Trademarks and Geographical Indications: Policy Issues and Options in Trade Negotiations and Implementation

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Trademarks and geographical indications have been the focus of contention in bilateral and multilateral trade negotiations and in the implementation of agreed trade obligations and regulations among World Trade Organization members, including partners in free trade agreements with Association of Southeast Asian Nations (ASEAN) members. This paper examines these issues, and the related policy implications and options, in terms of specifications and scope, priority rights and coexistence, and the treatment of generic names in the registration and protection of geographical indications. The development, commercialization, and protection of geographical indication products can benefit trade and development in ASEAN economies. However, a geographical indication system similar to that in the European Union would likely reduce ASEAN imports of competing products from non-European Union sources. An agenda for further research, policy facilitation, and information dissemination is mapped out, emphasizing the importance of adequate and affordable policy incentives and business development services.

I. INTRODUCTION

Trademarks (TMs) and geographical indications (GIs) are different, equal, and independent categories of distinctive marks and signs used to denote specific products, classes of products, or, in the case of TMs only, services. These two domains of intellectual property rights (IPRs), among others, are subject to domestic and multilateral laws, regulations, and administrative procedures that are far from uniform or harmonized within the member countries of the World Trade Organization (WTO). Inevitably, such systemic differences have resulted in diverse provisions, whether concluded or proposed, on matters relating to TMs and GIs in the bilateral or plurilateral

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free trade agreements (FTAs) among WTO members, including those in the Association of Southeast Asian Nations (ASEAN).[1]

As the following discussion will demonstrate, the relationships between TMs and GIs are delicate, overlapping, and problematic within a given territory or country. This applies in particular to the boundaries of their specifications and the interface of their coexistence. Further complications arise with the diverse territorial regimes on these two domains of IPRs. In fact, a variety of complicated and novel issues and difficulties has been encountered not only in bilateral and multilateral trade negotiations among WTO members; they have also emerged as TM- and GI-related commercial conflicts and disputes for management and resolution at the country level and in the implementation of transborder trade commitments.

This paper focuses on some of these issues and difficulties, and the pertinent implications and options, for policy consideration in trade negotiations and in the implementation of trade obligations and regulations relating to TMs and GIs. It makes selective reference to the systemic differences in the TM and GI regimes between Australia and New Zealand (ANZ) and the European Union (EU), among others. The FTA between ASEAN and ANZ, concluded in August 2008, was signed in February 2009, and an ASEAN–EU FTA has been under negotiation since May 2007.[2] Negotiations on this FTA are expected to be among the most challenging undertakings ASEAN has managed (Agence France Presse 2008).[3]

Among the developed countries and groupings, the EU has concluded the largest number of bilateral or plurilateral association agreements and economic partnership agreements (EPAs). The intellectual property (IP) templates in most of these instruments reflect the EU's advocacy of a

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[1]Such a systemic diversity is not limited to IPR-related matters in FTAs. Generally, the architecture, scope, depth of coverage, and substantive provisions, for example, on the timelines and product groups for liberalization, trade rules, and conformance requirements remain insufficiently harmonized and/or simplified for greater uniformity, transparency, and consistency in most of the proliferating FTAs. Such differences, together with the overlapping and intermingled membership of countries in bilateral, regional, and extra-regional FTAs, have become a subject of significant policy concern and research interest worldwide. See Kawai and Wignaraja (2009) and the references cited therein.

[2]Thus far, ASEAN has signed FTAs with ANZ, People's Republic of China, India, Japan, and Republic of Korea. Individual ASEAN Member States (AMSs), in contrast, have concluded as well as planned a much larger number of FTAs with countries and groups of economies within and outside Asia. Wattanapruttipaisan (2008) provides a detailed discussion of the evolving objectives and focus in ASEAN's relationships with its ten dialogue partners; of the push-pull forces for the region's FTAs, both signed and under negotiation with its seven dialogue partners; and the overall architecture and the intellectual property-related approaches in those FTAs. Canada, Russia, and United States (US) are the three other dialogue partners of ASEAN that have not undertaken FTA negotiations with ASEAN.

[3]Meanwhile, press reports have indicated that the EU is also considering engaging in exploratory discussions with a number of AMSs (such as Brunei Darussalam, Singapore, Thailand, and Viet Nam) on the negotiation of bilateral FTAs (Ashayagachat 2008, Linh 2008).

specialized system for the registration of GIs and of enhanced and extended protection for GIs. Thus far, the EU has entered into FTA negotiations with only three Asian trade partners (ASEAN, India, and Republic of Korea) despite the fact that developing Asian countries are involved in numerous FTAs with many regional and extra-regional partners.[4] An examination of TM- and GI- related issues and options in trade negotiation and in implementation is thus of significant policy interest to many economies and economic groupings in developing Asia.

Section II highlights some of the diverse provisions on TMs and GIs, comparing the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994 and the EU regulatory regimes. Section III builds on this base with an analysis of the existing and possible problems and difficulties relating to these two IPRs, especially in trade negotiation and implementation. Section IV examines some of the economic spillovers and the related implications and trade-offs in negotiation on TMs and GIs. This leads to a discussion in Section V of the pending supply- and demand-side issues in the agenda for further research, policy attention, and information dissemination on the development, commercialization, and protection of GIs in ASEAN and elsewhere.

Illustrations in the discussion and in the Appendix are based on groundbreaking problems and disputes, in both concept and practice, encountered in negotiation and implementation associated with TMs and GIs. These problems and disputes have surfaced and been resolved at the WTO and within the EU. The adjudication of recurrent disputes and appeals of these adjudications have cumulated in a considerable body of case law developed by the Court of Justice of the European Communities in Luxembourg (Waggoner 2008, Christensen and Hansen 2006, Directorate General Enterprise and Industry of the European Commission 2006, Evans and Blakeney 2006, Rovamo 2006).[5] This is the highest judicial institution in the EU; it is usually known as the European Court of Justice (ECJ).

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[4]For perspective, it is estimated that Asian economies have completed or are negotiating some 40 FTAs in this decade alone, adding up to a total of 103 FTAs to date. Most of these FTAs involve East and Southeast Asian economies. For details, see EPC (2008), Baldwin (2007), and ADB (2006).

[5]It should also be noted that as per customary practice, the term European Communities (EC) will be used in the text to refer to the European Economic Community created under the Treaty of Rome of 1957 and comprising the European Coal and Steel Community, as well as the European Atomic Energy Community. Meanwhile, the executive arm of the EU, the Commission of the European Communities, will be denoted as the European Commission.

II. DIVERSE REGIMES ON TRADEMARKS AND GEOGRAPHICAL INDICATIONS

IPRs are given (or denied) legal recognition and protection on the basis of the laws and regulations applicable in a given territory or country, the (historical) principle of territoriality. Nevertheless, problems and disputes as to the right of exclusive use of marks and signs for goods or services are not uncommon, even in the conduct of commercial and industrial activities subject to the same regimes on TMs and GIs in a given territory or country.[6] These problems and disputes take on additional layers of complexity when the regulatory systems differ substantively between the two trading partners and/or when the FTAs of one territorial party incorporate different substantive provisions on TMs and GIs from its trade partners. International means to overcome some of the limitations imposed by the principle of territoriality include the harmonization of national laws through accession to common international treaties on IPRs (World Intellectual Property Organization [WIPO] 2002b).[7] By design or default, bilateral and plurilateral FTAs can become (and have been used as) a means for building up a critical mass of support for a particular regime (on, for example, TMs or GIs) and for its eventual incorporation into TRIPS.[8]

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[6]Difficulties and disputes arise, for example, where different parties may try to claim entitlement to such an exclusive use. Secondly, the same or similar marks and signs may be used by different parties as a TM or GI or both for the same or similar products or class of products. Thirdly, different parties may use the same marks and signs as a TM or GI for different goods or services but one of these goods or services, and its TM or GI, has had an established reputation or has been well-known among consumers within the territory or country concerned.

[7]Indeed, a distinguishing feature between international transactions concerning IPRs and those concerning goods is the operation of a variety of IP-related international treaties primarily designed to simplify, harmonize, and facilitate classification systems for the organization of information, processes, and procedures, e.g., for one-stop filing and registration for international designation of various categories of IP assets. The classification treaties include the Strasbourg Agreement Concerning the International Patent Classification 1971; the Vienna Agreement Establishing an International Classification of Figurative Elements of Marks 1973; the Locarno Agreement Establishing an International Classification for Industrial Designs 1968; the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks 1977; and the Trademark Law Treaty 1994. Meanwhile, the Singapore Treaty on the Law of Trademarks 2006 serves to further harmonize members' laws and regulations as well as contains several important technical and substantive changes compared to the Trademark Law Treaty. Among the global protection treaties are the Hague Agreement Concerning the International Registration of Industrial Designs 1925, the Patent Cooperation Treaty 1970, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedures 1977, and the Madrid Protocol Relating to the Madrid Agreement (Concerning the International Registration of Marks) 1989. See International Trademark Association (2006).

[8]TRIPS Article 71.2 states that amendments merely serving the purpose of adjusting to higher levels of protection of IPRs achieved, and in force, in other multilateral agreements and accepted under those agreements by all WTO members may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS. Likewise, international treaties of WIPO require a certain number of ratifications by

A. Overview of Provisions on Trademarks and Geographical Indications under TRIPS

1. Geographical Indications Protected under Trademark Regime

GIs had not been treated as a separate category of IPRs in most countries of the world (including ASEAN Member States [AMSs], ANZ, Japan, and United States) before they were incorporated in TRIPS as a new class of IP assets on 15 April 1994. As needed, these countries had registered and protected GIs within the ambit of the statutory requirements for registration and protection as TMs, including as collective marks or certification marks.[9] Such protection was often supplemented by domestic laws and regulations on unfair competition and consumer protection (WIPO 2002a). Notably in this connection, no AMS has acceded to the Lisbon Agreement of 1958, which embodied the most significant advance in GI protection before TRIPS.[10]

With the adoption of the WTO Agreement, including TRIPS, new or amended laws and implementing rules were subsequently introduced among WTO members in compliance to TRIPS. Regarding those members in ASEAN, the introduced and amended instruments and provisions for GIs are TRIPS-consistent although not always uniform; information is not yet available on the IPR regime in the Lao People's Democratic Republic (Lao PDR), however. A dedicated registration system for GIs, for example, has been established in Indonesia, Malaysia, Thailand, and Viet Nam. GIs are also protected as a new class of IPRs, but without a registration system, in

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member countries before those treaties can enter into force. The needed number of ratifications can be achieved indirectly through a series of FTAs requiring mutual accession to the treaties in question by both partners.

[9]Collective marks may be registered to or owned by a group of people or a collective entity in the country of origin. Certification marks can indicate the specific regional or other origin, the kinds of materials or other inputs used, the modes of manufacturing, and the assurance of quality or other characteristics embodied in the product concerned. For details on those two types of marks, see WIPO (2002a).

