 at 225, where it is provided that another conception relating to GIs is that they serve as a defence against fraudulent products or services, as well as a tool to conquer new markets.
268 Broude, T 'Taking trade and culture seriously: geographical indications and cultural protection in WTO law' (2005) 26 (4) *University of Pennsylvania Journal of International Economic Law* 4 623-692 at 647. Furthermore, see Kireeva & O'Connor op cit note 22 at 276, wherein it is provided that the primary purpose of GIs is to pinpoint a product's place of origin and demonstrate that it is where the product's qualities and reputation originate. Due to their potential for commercial success and great reputation, these signs are vulnerable to theft, abuse, and counterfeiting.
269 Watson op cit note 63 at 2.
270 Hughes, J 'Champagne, feta, and bourbon: the spirited debate about geographical indications' (2006) 58 (2) *Hastings Law Journal* 299-385 at 303.

geographic indications is that they fulfil a unique mix of (1) and (2): they communicate a product's geographic source and the product's non-geographic characteristics that are linked to its place of origin.[271] This is the theory behind terroir[272] which designates that a particular geography results in unique product qualities that other regions cannot duplicate.[273]

GIs, therefore, do not only serve the function of providing information, but they claim to indicate the special features of the good that bears the GI.[274] The attaching of a GI to a product assures the consumer of the 'quality and distinctiveness' which stems from the special 'regional, environments, and human influences such as climate, soil, subsoil, plants and special methods of production' combined.[275] A GI would be categorically useless to the consumer if there is no relationship between the geographic area and the quality attribute.[276]

GIs therefore serve as 'source identifiers', indicators of quality, and have the consequence of promoting goods of a particular area and, therefore, business interests.[277] The usage of the GI by others should thus be constrained in order to protect the sign's integrity as a means of communication.[278] The GI literature that does exist offers a similar economic justification, with the additional dimension that GIs exhibit characteristics of club goods; therefore, the term 'exclusivity' is given to a group of people.[279] A geographic indicator appears to grant a monopoly to the group of producers who are based in the designated area and are in the business of making the good to which the indication is applied.[280]

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[271] Hughes op cit note 270 at 304.

[272] The French concept of terroir denotes a close relationship with the land from which the products originate, not only in terms of the actual geological, meteorological, and other similar factors but also in terms of the distinctive qualities derived from the local human factor where protection for GIs first appeared. See I Calboli 'In Territorio Veritas: Bringing Geographical Coherence in the Definition of Geographical Indications of Origin under TRIPS' (2014) 6 *The WIPO Journal* 1 p 60.

[273] Hughes op cit note 270 at 304.

[274] Broude op cit note 268 at 648.

[275] Gutierrez, E 'Geographical indicators: Unique European Perspective on Intellectual Property' (2005) 29 (1) *Hastings International and Comparative Law Review* 29-50 at 32.

[276] Josling, T 'The War on Terroir: Geographical Indications as a Transatlantic Trade Conflict' (2006) 57(3) *Journal of Agricultural Economics* 337-363 at 341.

[277] Bowers, S A 'Location, location, location: the case against extending geographical indication protection under the TRIPS agreement (2003) 31 (2) *AIPLA Quarterly Journal* 129-164 at 135.

[278] Gangjee op cit note 60 at 1260.

[279] Gangjee op cit note 60 at 1260.

[280] Kerr, W A 'Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development (2006) 7(1) *Estey Centre Journal of International Law and Trade Policy* 1-14 at 6.

GIs safeguard agricultural goods that are made using traditional techniques and have distinctive characteristics resulting from local production circumstances.[281] These IPRs have long been viewed as a unique type of IP relevant to public policy goals in agricultural development as they have developed in national jurisdictions.[282] Giving distinct, legally recognised designations to agricultural producers and rural industries helps producers feel good about the goods they make, i.e. superior to cheeses, wines, or olive oils, when compared to those made by others; this has political value as well.[283]

Additionally, with the recent institutionalisation of GIs across the globe, the policy objectives involved in using them as tools for development have become more multidimensional, gradually incorporating territorial and rural development objectives as well as biodiversity and traditional knowledge conservation.[284]It has also been evidenced that communities do not merely use GIs for economic protection of their sources but that the IPR is also considered as a pointer to their places where they attach 'meanings, values and identities'.[285] Regardless of a product's reputation, a 'geographic identifier' could be any term, phrase, or symbol that identifies the location where it was manufactured; there is a known *land/qualities* nexus'.[286] Therefore, every geographic indication is also a geographical identifier, but not the other way around.[287]

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281 Dagne, T W 'Beyond Economic Considerations: (Re)Conceptualizing Geographical Indications for Protecting Traditional Agricultural' Products' (2015) 46 *Institute for Innovation and Competition* p 682.

282 Dagne, T 'The Identity of Geographical Indications and Their Relation to Traditional Knowledge in Intellectual Property Law' (2014) 5 (2) *The WIPO Journal Review* 137-151 at 266.

283 Kerr op cit note 280280 at 6.

284 Marie-Vivien, D & Biènabe, E 'The Multifaceted Role of the State in the Protection of Geographical Indications: A Worldwide Review' (2017) 98 (C) *World Development Elsevier 1*-11 at 2.

285 Ferrari op cit note 267 at 238.

286 Hughes op cit note 270 at 305.

287 Hughes op cit note 270 at 305.
Furthermore, Okediji provides that [c]ountry-of-origin [Indicators are] frequently seen as a piece of knowledge that aids consumers in determining the calibre/reliability of goods from that nation, which in turn influences purchasing intentions. The nation of origin of a product activates ideas about that nation and the general calibre of goods made there, and consumer factors like motivation, the relevance of the decision or product to the consumer, or product familiarity or experience can have an impact on the psychological processes that underlie these evaluations. Okediji, R L 'The International Intellectual Property Roots of Geographical Indications' (2007) 82 (3) *Chicago-Kent Law Review* 1329-1365 at 1361.

It is also necessary to distinguish between GIs and other labelling initiatives,[288] which significantly differ when it comes to the control that is provided to communities.[289] GIs and labelling schemes are fundamentally distinct; GIs fall under the IP regimes of different jurisdictions, whereas labelling schemes do not form part of legal regimes as they are generally voluntary.[290] GIs provide the owners thereof all the ownership attributes of the property, the ability to control the product, determination of the product use and conditions of use, and the right to restrict who else may want to use the title.[291] Even when there is no chance of confusion regarding the source, one cannot use a protected GI to promote their product unless the geographic and legal restrictions are met.[292] The GI protection discussion should come to a consensus and acknowledge that geography, or 'geographical origin', is the only basis for GI protection and the right to prohibit the use of geographic names by third parties to identify their products.

In this regard, a protective system built on a stricter terroir approach offers a far stronger case for GIs.[293]. Naturally, opponents will continue to criticise GI protection, claiming that many geographic labels in the 'new world' are generic, such as Champagne or Parmesan, and that current technology can nearly universally reproduce any terroir's environmental circumstances.[294] Registered identities must, therefore, be shielded from the following:[295]

a) Any commercial use, whether direct or indirect, of a name that has been trademarked in connection with goods that are not covered by the registration, provided that usage of the name takes advantage of the protected name's goodwill or that the goods are similar to those that are registered under the name;

Environmental labelling is usually understood to be the practice of informing customers about a product that has better environmental performance than comparable goods. In export markets, products are differentiated using both labelling and GIs. See U Grote op cit note 24 at 95-96. An example of a labelling scheme is an environmental labelling scheme: The Blue Angel label, launched in 1978 for industrial goods in Germany, was the first environmental label. The terms "fair trade," "organic," "Marine Stewardship Council (MSC) certified," and "Forest Stewardship Council (FSC) certified" are a few examples. With the addition of more environmental and quality features, social circumstances, and traceability over time, environmental labels have become more complex U Grote op cit note 24 at 95-96.

289 T W Dagne 'Place-based intellectual property strategies for traditional and local agricultural products: acting locally to participate globally in rights-based approach' (2012) 17 (3) *Drake Journal of Agricultural Law* 591.

290 Dagne (2012) op cit note 289 at 592.

291 Dagne (2012) op cit note 289 at 591.

292 Watson op cit note 63 at 5.

293 Calboli op cit bote 272 at 66.

294 Calboli op cit bote 272 at 66.

295 Watson op cit note 63 at 5.

b) any misappropriation, imitation, or evocation, even if the translation or the words 'style', 'type', 'method', 'as created in', or 'imitation' are used with the protected phrase or words to that effect;

c) any other false or deceptive statement made about the product's provenance, origin, nature, or other crucial details on the product's inside or exterior packaging, in advertising or promotional materials, or when the product is packaged in a way that could give the wrong impression about where it came from;

d) any such action that could deceive a consumer about the product's genuine origin.

These restrictions have the effect of protecting registered GIs from becoming generic.[296] A sign becomes generic, when the kind of objects to which it is applied or its unique traits have been lost over time.[297] In the context of geographical indications, generic terms are accepted to describe a category of product rather than a product with a specific geographical origin and distinctive features or a reputation owed to that origin.[298] A given term's generic status also depends on how consumers perceive it and the relevant legal environment.[299] In the absence of an international agreement, national law shall establish whether a geographical indicator is a generic term and exempt from any protection.[300] It is possible that a geographical name is seen as a geographical indicator in one country and is protected as such, whilst it is viewed as a generic or semi-generic term in another.[301]

A variety of objectives linked to agricultural policy, rural development, and, in certain cases, aiding in the preservation of cultural assets are carried out using GIs as a vehicle.[302] The grounds for GI protection lie in the fact that GIs may address these extra policy issues, take into account intergenerational knowledge and investments in production systems, and go beyond simply maintaining communication clarity in the marketplace.[303] Despite these identified

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[296] Watson op cit note 63 at 5.
[297] WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 10.
[298] Ibid at 10.
[299] Ibid at 10.
[300] WIPO Intellectual Property Handbook (2008) 121.
[301] Ibid at 121.
[302] Gangjee op cit note 60 at 1267.
[303] Gangjee op cit note 60 at 1267.

functions, there have been arguments put forward to reject arguments made in favour of GIs,[304]which can be summarised as follows:

a) The contention that the GI system in Europe safeguards consumers by prohibiting deceptive advertising;

This argument is said to be misleading because it is still against the law to use GIs with terms that make it clear they are generic and have absolutely no potential of deceiving consumers. It does not advance consumer interests or ensure the appropriate flow of information to forbid these applications. The public's ability to comprehend the geographic origin of products is actually hampered by GI protection regimes that impose deceptive and perplexing requirements.

b) the argument that the rights to traditional producers' intellectual property are unfairly violated by generic uses of geographical names;

It is frequently argued that traditional producers should be given GI protection since generic applications unfairly usurp the reputation built up by multiple generations of local producers. However, this moral justification for GI protection is based on the utterly illiberal notion that a group of people's rights and obligations should be determined by previous economic agreements.[305]

c) The argument that GI protection encourages economic development and progress.

It should not be shocking that there is empirical evidence against using GIs as a development tool. The purpose of GI protection in Europe is to stop traditional food markets from becoming more contemporary. They function similarly to agricultural subsidies in that they shield producers from the forces of a competitive market. Traditional products and ways of life are preserved in rural communities by protecting GIs. This is due to the fact that GIs offer a significant incentive to maintain outdated production methods

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[304] Watson op cit note 63 at 5.

[305] Rather than being the proprietors of a property right, traditional producers are best viewed as the recipients of protectionist regulation. GIs cannot be used to exclude qualified producers because they are not alienable. Additionally, the shared nature of GI rights negates their utility as an innovation catalyst. GIs actually lessen competition because they are favoured by a group of producers who would otherwise compete with one another. When all the producers in a given nation are split up based on area and production method, the industry begins to resemble a cartel. Even if there may be several producers, they all concur to always manufacture the same thing in the same location. Their competition is no longer based on product quality. In other words, by restricting innovative producers from effectively expressing the qualities of their products to the public, GI protection benefits traditional producers for doing something old rather than rewarding inventive producers for doing something new. See Watson op cit note 63 at 5.

and facilities. GI protection has been found to strengthen the social hierarchies and institutions endangered by economic change rather than advance economic progress and enhance the lives of the poor.

Despite these arguments raised in opposition to GIs, it can be acknowledged that there is value to GIs, such that the international community has entered into agreements to protect GIs. This IPR can, therefore in summary, serve one or more of the following functions: prevention of fraud, origin of goods, indicating quality, creating value reputation, safeguarding agricultural goods, and prevention of signs from becoming generic.

3.3.2. The Relationship between GIs and Trademarks

Both GIs and TMs fall within the umbrella of unfair competition law,[306] and '…some assume that geographic designations were an historic precursor of trademarks'.[307] A geographical indicator could, therefore, be a trademark for the purposes of definitional exercise if it is used to identify products on the market; however, it appears that not all distinctiveness is created equal.[308] GIs must, however, be more than just a reflection of an aspect that is particularly related to a place of origin, such as a quality or reputation; GIs must have distinctiveness independent of geography to be on the same standing with trademarks under the TRIPS Agreement.[309] Due to the similarities in functions, there is a good chance that trademarks and geographical indicators may clash. Both of these indications serve to identify the place of a product's origin—in one instance, its geographical origin, and in the other, its commercial origin; theoretically, any given term may therefore fulfil both purposes.[310]

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306 Gangjee op cit note 60 at 1253. When commercial practices mislead the public regarding a firm or its operations, particularly regarding the geographical origin of the products the company offers, it is agreed that unfair competition has occurred. To prevent the unauthorised use of a geographical indication based on an action against unfair competition, a plaintiff typically must show that the unauthorised party's use of the in question geographical indication is misleading and, if applicable, that damages or a likelihood of damages result from such use. Such a claim can succeed only if the geographical indicator in question has acquired distinctiveness or when the general public has come to associate the goods marketed under that geographical indication with a specific geographic origin and/or source. See WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 7.

307 Hughes op cit note 270 at 300.

308 Okediji (2007) op cit note 287 at 1337-1338.

309 Okediji (2007) op cit note 287 at 1338.

310 Burkhart, G & Groeschl, M 'The Long Road to Resolving Conflicts between Trademarks and Geographical Indications' (2014) 104 *The Trademark Reporter* 4 p830.

A GI does more than only describe a product's quality or features and its place of origin; it also distinguishes goods within the market and, in a way, can be viewed as a trademark.[311] As such, for an indicator to qualify as a GI, it must do more than identify the place of origin; it must also allow for the good itself to be identified.[312] A key distinction between GIs and trademarks can be found in the fact that the ownership in a trademark can either vest in an individual or an entity to identify goods and services, permitting exclusive use of the mark, while the ownership in GIs is not held exclusively by an individual[313] but all producers from an identified geographical area may use that indicator provided they meet the specified characteristics.[314] A GI is regarded as a public right, owned by the state or a parastatal institution, and is most often registered and managed by the government.[315] An essential reason why GIs cannot be classified as private property rights is that they are open to the tradition of social production and group decision-making.[316] With the exception of wines and spirits, trademark protection under conventional law does not give owners an exclusivity that is a hallmark of proprietary protection.[317] According to traditional trademark law, a sign or word is only granted exclusive protection if, through regular usage in connection with a product, it develops a reputation all its own in customers' minds as a sign of the product's origin.[318] But even before they are given a purpose and a reputation as a result of being used in the market, GIs for wines and spirits already transmit proprietary rights.[319]

Josling[320] therefore provides that GIs are fundamentally enforceable collective property rights for local producers. For certain club goods, collective marks and certification marks appear to be more suitable forms of protection.[321] GIs are not owned by rights holders in the same way

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311 Creditt, E C op cit note 27 at 447.
312 Creditt, E C op cit note 27 at 447.
313 Trademarks display characteristics of IPRs as private property because they are primarily recognised as belonging to specific individuals as right holders. See Dagne (2014) op cit note 282 at 263-264.
Creditt, E C op cit note 27 at 430; also see Calboli op cit note 272 at 66, where it was argued that GI opponents should acknowledge that GIs only have exclusive rights over the names of the items and not the actual things, which indicates that competitors can create the same commodities for the same markets. For instance, Wisconsin cheese producers are permitted to use buffalo milk to manufacture mozzarella-type cheese or blue-veined cheese; they are only prohibited from calling these cheeses Mozzarella di Bufala Campana or Roquefort (or Gorgonzola), respectively.
315 Grote, U op cit note 24 at 95.
316 Dagne (2014) op cit note 282 at 264-265.
317 Dagne (2015) op cit note 281 at 683.
318 Dagne (2015) op cit note 281 at 683.
319 Dagne (2015) op cit note 281 at 683.
320 Gutierrez op cit note 275 at 362.
321 Gutierrez op cit note 275 at 362.

that trademarks are.[322] However, 'protection' in terms of trademarks and the majority of other IPRs refers to enforcing private and exclusive economic ownership to prevent unauthorised third parties from using or copying the mark in connection with products.[323] The preservation of GIs does not automatically bar other people or groups from using them.[324]

Instead, for products created in the area to which the GI applies, all producers are allowed to utilise the indication (subject to relevant standards of production).[325] In relation to GIs, 'property' is therefore strictly defined as 'rights to something rather than to the item that is 'owned' (and thus always exclusionary, in a private property context).[326] GIs, furthermore, are not freely transferable, which sets them apart from trademarks and other traditional IPRs.[327] A fundamentally unique quality of GIs is their non-transferability. Unlike the majority of IPRs, GIs cannot be transferred via assignment, mortgage, or licencing, even if comparable items are produced elsewhere.[328] Additionally, GIs differ from traditional kinds of IPRs in that they possess special characteristics.[329]

There are various clauses in the TRIPS Agreement that address how trademarks and geographical indicators relate to one another.[330] The TRIPS Agreement's Article 16.1 provides a definition of rights granted to trademarks as follows:

> The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in the likelihood of confusion.

Therefore, the sole right to prohibit the use of signs that are identical or similar for products that are identical or similar belongs to the trademark proprietor.[331] The word 'signs' in the section can be construed to include all types of designations, even ones that might not qualify as GIs.[332] Article

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322 T Dagne (2014) ''The Identity of Geographical Indications and Their Relation to Traditional Knowledge in Intellectual Property Law' (2014) 265.
323 Dagne (2014) op cit note 282282 at 265.
324 Dagne (2014) op cit note 282 at282 at 265.
325 Dagne (2014) op cit note 282 at 265-266.
326 Dagne (2014) op cit note 282 at 265-266.
327 Dagne (2014) op cit note 282 at 266.
328 Dagne (2014) op cit note 282 at 266.
329 Dagne (2014) op cit note 282 at 266.
330 Kireeva & O'Connor op cit note 22 at 287.
331 Kireeva & O'Connor op cit note 22 at 287.
332 Kireeva & O'Connor op cit note 22 at 287.

22.3 of the TRIPS Agreement, which states that WTO members should refuse or invalidate the registration of a trademark that contains or is made up of a GI with respect to goods not coming from the indicated territory, is another clause that highlights the connection between a trademark and a geographical indication (GI);[333] that is, of course, if the use of the trademark indication for the relevant good in that WTO member state is such that it will mislead consumers about the real country of origin.

TRIPS, in its Article 24.5, which can, in a way, be construed as an exception in the laws relating to trademarks, allows registered trademarks and GIs which bear the same name to coexist, thereby permitting the holders of GIs and owners of trademarks to use the marks on their products.[334] It is, however, argued that:

> 'once placed on equal footing, countries that wish to protect longstanding trademarks from other countries that wish to reclaim geographical indications are given more legal justification in doing so. Since geographical indications would not be a superseding or more important property right than an existing trademark, trademark owners should be able to successfully keep geographical-indication holders from infringing on their rights to use the mark.'[335]

Far from trademarks which link the mark to a specific individual or entity, GIs signify a specific character or locality; it is, therefore, a property owned communally and shared by producers in the specific region.[336]

Another distinction lies in the regulation of the two IPRs: GIs are reportedly the area of IP that local laws in many nations were slow to identify and protect.[337] Depending on one's perspective, they have lingered or lurked for more than a century between the concepts of unfair competition and trademark law, maintaining a 'shadowy or subterranean presence', rarely manifesting in concrete form.[338] In contrast, the international trademark regime has a well-developed conceptual and institutional framework.[339]

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333 Kireeva & O'Connor op cit note 22 at 287.

334 In trademark law, if a GI bears a name similar to that of a trademark, then there can be no exclusive use of that mark. See Creditt, E C op cit note 27 at 450.

335 Creditt, E C op cit note 27 at 452.

336 Gutierrez op cit note 275 at275 at 32.

337 Gangjee op cit note 60 at 1261-1262.

338 Gangjee op cit note 60 at 1261-1262.

339 Gangjee op cit note 60 at 1262.

Even though TRIPS categorises GIs as a specific IPR in a specific section, GIs can still be protected through trademarks, another IPR that falls under the same category as distinctive signs, which are governed by a self-policing system of private law, as opposed to sui generis systems, which rely on more robust state intervention to tie GI protection to a proven connection between the item and its place of origin.[340] There is no doubt that GIs may serve as trademarks and do so in practice. However, it is also true that trademarks serve as geographical indications.[341]It is furthermore argued that because they are perhaps more credibly congruent with the traditional policies behind trademark protection, GIs should be treated as trademarks.[342]

The same TRIPS Agreement, however, provides equal protection for both trademarks and geographical indications (GIs). Trademarks and GIs are not superior to one another, but they also are not the same.[343] Considering that the functions of GIs and trademarks overlap, the discussion to follow below will only consider the relationship between GIs and development because despite the form of protection granted to goods of origin, whether sui generis or through trademark, for the reason that the function is the same, the contribution to development is also inferred to be the same.

3.3.3. The relationship between GIs and development

> '..the robust GI protection the EU provides to its Member States is both a valid and ingenious way of utilising IP for national economic and social objectives.'[344]

The justification for protecting GIs based on development is derived from the fact that a specific place of origin may be an indicator of the quality of a product.[345] It may also mean that the resources, i.e., techniques of production, species, landscape, culture or even the environments that are used in the product, are then considered as attributes which increase the value of the product.[346] This added value, which is derived from these resources, leads to a differentiation in products based on specific 'qualities' and consequently to the creation of niche markets. Producers of goods

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340 Marie-Vivien & Biènabe op cit note 284 at 2.
341 Okediji (2007) op cit note 287 at 1355.
342 Okediji (2007) op cit note 287 at 1363.
343 Kireeva & O'Connor op cit note 22 at 288.
344 Gutierrez op cit note 275 at 29.
345 Bramley & Kirsten op cit note 6 at 69.
346 Maskus, E 'The Economics of Intellectual Property Rights and Globalization: Dancing the Dual Distortion' in Maskus, E *Intellectual Property Rights in the Global Economy* (2000) Institute for International Economics 73.

that fall within such niche markets are then granted an opportunity, through GIs, to protect those markets as well as to enhance them. By differentiating products which originate in one place from those that originate elsewhere, GIs effectively restrict the supply of those goods.[347] Economic principles of demand and supply dictate that once supply is reduced while demand remains high, the price for a good or commodity increases. It is undeniable that there are benefits that could possibly arise out of the differentiation of products, thereby creating additional value for those goods.[348] Developing countries would, therefore, benefit from embracing and supporting the protection of products that originate from within their territory.[349] GIs could be used to promote the manufacturing of local products by providing market differentiation; a resultant consequence could also be an increase in tourism as individuals may travel to areas that offer exotic products identified in terms of the GI.[350]

Due to the long-term nature of GIs, they give the opportunity to create niche markets and deliver long-term benefits.[351] Additionally, they are believed to protect traditional and indigenous knowledge as a public benefit and act as resources for rural development.[352] Since the labour force and other production elements will remain in the region, benefits are anticipated.[353] Additionally, GIs are viewed as tourism promoters and tools for biodiversity conservation.[354] GIs can help local economies, the ecology, and the preservation of local culture, as has been highlighted.[355] With the aid of effective GI management, businesses may use their intellectual property assets to boost their competitiveness and strategic advantage.[356]

In both industrialised and developing nations, GI protection has grown in significance over time for non-agricultural products, including handcrafted artefacts and traditional design commodities.[357] GIs have a significant role in promoting local economies, as well as local culture

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347 Bramley et al. op cit note 224 at 114.

348 Vandecandelaere, E et al. *Linking People, Places and Products* (2009) 19 available at http://www.fao.org/docrep/013/i1760e/i1760e.pdf.

349 Bramley et al. op cit note 224 at 117.

350 Addor, F & Grazioli, A 'Geographical Indications beyond Wine and Spirits: A roadmap for better protection for geographical indications in WTO/TRIPS Agreement' (2002) 5 (6) Journal *on World Intellectual Property* 865-897.

351 U Grote op cit note 24 at 101.

352 Ibid at 101.

353 Ibid at 101.

354 Ibid at 101.

355 Calboli op cit note 272 at 58.

356 Grote, U op cit note 24 at 101.

357 Calboli op cit note 272 at 60.

and traditions, among various consumers in various nations in today's increasingly globalised and interconnected world. Particularly,[358] GIs capitalise on and improve the goodwill of the area by identifying a product's geographical origin and educating consumers about the commercial and historic characteristics of a place. Due to these factors, developing nations have also paid much more attention to GIs recently.[359]

In a knowledge-based economy where the value of products is determined by their intellectual property content, the conceptualisation of GIs as intellectual property instruments with distinct identity from conventional IPRs under trademark law holds significant potential for economically underdeveloped nations, whose economies are dependent on goods referred to as 'raw products and commodities'.[360] Therefore, from the perspective of developing countries, it is essential that talks on the protection of GIs recognise the conceptual constraints of GIs as distinct categories of IP that may shield all agricultural items.[361] Due to their locally customised standards and comprehensive development strategy, which combines a commercial dimension (in relation to intellectual property rights [IPRs]) with connections to public goods, geographic information systems (GIs) can be utilised as a tool for sustainable and rural development (heritage, food diversity, local expertise and local genetic resources, sociocultural identity, etc.).[362]

The economic consequences of a GI regime for developing countries are, however, difficult to assess.[363] It has been stated that little is known about the economic effects of identifying products in a global market with distinct geographical designations.[364] Kerr[365] presents that geographic indicator protection is something wealthy nations can afford to (presumably) spend resources on, but it is probably not something that should be promoted in underdeveloped nations. Protecting the geographic indicator from being copied and sold in international markets will be the first hurdle.[366] Even if foreign governments are in charge of enforcement, owners of the geographic indicator rights will still need to invest time and money in monitoring foreign producers and

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358 Calboli op cit note 272 at 60.
359 Calboli op cit note 272 at 60.
360 Dagne (2014) op cit note 282 at 283-284
361 Dagne (2014) op cit note 282 at 283-284.
362 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023, p 1.
363 Report on the Commission of Intellectual Property Rights *Integrating Intellectual Property Rights and Development Policy* (2002) 100-101. Available at: athttp://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf accessed on 4 February 2015.
364 Gutierrez op cit note 275 at 339.
365 Kerr op cit note 280 at 8.
366 Kerr op cit note 280 at 9.

alerting them to any infringement.[367] Any advantages to producers in the region to which the geographic indicator applies are, therefore, unlikely to be long-lasting.[368] Therefore, it is important to carefully consider if using spatial indicators as a development approach is acceptable,[369]and resources would probably be better used on aspects of development that have a higher likelihood of producing long-term results.[370] At best, there is a shaky connection between geographic indicators and sustainable development.[371]

Critics have emphasised that GI protection has evolved into being a tool primarily used to secure exclusive rights over the allure power of geographical terms, despite the claim that GIs aim to protect local products and rural development.[372] This practice of letting GI companies outsource some of the manufacturing of GI-denominated items —in terms of both ingredients and labour— indicates that GI protection has become primarily a tool to secure exclusive rights over the attractive power of geographical terms.[373] Doubts have been voiced about GI protection when the products in question are not wholly or almost entirely grown or manufactured in the GI-denominated zone. [374]It has also been argued that in certain situations, GI protection may, in fact turn into an unjustified anticompetitive subsidy as well as a weapon for possible consumer misunderstanding or even deception.[375] WIPO[376] even cautions that the mere availability of GI protection for a product does not guarantee automatic success or development for the region or country.

For GIs to aid in development, several conditions, such as the market potential of the products, cohesion between groups of producers of the product, or codes of practice to ensure the characteristics of the product that make it worthy of protection under the GI system is not compromised; and establishing a mechanism to ensure that the right producers benefit from the protection, amongst others. All these must be present in the region or country to foster the success

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367 Kerr op cit note 280 at 9.
368 Kerr op cit note 280 at) 11.
369 Kerr op cit note 280 at 11.
370 Kerr op cit note 280 at 11.
371 Kerr op cit note 280 at 11.
372 Calboli op cit note 272 at 58.
373 Calboli op cit note 272 at 58.
374 Calboli op cit note 272 at 58.
375 Calboli op cit note 272 at 58.
376 WIPO 'Geographical Indications: An Introduction' 17 available at http://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo_pub_952.pdf.

of that system and the manner in which the specific GI system is designed will also have an influence on the success of the GI.[377]

GIs can serve as forceful marketing tools for products, and because they are inherently collectively owned, they are an excellent instrument for regional or community-based economic development.[378] Developing countries with the potential to gain a competitive advantage through the exclusive production of certain goods, be it in agriculture or manufacturing, should be particularly interested in GI protection.[379] Janjua and Samad[380] provide that GI may have the effect of assisting in the alleviation of poverty. For GIs to have developmental effect, such GIs must be tailored to ensure economic, social, and environmental sustainability.[381] It is noted that the impact of any GI will be stronger for local stakeholders who are located in the place linked to the specific product.[382] For a GI system to function properly, it needs to have in place institutional, legislative and organisational frameworks.[383] This ties in well with the WIPO view that several conditions need to be in place for GIs to contribute to development, including the mechanism of ensuring that the right producers benefit from the protection.[384]

From the above, one can surmise that there are differing views on the role that GIs can play in advancing developmental objectives. However, it seems that there is at least some role GIs can play in advancing development objectives. This developmental role can further be assisted by ensuring that GI protection is aligned with developmental objectives and further ensuring that GIs benefit those who are entitled to benefit therefrom.

Crucially, the African Union Continental Strategy for GIs in Africa for 2018 to 2023 is also built on the premise that GIs can be a driver for economic development and sustainable

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377 WIPO 'Geographical Indications: An Introduction' 21. Also see Adebola, T 'The legal construction of geographical indications in Africa' (2023) 26 *The Journal of World Intellectual Property* 3-29 wherein it is stated that increasing trade earnings, rural development, and tourism are possible GI benefits, but none of them can happen in isolation; to realise these potentials, a variety of additional conditions are required.

378 Idris, K *Intellectual Property: A Power- Tool for Economic Development- Overview* (2002) 21 WIPO, Geneva.

379 It is acknowledged that the rich agricultural, TK and repositories from diverse cultures grant the continent a GI comparative advantage. See Adebola (2020) op cit note 250 at 235.

380 Janjua, P Z & Samad, G 'Intellectual Property Rights and Economic Growth: The Case of Middle Income Developing Countries' (2008) 46 (4) *The Pakistan Development Review* 4: 711-722 at 712.

381 European Commission 'Workshops on Geographical Indications: development and use of specific instruments to market origin-based agricultural products in African-ACP countries' 25 available at http://ec.europa.eu/agriculture/developing-countries.

382 Ibid at 26.

383 Oguamanam & Dagne op cit note 230 at 91.

384 WIPO 'Geographical Indications: An Introduction' 21.

development of the region, which is made up mostly of developing countries. The AU Strategy was developed in the acknowledgement that the African continent is imbued with rich natural resources and biological diversity, as well as products whose specific characteristics, qualities and reputation result from the region.[385] Therefore, GIs can be used as a mechanism to coordinate and promote these goods in the hope that they will lead to sustainable development.[386] The strategy is discussed further under 4.4.3.

3.4. Conclusion

This Chapter was aimed at addressing the research questions on how GIs are defined and whether GIs have the potential to advance the development of states. The discussion above considered the link between IPR protection and development generally, as well as GI protection and development in particular. While the connection between development and GI protection on the one hand and IPR on the other remains contentious and quite frankly uncertain, the author of this thesis asserts that a properly designed system for GI protection, both internationally and nationally, has the potential to positively impact the development of a country to which it relates. The full extent of the development potential of GIs can, however, only be fully realised if countries provide adequate national protection of their own GIs in addition to the existing international protection. Moreover, the analysis of the GI law in Namibia and an assessment on whether the law is effective in achieving its objectives from an efficiency perspective will be conducted in Chapters 5 and 6 below. In line with the normative approach of analysis, a question that will be asked is whether it is likely that the promotion of a GI framework is able to improve the situation of Namibia in terms of the well-being of its people or its human development.

Having assessed the possible contribution of GIs to development, the frameworks available for global and regional GI protection will be discussed in the following chapter.

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385 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 1.
386 Ibid at 1.