[10]The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration contains, among other things, a clear definition of appellation of origin and provides that a protected GI in one country can never become generic in another country. Notably, ANZ, Canada, Japan, and US are not among the 26 contracting members of the Lisbon Agreement as of 15 October 2008. No AMSs have signed on to the Madrid Agreement for the Repression of False or Deceptive Indications of Sources of Goods of 1891. This agreement does not protect generic terms and allows national courts to decide which indications of source are generic. Wines are excluded from the generic treatment. Seven AMSs (except Brunei Darussalam, Lao People's Democratic Republic, and Myanmar) are signatories to the Paris Convention for the Protection of Industrial Property, concluded in 1883. Indications of source and appellations of origin are protected in the Paris Convention but they (and the concept of false representation of origin) are not defined in the Convention. This has greatly limited effective enforcement of the Convention for all practical purposes (WIPO 2008, Waggoner 2008, Rovamo 2006).

Singapore, where GIs can alternatively be registered for protection under the TM system, as appropriate. Meanwhile, the protection of the GIs is ensured under the TM system in the Philippines.[11]

As such, AMSs and the current and prospective partners in ASEAN FTAs do not always have a common regime on GIs. In particular, ANZ have granted protection to GIs as an integral part of their TM regimes.[12] Negotiations on the ASEAN–ANZ FTA were concluded in August 2008 and the instrument was signed by both parties at the ASEAN Summit in Hua Hin, Thailand, in February 2009.[13] Article 7 in this FTA deals with TMs and GIs in four provisions that, for all practical purposes, are not TRIPS-plus in nature.[14] By implication, each party is obliged to protect TMs and GIs registered in its jurisdiction in accordance with TRIPS and domestic laws. Each party also recognizes that GIs are eligible for protection as goods and, as appropriate, service marks (including collective and certification marks). Finally, GIs may

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[11]See "Government Regulation of the Republic of Indonesia Number 51 Year 2007 Regarding Geographical Indication" (promulgated in September 2007); "Geographical Indications Act 2000" of Malaysia (entry into force in June 2000); Section 123.1(g) in the "Intellectual Property Code" of the Philippines (entry into force in January 1998); "Geographical Indications Act 1998" of Singapore (entry into force in January 1999); "Act on Protection of Geographical Indication B.E. 2546 (2003)" of Thailand (entry into force in April 2004); and the "Intellectual Property Law" of Viet Nam (entry into force in July 2006). It should be noted that in Singapore, the law protects only the GIs of a country that is a member of the WTO, a party to the Paris Convention, or a country designated by the Singaporean government as a qualifying country. The producer, trader, or association of such producers or traders of any such GIs enjoy automatic protection there (Intellectual Property Office of Singapore 2007). Information and details on the IPR systems and regulations in AMSs can be found at ECAP II (2007). For a comparative review of GI laws and regulations in Asia, see Gopalakrishnan et al. (2007) and Rangnekar (2004b).

[12]To cater to GIs, meanwhile, Japan has implemented a system of collective regional marks as a subset of its TM regime (Evans and Blakeney 2006). In the People's Republic of China, GIs can be protected under the TM system (including as collective and certification marks) and/or as designations of origin (special label system) from 1999 and, after WTO accession, as GIs (superseding the previous regulations on designations of origin) from July 2005 (Zhu 2006).

[13]The "Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area" will come into force 60 days after ANZ and at least four AMSs have notified completion of their domestic ratification processes. The target for this is the second half of 2009 and no later than 1 January 2010. The legal text of this Agreement is available at bilaterals.org (2009).

[14]A standard is TRIPS-plus if an FTA or other agreement requires a WTO member to implement an IP-related standard that is more extensive in scope or depth than that provided in TRIPS or if an FTA or agreement eliminates an option available to that member under a TRIPS standard (Drahos 2001). The latter provision can turn or elevate a generally soft (or best-endeavor) law (e.g., "Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties," TRIPS Article 17) into an explicit treaty law or legal obligation (e.g., "The EC Party and the CARIFORUM Signatory States shall provide for the fair use of descriptive terms, including geographical indications, as a limited exception to the rights conferred by a trademark. Such limited exceptions shall take account of the legitimate interests of the owner of the trademark and of third parties," EPA between the CARIFORUM States, comprising 15 island economies in the Caribbean, and the EC, Article 144.F). The full text of this "Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part" is available from European Commission (2008b).

be protected through a TM system rather than by means of a newly-set-up, dedicated regime on GIs.

ANZ's approach toward TMs and GIs in the plurilateral FTA with ASEAN largely mirrors that adopted in the bilateral FTAs and closer economic partnership (CEP) agreements that ANZ have separately signed so far with two AMSs, namely Singapore and Thailand.[15] In particular, the clauses concerning TMs and GIs in those FTAs and CEPs are not TRIPS-plus in terms of substantive coverage and obligations.[16] The one TRIPS-plus exception is found in the Singapore–Australia Free Trade Agreement (SAFTA), where accession by both Singapore and Australia to the WIPO Copyright Treaty of 1966 and the WIPO Performances and Phonograms Treaty of 1966 (WPPT) is stipulated within four years from the date of entry into force in July 2003 of SAFTA (Articles 13.2.2 and 13.2.3).[17]

2. Trademarks and Geographical Indications under TRIPS

According to TRIPS, the signs or marks for a traded product or service are protected indefinitely where they are registered and renewed, if the signs or marks concerned (i) are inherently capable of distinguishing the relevant goods or services or (ii) have acquired sufficient distinctiveness through use. The initial registration and subsequent renewals are for a period of not less than seven years (Article 18). TM owners have the exclusive right to prevent use by third parties of identical or similar signs or marks for goods or services if this would lead to public confusion (Article 16.1). However, among the

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[15]SAFTA was signed in February 2003 and came into force in July of the same year while the corresponding timeline for the Thailand–Australia FTA was July 2004 and January 2005, respectively. Concerning New Zealand, the ANZ–Singapore CEP was concluded in August 2000 and came into force in August 2001 while the corresponding timeline for the Thailand–ANZ CEP was April and July 2005, respectively. The legal texts of those bilateral FTAs and CEPs are accessible through Department of Foreign Affairs and Trade, Australia (2003 and 2004), bilaterals.org (2004), and Ministry of Foreign Affairs and Trade, New Zealand (2004).

[16]More generally, the IP-related provisions are much less detailed. For example, IPRs are covered in Chapter 13, with seven articles on three pages (98–100) out of 117 pages of the main text (excluding annexes) of SAFTA; and in Chapter 13, with five articles on two pages (93–94) out of 116 pages of the main text of the Thailand–Australia FTA. Comparatively, IPRs are covered in Chapter 16, with 10 articles on 22 pages (187–209) out of 236 pages of the main text of the FTA between the US and Singapore (International Enterprise Singapore 2003). It is also relevant to note that IPRs are covered in Chapter 2 with 16 articles on 23 pages (10–33) out of 61 pages of the main text of the agreement between the US and Viet Nam on trade relations in July 2000 (Embassy of the United States of America in Viet Nam 2000).

[17]Singapore became a party to both treaties in April 2005; Australia followed in July 2007. It should also be noted that SAFTA requires Australia and Singapore to take internal steps for compliance with (but not necessarily for accession to) the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs 1999. In April 2005 Singapore became a party to the Hague Agreement 1925 and the Geneva Act although Australia has not yet acceded to those two instruments (WIPO 2008).

limited exceptions to or dilution of such exclusive rights is the fair use by third parties of descriptive terms (which may contain GIs), provided that such exceptions or dilution of rights take account of the legitimate interests of the TM owners and the third parties involved (Article 17). There are also limited exceptions accorded to prior TMs for wines and spirits, as will be explained below.

Currently, TRIPS has a broad definition of GI, but this is applicable only to goods (and not services). It requires only that the indication in question identifies a product whose quality, reputation, or other characteristic is essentially attributable to its geographical origin such as a territory, region, or locality (Article 22.1). In addition, there are no detailed specifications concerning quality, reputation, or other characteristics or concerning production, processing, and marketing that should be attributable to GIs. WTO members, moreover, have the freedom to determine the legal means of protection for all GIs (Article 22). As such, GIs may be protected under a specialized (or dedicated) system (such as that in several AMSs, EU, and India) or under the TM system (e.g., in ANZ, Japan, United States, and Philippines).

General protection of GIs is ensured under TRIPS Article 22.2(a) and 22.2(b), which together prohibits any designation or presentation that is false or misleading as to the true place of origin of the product. GIs are also protected against any use that may constitute an act of unfair competition on the basis of Article10*bis* of the Paris Convention (specifically the Stockholm Act of this Convention of July 1967).[18] Thus, an application for a TM for a good or service shall be refused or the registration of such a TM invalidated if the TM under consideration contains or consists of a false or misleading GI. Likewise, a GI for a product may be literally true as to the place of origin of the goods concerned. However, the application for and the registration of such a GI shall be refused or invalidated if that GI gives a false impression that the goods in question originate in another territory (Article 22.3 and 22.4).

Absolute protection is given specifically to wines and spirits under TRIPS. Nevertheless, such enhanced protection is not available to a GI for any product (regardless of its nature) that does not originate from the indicated place of origin. This applies regardless of whether the GI in

[18]Regarding unfair competition, Article 10*bis* is among the provisions of the Paris Convention incorporated into TRIPS (Articles 2.1 and 22.2). It specifies that any act of unfair competition comprises business activities contrary to honest practices in industrial or commercial matters. Such activities include (i) those of a nature as to cause confusion with the firm, the goods, or the industrial or commercial activities of a competitor; (ii) false business allegations that serve to discredit a competitor; and (iii) indications or allegations that are 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 (Article 10*bis*[2] and [3]). Some of the issues encountered in the interpretation of unfair competition are highlighted in WIPO (2002a, 17–9).

question, or in a translated form, misleads the public (as to the true origin of the product concerned) or constitutes an act of unfair competition (Article 23.1 and 23.2). Furthermore, absolute protection under TRIPS excludes the protection of a GI for wines or spirits that, although indicating their true geographical origin, involve another GI, e.g., champagne (Article 23.2). Likewise, such protection is not available to any GI that is accompanied by terms such as “kind,” “type,” “style,” or “imitation,” e.g., produced by means of the Champagne method or *methode champenoise* (Article 23.1).[19]

Concerning overall exemptions and limitations under TRIPS, a WTO member is not required to protect GIs for goods and for wines and spirits that (i) are not or cease to be protected in the country of origin, or (ii) have become generic (i.e., being a term customary in the local language as the common name for such goods, including wines and spirits) in that member country (Article 24.6 and 24.9). TRIPS does protect a TM that had been registered in good faith before a conflicting (i.e., similar or identical) GI was granted protection in the country of origin or before the date of entry into force (15 April 1994) of the WTO Agreement (which includes TRIPS) in the WTO member concerned (Article 24.5). In the case of wines and spirits, exemption is accorded to a GI of another WTO member that has been in continuous use locally for at least 10 years before 15 April 1994 or in continuous use in good faith preceding that date (Article 24.4).

B. Overview of Provisions on Geographical Indications in the EU

1. TRIPS-Plus System of Geographical Indication Protection

ASEAN has been negotiating a comprehensive FTA with the EU, which has had in place a specialized system for the registration and enhanced and

[19]It should be noted that this particular expression had become customary or generic as an indication of the production technique for sparkling wines in Europe and other wine producing regions. This technique reportedly had been discovered by a Benedictine monk, Dom (Pierre) Pérignon, from a monastery near Reims, France, at the turn of the eighteenth century. The process had been further refined (disgorging of sedimentation) by Madame Clicquot in 1816. However, in the EC in 1985, the term methode champenoise became reserved exclusively for sparkling wines produced in the Champagne region of France. Wine makers who had traditionally used this expression or its equivalents or who wished to sell their products in the EU were given a transitional period until August 1994 to phase out the use of such terms in wine labeling. This regulation faced a legal challenge in 1994 by a group of wine producers in Germany (the Winzersekt case). The ECJ ruled that the European Commission did not exceed the limits of its discretion in adopting the provision governing the use of the term methode champenoise (Rovamo 2006). The alternative formulation to denote sparkling wines, e.g., produced in accordance with the traditional or classical method (or *methode traditionelle* or *methode classique*), is acceptable both in the EU and under TRIPS.

extended protection of GIs.[20] The bilateral and plurilateral association agreements and EPAs concluded by the EU typically have detailed provisions concerning, for example, the establishment of a registration system for GIs, the extension of the scope of GIs and of enhanced protection for wines and spirits to all products registered as GIs, and the coexisting relationships between GIs and TMs. As such, the boundaries and depth of GI obligations in those agreements are significantly TRIPS-plus. But such higher standards of protection are nevertheless consistent with the EC positions in the current Doha Development Agenda (DDA) negotiations launched at the fourth WTO Ministerial Meeting in November 2001.[21] Generally, however, the pertinent obligations in protection and enforcement in EU association agreements and EPAs are comparatively simpler for low-income developing and least developed countries. They are more stringent for higher-income developing economies and the current or prospective candidates for EU accession.[22]

Indeed, the protection of GIs and several other IP assets has had a long history in Europe, and the current regime on GI protection in the EU has been

[20]India has also set up a dedicated system for the protection of GIs, with extensive provisions concerning the coexisting relationships between GIs and TMs in the "Geographical Indications of Goods (Registration & Protection) Act, 1999" and the "Geographical Indications of Goods (Regulation and Protection) Rules, 2002." So far, however, India has concluded negotiations on an FTA on goods with ASEAN under the "Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the Republic of India," signed at the summit between the two sides in Bali in October 2003. Similar to other framework or partnership agreements ASEAN has signed with its dialogue partners in East Asia, that instrument governs FTA negotiations between ASEAN and India in other areas and emphasizes TRIPS-consistent cooperation between the two sides in the field of IPRs (Wattanapruttipaisan 2008).

[21]The three GI-related matters for DDA negotiation are the establishment of a multilateral register for wines and spirits; the extension of higher protection on wines and spirits to other (food and non-food) products, including handicrafts; and the link between negotiations on agriculture and GIs, given the EC proposal to repatriate (or claw back) some 41 names that have become generic or customary terms in non-EU countries.

[22]By way of example, the latest EPA was initialed between the European Commission, plus the 27-member EU grouping, and the CARIFORUM grouping of 15 economies in the Caribbean in December 2007. Chapter 2 of Title IV (on Trade-Related Issues) of Part II of this EPA is devoted to "Innovation and Intellectual Property" (Articles 131–164). The section on innovation (Articles 133–138) focuses mostly on mutual cooperation (e.g., in science and technology, information and communications technology, and eco-innovation and renewable energy). The section on IP contains fairly detailed provisions on protection and enforcement matters (Articles 139–164). There is a long implementation period for provisions in the IP section, 2014 for CARIFORUM signatory members and 2021 for Haiti, the only least developed countries in this grouping (Article 140.b). The signatory members agree to set up a system of GI protection no later than the beginning of 2014 (Article 145.2). The GI-related provisions cover an extension of higher GI protection to all goods (Article 145.B.3.a) that are produced in accordance with the relevant product specifications (Article 145.B.2). This latter provision seems to favor a GI registration system over alternative protection systems such as trademark supplemented, in many countries, by laws and regulations on unfair competition and consumer protection. See European Commission (2008b) and Santa Cruz (2007).

advocated as part and parcel of that tradition.[23] A more simplified system for GIs had been in operation in the EU under EC Council Regulation 2081/92 of July 1992 on the "Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs." GI denoted an agricultural product or a foodstuff originating in a specific region (or a place or, in exceptional cases, a country). In particular, Article 2(b) of that regulation specified that the goods concerned must possess a specific quality, reputation, or other characteristics attributable to that geographical origin and the production and/or processing and/or preparation that take place in the defined geographical area.

As regards registration, the same regulation allowed for the registration of names of geographical areas located within the EC by filing an application with the European Commission. For non-EC countries, however, additional conditions were imposed regarding the registration process and reciprocal protection. In particular, the government of the (non-EC) country in which the geographic area was located had to provide a guarantee about the product specifications; to establish inspection facilities for such products and the same right of objection to registration of the GIs as that set out in the EC Council Regulation; and to ensure equivalent protection for the corresponding GI products originating from the EU.

2. Current Geographical Indication Protection under EU Regime

EC Council Regulation 2081/92 was repealed by the amending EC Council Regulation 510/2006, which went into effect on 31 March 2006. The new regulation was introduced partly in compliance with adjudicatory findings by a WTO panel (on the "Budweiser case") adopted in April 2005 by the WTO Dispute Settlement Body. Notably, those findings were not appealed for a review by the WTO Appellate Body by both parties to the dispute.[24] The

[23]The first laws protecting GIs were imposed as early as the fourteenth and fifteenth centuries in France, Portugal, and Tuscany (in present-day Italy). France was the first country to enact systems for GI protection that have later influenced the making of national laws in other European countries and of international treaties. Legal protection of GIs was in force in France in 1824, and the laws of 1919 established GIs as a collective IP asset that could be registered as a (controlled) appellation of origin. For an overview of the economic, social, cultural, and environmental significance and nuances of agriculture and GIs as well as the rationale and evolution of legal protection for GIs in the European context, see Evans and Blakeney (2006) and Rovamo (2006) and the many references cited therein.

[24]The WTO case is denoted as "European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs." It was initiated separately by the US and Australia after separate mandatory consultations between those two countries and the EC had failed. Both countries requested the establishment of a WTO dispute settlement panel in August 2003 and findings from the panel substantiated the enhanced protection for GIs on an international level. Besides, TMs and GIs can coexist, as they are independent and equal IPRs, except in the case of the most well-known, prior

panel had found that the additional registration conditions in EC Council Regulation 2081/92 might have imposed significant barriers to the registration of non-European GIs. As such, the EC rules were inconsistent with the national treatment requirement of TRIPS and the most-favored-nation clause of the General Agreement on Tariffs and Trade.

In EC Council Regulation 510/2006, the former provisions concerning equivalence and reciprocity for products from third countries were deleted to allow equal access to the registration of foreign GIs. Additional simplified provisions were introduced with respect to (i) registration procedures for producers (an association or a natural or legal person) in third countries, (ii) national opposition procedures for third parties (who wish to oppose the registration of the GI in question in the country of origin), and (iii) inspection requirements in the third-country registration process.[25] The same regulation specifies new types of GIs, namely protected geographical indications (PGIs) and protected designations of origin (PDOs). However, the term GIs will be used generally in the following text to denote both PGIs and PDOs in the EU context, except for where the specific designations of PGIs and/or PDOs are required for greater accuracy in discussion.

PDOs and PGIs cover only agricultural products, beverages, and foodstuffs primarily for human consumption. They do not include services or products of handicraft and industry. These non-food and non-services items are candidates for extension of GI coverage and enhanced protection under DDA negotiation at present. By and large, the requirements for a PGI are less exacting than those for a PDO because a PGI product does not have to originate entirely from the designated region. Such a good needs to have only one particular quality of the product characteristics attributable to that geographical area. On the other hand, PDO items must be raised, grown, produced, processed, and prepared (e.g., slicing, packaging, and labeling)

TMs. Moreover, the then current EC Council Regulation 2081/92 was found to be inconsistent with TRIPS, especially with respect to the coexistence of GIs and prior TMs. This inconsistency was, nevertheless, justified by TRIPS Article 17, which allows for limited exception (or dilution) to TM owners' rights (e.g., the "fair use of descriptive terms" permissible under the same Article). But this limited exception is narrow and does not confer the right to use any other signs or marks or combinations of signs or marks, or to use linguistic versions relating to these signs and marks that were not entered into the GI registry maintained at the European Commission. The goods to which the GI is applied must conform to the registered specifications for them. In this connection, TRIPS Article 24.5 (on limitations and dilution of rights) serves as the boundary between TMs and GIs. These and other findings by the same WTO panel give cause for claims of victory by both parties to the dispute, hence no appeal for an Appellate review.

[25]In particular, the European Commission has 12 months to examine applications for GI registration that were earlier scrutinized and passed on to it by the country of origin. If the applications meet with the conditions in the current regulation, the specifications of the GIs concerned will then be published by the European Commission in the *Official Journal of the European Union*. Third parties will have six months after the publication date to lodge objection to the proposed registration. This will become official when the registration of the GI concerned is published by the European Commission in the same journal.

within the protected region and the product quality and characteristics must be essentially attributable to that region.

If there is conflict between a GI and a TM, then the TRIPS-plus strength and scope of protection in the EU shifts the balance decidedly in favor of the GI. As regards registration, for example, the prior existence of a conflicting TM (whether registered or unregistered) may not necessarily prevent registration of a GI in the EU (EC Council Regulation 510/2006, Article 7.3.c). Registration of the GI in question may be refused only in light of the reputation and length of use of the TM under consideration. This implies that the pertinent GI, if so registered, is liable to mislead the consumers as to the true identity of the product so protected by the TM concerned (Article 3.4). On the other hand, any application for a conflicting TM for the same product after the date of application for registration of the GI concerned shall be refused (Article 14.1).

Once registered, these two categories of IPRs are accorded sharply different treatment. A duly registered GI shall not become generic (Article 13.2), and shall have priority over both prior and later TMs. In particular, TM owner’s rights cannot prevail over a third party who uses a registered GI that is similar to the TM concerned in good faith or in accordance with honest practices in business and industry (e.g., ECJ decision on the case *Gerri v. Kerry Spring* natural mineral waters discussed below). The coexistence between TMs and GIs is allowed when a TM was applied for, registered, or established by use and/or in good faith in the EU under two specific timelines. One is before protection was given to the GI in the country of origin, and the other is before the cutoff date of 1 January 1996 even if this date is after protection was granted to the GI in the country of origin (Article 14.2).

III. ISSUES IN FTA NEGOTIATION AND IN IMPLEMENTATION

The above backdrop concerning diverse regimes on TMs and GIs in TRIPS and in the EU implies a wide range of policy issues and operational difficulties relating to these two domains of IPRs and their interrelationships.[26] The following section examines several pertinent problems, and the related implications and options, of a technical and legal nature as regards scope and definitions, priority rights and coexistence, and

[26]Kim (2008) put forward several reasons why GIs are emerging as a likely obstacle in FTA negotiations between the Republic of Korea and the EU. Snyder (2008) examined complex constitutional and regulatory issues concerning the enhanced protection for GIs in relation to TMs in the US context. Waggoner (2008) discussed the gains expected to accrue to the US in adopting the European approach toward enhanced protection for GIs.

genericism. Some of the economic costs and benefits of an EU-style GI protection in ASEAN are discussed in Section IV.