CHAPTER 4: INTERNATIONAL AND REGIONAL FRAMEWORK FOR THE PROTECTION OF GEOGRAPHICAL INDICATIONS

4.1. Introduction

Namibia is a party to several international and regional instruments that are specifically concerned with GI protection. These will be discussed here. The chapter will also discuss those international and regional instruments that relate to Trademarks for the reason that sometimes GIs find protection under this IPR regime. The discussion in this chapter aims to lay a foundation for the discourse on the protection of GIs within selected jurisdictions in Chapter 5. It will finally discuss the practical implementation of these international and regional legal instruments within the Namibian domestic setting. This chapter, therefore, aims to look at these international and regional instruments in view of addressing research question 1.3.4(is provision made for GI protection on the international and regional levels?).

4.2. International Framework for GI Protection

It is argued that the protection of GIs in international law is justifiable for many of the reasons why trademark protection is justifiable: primarily to protect consumers from confusion and reduce their search costs.[387]There are several international agreements on intellectual property, separate from trade agreements, which offer some protection for geographic indicators. These include the Paris Convention for the Protection of Industrial Property of 1883, the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods of 1891, the International Convention on the Use of Appellations of Origin and Denominations of Cheeses (Stressa Convention of 1951), and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958 (the Lisbon Agreement). The World Intellectual Property Organization (WIPO) presented a draft international treaty on geographical indicators; nevertheless, the lack of a robust dispute resolution mechanism limited the WIPO instrument's efficacy, and the proposed treaty was obviously never finalised.[388]

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[387] Raustiala, K & Munzer, S R ‘The Global Struggle over Geographic Indications’ (2007) 18 *European Journal of International Law* 337–365 at 340.

[388] Kerr op cit note 280 at 75.

Namibia is a contracting party to international instruments that make direct provisions for GI protection, all of which gain entry into the domestic law in terms of and conditional to the Constitutional provisions discussed below at 4.6. Hereunder is a discussion of these instruments.

4.2.1 The Paris Convention for the Protection of Industrial Property of 1883

The first international multilateral agreement to include provisions relating to indications of geographical origin was the Paris Convention. Namibia became a state party to this treaty on 1 January 2004. The Paris Convention recognises in its Article 1(2) 'indications of source' and 'appellations of origin' as subject matters for industrial property.[389] The phrase ‘appellations of origin is used by the Paris Convention without a precise definition being provided therein.[390]

The Convention provides that in instances where false indications of the source are used for goods, such goods should be seized upon importation or ultimately be made subject to remedial action within the country importing such goods.[391] It further obliges Member states to make sure that suitable legal remedies are available inside their borders to prevent the use of false source indications.[392] These provisions ‘shall apply in cases of direct or indirect use of a false indication of the source of the goods’.[393] In terms of the Convention, members are also expected to make sure that they offer suitable remedies to foreign nationals, which will enable them to repress all acts set out in Articles 9 to 10*bis*.[394] Article 9[395] relates to the importation of goods that unlawfully bear a

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389 Article 1(2): “The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition”.

390 Dagne (2014) op cit note 282 at 260.

391 Article 9(1) of the Paris Convention for the Protection of Industrial Property of 1883.

392 Article 9 of the Paris Convention for the Protection of Industrial Property of 1883.

393 Article 10(1) of the Paris Convention for the Protection of Industrial Property of 1883.

394 Article 10*bter* (1) of the Paris Convention for the Protection of Industrial Property of 1883 on Marks, Trade Names, False Indications, Unfair Competition: Remedies, Right to Sue, reads as follows:
(1) The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10bis.

395 Article 9(1) All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such a mark or trade name is entitled to legal protection.
(2) Seizure shall likewise be effected in the country where the unlawful affixation occurred or in the country into which the goods were imported.
(3) Seizure shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country.
(4) The authorities shall not be bound to effect seizure of goods in transit.
(5) If the legislation of a country does not permit seizure on importation, seizure shall be replaced by prohibition of importation or by seizure inside the country.

mark or a trade name and provide for their seizure. Article 10[396] allows for the seizure of products with a false indication in relation to either the source or the producer. Article 10*bis*[397] relates to unfair competition and mandates member states to safeguard consumers from unfair competition.

A major shortcoming of the Paris Convention, as far as GIs are concerned, is that this Convention did not provide adequate protection for GIs as the conditions of protection were not succinctly defined, considering that there could be a possibility that two GIs from two different countries can be found to exist but that would not constitute false use of the name under the Convention, despite the possibility of confusion being caused.[398] The Convention has also been referred to as an ineffective agreement as it does not provide for true enforcement, makes no provision for the protection of GIs and member states are left to come up with 'border measures for false indications without defining the conditions for protection'.[399] Furthermore, the Convention does not provide a definition for GIs.[400]

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(6) If the legislation of a country permits neither seizure on importation nor prohibition of importation nor seizure inside the country, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.

396 Article 10(1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant.
(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall, in any case, be deemed an interested party.

397 Article 10bis:
(1) The countries of the Union are bound to assure nationals of such countries effective protection against unfair competition.
(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
(3) The following in particular shall be prohibited:
1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

398 Evans, G & Blakeney, M "The international protection of geographical indications yesterday, today and tomorrow" in G Westkamp Emerging issues in Intellectual Property: Trade, Technology and Market Freedom: Essays in Honour of Herschel Smith (2007) 267 and Y Kisuule *Least Developed Countries and Geographical Indications: How Can Uganda Position itself to benefit from Geographical Indications?* (LLM thesis. University of Cape Town, 2015) 8.

399 Gutierrez op cit note 275 at 33.

400 Gutierrez op cit note 275 at 32-33.

The Convention, it is stated, also did not make provision for actual recourse when a GI was misused, as the seizure of falsely represented goods of origin had to have been prohibited by the law within the jurisdiction.[401]

4.2.2 The Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods

Members of the Paris Convention put out a proposal for a more thorough form of protection, and this led to the creation of the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods. Although the Agreement doesn't define indications of source, Article 1(1) explains it by stating:

> [a]ll goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.

First, the language of this Section shows a clear emphasis on the connection between the product's 'indication' and its 'geographical origin', which could be a specific country or region within a country.[402] Additionally, a geographical name is not required for the ‘indications of source’ indicator.[403] Phrases, symbols, or iconic emblems that are either directly or indirectly connected to the geographic origin region may serve as a source indication.[404] The main purpose of ‘indications of source’, it has been stated, is to adhere to customs laws.[405]

Paragraph 1 (1) in Article 3 allows a vendor to include his name or address on goods coming from a country other than the one where the sale is taking place but stipulates that if he does, he must also include an exact indication in clear characters of the country or place of manufacture or production, or some other indication, along with his name or address.[406] Seizure or comparable actions may be sought and implemented under certain circumstances, which are outlined in the other parts of Articles 1 and 2.[407] Article 3bis of the Madrid Agreement mandates

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[401] Creditt, E C op cit note 27 at 432.
[402] Dagne (2014) op cit note 282 at 261.
[403] Dagne (2014) op cit note 282 at 261.
[404] Dagne (2014) op cit note 282 at 261.
[405] Dagne (2014) op cit note 282 at 261.
[406] WIPO Intellectual Property Handbook (2008) 124.
[407] Ibid at 124.

that States that are signatories prohibit the use of any indications that could mislead the public about the place of origin of the goods in connection with the sale, exhibition, or offering for sale of any item.[408]

However, Namibia is not a signatory to the Madrid Agreement. This may not be of any consequence, however, because the Agreement is said to have failed due to its inability to gain support from important trading countries, including Germany, Italy, and the United States.[409]

4.2.3. The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958.

The Lisbon Agreement for the Protection of Appellation of Origin and their International Registration was developed to address concerns that Article 10 of the Paris Convention, as well as the Madrid Agreement, did not guarantee an effective protection of appellations of origin by considering 'the special case of appellations of origin as distinct from indications of source'.[410] Article 3 of the Agreement provides that:

> ‘[p]rotection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as “kind,” “type,” “make,” “imitation”, or the like.

With the help of the Lisbon Agreement, appellations of origin for all types of products are given ‘absolute protection’, are defined, and are subject to an international registration system.[411] However, Appellation of Origin is defined in Article 2 of the Lisbon Agreement as:

> ‘. . . geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors’.

As a result, an appellation of origin is usually a designation that refers to a nation, territory, or place. Furthermore, products with a geographic name should display attributes and traits exclusive to the defined geographic region; for instance, the French areas of Champagne and Roquefort

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408 WIPO Intellectual Property Handbook (2008) 124.

409 Blakeney, M Coulet, T Mengistie, G & Mahop, MT Extending the Protection of Geographical Indications: Case studies of Agricultural Products in Africa (2012) 10. The Agreement has been criticised for having minimal impact. See Gutierrez op cit note 275 at 33.

410 A Wang *Geographical Indications as Intellectual Property: In search of Explanations of Taiwan’s Conundrum* (unpublished PhD thesis, Newcastle University, 2013) 78.

411 Wang op cit note 410 at 80.

generate the Champagne wine and Roquefort cheese (known for their sparkling and nutritive qualities, respectively).[412]

Appellations of origin are defined in the Lisbon Agreement in a way that is quite similar to how geographical indications are established in the TRIPS Agreement; however, upon closer inspection, the two terms as they are used in each treaty exhibit significant distinctions.[413] Appellations of origin serve as designations and are little more than the geographical names of a nation, territory, or area.[414] They are unaffected by reputation.[415] In this derivation, appellations of origin just specify the geographic origin of the goods, much like 'mainly geographically descriptive' marks. The regime established by The Lisbon Agreement focused on correcting alleged limitations of the Paris Convention and the Madrid Agreement, and it is widely agreed that GIs are narrower than appellations of origin.[416] In some ways, the debate over whether to take a harsher or more lenient stance on the idea of geographical origin was not entirely new during the talks leading to the ratification of TRIPs.[417]

Geographical indications (GIs) and appellations of origin are both protected by the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, which entered into force in 2015.[418] This Act has not been ratified by either Namibia or ARIPO, of which Namibia is a member. In terms of the agreement, each contracting state undertakes to protect appellations of origin within their territory.[419] Article 13[420] acknowledging the coexistence of

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412 Dagne (2014) op cit note 282 at 260.

413 Okediji (2007) op cit note 287 at 1341-1342.

414 Okediji (2007) op cit note 287 at 1341-1342.

415 Okediji (2007) op cit note 287 at 1341-1342.

416 Okediji (2007) op cit note 287 at 1341-1342.

417 Calboli op cit note 272 at 61.

418 Article 2 of the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, of 2015.

419 Article 9 Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications of 2015.

420 Article 13 provides as follows:
(1) [Prior Trademark Rights] The provisions of this Act shall not prejudice a prior trademark applied for or registered in good faith or acquired through use in good faith, in a Contracting Party. Where the law of a Contracting Party provides a limited exception to the rights conferred by a trademark to the effect that such a prior trademark in certain circumstances may not entitle its owner to prevent a registered appellation of origin or geographical indication from being granted protection or used in that Contracting Party, protection of the registered appellation of origin or geographical indication shall not limit the rights conferred by that trademark in any other way.
(2) [Personal Name Used in Business] The provisions of this Act shall not prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

trademarks, appellations of origin, and GIs allows for flexibility at the national level. The Geneva Act broadens the scope of such protection to cover geographical indications and appellations of origin, as the Lisbon Agreement only covers appellations of origin.[421] WIPO has indicated that the benefits of the Geneva Act are that:[422] regardless of the type of commodities to which they are applicable, the Geneva Act stipulates that each Contracting Party will be able to obtain sufficient protection for its geographical indications and appellations of origin in the other Contracting Parties. A single registration procedure with WIPO will make protection available, reducing costs and formalities. Additionally, any registered GI or appellation of origin under the Act will be recognised for as long as its origin Contracting Party continues to safeguard it. Namibia should consider becoming a state party to this Act.

TRIPS is discussed below.

4.2.4. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) of 1994

The Preamble to the TRIPS Agreement makes it clear that it seeks to promote adequate and effective protection of IPRs, and ensure that laws and other regulations in place to support that protection uphold those rights without becoming obstacles to lawful trade.[423] The agreement was crafted to restrict international trade barriers, make provision for enforcement, and mechanisms related to dispute settlement, making it a significant agreement related to the governance of IP on the international level.[424] National regulatory frameworks have been implemented in the majority of emerging nations to safeguard their IP in compliance with the TRIPS Agreement obligations.[425] Members of the WTO are required to modify their domestic legislation to bring it into compliance

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(3) [Rights Based on a Plant Variety or Animal Breed Denomination] The provisions of this Act shall not prejudice the right of any person to use a plant variety or animal breed denomination in the course of trade, except where such plant variety or animal breed denomination is used in such a manner as to mislead the public.

4) [Safeguards in the Case of Notification of Withdrawal of Refusal or a Grant of Protection] Where a Contracting Party that has refused the effects of an international registration under Article 15 on the ground of use under a prior trademark or other right, as referred to in this Article, notifies the withdrawal of that refusal under Article 16 or a grant of protection under Article 18, the resulting protection of the appellation of origin or geographical indication shall not prejudice that right or its use, unless the protection was granted following the cancellation, non-renewal, revocation or invalidation of the right.

421 WIPO 'Main Provisions and Benefits of the Geneva Act of the Lisbon Agreement' (2015), 3.

422 Ibid at 7.

423 Kireeva & O'Connor op cit note 22 at 294 to 295.

424 Gutierrez op cit note 275 at 34.

425 Gutierrez op cit note 275 at 350.

with its rules.[426] Since each of the seven categories of IP is subject to minimal standards for the protection of IP rights under the TRIPS Agreement, WTO members are typically free to offer higher but not lower levels of IP protection.[427] The TRIPS was entered into in order to provide further protection for IPRs[428] and has made provision for several categories of IP, which may be considered more comprehensive than any other multilateral agreement on IPRs. According to Article 1.1 of TRIPS

> 'members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'.

Article 2.1 of the Agreement also states that, with regard to Parts II, III, and IV of the Agreement, Members shall comply with Articles 1 through 12 and Article 19 of the Paris Convention (1967). GIs were safeguarded at the national and regional levels prior to the TRIPS Agreement under a wide range of legal theories, precepts, and nomenclatures, including 'protected appellations of origin' and 'registered geographical indications', and they were regulated by a patchwork of trademark and unfair competition or 'passing off' laws.[429]

The TRIPS Agreement marked the first time the phrase 'geographical indicators' was used in a binding Agreement.[430] However, there are significant differences in the regulatory frameworks for protecting geographical indicators as well as the definitions of the term; while some nations distinguish 'indications of source' from 'appellations of origin', others protect their GIs under trademark rules.[431] WTO members are required to enshrine the TRIPS Agreement's provisions into

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[426] Wang op cit note 410 at 67.

[427] Wang op cit note 410 at 67.

[428] The preamble provides as follows:

> *Desiring* to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;
> *Recognising* that intellectual property rights are private rights;
> *Recognising* the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

[429] Bowers op cit note 277 at 138.

[430] Dagne (2014) op cit note 282 at 262.

[431] Grote, U op cit note 24 at 99. Kireeva & O'Connor op cit note 22 at 286 provide that a number of WTO members have trademark protection for GIs.

their domestic legislation; however, the TRIPS Agreement does not specify how WTO members are to implement the requirement to safeguard GIs.[432] As a result, there is no common approach among WTO members in regard to the available forms of protection offered for GIs.[433] Since the TRIPS does not mandate that WTO members offer a uniform method of GI protection at the national level, the Agreement handles GIs differently from other IPRs in this regard.[434] For instance, all countries basically adhere to the same standards of protection for WTO members in the areas of copyrights, trademarks, and patents.[435] In contrast, the Agreement does not mandate a standard method for GI protection.[436]

GI protection is addressed in Section 3 of Part II under Articles 22 to 24 of TRIPs. The overarching goal of these Articles is to establish a minimal level of international GI protection in order to avoid deceiving consumers and to stop unfair business practices.[437] Article 22.1 sets forth a definition of a geographical indicator and provides that:

> [g]eographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.[438]

According to Gutierrez,[439]protection of GIs in terms of this Article points to a limitation on the place of origin only and excludes 'other human factors' like production methods and manufacture. This provision also seems to apply to goods only and not services in terms of wording. Attention is drawn to the fact that TRIPS' Article 22.1 effectively misuses or at least erroneously interprets the concepts of 'geographical' and 'origin', expanding the reach of GI protection beyond what those terms mean in a dictionary.[440] Similarly, the definition of 'origin' is 'the place from where anything arises or originates'.[441] The 'geographical origin' of products should once again be coherently identified in the definition and protection of GIs.

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432 Kireeva & O'Connor op cit note 22 at 276.
433 Kireeva & O'Connor op cit note 22 at 276.
434 Dagne (2014) op cit note 282 at 289.
435 Dagne (2014) op cit note 282 at 289.
436 Dagne (2014) op cit note 282 at 289.
437 Gutierrez op cit note 275 at 35.
438 Article 22.1 of TRIPS.
439 Gutierrez op cit note 275 at 35.
440 Calboli op cit note 272 at 59.
441 Calboli op cit note 272 at 59.

The final version of TRIPs Article 22.1 confirmed that items can be protected even if they do not wholly originate from the GI-denominated territories.[442] Due to pressure from special interest groups, mostly from wealthy nations, and in light of expanded trade discussions(in which countries and corporations were also promoting fewer trade barriers and fewer subsidies), this was done.[443] TRIPS went even further, as Dev Gangjee has explained, and combined the idea of 'essential' (no longer 'exclusive') terroir with the increasingly important (and lucrative) idea of 'GI reputation' that is, the alluring influence that geographic names can have when applied to goods for sale in the marketplace.[444] Due to this, GI producers were granted complete permission to partially stray from producing their goods in GI-denominated territories while still holding exclusive rights to the GIs and the potential to enforce these rights against third parties.[445]

The Agreement itself envisions two levels of protection. The first level of protection, as set out in The fundamental level of GIs protection, is provided by Article 22.2.[446] It relates to the requirement imposed on countries to provide legal means within their jurisdictions, which prevent false or misleading claims of geographical origin which is applicable to any good.[447] oriGIn, an international organisation of producers for GI protection, argues that Article 22 is a failure in practice, stating that it 'does not allow producers to be protected against abuses of their name and does not protect consumers who are too often misled as to the true origin of the products they buy'[448]

The Agreement further contains a general obligation for WTO members to provide protection against 'misleading use of a GI and against use that constitutes an act of unfair

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442 Calboli op cit note 272 at 61.
443 Calboli op cit note 272 at 61.
444 Calboli op cit note 272 at 61.
445 Calboli op cit note 272 at 61.
446 Article 22 2. In respect of geographical indications,
Members shall provide the legal means for interested parties to prevent:
(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
(b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).
447 Article 22.2(a) of TRIPS provides that "In respect of geographical indications, Members shall provide the legal means for interested parties to prevent: the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good."
448 Gutierrez op cit note 275 at 36.

competition.'[449] Furthermore, Article 22.3 includes a clause that addresses situations in which a trademark consists of a geographical indication. Therein, a requirement has been set to the effect that if the use of a trademark containing or consisting of a GI with regard to goods not coming from the territory designated could mislead the public as to the true place of origin of the goods, members may refuse or cancel the registration of the trademark.[450]

In this instance, the GI will win, given that the branded sign can be characterised as a GI under the TRIPS Agreement and that its use may deceive the public about the real source of the goods. Article 22.4 makes GIs 'which although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory' subject to the sub-Articles 1, 2, and 3 of Article 22.[451] If a GI, therefore, has the same designation as another, thereby being able to take advantage of the reputation built by another, and such GI has a consequence of misleading the public, then the use of that GI should not be permitted.

It is to be noted that the TRIPS Agreement sets out what acts need to be prevented with regards to GIs but does not prescribe the manner in which this should be done; it merely indicates that member states must provide 'legal means' under Article 22. The laws against unfair competition, consumer protection, rules for the protection of certification and collective marks, as well as sui generis legislation, provide protection for GIs in various jurisdictions throughout the world.[452] Finally, it is clear that the TRIPS Agreement's main objective, which is to create a

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[449] Article 22.2 (b) of TRIPS provides that "In respect of geographical indications, Members shall provide the legal means for interested parties to prevent: any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967)"

[450] Article 22.3 of TRIPS provides that A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated if the use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

[451] Article 22(4). 4.

> The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

[452] Gutierrez op cit note 275 at 32. A persistent issue that has been identified with protecting GIs internationally: "the diversity of many national ideas has always existed. Laws governing unfair competition, trademarks, advertising and labelling, foods and health, as well as specific rules, all handle geographic indications". See Gangjee op cit note 60 at 1260; Burkhart & Groeschl 'op cit note 294 at 832, which also provides that There are several different protection mechanisms for GIs, from sui generis systems protected by national laws, regional laws, bilateral agreements, or multilateral agreements to unfair competition over collective and certification marks. Further also see Kongolo, T 'Trademarks and Geographical Indications within the Frameworks of the African Intellectual Property Organization Agreement and the TRIPS Agreement' (1999) 2 (5) *Journal of World Intellectual Property* 833-844, at 839-840.

predictable multinational system of rules and procedures protecting intellectual property rights, is undermined by the lack of coherence when regarded as a whole.[453] This is due to the fact that the TRIPS Agreement's protection of GIs has been implemented in the most inconsistent and disorganised way possible, as well as the practical challenges associated with getting protection outside one's jurisdiction.[454] There may be no area of intellectual property law that offers as many different types of protection as the field of geographical indicators, with the possible exception of design law and traditional knowledge.[455]

A discussion on GI protection within the context of TRIPS will, however, be incomplete without reflecting on the international debate pertaining to extending protection to all products, similar to that which is offered for wines and spirits. The TRIPS Agreement provides for the protection of GIs but differentiates the protection afforded for wines and spirits from that provided for other products. Regarding products that aren't wines and spirits, on the one hand,[456] TRIPS' Article 22.2 stipulates:

> [i]n respect of geographical indications, Members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of Article l0*bis* of the Paris Convention (1967).

Articles 22.3 and 22.4 add to Article 22.2. For goods that do not originate in the designated territory, Article 22 specifically addresses the registration of geographical indication-containing trademarks if the use of those trademarks for such goods would be deceptive as to the genuine place of origin of the goods.[457] In that case, the possibility of rejecting or invalidating the trademark registration must exist, either ex officio, if the pertinent law enables it, or at the request of an interested party.[458] According to Article 22.4, the use of misleading geographic indications, or geographical indications that are literally accurate but misrepresent to the public that the items on

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453 Kireeva & O'Connor op cit note 22 at 294 to 295.
454 Kireeva & O'Connor op cit note 22 at 294 to 295.
455 WIPO Intellectual Property Handbook (2008) 120.
456 Dagne (2015) op cit note 281 at 682: 'currently, the Agreement on Trade-related Aspects of Intellectual Property Rights provide a differential level of GIs protection for wines and spirits on the one hand, and all other agricultural products on the other'.
457 WIPO Intellectual Property Handbook (2008) 124.
458 Ibid at 124.

which they are used are produced in another country, must be covered by the protection provided by Articles 22.1 to 3.[459]

The second level of protection stipulated by the Agreement is described in Article 23.1 and relates to a special protection for wines and spirits that forbids the use of geographical terms with goods that do not originate in the indicated area, even when accompanied by expressions like 'imitation' or 'kind'.[460] Article 23 stipulates the following:

> 1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like.4
>
> 2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contain or consist of a geographical indication identifying spirits shall be refused or invalidated, *ex officio* if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.
>
> 3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.
>
> 4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Article 23, as set out above, has provisions that are more specific, for example, limiting practices such as referring to wines being in the 'style of' Champagne, using homonyms that might mislead, such as 'Rone' for 'Rhone', and the term 'Burgundy' to describe wine even if the fact that it is being

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[459] Ibid at124.

[460] Article 23.1 of TRIPS.

produced in New Zealand is fully revealed on the label.[461] It also commits the member states to future negotiations in terms of Article 23.4. These Article 23 regulations forbid the use of GIs pertaining to wines and spirits which originate from other localities, regardless of whether said use amounts to unfair competition or may mislead the public, thereby providing higher protection than that provided for under Article 22.[462] This clearly shows that stricter protection is granted for wines and spirits as opposed to other goods that do not fall into those categories.

Furthermore, Article 22 is argued to place a burden on producers to provide proof that the unpermitted use of the indication has resulted in the public being misled and or the use thereof constituted unfair competition, and this burden might be lifted if Article 23 were to be expanded to cover all items.[463] Third parties are only forbidden from utilising a GI in foreign markets 'in a manner that may mislead the public' or 'in a manner that may constitute an act of unfair competition' under the less stringent GI protection for agricultural products other than wines and spirits.[464] In other words, using GIs for agricultural products other than wines and spirits is not illegal unless it deceives the public or amounts to unfair competition.[465] This means that a party who feels wronged by GIs for agricultural products must demonstrate not only that the use of the indicator is incorrect but also that it may cause public confusion or amount to unfair competition.[466] Between nations that seek a larger level of protection than what is currently provided and those that support the minimal level of protection, the difference in GI protection accorded to agricultural products has been a major topic of discussion and international negotiation.[467]

Broadly, countries offer two different legal methods for protecting GIs: a sui generis system that specifically deals with GIs or certification marks and collective marks under traditional trademark law.[468] There is a large amount of proprietary protection for wines and spirits that goes above and beyond the protection that may be obtained under traditional trademark law.[469] Countries that protect geographical indications through trademark law have altered their legislation to improve the protection of GIs for wines and spirits as a result.[470]

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461 Kerr op cit note 280 at 4.
462 Kisuule op cit note 398 at 10. Also see U Grote op cit note 24 at 98.
463 Kisuule op cit note 398 at 26.
464 Dagne (2015) op cit note 281 at 683.
465 Dagne (2015) op cit note 281 at 683.
466 Dagne (2015) op cit note 281 at 683.
467 Dagne (2015) op cit note 281 at 683.
468 Dagne (2015) op cit note 281 at 683.
469 Dagne (2015) op cit note 281 at 683.
470 Dagne (2015) op cit note 281 at 683.

Differentiated protection of GIs is a topic that has been discussed repeatedly within the World Trade Organization (WTO) community since it was included as a topic for consideration in the Doha Ministerial Declaration's adoption in 2001. According to Ministerial Declaration Section 18,

> [w]ith a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this declaration (WTO, 2001)

In the words of Addor & Grazioli:[471]

> [c]onvinced of the economic benefit and great trade potential inherent in GIs, many countries around the world, among them developed, developing and least-developed countries, are actively working within the World Trade Organization (WTO) to have the existing protection granted by the Agreement on Trade-Related Aspects of Intellectual property Rights (TRIPs) to GIs for wines and spirits extended to cover GIs identifying all products. These countries are no longer willing to tolerate their GIs being illegitimately used by producers and manufacturers who are not located in the designated region, as it means a considerable loss of reputation and long-term income for the producers and manufacturers within their territories.

Some states have been arguing for a balanced minimal GI protection on the international level for all goods without distinction. [472] Calls have been made to the effect that the form of absolute protection granted to wines and spirits should be conferred to other goods as well. Expressions of interest for this extension have been given by several developing countries, including Turkey, India, Egypt, Cuba and Indonesia, amongst others.[473] These states argue that additional protection

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[471] Addor & Grazioli op cit note 350 at 866.

[472] Correa, C M 'Protection of geographical indications in Caricom Countries' (2002) 29. Paper prepared for CARICOM available at *http://www.crnm.org/documents/studies/ geographical%20Indications%20-%20Correa.pdf.*

[473] Correa (2002) op cit note 472 at 29. Also, U Grote op cit note 24 101.

would not only increase the chances of market access and thereby increase product value, but in the absence of this additional protection, free-riding was highly possible, which may lead to indications becoming generic[474] over time.[475]

Creditt[476] asserts that the expansions to Article 23 of TRIPS should be embraced by the international community to enable it to reach products that are not wines and spirits and then promote the protection of GIs through the trademark system already established. Other GIs and manufacturers of commodities with GI capacity who seek protection should also be included in the registration system, which shouldn't be limited to just wines and spirits.[477] It is further averred that 'there is no logical reason for the extension of a higher level of protection to wines and spirits at the expense of other, equally distinctive products due to geographical origin'.[478]

A variety of grandfathering clauses are included in the exclusions section of Article 24 (International Negotiations; Exceptions), which effectively allows governments to pick and choose whatever geographic indicators they want to maintain.[479] The exceptions clauses state:

> 24. 4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (*a*) for at least ten years preceding 15 April 1994 or (*b*) in good faith preceding that date.
>
> 24. 5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

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474 Despite not using the word "generic," TRIPS Article 24.6 is frequently regarded as the exception to the rule regarding generic terminology. 18 It includes the following provisions:
"6. Nothing in this Section [Section 3, Part II of the TRIPS Agreement] shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement." See WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 12.

475 Correa (2002) op cit note 472 at 31

476 E C Creditt op cit note 27 at 451.

477 E C Creditt op cit note 27 at 451.

478 E C Creditt op cit note 27 at 454.

479 Kerr op cit note 280 at 3.

(a) before the date of application of these provisions in that Member as defined in Part VI or,

(b) before the geographical indication is protected in its country of origin; measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark or the right to use a trademark on the basis that such a trademark is identical with, or similar to, a geographical indication.

24. 6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement. (TRIPS, 1994).

Several exceptions to the obligations under Articles 22 and 23 are included in Article 24:[480]

[i]n general, there are three types of exceptions: earlier good faith trademark rights, generic designations, and continuous and similar usage of geographical indicators for wines and spirits.

Other provisions of Article 24 deal with issues like guidelines for outdated geographic indicators and the statute of limitations for filing complaints.[481] The TRIPS also makes provision for Dispute Settlement in its Article 64, which reads as follows:

[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

However, there were certain loose ends in the TRIPS agreement that have been challenging to tie up.[482] The first step was to define geographical indications in a way that would help a nation trying to abide by them, thereby creating definitional issues that may require resolution by the Dispute

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480 WIPO Intellectual Property Handbook (2008) 124.

481 Kerr op cit note 280 at 3-4. The exceptions are there to stop words like "cheddar" and "port" from becoming protected as geographic markers after being used generically for a very long time.

482 Gutierrez op cit note 275 at 351.

Settlement Panel.[483] Among these is the question of whether a GI can refer to a country as a whole rather than just an area.[484] Such GIs could unjustifiably split the market along national lines and present serious problems to WTO rules based on the idea of 'similar products'.[485]Another issue is that some plant kinds, like Basmati rice, are specific to certain geographic regions yet can be grown elsewhere.[486] It is also worth noting that a geographical indication's protection duration is not specified under the TRIPS Agreement.[487]

As a WTO member,[488] Namibia is bound by the WTO TRIPS Agreement and has been obligated to make provision in its laws for the protection of GIs. There is flexibility in the sense that the Agreement does not prescribe a specific regime of protection, and in accordance with that flexibility, Namibia has made provision for the protection of GIs through trademark laws. This is discussed below in 5.3.

4.3.International Framework for TM Protection

On the international level, trademarks have several instruments applicable to them. Namibia is not a contracting party to the following agreements which relate to trademarks: the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 1979;[489] though it follows the common classification of goods and services in registration of marks; the Nairobi Treaty on the Protection of the Olympic Symbol of 1981;[490] the Vienna Agreement Establishing an International Classification of the Figurative

483 Gutierrez op cit note 275 at 351.
484 Gutierrez op cit note 275 at 351.
485 Gutierrez op cit note 275 at 351.
486 Gutierrez op cit note 275 at 351.
487 Kongolo op cit note 452 at 843.
488 Since the TRIPS Agreement was a component of the WTO's "single undertaking," it extended to all of its members. It was significant that its provisions were supported by the WTO's improved dispute resolution processes, which were embodied in the Dispute Settlement Understanding (DSU). See Gutierrez op cit note 275 at 350.
489 In terms of this Agreement, states have adopted a common classification of goods and services for the purpose of registration of marks.[489] The Agreement establishes the Nice Classification (NCL), Available at https://www.wipo.int/classifications/nice/nclpub/en/fr/, which is an international classification of goods and services applied for the registration of marks.
490 The Treaty imposes the following obligation on all contracting states in terms of Article 1, subject to exceptions:

> 'Any State party to this Treaty shall be obliged, subject to Articles 2 and 3, to refuse or to invalidate the registration as a mark and to prohibit by appropriate measures the use, as a mark or other sign, for commercial purposes, of any sign consisting of or containing the Olympic symbol, as defined in the Charter of the International Olympic Committee, except with the authorisation of the

Elements of Marks, as amended on 1 October 1985;[491] the Trademark Law Treaty of 1994 and the Singapore Treaty on the Law of Trademarks of 2006.[492]

Hereunder is a summary of the international instruments related to TM protection applicable to Namibia:

4.3.1 The Paris Convention for the Protection of Industrial Property of 1883

In addition to providing for the protection of GIs, the Paris Convention of 1883 also protects trademarks. The protection of trademarks, among others, is listed as an object of industrial property in Article 1. The Convention forbids invalidation or refusal to register a mark unless, inter alia, '… they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin…'[493] This can be taken to suggest that an application for trademark registration may be denied for a mark that exclusively contains an indication of origin.