A. Scope and Definitions

Concerning the volume of GIs, the number of non-regional GIs that AMSs and other developing countries may be obliged to protect far outweighs the number of (locally developed and registered) GIs for which these countries may gain protection overseas (e.g., in the EU). Between 1993 and September 2008, for example, some 801 PGIs and PDOs were registered by the European Commission—with about 168 for cheese, 199 for meat and meat-based products, 177 for fresh and processed fruits and vegetables, and 121 for olive oils and fats.[27] The same European Commission register includes beers and non-alcoholic beverages, but it does not cover some 4,000 names of wines and spirits (including wine-based spirit drinks) recognized generally as (national) appellations of origin in the EU (rather than registered on a separate list as such) (Nixon Peabody LLP 2005).[28]

In comparison, only a handful of GIs have been registered in ASEAN—for example 19 GIs in Thailand and 11 GIs in Viet Nam up to mid-2008.[29] No GI from ASEAN has been on the register of the European Commission, although Thailand is applying to register Thung Kula Ronghai jasmine rice as a PGI in the EU. To date, Café de Colombia is the only non-EU PGI on that register. Coffee beans have been a major source of export earnings to

[27]See European Commission (2008a). In addition, 270 applications had been made for the registration of new PDOs and PGIs and another 110 applications had been made for amendment to specifications in current PDOs and PGIs.

[28]It should be noted that EC Council Regulation 479/2008 on the common organization of the market in wine, in force from August 2008, introduces wide-ranging, basic reforms concerning the production, making, labeling, and marketing of wines. In particular, the current appellation systems for wines from different national systems will be consolidated into PGIs and PDOs, with due safeguard given to well-established national quality systems (European Commission 2008c).

[29]The 19 GIs registered in Thailand were mostly for human consumption: jasmine rice from Surin and Thung Kula Ronghai; golden aromatic rice of Sakon Dhavapi Haang and rice from Sangyod Muang Phattalung; coffee beans from Doi Chaang and Doi Tung; Chaiya salted eggs; pineapples from Nanglae, Chiangrai Phulae, and Sriracha; Chainat Khaotangkwa, and Nakornchaisri pomeloes; Surat Thani oysters; Trang roast pork; Phurua Plateau wine; and Phetchabun sweet tamarind. Other registered GIs were Mae Jaem Teen Jok fabric, Lamphun Brocade Thai silk, and Praewa Kalasin Thai silk. Application for GI status was made for Mud Mee Thai silk from Channabot in Khon Kaen province. The 11 GIs on register in Viet Nam comprised Shan Tuyet Moc Chau and Tan Cuong tea, Phu Quoc and Phan Thiet fish sauce, Binh Thuan dragon fruit, Buon Ma Thuot coffee, Doan Hung grapefruit, Lang Son anise, Hai Hau fragrant rice, Thanh Ha litchi, and Vinh oranges. There were six applications for registration as GI products (e.g., various kinds of foodstuffs and carved furniture) in Indonesia as of February 2008. It is believed that Kintamani Bali Coffee has fulfilled the administrative and examination requirements and so may have proceeded to registration. Information and details on the IPR systems and regulations in AMSs are provided by the EC–ASEAN Intellectual Property Rights Cooperation Programme (ECAP II) (2007).

Colombia. However, producers in this country had encountered recurrent enforcement problems as TMs and certification marks were not able to prevent false labeling and the widespread use of "Colombia-type" or "Colombia-blend" expressions by external producers and roasters. Such unfair business practices had had an adverse impact on global consumer confidence in the quality and consistency of Colombian coffee beans.[30]

Concerning the scope of coverage, GIs in AMSs comprise not just agricultural foodstuffs but also handicrafts and products of industry.[31] Within the food categories, most GIs in ASEAN are unlikely to be a major source of foreign exchange earnings in the EU, or elsewhere for that matter, largely because of different food cultures and preferences. A clear exception is rice, of which several AMSs have been among the world's largest exporters. But the opportunities to differentiate an otherwise relatively homogeneous export commodity and gain a price premium on the specific types of high-quality rice now protected as GIs in Thailand and Viet Nam have yet to be tested and exploited in the principal export markets (namely North America and the EU).

Meanwhile, the non-food GIs (such as textiles and silk fabrics in Thailand) are not eligible for registration and protection as PDOs and PGIs in the EU at present, unless there is an agreement otherwise at the multilateral DDA negotiations or, less likely, a plurilateral agreement with the EU. Yet among many other things, indigenous textiles and silks may well prove to be one of the most tangible and strongest statements of ASEAN's rich and diversified regional and ethno-cultures and natural environment.[32] Such

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[30]In response, the National Federation of Coffee Growers of Colombia decided to apply for a denomination of origin in Colombia in December 2004. This application was approved in February 2005 and the federation followed through with an application to the European Commission for registration of Colombian coffee beans as a PGI in June 2005. The then-prevailing two-year scrutiny and opposition period expired in June 2007 and the registration of Café de Colombia as a PGI was made by the European Commission in September of the same year.

[31]The GI coverage in these countries is defined in the following legislation: Article 2(2) of "Government Regulation of the Republic of Indonesia Number 51 Year 2007 Regarding Geographical Indication;" Section 2 of "Geographical Indications Act 2000" of Malaysia; Section 2 "Geographical Indications Act 1998" of Singapore; and Section 3 paragraph 3 of "Act on Protection of Geographical Indication B.E. 2546 (2003)" of Thailand. The "Intellectual Property Law" of Viet Nam does not specify the boundaries of protected GIs.

[32]Indigenous and ethnic textiles and silk fabrics are often considered as an intangible cultural element with limited commercial appeal and potential. Such textiles and silks display a very large range of patterns and motifs with varying color shadings and nuances, and expressions of spiritual and aesthetical aspirations and values. Most of the color combinations and representations are not only specific to particular ethnic groups and lines of descent, but are also specific to the production techniques concerned (e.g., from the cultivation of silk worms and weaving of silk and cotton, to dyeing techniques and color ingredients, to the types of traditional handlooms and techniques of fabric weaving and embroidery). Under an appropriate regime of protection, including as PGIs and PDOs, the production and processing of textile and silk fabrics may become a valuable source of local employment and cash incomes, and an important means for the preservation of indigenous culture, knowledge, and technologies. The Tai textiles of the

artisan products can be an important commercial resource and ecotourist attraction if suitably developed and promoted, including as GIs. The growth of the cottage enterprises for Thai silk into a dynamic, diversified, and competitive world-class industry is a pertinent and eloquent example.

TRIPS explicitly provides for speedy and inexpensive protection for textile designs. This is a contrast to the more complex procedures for the protection of other (conventional) industrial designs, which have to be new or original, and which are not dictated essentially by technical or functional considerations (Article 25.1). WTO members are required to ensure that the requirements for securing protection of textile designs do not unreasonably reduce opportunities for stakeholders to seek and obtain such protection, especially with respect to cost, examination, and publication. Members are free, however, to meet this obligation through their industrial design law or copyright law (Article 25.2).

If GIs are not protected in a product's country of origin, they cannot be protected at the multilateral level and in AMSs. Thus, the very small number of registered GIs in ASEAN raises several worrisome implications. It may reflect the recent introduction of GIs as a new class of IP assets in TRIPS and WTO members in the region. It may also be due to limited institutional capabilities and resources for examination and registration. Another explanation of the small number may be inadequate local awareness of GI application standards and requirements and of the costs and benefits of GI development and commercialization.[33] Means for enhanced capacity building, public awareness, and information dissemination for "catching up" purposes are pertinent and should be considered in these contexts. Several other important policy implications and options will be examined when issues relating to generic or customary names are discussed in Section III.C.

Mekong region (covering the southern People's Republic of China and the northern regions of Lao People's Democratic Republic, Thailand, and Viet Nam) are a case in point (Connors et al. 2006).

[33]Notably, stakeholders in India had earlier been successful in contesting a patent (number 5,663,484 with 20 claims of inventiveness and novelty) on basmati rice lines and grains granted to RiceTec, Inc. in September 1997 by the United States Patent and Trademark Office (USPTO). This was a huge victory for Indian farmers in Punjab, Haryana, and Uttar Pradesh, where this long-grain aromatic rice has long been cultivated. The economic and social losses involved could have been enormous: exports of basmati rice, worth about US$250 million in the early 1990s, rose to US$596 million in 2005. Nevertheless, local efforts to register basmati rice as a GI have not been successful in India. The application was filed with the Geographical Indications Registry in August 2004 by the Heritage Foundation, a trust composed mainly of rice millers and exporters based in Karnal, Haryana. The Registrar found in December 2008 that the application was flawed in terms of representation in the trust of basmati growers and farmers and was also lacking the requisite supportive data (*Economic Times* 2008).

B. Priorities and Coexistence

Systems for IPR protection are typically characterized by the traditional principle of priority, such as "first in time, first in right" (Articles 1–12 of the Paris Convention), embodied in TRIPS as the basis for resolving conflicts between IPRs (Christensen and Hansen 2006, Evans and Blakeney 2006).[34] The same principle is also upheld in most partners of ASEAN FTAs (especially ANZ and Japan), and in the TRIPS-compliant regimes on GIs in ASEAN, including provisions on exceptions for prior use.[35] Generally, then, the TRIPS-plus priority rights accorded to PDOs and PGIs over both prior and later TMs are likely to pose several other contentious issues in ASEAN–EU FTA negotiations and in implementation.

At one level, products from well-known geographical localities or regions in AMSs may already have been protected by TMs. With the development and commercialization of GIs, additional businesses may be set up in, or relocated to, those geographical areas to take advantage of their current commercial attraction and prospective development potential. Thus, legal and commercial conflicts within AMSs may come from applications for registration of GIs that contain signs or indications of visual and/or aural similarity to those in the existing TMs. As noted earlier, those applications can be refused under TRIPS but may not be denied under the EU regime. Likewise, the considerable language and phonetic similarities shared by several groups of AMSs may also cause legal and commercial complications, especially if the products concerned are traded regionally and globally. Such similarities mean a substantial chance of aural closeness existing between a TM registered, for example, in one AMS and a GI registered in another AMS.

In those regards, the case law developed by the EJC may shed some light. In its rulings on the case *Gerri v. Kerry Spring* natural mineral waters in January 2004, for instance, the ECJ did not specifically exclude the concurrent use of a GI as a TM from the protection accorded to that GI.[36] The

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[34]Thus, a mark or sign identical or similar to a registered TM for the same or similar kind or class of goods or services cannot be registered. This is because the likelihood of confusion shall be presumed in case of the use of such mark or sign (TRIPS, Article 16.1). Rangnekar (2003) discusses briefly the real and imminent overlap between TMs and GIs.