Article 5C(1) with regards to marks provides that a mark may be deregistered when that mark is not used, and the failure to use that mark is compulsory, provided that the person has justified their inaction. A mark may not be denied registration if it was already registered in the country of origin, according to Article 6 of the Treaty on the protection of trademarks in other countries, which gives each state the discretion to decide how trademark applications and registrations are handled within their borders. It also ensures that legally registered marks are independent from those registered in other countries, including the nation of origin. In order to protect well-known marks, Article 6bis requires that member states:

> 'ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that

International Olympic Committee. The said definition and the graphic representation of the said symbol are reproduced in the Annex.'

491 This Agreement was also entered into consequent to Article 19 of the Paris Convention. The Convention defines the classification of figurative elements in terms of Article 2; the Classification of Figurative Elements comprises a list of categories, divisions and sections in which the figurative elements of marks are classified, together with, as the case may be, explanatory notes

492 This Treaty, built on the Trademark Law Treaty, applies to marks which consist of signs that any contracting party can register as a mark under its law, and applies to marks relating to goods and services- Article 12, however, excludes collective marks, certification marks and guarantee marks- Article 12 (2) (b)

493 Article 6*quinquies*(B) (2).

country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods'[494]

Article 6ter prohibits the use of 'state emblems, official hallmarks and emblems of IGOs' as trademarks and extends this prohibition to '…armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organisations' of member states. Article 6 relates to the assignment of marks and makes allowance for a mark to be assigned if such assignment accompanies the transfer of the company or goodwill to whom the mark belongs.

A mark that has been properly registered in one country may be recognised and protected in the jurisdictions of other member states, according to Article 6quinquies (A). Such marks can only be denied registration or invalidated if one or more of the conditions listed in Article 6*quinquies* (B)[495] are met. Article 6*quinquies* (C) to (F) set out further conditions applicable to trademarks that fall under the category.[496] Article 6sexies provides protection for service marks but does not make registration of those marks mandatory. According to Article 7, a mark's

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494 Article 6 bis (1) of the Paris Convention.

495 Article 6 quinquies (B) of the Paris Convention provides that:

Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

1. when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;
2. when they are devoid of any distinctive character or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;
3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

This provision is subject, however, to the application of Article 10bis.

496 Article 6 quinquies of the Paris Convention provide that:

C.— (1) In determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use.

(2) No trademark shall be refused in the other countries of the Union for the sole reason that it differs from the mark protected in the country of origin only in respect of elements that do not alter its distinctive character and do not affect its identity in the form in which it has been registered in the said country of origin.

D. — No person may benefit from the provisions of this Article if the mark for which he claims protection is not registered in the country of origin.

E. — However, in no case shall the renewal of the registration of the mark in the country of origin involve an obligation to renew the registration in the other countries of the Union in which the mark has been registered.

F. — The benefit of priority shall remain unaffected for applications for the registration of marks filed within the period fixed by Article 4, even if registration in the country of origin is effected after the expiration of such period.

relationship to a particular class of goods need not preclude its registration. In Article 7bis, which deals with collective marks, member states are expected to permit the registration and protection of collective marks, while Article 8 makes provision for the protection of a trade name without the need to register it even if that trade name does not form part of a trademark. Articles 9 to 10bis are discussed above in 4.2.1. The Convention clearly makes provision for adequate protection of trademarks and provides minimum standards of protection of these within member states.

The Convention does not have any specific provisions relating to certification marks, either to exclude them from trademarks or to define them separately. With regards to collective marks, these are set out under Article 7*bis* as follows:

> (1) The countries of the Union undertake to accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.
>
> (2) Each country shall be the judge of the particular conditions under which a collective mark shall be protected and may refuse protection if the mark is contrary to the public interest.
>
> (3) Nevertheless, the protection of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin, on the ground that such association is not established in the country where protection is sought or is not constituted according to the law of the latter country.

Given the aforementioned clauses, the Convention does not define a collective mark. However, it grants governments the discretion to determine the requirements for collective mark protection and a right to refuse protection in cases where the mark is against the public interest. Public interest is also not defined in the Convention. Collective marks belonging to associations that are not established in that jurisdiction may not be refused based on that reason alone. The Convention furthermore places the responsibility for the construction of a system for submitting and registering trademarks under each member nation's domestic law.[497] Namibia has done this through the Industrial Property Act of 2012. This Act is discussed below in 5.3.1.

Despite having a significant number of member state parties, the Paris Convention 'has largely been considered as an ineffectual international agreement due to the low substantive levels

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[497] Article 6.

of protection, the lack of enforcement processes, and the absence of a competent organisation to resolve inter-sovereign disputes'.[498]

4.3.2 The Madrid System

The Madrid System for the International Registration of Marks is governed by the Madrid Agreement Concerning the International Registration of Marks, which was signed in 1891, and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, which was signed in 1989.[499] All the contracting states to the Protocol make up the Madrid Union and are regarded as a Special Union in terms of Article 19[500] of the Paris Convention.[501] In terms of the Agreement, all states that have signed both the Madrid Agreement and the Protocol, as defined in Article 9sexies, shall be subject to the Protocol alone. This explains why the clauses in both documents have similar wording. The details of a mark's international registration are outlined in Article 3 of the Madrid Agreement. Additionally, those requesting the international registration of trademarks:

> 'must indicate the goods or services in respect of which protection of the mark is claimed and also, if possible, the corresponding class or classes according to the classification established by the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks'.[502]

Article 3(2) of the Protocol outlines this. Additionally, Article 4 (1) of the Agreement states that a trademark has been registered

> 'at the International Bureau in accordance with the provisions of Articles 3 and 3*ter*, the protection of the mark in each of the contracting countries concerned shall be the same as if the mark had been filed therein direct'. [503]

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498 Wang op cit note 410 at 75.

499 WIPO. See https://www.wipo.int/treaties/en/registration/madrid_protocol/.

500 Article 19 of the Paris Convention provides that "It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention".

501 Article 1 of Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989, as last amended in 2007, provides that states that are contracting members to it, or only to the Madrid Agreement Concerning the International Registration of Marks as revised at Stockholm in 1967 and as amended in 1979, will form members of the Union.

502 Article 3(2) Madrid Agreement Concerning the International Registration of Marks of 1891, and Article 3(2) of the Protocol.

503 Also see Article 4 (1) (a) of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989 was last amended in 2007.

However, the classification of goods is not binding to the contracting countries.[504] The Agreement also provides for a priority right stipulated in Article 4(D) of the Paris Convention,[505] without needing to meet the requirements therein. The aforementioned is a provision that is equivalent to that in Articles 4(1)(a) and (2) of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989 as last amended in 2007. The Protocol provides that reference to marks shall mean trademarks and service marks.[506] The Protocol does not make reference to collective or certification marks which are relevant to the discussion at hand. There is, furthermore, no indication that trademarks in the Protocol are inclusive of, or exclusive of, collective and certification marks. This Agreement is said to be limited to remedies that the laws in the state seeking sanctions have been provided for.[507] The phrase 'indications of source' is also not specifically defined in the Madrid Agreement.[508]

In conclusion of this section, the above instruments – the Madrid system and the Paris Convention – do not specifically make provision for certification marks, which can be used to protect GIs. Although the Paris Convention makes provision for collective marks, the relevant

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504 Article 4(1) Madrid Agreement Concerning the International Registration of Marks of 1891; and Article 4 (1) (b) of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989 as last amended in 2007.

505 Article 4(D) of the Paris Convention provides that:

> (1) Any person desiring to take advantage of the priority of a previous filing shall be required to make a declaration indicating the date of such filing and the country in which it was made. Each country shall determine the latest date on which such declaration must be made.
> (2) These particulars shall be mentioned in the publications issued by the competent authority, and in particular in the patents and the specifications relating thereto.
> (3) The countries of the Union may require any person making a declaration of priority to produce a copy of the application (description, drawings, etc.) previously filed. The copy, certified as correct by the authority which received such application, shall not require any authentication and may
> , in any case, be filed, without fee, at any time within three months of the filing of the subsequent application. They may require it to be accompanied by a certificate from the same authority showing the date of filing and by a translation.
> (4) No other formalities may be required for the declaration of priority at the time of filing the application. Each country of the Union shall determine the consequences of failure to comply with the formalities prescribed by this Article, but such consequences shall in no case go beyond the loss of the right of priority.
> (5) Subsequently, further proof may be required.
> Any person who avails himself of the priority of a previous application shall be required to specify the number of that application; this number shall be published as provided for by paragraph (2) above.

Also see Article 4 (2) of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989 was last amended in 2007.

506 Article 2(3) of Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989 as last amended in 2007.

507 Creditt, E C op cit note 27 at 433.

508 Wang op cit note 410 at 77.

provisions do not define what a collective mark is. Even though states may provide for protection within their jurisdictions for this, it seems that it is up to states to define what constitutes a collective mark, as there is no guidance provided.

4.3.3. TRIPS

TRIPS Articles 15 to 21 provide the rules governing the protection of trademarks. TRIPS' Article 15.1 defines a trademark in terms that are enforceable as a '[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings'. These signs—words, human names included, letters, numerals, figurative elements, colour schemes, and any combination of these signs—are eligible for trademark registration.[509] If signs are not naturally capable of differentiating the relevant items or services, members may make registrability contingent on uniqueness acquired through usage.[510] Signs may need to be visible in order to be registered, according to the requirements of the members.[511] The Agreement gives trademark owners exclusive protection and enables them to prevent third parties from using identical marks for goods and services if doing so would the 'likelihood of confusion'.[512] The rights granted to a trademark owner are outlined in Article 16:

> 1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.
> 2. Article 6*bis* of the Paris Convention (1967) shall apply *mutatis mutandis* to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

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509 Wang op cit note 410 at 71.
510 Wang op cit note 410 at 71.
511 Wang op cit note 410 at 71.
512 Adewopo op cit note 240 at 760.

3. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

As a result, the TRIPS establishes minimal requirements for trademark protection, which states can only build on but not deviate from. This specificity differs significantly from the provisions made with regard to GIs in the same Agreement. However, it can be claimed that the TRIPS does establish basic standards of protection for GIs that are protected by trademark laws, given that some states choose to employ trademark laws as the legal method with which to protect GIs in accordance with the terms of Article 22.

4.4. Regional Frameworks for GI Protection

'Many nations relied upon bilateral or regional agreements for the protection of geographical indications.' Many of these agreements designated specific geographical indications to be protected by the parties and typically followed one of two models: The first model encompassed agreements that established open-ended systems for the registration of geographical indications that meet specified criteria of general application after compliance with specified procedures. An example of an agreement that followed this model is the Bangui Agreement of 2 March 1977, Relating to the Creation of an African Intellectual Property Organization.' The second model, used by many bilateral agreements and some regional agreements, specified lists of geographical indications from each of the countries party to the Agreement, sometimes in conjunction with minimum standards defining the protection to be accorded. These agreements typically lacked internal mechanisms by which the parties could make additions to the lists; correspondingly, such additions typically required a new agreement amending the earlier Agreement. An example of this model is the Agreement between Germany and France, of 8 March 1960, on the Protection of Indications of Source, Appellations of Origin and Other Geographical Designations.'[513]

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[513] Bowers op cit note 277 at 138-139.

IP on the African continent is handled by the African Intellectual Property Organization (OAPI) and the African Regional Intellectual Property Organization (ARIPO).[514] OAPI and ARIPO were created to adhere to the western paradigm of IP protection, which regrettably does not always suit and match with African realities and situations.[515] To supplement these two organisations is the African Union's (AU) 2019-implemented African Continental Free Trade Area (AfCFTA) Agreement. This Agreement and the relevant instruments under ARIPO[516] of which Namibia is a member state, will be discussed hereunder, as well as below at 4.5 to 4.6.

4.4.1. The Banjul Protocol on Marks of 1993 within the framework of ARIPO

The registration of trademarks and the management of those registered trademarks are covered under the Banjul Protocol. It became effective in Namibia on 14 January 2004. The Protocol does, however, not have any specific provision concerning GIs, nor certification or collective marks. It merely sets out a filing system for trademark registration. It will thus be looked at in more detail below under 4.5. There is, however, reason to hope as the member states of ARIPO held a conference on Geographical Indications between 10 and 12 November 2021 to map out a plan for a GI legal framework aimed at demonstrating the significance of GIs for both regional and national markets.[517] This Conference highlighted the recognition amongst the member states of ARIPO that GIs can be used as a tool for development.[518]

4.4.2. The Pan African Intellectual Property Organization (PAIPO) Statute of 2016

The members of the African Union agreed on this Statute in order to ‘promote a development-oriented intellectual property system, in order to achieve the objectives of the African Union’.[519]

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[514] Mupangavanhu, Y *The Regional Integration of African Trade Mark Laws: Challenges and Possibilities* (unpublished LLD thesis, University of the Western Cape, 2013) 116.

[515] Mupangavanhu, Y ‘African Union Rising to the Need for Continental IP Protection: The Establishment of the Pan-African Intellectual Property Organization’ (2015) 59 (1) *Journal of African Law* 1 -24, at 17.

[516] ARIPO has four Protocols: *Harare Protocol on Patents and Industrial Designs of 2019* (Harare Protocol), *Banjul Protocol on Marks of 1993* (Banjul Protocol), *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore of 2010* (Swakopmund Protocol) and *Arusha Protocol for the Protection of New Varieties of Plants 2015* (Arusha Protocol).

[517] ARIPO. ‘ARIPO Member States discuss GI protection approach ‘ available at https://www.aripo.org/success-stories/aripo-member-states-discuss-gi-protection-approach/

[518] Ibid.

[519] Statute of the Pan African Intellectual Property Organization, p1. The PAIPO statute acknowledges the important role effective continental IP organisations can play in advancing the socioeconomic and cultural advancement of Africa- see Adebola (2020) op cit note 250 at 254.

The Statute also aims to complement the work being done by ARIPO.[520] States have acknowledged that IP is important in this regard, taking into account, among other things, the 2030 Agenda for Sustainable Development and the African Union Agenda 2063 can 'serve as a tool for development'.[521] The Statute considers intellectual property as referring to and inclusive of 'symbols, names…used in commerce', as well as geographical indications.[522] The Statute also aims to establish the Pan-African Intellectual Property Organization[523] whose functions will be to:

(i) Ensure the effective use of the intellectual property system as a tool for economic, cultural, social and technological development of the continent;

(ii) Contribute to the accelerated achievement of the objectives of the African Union as stated in the Constitutive Act of the African Union;

(iii) Promote the harmonisation of intellectual property systems of its Member States, with particular regard to protection, exploitation, commercialisation and enforcement of intellectual property rights;

(iv) Provide common services to Member States and/or regional economic communities in the administration and management of intellectual property rights that maximise and build upon the solid achievements of ARIPO, OAPI and/or WIPO;

(v) Provide a forum for policy discussions and formulation, addressing political issues and developing African common positions relating to Intellectual Property matters, particular regard being given to genetic resources, traditional knowledge, Geographic indicators, expressions of folklore, matters pertaining to and arising from the Convention on Biological Diversity (CBD) and emerging topics in the field of intellectual property;

(vi) Initiate activities that strengthen the human, financial and technical capacity of Member States to maximise the benefits of the intellectual property system to improve public health and eradicate the scourge of piracy and counterfeits on the continent; and

(vii) To foster and undertake positive efforts designed to raise awareness on intellectual property in Africa and to encourage the creation of a knowledge-based and innovative society as well as the importance of creative industries, including, in particular, cultural and artistic industries;

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520 Statute of the Pan African Intellectual Property Organization 2.
521 Ibid at 1-2.
522 Article 1 of the Statute of the Pan African Intellectual Property Organization.
523 Article 2 of the Statute of the Pan African Intellectual Property Organization.

(viii) To lead the African negotiation in the international IP issues and to ensure the African common position

This Statute is relevant because Namibia is a member state of the AU and is therefore bound to the Statute, should it be adopted. The Statute is significant because of its intent to use IP for development. And in the context of the definition of IP in the Statute, this includes GIs. Namibia can, therefore, benefit from the realisation of the objectives of the Statute and as such active participation is encouraged. Even though the Statute was adopted in 2016, it is yet to be ratified. This has been attributed to the failure of the establishment of PAIPO.[524]

4.4.3. The African Union (AU) Continental Strategy for Geographic Indications of 2018–2023

A continental strategy on GIs has been recognised as important and necessary by the African Union Commission (AUC), Regional Economic Communities (RECs), and partners at the international level (FAO, European Union [EU]) as a way to contribute to the various agendas and programmes for Africa with regard to agricultural sector development, in particular to the United Nations (UN) sustainable development goals.[525] In order to ensure the transformation and sustainable development of the African continent for future generations, the aspirations of Agenda 2063, which was adopted by the 24th African Union Assembly in 2015 as a continental plan for the next 50 years, serve as inspiring guidance for the GI African strategy.[526] In adopting and implementing the Continental Strategy, the AU ultimately articulates its position on GIs and promotes Africa's interest in participating in the global GIs market.[527] As of 2023, there are about 186 registered GIs in African countries.[528]

The overarching objective of this continental strategy is to 'provide guidance to the AU, RECs, regional institutions in charge of GIs, member states and other stakeholders involved in GI promotion and protection so as to contribute to sustainable rural development on the African

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524 Chidede, T 'The AfCFTA Protocol on Intellectual Property Rights – what, when, how and why?' (2021)South African Research Chair: Intellectual Property, innovation and Development, UCT available at http://www.ipchair.uct.ac.za/news/afcfta-protocol-intellectual-property-rights-%E2%80%93-what-when-how-and-why.

525 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 1.

526 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 1.

527 Adebola, T 'The legal construction of geographical indications in Africa' (2023) 26 *The Journal of World Intellectual Property* 3-29, at 15.

528 Adebola, T (2023) op cit note 527, at 13.

continent'.[529] It aims at ensuring transformation and sustainable development of the African continent by contributing to the aspirations of the Agenda 2063.[530] With regards to the discussion at hand, below are some definitions the strategy sets out that are considered relevant. According to the strategy, an 'appellation of origin' [531] is:

> [t]he geographical name of a country, region or locality that serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

A Certification trademark[532] is defined as:

> '…a word, name, symbol or device that signals certification by a third party of the characteristics of a product, which may include geographical origin. It conforms to specifications laid out by the owner, which can apply to the place of origin and/or methods of production. Use of the mark requires some verification by the owner that prescribed attributes have been met or are presented'.

The strategy then continues to differentiate between certification marks and trademarks with respect to use, the criteria for issuing the mark, and its use.[533] Additionally, a Collective trademark[534] is defined as a trademark that indicates that

> '…given products or services were produced or commercialised by the members of an identified group. Collective marks serve to indicate that the person who uses the collective

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529 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023, 52. According to Adebola, there are six strategic results included in the Continental Strategy which provide set admirable standards; these are:

> (i) An African vision on GIs. (ii) The introduction of legal and institutional frameworks at national and regional levels to protect GIs. (iii) The development and registration of GI products as pilots and drivers for rural and sustainable development. (iv) Market development for GIs products through innovative approaches on local, regional and export markets. (v) Research, training programs and extensions to ensure the identification, development and diffusion of best African-tailored practices to contribute to the African approach. (vi) Promotion of awareness to all stakeholders. See T Adebola 'The legal construction of geographical indications in Africa' (2022) The *Journal of World Intellectual Property* 1– 27 at 13.

530 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 1

531 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 xiii.

532 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 xiii.

533 'Certification marks differ from trademarks in three important ways. First, a certification mark is not used by its owner. Second, any entity that meets the standards set by the owner and undergoes the certification process is entitled to use the certification mark. Third, a certification mark cannot be used for purposes other than to certify the product or service for which it is registered (except to advertise the certification programme services)'. African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 xiii.

534 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 xiii.

> mark is a member of that collective body. Membership in the association that owns the collective mark is, generally speaking, subject to compliance with certain rules, such as the geographical area of production of the goods for which the collective mark is used, or standards of production of such goods'.

The strategy furthermore adopts the definition of GIs found in TRIPS Article 22.1.[535] An indication of source[536] is defined as:

> 'any expression or sign used to indicate that a product or service originates in a specific country, region or locality, without any other element of quality or reputation (Madrid Agreement, 1891, Art. 1.1; Paris Convention, 1883). Indication of source may also be called "indication of provenance'.

Finally, a trademark is defined as: [537]

> 'any sign that serves to distinguish the goods of one company from those of another. The term "company" is to be understood broadly as referring to all corporations engaged in commercial activity, including associations and producers' organisations'.

The strategy highlights a number of opportunities for geographical indications for the region. The first opportunity is the pool of traditional products with important economic, social and environmental contributions;[538] the second is that Africa is an important, fast-growing market for such products;[539] and the third is that Africa presents important products for export with possible synergies with other demanded standards.[540] The strategy also, however, highlights numerous challenges.[541]

The challenges specific to GIs are lack of awareness of all stakeholders; the complexity of the GIs strategies that require multi-disciplinary approaches as well as multi-stakeholder approaches at each stage of the GI development process; the cost involved in the specification of GIs; cross-border issues which need to be addressed in relation to shared products; and finally, the

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535 'Geographical indications [...] identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin'. African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 xiv.

536 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 xiv.

537 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 xv.

538 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 10.

539 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 12.

540 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 14.

541 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 16-18. Also see Adebola (2020) op cit note 250 at 245-246.

governance issues that relate to establishment, management of GIs, as well as dispute resolution. According to the strategy, these challenges need addressing to ensure that the full benefits of protection are enjoyed.

This strategy is important as it not only recognises the significance of GIs but it also recognises the role that GIs can play in advancing development on the continent. Furthermore, it acknowledges the need to create a framework for GI protection within Africa while taking into account the African context. Though it is just a strategy, accompanied by policy, and therefore not binding, it is an indication of the willingness of African states to use GIs for the promotion of its products and to cooperate in attaining the vision laid out with the hope of attaining sustainable development.

4.4.4. The OAPI Agreement Relating to the Establishment of an African Intellectual Property Organization of 1977 (Bangui Statute)

Establishing an African Intellectual Property Organization with the goal of promoting intellectual property was the purpose of this Agreement.[542] The Statute contains several Annexes that contain respective provisions applicable in member states to various IPR regimes. Annexes III and VI deal with trademarks and, service marks, and appellations of origin, respectively. Article 6(3) provides that:

> [a]ny international trademark registration effected under the provisions of the Trademark Registration Treaty and including the designation of at least one member State shall have the effect of a national filing in each member State which is also party to the aforesaid Treaty.

Herein, trademarks are defined.[543] The Statute furthermore provided for the maintenance of a register for trademarks or service marks.[544] It is also provided that trademarks or service marks are optional, but an exceptional declaration may be made by a state may make them compulsory for

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542 Agreement Relating to the Creation of an African Intellectual Property Organization 1977 1-2.

543 Annex III Article 2 Article 2: Any visible sign used or to be used to distinguish the goods or services of whatsoever enterprise shall be considered as a trademark or service mark, in particular, surnames by themselves or in a distinctive form, special, arbitrary or fanciful designations, the characteristic form or container of a product, labels, wrapping, emblems, prints, stamps, seals, vignettes, borders, combinations or arrangements of colours, drawings, reliefs, letters, numbers, devices, pseudonyms.

544 Article 13 of the Agreement Relating to the Creation of an African Intellectual Property Organization 1977.

specified goods and services.[545] The Statute also includes provisions for well-known marks to be protected:

> 'within the meaning of Article *6bis* of the Paris Convention for the Protection of Industrial Property',[546] and requires for classification of marks within the meaning of Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.[547] In the Statute, collective marks are protected 'in the general interest and in order to facilitate the development of commerce, industry, crafts and agriculture, the State, enterprises of public character, unions or groups of unions, and associations or groups of producers, manufacturers, craftsmen and trades',[548]

Furthermore, the Statute renders these marks unassignable and non-transferable.[549] The Statute additionally provides for penalties in case of contravention under Part VI of Annex III. The Statute provides a definition of appellations of origin as

> 'the geographical name of a country, region or specific place which serves to designate a product originating therein, the characteristic qualities of which are due exclusively or essentially to the geographical environment, including natural factors, human factors, or both natural and human factors ; any name which is not that of a country, region or specific place is also considered a geographical name if it relates to a specific geographical area when used in connection with certain products'.[550]

Given that this Statute offers special protection for trademarks, collective markings, and appellations of origin, setting out specific requirements and applicable penalties,[551] it merits consideration under this section. However, the Agreement is not applicable to Namibia as the country falls outside of the Agreement.

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545 Annex III, Article 1 of the Agreement Relating to the Creation of an African Intellectual Property Organisation 1977.

546 Annex III, Article 8 of the Agreement Relating to the Creation of an African Intellectual Property Organisation 1977.

547 Annex III, Article 10 of the Agreement Relating to the Creation of an African Intellectual Property Organisation 1977.

548 Annex III, Article 31 of the Agreement Relating to the Creation of an African Intellectual Property Organisation 1977.

549 Annex III, Article 36 of the Agreement Relating to the Creation of an African Intellectual Property Organisation 1977.

550 Annex VI, Article 1 of the Agreement Relating to the Creation of an African Intellectual Property Organisation 1977.

551 OAPI provides a *sui generis* GI system in Annex VI of the Bangui Agreement.

In conclusion, the regional frameworks for the protection of GIs can be considered to be non-existent because the instruments presently in existence do not specifically acknowledge, let alone provide for GI protection. However, the African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023 is an indication of the recognition of the lacuna on the regional level in relation to GI protection and is indeed a move in the right direction with regards to GI promotion and protection on the regional level.

4.5. Regional Framework for TM Protection

The two Protocols that have been approved under the ARIPO for the protection of industrial property rights are the Harare Protocol on Patents and Industrial Designs, which was adopted on 10 December 1982, and the Banjul Protocol on Marks, which was adopted in November 1993.[552] Only the Banjul Protocol is discussed hereunder due to its relevance to the discussion at hand.

4.5.1 The Banjul Protocol on Marks of 1993

The Banjul Protocol on Marks was adopted on 19 November 1993 at Banjul, The Gambia, with the latest revision in 2018.[553] Namibia became a party to the Protocol on 14 January 2004. The ARIPO is tasked by the Protocol with administering and registering trademarks on behalf of states in conformity with its stipulations.[554] Applications made to register a mark must adhere to the conditions outlined in the Protocol as stated under Section 3. The Protocol establishes a priority right comparable to that set forth in Article 4 of the Paris Convention; this right is valid for six months.[555] The Protocol allows for the multiple filing of applications through submission at one

[552] Adewopo, A ''Trademark Systems in Africa: A Proposal for the Harmonisation of ARIPO and the OAPI Agreements on Marks' (2003) 6 (3) *International Intellectual Property Law & Policy* 473-484 at 475.

[553] Although it was adopted in 1993 as part of ARIPO, the Banjul Protocol on Marks didn't go into effect until March 6, 1997. See Adewopo op cit note 552 at 475.

[554] Section 1.1 of the Banjul Protocol provides that:

> The African Regional Intellectual Property Organization (ARIPO) is hereby entrusted with the registration of marks and the administration of such registered marks on behalf of the Contracting States in accordance with the provisions of this Protocol.

[555] Section 4 of the Banjul Protocol provides as follows concerning the right of priority:

> 4:1 An applicant or a successor in title shall have the right to claim priority rights provided under Article 4 of the Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised.
>
> 4:2 The right to priority shall subsist only when the application is made within six months from the date of the earlier application.

office and designation to other ARIPO contracting states of choice.[556] This is provided for in Sections 2 and 3 of the Protocol. The Protocol requires that substantive examination of applications be carried out by the state that has been designated in an application. In this regard, Section 6 provisions are clear in that:

> 6:1 Every application for the registration of a mark shall be examined in accordance with the national laws of a designated State.
>
> 6:2 Before the expiration of 9 months from the date of the notification referred to in Section 5:3, each designated State may make a written communication to the Office that, if a mark is registered by the Office, that registration shall have no effect on its territory on the basis of any grounds, both absolute and relative, including the existence of third party rights.
>
> 6:3 Where the designated State refuses the application under Section 6:2, it shall give reasons under its national laws for refusing the application. These reasons shall, within one month of the decision being made, be communicated to the Office, which shall, without delay, communicate the same to the applicant.
>
> 6:4 The applicant shall be given an opportunity to respond through the Office to the designated State concerned to the decision to refuse the application. The decision shall be subject to appeal or review under the national laws of the designated State concerned. The appeal or review shall be filed through the Office. The decision upon appeal or review shall be communicated to the Office by the designated State within one month from the date of issuance.
>
> 6:5 A communication to the Office under Section 6:2 or a refusal by a designated State shall not prejudice the issuance by the Office of a certificate of registration having effect in those designated States in respect of which the application has not been subject to a communication under Section 6:2 or has not been refused.
>
> 6:6 Where a designated State which makes a communication under Section 6:2 subsequently withdraws it or where the designated State initially refused the application but subsequently accepts the same, the designated State shall within one month communicate this fact to the Office. In this case, the Office shall extend the registration to such designated State.

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556 The Protocol creates a centralised mechanism for the submission of trademark applications. See Adewopo op cit note 552 at 475.

Once a mark has been registered, it is registered in every designated state as per Section 8 of the Protocol.[557] Following the ARIPO Office's registration of a mark, additional designations are also permitted.[558] In Namibia, the applications for trademark protection can be submitted to ARIPO through BIPA, for administration. There are no specific provisions relating to the definition of a trademark, whether the certification and collective marks are included or not. Furthermore, no specific provisions have been created for collective and certification marks. In conclusion, considering that this is one of the ways of protection that can be extended to GIs, the absence of provisions in this regard is worrisome as there is no basic protection provided for within the region. States are, therefore, left to set their own rules, of course, in consideration of their international obligations.

4.6. The African Union Agreement Creating the Continental Free Trade Area (AfCFTA)

The member nations of the African Union (AU) joined into this African Continental Free Trade Area (AfCFTA) Agreement, which became effective in 2019, with a number of broad goals as set out in Article 3. An overarching objective of the AfCFTA is to help hasten the expansion of African economies.[559] State parties have, amongst other specific objectives, agreed to cooperate on intellectual property rights.[560] It has also been agreed that the Agreement will cover intellectual property rights.[561] Additionally, it was agreed that Phase II negotiations on intellectual property rights would be initiated by member states,[562] in addition to investment and competition, following the Agreement's approval by the AU's Assembly of Heads of State and Government.[563] In accordance with Article 8(1) of the Agreement, a Protocol on intellectual property rights is

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[557] Section 8 of the Banjul Protocol provides that:

> 8:1 The registration of a mark by the Office shall have the same effect in each designated State, with respect to rights conferred by the mark, as if it was filed and registered under the national laws of each such state.
>
> 8:2 The national laws of each Contracting State shall apply to the cancellation of a registration, whether based on non-use or any other grounds. Where registration has been cancelled, the Contracting State concerned shall, within one month of cancellation, notify the Office. The Office shall publish this fact in the Marks Journal and record it in the Register.
>
> 8.3. The indication of classes of goods or services provided for shall not bind the Contracting States with regard to the determination of the scope of protection of the mark.

[558] Section 9 of Banjul Protocol.

[559] Asiedu, M 'The African Continental Free Trade Agreement (AfCFTA)' (2018) 52 *Global Political Trends Center (GPoT)* 2.

[560] Article 4(c) of the Agreement establishing the African Continental Free Trade Area.

[561] Article 6 of the Agreement establishes the African Continental Free Trade Area.

[562] Article 7 (1) (a) of the Agreement establishes the African Continental Free Trade Area

[563] Article 7 (2) of the Agreement establishing the African Continental Free Trade Area

provided for. Further reference is made to IPRS in Article 23 of the Agreement in relation to the manner in which the Protocols will come into force.[564]

In advancing a model for the Protocol, Ncube recommends the incorporation of the TRIPS Agreement minimum standards by reference.[565] With regards to GIs and trademarks, this would mean the provisions discussed in Chapter 4 of the thesis would then be incorporated. Ncube[566] also lists trademarks and GIs as possible IP negotiation priority areas in crafting the Protocol. The Protocol is viewed as a chance for the continent to forge a new route for knowledge governance,[567] and an opportunity to craft an IP framework which is focused on the developmental objectives of Africa.[568] This view is supported by Adebola[569] whose contention is that the envisaged Protocol has the opportunity to remedy the 'fragmented IP architecture on the continent'. It is suggested that the Protocol be aligned to PAIPO and Agenda 2063.[570] 'This requires designing home-grown IP systems that underscore the unique forms of innovation and creativity in Africa, in order to deliver an effective development-oriented IP Protocol.'[571] Furthermore, there may be a need to consider the enabling of protection for non-conventional trademarks which suit the communal set-up of African producers, which are not adequately protected by the conventional trademark model.[572]

Pursuant to the objective Article 4(c) and Article 7 (1)(a|) of the AfCFTA Agreement, the Protocol on Intellectual Property Rights was finalized and approved in Libreville, Gabon in October 2022. The Protocol was entered into with the recognition of the 'the vital role of

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564 Part 2: The Protocols on Investment, Intellectual Property Rights, Competition Policy and any other Instrument within the scope of this Agreement deemed necessary shall enter into force thirty (30) days after the deposit of the twenty-second (22nd) instrument of ratification" and Par 4: For Member States acceding to the Protocols on Investment, Intellectual Property Rights, Competition Policy, and any other Instrument within the scope of this Agreement deemed necessary, shall enter into force on the date of the deposit of its instrument of accession".

565 Ncube, C B 'Intellectual property and the African continental free trade area: lessons and recommendations for the IP protocol' (2021) 21 (2) *Journal of International Trade Law and Policy* 105-121 at 113.

566 Ncube (2021) op cit note 565 at 115:

> 'Consideration of more appropriate forms of marks in use on the continent would need to extend to better use of GIs which will be informed by the AU GI Strategy. An analysis of how, if at all, existing trademark protection could be harmonised could also be undertaken because some trademark duration variances exist on the continent'.

567 Ncube, C et al. 'A principled approach to intellectual property rights and innovation in the African Continental Free Trade Agreement' in D Luke & J MacLeod (eds) *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective* (2019) Routledge, London 179.

568 Ncube et al. op cit note 567 at 182. Also see Chidede op cit note 524.

569 Adebola (2020) op cit note 250 at 234-235.

570 Ncube et al. op cit note 567 at 181.

571 Adebola (2020) op cit note 524 at 234.

572 Ncube et al. op cit note 567 at 187.

cooperation in intellectual property rights towards the realisation of the objectives of the AfCFTA Agreement. Article 2(1) of the Draft Protocol on Intellectual Property Rights provides that the over-arching objective is to create uniform standards and guidelines for the promotion, defence, sharing, and enforcement of IPRs. Article 9 and 10 of the Protocol contain provisions relating to GIs and trademarks (inclusive of all categories of marks), respectively. Interestingly enough, Article 9(1) specifically imposes an obligation on state parties to provide for GI protection through sui generis systems and makes allowance for additional protection to be provided through 'certification marks, collective marks, or unfair competition laws'. The Article further makes provision for the development of an Annex to be developed specifically relating to GIS. There is no draft Annex on GIs available yet.

4.7. The place of international law within Namibian Law

There is a need to assess the applicability of the international and regional instruments discussed above. The Namibian Constitution contains five provisions that are relevant to international agreements. Article 32(3) (e) gives the President the authority to 'negotiate and sign international agreements' and to assign such authority to others. Article 40(1)(i) lists one of the functions of the Cabinet as being 'to assist the President in determining what international agreements are to be concluded, acceded to or succeeded to and to report to the National Assembly thereon'. Article 63(2) (e) grants to the National Assembly the power to 'agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3) (e)'.[573] Article 144 states that 'unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding on Namibia under this Constitution shall form part of the law of Namibia'. Finally, Article 143 makes a provision that 'all existing international agreements binding upon Namibia shall remain in force unless and until the National Assembly acting under Article 63(2) (d) hereof otherwise decides'.

International agreements, therefore, become binding in terms of Article 144 of the Constitution through the three Articles mentioned above. The Cabinet, in terms of article 40(1) (i), must assist the President in deciding whether or not a particular international convention should be signed. Once the President has attached his signature to the international Agreement or Treaty,

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[573] This power and function under Article 63(2)(e) is separate from the power of the National Assembly to make laws under Article 63(1).

and the National Assembly has agreed to the accession as per Article 63(2) (e), in terms of the above provisions, the relevant Treaty becomes part of the national laws of Namibia. This, therefore, means that all international instruments that Namibia has acceded to gain direct application in the legal system and no enacting law is necessary to make them applicable, *at least in theory*.

While accession to international and regional instruments following the procedure described above may, in theory, make it part of Namibian law, from the perspective of the needs of practice, accession, by itself, may not be enough. The jurisprudence of Namibia was examined, and it was found that the human rights treaties which the country has acceded to since its independence have hardly had an effect on the country's legal process at a domestic level.[574] Although the Constitution of Namibia provides for the implementation of international agreements directly into the legal system, it seems almost impossible to carry out the provisions of those treaties without a legal domestic framework providing for their practical implementation. Therefore, even though the Namibian Constitution provides what may seem a liberal approach towards international agreements, the courts will still expect the provision of a domestic legal framework implementing the principles of those international agreements.

An example of such a framework is the Geneva Conventions Act 15 of 2003. When Namibia enacted this legislation, which commenced on 1 October 2004, the aim was to give effect to 'certain Conventions done at Geneva on 12 August 1949 and to certain Protocols to those Conventions done at Geneva on 10 June 1977'.[575] The Act has an arrangement of sections which are set out under different headings. The rest of the Act is then made up of several schedules of the different conventions. Namibia's adoption of the above instruments and intended accession to those it has not acceded to yet could possibly follow the route taken in the Geneva Conventions Act in order to provide full effect to these agreements.

In contrast, in the South African Constitution,[576] section 231, dealing with international agreements, places the responsibility for negotiating and signing all international agreements on the National Executive.[577] A resolution of the National Assembly and the National Council of

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574 Horn, N 'International human rights norms and standards: The development of Namibian case and statutory law' in Horn, N & Bösl, A (eds) Human rights and the rule of law in Namibia (2008) Konrad Adenauer Foundation, Windhoek.

575 Long title, Geneva Conventions Act 15 of 2003.

576 Constitution of the Republic of South Africa 108 of 1996.

577 Constitution of the Republic of South Africa 108 of 1996 s 231(1).

Provinces must be passed for such an agreement to be binding on the Republic of South Africa.[578] It also only becomes law in the Republic when it is enacted into law by national legislation.[579] The Constitution, however, also provides that 'a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution of Parliament'.[580] From the discussion above, it appears that it is desirable that Namibia when acceding to international instruments, should enact appropriate domestic legislation to give practical effect to that accession.

Aside from the above Constitutional provisions, there is, furthermore, the principle of *pacta sunt servanda*,[581] which requires states to comply, in good faith, with the obligations set out in treaties or instruments to which they have acceded. This is a fundamental principle and confirms international law as law.[582] Lukashuk[583] provides that though the principle has transformed into a set of rules which govern how international norms are given effect and interact with municipal law, the principles of sovereign equality and no interference are still accorded their place. States remain with a choice of how to implement international rules within their domestic setting. In conclusion, this section, therefore, Namibia, having acceded to the international instruments above, is bound to the obligations therein but can still exercise sovereignty in implementing these obligations and can do so in due consideration of the relevant constitutional provisions and domestic law.

4.8. Conclusion

This chapter looked at relevant international and regional instruments that relate to the protection of GIs and Trademarks. Despite arguments about whether protection should be extended to other items in accordance with the protection already provided to wines and spirits, the TRIPS Agreement is one of the most comprehensive agreements available for the protection of geographical indications– it is undeniable that the TRIPS Agreement has greatly improved the position with regards to GI protection. The basic standard of protection set out under TRIPS serves

578 Constitution of the Republic of South Africa 108 of 1996 s 231(2), subject to the exceptions in s 231(3).

579 Constitution of the Republic of South Africa 108 of 1996 s 231(4).

580 Constitution of the Republic of South Africa 108 of 1996 s 231(4).

581 Article 26 of the Vienna Convention on the Law of Treaties, 1969.

582 Lukashuk, I 'The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law' (1989) 83 (3) *The American Journal of International Law* 513-518 at 513.

583 Lukashuk op cit note 582 at 513.

as a minimum standard for GI protection in Namibia. On the regional level, the analysis above could not find a meaningful legal framework for GI protection.

Notably, international and regional agreements relating to trademarks which are relevant for Namibia do not specifically make provision for certification marks – a form of trademarks which could be used to protect GIs. As indicated, however, the adoption of the 2018–2023 Continental Strategy for Geographical Indications in Africa (AU) is a move in the right direction, which will hopefully result in the development of an adequate regional framework for GI protection.

Namibia, as a party to the instruments discussed in this chapter, has committed to upholding the obligations outlined therein. The chapter looked at the place of these international and regional obligations within domestic law, and although these obligations are binding, a legal domestic framework is required to practically implement the provisions of these international and regional instruments. As such, it is necessary to assess whether the international and regional frameworks for GI protection find implementation in national law. In the next chapter, the domestic legal framework relevant to GI protection in Namibia is considered.

CHAPTER 5: NATIONAL FRAMEWORK FOR GEOGRAPHIC INDICATION PROTECTION (GI)

'Namibia's current policy framework is weak and does not meet the challenges faced by owners of Intellectual Property'.[584]

5.1. Introduction

The purpose of this Chapter is to present an analysis of the Namibian law in relation to GIs. This includes the Common law and national legislation. Specifically, the Chapter will look at the Namibian legal position with regard to GI protection, as well as trademark protection as it relates to GIs. A discussion on trademark law is particularly relevant because the country's Industrial Property Act of 2012, as it stands now, allows geographical names or other origin indicators to be registered as certification or collective trademarks.[585]

This discussion would be incomplete, however, without reflecting on the Intellectual Property Audit Report for Namibia, which was undertaken in 2016. This Audit assessed the IP laws of Namibia, identified gaps, and made recommendations thereto. It led to the adoption of the National Intellectual Property Policy and Strategy (NIPPS) for the period 2019 to 2024. The exposition in this Chapter is geared towards addressing research question 1.3.5(does Namibia have a legal framework for GI protection?).

5.2. *Status Quo* with regards to Intellectual Property Law

Before Namibia, or South West Africa (SWA) as it was then known, became a German Colony in 1884, the law in place then was what is now referred to as customary law. The present legal system is greatly influenced by the colonial history of the country. The occupation of Namibia by South Africa had the most noticeable influence on the law,[586] with some legislation from that period still being utilised.

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584 Senior Counsellor Loretta Asiedu- WIPO African Bureau, in her speech at a one-day multi-stakeholder workshop held in Windhoek in April 2016 aimed at validating Namibia's national intellectual property strategy.

585 Section 187(2) of the Industrial Property Act of 2012.

586 The South African Government was given the authority to make laws through the South West Africa Constitution Act 39 of 1968. This power was further extended in terms of the South West Africa Affairs Act 25 of 1969. Legal Assistance Centre 'Namlex: Index to the laws of Namibia 2010 Update' (2010) 2, available at http://www.lac.org.na/laws/pdf/namlex2010.pdf.

After the passing of the UN Security Council Resolution 435 of 29 September 1976, which brought with it a framework for free and fair elections to be held under the supervision of the international community, a repeal of all remaining laws, regulations, or administrative measures which were discriminatory or restrictive in nature such as to inhibit the objective of a free and fair election was conducted.[587] Therefore, any laws currently in place and which came into force before 1990 are those that were carried over from the South African regime and which remained after the process of repeal.

Up until August 2018, when the Industrial Property Act of 2012 came into force, the law of Intellectual Property was one of the areas within Namibian law that almost wholly comprised of legislation from the colonial regime. With the exception of the Copyright and Neighbouring Rights Act of 1994, IP legislation in Namibia was made up of Acts that were in place before 1990, when Namibia gained its independence.[588] This is despite the fact that the country in which these laws originated - South Africa - has since amended, repealed or updated several of their laws in this area.

The current situation is that several laws in the area of IP are outdated and have not been reviewed to take into account the changing needs of society. In the year 2009, while considering the matter of *Gemfarm Investments v Trans Hex Group*[589] Maritz, J. made a remark which painted an apt picture of the Namibian IP law as a whole, even though the case mainly concerned patent law:[590]

> All the exceptions raised in this action concern the application or interpretation of probably the most neglected area of statutory regulation in Namibia: patent legislation. In a world increasingly driven by globalised economies and markets, in an age where more technological advances have been made in a single century than in all the centuries which have preceded it combined, at a time when commerce and industries are increasingly based in and benefiting from the power of knowledge converted into ideas, inventions and technologies for the benefit of humankind and its environment, it should be a serious

[587] Legal Assistance Centre 'Namlex: Index to the laws of Namibia 2010 Update' (2010) 4.

[588] Article 140 of the Namibian Constitution specifically provides that "Subject to the provisions of this Constitution, all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by an Act of Parliament or until they are declared unconstitutional by a competent Court".

[589] 2009 (2) NR 477.

[590] *Gemfarm Investments v Trans Hex Group* 2009 (2) NR 477, at 481-482.

> legislative concern that our statutory laws designed to record, preserve and protect those ideas, inventions and technologies are marooned in outdated, vague and patently inadequate enactments passed by colonial authorities in this country about a century ago, *yet*, it is by those laws that this Court is called upon to adjudicate the defendant's exceptions to the plaintiff's particulars of claim.

This said, over the past few years, IP law in Namibia has been receiving increased attention from lawmakers. Key outcomes of this much-needed attention are the promulgation of the Industrial Property Act of 2012 and its coming into force in 2018. Additionally, the Business and Intellectual Property Authority was created by the founding Act of 2016 which is now tasked with overseeing IP in Namibia.

As mentioned earlier in this thesis, in 2015, Namibia, with the assistance of WIPO, conducted an IP audit for the purpose of drafting the IP Development Plan.[591] The group of experts that were assigned, among others, the task of reviewing the relevant National development policies, strategies and plans, as well as the IP framework then in place, worked in collaboration with representatives from the Ministry of Industrialization, Trade and SME Development, carrying out research, hosting several workshops and conducting interviews.[592] They subsequently released, on 17 January 2016, an IP Audit Report titled 'Intellectual Property Audit Report of Namibia'[593] To present their findings in accordance with the WIPO terms of reference. This report is briefly discussed below at 5.5. Yet, before turning to the findings of the report, the Common law protection of IP in Namibia, as well as the domestic legislative frameworks relating to GIs in the country, will be reviewed.

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591 BIPA 'Annual Report 2016 to 2017' 24 available at https://www.bipa.na/?wpdmact=process&did=NzQxLmhvdGxpbms=

592 Mengistie, G et al. 'Intellectual Property Audit Report of Namibia' (2016) 7.

593 Mengistie et al op cit note 592 at 7. In *Elisenheim Property Development Company (Pty) Ltd v Guest Farm Elisenheim & Others* (A 295/2012) [2013] NAHCMD 187 (05 July 2013); the following was stated with regards to common law and trademarks:

> [60] Under the common law, however, a trade mark would only become a form of property in consequence of its use by a trader who can claim to have acquired a repute in the mark in question. This would entail establishing that the mark has become distinctive in the minds of the purchasing public in distinguishing the goods or services from other similar goods or services rendered by others.
>
> [61] In order to succeed with establishing ownership of a mark under common law, the first respondent would be required to adduce evidence of its use from the trade as to its distinctiveness and documentary evidence to establish that the mark has become distinctive in the sense contended for by the first respondent.

5.3. National legal framework related to GIs

When it comes to the legal environment in relation to GI protection within Namibia, there are in existence national instruments which relate to GIs. These will be discussed below.

5.3.1. The Industrial Property Act 1 of 2012(IPA)

This Act covers various IP regimes such as Patents, Trademarks, and Industrial designs but does not have a designated section that deals with GIs.[594] However, it is worth noting that Namibia's submission to the TRIPS Council in May 2003 stated that until a draft law on geographical indications was promulgated, geographical indications would remain protected under Trademarks in South West Africa Act 48 of 1973 which has since been repealed by the Industrial Property Act of 2012.[595] As will be demonstrated below, GIs find protection under the Section within the Act, which deals with trademarks. The application of the Act should be read with the Industrial Property Regulations No. 114 of 2018. Hereunder, the relevant provisions of the Act as they pertain to definitions, requirements for protection, registration, rights conferred, infringement and remedies, prohibition against false indications of source, and international applications are outlined. In addition, the Common law position is also considered. The discussion on the comparative jurisdictions in Chapter 6 will consider the same factors as the ones set out below before an interrogation of the similarities and differences between the three jurisdictions is undertaken under 6.5 below.

a) Relevant definitions under IPA

i) A Trademark is defined as:

> 'other than a certification or a collective trade mark, means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing those

594 The Preamble provides that "to provide for the grant, protection and administration of patents and utility model certificates; to provide for the registration, protection and administration of industrial designs; to provide for the registration, protection and administration of trade marks, collective marks, certification marks and trade names...". By this, one can clearly see that GIs do not have a designated section in the Act.

595 Echols, M A 'Geographical Indications for Foods, Trips and the Doha Development Agenda' (2003) 47 *Journal of African Law* 199–220, at 206

goods or services from the same kind of goods or services connected in the course of trade with any other person.'[596]

ii) A mark is defined as:

'any sign capable of being represented visually, including a device, name, signature, word, letter, numeral, figurative element, shape, colour or container for goods, or any combination of such signs'[597]

iii) Collective marks means

'a mark capable of distinguishing, in the course of trade, goods or services of persons who are members of an association from goods or services of persons who are not members thereof'[598]

iv) Certification marks means

'a mark capable of distinguishing, in the course of trade, goods or services certified by any person in respect of kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services, as the case may be, from goods or services not so certified'[599]

b) Requirements for Protection under the IPA

In order for a mark to be registered and find protection under the Act, the mark must meet the requirement of 'distinctiveness', which means that it is

'capable of distinguishing the goods or services of a person in respect of which it is proposed to be registered from the goods or services of other persons, either generally or, where the trade mark is proposed to be registered subject to limitations, in relation to use within those limitations'[600]

Distinctiveness will be met by a mark which, at the time of the registration application, 'is inherently capable of so distinguishing or if it became capable of distinguishing by reason of prior use thereof'.[601]

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596 Section 131 of the Industrial Property Act of 2012.
597 Section 131 of the Industrial Property Act of 2012.
598 Section 131 of the Industrial Property Act of 2012.
599 Section 131 of the Industrial Property Act of 2012.
600 S134. (1) of the Industrial Property Act of 2012.
601 S134 (2) of the Industrial Property Act of 2012.

c) Registration

An application for registration by a person who has a bona fide claim[602] to it must be made in the manner prescribed in the Act under s 140 and filed with the Registrar, who will then examine the application and make a determination as to whether the requirements laid out in s140(1) have been met.[603] This is the formal requirement. Once that requirement has been met, the Registrar must determine whether the mark meets the substantive requirements; the mark is a 'mark' as that term is defined in s131, and it is registrable as a trade mark under sections 134, 137, and 138.[604] A mark can be refused registration in terms of the Act if there exist objective grounds,[605] justifying such refusal, or there are identifiable third-party rights that need to be protected.[606]

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602 S139 of the Industrial Property Act of 2012.

603 S145 (1) of the Industrial Property Act of 2012.

604 S145 (2) of the Industrial Property Act of 2012.

605 S137 of the Industrial Property Act of 2012 lists these objective grounds as a mark if:

(a) it is incapable of distinguishing the goods or services of one person from those of other persons;
(b) it is contrary to public order or morality;
(c) it is inherently deceptive, or the use thereof is likely to mislead or deceive the public or other traders, including as regards the geographical origin of the goods or services concerned or their nature or characteristics;
(d) it consists exclusively of a sign or indication which serves, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or time or mode of production of the goods or rendering of the services;
(e) it consists exclusively of a sign or indication which has become customary in the current language or amongst *bona fide* traders in regard to the goods or services concerned;
(f) it is identical with, or is an imitation of or contains as an element, an armorial bearing, flag or other emblem of, a name of or abbreviation or initials of the name of, or official sign or hallmark adopted by, any State, intergovernmental organisation or organisation created by an international convention unless authorised by the competent authority of that State or organisation;
its use would be likely to cause confusion or would offend any class of person, or would be contrary to law;
the applicant for registration has no *bona fide* claim to proprietorship or no *bona fide* intention of using it as a trade mark; or
the application for registration was *mala fide*

606 S138 (1) of the Industrial Property Act of 2012 proves`;

A mark is not registrable and cannot validly be registered if –
(a) subject to subsection (2), it is identical with or confusingly similar to, or it or an essential element thereof constitutes a reproduction, imitation or a translation of, a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark and which is well known in Namibia, if the use of the mark is to be in relation to the identical or similar goods or services in respect of which the trade mark is well known, and such use of the mark is likely to cause deception or confusion;
(b) it is identical with or confusingly similar to, or it or an essential element thereof constitutes a reproduction, imitation or translation of a trade mark which is well known and registered in Namibia for goods or services which are not identical or similar to those in respect of which registration is applied for if the use of the mark would be likely to take unfair advantage of or be detrimental to the distinctive character or the repute of the well-known mark or the interests of the owner of the

Once the Registrar is satisfied that the requirements for registration have been met as per sections 131, 134, 137, 138 and 140, and there was no opposition to the mark in accordance with s147, registration of the mark and issuance of a certificate or registration should take place.[607] Section 133 (1) provides that:

> 'the goods or services for which registration of the mark is requested must be classified in a particular class or classes as provided for in the International Classification of Goods and Services, and the application for registration must indicate the applicable class or classes of the International Classification of Goods and Services or any prescribed classification of goods or services'. [608]

> well- known trade mark is likely to be prejudiced by such use, despite the absence of deception or confusion; or
>
> (c) it is identical to a registered trade mark or to a trade mark in an application belonging to a different proprietor with an earlier filing or priority date, in respect of the same goods or services or closely related goods or services, or if it so nearly resembles such a trade mark as to be likely to deceive or cause confusion.

(2) Subsection (1)(a) does not apply in relation to any trade mark application or registration having a filing date or priority date prior to the date on which this Act comes into force or to the date on which the well-known trade mark becomes entitled, in Namibia, to protection under the Paris Convention, whichever date is the later date.

[607] S148 (1) and (2) of the Industrial Property Act of 2012.

[608] S95 of the Industrial Property Regulations No. 114 of 2018 provides that:

> The Registrar must, subject to regulation 125, apply the International Classification of Goods and Services for the Purposes of the Registration of Marks adopted by the Nice Agreement of 15 June 1957, as revised (referred to in this part as "the International Classification") for all purposes relating to the registration and publication of marks.

If the requirements are not met, the application is refused.[609] A holder of a registered mark is granted an exclusive right that allows them to exclude all others from using the mark unless otherwise authorised by said owner.[610] Registration further confers the owner:[611]

> ‘remedies or actions available to him or her, the right to institute legal proceedings against any person who infringes the trade mark by using the mark in the course of trade’.

d) Rights conferred

The exclusive right to a mark referred to above ‘may be acquired by registration of the mark as a trade mark, a certification trade mark or a collective trade mark’.[612] A registered mark is valid for ten years,[613] and maybe renewed 'on a written request by the registered owner prior to, or within the prescribed period of grace after, the expiration of a ten-year period', subject to payment of fees.[614] An owner of a mark may voluntarily license it out through a contract,[615] and a registered trademark may be transferred;[616]

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609 S148(2) to (4) of the Industrial Property Act of 2012provide that:

Where –

1. (a) the requirements for the registration of a mark as contemplated in subsection (1) are not complied with; or
2. (b) an application for the registration of a mark has been successfully opposed under section 147,

the Registrar must refuse to register that mark as a trade mark.

(3) If, by reason of default on the part of the applicant, after acceptance of the application in terms of section 146(1)(a), the registration of a trade mark has not been completed within the prescribed period from the date of such acceptance, the Registrar must give notice of the non-completion to the applicant, and, if at the expiration of the prescribed period from that notice or of such further time as the Registrar may allow, the registration is not completed, the application must be considered as having been abandoned.

(4) If the application is conditionally accepted in terms of sections 146(1)(b) or, 146(4) or 146(5)(b) and the applicant fails to take such steps as are available to him or her under this Act to complete the registration of the trade mark within the prescribed period, or such further time as the Registrar may allow, the application must be considered as having been abandoned.

610 151. (1) Subject to sections 153, 154 and 155, the registered owner of a trade mark has the right to exclude all other persons from using the registered trade mark in the course of trade in the manner contemplated in section 152 unless that other person has been authorised, in writing, to do so by the registered owner of that mark.

(2) A trade mark must be registered in respect of goods and services falling in a particular class or classes as provided for in the International Classification of Goods and Services or any prescribed classification of goods or services, as contemplated in section 133 and the rights arising from the registration of a trade mark are determined in accordance with the classification applicable at the date of registration.

611 S152 of the Industrial Property Act of 2012.

612 S132 (1) of the Industrial Property Act of 2012.

613 S157 of the Industrial Property Act of 2012.

614 S158 of the Industrial Property Act of 2012.

615 S165(1) of the Industrial Property Act of 2012.

616 174. (1) of the Industrial Property Act of 2012.

(a) assigned or transferred either in connection with or without the goodwill of the business concerned or

(b) assigned or transferred in respect of either all of the goods or services to which the trade mark applies or in respect of some but not all of those goods or services.

e) Infringement and remedies

The Act sets out the following as acts of infringement:[617]

(a) the unauthorised use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;

(b) the unauthorised use of a mark which is identical or similar to the registered trade in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered that in such use, there exists the likelihood of deception or confusion; the unauthorised use in the course of trade in relation to any goods or services of a mark which is identical or similar to a registered trade mark registered, if such trade mark is well known in Namibia and the use of the said mark would be likely to take unfair advantage of or be prejudicial or detrimental to, the distinctive character or the repute of the registered trade mark, despite the absence of confusion or deception.

If an act of infringement occurs against a mark registered under the Act, the mark's owner may institute infringement proceedings and seek the following remedies:[618] an interdict, an order for the removal of the infringing mark from goods or materials and, if not possible, the delivery up of such goods; damages; in lieu of damages, reasonable royalty as would have been payable had the owner licensed out the mark. Should a person facing infringement proceedings be able to demonstrate that the actions they took did not violate the mark, they may request the Tribunal, no later than five years after the threat, to interdict the threat and award damages for any financial loss which may have accrued from the threats.[619] A counterclaim by the person making the threats is allowed.[620]

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617 S182 of the Industrial Property Act of 2012.

618 S183 of the Industrial Property Act of 2012.

619 S186 of the Industrial Property Act of 2012.

620 S186 (4) of the Industrial Property Act of 2012.

In the case of *Namib Mills (Pty) Limited v Bokomo Foods Namibia (Pty) Ltd*[621] infringement proceedings were instituted by the applicant, who claimed that the respondent imitated their packaging, thereby breaching the provisions of s 194(1) of the IPA. In this case, however, the applicant also further submitted that the respondent's conduct constituted an act of unlawful competition at common law, contending that passing-off also took place. The matter was, therefore, adjudicated on that basis and not necessarily on the breach of s194 (1). Passing off is discussed below at 5.4.

f) Certification and collective marks in the IPA

The Act stipulates that in relation to certification and collective marks, the provisions under Chapter 4 of the Act relating to trademarks are also applicable unless the provision specifically only refers to a trademark.[622] Additionally, subject to sections 187 (2) and (3) as well as sections 188, 189, and 190, the provisions of Chapter 4 shall be considered as though such provisions were referring to a certification or collective mark.[623] This can be construed to mean that all these sections also relate to collective and certification marks: s138 on third-party rights, s139 on who may apply for registration, s182(c) on acts of infringement, s183 (1) (b) on interdict, s145 examination of form and substance, s146 (4) on acceptance or refusal of application, s195 on indication of source and origin, s204 on evidence of ownership, s177 on removal when a mark becomes generic.

The same section 187 additionally provides that '[g]eographical names or other indications of geographical origin may be registered as certification or collective trade marks'. A further relevant provision pertains to the s188 rules governing how collective and certification marks are to be used must be applied. These rules are set out as follows:

> (1) An application for the registration of a certification trade mark must designate the mark as a certification mark and must be accompanied by a statement by the applicant containing the information as prescribed and by a copy of the rules governing the use of the certification mark.

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621 (HC-MD-CIV-MOT-GEN-2018/00398) [2020] NAHCMD 100 (16 March 2020)

622 S187 (1) of the Industrial Property Act of 2012.

623 S187 (1) of the Industrial Property Act of 2012.

(2) An application for the registration of a collective trade mark must designate the mark as a collective mark and must be accompanied by a copy of the rules governing the use of the collective trade mark and containing the information as prescribed.

(3) For the purposes of subsections (1) and (2), "rules" means the rules made by the person under whose control the certification or collective mark may be used.

(4) The registered owner of a certification mark or a collective mark must notify the Registrar, in writing and in the manner prescribed, of any changes made in respect of the rules referred to in subsection (3).

When the Registrar determines that s188 rules set out above have been met, the application for registration must be accepted as provided for in s146[624] and handled in accordance with that

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[624] Section 146 of the Industrial Property Act of 2012 provides that:

(1) The Registrar must consider the application, and he or she may -

1. (a) if he or she is satisfied that the application complies with the requirements of section 145, accept the application;
2. (b) if he or she deems it appropriate, accept the application subject to such amendments, modifications, conditions or limitations as he or she may deem fit, or
3. (c) if he or she is satisfied that the application does not comply with the requirements of section 145, refuse the application.

(2) The Registrar must advise the applicant for registration in writing within a reasonable period from the date of application of his or her decision in terms of subsection (1), and in the case of a decision in terms of subsection (1)(c) must, on application by the applicant within the prescribed period and in the prescribed manner, State in writing the grounds for the decision.

(3) Where the Registrar has advised the applicant of a decision in terms of subsection (1)(c), and unless within the prescribed period from the date of the advice or from the date on which grounds for the decision were furnished in terms of subsection (2), whichever is the later date, the applicant submits arguments, in writing, or applies for a hearing or an extension of time, the application is deemed to have been abandoned.

(4) In the case of a decision in terms of subsection (1)(b), the Registrar, if he or she finds that the mark contains matter which is not capable of distinguishing within the meaning of section 134, may require as a condition of the mark being registered as contemplated in section 136, that the applicant –

(a) disclaims any right to the exclusive use of such matter or

(b) makes such other disclaimer or endorsement as the Registrar deems necessary for the purpose of defining the rights under the registration,

but such disclaimer or endorsement does not affect any other rights of the applicant in respect of the mark except as arising out of the registration.

(5) If the Registrar accepts an application subject to any amendments, modifications, conditions or limitations, or any disclaimer or endorsement as contemplated in subsection (1)(b) or in subsection (4) and –

1. (a) the applicant does not accept such amendments, modifications, conditions or limitations, or such disclaimer or endorsement, he or she may, within the prescribed period from the date of the advice of conditional acceptance, submit arguments, in the prescribed manner, apply for a hearing or for an extension of time, failing which the application is deemed to have been abandoned;

Section. If a certification or collective mark is not used or becomes generic, it may be removed from the register.[625] According to s179, the collective or certification mark may also be declared invalid,[626] and once this is done, if there are sufficient grounds to contemplate an earlier date, the removal shall be deemed to be effective as of the application date for the order or an earlier date.[627] In terms of Section (6)1, a specific section of the register of trade marks is required for the registration of certification trade marks and collective trade marks.

g) False Indications of source or origin

The Act also prohibits the sale or distribution of goods in Namibia which bear false indications of source under s195.[628] Such an act is considered an offence, and if found to have acted recklessly

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2. (b) the applicant accepts such amendments, modifications, conditions or limitations, or such disclaimer or endorsement, he or she must within the prescribed period so notify the Registrar, in the prescribed manner, whereupon the application is deemed to have been accepted; or
3. (c) the applicant accepts such amendments, modifications, conditions limitations, or such disclaimer or endorsement but fails to notify the Registrar within the prescribed period and in the prescribed manner, the application is deemed to have been abandoned.

(6) In the case of a decision in terms of subsection (1)(a) or a decision in terms of subsection (1)(b) which is accepted by the applicant, the Registrar must, within such time and in a manner prescribed, publish that application in the bulletin.

625 See s176 and 177 of the Industrial Property Act of 2012

626 S 179(1) of the Industrial Property Act of 2012 provides that:

Any interested person may apply to the Tribunal for the invalidation of the registration of a trade mark on the ground that the requirements of sections 131, 137 or 138 have not been complied with or are no longer complied with.

(2) An application under subsection (1) must be made in the prescribed manner and be accompanied by a statement setting the ground or grounds on which the applicant relies for the registration to be invalidated.

(3) An application for the invalidation of a registration of a trade mark, together with the statement setting out the ground or grounds on which the applicant relies, must be served on the owner of the trade mark in the prescribed manner.

(4) The owner has the right to submit, in the prescribed manner, to the Tribunal his or her reply to the application for the invalidation of the registration.

(5) The parties must follow the procedure and submit such evidence as prescribed, and the Tribunal must, taking into account the requirements of section 147, decide the matter and determine the relief, if any, to be granted.

(6) If the Tribunal is satisfied that an amendment of the trade mark registration will remove the ground of invalidity, it may uphold the trade mark registration subject to such amendment and subject to such terms or conditions as it deems fit.

(7) The final decision of the Tribunal must be notified to the Registrar, who must record it and, as soon as possible, publish it in the bulletin.