[35]See, for example, "Government Regulation of the Republic of Indonesia Number 51 Year 2007 Regarding Geographical Indication," Article 27(2); "Geographical Indications Act 2000" of Malaysia, Section 28(1) and 28(2); "Geographical Indications Act 1998" of Singapore, Section 7(1) and 7(3); and "Act on Protection of Geographical Indication B.E. 2546 (2003)" of Thailand, Section 28, paragraphs 2 and 4. The relationships between (prior) TMs and GIs are not specified in the GI laws in Thailand and Viet Nam, however.

[36]The case had been referred to the ECJ by the German Supreme Court in January 2002. It should also be noted that natural mineral waters and spring waters were subsequently excluded from the scope of GI protection under EC Council Regulation 692/2003 because of huge difficulties in administration.

mere fact that there may be public confusion between a GI and a TM is not sufficient to conclude that the registration and use of the GI concerned in the course of trade is not in accordance with honest practice in business and industry, or is not done in good faith. It is thus for the national court to assess all the relevant circumstances, including the shape and labeling of the bottle in this particular case, to determine whether the producer of a product bearing a GI is unfairly competing with the TM owner (Hall 2004). On the other hand, it is a prerequisite for the national court to assess all the relevant circumstances to determine whether the registration of a prior TM (e.g., Cambozola in Austria since 1983) was done in good faith before the application for registration of a PDO (in this case, the registration of Gorgonzola in Italy, the country of origin, in June 1996).[37]

At another level, there is the cutoff date of 1 January 1996 for coexistence between TMs and GIs allowable under EC Council Regulation 510/2006. This considerably narrows the scope and applicability of the limited exceptions concerning TM rights in TRIPS Article 17. The provision may have had the effect of depriving owners of TMs registered or acquired after the above date of both their legitimate right to take action against the confusing use of (similar or conflicting) GIs and their legitimate interest in using these TMs in the normal course of production and trade. Those TMs notably had not been at risk under the repealed EC Council Regulation 2081/92. How a cutoff date, if any, for coexistence between GIs and TMs in ASEAN is to be handled would be another difficult policy issue in FTA negotiation and in implementation. The cutoff date provision in the EU has caused much disquiet among WTO members, especially those relying mainly on the TM system for the protection of GIs.[38]

More generally, there are real possibilities of valuable rights and brand leadership from valid, well-known, and prior TMs being lost or eroded in major and highly competitive markets (e.g., for fish sauce and rice, newly protected as GIs in Thailand and Viet Nam). Externally, the most famous case of diluted rights relates to the TMs “Budweiser” and/or “Bud.” These are subject to restrictions or termination in several EU countries because they are

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Several names of natural and mineral waters had already been registered by the European Commission, and these GIs will be removed from the register when the transition period ends on 31 December 2013 (Rovamo 2006).

[37]In March 1999, the ECJ ruled in the Cambozola case filed in 1997 that the concept of good faith must be viewed in the light of the entire body of legislation, both national and international, in force at the time of application for TM registration. The TM owner is obliged to take all reasonable steps to ensure that the use of the TM was compatible at least with national law in force at the time (Directorate General Enterprise and Industry of the European Commission 2006, Rovamo 2006).

[38]The EC is addressing this issue with a number of proposed amendments to TRIPS currently under DDA negotiation (Evans and Blakeney 2006, Rovamo 2006).

in conflict with the PGIs for beer, Budějovické pivo, and Českobudějovické pivo, granted to a brewer from the Czech Republic (Appendix). Likewise, Kraft Foods has been forced to sell its product as “Kraft Pamesello Cheese” in the EU so as to comply with the protection of Parmigiano-Reggiano (or Parmesan) as a PDO in the EU.[39] For illustrative purposes, a selected number of other well-known cases in the EU are summarized in the Appendix.

C. Generic Terms

The matter of generic terms may introduce several other issues in ASEAN–EU FTA negotiation and in implementation. Generally under TRIPS and the current EC Council Regulation as well as in most AMSs, registration and hence protection is not accorded to geographical names (or in the Philippines, marks)[40] consisting of signs or indications that fall into two categories: signs or indications that have become generic or customary locally (without regard to the country of origin), and those that are disused or not protected in the country of origin. On the other hand, however, protected names may not become generic in the EU (EC Council Regulation 510/2006, Article 13.2), an important provision carried over from the Lisbon Agreement. Among AMSs, Indonesia also has a similar provision, namely that a registered GI cannot fall into the public domain.[41]

Little information exists on the number of geographical terms and names that may have become generic or customary in an AMS or a group of AMSs. In addition, it is also not well known how many terms (or their linguistic equivalents) for goods are considered geographically significant in some AMSs but generic or customary in some other AMSs. Meanwhile, the local verification of generic and customary names may be a highly challenging task. A comparative perspective can be gleaned from the extensive efforts, complex procedures, and legal defenses that the European Commission has to make, follow, and manage to ensure a judicially credible verification process. In particular, feta was declared by the European Commission as a PDO in October 2002 after a 15-year tussle in verification within and outside Greece and several legal cases against the European Commission filed by Denmark, France, and Germany (Appendix).

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[39]Kraft Foods began producing its own version of Parmesan cheese in the US way back in 1945. Parmesan is the French term for Parmigiano; both terms mean “of Parma.” As a PDO, Parmigiano-Reggiano can only be produced in Parma, Reggio Emilia, Modena, Bologna, and Matua. However, Parmesan is a generic term outside the EU and the proposed repatriation of such generic terms by the EC is another contentious issue for negotiation under the DDA.

[40]“The Intellectual Property Code of the Philippines 1998,” Section 123.1(g), (h), and (i).

[41]“Government Regulation of the Republic of Indonesia Number 51 Year 2007 Regarding Geographical Indication,” Article 2(4).

For AMSs, a more basic issue is, firstly, whether they may wish to consider a different and selective approach toward the issue of genericism. In other words, genericism could be treated as an open issue and on a case-by-case basis. Where merited, therefore, protection could be granted to names and terms that are currently considered as generic or customary in ASEAN or parts of the region. The grounds in support of such a differentiated approach include the comparatively recent incorporation of GIs as a new class of IP assets in TRIPS and subsequently in the laws and regulations of WTO members in ASEAN. As such, there may be problems involving the adequacy of institutional capabilities and resources in examination and registration, and of public awareness and familiarity concerning standards and procedures for GI applications and the costs and benefits of GI development and commercialization, as noted earlier.

A second issue of concern regarding generic terms is that the lack of protection until the (comparatively) recent entry into force of TRIPS may have rendered potentially qualified GIs customary or generic and thus unprotectable in the AMSs as well as multilaterally. This may have allowed a much wider use of those potential GIs, in their original and/or translated forms, within and outside ASEAN. Such unregulated usage, in turn, may have caused a significant dilution or erosion of the reputation of those indications. Additionally, some current and prospective GIs in ASEAN may have suffered from diluted or eroded reputations because many TMs might have been based on, and registered with, the indications in question.[42]

Indeed, famous names and terms such as basmati and jasmine rice, Darjeeling and oolong tea, neem and turmeric, batik and Mud Mee silk, arabica coffee and kiwifruit, and India rubber and chinaware may not enjoy universal protection as GIs at present. Arguably, the genericism of those terms does not necessarily make their usage or exploitation any less of an IPR misappropriation and/or misrepresentation (Waggoner 2008, Rangnekar 2003). In the worst-case scenario, the possibilities of usurpation, including bio-piracy, by unauthorized parties cannot be discounted.[43] Some of

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[42]For perspective, there were 75 registered TMs and pending applications for TMs in India embodying the term basmati rice as of November 2005 (Chandola 2006).

[43]Although there is no accepted definition of "bio-piracy," the concept is generally understood as the appropriation, without prior informed consent and benefits-sharing arrangements, by individuals or institutions of proprietary or monopoly control over, for example, traditional knowledge and technologies that have been discovered, improved, accumulated, and shared by indigenous peoples over centuries. Such misappropriation may be due to the granting of "wrong" patents that are neither novel nor inventive as regards the knowledge and technologies already in the public domain. Alternatively, the misappropriation may be due to the granting of the "right" patents because domestic laws and regulations on standards of patentability are low or because public disclosure of traditional knowledge or indigenous technologies is not regarded as prior art. The granting and revocation of certain patent claims in the basmati rice, turmeric, and neem cases are pertinent in the above contexts.

the many attempts made to register TMs for GIs and other well-known marks and signs and to obtain exclusive proprietary rights (e.g., through patenting) over biogenetic resources indigenous to Asia, among other countries and regions, will be discussed briefly in the next section.

A third consideration concerns the registration of PGIs and PDOs, which has been sanctioned by the European Commission. At one level, a considerable number of the registered GIs were formerly generic terms or common names in many countries inside and outside the EU (e.g., feta and Parmesan). At another level, concerted efforts have been made by the EC to repatriate or claw back some 41 names (with 28 for wines and spirits) in their proposals for negotiation under the DDA. These names have become generic or customary in many non-EU WTO members and have been used by non-original or non-EU producers to brand and market their goods outside the EU. The terms proposed for repatriation include Parmesan, bologna, Gorgonzola, Roquefort, feta, Chablis, port, sherry, Burgundy, and champagne.

The proposed claw-back, if successful, would prevent non-regional or non-designated producers from using those terms on their products, even if such usage neither misleads the public (as to the origin of the items concerned) nor constitutes an act of unfair competition (because of prior usage and commerce). However, there remains the uncertain status of protection for a translated GI. The WTO panel (April 2005) and the Court of Appeal in Sweden (January 2006) had ruled that protection for a GI is not extended to its translated form or other signs, except in cases of misuse by third parties or where the translated form or signs were specifically entered into the European Commission register. Those rulings would have implications on a large number of generic names in their translated forms in non-EU countries proposed for repatriation by the EC; examples include port for Oporto and sherry for Jerez (Noda 2005).

IV. ECONOMIC SPILLOVERS AND POTENTIAL

Comparative advantage, commercial interests, and other developmental prospects constitute perhaps the heart of the matter. They are also colored by the increasingly fierce competition among interdependent countries for external markets, supply sources, and strategic alliances. TRIPS-plus, EU-style protection of GIs is not yet obligatory under the FTAs that ASEAN has concluded with six dialogue partners (ANZ, People’s Republic of China, India, Japan, and Republic of Korea). However, such protection will likely be one of the focal areas for negotiation under the ASEAN–EU FTA. Some of the economic-related issues in FTA negotiation and in implementation will be the focus of this section. An agenda of outstanding matters for policy attention and further research is mapped out in Section V.

A. Major Suppliers

At first glance, European food culture is markedly different from those in ASEAN and in several other regions of the world. On the supply side, nevertheless, GI products make up a substantial portion of EU earnings on global agricultural exports. Demand-wise, ASEAN (including its vibrant tourism sector) has been a sizable import market (in absolute terms) for food and beverage products from both EU and non-EU producers. Many of the latter are highly competitive suppliers and exporters to ASEAN (and to other non-EU regions) of products that compete directly with, or are good substitutes for, similar items designated as PGIs and PDOs and imported into ASEAN from the EU.[44] Such imports include a wide range of temperate-zone and other high-quality foodstuffs (such as meat and meat-based goods, dairy and related goods, fruits and nuts, grains and vegetables, and olive oils and other derivatives) and beverages (beer, wines, and spirits in particular).