627 S180 of the Industrial Property Act of 2012.

628 This remedy is the national provision for the obligation undertaken by Namibia in Articles 9 to 10 of the Paris Convention for the Protection of Industrial Property.

or negligently in that regard, such person can be held liable 'to a fine not exceeding N$10 000 or to imprisonment for a period not exceeding 24 months or to both the fine and imprisonment'.[629]

Furthermore, trademarks that qualify for protection as well-known marks under the Paris Convention are given protection.; provided the mark is that of a person who is a national of a Paris Convention country, or they are domiciled in a Paris Convention country, or they have a 'real and effective industrial or commercial establishment' in a Paris Convention Country.[630] The person need not carry on business in Namibia nor have goodwill, but the assessment of whether a trademark

> 'is well-known in Namibia, due regard must be given to the knowledge of the trade mark in the relevant sector of the public of Namibia, including knowledge which has been obtained as a result of the promotion of the trade mark'. [631]

h) International applications

Where the Registrar receives a trademark registration application through ARIPO pursuant to the Banjul Protocol, the application must be transmitted promptly in accordance with the Banjul Protocol, and where Namibia has been designated for registration, the Registrar shall examine the application in accordance with the Act's provisions.[632]In the likeness of the procedure related to ARIPO trademarks, where Namibia has been designated for registration, the Registrar 'must proceed in accordance with section 145 as if the relevant mark is the subject of an application under this Act'. [633]

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[629] S195(3) of the Industrial Property Act of 2012.
[630] S196 (1) of the Industrial Property Act of 2012.
[631] S196(2) of the Industrial Property Act of 2012.
[632] S156(2) of the Industrial Property Act of 2012 provides that:

> (b) if the Registrar finds that the mark is not registrable as a trade mark in terms of this Act, communicate to the office of ARIPO within 12 months from the date on which the Office was notified of the designation that the registration of the mark will have no effect in Namibia;
> (c) if the Registrar finds that the mark is registrable as a trade mark in terms of this Act, notify the office of ARIPO within 12 months from the date on which the Office was notified of the designation that the mark has no effect in Namibia until such time as any possible opposition to the registration in accordance with this Act has been resolved, and then the provisions of subsections (3) and (4) apply.

[633] S200 of the Industrial Property Act of 2012.

i) Geographical Indications and the IPA

Section 187(2) provides that '[g]eographical names or other indications of geographical origin may be registered as certification or collective trade marks'. The provisions in the Act relating to collective and certification marks were considered above. When it comes to GIs, therefore, those are the sections that are applicable.

In addition to s187 above, the law stipulates that a certification trade mark may denote the country of origin of goods or services.[634] Moreover, the Act stipulates that a mark cannot be legitimately registered if it is intrinsically deceptive or likely to mislead the general public or other traders regarding the geographical origin of the goods or services.[635] This refers to marks that are solely signs or indications that assist in identifying the geographic source of the good.[636] The Act further restricts the ability to bring legal action against the legitimate use of a mark that identifies the place of origin of the products and services.[637] Section 137 set out above can also be considered as relating to GIs as it makes specific reference to them as an objective ground within which to prohibit the registration of a mark, i.e. if it consists exclusively of a sign or indication which serves, in trade, to designate the *geographical origin*, of the goods or rendering of the services.

In conclusion of this Section, there are provisions within the Industrial Property Act which specifically mention GIs. However, the protection of GIs is clearly provided for through the provisions concerning certification and collective marks. The manner and form of protection, as well as the rights conferred, are similar to those granted for trademarks generally.

Therefore, it is understood that in addition to meeting the condition of distinctiveness, a GI must also conform with the definition of a 'mark' set out above, and the application for registration must be made out in the manner as prescribed in the Act, in order to be registered as a collective or certification mark. Once the formal and substantive requirements have been met, the GI mark can, therefore, be registered, and an exclusive right is conferred, thereby enabling the holder thereof to institute infringement proceedings when infringement occurs. The holder is then entitled to seek the remedies as set out in the Act.

There are, furthermore, some other legislative texts that are not really IP specific, and the GI protection therein can only be read into the relevant sections; these are the Competition Act 2

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634 Section 131 of the Industrial Property Act of 2012.
635 Section 137 (c) Industrial Property Act of 2012.
636 Section 137 (d) Industrial Property Act of 2012.
637 Section 158 (1) (b) Industrial Property Act of 2012.

of 2003, which was promulgated to safeguard and promote competition in the Namibian market; [638] the Companies Act 28 of 2004, which contains some provisions in the Act that may be interpreted to include GI rights.[639] There is also the Criminal Procedure Act 25 of 2004, which provided, concerning rules of evidence, that in a charge in which any trademark or forged mark is mentioned, it is not necessary to provide a copy and stating that the trademark or forged mark is a trademark or forged mark is sufficient.[640]

Whether these provisions and their implementation are sufficient to adequately protect GIs or whether a designated GI law would be adequate will be addressed after undertaking the comparative assessment of the approaches of selected jurisdictions in Chapter 6 below.

5.4. Common Law and IP

Under Namibian law, the protection of intellectual property is available under common law for registered and unregistered trademarks, as well as unlawful competition.[641] The common-law delictual remedy of passing off comes into play in this context. A discussion on passing off is relevant because the majority of case law that has been adjudicated in relation to trademark infringement in Namibia was based on this action. Passing off is frequently viewed as the foundation for defence against dishonest commercial rivals in nations that adhere to the common

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[638] Section 30(1) provides that:

> the Competition Commission may, upon application, and on such conditions as the Commission may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or *any other intellectual property rights* [emphasis added].

The Section above can be interpreted to include, within the jurisdiction of the Competition Commission, any right or interest acquired or protected in terms of any law relating to GIs, which constitute an IPR.

[639] The first Section in the Act to be considered is Schedule 2 on the powers that may be included in the memorandum and articles of the company This text provides a list of IPRs that a company can, in terms of the memorandum and articles of the company, have powers to 'acquire, protect, prolong and renew any… other rights and to deal with and alienate them'. Although GIs have not been specified in this Section, they can be interpreted to be included under 'other rights'. Schedule 4(r) of the Act on Requirements for Annual Financial Statements, Interim Reports and Provisional Annual Financial Statements provides for a definition of 'intangible assets'. This definition of intangible assets also mentions some IPRs, and because GIs are not excluded, they can safely be interpreted to be included in that definition. This, therefore, means that companies in Namibia are not restricted from acquiring GI rights.

[640] Criminal Procedure Act 25 of 2004, Section 102 (11) There are no specific provisions relating to GIs that could be found in the Act; however, Section 102 on trademark forgery can be interpreted to include GIs, and should that mark indicating origin, therefore, be forged, the Section provides that a provision copy is not necessary. This is in consideration of the fact that indications of origin in Namibia may find protection in Namibia as collective or certification trademarks. The relevant legal provisions relating to collective or certification marks will be looked at above under the review of the Industrial Property Act of 2012.

[641] A van der Merwe et al op cit note 20 at 56.

law system.[642] The passing-off action can be thought of as a legal remedy for situations where one person's products or services are misrepresented as belonging to another.[643] Typically, in order to successfully file a passing off claim to stop the unauthorised use of a geographical sign, the plaintiff must demonstrate that the goods he supplies, on which the geographical indication is regularly used, have a goodwill or reputation attached to them,[644] that the defendant is misrepresenting the plaintiff's goods to the public, and that the plaintiff will suffer harm as a result of the defendant's misrepresentation.[645]

Case law further developed the concept of passing off in Namibia. The case of *Sparletta (Pty) Ltd v Namibia Breweries Ltd*[646] considered the issue of passing-off, and Hannah AJ stated:[647]

> What has to be proved in a passing-off action was, if I may respectfully say so, succinctly put by Nicholas J in *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd*[648] in the following passages: 'In the case of indirect representation, the plaintiff must prove in the first instance that the defendant has used or is using in connection with his own goods, a name, mark, sign or get up which has become distinctive.'; 'It is not necessary that the get-up as a whole shall be distinctive, for a part of the get-up may be shown to be so identified with the plaintiff's goods that its use for similar goods is calculated to pass them off as his. The plaintiff must prove that the defendant's use of the feature concerned was likely or calculated, to deceive, and thus cause confusion and injury, actual or probable, to the goodwill of the plaintiff's business, as, for example by depriving him of the profit he might have had by selling the goods which, *ex hypothesi*, the purchaser intended to buy'.

642 WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 6.

643 Ibid at 6.

644 For a geographical indicator to be protectable, it must have gained a certain reputation or goodwill. In other words, potential purchasers must be able to connect the geographic signal to the nation of origin of the goods. To deceive consumers about the true nation of origin of the goods or services, the geographical indicator must also be used on products or services that don't come from the designated geographical area. Some national laws require documentation of losses or the potential for harm that such fraudulent activities might create. See WIPO Intellectual Property Handbook (2008) 124.

645 WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002) 6.

646 1991 NR 384.

647 1991 NR 384 at 398.

648 1977 (4) SA 434 (W).

The Namibian Supreme Court also dealt with the issue of passing off in the case of the *Mega Power Centre CC t/a Talisman Plant and Tool Hire v Talisman Franchise Operations (Pty)* Ltd[649]. In its judgement, the Court upheld the Common law principles. [650] In so doing, it reaffirmed the status of the Common law in Namibian law as set out in Article 66(1) of the Namibian Constitution. This affirmation is also evidenced by the subsequent High Court judgment of *Southern Africa v Sun Square Hotel (Pty) Ltd*[651] in which the aspect of passing off was also considered; par 24 of the judgement cited the definition of passing off as set out in *Brian Boswell Circus (Pty) Ltd, and Another v Boswell-Wilkie Circus (Pty) Ltd* quoted above. The High Court furthermore confirmed the approval of the definition in *Mega Power Centre CC t/a Talisman Plant and Tool Hire v Talisman Franchise Operations (Pty) Ltd and Others* and *Gonschorek & Others v Asmus & Anothe*r.[652]

In the *Namib Mills (Pty) Limited v Bokomo Foods Namibia (Pty)* referred to above,[653] the Court adopted the interpretation of the provisions of s 194(1) of the Industrial Property Act[654] in accordance with the European Court of Justice within the *Gillette Company and Gillette Group Finland Oy v LA-Laboratories Ltd Oy* case[655] where a case for infringement was brought against *LA-Laboratories*. In this case, the ECJ stated that:[656]

> the condition of honest use constitutes, in substance, the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner. Furthermore, the use of the trade mark will not be in accordance with honest practice in industrial or commercial matters when it is done in such a manner that it may give the impression that there is a commercial connection between the reseller and the trademark owner; that the use will also not be in accordance with honest practice if such use affects the value of the trademark by taking unfair advantage of its distinctive character or repute. In addition, the Court pointed

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649 [2013] NAHCMD 156 (07 June 2013).

650 Par 19 provides: Once a passing off has been established, damages are presumed. The applicant need not wait to show that damage has resulted. He can bring his action as soon as he can prove the passing off because it is one of the class of cases in which the law presumes that the plaintiff has suffered damages.

651 [2018] NAHCMD 105 (23 April 2018).

652 2008 (1) NR 262 (SC).

653 See *e) Infringement and remedies.*

654 This Section provides that "any act of competition contrary to honest practices in industrial or commercial a matter is unlawful.

655 Par 77. Also, see *The Gillette Company and Gillette Group Finland Oy v LA-Laboratories Ltd Oy* C-C-228/03) EU:C:2005:177 (17 March 2005.

656 Par 64.

> out that the use of the trademark will not be in accordance with honest practice if it discredits or denigrates the mark. Finally, where the third party presents its product as an imitation or replica of the product bearing the trademark of which it is not the owner, such use does not comply with honest practice.

The Court, in this matter, made reference to the definition by the Supreme Court in the *Mega Power Centre CC t/a Talisman Plant and Tool Hire v Talisman Franchise Operations (Pty)* Ltd matter, on the wrong known as passing-off at common law.[657] After due consideration of the evidence presented by the respective parties, the Court concluded that:

> the applicant has failed to prove on a balance of probabilities likelihood that a substantial number of purchasers of its products are likely to be deceived or confused into believing that the respondent's flour products are the products of the applicant or are in some way or another connected to or associated with the applicant's products. It thus follows that the applicant's claim based on the wrong Passing-off also fails.

In an unopposed application based on passing off, the case *Namchar Proprietary Limited v Registrar of the Business and Intellectual Property Authority*[658] considered the issue of passing off as dealt with in the *Gonschorek v Asmus and Another*.[659] The view of the Court was that 'the second respondent's name – NAM CHAR COAL is confusingly similar to that of the applicant – NAMCHAR' and furthermore that 'there is real likelihood of deception or confusion to an average and informed purchaser of the second respondent's products that its products are the products of the applicant which amounts to passing off at common law'.

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[657] Herein, the Court also, in dealing with passing off, quoted from Corbett, JA, in the matter of *Brian Boswell Circus (Pty) Ltd and Another v Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (AD) at 478 F-I:

> 'The wrong known as passing off is constituted by a representation, express or implied, by one person that his business or merchandise, or both, are, or are connected with those of another…….Where they are implied, such representations (concerning the wrongdoer's business) are usually made by the wrongdoer adopting a name for his business which resembles that of the aggrieved party's business, and the test is whether in all the circumstances the resemblance is such that there is a reasonable likelihood that ordinary members of the public, or a substantial section thereof, may be confused or deceived into believing that the business of the alleged wrongdoer is that of the aggrieved party or is connected therewith. Whether there is such a reasonable likelihood of confusion is a question of fact to be determined in the light of the particular circumstances of each case'.

[658] (HC-MD-CIV-MOT-REV-2020/00116) [2020] NAHCMD 370 (21 August 2020).

[659] *Gonschorek v Asmus and Another* 2008 (1) NR 262 (SC) at para 52.

The owner of a GI, in addition to the statutory remedies set out in the Industrial Property Act, may therefore, also seek relief through the common law remedy of passing off. This remedy is available for both registered and unregistered marks.

5.5. Intellectual Property Audit in Namibia: Key Findings

In 2015, Namibia started the process of IP Policy formulation[660] with the assistance of WIPO. This ended with the production of a report titled 'Intellectual Property Audit Report of Namibia', which was delivered in January 2016.[661] The National Intellectual Property Policy and Strategy (NIPPS) for the years 2019 to 2024 was created as a result of this report. This NIPPS is further elaborated below at 5.6.

The report starts off with an acknowledgement of Namibia's developmental vision and ancillary policies and plans. It further highlights the nation's NDPs, which have been discussed in Chapter 3 above. The report notes that IP could be used as an effective tool in supporting the various developmental policies; however, there was little evidence of the integration of IP in addressing policy issues, thereby not making meaningful use of the IP tool in meeting intended development objectives.[662] This is the central argument of this thesis in relation to GIs.

The second part of the audit report on findings and recommendations is particularly noteworthy. Broadly, the Audit can be considered a significant catalyst for IP reform in Namibia that highlights important shortcomings with regard to the laws, primarily that they were outdated and new laws needed to be enacted when the Audit was concluded. The Audit highlights that although Namibia has articulated its development objectives, these needed to be aligned with and linked to IP protection so that this area of law can be effectively used as a tool to meet the country's development objectives. Below is a summary of the findings of the Audit relevant to the discussion at hand.[663]

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660 Ncube asserts that It is essential that the policy design be sound in order to develop an adequately balanced IP regimes that best serve the public interest. One of the most important things that IP policymakers should keep in mind is that an IP policy and legislative framework should be created with reference to the socio-economic status and goals of the relevant country. It is widely acknowledged that legal development is crucial to economic development and that, among other things, legal and economic development are "constitutive aspects of development as a whole'. See C B Ncube (2013) 'The Development of Intellectual Property Policies in Africa- Some Key Considerations and a Research Agenda' (2013) 1 *Intellectual Property Rights* 1-5, at 1.

661 Mengistie et al op cit note 592 at 10.

662 Mengistie et al op cit note 592 at 14.

663 Mengistie et al op cit note 592 at 11- 40.

5.5.1 Domestic Policy Framework

This Part of the Audit concerning Namibia's IP policy framework looked at the development of policies and strategies, national IP Policy coordination and Institutional IP policy and management. The Audit found that Namibia has clearly set out its development vision and elaborated the national and sectoral development policies, strategies, and plans.[664] These are aimed at enhancing socio-economic development, poverty reduction and improvement of standards of living of its people. [665] The Audit furthermore found that the objectives and strategies of the policies and strategies currently in place can be effectively supported by IP.[666] The Audit, however, noted that there is little effort made to integrate IP for the purpose of addressing issues and thereby ensuring that IP is used as a tool for meeting these developmental objectives. The study also made numerous recommendations for the consideration of the Government.[667]

5.5.2 The IP legal framework

The Audit considered the intellectual property and related laws that are generally and specifically related to IP and the membership of Namibia to international IP treaties. It was reported that the existing legal framework was inadequate and suffered from a number of shortcomings.[668] Some of the shortcomings which were listed then have gone with the implementation of the Industrial Property Act of 2012 in 2016, such as the absence of protection for collective marks and well-known marks. The protection provided for these is discussed above in 5.3.1. It was, therefore,

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664 Mengistie et al op cit note 592 at 12.
665 Mengistie et al op cit note 592 at 12.
666 Mengistie et al op cit note 592 at 14.
667 Mengistie et al op cit note 592 at 23. The recommendations made are that the Government may: a. Articulate a national IP policy involving key stakeholders both from the public and private sector, taking into account existing and draft national and sectoral development policies as well as international commitments based on international best practices, etc. b. Ensure integration of IP into the national and sectoral development policies and strategies when revising existing or issuing new policies and strategies including the draft Policies and Strategies such as the Arts and Culture Policy; c. Set up policy coordination mechanisms to ensure policy coherence and greater coordination amongst key public and private sector bodies; d. Support the further development of draft institutional IP policies and encourage the development of Institutional IP policies in relevant public higher learning and R&D institutions that will complement the national IP policy and strategy goals and objectives and meet the needs of the institutions, researchers and the general public; e. Strengthen the technology transfer office of the Polytechnic of Namibia and support the establishment of the IP department under UNAM and NCSRT to cater for the needs of public research and development institutions and academic institutions; and f. Build IP management capacity by training assigned personnel by equipping the IP management units or technology transfer office with the requisite facility and operational manuals such as draft license guidelines and agreements.
668 Mengistie et al op cit note 592 at 18-20.

reported that there was a need to enact new laws.[669] In order for IP to be used as a development tool, there also needs to be, according to the Audit, greater coordination amongst all key Government and private bodies within the processes of development and implementation of policies, strategies and laws.[670] Several recommendations were made to the Government to consider employing, with the assistance of WIPO and key development partners.

These recommendations were made for the Government to act as follows: a) Expedite the entry into force of the Industrial Property Act b) Finalise and publish the regulations for the implementation of the Industrial Property Act; c) Amend the existing Copyright and neighbouring protection Act taking advantage of the available policy space in order to address their shortcomings, meet the need of stakeholders and the requirements of regional and international IP agreements to which the country is a party; d) Revise the existing Customs and Excise laws in compliance with the requirements of the TRIPS agreement; e) Review and enact the draft law on access to genetic resources and associated traditional knowledge to complement the measure taken in acceding to the Nagoya protocol ; f) Enact new laws that will provide for the protection and exploitation of new plant varieties, geographical indications, layout designs of integrated circuits, undisclosed information and facilitate the implementation of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore in line with the needs of stakeholders and the country as well as the requirements of international agreements to which the country is a party or will be a party taking maximum advantage of the flexibilities and policy spaces; and g) Undertake a study and accede to relevant international IP treaties to which Namibia is signatory. [671]

5.5.3 IP awareness and use

The Audit acknowledged that some individuals, academic institutions and business establishments are well aware of IP and even protect their IP assets using copyrights, trademarks and patent laws of the country [672], awareness by IP holders or potential users thereof is still, by and largely

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669 Mengistie et al op cit note 592 at 20.

670 Mengistie et al op cit note 592 at 14.

671 Namely, the Arusha Protocol for the protection of new Plant Varieties, WIPO Phonogram and Performers Treaty (WPPT), WIPO Copyright Treaty (WCT), Trademark law treaty, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh VIP Treaty) and Beijing Treaty on Audiovisual Performances and agreements that it is signatory to but may complement new laws that the country may enact to meet the needs of stakeholders or the country.

672 Mengistie et al op cit note 592 at 31.

inadequate.[673] The committee highlighted further challenges that needed to be addressed, and recommendations were offered to address these challenges.[674]

5.6. The National Intellectual Property Policy and Strategy (NIPPS) (2019 to 2024)

The NIPPS was developed after the 'Intellectual Property Audit Report of Namibia' was finalised and reported on in 2016. The NIPPS aims to establish a framework for Namibia that is conducive to innovation and competitiveness through the generation of IP, its protection and commercialisation.[675] The Policy sets out parameters relating to utilising IP as a tool for development. In summary, the Policy provides for the following:[676]

1. The maintenance of a balance between IPR and safeguarding against market abuse;
2. The promotion and rewarding of innovation while ensuring access to affordable medicine of quality;
3. The creation of incentives for industrial innovation while availing space for ongoing progress for research and development;
4. Educating, empowering and coordinating effective and balanced enforcement strategies;
5. Protecting of all IPR and safeguarding public interest;
6. The upholding and promotion of the value of knowledge and the transfer of technology while ensuring the protection of IP, investor attraction and promotion of local innovation.

The NIPPS is divided into four parts, which are summarised below:

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673 Mengistie et al op cit note 592 at 31.

674 Mengistie et al op cit note 592 at 32. The Government may consider:
The Government may consider, with the assistance of WIPO and other development partners, the following: a) Design and implement target oriented, coordinated and continuous IP awareness programs involving beneficiaries or potential beneficiaries of the intellectual property system; b) Allot adequate funds to BIPA to effectively discharge its responsibilities related to the creation and strengthening of awareness of IP; c) Strengthen the offering of IP to under graduate students of the law faculty of UNAM by making it a mandatory course and supporting the development and availability of IP teaching materials; d) Support the incorporation of IP into the post graduate program of the faculty of law of UNAM and the integration of IP into the curriculum of primary and secondary schools, TVTCs and HLIs; e) Train staff that is or will be engaged in offering of IP courses to students of HLIs at a post graduate level in the field of IP and make available relevant materials such as WIPO IP teaching manual, international IP treaties and other materials that may help the teaching and learning process; f) Provide IP promotional materials such as the WIPO comic books and support their translation into local languages; g) Train journalists and encourage the use of print and electronic media in sensitising potential right holders, various stakeholders and the general public on the importance of intellectual property; h) Establish an IP help desk in the Namibian Chamber of Commerce and Industry (NCCI) and train/assign staff; and i) Organise colloquiums for parliamentarians and top officials of Government.

675 GRN *National Intellectual Property Policy Strategy (NIPPS)* (2019) 8.

676 Ibid at 8.

Part A: Introduction[677], Background, Rationale, Alignment, and Policy Guiding Principles

This Part of the NIPPS confirms that the objectives and strategies of the NDPs can be effectively supported with IP. It further provides for the acknowledgement of the Government of the potential effectiveness of IP as a tool for development, provided there is the formulation of clear policy guidance. The NIPPS is the framework that will be used to facilitate the integration of IP into the development Plans of the country. Crucially, this Part of the NIPPS also confirms the fact that there is the absence of a national position on the protection of GIs, along with new plant varieties.[678]

However, this overlooks the protection made for GI, which is available under collective and certification marks provisions in terms of the Industrial Property Act of 2012. This Part of the NIPPS highlights the issues and challenges that were brought to the fore as a result of the IP audit and aligns the NIPPS to the Constitution, Vision 2030, the NDPs, the HPP[679], as well as regional and international instruments ratified by Namibia.[680] One of the guiding principles of the NIPPS is the provision for the enactment of new laws with national development plans' aims and goals in mind.[681]

Part B: Policy Direction[682] & Policy Objections and Strategies

This Section sets out the Vision, Mission and Goals of the Policy, as well as the 14 overall objectives, which are outlined below under Part C in connection with concrete implementation plans. The Vision of the NIPPS[683] is to enable an IP system that is utilised in an effective manner

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677 GRN *National Intellectual Property Policy Strategy (NIPPS)* (2019) 11 -20.

678 Ibid at 14.

679 Pillars 2 and 4 which are discussed in this thesis.

680 GRN *National Intellectual Property Policy Strategy (NIPPS)* (2019) 19.

681 Ibid at 20.

682 Ibid at 22-31.

683 The mission is set out under 6.2 as:

> To create a balanced and effective intellectual property system which values and protects all creativity and innovation by:
> - Fostering an enabling environment for the generation, commercialisation and utilisation of creative, cultural, and inventive assets;
> - Promoting competitiveness, fair trade and technology transfer;
> - Strengthening IP education and enforcement;
> - Safeguarding public interest; and
> - Promoting access to education and information for all persons.

In addition to these, the goals have been formulated as follows under 6.3: The main policy goals are to:

to contribute to the realisation of Vision 2030. Under the objective of 'adequate, effective, dynamic and comprehensive IP and related laws', one of the strategies listed is to 'and develop Namibia's position on protection of geographical indications and plant varieties'.[684]

Part C: Implementation Framework[685]

This Part of the NIPPS sets out what will be required for the implementation of the Policy. It acknowledges that a number of public and private bodies will need to be involved and participate in its implementation.[686]A key institution that has been identified is the Business and Intellectual Property Authority (BIPA).[687] This is the only part of the document that does not make mention of GIs.

Part D: Conclusion[688]

In its conclusion, the NIPPS acknowledged that if effectively implemented, it can support the Government in the achievement of its policies and strategies as well as ensure the effective use of IP.[689]

(a) Facilitate the integration of IP into national development plans and sectoral policies to ensure its contribution to the realisation of national and sectoral development goals;
(b) Foster the use of intellectual property as a tool for socio-economic development, strengthen & maximise the potential areas where the country has comparative and competitive advantage;
(c) Stimulate and foster the generation, protection, management and commercialisation of IP assets in Namibia;
(d) Facilitate transfer and acquisition of foreign technology;
(e) Provide for the development and strengthening of balanced and accessible IP infrastructure including but not limited to IP protection, administration and balanced enforcement legal and institutional framework;
(f) Provide for effective and adequate exceptions, limitations and flexibilities for purposes of safeguarding public interests, promotion of access to medicine, education and information for all Namibians;
(g) Build and strengthen capacity including human resources needed for effective protection, management and enforcement of intellectual property and the use of intellectual property as a tool for development;
(h) Promote greater awareness of intellectual property among potential users, government entities, the private sector and the general public and improve the use of IP in meeting technological, social, cultural and economic needs; and
(i) Strengthen linkages between the national, regional and international IP systems and maximise benefits from the opportunities offered.

[684] GRN *National Intellectual Property Policy Strategy (NIPPS)* (2019) 24.
[685] Ibid at 33-36.
[686] Ibid at 33.
[687] Ibid at 33.
[688] Ibid at 38.
[689] Ibid at 38.

The NIPPS ends with an outline of the implementation plan for the five-year period between 2019 and 2024.[690] To this end, there are 14 overall objectives, which each have enabling objectives, as well as short to medium-term timelines leading up to the year 2024, responsible bodies, as well as key performance indicators.

When it comes to GI rights and the role they can play in advancing Namibia's development objectives, the NIPPS lays the necessary foundation. Of the 14 objectives outlined in the Policy, the ones deemed relevant for the discussion at hand are Objectives 1 and 7. Objective 1[691] can be achieved in part by the intentional promotion and protection of GIs. So far, the developmental plans assessed in Chapter 3 did not integrate GIs into national development plans and sectoral development policies. Therefore, it is hoped that the inclusion of this objective in the NIPPS will result in the integration of IPR and, most relevant to the discussion at hand, GIs into any new sectoral development policies that may be developed so GIs can be used to support developmental goals. Objective 7[692] can also be beneficial for GIs as it can serve as an encouragement to identify as well as develop Namibian GI capacity goods.

5.7. Bilateral Agreements

Namibia, along with South Africa, Botswana, Eswatini, Lesotho, and Mozambique, signed a trade agreement, the SADC-EU Economic Partnership Agreement (EPA), effective in October 2016.[693] The Agreement covers trade in goods and, most relevant to the discussion at hand, rules of origin and guarantees free access of SADC countries to the EU.[694] The SADC EPA is a development-oriented trade agreement that grants asymmetric access to partners of the SADC APE group.[695] The Agreement recognises the 'special circumstances of Namibia, together with Botswana, Lesotho and Swaziland and the effects of liberalisation'[696], and covers several areas. Article 16 of

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690 Ibid at 39-49.

691 Objective 1 aims to integrate IP into national development plans and sectoral development policies to ensure meaningful contribution of the IP system to support development goals by 2024.

692 Objective 7 aims to encourage and support the generation of IP assets by 2024.

693 South African Rooibos Council 'Rooibos continues to enjoy GI protection post-Brexit' (2020) *Agribusiness update* 13.

694 Article 24(1) of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States.

695 European Commission Available at https://trade.ec.europa.eu/access-to-markets/en/content/epa-sadc-southern-african-development-community.

696 Preamble of the Economic Partnership Agreement between the European Union and its Member States, of the one Part, and the SADC EPA States.

the EPA relates to the cooperation of IPRs, leaving room for future negotiations on the protection of IPRs.[697] This Article 16 (3) also indicates a decision on the part of member states to cooperate on 'matters related to Geographical Indications ('GIs') in line with the provisions of Section 3 (Articles 22 to 24) of the TRIPS Agreement', by this, the significance of GIs for 'sustainable agriculture and rural development' is highlighted. The EPA includes a bilateral protocol between the EU and South Africa on GIs. Namibia does not have the same agreement in place. Perhaps Namibia and the EU can consider commencing discussions on GIs, akin to Protocol 3 applicable to the EU and SA. Namibia can also consider entering into bilateral agreements with other states on the protection of GIs and allowing for trade in GI capacity goods between the parties to the agreement.

5.8. Conclusion

Namibian IP law is presently at a stage where it is receiving much-needed attention. The Industrial Property Act of 2012 came into force in 2018, providing much-needed updates to several IP regimes, including providing GI protection through collective or certification marks. A further protection mechanism in place is the common law rules of passing off, which can also be used to protect GIs in Namibia.

The IP audit, demonstrating shortcomings in the IP policy and legal framework for Namibia, served as a catalyst for the articulation of a National IP Policy and Strategy. This strategy aims to bridge the gap between law and development policy by linking its well-articulated development objectives to its IPR protection frameworks in order to use them as a tool to meet the country's development objectives. The country can, therefore, be said to have a sound legal and policy framework aimed at IP and GI protection linked to developmental objectives. This can be strengthened by negotiating a GI protocol under the EPA akin to Protocol 3 between SA and the EU. Namibia can also consider signing EPAs with other countries with which it trades or intends to trade with.

Whether the legal provisions discussed in this Chapter are sufficient to adequately protect GIs or whether a designated GI law would be better suited will be addressed after undertaking the comparative assessment of the approaches of selected jurisdictions in Chapter 6 below. The

[697] Article 16 (6) of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States.

succeeding Chapter will, therefore, look at how the jurisdictions of South Africa and India have made provision for GI protection.

CHAPTER 6: COMPARISON OF GI PROTECTION IN THE JURISDICTIONS OF SOUTH AFRICA AND INDIA

6.1. Introduction

This Chapter aims to address research questions 1.3.6 (do the legal frameworks on GIs in South Africa and India differ from Namibia?) and 1.3.7 (how should a GI framework in Namibia look like). The Chapter will look at how these two countries have made provision for GI protection within their jurisdictions. In the endeavour to improve a legal system, it is only prudent to consider how other states are regulating similar issues. This is because any form of scholarly research and writing, regardless of the discipline, involves, by implication, some form of comparison.[698] The following two countries have been chosen for comparison: South Africa and India, and the reasons for their being selected are set out above at 1.7. The Chapter will only cover the legal protection of GIs in the identified states and not address developmental aspects and the possible impact of GI protection on the development of these states. As such, the link between this Chapter and the preceding chapters should only be viewed in light of Chapter five, which specifically deals with GI protection in Namibia.

The evaluation of these GI systems will allow for an assessment of whether Namibia should adopt an approach comparable to any of the discussed jurisdictions and thereafter make appropriate recommendations in the final Chapter of this thesis.

6.2. Types of protection available for GIs

The approaches for GI protection are outlined in the summary below.

6.2.1. Labelling laws and listing schemes

These are the laws that focus on business practices, for instance, laws relating to unfair competition, consumer protection or labelling of products. In this case, no individual industrial property right is created, and any protection derived by a GI product is, therefore, indirect.[699] The aim is to prohibit certain acts that may involve unauthorised use. Certain jurisdictions have

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698 van Hoecke, M ‘Methodology of Comparative Legal Research’ in Law and Method 3 available at https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001.pdf.