A selected number of agro-based foodstuffs and alcoholic beverages imported into ASEAN from the major suppliers are listed in the Table.[45] The value of such imports has been substantial in absolute terms, averaging some US$3 billion a year in the mid-2000s. The region's import spending on products listed in the Table is divided almost equally between those from EU producers (some 47 percent on average during 2004–2006) and those from ANZ suppliers (around 44 percent). For products listed in the Table, EU exports to AMSs were worth US$1,563.3 million in 2006. Their composition was dominated by spirits (US$759.7 million), wines (US$282.8 million), concentrated and sweetened milk products (US$204.3 million), and butter and related goods (US$154.1 million).

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[44]Only a few PDOs and PGIs from the EU are currently registered specifically in AMSs (e.g., champagne and cognac in Thailand as of February 2008). However, the registration of such designated products can be expected to increase over time, which may affect imports from non-EU suppliers.

[45]The Table does not contain ASEAN import spending on wheat flour, other kinds of meat (especially beef), and other cooking and salad oils. For all practical purposes, these imported products do not feature as competing against GI products of the EU. ANZ are a key supplier of such imports in ASEAN, which has been an important market for wheat grains and wheat flour from Australia.

ASEAN Imports of Selected Food and Beverage Products, 2004–2006
(US$ million and percentage of total in brackets)

Import Sources	2004		2005		2006	
EU-15	1,232.8	(46.2)	1,487.2	(48.1)	1,563.3	(47.3)
Australia	590.0	(22.2)	660.8	(21.3)	717.2	(21.7)
New Zealand	639.6	(24.0)	689.0	(22.3)	721.4	(21.8)
United States	203.8	(7.6)	256.8	(8.3)	304.5	(9.2)
Total imports	2,667.2	(100.0)	3,095.8	(100.0)	3,306.4	(100.0)

ASEAN = Association of Southeast Asian Nations; EU = European Union.
Note: Imports comprise (i) ham, pork, and pork-based products; (ii) milk, cheese, butter, and other dairy goods; (iii) olive oils; and (iv) beer, wines, and spirits.
Source: ASEAN Secretariat, ASEAN Trade Statistics Database.

ANZ exports of the same types of products to ASEAN were only slightly lower at US$1,438.6 million in 2006. Concentrated and sweetened milk products (US$377.2 million), butter and related goods (US$96.4 million), ham and pork-based items (US$76 million), and cheese and wines (US$59 million each) constituted the bulk of Australia's 2006 earnings of US$717.2 million from exports to ASEAN of products listed in the Table. The corresponding figure for New Zealand was US$721.4 million with exports to ASEAN being dominated by concentrated and sweetened milk products (US$522.1 million). Another US$118.9 million came from butter and related fats and a further US$45.3 million from cheese.

In relative terms, ASEAN is a very important market to New Zealand for products in the Table, and a comparatively important market to Australia. AMSs, however, are a relatively small market for the United States (US) and the EU for products in the Table. In 2006, for example, those products accounted for some 2 percent of ASEAN spending on total imports from the EU, 5 percent in the case of Australia, but as much as 32 percent in the case of New Zealand. In contrast, the relative importance of the same products is negligible (0.4 percent) in terms of total ASEAN imports from the US. The main imported goods from this country were concentrated and sweetened milk products (US$197.4 million), butter-based goods (US$54.6 million), spirits (US$18.1 million), wines (US$11.2 million), and cheese (US$7.8 million).

B. Cost Implications and Trade Options

1. Trade Flows and Adjustment Costs

An FTA-based EU system of protection for GIs in AMSs would likely give rise to regulatory and implementation problems vis-à-vis ASEAN obligations in other FTAs, the ASEAN–ANZ FTA especially. Many of the goods imported from ANZ bear marks or signs that are regarded as, or may constitute, infringements of similar PGIs and PDOs from the EU (e.g., Camembert, Danablu, feta, Gorgonzola-style cheese, Parmesan, Danish and Polish salami).[46] As such, the enforcement of EU-style GI protection would likely reduce AMSs' imports of competing products from non-EU countries, especially those from ANZ. Equally important, local prices for GI-protected and imported goods are likely to be higher, due to the consequent adjustment costs incurred by suppliers and reduced competition. In many cases, these GI-related trade losses would subtract from the overall benefits of FTA trade liberalization (Evans and Blakeney 2006).

Indeed, all non-EU producers and exporters to ASEAN of such competing products will incur considerable commercial risks if they continue to brand and market their products with marks, signs, and indications protected as PDOs or PGIs in the EU. In particular, Denmark is a significant producer of feta cheese in Europe. For compliance purposes, however, a major Danish producer of this cheese had to re-brand its product as "Apetina" cheese for sale in the EU and elsewhere. Likewise, Germany was found by the ECJ to be non-compliant for allowing the use of another PDO, Parmesan, for locally produced cheese.[47] But re-branding and reprocessing also carry risks in terms of consumer perception and loyalty and hence market leadership and shares, as well as adjustment and marketing costs.

The cost and administrative implications involved in re-branding and reprocessing are one of the major points of contention under DDA negotiation. To mitigate adjustment problems, the European Commission has provided for transition periods of between 5 and 15 years for GI-infringing products. The maximum transition period is available to goods that have been in existence for at least 25 years. The transition time aims to allow the affected companies and producers to dispose of remaining inventory, come up with new product names and new labels, and reeducate consumers through advertising campaigns. One technique companies could use during the transition period would be phasing in new labels incorporating both the infringing GIs and the new product names (Waggoner 2008).

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[46]Wines and spirits may be a partial exception because of bilateral agreements between the EC and, for example, Australia and the US. In particular, the bilateral agreements provide for the phasing out of the use of semi-generic terms and European regional names, such as champagne, Chianti, port, Chablis, or Burgundy in Australia and the US in return for market access in the EU. The use of 17 of such terms on new wine labels sold in the US would be prohibited from December 2006 (Snyder 2008).

[47]The case was brought against Germany by the European Commission in 2005. The EJC ruled in February 2008 that, although Parmesan is translated from the French for Parmigiano-Reggiano, the two terms are synonymous and are protected as PDOs not just individually but also together (Filemot Technology Law Ltd. 2008). The judgment was based in part on an earlier case law concerning another PDO for cheese, Gorgonzola.

2. Trade Potential and Negotiation Options

Having looked at the potential costs, we must now estimate and factor in the potential benefits ASEAN stands to gain from the development and commercialization of GI-based products. Such returns include the associated revitalization and preservation of rural regions, ethno-cultures and skills, and environmental quality and bio-diversity in AMSs. Indeed, the potential for development and commercialization by AMSs of non-traditional IP assets is significant at the domestic, regional, and international levels. ASEAN is well-endowed with traditional knowledge and indigenous technologies, agricultural and food resources, and biogenetic materials and handicrafts. In addition to food items and beverages for human consumption, GIs from ASEAN can cater to sophisticated markets and market niches in natural medicine, culinary, cosmetic, specialty, and other lifestyle products.

There are strong indications that GIs are well-placed to capitalize on the new trends in consumer demands away from commonplace, mass-produced products of uncertain quality, reliability, safety, and environmental friendliness or eco-compatibility in consumption, sourcing, and disposal. A multi-country survey by the Boston Consulting Group in 2003 showed that once basic needs are met, shoppers would pay a price premium of up to 200 percent for lower-volume, niche and/or customized products of technology, functionality, and emotional, social, and environmental appeal.[48]

It is worth noting that health-care and agro-processed products are among the fastest growing exports from ASEAN. Between 2003 and 2007, for example, earnings on health-care products went up from just US$11.5 billion to US$24.8 billion. The corresponding figures for agro-processed goods were US$11.8 billion and US$26.2 billion. However, the nature and composition of exported health-care and agro-processed products, and the range and importance of GI-based elements embodied in such products, remain to be identified by further research in ASEAN. For perspective, some 119 plant-based compounds were used in the multi-billion-dollar pharmaceutical industry worldwide in the mid-2000s. About three quarters of them had the same or related uses as the medicinal plants from which the compounds were extracted, based, or derived. A large proportion of those biogenetic resources came from the developing world (Andersen 2006).

The importance attached to GIs by the EU is evident in the typical TRIPS-plus template on GIs in bilateral and plurilateral association

[48]These consumer goods range from highly sophisticated vacuum cleaners, audio-video equipment, and camera cell phones to specialty lifestyle products such as proprietary olive oils, cheese, wines, and other foodstuffs of certified origin, high quality, and high safety standards (*Newsweek* 2004).

agreements and EPAs concluded by the EU thus far. Among the options for consideration by ASEAN in ASEAN–EU FTA negotiation are the possibilities of a soft-provision or best-endeavor approach, supplemented by some other trade-offs, for TRIPS-plus obligations on GI protection. Concerning IP-related matters, these trade-offs may include commitments by the EU in extending technical expertise and cooperation funds for regional capacity building in the development and commercialization of GIs as well as for the ancillary human and institutional infrastructure in examination and registration of GIs. The pressing needs in all those areas were pointed out earlier. As another trade-off, longer timelines may be accorded to all ASEAN economies, both developing and least developed, for the implementation of IP-related provisions.[49] The retention of certain TRIPS-consistent provisions on copyrights and related rights in the ASEAN–EU FTA is another trade-off option.[50]

Concerning market access, the possible trade-offs include improved market access, including tariff preferences, for exports of ASEAN and/or certain less developed AMSs to the EU, especially textiles and clothing, and agro-based products.[51] These are priority sectors for integration in ASEAN, and the consequent FTA-driven gains may be particularly significant for local

[49]In the EU–CARIFORUM EPA, there is a long implementation period for provisions in the IP section: 2014 for CARIFORUM signatory members and 2021 for Haiti, the only least developed country in this grouping (Article 140 b).

[50]The premier copyright treaty is the Berne Convention for the Protection of Literary and Artistic Works of September 1886 (as subsequently revised and amended). This Convention forms the substance of the copyright provisions in TRIPS. However, accession to the WIPO Copyright Treaty of 1966 and WPPT of 1966 has become almost a standard requirement in the association agreements and EPAs concluded by the EU. These two WIPO "Internet treaties" embody a collective effort to achieve a more uniform legal foundation for copyright protection in the (borderless or non-territorial) digital era. Nevertheless, they also contain TRIPS-plus provisions and add complex layers to substantive rules and standards on copyright protection. It should also be noted that both Australia and Singapore, two members of those treaties, will not apply or will limit certain provisions of WPPT Article 15(1) concerning certain uses and modes of communication of phonograms.