699 European Commission 'Workshops on Geographical Indications: development and use off specific instruments to market origin-based agricultural products in African-ACP countries’ 8.

destination marketing schemes or publicity schemes which also serve the purpose of placing origin-based goods which have a reputation under categories; these, however, have no protection attached to them. They do have, as a consequence, the protection of reputation.[700]

6.2.2. Trademarks

This type of protection is granted either individually or collectively to the public or a group, as well as protection through certification marks.[701] So, general trademark law provides protection for GIs through collective or certification marks.[702]

The territorial nature of intellectual property rights must be emphasised., such that the protection granted to the owner of a trademark cannot reach further than the boundaries of the territory within which the right is enforceable.[703] Trademarks are, therefore, governed by the territoriality principle, which implies that owners of trademarks each have their own exclusive rights within their country of choice.[704] The governing law of the place where the trademark is exploited and infringed determines the character of the right and the applicable rules.[705] This is recognised both in terms of the Paris Conventions,[706] as well as TRIPS.[707]

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700 Ibid at 8.

701 Ibid at 9.

702 Ibid at 9.

703 Wertheimer, H W 'The Principle of Territoriality in the Trademark Law of the Common Market Countries' (1967) 16 (3) *International and Comparative Law Quarterly* 630–662 at 630. Furthermore, *Hanover Star Milling* 240 U.S. at 425., Justice Holmes emphasised the following: "[a]s the common law of the several states has the same origin for the most part, and as their law concerning trademarks and unfair competition is the same in its general features, it is natural and very generally correct to say that trademarks acknowledge no territorial limits. But it never should be forgotten, and in this case it is important to remember, that when a trademark started in one state in recognised in another it is by the authority of a new sovereignty that gives its sanction to the right. The new sovereignty is not a passive figurehead. It creates the right within its jurisdiction, and what it creates it may condition, as by requiring the mark to be recorded, or it may deny".

704 Wertheimer op cit note 703 at 630.

705 Graeme, W A 'The Territoriality of United States Trademark Law' in Yu, P (ed) *Intellectual Property and Information Wealth* (2007) Prager Press, Westport 6.

706 Wertheimer op cit note 703 at 631. In terms of Article 6*bis* of the Paris Convention, Signatory nations must: "undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith".

707 TRIPS Article 16.3 provides that: "Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use".

6.2.3. Sui Generis protection measures

To be regarded as a *sui generis* system, such a system must identify the GIs and provide specific protection to them.[708] There are, therefore, specific elements that serve as identifiers of a *sui generis* GI system. These include:[709]

a) A list of all GIs protected within the territory;
b) A set process of administering verification of GIs as to origin and thereby qualifying it for GI protection due to the quality, notoriety, or other attribute unique to that region;
c) GI product specifications and requirements that all products comply with the specifications and deviation therefrom only permitted through amendment of administrative processes;
d) Provisions for controlling production;
e) Provision of an enforcement avenue for GIs by appropriate administrative action of authorities within a set structure;
f) Legal provisions laying down who may use the GI and what manner of protection is granted;
g) A rule protecting GI names from becoming generic in the territory of the parties.

For some European products, a *sui generis* approach to the implementation of GI has found popular application,[710] and considering the seemingly successful implementation of the system, it may explain why some other jurisdictions, like India, may follow that approach.

GI systems have the option of requiring registration or not. The owner of the GI is automatically protected by non-registration protection, much like with copyrights, though in Namibia, registration is encouraged for enforcement purposes.[711] The Indian GI Act, to be discussed below, does not make registration of GIs compulsory.[712] Registration, however, does afford better legal protection, especially when it comes to the facilitation of infringement actions, and that may be why some countries require GIs to be registered before protection can be afforded. This type of system makes provision for names which can be registered, those which cannot per se be registered, regulations for the use of generic names and hemograms and further sets out all

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[708] European Commission 'Workshops on Geographical Indications: development and use off specific instruments to market origin-based agricultural products in African-ACP countries' 10.

[709] Ibid at 10.

[710] Oguamanam & Dagne op cit note 230 at 78.

[711] O'Connor, B 'Sui Generis Protection of Geographical Indications' (2004) 9 (n) *Drake Journal of Agricultural Law* 359-388 at 364.

[712] Article 11 of the Geographical Indications of Goods (Registration and Protection) Act of 1994.

the requirements that need to be met from registration to administration authorities and competent bodies to oversee the GIs.[713] *Sui generis* systems allow owners to ban the direct or covert commercial use of registered names, which is one way they offer enhanced protection.[714]

While there are some differences between national and international regulations regarding GI protection, all of the jurisdictions that adopt the sui generis model share certain fundamental elements of what might be called Europe's approach[715] to GI protection.[716] The first is the terroir factor, which is a crucial connection between geographical characteristics and GI protection.[717] The presence of required product standards for GI users is the second crucial component.[718] Absolute security from unauthorised usage is the third key component of the European strategy.[719] It is possible to have a combination of all the systems set out below at 6.3 and 6.4, as they are not mutually exclusive. This, therefore, means that a product can be protected through the *sui generis* system as well as a collective or certification trademark.

Hereunder, the approaches of South Africa and India to GI protection are considered. The approach used in assessing Namibia's GI framework under 5.3.1 will be used in this comparative section.

6.3. South Africa

South Africa follows the second option listed above, i.e. using trademark laws to protect GIs. Of the International Agreements discussed above at 4.2, The Madrid Agreement Concerning the International Registration of Marks, which was signed in 1989, does not include South Africa as a state party. Furthermore, South Africa is not a member of the Nice Convention Concerning the International Classification of Goods and Services for the Registration of Marks of 1979, though adhering to international Classification;[720] the Trademark Law Treaty of 1994, and the 2006

[713] O'Connor op cit note 711 at 366-369.
[714] Adebola (2020) op cit note 250 at 247.
[715] The most frequent and continuous criticism of Europe's GI system from American businesses and governments is that it is protectionist. The argument put up by opponents is that Europe only seeks to safeguard traditional farming interests from the forces of economic growth and global competition. See Watson op cit note 63 at 4.
[716] Watson op cit note 63 at 4
[717] Watson op cit note 63 at 4.
[718] Watson op cit note 63 at 4.
[719] Watson op cit note 63 at 5.
[720] Section 11 of the Trade Marks Act 194 of 1993.

Singapore Treaty on the Law of Trademarks. Also, it not being a party to ARIPO; it is not a state party to the Banjul Protocol on Marks of 1993.

However, South Africa is a signatory to both the WTO TRIPS Agreement and the Paris Convention for the Protection of Industrial Property of 1883. The state offers GI protection through the Trade Marks Act 194 of 1993 and the Common law in accordance with its TRIPS obligations. This can be regarded as a dual system of protection.[721] Additionally, it has been said that the Trade Marks Act is supplemented by the Common Law.[722] It is the Trademarks Act that is most relevant to the discussion at hand. The only GI-specific law in place is one which relates to wines and spirits. In other words, there is no specific GI law currently in place in South Africa in relation to goods that do not fall in the category of wines and spirits. The importance of geographical indications and the international emphasis on their relevance in his state first became clear in February 1935 when South Africa concluded an agreement with France, later known colloquially as the Crayfish Agreement.[723]The effect of this agreement has been impressive in that, since that date, South Africa has incorporated the provisions of the Crayfish Agreement into its laws and has protected and recognised the inviolability of the names of origin of the French companies mentioned in the Agreement.[724]For example, legally, since the 1930s, South African winemakers have not been permitted to designate their sparkling wines as Champagne and their red wines as Burgundy.[725]

The following GIs have been identified as falling within South Africa: Rooibos tea, Klein Karoo Ostrich, Heuningbos Kalahari Melon Seed (KMS), Wine of Origin from Boland, and olive oil.[726]The bilateral agreement between South Africa and the EU provides a more extensive list of GIs.[727] The explicit reference to geographical indications in the provisions of Protocol 3 illustrates

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721 van der Merwe, A et al op cit note 20 at 107. The protection of geographical indications is implemented through four main legislative measures, which are the Trade Marks Act 194 of 1993, the Liquor Products Act 60 of 1989, the Merchandise Marks Act 17 of 1941, and, to a lesser extent, legislation for the protection of traditional knowledge. See Lubinga, M H, Ngqangweni, S, Van der Walt, S, Potelwa, Y, Nyhodo, B, Phaleng, L and Ntshangase, T 'Geographical indications in the wine industry: does it matter for South Africa?' (2021) 33 *International Journal of Wine Business Research* pp. 47-59.

722 Dean, O & Dyer, A (eds) *Dean & Dyer: Introduction to Intellectual Property Law* (2014) 209.

723 Stern, A 'Wine and the protection of geographical indications in South Africa' (2000) *De Rebus* 31.

724 Stern op cit note 723 at 31.

725 Stern op cit note 723 at 31

726 African Union (AU) Continental Strategy for Geographical Indications in Africa 2018 to 2023, p. 64.

727 Examples such as the Bamboesbaai, Lower Orange River/Central Orange River Ceres Plateau, Plettenberg Bay, Polkadraai Hills. See Annex I to Protocol 3 in the Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group available at *http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf ,*

the additional importance that the Parties to the Agreement attach to GIs when compared to traditional regimes of intellectual property).[728]

6.3.1. Common- Law Trademark Protection

GIs in South Africa can find defence under Common Law.[729] Under the Common law, prohibition is made against misleading or deceptive marks or descriptions in relation to any goods under unlawful competition rules, specifically, passing off, which has been discussed above at 5.4. In order to avoid repetition, the principles set out above at 5.4, having a basis in Common law and passing off, similarly apply here. The act of passing off can result in delictual liability, and a party who has been injured may take legal action under the Lex Aquilia. Passing off was defined in the case of *Capital Estate and General Agencies (Pty) Limited v Holiday Inns Inc.*[730] as follows:

> the wrong known as passing off consists of a representation by one person that his business (or merchandise as the case may be) is that of another or that it is associated with that of another, and, in order to determine whether a presentation amounts to passing off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is or is connected with that of another.

For passing off to be established, the applicant must prove the presence of goodwill or reputation associated with the mark, which relates to the opinion of the relevant section of society towards the product/service; misrepresentation as well as deception resulting in damage or likelihood of damage to the goodwill.[731] It is a species of unlawful competition, and registration of a mark is immaterial. Passing off can, therefore, be brought as an action against a misappropriated GI. The owner of the GI must provide evidence in this situation, which can prove to be cumbersome because he or she would not only have to establish jurisdiction but also that the reputation or goodwill of the products fell within the jurisdiction of the Court.[732]

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728 Sunner, L 'How the European Union is expanding the protection levels afforded to Geographical Indications as part of its global trade policy' (2021) 16 *Journal of Intellectual Property Law & Practice* pp 341-347 at 346.

729 van Der Merwe op cit note 86 at 186.

730 1977 (2) SA 916 (A) 929C.

731 *Capital Estate and General Agencies (Pty) Limited v Holiday Inns Inc.* 1977 2 SA 916 (A) 929C.

732 Sibanda, O S 'The Prospects, Benefits of *Sui Generis* legislation for Geographical Indication Protection in South Africa' (2016) 51 (3) *Foreign Trade Review* 213-224.

In *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd. and Another*,[733] the Court considered Art 6bis (1) of the Paris Convention, as given effect in section 35 of the Trade Marks Act. It was stated in this case that according to law, a claim for passing off must be based on goodwill already existing in the nation.[734] Therefore, section 35(1) appropriately broadens protection to include 'whether or not such person carries on business, or has any goodwill, in the Republic' for the owner of a foreign mark. Additionally, the type of protection provided by subsection (3) is a typical example of what is allowed under the common law of passing off: a prohibition on using the mark in connection with products or services for which it is well known and where the use is likely to cause confusion or deception.[735] Further that 'a mark is well-known in the Republic if it is well-known to persons interested in the goods or services to which the mark relates'.[736] Therefore, it was determined that the mark, in this case, qualified as well-known for the purposes of Section 35 of the New Act.[737] In *Schultz v Butt*[738] it was stated:

> 'As a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader that constitutes an *injuria* for which the Aquilian action lies if it has directly resulted in loss.' [739]

In South Africa, unlawful competition is recognised as an actionable wrong, distinct from that of passing off, fitting comfortably under the umbrella provided by the *Lex Aquilia*[740]. In the case of

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733 *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd. and Another*; McDonald's Corporation v *Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd. and Another* (547/95) [1996] ZASCA 82; 1997 (1) SA 1 (SCA); [1996] 4 All SA 1 (A); (27 August 1996).

734 *Ibid at* 31.

735 *Ibid at* 33.

736 Ibid at 36-37.

737 Ibid at 65.

738 1986 (3) SA 667 (A) at 678F-H.

739 Par 16. Furthermore, in the case of *Milestone Beverage CC and Others v The Scotch Whisky Association and Others* (1037/2019) [2020] ZASCA 105 (18 September 2020) in par 1, the Court stated that: 'Whilst competition in trade is healthy and to be encouraged, it 'must be carried on by means that are fair, rather than foul, or – more correctly – by means which are lawful rather than unlawful'. To borrow from Corbett J: 'Though trade warfare may be waged ruthlessly to the bitter end there are certain rules of combat which must be observed. The trader has not a free-lance. Fight he may, but as a soldier, not as a guerrilla.' *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) Pty Ltd* 1968 (1) SA 209 (C) at 219 C-D.

740 *Lex Aquilia Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 188.

Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd,[741] Booysen J had this to say about unlawful competition and passing off:

> 'It follows from what I have said that a person who falsely and culpably represents to the public that his products are products of a particular character, composition or origin known by the public under a descriptive name which has gained a public reputation, without passing them off as the product of the plaintiff, who produces what may be termed the genuine products, and who thereby causes patrimonial loss to the plaintiff, commits the delict of unlawful competition, and is liable in damages to the plaintiff. It follows also that the injured party is entitled to an interdict restraining such conduct where such patrimonial loss has occurred or is likely to be caused. Perhaps I should add that I take the view that where all the above elements are present save that of fault (or culpability), an interdict would still be justified. (Cf *Dunlop (South Africa) Ltd v Metal and Allied Workers Union and Another* 1985 (1) SA 177 (D) at 188G-H.)'[742]

In considering whether marks are confusingly similar, Laddie J in *Century City Apartments v Century City Property Owners*[743] said:

> 'The likelihood of confusion must be appreciated globally, taking account of all relevant factors. It must be judged through the eyes of the average consumer of the goods or services in question. That customer is to be taken to be reasonably well informed and reasonably circumspect and observant, but he may have to rely upon an imperfect picture or recollection of the marks. The Court should factor in the recognition that the average consumer normally perceives a mark as a whole and does not analyse its various details. The visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. Furthermore, if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion.[744]

It is evident from the foregoing that GIs do receive common law protection in South Africa. An owner of a GI that has been misappropriated can, therefore, find relief in the action of passing off,

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741 1990 (4) SA 136 (D) at 143G-I.

742 Par 17.

743 (57/09) [2009] ZASCA 157 (27 NOVEMBER 2009).

744 Par 13.

or unlawful competition, through delictual action. If the GI owner is able to prove on a balance of probabilities that either passing off or unlawful competition has occurred against their GI, they may enforce their rights through these avenues.

Having looked at the common law protection of GIs, the statutes that are relevant to the discussion on GI protection within South Africa will be reviewed hereunder.

6.3.2. The Trade Marks Act 194 of 1993

The Trade Marks Act No 194 of 1993 came into force to 'provide for the registration of trade marks, certification trade marks and collective trade marks; and to provide for incidental matters.'[745]

a) Relevant definitions

Section 2 of the Act provides for definitions, and the ones that are relevant to the discussion at hand are set out below:

1. A 'certification trade mark' is defined as 'a mark registered or deemed to have been registered under section 42'
2. A 'collective trade mark' means a mark registered under section 43
3. A 'mark' is defined as:

> 'any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned.'

4. A 'registered trade mark' is defined as 'a trade mark registered or deemed to be registered under this Act'
5. And finally, a 'trade mark' is set out as:

> 'other than a certification trade mark or a collective trade mark, means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person'

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[745] The preamble of Trade Marks Act No 194 of 1993.

b) Requirements for Protection

A mark will only be protected in terms of the Act, if it has been registered. For that to happen, a mark needs to be registrable; section 9 sets out the conditions that need to be met for a mark to be registrable:[746] Primarily, the mark must be able to separate the owner's goods and services from those of others. The Act further provides for marks that will not be registered, and if for some reason they are registered, they are liable to be removed from the register.[747] The application for

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[746] Section 9 provides that:

> (1) In order to be registrable, a trade mark shall be capable of distinguishing the goods or services of a person in respect of which it is registered or proposed to be registered from the goods or services of another person either generally or where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within those limitations.
>
> (2) A mark shall be considered to be capable of distinguishing within the meaning of subsection (1) if, at the date of application for registration, it is inherently capable of so distinguishing or it is capable of distinguishing by reason of prior use thereof.

[747] Section 10 sets out marks that are unregistrable:

The following marks shall not be registered as trade marks or, if registered, shall, subject to the provisions of sections 3 and 70, be liable to be removed from the register:

> (1) A mark which does not constitute a trade mark;
>
> (2) a mark which –
>
> 1. *(a)* is not capable of distinguishing within the meaning of section 9; or
> 2. *(b)* consists exclusively of a sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services; or
> 3. *(c)* consists exclusively of a sign or an indication which has become customary in the current language or in the bona fide and established practices of the trade;
>
> (3) a mark in relation to which the applicant for registration has no bona fide claim to proprietorship;
>
> (4) a mark in relation to which the applicant for registration has no bona fide intention of using it as a trade mark, either himself or through any person permitted or to be permitted by him to use the mark as contemplated by section 38;
>
> (5) a mark which consists exclusively of the shape, configuration or colour of goods where such shape, configuration or colour is necessary to obtain a specific technical result, or results from the nature of the goods themselves;
>
> (6) subject to the provisions of section 36(2), a mark which, on the date of application for registration thereof, or, where appropriate, of the priority claimed in respect of the application for registration thereof, constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of a trade mark which is entitled to protection under the Paris Convention as a well–known trade mark within the meaning of section 35(1) of this Act and which is used for goods or services identical or similar to the goods or services in question;
>
> (7) a mark the application for registration of which was made *mala fide*;
>
> (8) a mark which contains the coat of arms, seal or national flag of the Republic or, save with the authorisation of the competent authority of the convention country concerned, of any convention country;
>
> (9) a mark which contains any word, letter or device indicating State patronage;
>
> (10) a mark which contains any mark specified in the regulations as being for the purposes of this section a prohibited mark;

the registration of a trademark must be made in the prescribed form as set out in the Trademark regulations,[748] and in accordance with section 16[749] of the Act. Furthermore, the Act makes provision for the advertisement of the application[750] and permits any interested party to oppose the application in the manner prescribed.[751] Regulation 18 applies in this case.

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(11) a mark which consists of a container for goods or the shape, configuration, colour or pattern of goods, where the registration of such mark is or has become likely to limit the development of any art or industry;
(12) a mark which is inherently deceptive or the use of which would be likely to deceive or cause confusion, be contrary to law, be *contra bonos mores*, or be likely to give offence tiny class of persons;
(13) a mark which, as a result of the manner in which it has been used, would be likely to cause deception or confusion;
(14) subject to the provisions of section 14, a mark which is identical to a registered trade mark belonging to a different proprietor or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which such trade mark is registered, would be likely to deceive or cause confusion, unless the proprietor of such trade mark consents to the registration of such mark;
(15) subject to the provisions of section 14 and paragraph (16), a mark which is identical to a mark which is the subject of an earlier application by a different person, or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which the mark in respect of which the earlier application is made, would be likely to deceive or cause confusion, unless the person making the earlier application consents to the registration of such mark;
(16) a mark which is the subject of an earlier application as contemplated in paragraph (15), if the registration of that mark is contrary to existing rights of the person making the later application of registration as contemplated in that paragraph;
(17) a mark which is identical or similar to a trade mark which is already registered and which is well known in the Republic, if the use of the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of deception or confusion:
Provided that a mark shall not be refused registration by virtue of the provisions of paragraph (2) or, if registered, shall not be liable to be removed from the register by virtue of the said provisions if at the date of the application for registration or at the date of an application for removal from the register, as the case may be, it has in fact become capable of distinguishing within the meaning of section 9 as a result of use made of the mark.

[748] See Regulation 11 of the Trademark Regulations.

[749] Section 16 on the Application for registration reads:
(1) An application for registration of a trade mark shall be made to the registrar in the prescribed manner. (2) Subject to the provisions of this Act, the registrar shall- (a) accept; 5 (b) accept, subject to such amendments, modifications, conditions or 10 limitations, as he may deem fit; (c) provisionally refuse; or (d) refuse the application. (3) The registrar shall advise an applicant for registration in writing within a 15 reasonable period from the date of the application of his decision in terms of subsection (2). (4) In the case of an acceptance in terms of subsection (2)(b) or a refusal in terms of subsection (2)(d), the registrar shall, on application by the applicant in the prescribed manner, state in writing the grounds for his decision. 20 (5) The registrar or the Court, as the case may be, may at any time, whether before or after acceptance of the application, correct any error in or in connection with the application, or may permit the applicant to amend his application upon such conditions as the registrar or the Court, as the case may be, may think fit.

[750] Section 17 of the Trade Marks Act of 1993.

[751] Section 18 of the Trade Marks Act of 1993.

c) Registration

Once a mark meets the requirements of section 9 and does not fall within any of the provisions under section 10, it may then be registered.[752] Such registration also serves as prima facie proof of the validity of the trade mark.[753] Additionally, it is necessary that the mark be categorised in relation to a certain class or classes in accordance with the established classification.[754] This classification is set out in the Trademark regulations under Schedule 3[755] to these Regulations, in accordance with s 69(2) of the Act.[756]

The Act requires that a register of all registered trademarks which is open for public inspection be kept in its s22. This register serves as prima facie proof on any matters inserted in it as long as it is done as authorised by the Act.[757] An interested person may apply for the removal from the register or variation of a trademark that is in breach of a condition of registration.[758] Section 27 of the Act also makes provision for the removal of a make on the ground of non-use. If

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752 Section 29 of the Trade Marks Act of 1993 provides that:
(1) When an application for registration of a trade mark has been accepted and advertised in the prescribed manner and either –
(a) the application has not been opposed and the time for notice of opposition has expired; or
(b) the application has been opposed and has been granted, the registrar shall register the trade mark as on the date of the lodging of the application for registration, and that date shall, subject to the provisions of section 63, for the purposes of this Act be deemed to be the date of registration: Provided that where it appears to the registrar, having regard to matters which came to his notice after acceptance of an application, that the trade mark has been accepted in error, he may withdraw the acceptance and proceed as if the application had not been accepted.
(2) On the registration of a trade mark, the registrar shall issue to the applicant a certificate in the prescribed form of the registration thereof sealed with the seal of the trade marks office.

753 Section 11 of the Trade Marks Act of 1993.

754 Section 51 of the Trade Marks Act of 1993.

755 It is provided in Regulation 4 that:
(2) For the purposes of classifying goods and services in accordance with Schedule 3 to these Regulations and of interpreting this Schedule, reference shall be had to the 6th Edition of the International Classification of Goods and Services for the purposes of the registration of marks under the Nice Agreement of 15 June 1957 (as revised) published by the World Intellectual Property Organisation in 1992, including the explanatory notes and lists of goods and services published therein.

756 S69 (2) of the Act provides that 'the Minister may also make regulations, not inconsistent with this Act, as to all matters, including forms and a schedule of classification of goods or services, which by this Act are required or permitted to be prescribed or which are necessary or convenient for giving effect to the provisions of this Act or for the conduct of any business relating to the trade marks office established by this Act.'

757 S 49 of the Trade Marks Act of 1993.

758 Section 26 of the Trade Marks Act of 1993 provides that:
(1) Any interested person may apply for the removal from the register, or a variation, of a registered trade mark if its proprietor or any person permitted to use it in terms of section 38 fails to comply with any condition entered in the register in relation to its registration.
(2) Such application may be made to the Court or to the registrar.
(3) The registrar has *locus standi* to make such application to the Court.

a trademark is removed from the register, in full or partially, as ordered by the registrar or Court and in accordance with the provisions of the Act, such removal will either be regarded as done on the date of application for removal or based on satisfactory grounds, an earlier date.[759] A registered trade mark is registered for a period of 10 years and can be renewed in accordance with the prescribed procedure.[760]

d) Rights conferred

A registered trademark can be assigned and transmitted whether as part of the goodwill of the business or without it; such transmission and assignment can be in respect of some or all of the goods or services to which it has been registered.[761] There is no specific mention of the exclusive right of ownership of the mark in the Act. However, the acts that constitute infringement refer to the 'unauthorised' use. This can be construed to mean that the holder of a registered trademark obtains a right only he can exercise, to the exclusion of all others.

e) Infringement and remedies

Infringement of a trademark in terms of this Act cannot occur without there being registration of the mark in accordance with the Act.[762] The Act then goes on to indicate the instances in which

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759 Section 28 of the Trade Marks Act of 1993.

760 S37 of the Trade Marks Act of 1993.

761 Section 39 of the Trade Marks Act of 1993

762 S33 of the Trade Marks Act of 1993 provides that:

> No person shall be entitled to institute any proceedings under section 34 in relation to a trade mark not registered under this Act: Provided that nothing in this Act shall affect the rights of any person, at common law, to bring any action against any other person.

infringement will occur.[763] as well as acts which do not constitute infringement[764] of a registered trade mark. If infringement does occur, the owner of the trade mark may be eligible for relief in the form of an interdict, an order for the removal from the product, the infringing mark, if impossible, delivery up of infringing material, damages, in lieu of damages, reasonable royalty which would have been payable had the trademark been licensed.[765]

According to section 35 of the Act, well-known marks which are entitled to protection under the Paris Convention are protected.

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[763] S 34(1) of the Trade Marks Act of 1993 provides that:

(1) The rights acquired by registration of a trade mark shall be infringed by –

(a) the unauthorised use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;

(b) the unauthorised use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered that in such use, there exists the likelihood of deception or confusion;

(c) the unauthorised use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception: Provided that the provisions of this paragraph shall not apply to a trade mark referred to in section 70(2).

[764] S 34(2) of the Trade Marks Act of 1993 provides that:

(2) A registered trade mark is not infringed by –

(a) any bona fide use by a person of his own name, the name of his place of business, the name of any of his predecessors in business, or the name of any such predecessor's place of business;

(b) the use by any person of any bona fide description or indication of the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of his goods or services, or the mode or time of production of the goods or the rendering of the services;

(c) the bona fide use of the trade mark in relation to goods or services where it is reasonable to indicate the intended purpose of such goods, including spare parts and accessories, and such services;

(d) the importation into or the distribution, sale or offering for sale in the Republic of goods to which the trade mark has been applied by or with the consent of the proprietor thereof;

(e) the bona fide use by any person of any utilitarian features embodied in a container, shape, configuration, colour or pattern which is registered as a trade mark;

(f) the use of a trade mark in any manner in respect of or in relation to goods to be sold or otherwise traded in, or services to be performed, in any place, or in relation to goods to be exported to any market, or in any other manner in relation to which, having regard to any conditions or limitations entered in the register, the registration does not extend;

(g) the use of any identical or confusingly or deceptively similar trade mark which is registered.

[765] S 34(3) of the Trade Marks Act of 1993.

f) Certification and collective marks in the TMA

In addition to defining certification[766] and collective marks,[767] the Act also provides that the provisions of the Act, unless specifically stated, are applicable to both certification trademarks and collective trademarks. Section 43 (2) specifically provides that (2) '[g]eographical names or other indications of geographical origin may be registered as collective trade marks'.

The Act also sets out offences and applicable penalties: for an offence perpetrated in relation to registers, a person may be found guilty of fraud and 'liable to a fine a fine, or to imprisonment for a period not exceeding 12 months';[768] for an offence involving the making of false statements that are aimed at deceiving or influencing the registrar, a person who is convicted may be found 'liable on conviction to a fine, or to imprisonment for a period not exceeding 12 months';[769] and for a person who makes a representation that is false in relation to the registration of a trade mark,[770] if convicted, such person shall be 'liable on conviction to a fine, or to imprisonment for a period not exceeding 12 months'.[771]

g) False Indications of source or origin

Although there are no particular laws against the use of misleading indications regarding the origin or source of goods, this could possibly be covered by the offences listed under Section 62[772] of the Act, which deals with making false statements in connection with the registration of a trademark.

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766 Sections 42(1) of the Trade Marks Act of 1993 defines a certification mark as:
A mark capable of distinguishing, in the course of trade, goods or services certified by any person in respect of kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services, as the case may be, from goods or services not so certified, shall, on application in the prescribed manner, be registrable as a certification trade mark in respect of such first–mentioned goods or services, in the name, as proprietor thereof, of that person: Provided that a mark may not be so registered in the name of a person who carries on a trade in the goods or services in respect of which registration is sought.

767 Sections 43 of the Trade Marks Act of 1993 defines a collective mark as:
A mark capable of distinguishing, in the course of trade, goods or services of persons who are members of any association from goods or services of persons who are not members thereof, shall, on application in the manner prescribed and subject to the provisions of this section, be registrable as a collective trademark in respect of such first–mentioned goods or services in the name of such association as the proprietor thereof.

768 Section 60 of the Trade Marks Act of 1993.

769 Section 61 of the Trade Marks Act of 1993.

770 This includes the use 'use in the Republic in relation to a trade mark of the word "registered" or of any abbreviation thereof or of any other word or letter which might reasonably be construed as referring to registration, including the symbol R'. see Section 62(2) of the Trade Marks Act of 1993.

771 Section 62(1) of the Trade Marks Act of 1993.

772 This section sets out provisions relating to the penalty to be applied in cases where a person falsely represents that a trade mark is registered. It reads as follows:

h) International applications

The Act does not specify any procedures for the processing or consideration of international applications for trade mark registration. The Industrial Property Act of Namibia refers to ARIPO applications and how these should be handled. The lack of such a clause in the South African Act can be attributed to the country's non-membership to ARIPO.

i) Geographical Indications and the TMA

Section 43 (2) specifically provides that (2) '[g]eographical names or other indications of geographical origin may be registered as collective trade marks'. The Section further provides that

> ' Subject to the provisions of this section, the provisions of this Act shall, except in so far as is otherwise provided, and in so far as they can be applied, apply to a collective trade mark'[773]

This, therefore, means that the provisions discussed above, with reference to an application for registration, infringement and remedies, apply with regards to GIs as they can be registered as collective trademarks. It can also be stated that South Africa provides a similar level of protection to GIs as it does to collective trademarks.

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62. (1) Any person who makes a representation- . (a) with respect to a mark not being a registered trade mark, to the effect that it is a registered trade mark; (b) with respect to a part of a registered trade mark not being a part separately registered as a trade mark, to the effect that it is so registered; (c) to the effect that a registered trade mark is registered in respect of any goods or services in respect of which it is not registered; or (d) to the effect that the registration of a trade mark gives an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered in the register, the registration does not give that right, shall, be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding 12 months.

(2) For the purposes of this section, the use in the Republic in relation to a trade mark of the word "registered" or of any abbreviation thereof or of any other word or letter which might reasonably be construed as referring to registration, including the symbol R, shall be deemed to import a reference to registration in the register except- ' (a) where that word, abbreviation, letter or symbol is used in physical association with other words delineated in characters at least as large as those in which that word, abbreviation, letter or symbol is delineated and indicating that the reference is to registration as a trade mark under the laws of a country outside the Republic being a country under the laws of which the registration referred to is in fact in force; (b) where that word (being a word other than the word "registered") abbreviation, letter or symbol is of itself such as to indicate that the reference is to such registration as is referred to in paragraph (a); or (c) where the word, abbreviation, letter or symbol is used in relation to a mark registered as a trade mark under the laws of a country outside the Republic and in relation to goods to be exported to that country.

[773] Section 43 (3) Of the Trade Marks Act of 1993.

6.3.3. The Intellectual Property Laws Amendment Act of 2013

This Act is not yet in effect and is awaiting the President's proclamation in a Government Gazette.[774] In addition to revising some of the current laws, such as the Trade Marks Act of 1993, this Act also seeks to provide further protection for GI.[775] Section 43B (4) and (5) provide that:

> (4) Geographical indications or other marks of geographical origin may be registered as certification marks: Provided that the registrars of patents, copyright, trademarks and designs shall clearly indicate in the register that the certification mark as a geographical indication.
>
> (5) Geographical indications or other marks of geographical origin may be registered as collective trade marks: Provided that the registrars of patents, copyright, trade marks and designs shall clearly indicate in the register that the collective mark as a geographical indication.

Additionally, s43K (1) provides that:

> [t]he Minister may by notice in the *Gazette* provide that any provision of this Act specified in such notice shall in the case of any country so specified apply so that –(b) …geographical indications recognised in the specified country as … geographical indications shall be deemed to be … geographical indications as defined in this Act.

The section furthermore provides that the said notice referred to in s43K (1) (b) may 'limit application of the Act to such types of geographical indications as may be specified'.

Sibanda[776] asserts that the provisions in the Act, stated above, which are geared towards GI protection, are inadequate and offer no stronger protection than already provided for in existing legislation. It must be noted, however, that the Trade Marks Act expressly allows geographical names or other origin indicators to be registered as collective trademarks, but it is silent on the issue of whether geographical names can be registered as certification marks. An important point is that the Intellectual Property Laws Amendment Act of 2013 states 'geographical indications or other marks of geographical origin' may be registered as collective marks or certification marks.[777] It must, therefore, be acknowledged that, to a certain extent, the amendment, once it comes into

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774 South African Government. Intellectual Property Laws Amendment Act 28 of 2013 Available at https://www.gov.za/documents/intellectual-property-laws-amendment-act-0.

775 South African Government. Intellectual Property Laws Amendment Act 28 of 2013.

776 Sibanda op cit note 732 at 213-224.

777 Section 43B (4) and (5).

force, provides some additional protection because registration as certification marks would now be specified in the statute.

6.3.4. The Merchandise Marks Act 17 of 1941

A statute worth discussing which prohibits certain forms of conduct is the Merchandise Marks Act 17 of 1941. It is an offence to use a 'false trade description to goods', according to the Act.[778] The Minister of Trade and Industry has the authority under Section 10(1) to forbid by notice in the Government Gazette, the sale or importation into the Republic of any items, as specified in the notice, that does not clearly identify the country of manufacture or production, i.e. the country of origin.

In accordance with s15(1),[779] in order to put the protection into force a number of European Union (EU) products in the country, the Minister of Trade and Industry published notification no. 40359 in the Government Gazette. This was done in terms of Protocol 3 on Geographical Indications and Trade in Wines and Spirits of the Economic Partnership Agreement (EPA involving the EU and the Southern African Development Community (SADC) to further strengthen their trade links. Article 14 of the EPA provides that the parties agree to cooperate on matters related to GIs, as well as trade in wines and spirits,[780] and to that end, set out GIs of South Africa[781] and the European Union.[782]

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778 Section 10(1) "The Minister may, after such investigation as he may think fit, by notice in the Gazette prohibit the importation into or the sale in the Union of goods of any class or description specified in the notice, whether made or produced in the Union or elsewhere, unless one or more of the following requirements, specified in the notice, have been complied with in respect of those goods". This corresponds with the protection of indications of source laid out in the Paris Convention.

779 Section 15(1)provides that "[t]he Minister may, after such investigation as he may think fit, by notice in the Gazette, prohibit either absolutely or conditionally the use of any mark, word, letter or figure or any arrangement or combination thereof in connection with any trade, business, profession or occupation or in connection with a trade mark, mark or trade description applied to goods".

780 Article 14 provides that:

(1) The Parties shall cooperate on matters related to GIs and trade in wines and spirits, and in particular: product definitions, certification and labelling of wines;
a) use of grape varieties in winemaking and labelling thereof;
b) use of traditional terms on labelling of wines;
c) product definitions, certification and labelling of spirit drinks;
d) issues of mutual concern relating to products classified under HS 2205; and
e) matters related to the attachment to the exchange of letters in Annex X to the TDCA as referred to in Article 17(2) of this Protocol.

781 Annex I to Protocol 3 Section A lists these GIs under the categories of: Agricultural products and foodstuffs, Beers, Wines.

782 Annex I to Protocol 3 Section A lists these GIs under the categories of Agricultural products and foodstuffs, Beers, Wines.

Under Protocol 3, South Africa protects 251 EU GIs of food, wine and spirits, including Roquefort (from France) and Feta (from Greece). In return, the EU protects South Africa's 105 GIs, including wines and spirits registered under the Liquor Act, as well as three non-alcoholic agricultural products: Rooibos, Honeybush (a unique tea from the Eastern and Western Cape regions) and Karoo Meat of Origin (unique lamb meat from the Karoo region).[783] The agreement is beneficial for both parties in that producers located outside of the EU will not be able to sell products in South Africa using protected GIs and vice versa. Furthermore, all the GIs listed in the agreement are protected in the EU. This agreement indisputably has the consequence of protecting GIs.

In conclusion, therefore, South Africa provides protection for its GIs through the common law and legislative measures, as well as the EPA referred to above. This position has been stated as providing significant protection. On that basis, it can, therefore, be inferred that in order for a conclusion to be made that the protection in place in a jurisdiction with regards to GI protection is adequate, such a state's system of GI protection need not be *sui generis* because protection for GI can be adequately provided through non *sui generis* measures.[784]

6.4. India

In general, geographical indications in India are divided into three categories: handicraft products, agricultural products and food products.[785] The Geographical Indications of Goods (Registration and Protection) Act of 1994 and the Rules to the Act of 2002, which deal with the process of GI applications and filing and registration thereof, respectively, led to the adoption of a sui generis GI protection system in India.[786] Before the enactment of this law, there was no separate law

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783 Adebola, T (2023) op cit note 527, at 19. For South Africa, the EPA has expanded existing market access for new products, such as fruit and wine, and further protected the GI status of rooibos and honey plants, along with other types. Through the inclusion of the Geographical Indication Protocol of the Economic Partnership Agreement (EPA) between the Southern African Customs Union (SACU) and the EU, rooibos is now protected as a GI in the EU. See South African Rooibos Council 'Rooibos continues to enjoy GI protection post-Brexit' (2020) *Agribusiness update*,13.

784 van Der Merwe op cit note 86 at 192 indicates that the present law in South Africa provides reasonable protection for geographical indications of origin.

785 Sarkar, I ‘Protection of geographical indications in food products: study of the world & India’(2022) 2 *Indian Journal of Integrated Research in Law* 8. Also see Soam, S K ‘Analysis of prospective geographical indications of India’ (2005) 8 *Journal of World Intellectual Property* 679-706-710 at 680. As of 2022, more than 365 items have received the GI label.

786 Raju, K D & Chaudhary, S ‘An Analysis of Sectoral Distribution of Registered Geographical Indications in selected Countries’ (2013). 48 *Foreign Trade Law Review* 2:255 at 256.

specifically related to GIs in India.[787] However, the current legal system in the country can be used in three different ways to prevent the abuse of geographical indications:[788] (i) under the Consumer Protection acts; (ii) through passing-off actions in courts; and (iii) through certification trade marks. The GI Act in India is administered by the Controller General of Patents, Design and Trademarks (CGPDTM) in Chennai, which is the Registrar of Geographical Indications.[789] The common practice in this system is that the state is the applicant for GIs, though this is not laid down in the law.[790] There is, furthermore, intervention on the part of the state through public authorities charged with the registration of GIs in the process of defining GI specifications during the GI application.[791]

The discourse below will look at similar areas of protection as discussed above with regard to both Namibia and South Africa. It is worth noting that in addition to the *sui generis* law on GIs, India also has a specific and distinct law geared towards trademark protection.

6.4.1. The Trade Marks Act of 1999

According to this Act, a certification mark is defined as:[792]

> 'a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registrable as such under Chapter IX in respect of those goods or services in the name, as proprietor of the certification trade mark, of that person'

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787 Das, K 'Socioeconomic Implications of Protecting Geographical Indications in India' (2009) p 5-6.

788 Das (2009) op cit note 787 at 6 also see Vinayan, S 'Geographical indications in India: issues and challenges an overview.' (2017) 20 *Journal of World Intellectual Property* 119-132 at 120, and Das, K 'Prospects and challenges of geographical indications in India' (2010) 13 *Journal of World Intellectual Property* 148-201, at 148, and Govindrajan, G & Kapoor, M 'Why the protection of geographical indications in India needs an overhaul'(2018) 8 *NLIU Law Review* 22-48, at 25.

789 Ahmad, T 'India: Legal Protection of Geographical Indications' (2018) *Washington, DC, Law Library of Congress*, 2. Also see Vinayan, S 'Geographical indications in India: issues and challenges an overview.' (2017) 20 *Journal of World Intellectual Property* 119-132 at 120, and K Das 'Prospects and challenges of geographical indications in India' (2010) 13 *Journal of World Intellectual Property* 148-201 at 149.

790 Marie-Vivien & Biènabe op cit note 284 at 6.

791 Marie-Vivien & Biènabe op cit note 284 at 6. An example of state intervention in India is the government supporting the costs of defending Basmati rice. With an export value of Rs 28 billion, basmati rice is India's most valuable GI product. See Sarkar, (2022) op cit note 785 at 10.

792 Section 2(e) of the Trade Marks Act of 1999.

The definition above is highlighted because it indicates that in India, a certification mark can be used to verify the origin of products and services in order to set them apart from competing products and services. Therefore, it would be simple to assume that a certification mark can be utilised to safeguard goods of origin in India. This is, however, not the case as the Trade Marks Act in s9 provides a list of trade marks 'which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, *geographical origin* or the time of production of the goods or rendering of the service or other characteristics of the goods or service'[793] as an absolute ground to deny the registration of a trade mark and thereby may exclude marks of geographical origin. A trade mark will not be violated when used, according to section 30 (2), 'in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services' it implies that it is acceptable to apply a mark on a good to identify the country of origin of that good or service.

Below, the GI *sui generis* law will now be considered.

6.4.2. Geographical Indications Goods (Registration and Protection) Act of 1999

The three main objectives of the Geographical Indications (Registration and Protection) of Products Act 1999 are to provide specific legal provisions for the management of geographical indications of domestic products to provide adequate protection to manufacturers of specific products, prevent unauthorised users from misusing these products, prevent customers from being deceived and promote the export of products with geographical indications Indian management in the international market.[794]Similar to how the legal environment for GIs in Namibia and South Africa was evaluated, the assessment below will focus on the same aspects of the law to allow for a proper comparison.

a) Relevant definitions

In terms of s 2(1) (e) of the Act, a GI is defined as follows:

[793] Section 9(1) (b) of the Trade Marks Act of 1999.

[794] Santhosh, A 'Geographical indications: study on history, laws and socio-economic effects with case study of Darjeeling tea' (2022) 2 *Indian Journal of Integrated Research in Law* 1-14, at 6-7.

> 'in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be'.

Furthermore, s 2(3) provides the scope of GIs covered by the Act:

> 'unless the context otherwise requires, any reference—
>
> (a) to the use of a geographical indication shall be construed as a reference to the use of a printed or other visual representation of the geographical indication;
>
> (b) to the use of a geographical indication in relation to goods shall be construed as a reference to the use of the geographical indication upon, or in any physical or in any other relation whatsoever, to such goods;
>
> (c) to a registered geographical indication shall be construed as including a reference to a geographical indication registered in the register;
>
> (d) to the Registrar shall be construed as including a reference to any officer when discharging the functions of the Registrar in pursuance of sub-section (2) of section 3;
>
> (e) to the Geographical Indications Registry shall be construed as including a reference to any office of the Geographical Indications Registry'.

The Indian Act, therefore, provides a working definition of what a GI is and the scope thereof.

b) Requirements for Protection

The Act forbids the trademark registration of a GI.[795] The Act also provides certain GIs for which registration is prohibited; this will be in cases where:[796]

(a) the use of which would be likely to deceive or cause confusion; or

(b) the use of which would be contrary to any law for the time being in force; or

(c) which comprises or contains scandalous or obscene matter; or

(d) which comprises or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India; or

(e) which would otherwise be disentitled to protection in a court; or

(f) which are determined to be generic names or indications of goods and are, therefore, not or ceased to be protected in their country of origin, or which have fallen into disuse in that country; or

(g) which, although literally true as to the territory, region or locality in which the goods originate, but falsely represent to the persons that the goods originate in another territory, region or locality, as the case may be.

The Act makes allowance for the registration of GIs which are spelt or pronounced in a similar manner but relate to different products and origin, what is termed as 'homonymous', subject to s7 of the Act[797] If the Registrar is confident that the same indication is differentiated, that the manufacturers of the goods in question are treated fairly and that there is also no chance that consumers will be misled or confused by that registration.[798] This complies with TRIPS Article

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795 S25 of the Geographical Indications of Goods (Registration And Protection) Act, 1999:

> Prohibition of registration of geographical indication as trade mark.—Notwithstanding anything contained in the Trade Marks Act, 1999 (47 of 1999), the Registrar of Trade Marks referred to in section 3 of that Act, shall, suo motu or at the request of an interested party, refuse or invalidate the registration of a trade mark which—
> (a) contains or consists of a geographical indication with respect to the goods or class or classes of goods not originating in the territory of a country, or a region or locality in that territory which such geographical indication indicates, if use of such geographical indications in the trade mark for such goods, is of such a nature as to confuse or mislead the persons as to the true place of origin of such goods or class or classes of goods;
> (b) contains or consists of a geographical indication identifying goods or class or classes of goods notified under sub-section (2) of section 22.

796 S9 of the Geographical Indications of Goods (Registration and Protection) Act, 1999.

797 S10 of the Geographical Indications of Goods (Registration And Protection) Act, 1999. The Registrar must of course, be satisfied that there will be no confusion or misleading of consumers.

798 Section 10 of the Geographical Indications of Goods (Registration and Protection) Act of 1994.

24.4, which requires member states to decide on the actual circumstances in which the homonymous indicators in question will be distinguished from one another.

c) Registration[799]

An entity created by law to represent the interests of producers of products, such as an association of people or producers, may make an application for the registration of a GI in connection to those commodities in the format and manner specified in s11 of the Act.[800] The application must contain a classification of such goods within the manner prescribed in the Fourth Schedule of the Geographical Indication Rule 21.[801] If such an application is accepted, the application will then be advertised in accordance with s13 of the Act, and opposition will be allowed within the prescript of s14.[802] The GI Rules furthermore set out the procedure for receipt of applications for GI

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799 Under the Indian Act, if a manufacturer claims a GI for a product produced, it must ensure that at least one of the manufacturing, processing or preparation of the product must take place within its territory. In this sense, the GI Bill is more restrictive than the definition of the TRIPS Agreement. See Sarkar, (2022) Op cit note 785 at 8.

800 S11 of the Geographical Indications of Goods (Registration And Protection) Act, 1999:

> Application for registration.—(1) Any association of persons or producers or any organisation or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods who are desirous of registering a geographical indication in relation to such goods shall apply in writing to the Registrar in such form and in such manner and accompanied by such fees as may be prescribed for the registration of the geographical indication.

801 Rule 21 of the Geographical Indications of Goods (Registration and Protection) Rules, 2002.

802 Section 14 of the Geographical Indications of Goods (Registration And Protection) Act, 1999:

Opposition to registration.—(1) Any person may, within three months from the date of advertisement or readvertisement of an application for registration or within such further period, not exceeding one month, in the aggregate, as the Registrar, on application made to him in such manner and on payment of such fee as may be prescribed allows, give notice in writing in the prescribed manner to the Registrar, of opposition to the registration.

registrations, including outlining what the application should contain.[803] The Act provides for the registration of GIs under s16[804] and requires that a register be kept.[805]

Once a GI has been registered, it will be valid for a period of 10 years and may be renewed in accordance with s18. The certificate issued at registration will serve as prima facie proof of the validity of the GI.[806] Payment of the renewal fee will result in the removal of the GI from the register.[807] Should an application be submitted by another entity, the GI that has been removed from the register will still be considered to be on file during the one-year period following the removal, thereby barring the new registration, unless the tribunal is satisfied either—

(a) that there has been no bona fide trade use of the geographical indication which has been removed within the two years immediately preceding its removal; or

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803 Rule 32 of the Geographical Indications of Goods (Registration and Protection) Rules, 2002.

804 S16 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

Registration.—(1) Subject to the provisions of section 12, when an application for registration of a geographical indication has been accepted and either—
(a) the application has not been opposed and the time for notice of opposition has expired; or
(b) the application has been opposed and the opposition has been decided in favour of the applicant, the Registrar shall, unless the Central Government otherwise directs, register the said geographical indication and the authorised users, if any, mentioned in the application and the geographical indication and the authorised users when registered shall be registered as of the date of the making of the said application and that date shall, subject to the provisions of section 84, be deemed to be the date of registration.
(2) On the registration of a geographical indication, the Registrar shall issue each to the applicant and the authorised users, if registered with the geographical indication, a certificate in such form as may be prescribed of the registration thereof, sealed with the seal of the Geographical Indications Registry.
(3) Where registration of a geographical indication is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the Registrar may, after giving notice to the applicant in the prescribed manner, treat the application as abandoned unless it is completed within the time specified in that behalf in the notice.
(4) The Registrar may amend the register or a certificate of registration for the purpose of correcting a clerical error or an obvious mistake.

805 S6 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

806 S23 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

Registration to be prima facie evidence of validity.—
(1) In all legal proceedings relating to a geographical indication, the certificate of registration granted in this regard by the Registrar under this Act, being a copy of the entry in the register under the seal of the Geographical Indications Registry, shall be prima facie evidence of the validity thereof and be admissible in all courts and before the Appellate Board without further proof or production of the original.
(2) Nothing in this section shall be deemed to be affect the right of action in respect of an unregistered geographical indication.

807 S19 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

(b) that no deception or confusion would be likely to arise from the use of the geographical indication which is the subject of the application for registration by reason of any previous use of the geographical indication which has been removed.[808]

Infringement action in terms of the Act can only be brought for registered GIs; those seeking remedy for infringement of unregistered GIs may do so through the application of common law.[809] Should a person be aggrieved with an order or decision of the Registrar in relation any provisions of the Act, they may lodge an appeal with the Appellate Board within three months of that decision being made.[810]

In the *Scotch Whisky Association v. Golden Bottling*[811] case, the Court had the opportunity to consider a dispute based on GIs. In the matter, the plaintiffs brought an action seeking a permanent injunction restraining the defendant and those acting under his command from selling, in any form, whiskey under the name 'Red Scot' or any other name containing the word 'Scot' or any word similar to it so that the defendant could not consider his whiskey to be Scotch whiskey. Scotch whiskey is available worldwide, and the plaintiffs recorded sales figures for Scotch whiskey as well as several examples of advertising by various airlines, including Indian Airlines and Air India. In other words, Scotch whiskey is known around the world as whiskey produced in Scotland and advertised as such. The plaintiffs stated that they knew that the defendant was manufacturing and selling 'Red Scot' whiskey because the name 'Red Scot' whiskey gives the impression that it is Scottish whiskey.

The Plaintiffs made reference to Article 22 of TRIPS and Article 10bis of the Paris Convention (1967) and submitted that the word 'Scot' or 'Scotch' is a geographical indication within the meaning of Article 22.1 because it identifies the whiskey as produced in Scotland. It was stated that India had passed the Geographical Indications of Goods (Registration and Protection) Act, 1999. Section 2(e) of the Act defines geographical indication in the following words: -Section 20(1) of the Act prohibits any person from bringing proceedings to prevent or

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808 S19 of the Geographical Indications of Goods (Registration and Protection) Act, 1999.

809 S20 of the Geographical Indications of Goods (Registration and Protection) Act, 1999.

No action for infringement of unregistered geographical indication.—

(1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered geographical indication.

(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.

810 S31(1) of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

811 129 (2006) DLT 423, 2006 (32) PTC 656 Del.

obtain damages for infringement of an unregistered geographical indication. However, this does not affect the right to sue any person for counterfeiting goods that are the goods of another person or the remedies in connection therewith [section 20(2)].

In view of the above, learned counsel for the plaintiff submitted that his client can approach this Court to restrain the defendant from passing on his goods as goods of the plaintiff if he uses the words 'Scot'. The defendant gave the impression to unwary whiskey consumers that their product was of Scottish origin or that it was Scottish whiskey. In these circumstances, the relief sought by the plaintiff was granted, and the defendant and those acting under his command were not permitted to use the word 'Scot' or any similar word in the whiskey manufactured and sold by the defendant. The injunction was granted, and damages, as prayed for by the Plaintiffs to the extent of Rs. 5,00,000 were awarded. The Court, therefore, upheld the provisions of the GI Act, as well as acknowledged the international obligations undertaken by India as a state party to TRIPS and the Paris Convention.

d) Rights conferred

The following rights are granted to the registered GI owner:[812] The right to seek infringement relief within the prescript of the Act and they are granted an exclusive right of use of the GI, subject to any limitation attached to the registration. There is further provision made to the effect that a GI right 'shall not be the subject matter of assignment, transmission, licensing, pledge, mortgage or

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[812] S21 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.
1) Subject to the other provisions of this Act, the registration of a geographical indication shall, if valid, give,—
(a) to the registered proprietor of the geographical indication and the authorised user or users thereof the right to obtain relief in respect of infringement of the geographical indication in the manner provided by this Act;
(b) to the authorised user thereof the exclusive right to the use of the geographical indication in relation to the goods in respect of which the geographical indication is registered.
(2) The exclusive right to the use of a geographical indication given under clause (b) of sub-section (1) shall be subject to any condition and limitation to which the registration is subject.
(3) Where two or more persons are authorised users of geographical indications, which are identical with or nearly resemble each other, the exclusive right to the use of any of those geographical indications shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by anyone of those persons as against any other of those persons merely by registration of the geographical indications, but each of those persons has otherwise the same rights as against other persons as he would have if he were the sole authorised user.

any such other agreement', the right of an authorised user to a registered GI; however, may be transferred to his successor in title following death.[813]

e) Infringement and remedies

Should a GI which is registered in terms of the Act be infringed through any of the uses listed under s22,[814] Provision is made for infringement proceedings and remedies. The following have

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[813] S24 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

[814] In terms of s20 Geographical Indications of Goods (Registration And Protection) Act, 1999, infringement will occur when:

> 1) A registered geographical indication is infringed by a person who, not being an authorised user thereof,—
> (a) uses such geographical indication by any means in the designations or presentation of goods that indicates or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the persons as to the geographical origin of such goods; or
> (b) uses any geographical indication in such manner which constitutes an act of unfair competition including passing off in respect of registered geographical indication.
> Explanation 1.—For the purposes of this clause, "act of unfair competition" means any act of competition contrary to honest practices in industrial or commercial matters.
> Explanation 2.—For the removal of doubts, it is hereby clarified that the following acts shall be deemed to be acts of unfair competition, namely:—
> > (i) all acts of such a nature as to create confusion by any means whatsoever with the establishment, the goods or the industrial or commercial activities, of a competitor;
> > (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods or the industrial or commercial activities, of a competitor;
>
> (iii) geographical indications, the use of which in the course of trade is liable to mislead the persons as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods;
> (c) uses another geographical indication to the goods which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the persons that the goods originate in the territory, region or locality in respect of which such registered geographical indication relates.
> (2) The Central Government may, if it thinks necessary so to do for providing additional protection to certain goods or classes of goods under sub-section (3), by notification in the Official Gazette, specify such goods or class or classes of goods, for the purposes of such protection.
> (3) Any person who is not an authorised user of a geographical indication registered under this Act in respect of the goods or any class or classes of goods notified under sub-section (2), uses any other geographical indication to such goods or class or classes of goods not originating in the place indicated by such other geographical indication or uses such other geographical indication to such goods or class or classes of goods even indicating the true origin of such goods or uses such other geographical indication to such goods or class or classes of goods in translation of the true place of origin or accompanied by expression such as "kind", "style", "imitation" or the like expression, shall infringe such registered geographical indication.
> (4) Notwithstanding anything contained in this section, where the goods in respect of which a geographical indication has been registered are lawfully acquired by a person other than the authorised user of such geographical indication, further dealings in those goods by such person including processing or packaging, shall not constitute an infringement of such geographical indication, except where the condition of goods is impaired after they have been put in the market.

been listed as offences under the Act: falsification and false application.[815] may result in 'imprisonment for a term' of 'not less than six months but which may extend to three years', and if fined, 'such fine shall not be less than fifty thousand rupees but may extend to two lakh rupees';[816] The selling of goods to which a false geographical indication is applied may result in imprisonment for a term; this term shall not be less than six months but may extend to three years, and with a fine which shall not be less than fifty thousand rupees but may extend to two lakh rupees.[817]

If a person has already been convicted of one of these offences before and is convicted again, an enhanced penalty will be invoked, and they 'shall be punishable for the second and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to two lakh rupees'.[818] In addition to those mentioned above, another offence relates to the false representation that a GI is registered. This is set out in section 42, and if one is found guilty of this, the punishment will be 'imprisonment for a term which may extend to three years, or with fine, or with both'.

Additionally, if a person improperly describes 'a place of business as connected with the Geographical Indications Registry', they would have committed an offence and shall be punishable

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815 Application in this case is explained in section 37 of the Act, which sets out the instance in which a person would be said to have applied a geographical indication to goods.

816 S38 of the Geographical Indications of Goods (Registration And Protection) Act, 1999

> Falsifying and falsely applying geographical indications.—
> (1) A person shall be deemed to falsify a geographical indication who, either,—
> (a) without the assent of the authorised user of the geographical indication makes that geographical indication or deceptively similar geographical indication; or
> (b) falsifies any genuine geographical indication, whether by alteration, addition, effacement or otherwise.
> (2) A person shall be deemed to falsely apply to goods a geographical indication who, without the assent of the authorised user of the geographical indication,—
> (a) applies such geographical indication or a deceptively similar geographical indication to goods or any package containing goods;
> (b) uses any package bearing a geographical indication which is identical with or deceptively similar to the geographical indication of such authorised user, for the purpose of packing, filling or wrapping therein any goods other than the genuine goods of the authorised user of the geographical indication.
> (3) Any geographical indication falsified as mentioned in sub-section (1) or falsely applied as mentioned in sub-section (2), is in this Act referred to as a false geographical indication.
> (4) In any prosecution for falsifying a geographical indication or falsely applying a geographical indication to goods, the burden of proving the assent of proprietor shall lie on the accused.

817 S40 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

818 Section 41 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

with imprisonment for a term which may extend to two years, or with a fine, or with both.[819] The falsification of an entry into the register will carry with it, upon conviction, imprisonment for a term which may extend to two years, or with a fine, or with both.[820] In an instance where an offence is committed by a company, the company itself and all persons responsible for the conduct of the company when the offence was committed 'shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished'.[821] The section also provides guidance on what constitutes a 'company'.

With regards to civil action, a person who sues as a result of the infringement of their GI or for passing off may be awarded the following relief:[822]

> 'an injunction and at the option of the plaintiff, either damages or account of profits, together with or without any order for the delivery-up of the infringing labels and indications for destruction or erasure'… the order of injunction …may include an ex parte injunction or any interlocutory order for any of the following: discovery of documents; preserving of infringing goods, documents or other evidence which are related to the subject-matter of the suit; restraining the defendant from disposing of or dealing with his assets in a manner which may adversely affect plaintiff's ability to recover damages, costs or other pecuniary remedies which may be finally awarded to the plaintiff.

If a person engages in threats of legal proceedings, the aggrieved party may sue on the basis that the threats are unjustifiable and may seek an order to such effect, as well as an injunction against further threats or continuation of threats, and may additionally recover damages sustained. [823] An

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819 Section 43 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

820 Section 44 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

821 Section 49 of the Geographical Indications of Goods (Registration And Protection) Act, 1999 provides that:

> 49. Offences by companies.—(1) If the person committing an offence under this Act is a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.
>
> (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or that the commission of the offence is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

822 Section 67 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

823 See section 73 of the Geographical Indications of Goods (Registration And Protection) Act, 1999.

interesting feature of the GI Act is the distinction between two concepts: 'registered proprietor' and 'authorised user'.[824] It is important to note that it is the ‘authorised User’ and not the ‘registered proprietor’ who has the exclusive right to use the GI.[825]However, both ‘registered proprietor’ and ‘authorised users’ can bring infringement actions.[826] The GI Act also provides for remedies for GI violations that can be availed by both the registered proprietor and authorised users.[827]

f) Certification and collective marks in the Act

There is no reference made in the Act to collective or certification marks. This is presumed to be by design because these marks are covered in the Trade Marks Act of 1999.

g) False Indications of source or origin

With regards to false indications of origin, s22(1)(c) of the Act provides as follows:

> ‘A registered geographical indication is infringed by a person who, not being an authorised user thereof,— c) uses another geographical indication to the goods which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the persons that the goods originate in the territory, region or locality in respect of which such registered geographical indication relates’.

The above may have the consequence of infringement proceedings being instituted through the criminal or civil route as explained above at h).

824 Das (2009) op cit note 787 at 13.
825 Das (2009) op cit note 787 at 14.
826 Das (2009) op cit note 787 at 14.
827 Section 21(1)(a).

h) *Provisions relating to trademarks*

The Act has a few provisions relating to trademarks: first of all, a GI is not allowed to be registered as a trademark.[828] However, the owner of a trademark that contains a geographical indication but was registered in good faith is protected under section 26.[829]

The above statute on GIs is all-encompassing and even sets out offences and penalties for different acts conducted against registered GIs.[830] The Act also extends powers to the government to decide which GI products need higher protection under the Act.[831]

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[828] Section 25 of the Geographical Indications of Goods (Registration And Protection) Act, 1999 provides that

> Prohibition of registration of geographical indication as trade mark.—Notwithstanding anything contained in the Trade Marks Act, 1999 (47 of 1999), the Registrar of Trade Marks referred to in section 3 of that Act, shall, suo motu or at the request of an interested party, refuse or invalidate the registration of a trade mark which—
> (a) contains or consists of a geographical indication with respect to the goods or class or classes of goods not originating in the territory of a country, or a region or locality in that territory which such geographical indication indicates, if use of such geographical indications in the trade mark for such goods, is of such a nature as to confuse or mislead the persons as to the true place of origin of such goods or class or classes of goods;
> (b) contains or consists of a geographical indication identifying goods or class or classes of goods notified under sub-section (2) of section 22.

[829] S26. Protection to certain trade marks.—(1) Where a trade mark contains or consists of a geographical indication and has been applied for or registered in good faith under the law before the coming into force of the Act relating to trade marks for the time being in force, or where rights to such trade mark have been acquired through use in good faith either—

> (a) before the commencement of this Act; or
> (b) before the date of filing the application for registration of such geographical indication under this Act, nothing contained in this Act shall prejudice the registrability or the validity of the registration of such trade mark under the law relating to the trade marks for the time being in force, or the right to use such trade mark, on the ground that such trade mark is identical with or similar to such geographical indication.
> (2) Nothing contained in this Act shall apply in respect of a geographical indication with respect to goods or class or classes of goods for which such geographical indication is identical with the term customary in common language as the common name of such goods in any part of India on or before the 1st day of January 1995.
> (3) Nothing contained in this Act shall in any way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to confuse or mislead the people.
> (4) Notwithstanding anything contained in the Trade Marks Act, 1999 (47 of 1999) or in this Act, no action in connection with the use or registration of a trade mark shall be taken after the expiry of five years from the date on which such use or registration infringes any geographical indication registered under this Act has become known to the registered proprietor or authorised user registered in respect of such geographical indication under this Act or after the date of registration of the trade mark under the said Trade Marks Act subject to the condition that the trade mark has been published under the provisions of the said Trade Marks Act, 1999 or the rules made thereunder by that date, if such date is earlier than the date on which such infringement became known to such proprietor or authorised user and such geographical indication is not used or registered in bad faith.

[830] Chapter VIII of the Geographical Indications of Goods (Registration and Protection) Act of 1994.

[831] Section 22 (2) provides that "[t]he Central Government may, if it thinks necessary so to do for providing

It has been stated that there are some limiting issues pertaining to the success of the GI Act:[832]

1. Obtaining legal protection in various countries under their respective legal and technical frameworks is an extremely difficult task. This is all truer because there are significant differences in GI protection methods from country-to-country.[833]

2. For GI to be successful, manufacturers must be aware of the protections from which they can benefit, but some goods are not recorded due to a lack of awareness by the producers. This phenomenon leads to inefficiencies in the GI system in India.[834]

3. The current law relies mainly on documentary evidence to grant geographical indications: The process of obtaining and applying for a GI requires submitting a large amount of documentary evidence. Documentary evidence is not always easy to come by, especially in areas where history is passed from generation to generation by word of mouth.[835]

4. The law does not address whether the government can be the registered GI owner or whether the government agency is the appropriate body to hold GI rights. When the government becomes involved in the production and marketing process, there is a risk of harm to producers not affiliated with the government.[836]

5. Even when rights are granted, local sellers do not always benefit from them. This can be due to a multitude of reasons: market operators sell inauthentic products to consumers, thereby depriving genuine sellers of their consumer base; lack of organisation and awareness of these local producers; lack of full implementation of GIs etc.[837]

6. It is important that all registered GI holders, whether government or private, actively enforce their GI because failure to do so defeats the very purpose of GI registration.

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additional protection to certain goods or classes of goods under sub-section (3), by notification in the Official Gazette, specify such goods or class or classes of goods, for the purposes of such protection".Chandrachur, A & Chamaria, S 'Geographical Indications for Food Products with Special Reference to India' (2020) 19 *Supremo Amicus* 120-125 at 125. Also see Das, K 'Prospects and challenges of geographical indications in India' (2010) 13 *Journal of World Intellectual Property* 148-201 at151.

832 Govindrajan, G & Kapoor, M 'Why the protection of geographical indications in India needs an overhaul'(2018) 8 *NLIU Law Review* 22-48 at 31 to 47.