[51]ASEAN as a whole has lost significant market share in textiles and clothing products in the EU, mostly to the People's Republic of China. Thus, such a negotiated trade-off would be particularly helpful to many AMSs that have depended heavily on textiles and clothing exports for foreign exchange earnings and mass domestic employment (e.g., Cambodia, Indonesia, Lao People's Democratic Republic, Thailand, and Viet Nam). It would also stimulate the formation of further cross-border linkages with East and South Asian producers for leveraged collective efficiency and competitiveness in textiles and clothing supplies. On the other hand, several AMSs are strongly competitive in the export of agro-based and fisheries products, two priority sectors in terms of domestic importance and export earnings. The widened market access to the EU so negotiated is helpful in further building up AMSs' current advantage in a highly competitive marketplace as well as in fostering further production linkages and integration within ASEAN. Indeed, the integration of 12 priority sectors, including agro-based processed products and fisheries, is to be accelerated so as to underpin the establishment of the ASEAN Economic Community in 2015. For a more detailed discussion on textiles and clothing and on the priority integration sectors in ASEAN, see Wattanapruttipaisan (2005 and 2007).

employment creation and/or foreign exchange earnings. This overarching consideration may prove more crucial in the calculus of domestic political economy in AMSs than the higher prices of GI products and reduced competition in a (comparatively) small segment of the import sector. This segment may also be less vocal and have less well connected constituencies and consumers. The costs and benefits of all these options and possibilities, among many other pending items on the GI-related agenda, merit due analysis and consideration.

V. AGENDA FOR POLICY CONSIDERATION AND FURTHER RESEARCH

As indicated in the preamble to TRIPS, IPRs are "private rights" and all forms of proprietary ownership are in varying degrees restrictive to open trade, business competition, and public access. Regarding GIs specifically, their regulation and protection have a far reaching impact on a variety of economic and equally important non-economic factors and forces with complex relationships.[52] As such, a principled case for increased and extended protection of GIs has emerged as more important; the issues involved have bridged the divide between developed and developing countries.[53] Nevertheless, opinions among developing countries—and especially in smaller and lower-income economies—remain divided regarding the enhanced and extended protection for GIs and the associated administrative and financial costs and benefits (see, for example, Waggoner 2008, Evans and

[52]Among the non-economic elements are (i) the protection, preservation, and revitalization of traditional skills and knowledge and the integrity and diversity of indigenous cultures and biogenetic resources, and (ii) the security of open access and the associated mutual sharing of benefits. In these contexts, GI is a necessary but far from adequate instrument for protection, in part because there are no mechanisms for benefit sharing in GI systems. Supplementary means currently available at the multilateral level include the Convention for the Protection of New Varieties of Plant of 1961. This instrument contains uniform and clearly defined principles for the protection of plant breeders' rights, and the convention's 1991 version (which came into force in 1998) provides the most extensive protection for plant breeders. The concept of farmers' rights was introduced (through the Food and Agriculture Organization of the United Nations) in the Convention on Biological Diversity of 1992 (in force since December 1993). This is also the first international treaty to address the conservation, sustainable use, and equitable sharing of the benefits obtained from the utilization of biological diversity. The International Treaty on Plant Genetic Resources for Food and Agriculture of November 2001 (in force since June 2004) deals with similar concerns as embodied in the Convention on Biological Diversity but with a focus on promoting and ensuring sustainable agriculture and food security.

[53]In 2002, for example, some 37 countries (both developed and developing) supported a proposal at the WTO aimed at extending enhanced protection for wines and spirits (TRIPS Article 23) to all GIs. Handicrafts are within the expanded boundaries of GI protection although it is not clear whether products of industry, as currently provided in the GI systems in several AMSs, are within the scope of such protection.

Blakeney 2006, Rovamo 2006, and Rangnekar 2003 and 2004a and the many references cited therein).

The GI-related resources available contain useful information for policy as regards the legal and administrative aspects of protection and enforcement and, to a much lesser extent, development and commercialization of GIs (Rangnekar 2003). Practical lessons and insights have also been gained from the many GI-related disputes and their adjudication in the EU and at the WTO. Nevertheless, the existing resources do not provide sufficient guidance for consideration in FTA negotiation and in policy design and implementation, generally and in the context of ASEAN. Many pending issues in the rich agenda awaiting further policy-based research and information dissemination have been highlighted in the preceding discussion. For illustrative purposes, a number of these issues are examined in greater detail below.

On the demand side, there are administrative, legal, financial, and other burdens and implications associated with maintaining an EU system for enhanced and extended protection for GIs. Among these burdens and implications are those of an institutional and infrastructure nature; those borne by holders of the GIs themselves, plus their investment in developing and protecting their GIs in domestic and external markets; those associated with the registration and protection of the significantly larger number of GIs from other countries, mostly the EU; those relating to the ripple effects of such protection on specific sectors and industries of the local economy (such as higher import prices and reduced import competition); and those arising from the implementation of FTAs with partners having different systems and arrangements for GI protection.

Supply-wise, it is necessary to have a detailed mapping, firstly, of the range and specific categories of GIs that are of significant trade and development interests in AMSs at present and prospectively; and secondly, of the groups of stakeholders who have or will have benefited from the development and commercialization of such GIs. Significance can be measured in terms of, for example, the existing or potential cash income and foreign exchange earnings; local or regional employment generation; the revitalization and promotion of traditional skills, technologies, and knowledge; and the preservation and protection of local and indigenous cultures, bio-diversity, and environmental integrity. The stakeholder groups include domestic and external consumers on one side and on the other side, the growers and processors (e.g., cottage enterprises and the regional and other communities) and the transporters, distributors, and suppliers of goods and services across all stages of value creation or the supply chain.

Parameters in the mapping exercise include the specific strengths, weaknesses, opportunities, and threats facing (i) different categories of GIs endowed with significant commercial interests and prospects, and (ii) different groups of stakeholders in question. Such an exercise helps build up an accurate, balanced, and transparent picture of possibilities and constraints under current and emerging trade and development scenarios. In turn, this picture serves to underpin the follow-up policy and other actions and programs needed to take full advantage of present and future opportunities, including those being opened up further by ASEAN FTAs. In addition, a better understanding of possibilities and constraints will facilitate the design and implementation of specific policy measures, including the provision of incentives and the promotion of domestic and cross-border linkages and alliances. All these are necessary to equip and enable the pertinent stakeholder groups in managing the current and emerging constraints and challenges in the development, commercialization, and protection of their GIs.

Business development support services (BDSs), including the associated infrastructure, are emerging for the specific categories of GIs and stakeholders identified in the mapping exercise.[54] Regrettably, the range of coverage, quality, and affordability of IP-related BDSs has remained another pressing matter on the agenda for policy attention and resources across ASEAN. Adequate accessibility of such services is a major determinant of the success or lack of success in GI development, commercialization, and protection. Effective BDS inputs will be crucial, for example, in customized promotion campaigns to obtain a price premium for high-quality rice, particularly in the EU and North America. This is the case for many other regional products currently or to be protected as GIs in AMSs.

BDSs are also indispensable for the time-consuming and costly maintenance of effective protection of IPRs, including GIs, especially in external jurisdictions. Indeed, concerted efforts were made, for example, by interested parties in India and third parties to revoke (external) patents granted in the basmati rice, turmeric, and neem cases.[55] Additionally, some 15

[54]BDSs cover legal advice on registration, protection and enforcement, and other professional advice and access to databanks and information sources on external and domestic markets, on sanitary and phytosanitary standards, and on other (mandatory or voluntary) technical and conformance requirements. Another category of BDSs includes business planning for institutional and venture capital funding, and promotion activities (such as public relations and information dissemination) for better consumer awareness and acceptance in specific domestic and external markets, and research on markets and technologies. Yet another BDS class comprises marketing and supply chain management, and advice on and access to alliance formation and linkage facilitation for regionalization and globalization purposes.

[55]RiceTec, Inc. attempted to enter the international basmati rice market with branded rice like “kasmati” and “texmati,” which were described as basmati-type rice. Through its own research and development, the company was granted a patent, with 20 claims of novelty and inventiveness, by USPTO in September 1997. Because of the significant built-up public pressure and the legal challenge of this patent

external applications for new TMs for basmati rice or its variations have been challenged with success by India's Basmati Development Fund and Agricultural and Processed Foods Export Development Authority. Likewise, the Tea Board of India has mounted frequent legal defenses against the attempted registration in a large number of countries overseas of TMs considered by the Board as an infringement of Darjeeling tea, a registered GI in India (Srivastava 2005). Protection and enforcement are costly: some US$200,000 was spent by the Tea Board during 1999–2003 (Rangnekar 2004b). The cases point to the heavy legal and other burdens that the maintenance of a GI, like the maintenance of many other IP assets, can impose. BDS inputs and other stakeholders' support are important for dealing with these burdens.

VI. CONCLUSION

GIs and TMs, two independent and equal domains of IPRs, are subject to different regulatory systems among WTO members, including ASEAN FTA partners such as ANZ and EU. The EU has been a strong advocate at the bilateral and multilateral levels of its TRIPS-plus, specialized regime on GIs. The EU itself has experienced complex and novel issues in trade negotiations and recurrent commercial disputes in implementation relating to TMs and GIs. Thus, difficulties for mutual resolution could be expected in ASEAN–EU FTA negotiation as well as in the implementation of trade- and IP-related obligations and laws in AMSs whose regulatory systems on GIs are currently TRIPS-compliant.

This paper has examined a wide range of substantive and financial issues—and the pertinent implications and options—arising from the delicate, overlapping, and problematic relationships between TMs and GIs. The paper focused on the specifications and scope of GI protection, priority rights and coexistence between TMs and GIs, and the treatment of generic and customary names and terms in the registration of GIs. The discussion

from stakeholders in India and elsewhere, RiceTec, Inc. surrendered four claims and withdrew another 11. Subsequently in 2002, the company was deprived of the right to call or describe its rice lines as "basmati," and the scope of the patent grant was restricted by USPTO to three specific rice strains developed by RiceTec, Inc. that are unrelated to the varieties grown in India. In the turmeric case, the University of Mississippi Medical Center was granted in March 1995 a USPTO patent on a method for promoting wound healing with turmeric powder. Following a legal challenge by the Council of Scientific and Industrial Research of India, the patent was revoked in 1997. A patent on a pesticide based on chemical compounds from the neem plant granted in 1995 by the European Patent Office (EPO) to the United States Department of Agriculture and W.R. Grace, a transnational chemical corporation, was challenged by the Research Foundation for Science, Technology and Ecology from India and the International Federation of Organic Agriculture Movements. The patent was revoked by the EPO in 2000; on appeal, the revocation was upheld by the EPO in 2005. For details, see Manoj (2006) and *Hindu* (2005).

demonstrated that sophisticated institutional resources and infrastructure are required for EU-style protection of GIs in ASEAN and elsewhere. In addition, the balance of protection between local and foreign GIs tilts almost wholly toward the latter, even assuming a multilateral extension of enhanced GI protection to all products of handicraft and industry. These products are covered in AMSs' regimes on GIs.

The very small number of registered GIs in ASEAN raises several worrisome implications. In particular, the lack of protection thus far might have contributed to a significant dilution of the reputation of qualified and registrable GIs. It may have likewise led to the genericism and hence the un-registrability of those indications. As such, a different approach toward genericism may be considered to minimize the possibilities of misappropriation and misrepresentation of IPRs by unauthorized parties. There have been many external attempts to register TMs for Asian GIs, among those in other countries, and to obtain exclusive rights (by means of patenting) over biogenetic resources wholly indigenous to Asian and other developing countries.