833 Govindrajan, & Kapoor (2018) op cit note 832, at 31 to 32.

834 Govindrajan, & Kapoor (2018) op cit note 832, at 33.

835 Govindrajan, & Kapoor (2018) op cit note 832, at 33

836 Govindrajan, & Kapoor (2018) op cit note 832, at 35.

837 Govindrajan, & Kapoor (2018) op cit note 832, at 35.

Protecting GIs in foreign jurisdictions is an even more difficult task due to the significant costs involved.[838]

7. There is no proper post-registration system. While there have been many efforts to promote GI registration, there has subsequently been little effort to enforce GI and promote the products.[839]

Patnaik, also points out that there are no provisions of the GI Act which allow services to be covered under the Act, as such a GI is limited to product registration, not services.[840] Despite these stated challenges, it is averred that the implementation of the Geographical Indication system has proven to bring immense benefits to producers and consumers in India and abroad for the following reasons:[841]

1. It helps authorised manufacturers to produce and supply their products in the best possible form in the absence of unfair competition from unauthorised manufacturers in the market.
2. Labels that provide geographical indications often provide a platform for the manufacturer to earn maximum profits using the market value of the product. Surveys often show that customers are willing to pay more for authentic products that are labelled according to their origin.
3. The system benefits both manufacturers and customers by preventing unfair trading practices in the market.
4. The protection afforded by geographical indications plays an important role in preserving and protecting the traditional knowledge and skills of indigenous communities in the country and helping to keep their customs and traditions alive.
5. Since geographical indications are indications of a product's origin, they stimulate the social, economic and cultural development of the country's localities, especially in rural areas.
6. It contributes to the country's gross domestic product (GDP) by enhancing trade and exports, thereby increasing per capita income. It also improves the country's reputation and perception internationally and puts the country in a better position in the hierarchy.

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838 Govindrajan, & Kapoor (2018) op cit note 832, at 37.

839 Govindrajan, & Kapoor (2018) op cit note 832, at 38

840 Patnaik, N ‘Geographical indications protection in India: case study analysis on 'tirupati laddu'’ (2021) 3 *Indian Journal of Law and Legal Research* 1-10, at 4.

841 Santhosh, (2022) op cit note 794 at 7-8.

These benefits can further be highlighted by the incremental number of GI registrations over the years within the country. Until March 2007, 30 GIs were registered in India.[842] By 2022, more than 365 items have received the GI label.[843]

6.5. Consideration and assessment of the Approaches to GI protection

South Africa follows the second option listed above at 6.2.2, i.e. that of using trademark laws to protect GIs. India adopted a *sui generis* GI protection system. Like South Africa, India also has a specific and distinct law geared towards trademark protection. However, unlike South Africa, the trademark law in India does not cover GI protection. Based on the method used under 6.3 and 6.4, a comparison of several GI protection-related components will be done below. The Namibian approach will also be referred to herein.

6.5.1. Definitions

Under the South African approach, there is no definition provided for GIs; however, the Indian Act specifically defines a GI. The position in South Africa with regards definitions is that GIs are indicated as finding protection as a collective mark, with certification marks only included in the amendment laws. The Act then defines a collective mark as a mark falling within the specifications laid out in the relevant section, i.e. for collective marks, this is s43. The Act, however, defines a 'mark', therefore providing a scope of what a mark is, which can be considered either collective or a certification; however only the former is presently applicable to GIs.

Regarding the protection of a GI under collective markings, the situation in Namibia is the same; however, the Namibian position extends this same approach to certification marks, thereby providing a wider scope of application than South Africa.

In the Indian Act, the GI is provided as an 'indication', but no definition is provided on what this is; this, to a certain extent, may be countered by the provision of what a GI can refer to in s2(3), i.e. 'the use of a printed or other visual representation of the GI'.

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842 Das, K ‘Protection of Geographical Indications: An Overview of Select Issues with Particular Reference to India’ (2007). *Centre for Trade and Development Working Paper No.* p53.

843 Sarkar, (2022) op cit note 785 at 8.

6.5.2. Requirements for Protection

In South Africa, the protection of a mark and GI, provided for in the Act, is only limited to registered collective marks. In Namibia, the requirements for protection extend to the provisions in relation to collective and certification mark registration, provided the distinctiveness element is met. This does not seem to be a formal requirement within the South African Act, though s9 does require that a mark be capable of distinguishing goods of one producer from those of another. As such, distinctiveness is provided for, albeit indirectly.

In India, a GI cannot be registered as a trademark, which is different from South Africa; however, it does not specify the precise conditions that must be met for registration to be approved. Instead, it provides a list of GIs which cannot be registered, such as one which 'comprises or contains scandalous or obscene matter', which in a way is similar to the South African and Namibian provisions on non-registrable marks.

An advantage of the Indian approach, depending on one's viewpoint, is that it allows for homonymous indications to be registered. This may not work well in Namibia or South Africa because once a mark is spelt or pronounced in a similar manner to that of another, this may meet the requirement of the likelihood of confusion, therefore rendering such mark non-registrable as it does not meet the distinctiveness requirement.

6.5.3. Registration

For the purpose of registration, in South Africa, the application must be submitted by the holder of the collective mark in the prescribed form and content, inclusive of a classification in accordance with the regulations. Once the registration has been approved, the mark will be registered for a period of 10 years and may be renewed for further ten-year periods, subject to payment of a fee. The mark may be removed from the register in accordance with the provisions of the Act.

The Indian Act requires the relevant association of producers or representatives to submit the application in the prescribed format, also indicating the classification of the GI in accordance with the rules. A registered GI must be kept in the register and is also valid for a period of 10 years. It may be renewed after paying fees. The Act also prescribed that a certificate be issued upon

registration. A detailed review of the GI Act and Rules indicates that the entire registration process is time-consuming and requires legal advice.[844]

The Namibian Act also requires an application to be submitted as prescribed by the Act. The Registrar will then conduct a formal and substantive assessment of the application. If all requirements are met, the mark, whether collective or certification, must be registered and a certificate of registration issued. The Act in s188 provides for rules on how collective and certification marks must be applied. If these rules are complied with, the Registrar will accept the application for registration. A certification or collective mark may also be invalidated, which will result in its removal from the register. Collective and certification marks, it is required, must be registered in a particular section of the trade marks register.

6.5.4. Rights conferred

Under the South African approach, once a mark has been registered, provision is made for the mark to be assigned or transferred as part of the goodwill of a business or without it. The Act does not mention that the mark confers an exclusive right of ownership, but it can be inferred from the fact that the use of the registered mark without authorisation can be considered an infringement of the mark. In the Indian Act, the owner of a GI that has been granted registration is conferred several rights, including the right to seek relief for infringement. The Act specifically provides that the holder of the GI is granted an exclusive right of use; however, such GI may not be 'the subject matter of assignment, transmission, licensing, pledge, mortgage or any such other agreement'; the owner can, however, pass it down in death. In a way, that exclusive right is limited.

In Namibia, a holder of a registered mark is granted an exclusive right that allows them to exclude all others from using the mark unless otherwise authorised by said owner. Registration further confers the owner the right to seek remedies available to them. The Act also makes provision for licensing of the mark through contract, should the holder so wish. The registered mark may also be transferred as part of the goodwill of a going concern.

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844 Vinayan, S ‘Geographical indications in India: issues and challenges an overview.’ (2017) 20 *Journal of World Intellectual Property* 119-132, at 122.

6.5.5. Infringement and remedies

Within the South African Approach, it is specifically stated that infringement in accordance with the Act can only occur where there is a registered mark. Acts which constitute infringement and those that do not are enumerated. Should infringement occur, the owner of the mark may seek relief in the form of an interdict, an order for the removal from the product, the infringing mark, where impossible, delivery up of infringing material, damages, and in lieu of damages, reasonable royalty which would have been payable had the trademark been licensed. In terms of the Act, well-known marks in terms of the Paris Convention may also be infringed, and the owner thereof is entitled to institute infringement proceedings. The Act also identifies offences that can be committed against the registers and provides for a sanction in the case where one is found guilty.

India identifies uses that may result in the infringement of a registered GI. In addition, the Act sets out offences and the applicable sanctions and additionally provides remedies in both civil and criminal law. Passing off is also set out as a remedy; the relief that one may seek for a suit based on passing off is set out in s67 of the Act.

The Namibian position sets out the acts which may constitute infringement. Where infringement occurs, the owner is entitled to institute legal proceedings against the infringer and may seek relief in the form of 'an interdict, an order for the removal of the infringing mark from goods or materials and if not possible, the delivery up of such goods; damages; in lieu of damages, reasonable royalty as would have been payable had the owner licensed out the mark'.[845] There is also a provision made for a person threatened with infringement, who is certain that they have not engaged in infringing acts, to seek remedy in the form of an interdict and damages where applicable.

6.5.6. Certification and collective marks

Certification and Collective marks in South Africa are subject to the same provisions set out for trademarks. Until the coming into force of the Intellectual Property Laws Amendment Act, only the provisions in the Trade Marks Act in relation to collective marks will govern GIs. The Indian GI Act does not make reference to collective or certification marks, but a GI can be registered on behalf of an association of producers and, consequently, be 'collectively' owned.

[845] S183 of the Industrial Property Act of 2012.

With reference to Namibia, certification and collective marks can be used to protect GIs. The provisions in the Act relating to trademarks are applicable to certification and collective marks unless otherwise specifically stated that they only relate to trademarks, with the exclusion of certification and collective marks.

6.5.7. False Indications of source or origin

The South African Trade Marks Act does not contain specific provisions aimed at prohibiting the use of a false indication as it pertains to the source of origin of the goods, but the Act identifies offences related to false representation. This can be construed to have the same effect of guarding against the use of false indications of origin or source. Furthermore, the Merchandise Marks Act 17 of 1941 guards against certain forms of conduct, and this includes rendering as an offence the application of a false trade description on goods. Goods which do not bear a clear indication of the country of manufacture may also be prohibited from importation. These provisions may have the result of guarding against false indications of origin.

The Indian Act indicates that it will constitute infringement where a GI falsely represents that goods originate from the area in respect of which the registered GI indicates. This is a safeguard against false indications of origin.

In Namibia, there is a prohibition on the distribution of goods which bear false indications of source, making engaging in such an act an offence which is punishable by imprisonment or a fine, or both.

6.5.8. International applications

The South African and Indian Acts do not make any reference to international applications and how these will be treated. Namibia provides that applications received through ARIPO and designated to Namibia must be transmitted in accordance with the Banjul protocol, and registration be considered in accordance with the Act. South Africa is not a member state of ARIPO, and India falls outside the membership qualification.

6.5.9. Common law protection

In South Africa, GIs can find defence under Common Law, wherein the use of misleading or deceptive marks in relation to goods is prohibited under unlawful competition rules and can find

remedy through the action of passing off. This passing-off remedy may also be instituted for registered GIs. For passing off to be established, the applicant must prove the presence of goodwill or reputation associated with the mark according to the opinion of the relevant section of society towards the product/service, misrepresentation, as deception resulting in damage or likelihood of damage to the goodwill.[846] It is a species of unlawful competition, and registration of a mark is immaterial. Passing off can, therefore, be brought as an action against a misappropriated GI. Under Indian law, infringement action in terms of the Act can only be brought for registered GIs; those seeking remedy for infringement of unregistered GIs may also do so through the application of common law. Passing off is also included as a remedy in the GI Act of India.

The comparative jurisdictions of India and South Africa both provide for the protection of a GI registered in terms of an Act, whether it be by a collective mark, certification, or GI title, as the case may be; however, unregistered GIs cannot be enforced in terms of the Indian Act. The remedy of passing can be instituted in that regard.

When one considers the only existing legislation within Namibia on GIs, that is, protection granted through trademark laws, there is a need to assess whether this manner of protection is sufficient or whether it would be more beneficial for Namibia to adopt a *sui generis* system like that of India. From the above, one can conclude the following: in a *sui generis* protection system, the label belongs to the state, and the regulatory authority controls the product. It is a public or private property right, whereas the certification mark usually belongs to the manufacturer or association of manufacturers that manages the mark.[847] Additionally, a *sui generis* system is designed to protect the identification of origin and its association with reputation and quality,[848] the certification mark, on the other hand, is intended to certify quality assurance, definable assets, materials, origins, manufacturing methods or methods, locations or regions or origins of goods or services.[849] It has been stated that a *sui generis* system provides stronger protection in comparison to trademark law.[850] This system allows a state to craft its GI laws in a way that fills the gap created by the TRIPS agreement in its provisions that grant greater protection to wines and spirits as

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846 *Capital Estate and General Agencies (Pty) Limited v Holiday Inns Inc.* 1977 2 SA 916 (A) 929C.

847 Sheldon, LN *The Protection of Geographical Indications for Agricultural Products in Africa using Trademarks and Sui Generis Legislation (unpublished LLM thesis, University of the Western Cape, 2014).*

848 Correa,(2002) op cit note 472 at 224.

849 International Trademarks Association „Certification marks" available at http://www.inta.org/TrademarkBasics/FactSheets/Pages/CertificationMarks.aspx;

850 Gangjee op cit note 60 at 1267.

opposed to other goods. This is what India has done by incorporating Article 23 of TRIPS in its Act, thereby extending that level of protection to all GI-capacity goods.

However, establishing a *sui generis* system of GI protection will be costly because a national registry will need to be created and equipped with human capital, including experts, to assess applications. This may not be possible due to a lack of funds within the country and even expertise. Oguamanam & Dagne have identified several challenges which states may face in establishing a GI regime when it comes to the institutional and organisational frameworks:[851] the structural framework for the identification of eligible products and registration thereof needs to be in place; because the distinctive factor of GIs is that they indicate quality, which is linked to a specific place, there is a need to ensure that GIs are compliant with the requirements for that GI category; additionally, there is the challenge of ensuring that consumers are aware of the quality, reputation or characteristics of the GI protected goods.[852]

This, therefore, makes the protection of GIs through trademark laws significantly cheaper for the government because it will not need to establish administrative structures, as most of the structures and resources are already in place to support trademarks. Furthermore, the trademark and common laws can always be supplemented by partnership agreements with the necessary trading partners, as was done between the EU and SA.

Namibia, when compared to the jurisdiction of South Africa and India, has a closer relation to the approach in South Africa, albeit the minor difference pointed out above in the assessment of jurisdictions. It is noted that the provisions in these countries with regards to GI in relation to definitions, requirements for protection, rights conferred, infringement and remedies available to the holder of a GI are not vastly different, therefore answering sub-research question 1.3.6 in this manner; though the form of in which the protection is granted differs, the legal effect is the same, for that reason, the protection granted for GIs between the three countries does not vastly differ in substance. A difference between the three jurisdictions is the fact that India, through its sui generis Act, grants the same level of protection to all GI goods without the differentiated treatment found in the TRIPS Agreement.

[851] Oguamanam & Dagne op cit note 230 at 91-98.
[852] Oguamanam & Dagne op cit note 230 at 95.

6.6. Conclusion

Following the discussion of the GI legal frameworks of selected jurisdictions above, it then necessitates consideration of the form which the Namibian GI legal framework can and should take against the backdrop of Namibia's development objectives. As shown above, in Chapter 5, Namibia currently provides protection for GIs mainly through registration as certification or collective trademarks in accordance with the Namibian Industrial Property Act of 2012. Namibia furthermore provides protection of GIs through common law rules of passing off. This approach broadly resembles the approach adopted by South Africa and, as far as the general use of the trademark system for GI protection is concerned, as well as the use of passing off as a remedy for GI enforcement.

It has been stated that in order for GIs to have developmental effects, such GIs must be tailored to ensure economic, social, and environmental sustainability.[853] It does not necessarily have to be that there exists a designated sui generis law on GIs for development to be effected. From the assessment above, it looks like both approaches to GI protection the countries of comparison provide sufficient protection. Seeing as the position in Namibia is similar to that of South Africa, an approach that has not seen significant criticism, the Namibian approach to GI protection can also, in the same vein, be considered adequate. The protection granted through trademarks can, therefore, be maintained in answering sub-question 1.3.7. Namibia is also a signatory to the same partnership agreement discussed above at 6.4.4 and could use this to further protect GI capacity goods and trade thereof between Namibia and the EU.

853 European Commission 'Workshops on Geographical Indications: development and Use off specific instruments to market origin-based agricultural products in African-ACP countries' 25.

CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

7.1. Introduction

In this thesis, the issue of IP protection generally, as well as GI protection specifically(inclusive of trademarks), and its potential to drive development in Namibia have been discussed. The general consensus is that IPRs have the potential to contribute to development; however, not all states are using this tool effectively. The potential has so far been evidenced in the contribution made by some of the more established IPRs, such as patents, trademarks and copyrights, to states that are now considered developed. This Chapter contains a summary of the chapters, conclusion to the study and recommendations.

7.2. Summary of Chapters

Chapter 1 provided an introduction to the study. It sets out the statement of the problem, the research questions, the hypothesis, the conceptual framework and the methodology. It moreover set out the objectives of the study, which is whether the formulation of a GI protection framework can assist Namibia in the attainment of its Vision 2030 developmental objectives. The objective of the research was, therefore, to ascertain the form that a GI protection legal framework in Namibia, which is able to support the development objectives of Vision 2030, should entail. The questions which were sought to be addressed in the succeeding chapters were raised, namely:

1.3.1. How are GIs defined?

1.3.2. Do GIs have the potential to advance the development of states?

1.3.3. How has Namibia incorporated GIs in its development objectives?

1.3.4. Is provision made for GI protection on the international and regional levels?

1.3.5. Does Namibia have a legal framework for GI protection?

1.3.6. Do the legal frameworks on GIs in South Africa and India differ from Namibia?

1.3.7. What should a GI framework in Namibia look like?

Chapter two took a closer look at development planning as a concept, as well as the right to development. This was necessary as it provided a foundation for the discussion on the need for effective implementation of development plans. It was followed by examining Namibia's Development Plans under the country's Vision 2030 as well as the Harambee Prosperity Plans. These Plans were assessed, and the positioning of GIs within them was determined.

Namibia, like many other states, has also engaged in a development planning process that resulted in the drafting of the Vision 2030 document and its revolving 5-year NDPs, all of which have been supplemented by the HPPs, which came into force during the current President's term of office. These plans speak to effective governance, economic advancement, and social progression, which fall well within the discussion at hand. The law-making process hence must ensure that it does not hinder development, and the HPPs clearly indicate the government's willingness to work toward economic transformation, which includes repealing laws that have the potential to retard development. The Chapter concluded that GI rights promotion could contribute to the developmental plan of moving Namibia away from a country dependent on the trade of raw materials to one trading in finished products. The sub-research question 1.3.3 on what Namibia's development objectives are was therefore addressed in Chapter two.

Chapter three provided an introduction to IPRs in general before providing an overview of Geographical Indications. The Chapter also considered Trademark protection because some jurisdictions use trademark laws to protect GIs. The functions of both trademarks and GIs were then discussed, and the relationship between the two regimes was assessed. A discussion of the IPR of GI was undertaken, and its potential to drive development was then analysed.

The WTO TRIPS and WIPO’s Paris Convention on the Protection of Industrial Property both specify what a GI is and require parties to either instrument to provide GIs with a minimum level of protection, as outlined in both instruments. The Chapter observed that there are those who argue that the more protection is afforded to IP generally, the better it is for development, while others argue that too much IP protection can hamper development.

It is, however, asserted that developing countries with the potential to gain a competitive advantage would do well to pay some interest to GI protection. IP protection, generally, and GI protection specifically, can contribute to development. Whether a state is developed or developing, there is always a concern for human development, and consequently, all IP laws and policies should have this as their primary goal. The Chapter, therefore, served its purpose of answering the sub-question of what the definition of a GI is. Furthermore, sub-question 1.3.2 on whether GIs have the potential to advance the development of states was also addressed, and the conclusion reached was that GIs have the potential to drive development under the right conditions. From an efficiency perspective, under the law and economics approach, a GI law can assist the country in achieving its developmental objectives.

Chapter four examined the international and regional instruments applicable to GI protection. Due to the fact that some countries use trademark laws to protect goods of origin, the international frameworks relating to trademarks were also discussed in this Chapter. Finally, the Chapter looked at the proposed extensions for GI protection to all goods similar to the protection now given to only wines and spirits under the TRIPS Agreement. States that have requested such expansion have argued that Article 23 of TRIPS in preventing the use of GIs for wines and spirits which originate from other localities, regardless of whether said use amounts to unfair competition or may mislead the public and provides higher protection other than what is provided for under Article 22 with respect to wines and spirits, for other goods that do not fall in those categories. This discussion was relevant because Namibia also has producers of wines and spirits.

The protection as envisaged by international instruments for GIs can, however, only be fully accomplished if countries provide adequate national protection of their own GIs. The sub-research question 1.3.4, relating to what the regional and global legal framework for GI protection is, was therefore addressed in this Chapter. The Chapter also considered the African Union (AU) Continental Strategy for Geographical Indications in Africa for the period 2018 to 2023 and regarded it as a critical step at the regional level towards developing an adequate regional framework for GI protection. The rules and obligations contained in regional and international instruments would, however, be more effective within the Namibian context if they are given practical effect through an Act of parliament because the practical implementation of these provisions in the international agreements is almost impossible to carry out without a legal domestic framework enabling such implementation. It can be conceded that, in effect, the Industrial Property Act of 2012 provides national implementation of international obligations undertaken by Namibia prior to the promulgation of the Act.

Chapter five then dealt with the *status quo* of Intellectual Property protection in Namibia generally, and GI more specifically. The Chapter assessed the type of protection provided to GIs under the Industrial Property Act of 2012. The protection granted in terms of common law was also deliberated upon, with reference to cases that specifically addressed passing off as a remedy under common law. It was found that the Industrial Property Act of 2012 protects GIs using collective and certification marks. The Act lays forth the procedures for registering, the rights granted, and the remedies accessible to a holder of a collective or certification mark and, in the same vein, a registered GI mark. The Chapter also looked at the findings of the Namibian IP audit,

which was undertaken in 2016 and which has paved the way for the development of the IP legal environment through its findings and recommendations. It was after this audit, in which the need for an active IP law reform was highlighted, that the Industrial Property Act of 2012, which makes provision for GIs, came into force. This Chapter also looked at the National Intellectual Property Policy and Strategy for Namibia for the period 2019 to 2024, which was another outcome of the IP audit. One of the key strategies listed and which applies to the discussion at hand is the strategy listed under the policy direction section of the NIPPS, which is to 'develop Namibia's position on protection of geographical indications and plant varieties'. This shows a willingness and recognition that the state can use GIs to promote developmental policies. The Chapter also noted that Namibia, through SADC, has entered into a cooperation agreement which recognises the need to engage on matters related to IPRs generally, as well as GIs specifically.

Chapter five, therefore, addressed sub-research question 1.3.5, whether Namibia has a legal framework for GI protection. This was answered in the affirmative. A further conclusion was reached that there is indeed a concerted effort on the part of the government to align its development objectives with IP protection.

Chapter six investigated the laws governing GI protection in two chosen nations: South Africa and India. This was done with a view of identifying suitable best-practice approaches for GI protection in Namibia with regard to GI protection. Broadly, GIs find varied protection in the various legal systems around the world, such as rules against unfair competition, regulations protecting consumers, laws protecting certifications and collective marks and by way of *sui generis* laws.[854] Despite these differing approaches, the common and underlying feature of all is the prohibition of the use of the GI by unauthorised parties in such a way that such use leads the public to think that a good originates from one area when it does not.

In order to identify a suitable approach to GI protection for Namibia, the current GI protection frameworks of India and South Africa were compared. The provisions of the Trade Marks Act of 1993 on collective marks were found to specifically cover the protection of geographical indications (GIs) in South Africa and will include certification marks once the

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[854] WIPO has highlighted the following as existing approaches for the protection of GIs: Unfair Competition and Passing off; Appellations of Origin and registered GIs; Collective and certification marks; and Bilateral agreements. See WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 8th Session: Addendum To Document Sct/6/3 Rev. (Geographical Indications: Historical Background, Nature of Rights, Existing Systems For Protection and Obtaining Protection in Other Countries) (2002).

Intellectual Property Laws Amendment Act of 2013 comes into force. GIs also find protection under common law in South Africa. India, on the other hand, for the protection of GIs, has a *sui generis* law in place, an all-encompassing statute that is aimed at protecting GIs. A conclusion was reached that the approaches to GI protection in both countries of comparison provide sufficient protection.

The sub-research question 1.3.6 on whether the legal frameworks on GIs in South Africa and India differ from Namibia was addressed in Chapter six, as well as sub-question 1.3.7 on how a GI framework in Namibia should look. The approach that Namibia has in place now seems to be adequate as it seems to have a similar GI protection effect when compared to India and South Africa. Further, there are not vast differences in the rights conferred or remedies available to an owner of a registered GI in Namibia to one in South Africa and India, as was demonstrated in the analysis under 6.5 above.

7.3. Conclusions

The discussion above produces several conclusions. IPRs and the promotion thereof have the potential to drive development. This tool is not yet being used to its optimal potential by all countries, especially those still termed as 'developing'. GIs are especially relevant to developing countries that depend on the export of primary commodities. If GI-capacity goods are not protected, competitors could pass them off as their own, even though they have been made in other localities or areas with different characteristics and quality ties.

When it comes to IP, generally, there are differing views as to the link between IP and development. It is acknowledged herein that IPRs do contribute to development, even if partially and even if in conjunction with other factors. Jurisdictions of the world have established GI regimes which are relatively successful and may have had a role to play in the development of their states.

Different countries provide protection to GIs through various means, all of which are aimed at preventing unauthorised use as well as averting the likelihood of confusion on the part of consumers.[855] There is no one right approach, and each country must choose one that best aligns with its objectives and which it deems to be the most appropriate for the promotion of rights. This

[855] Strong GI protection, according to proponents, is required to thwart fraud, guarantee fairness, and foster economic growth. See Watson op cit note 63 at 2.

protection, in whatever form it takes, can be viewed as either contributing to development or hindering it. However, IP protection that is imposed needs to be fitting to the economy it relates to if it is going to be of any benefit. Namibia, as a developing country, could greatly benefit from promoting products that originate from within its territory.

For Namibia, there is very little evidence of the integration of IP into the process of addressing policy issues, and it can, therefore, be concluded that full use is not being made of IP within the intended development objectives. The Industrial Property Act of 2012 currently makes provision for GI protection. This, in addition to the common law and the international obligations imposed on Namibia by accession and which are applicable to it by virtue of Article 144 of the Constitution, which relate to GIs, form part of the overall GI law within the state. These international obligations undertaken by Namibia specifically call for member states to put into place measures within their jurisdictions to guard against GI infringement. Because it is not specified the manner of GI protection that must be implemented by states, the inclusion of GI protection by Namibia within certification and certification marks can be considered as compliance with the obligations undertaken by the state.

Development planning has been instrumental in promoting economic growth in a number of states and is not, therefore, without its benefits. This has even been evidenced in Africa. Plans, however, fail if not implemented properly. The risk of failure of development plans can be averted if a state determines the rate of development it wishes to attain ahead of time and identifies the sectors of major importance in which it wants this development to take place.

Namibia has done this by setting up revolving five-year plans, each with its own goals within identified key areas. These developmental objectives, however, do not make reference to the promotion and protection of GIs as a tool for attaining them. GI protection for goods can, therefore, be used as a strategy of implementation for promoting the developmental objectives of the state. This is especially applicable to the more flexible HPPII, which considers the potential for plans to be thrown out of balance. Further, this specific plan acknowledges that the Namibian regulatory framework must indeed facilitate the achievement of economic competitiveness, which is key for development. The promotion of GI rights is a strategy that could greatly contribute to the development objectives set out under the HPPII, thereby moving the country from depending heavily on trading in raw materials to trading in finished products. There is, therefore, a need to align these developmental objectives with the GI law in place. This could be done through the

adoption of a GI policy. This GI policy, accompanied by a strategy, can fall under the administration of the BIPA, which is a state-owned enterprise under the Ministry of Industrialization, Trade, and SME Development. The development of this GI policy and strategy can be crafted within the guidance of the African Union Continental Strategy for GIs in Africa for 2018 to 2023, discussed above in Section 4.4.3. The premise of this AU strategy is the use of GIs as a driver for economic development and sustainable development of the region. One of the challenges identified by the AU strategy is the lack of awareness of all stakeholders, as well as the complex and multidisciplinary approaches that are required in the process of GI development, as well as the costs involved in GI specifications, as well as dispute resolution.

The GI strategy and Policy in Namibia can be developed in the likeness and frame of the NIPPS discussed in section 5.6. The GI strategy and policy must have objectives aimed at the creation of an environment conducive to the promotion, generation, protection, and commercialisation of GIs as a tool for development. There must, therefore, be policy-guiding objectives and strategies for implementation. One of the key objectives can aim to integrate IP into development, thereby ensuring that GIs support development goals. This will align with the NIPPS objective 1 discussed above at 5.6. Additional objectives that the GI strategy and policy can consider are those aimed at ensuring the generation of GI assets, commercialisation of those assets, and improvement and strengthening of GI awareness, which are aligned with objectives 7, 9, and 10 of the NIPPS. The GI strategy and policy can also be rolled out in five-year periods of implementation, which have specific timelines set out to allow for measurement of the progress in implementation. Namibia can also consider the sustainability strategy for GIs developed by the Organization for an International Geographical Indications Network (oriGin). Further recommendations to supplement this are set out under 7.4 below. A guideline and exposition on the full scope and content of the GI strategy and policy are beyond the scope of this thesis.

However, it goes without saying that the promotion of this GI policy and strategy will be key to its successful implementation. As a developing country which has GI capacity goods, Namibia could greatly benefit from a GI system that actively promotes, through policy direction, the protection of agricultural and manufactured goods, the characteristics and qualities of which are tied to the country and its environment.

When it comes to GI protection, the legal frameworks of India and SA were assessed in order to gauge the most appropriate approach that Namibia can follow.

To answer sub-research question 1.3.7, it can be stated that the protection currently provided for in Namibia with regards to GIs in the form of certification marks or collective trademarks is only acceptable in form, in the sense that although the protection granted by Namibia is similar to that of South Africa, the actual manifestation of the protection through a list of registered GIs is not evident. This could be because the GI law does not allow for practical implementation, or there could be something lacking in the system that hinders the registration of GIs, such as a GI identification and specification guide or model. Consequently, a stark difference between Namibia and the jurisdictions of comparison (South Africa and India) is the absence of registered GIs. This could be attributed to the actual implementation of the laws or lack of awareness on the part of producers on the value of registering GIs. Another consideration could be that GI capacity goods are registered under the trademarks register as trademarks, not as GIs.

Finally, to respond to the primary question, the existing protection of GIs through collective and certification marks, once aligned to a properly constituted GI policy, which is further aligned to the developmental objectives, can contribute to the attainment of Vision 2030.

7.4. Recommendations

It is recommended that Namibia puts in place a GI policy and strategy attached to the existing GI legal regime and developmental objectives, with the aim of promoting its GI capacity goods in both agricultural and manufacturing industries. Namibia, as a developing country, could greatly benefit from embracing and supporting the protection of products such as dates, grapes, cereal crops, beef, *eedingu*, fish, wine, organic oils, textiles and leather products. Namibia can furthermore borrow from the Indian approach, where the classification of GIs has been set out in a schedule, thereby providing a wide range of classes from which one can find a classification for products. This will align with Objective 7 of the NIPPS, which aims to encourage and support the generation of IP assets by 2024.

Namibia's GI policy and strategy, together with the legal framework, need to be fully harmonised and strengthened. The existing IP policy and strategy itself is not sufficient as it does not fully elaborate on the GIs and the role they can play in advancing the developmental objectives of Namibia. The IP audit report identified that there was no clarity on the integration of IP in addressing policy issues, thereby not making meaningful use of the IP tool in meeting intended development objectives. This, by extension, also applies to GIs. Therefore, there is a need for a

national policy framework to provide appropriate direction. The audit report identified that there is an IP policy framework but no GI-specific framework that could serve the country's development objectives. A GI policy and strategy framework needs to be developed to provide guidance on the following:

a) GI inclusion in sectoral and national development strategies
b) The promotion of the GI policy and strategy to encourage the generation and exploitation of GI- GI-capacity goods with the added support and the promotion of regional inventive, creative, and innovative activities as well as technology transfer;
c) Alignment of the GI policy to the law to ensure that the GI law is effective in achieving its objectives;
d) Identification of the categories of Goods for which GIs can be registered. An example is the Indian position, which has three categories: handicraft products, agricultural products and food products;
e) Development of a model for the identification and specification of GIs to allow interested parties with GI capacity goods to develop standards of measure and compliance which can be used by all eligible producers;
f) Maximisation the benefits from membership to regional and international GI agreements and trading agreements; and
g) Engagement in negotiations at bilateral, regional and international levels involving geographical indication issues or matters that may affect the generation, protection and commercialisation of GI-capacity goods, for example, cooperating on a GI protocol under the EU SADC EPA.

There further needs to be in place coordinated efforts between the different sectors of government. IP awareness and use by IP holders or potential users was identified by the IP audit as inadequate. Therefore, with specific reference to GIs, public education is essential. This education needs to focus on the relevance of GIs, their regulation, rights created and remedies available when infringement occurs.

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