As regards trade costs and development potential, enforcement of EU-style, enhanced and extended protection of GIs would likely reduce AMSs' imports of competing products from ANZ and push up local prices for GI-protected imports due to supplier adjustment costs and reduced competition. The benefits to ASEAN from the development and commercialization of GI-based products may be significant, however. They include the revitalization and preservation of rural regions, ethno-cultures and skills, environmental quality, and bio-diversity in AMSs. More immediately, soft provisions on several IP-related matters, EU assistance in GI development and commercialization, and better market access for textiles and clothing and agro-product and fisheries exports for AMSs are among the options and possible trade-offs for consideration in negotiation.

A rich agenda awaits further policy-based research and information dissemination, generally and in the context of ASEAN. Among the pending issues on the demand side are the administrative, legal, financial, and other burdens and implications associated with maintaining an enhanced and extended system of protection for GIs. Policy design and implementation in AMSs has been made more difficult by inadequate information on several crucial supply-side variables. Therefore, accurate, balanced, and transparent mapping of the possibilities and constraints is needed of the range of GIs having current and prospective trade significance and of the stakeholders who have benefited or stand to benefit from the development and commercialization of those GIs.

BDSs are a major determinant of the success, or lack of success, in GI development, commercialization, and protection. Customized promotion campaigns, for example, are crucial in obtaining a price premium for high-quality rice; more generally, such campaigns are needed for many other products currently or to be protected as GIs in AMSs. Meanwhile, unauthorized attempts at appropriation or usurpation of IPRs, including GIs, are not uncommon. In external jurisdictions especially, experience has shown that effective protection of GIs requires significant support not just from the involved stakeholders and interested third parties but also from a wide range of BDS inputs.

APPENDIX: CASE STUDIES[56]

A. Budweiser and Bud Beer

Disagreements over the exclusive rights to use the trademark (TM) of Budweiser (and later on, Bud) started in the late 1890s, when Anheuser-Busch, a giant brewer of Saint Louis, Missouri, and Budejovicky Budvar, a much smaller company in the former Czechoslovakia, began to export their like-named products. Some 100 legal challenges involving TM rights have since been mounted in over 40 jurisdictions across the globe in the century-long battle between these two brewers. Anheuser-Busch was taken over by InBev, a brewer from Belgium, for US$52 billion in July 2008, but the conflict is expected to drag on.

Budweiser means the beer of the Budweis region. This is the same as the concept in which champagne describes the wine of the wineries in the Champagne region of France. The name Budweiser was adopted and registered in the United States (US) in 1876 by Anheuser-Busch. Budejovicky Budvar was founded in 1895 in the town of Ceske Budejovice (also known as Budweis) in the former Czechoslovakia. Reportedly, the beer has been brewed in the same town since the thirteenth century.

The court judgments delivered so far have resulted in a division of markets. Anheuser-Busch has been selling Budweiser in some 16 countries and Bud in another 15 countries. The company has a dominant market share in North America and most of South America and Asia. Budejovicky Budvar has Budweiser and Bud registered as TMs and appellations of origin in 28 European countries and 37 non-European countries. Rather exceptionally, however, both brewers have the right to use Budweiser and Bud in the United Kingdom, the second most important global market for beer to Anheuser-Busch.

Under the European Union (EU) system, the prior existence of a conflicting TM (Budweiser and Bud from Anheuser-Busch) does not necessarily prevent registration of a protected geographical indication (PGI) or protected designation of origin (e.g., Budějovické pivo and Českobudějovické pivo from Budejovicky Budvar) in the EU. Once registered, however, geographical indications (GIs) have priority over prior and later TMs in the EU. Judgment from the Court of Appeal in Sweden (January 2006) reaffirmed that a PGI is protected against misuse even if translated. Ordinarily, however, a PGI is only protected in its registered form and this does not confer owners the right to use the PGI in any other (unregistered) form. As such, Budweiser Beer cannot be used in Sweden by Budejovicky Budvar to denote the PGIs granted to Budejovicky Budvar because the terms in question are a translated PGI.

Notably, a World Trade Organization (WTO) panel had made a similar finding in April 2005. The TM "Budweiser" had been in existence prior to the registration of "Budejovicky pivo" and "Českobudějovické pivo" as PGIs. Therefore, under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the existing TM rights should not be undermined or limited by a subsequent GI. The

[56]The cases are extracted from online sources cited in the text as well as Waggoner (2008), Directorate General Enterprise and Industry of the European Commission (2006), Evans and Blakeney (2006), Rovamo (2006), Nixon Peabody LLP (2005), Noda (2005), and Homolova (2000).

panel found that Anheuser-Busch could continue to use its TM in the European Communities (EC) (Waggoner 2008). Nevertheless, the same WTO panel also found that the inconsistency between the EC regime and TRIPS with respect to the coexistence of GIs and prior TMs was sufficiently justified by TRIPS Article 17, as discussed in the text.

It is also pertinent to note that the brand Parma ham had been registered as a TM by ham producers in Canada in 1971. As a result, Parma ham producers in Italy cannot export the ham to Canada under the original name "Prosciutto di Parma." Similarly, the Office for Harmonization of the Internal Market of the EC could not register the name "Budweiser" as a single TM in all 25 EU countries because it was identical to a prior TM registered in Austria and France by the Czech brewer Budejovicky Budvar. This decision aimed to avoid causing confusion to the consumers in those two countries.

B. Feta Cheese

Greece started to promote the production and marketing (including export) of feta cheese in 1987. Feta was then established as a protected denomination of origin in 1992 when Greece also made a request to the European Commission for the registration of feta as a GI in the EU. Concerned that the name had become generic, the European Commission arranged for a survey in Greece to provide inputs for consideration and advice on the matter from a scientific committee. On the basis of the survey results and advice received, the European Commission concluded that feta had not become a generic term and the name was registered as a GI in the EU in June 1996.

Denmark, Germany, and France, which were among the major producers of feta cheese, took legal action for the annulment of feta as a GI in the same year. In considering the case, however, the European Court of Justice (ECJ) focused on whether the European Commission had properly applied all the criteria specified in the then EC Council Regulation 2081/92 and had taken all the factors into account in making its decision. It concluded that the European Commission had not taken due account of the situations existing in countries outside Greece and the existence of products marketed legally as feta in those countries. The registration of feta as a GI was revoked by the ECJ in March 1999.

Following the ECJ guidelines, the European Commission subsequently made another assessment of the generic character of the name feta, including sending a detailed questionnaire to obtain an exhaustive picture of production and consumption in all EU member countries. On the basis of this survey and of scientific analysis and advice, the European Commission decided to allow the re-registration of feta as a GI in October 2002. That decision gave exclusive right for production and export to producers located mostly in mainland Greece (namely Macedonia, Thrace, Thessalia, Epiros, Sterea Hellas, Peloponnese, and the island of Lesvos).

Denmark and Germany took legal action against the registration in 2002 but the ECJ found in October 2005 that the European Commission decision to register feta as a GI was compatible with the provisions in EC Council Regulation 2081/92. Since feta had been registered under the simplified procedure under the previously effective

EC Regulation, however, other EU producers were given a transitional period of five years to change their product names or cease production altogether.

C. Parma Ham

The case was (re-)initiated in the United Kingdom (UK) in 1997 by the Association of Producers of Prosciutto di Parma, Italy, against Asda Stores Ltd. and Hygrade Foods Ltd., UK-based food distributors and processors, respectively. Asda had purchased Parma ham from Hygrade, which had presliced, prepacked, and hermetically sealed the ham. Parma ham was a protected denomination in the country of origin and was a GI in the EU. Currently, Parma ham production and exports are limited to 10 regions in Italy (Emilia-Romagna, Veneto, Lombardy, Piedmont, Molise, Umbria, Tuscany, Marche, Abruzzo, and Latium).

Both the High Court and the Court of Appeals dismissed the case. On a subsequent appeal, the UK House of Lords referred the case to the ECJ for a preliminary ruling. The judgment in this case, made in 2001, reaffirms that GIs confer on the regional producers an exclusive right to use their regional names as a description of the products. In addition, protection can be extended to such operations as raising, slaughtering, slicing, labeling, and packaging (all in the designated areas) if these production conditions and requirements are laid down in the specifications of the GIs concerned. Such production specifications are needed for the purposes of controlling product quality and preserving product authenticity and reputation.[57]

The fact that Parma ham cannot be prepackaged, presliced, or prelabeled elsewhere has a direct impact on trade flows within and outside the EU. Such protection can have a restrictive impact on outward processing trade, which, through globalization and the proliferation of supply chains, has become a major source of employment and income in many industries and economies.

D. Melton Mowbray Pork Pie

The Melton Mowbray Pork Pie (MMPP) Association, England, applied for registration of “Melton Mowbray pork pie” as a GI in the EU. This application had been approved domestically by the UK Department for Environment, Food and Rural Affairs (DEFRA). This registration was challenged by Northern Foods Plc. in 2005 on the basis that the designated area of 1,800 square miles was artificially large and may have created disproportionate benefits among the pork pie producers involved.

Northern Foods’ objections were dismissed as misconceived by the UK High Court in December 2005. The case then went on to the UK Court of Appeals, which decided in March 2006 to allow Northern Foods to refer the matter to the ECJ for a ruling. The ECJ was to decide on the criteria that must be uniformly applied across the

[57]In the case of Parma ham, however, the outcome was affected by the fact that Prosciutto di Parma had been registered under a simplified procedure under EC Council Regulation 2081/92. That regulation did not provide for any right of objection and the production specifications were not published in any form. As such, the rules on slicing and packaging could not be relied on against third parties. Consequently, for reasons of legal security and transparency, the old regulation was deleted in EC Council Regulation 692/2003 (Rovamo 2006).

EU in defining and delimiting the linkage between the PGI and the protected geographical area.

The ECJ had dealt with the issue of protected geographical area for the first time in a dispute between the European Commission and the (then) Federal Republic of Germany in the "Sekt/Weinbrand" case in 1975. At that time, the ECJ had decided that the size of the designated area was immaterial, and neither the extent of a national territory nor a linguistic criterion could justify an indication of origin. It further suggested that GIs could only be justified through a definite link between some features of the products so designated and their geographical origins.

Simultaneous with the legal action, however, Northern Foods was negotiating with DEFRA to secure a transition period of five years for the relocation of its production facilities to the East Midlands (which lies within the protected region). In return, the company would drop its pending court case and change the recipe and processing techniques for its own MMPP. A deal was reached between Northern Foods and DEFRA in November 2006.

Details of the registration of MMPP as a PGI were published in the *Official Journal of the European Communities* on 4 April 2008 (European Commission 2008a). There is a waiting period of 6 months for objections by any interested party in third countries, including EU members but not the originating state. Since no objection was received by the European Commission by mid-October, registration of the MMPP as a PGI will now go through automatically (Scott-Thomas 2008).

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